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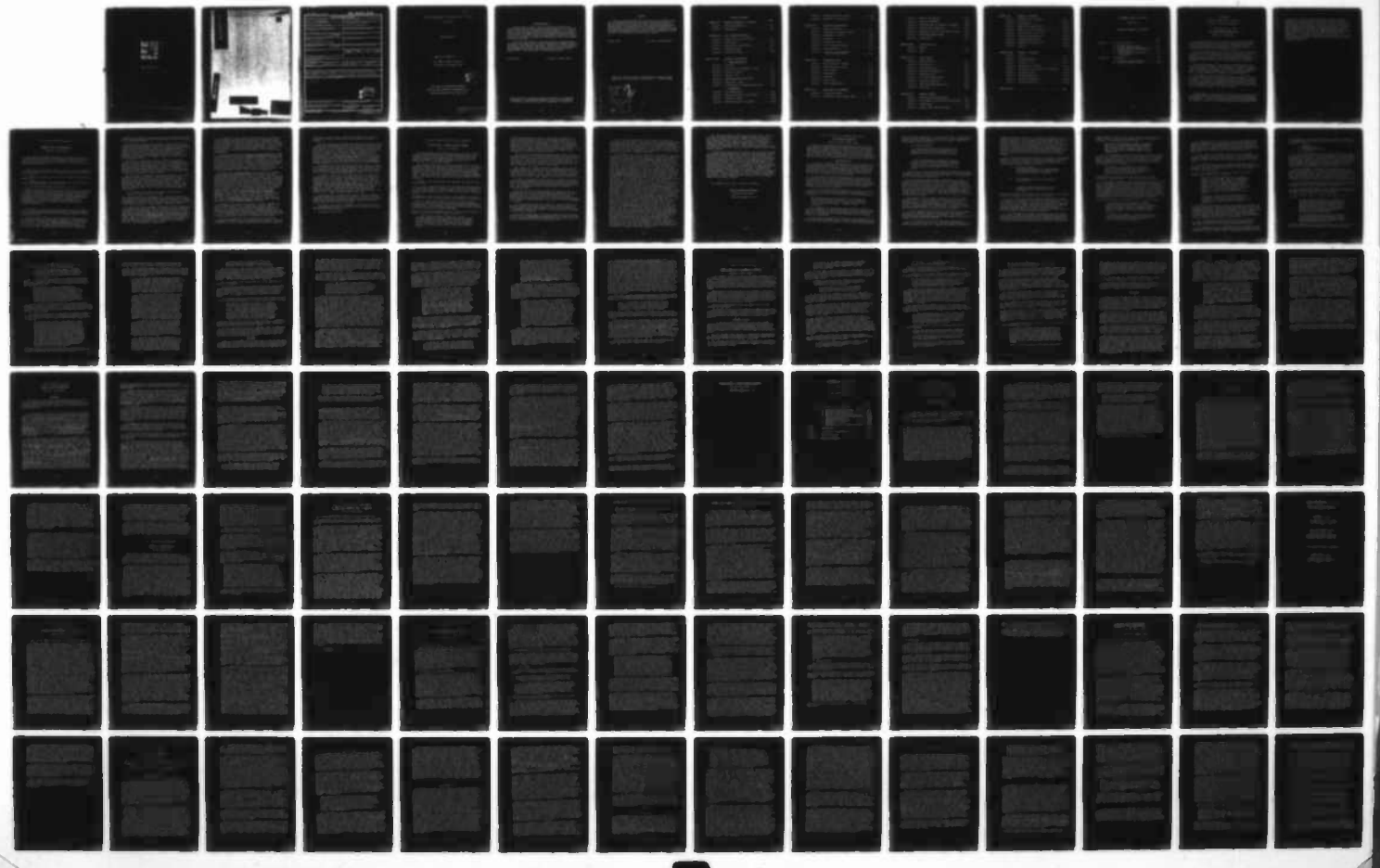

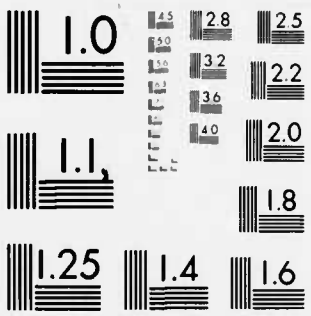

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GOVERNMENT CONTRACT LAW

CASES

Fourth Edition

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Compiled and Edited by . . .

DR. JAMES O. MAHOY, Attorney

Professor of Procurement Law

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THE SCHOOL OF SYSTEMS AND LOGISTICS

THE AIR FORCE INSTITUTE OF TECHNOLOGY (AU)

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October 1983 Dr. James O. Mahoy, Editor

This publication has been reviewed and approved by competent personnel of this command in accordance with current directives on doctrine, policy, essentiality, propriety, and quality.

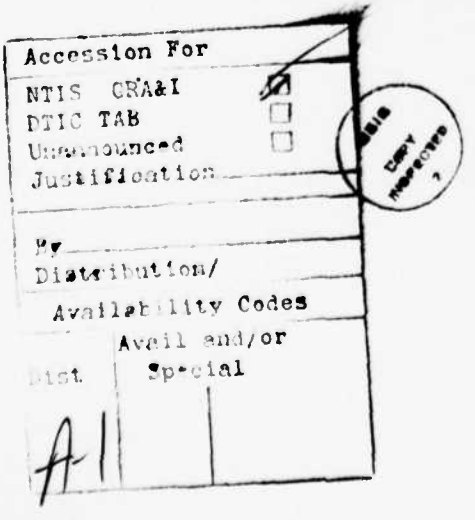
PREFACE

The cases presented here are drawn from the reported decisions and opinions constituting the case law on Government contracts. They are intended to illustrate the general principles enunciated in the Department of Defense "Contract Law" course offered by The Air Force Institute of Technology, School of Systems and Logistics in its continuing education curriculum. The cases do not necessarily provide an historical development of the law nor are they presented as representative of the policies of any Government agency.

October 1983

Dr. James O. Mahoy, Editor

"The law is the last result of human wisdom acting upon human experience for the benefit of the public." - Samuel Johnson



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CHAPTER ONE

ESSENTIAL ELEMENTS OF A CONTRACT

Section 1. Offer and Acceptance

A. Purchase Order as Offer

BART MANUFACTURING CORPORATION

ASBCA No. 13029 (1968)

The Government has moved to dismiss the above-captioned appeal, upon alternative grounds that (1) there is no contract between the parties and (2) because of the absence of Termination clauses, concluding that "there are no contract provisions which expressly or impliedly provide for the price adjustment sought."

This procurement, with a dollar value of $2,400, was instituted by a unilateral purchase order on DD Form 1155. The face of the order states that it is a "Confirmation of Phone Order with Mr. Lewis 11/4/65." There is nothing in the record to show the substance of the said telephone conversation. The purchase order does not contain Changes, Termination for Default, or Termination for Convenience clauses.

The record does suggest that the order followed an unsolicited proposal from the appellant. There are no facts alleged or proved which would show the substance of the proposal. However, the contract item is described in the order as a "Reflector, 30-inch diameter, 9 3/4 inch focal length, Rhodium coated, .1 inch diameter Circle of Confusion, Bart Manufacturing Corporation Stock No. 30-100."

On December 21, 1965, appellant delivered a reflector to the engineer in the office which had made the purchase request. Although an unsworn statement by this engineer alleges that the reflector was not completed, and that it was received for testing of the circle of confusion only, appellant submitted an invoice for the full contract price on December 23, 1965. The latter action leads to the conclusion that appellant believed it had filled the order.

* * * * *

The Government's initial position is "that the DD Form 1155 order was an offer which never ripened into a unilateral contract because of the Appellant's failure to perform the required delivery within the time sequence." The fact is, whether the initial delivery of December 21, 1965 did or did not constitute performance of the purchase order,

as amplified by the previous and referenced telephone and other conversations, may constitute a sharp issue of fact. But even assuming that agreement between the parties, we have held that where the recipient of a purchase order takes sufficient and substantial actions looking toward delivery, a contract is deemed to have arisen between the parties before the scheduled due date, with the usual legal consequences for both parties. World Electrical Specialties Corp., ASBCA No. 9510, 65-1 BCA par. 4679, and cases and authorities cited there. In our opinion, the instant case falls into that category, even if we decide that the delivery of December 21, 1965, was solely for the purpose of testing one characteristic of an otherwise incomplete reflector. Thus, we find that a contract did arise between the parties.

* * * * *

B. Purchase Order as Acceptance

ORDNANCE PARTS & ENGINEERING CO.

ASBCA No. 12,820 (1967)

* * * * *

The contractual instrument from which this appeal arises is a Purchase Order signed only by the contracting officer. As the basis for its issuance, it recites an oral quotation received from appellant. It contains a standard Disputes article but no Default or other termination article.

* * * * *

The principal question presented is appellant's right to repudiate the contract without liability. The operative questions controlling our decision are:

1. Whether a binding bilateral contract resulted from the parties' negotiations;

2. Whether appellant's failure to deliver the items ordered was a default provided for under the contract; and,

3. The appropriate remedy available to the parties.

Appellant contends the contract was unilateral and that as offeree it had the right to avoid the contract and to render it unforceable by its failure to perform. Respondent contends that appellant's oral quotation was an offer which the Government reasonably accepted when it issued an authorization to proceed and confirming Purchase Order. Alternatively, it contends that appellant's preparations for performance were sufficient manifestation of acceptance of the Purchase Order to convert a unilateral contract into a binding bilateral agreement.

* * * * *

On the merits, we find there was no binding bilateral agreement. For this reason, we find the contracting officer erroneously assessed and collected as excess costs the sum of $1,324.34 based on its purported terminiation.

The Request for Quotations, the Purchase Order, and the regulations governing their use negate the existence of an agreement based upon mutuality of obligation. Corbin on Contracts, Section 152, at 498 (1950 ed.). One who asserts that a quotation of prices is an offer has the burden of showing the exact terms of the offer. A quotation of prices, standing alone, is not an offer. Furthermore,

respondent's own request for quotations and the regulations governing their use advised appellant that its quotations would not be construed as, or considered, offers.

As against this we have only the buyer's hearsay recital of an alleged verbal understanding arrived at with appellant when appellant called in its price quotation. Under the circumstances, we can accord little probative value to this wholly uncorroborated statement. However, we need not finally determine its probative value, since it shows on its face that the alleged agreement was not made by the contracting officer or anyone else with authority to bind the Government contractually. See Prestex, supra, at 15,321-322; ASPR 16-201.2 supra footnote 2.

The opinion and conclusion of this and the other Government witnesses is also inconsistent with the condition precedent in the notice to proceed. This stated, "No delivery is to be made prior to receipt of the confirming instrument." This, the record shows, was the Purchase Order issued almost 30 days later. Furthermore, applicable regulations provided that issuance of the Purchase Order did not constitute a contract but instead an offer by the Government to appellant. ASPR 16-201.2 supra footnote 2.

We also reject the suggestion that the authorization to proceed be construed as either an elliptical acceptance of an offer from appellant or as a manifestation of part performance by either party. The record shows that the quotations solicited from appellant apparently related to items manufactured by others. There is no evidence that appellant was a manufacturer. On the contrary, what little evidence we have specifically indicates appellant did not intend to produce Item 2 itself. Thus, its letter of November 30, 1966, begins:

> At the time of our Quotation, we had a delivery promise from the factory of February 18, 1967.

The contracting officer's memorandum of his telephone conversation with appellant on December 29, 1966, states that appellant "stated he would call his source and explain the situation." Appellant's letter of September 19, 1967, to the termination contracting officer contains uncontradicted references to "our supplier's delivery schedule."

As previously noted, respondent removed from the Rule 4 papers the only contemporaneous record of what it claims occurred when appellant submitted its oral quotation. From this we may, and do, infer that the content of this memorandum would be adverse to the position now advanced by respondent. Interstate Circuit v. United States, 306 U.S. 208, 225-226 (1939); McCormick On Evidence, Section 249, at 535-536 (1954). When all of the surrounding circumstances are considered, we must conclude that the manifestations in the notice to proceed are more consistent with the award of a unilateral than a bilateral contract. Compare Aero Corp., supra, note 8.

Our conclusion in this respect finds affirmation in the terms of the "confirming instrument" or Purchase Order. The Purchase Order clearly informed the contractor that until he accepted the order in writing he might not treat the Purchase Order as a promise on the part of the Government to pay monies due or to become due. Finally, ASPR 3-608.5 provides for cancellation of Purchase Orders at any time prior to the supplier's initiation of performance or where accepted in writing on other than prescribed forms without cost or liability to either party.

In passing we note that in Waterman Instrument Corporation, ASBCA No. 11392, 66-2 BCA par. 5783, at 26,902, we accepted as proof of the truth of the facts asserted a statement by appellant's vice president that before the initial delivery date it had ordered, received, inspected and returned to its supplier for reworking the transformers covered by the Purchase Order. Appellant corroborated this statement with evidence from its supplier. From this we concluded there had been sufficient performance to constitute a binding bilateral agreement and denied the Government's motion to dismiss an appeal from a termination under a Default clause in the Purchase Order.

Here appellant's part performance consists only of a statement that appellant had obtained quotations from suppliers who later informed appellant they could not deliver the items. We find this was insufficient performance to give rise to a binding bilateral contract. Restatement of Contracts, Section 45, Comment a. Whatever inferences the Board has felt warranted in drawing from the facts in prior cases concerning the existence of binding or enforceable agreements are not binding on the Board in this case. A meeting of the minds is not to be determined by an inflexible formula or slide rule calculation but upon a consideration of "all surrounding circumstances, including common usage, trade usage, and preliminary negotiations and communications." Shedd, Resolving Ambiguities in Government Contracts, 36 Geo. Wash. L. Rev., 1, 9-10 (1967). In addition, in Government contracts administrative usage and interpretation and applicable administrative regulations are relevant and often controlling. States Marine Lines, Inc., ASBCA No. 11923, 67-2 BCA par. 6714, at 31,106; Walter J. Moeller, ASBCA No. 12352, 68-1 BCA par. 6750, at 31,240; Prestex, supra, at 15,321-22.

Consequently, we cannot view appellant's letter of November 30, 1966, as anything more than a proposal for a mutual no-cost cancellation. Indeed, this was the contemporaneous interpretation placed on it by the contracting officer. The memorandum of his telephone conversation with appellant on December 29, 1966, shows he first informed appellant of the Government's continuing need for Item 2. This is consistent only with the view that the contracting officer understood appellant was asking for cancellation of the order.

Nor does the remainder of the conversation recited aid the Government's position. Appellant never offered to perform if granted an extension of time nor did it request such an extension. Appellant

merely said it would call its supplier "and explain the situation", but that the supplier "might not be able to meet the delivery schedule."

We cannot, therefore, find that appellant ever offered to perform in return for the Government's promise to accept late delivery. There is nothing in the hearsay report of the conversation of December 29, 1966, probative of an "intent" on the part of the parties to promise delivery in return for a promise to extend the time for delivery. At best, like the unilateral correction found in the Modification of November 29, 1966, it served merely to amend the Government's outstanding offer. Compare, Aero Corp., supra, note 8, at 18,375. Without more reliable evidence as to the content of this conversation we cannot conclude that either standing alone, or in the context of events, it gave rise to a binding bilateral contract. Westinghouse Electric Supply Co., ASBCA No. 6068, 60-2 BCA par. 2676, at 13,450.

Nor does the fact that appellant sought cancellation of only one of the two items in its letter of November 30 help respondent. There was no necessary connection between the items, nor was the delivery and payment for one in any way made dependent upon delivery of the other. Compare Flight Test Engineering Co., supra, note 5 at 18,172.

As appellant points out, under applicable law and regulations a Purchase Order is considered a unilateral contract, not binding on either party until the offeree initiates performance or accepts the Government's offer in writing. ASPR 3-608.4(a), 3-608.5, April 1, 1966 and April 3, 1967; ASPR 16-201.2; 16-102.1(b), 1 October 1965 and 1 December 1966; World Electrical Specialties, supra, note 2, at 22,344-45. Not only did this purchase order contain no place for the appellant to indicate acceptance but the appropriate additional General Provisions, including the Default and Termination for Convenience articles, were never included. See ASPR 3-608.4(a), (b); 3-608.5, 1 April 1966, 1 December 1966, 3 April 1967.

Accordingly, we find the Purchase Order in question imposed no enforceable obligation on appellant to perform. We also find that, absent an enforceable contractual obligation and provision for default termination, the contracting officer had no right to unilaterally assess excess costs or to collect damages.

Accordingly, the matter is remanded to the contracting officer for reconsideration of the collection action in the light of findings and opinions expressed herein.

The appeal is dismissed.

C. Notice of Award-No Formal Execution Necessary

UNITED STATES v. PURCELL ENVELOPE COMPANY

249 U.S. 313 (1919)

Mr. Justice McKenna delivered the opinion of the court. Action brought by appellee, the Purcell Envelope Company which we shall designate as the Envelope Company, against the United States for damages for breach of an express contract. The Court of Claims rendered judgment for the Envelope Company for the sum of $185,331.76. The United States Appeals.

The findings of the court are quite voluminous, but it is only necessary to quote from them to the following effect: The Post Office Department, through the Postmaster General, James A. Gary, invited by advertisement bids "for furnishing stamped envelopes and newspaper wrappers in such quantities as may be called for by the department during a period of four years, beginning on the first day of October, 1898." In pursuance of the invitation the Envelope Company submitted a bid in the manner and time specified in the advertisements of the Department.

The bid of the Envelope Company was accepted, and the following order entered:

". . . 2nd. That the contract for furnishing the envelopes called for by the advertisement and specifications referred to be awarded to the Purcell Envelope Co., of Holyoke, Mass., as the lowest bidder for the Government standard of paper, at the following prices a thousand, namely: . . ."

The Department, before issuing the order, investigated the financial responsibility of the Envelope Company and considered it satisfactory.

April 21, 1898, the Department sent to the Envelope Company a "contract in quadruplicate," to be executed "at once" and returned to the Department. It was promptly returned as requested, signed by the president of the Envelope Company, with the Fidelity & Deposit Company of Maryland as surety in the sum of $200,000.

On April 27, 1898, the Department, by the Third Assistant Postmaster General, wrote to the Envelope Company as follows:

> Your telegram of today is before me. As the Postmaster General has not yet signed the contract awarded by the Department to your company for furnishing stamped envelopes during the coming four years, but is holding the matter in abeyance, I have to request that you suspend all action under my letter of the 21st instant until further orders.

The Envelope Company had, however, already made arrangements and contracts for the supplying to it of the necessary materials to fulfill the terms of the contract and was ready and willing at all times to fully perform it according to its terms. But neither the Postmaster General, nor any department or officer of the Government made any call or request upon the Envelope Company to furnish or deliver the envelopes or wrappers which were the subject-matter of the contract and the company's plant was kept intact ready for the performance of the contract, remaining idle.

22 July 1898, the Department, through Postmaster General Smith, the immediate successor of Postmaster General Gary, the latter having gone out of office, revoked and cancelled the contract and declared it to be null and void. Prior to doing so the Postmaster General instituted an investigation through one of his proper officers into the business and financial standing of the Envelope Company and the report thereunder was unfavorable to the company.

On or about 22 July 1898, the Envelope Company, having received information that the Postmaster General designed readvertising for proposals sought, by a bill filed in the Supreme Court of the District of Columbia, to enjoin his action. The bill was dismissed 15 August 1898. The court, however, was of opinion that a contract had been executed but that the Envelope Company had an efficient remedy at law.

An offer was subsequently made by two other companies to supply the Post Office Department, upon an emergency contract, stamped envelopes and wrappers of the kinds and qualities the Government should need. The Department declared that an emergency existed under **3709, Rev. Stats., accepted the offer and entered into a contract in accordance herewith.

The total cost to the Envelope Company for materials and the manufacture and delivery of the envelopes and wrappers in accordance with the terms of its contract would have been $2,275,224.46. Deducting that sum from the contract price leaves a difference of $185,331.76, which represents the profit the company would have made if it had been allowed to perform its contract. For that sum judgment was entered.

It will be observed from the recitation of the above facts that the case presents the propositions--First, was there a completed contract between the Envelope Company and the United States through its Postmaster General, and, second, if there was such contract, what is the measure of damages?

For an affirmative answer to the first proposition the Envelope Company relies on Garfielde v. United States, 93 U.S. 242, and on that case the Court of Claims rested its decision and considered that the case was supported by other cases which were cited.

The case may be considered as the anticipation of this--its prototype. It passed upon a transaction of the Post Office Department and decided that a proposal in accordance with an advertisement by that department and the acceptance by it of the proposal "created a contract of the same force and effect as if a formal contract had been written out and signed by the parties." And for this, it was said many authorities were cited but it was considered so sound as to make unnecessary review of or comment upon them.

In resistance to the case as conclusive the Government urges the qualification that "the court did not say, or assume to say, that the acceptance of the proposal in all (counsel's) cases constituted a contract, but held that it did in the present (that) case", and that "there was a reason for the conclusion. . .which does not obtain in the case at bar". We cannot agree, and in answer to the first qualification it is only necessary to say that the court expressed a principle, not, of course, applicable to all cases, but applicable to like cases; and the present is a like case, identical in all that makes the principle applicable. And in so determining we answer the other objection of the Government that there were features in the law in the Garfielde Case which do not obtain in the pending case, which constituted, if we understand counsel, the determination of the law against the act of the Postmaster General, his duty being merely ministerial. In the present case, it is insisted his action is not so subordinate, that he has discretion, and when exercised it is paramount, his action being "quasi judicial", the contract not having been consummated, and that, therefore, it was within his power to review and set aside the decision of his predecessor. We are unable to concede the fact or the power asserted to be dependent upon it. There must be a point of time at which discretion is exhausted. The procedure for the advertising for bids for supplies or services to the Government is given the benefit of the competition of the market and each bidder is given the chance for a bargain. It is a provision, therefore, in the interest of both Government and bidder, necessarily giving rights to both and placing obligations on both. And it is not out of place to say that the Government should be animated by a justice as anxious to consider the rights of the bidder as to insist upon its own. And, we repeat, there must be some point at which discretion ceases and obligation takes its place. That point is defined in the Garfielde Case, and that the definition is applicable to the case at bar is illustrated by the findings of the Court of Claims. Upon the invitation, in accordance with law, of Postmaster General Gary, the Envelope Company and eleven others submitted bids. The Envelope Company was the lowest bidder and after the Company had been found upon investigation to be financially responsible its bid was accepted by entry of a formal order. The Company was then directed by the Department to execute the necessary contract in quadruplicate which it did, and returned the contract to the Department with a surety whose responsibility was not questioned at any time nor was other security demanded, as it might have been. Postmaster General Gary went out of office, and his successor, either by inducement or upon his own resolution, revoked the contract and entered into a contract with other companies.

The record furnishes no justification of such action. There is no charge of default against the Envelope Company, no charge of inability to perform its contract, except in a particular which we shall hereafter mention. There is, it is true, a finding that Postmaster General Smith caused an investigation to be made of the financial standing of the Envelope Company and that the report thereunder was unfavorable to it. This is made a great deal of, and the fact that the contract was not signed nor the bond of the Envelope Company approved.

It makes no difference that the contract was not formally signed or the bond formally approved, as counsel for the Government contends they should have been, both by the terms of the contract and by a statute of the United States (28 Stat. 279). Their formal execution, as we have seen was not essential to the consummation of the contract. That was accomplished, as was decided in the Garfielde Case by the acceptance of the bid of the Envelope Company and the entry of the order awarding the contract to it. Therefore, we do not follow with minute attention the argument of the Government in asserting the power of Postmaster General Smith to review and annul his predecessor's decision and that directed against the financial standing of the Envelope Company or the deception the Government asserts was practiced on Postmaster General Gary, which are made the subject of a request for findings. We may assume that the Court of Claims considered such charges and all other elements before concluding that the Envelope Company was entitled to recover.

* * * * *

The judgment of the Court of Claims is Affirmed.

FEDERAL ELECTRIC CORPORATION

ASBCA No. 11726 (1968)

Reprinted infra at p. 1-32

D. Notice of Award As Acceptance/Counter-offer

DATA GENERAL CORPORATION

ASBCA Nos. 21865 & 22568 (1979)

These are timely appeals from contracting officers' decisions which terminated subject contract DAAD07-76-C-0160 for default and assessed excess reprocurement cost. Appellant has filed a motion under ASBCA No. 21865 to dismiss for lack of jurisdiction alleging that the procurement activity between the parties did not result in a valid contract. The Board deferred decision on the motion pending a hearing on both the motion and the merits of the case. A hearing was held at the offices of the Board and both parties have filed briefs.

FINDINGS OF FACT

1. On 9 July 1976 the procurement office at White Sands Missile Range, New Mexico, announced its intention to solicit proposals for the furnishing of a mini-computer and display sub-system and issued purchase descriptions. The announcement advised that a request for proposals would be issued about 13 August 1976 and because of the short period of time available to make an award, the solicitation period would not be any longer than three weeks.

2. A pre-solicitation conference was held on 22 July 1976. The attendees, which included a representative for appellant, were advised of the urgency associated with the requirement and of the efforts made to resolve the problems of procuring supplies which were required to be interfaceable and compatible with existing equipment. Equipment suppliers did not manufacture and sell both the mini-computer and the display sub-system.

3. At the pre-solicitation conference, a question was raised as to whether or not contact had been made with the manufacturers regarding the 120 day delivery requirement. The Government answered as follows:

> Most system houses delivery date is 90 - 120 days, but the delivery date can be negotiated. We are asking for off-the-shelf equipment and as a result there should be little or no design problems. 120 days is not unreasonable.

4. Subsequent to the conference, the Government responded to questions concerning the memory requirement set forth in the purchase description stating that specified paragraphs had been relaxed as a result of its requesting off-the-shelf equipment and desiring open competitive requirements.

5. The executive summary sheet attached to the Standard Form 33 Solicitation Offer and Award (SF33) indicated the possibility that one or more contracts would be awarded as a result of the solicitation and

described the mini-computer as an off-the-shelf item. The Request for Proposal (RFP) which was dated 20 August 1976, included Standard Form 33A Solicitation Instructions and Conditions (SF33A). Clause 10 of SF33A, reads in part as follows:

> 10. AWARD OF CONTRACT.
>
> (a) The contract will be awarded to that responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered.
>
> * * *
>
> (d) A written award (or Acceptance of Offer) mailed (or otherwise furnished) to the successful offeror within the time for acceptance specified in the offer shall be deemed to result in a binding contract without further action by either party.

The RFP also included a standard Changes clause, Disputes clause and Default clause. The bottom of the face sheet of SF33 included the statement that "Award will be made on this form, or on Standard Form 26, or other official written notice."

6. On 9 September 1976 appellant, in response to the RFP, proposed to furnish an ECLIPSE S/230 computer and advised that the Univac 1108 and Varian 620/i interfaces were not standard commercial products and that its proposal was subject to the terms of its Form 400. Form 400 was Data General Corporation's standard form detailing the terms and conditions under which it sells its products. The form includes provisions regarding prices, delivery, payments, property rights, warranties, and acceptance. Appellant offered to furnish the system subject to most of the same terms and conditions as existed in its current GSA contract.

The proposal did not include a signature in block 19 of the Standard Form 33. In block 18 where it is required to include the name and title of an authorized person to sign the offer the misspelled name of Arthur Dandeneau was both printed and written in script. Attached to appellant's proposal was its product brief for the Eclipse C/330 computer, its product brief for the video display 6012 and product briefs for various peripheral equipment.

7. On 13 September 1976 the Proposal Evaluation Board reviewed the technical proposals received and determined that no proposal completely satisfied the contract requirements. The Proposal Evaluation Board recommended that each of the vendors be queried with respect to the technical deficiencies.

8. The contracting officer, Mr. Roberson, telephoned Mr. Dandeneau and advised that there were some administrative areas to be resolved and several technical areas that also needed clarification

regarding appellant's proposal. Mr. Dandeneau, appellant's contracts manager, was unfamiliar with the proposal and advised that Mr. Karlosky, appellant's sales engineer, must have signed the proposal with his authority. Mr. Dandeneau explained that all technical questions would have to be discussed with Mr. Karlosky. Mr. Roberson advised Mr. Dandeneau that the agreement Form 400 attached to appellant's proposal was not acceptable to the Government because it provided for delivery FOB origin as opposed to FOB destination. The parties agreed to delete the form. Mr. Dandeneau also agreed to provide a corporate certificate stating his authority to bind the company.

9. Mr. Karlosky, the sales engineer for appellant, was contacted regarding the technical questions raised by the Proposal Evaluation Board. Mr. Karlosky responded by TWX dated 16 September 1976 proposing various clarifications to the technical questions. The clarification provided in part as follows:

**	3.1.4	POTENTIAL EXPANSION THE S/230 HAS POTENTIAL FOR 512KW OF MEMORY. THE UPGRADE AND SUPPORT OF THIS MEMORY HAS NOT BEEN ANNOUNCED BY DATA GENERAL.
		* * *
**	3.9	THIS INTERFACE SHALL HAVE THE FOLLOWING SPECIFICATIONS:
		* * *
**	(C)	A FORM OR PRIORITY MEMORY ACCESS WILL BE AVAILABLE, AND DATA TRANSFERS WILL NOT CYCLE STEAL.

These clarifications were considered to have resolved the outstanding questions developed by the Proposal Evaluation Board.

10. On 21 September 1976 Mr. Roberson telephoned Mr. Dandeneau and inquired as to the lack of the receipt of the corporate certificate. Mr. Dandeneau stated that the proposal was unauthorized and that because of a number of problems with the terms of the potential contract, appellant was withdrawing from negotiations. Mr. Roberson persuaded appellant to continue negotiations and Mr. Dandeneau agreed to forward a document identifying the areas that in his opinion had not been resolved by the parties.

11. By TWX dated 22 September 1976 appellant advised that the solicitation included certain defects and suggested that the procurement be handled by the Government making an award which appellant would have the option to reject or clarify. The TWX listed ten areas of concern which appellant proposed to include in its review of any

proposed award. Some of the ten items related to broad areas of concern including licensing arrangements and quality control actions. Paragraph 5 of the document read as follows:

> THE TRAINING, DOCUMENTATION, SOFTWARE, PACKAGING QUOTED WILL BE DGC STANDARD PRODUCTS PRODUCED TO DGC'S SPECIFICATIONS AND QUALITY CONTROL PROVISIONS, EXCEPT FOR THE INTERFACES WHICH WILL BE MODIFICATIONS OF DGC'S STANDARD PRODUCTS PER THE PROVIDED SPEC.

12. On 23 September 1976 Mr. Roberson again called Mr. Dandeneau and discussed each of the ten items listed by appellant as areas of concern. Mr. Roberson noted on his copy of appellant's 22 September TWX the agreement reached as to each of the ten matters discussed. While not listed as a problem on the face of the TWX itself, the parties agreed to the following:

> The contract will stipulate that items to be furnished are standard products produced to Data General specifications and quality control provisions except the interfaces which will be modifications of standard products.

Mr. Dandeneau's position was that the contract had to be for appellant's standard product or he did not want to do business.

13. During the telephone conversation, the parties discussed but are in disagreement as to what their understanding was regarding an order of precedence clause. Appellant states that it insisted upon an order of precedence which stated that in the event of any conflict or difficulty appellant's specifications would govern. The Government's contract negotiator disagrees with appellant and takes the position that the agreed solution regarding the ten problem areas would be put in the schedule which is first in the order of precedence. However, the Government is unable to explain why the order of precedence clause was deleted from the contract document forwarded to appellant.

The Government summary of negotiations states in part as follows:

> (f) All items to be furnished are standard products produced to Data General's Specification and quality control provisions except the interfaces which will be modifications of standard products. This is acceptable - this is what we are trying to buy.
>
> (g) Order of Precedence - included should be the final agreed upon clarifications. The clarifications will be set forth in the schedule which is first in the order of precedence.

14. Best and final offers were solicited on 23 September 1976. Appellant responded that it would install the equipment within 140 days from receipt of an acceptable award for the final offered price of $151,422.50. Mr. Dandeneau testified that by acceptable award he meant an award that would be satisfied by appellant's standard product and one that would incorporate those provisions which had been negotiated.

15. Mr. Roberson explained to appellant that if appellant received the award it would be by a letter of notice of award with the contract document to follow. Appellant knew it was the Government's intent to award a firm contract by the 30th of September to obligate funds.

16. The best and final offer by appellant was lower than the best and final offer of $170,432 proposed by Varian Data Machines, the only other contractor responding to the RFP for the mini-computer, peripherals and interfaces.

17. On 30 September 1976 a notice of award was mailed to appellant which read in part as follows:

> Your offer dated 10 September 1976 as amended by messages of 16 September 1976, 22 September 1976 and Best and Final offer message of 27 September 1976, in response to White Sands Missile Range Request for Proposal DAAD07-76-R-0098 which together set forth the terms and conditions of the contract for furnishing a minicomputer and peripherals at a total price of $151,422.50, is accepted and award is hereby made effective this date.
>
> A contract in the usual form and numbered as set forth above, incorporating all the terms and conditions at the contract hereby created, has been prepared and is inclosed for your review and execution.

The attached contract document, which was unsigned, differed from the Purchase Description in that the changes were included to reflect the agreements negotiated by the parties regarding the items listed in the 22 September 1976 TWX, the order of precedence clause was deleted, and no mention was made of requiring delivery of appellant's standard product produced to Data General's specifications. The Government's technical specifications included a two hour data save function which was not required by Data Generals's specifications.

18. The contracting officer testified that if appellant had delivered a system which did not meet the requirements of the Government specifications, the system would have been rejected.

19. Subsequent to the alleged award, several meetings were held between the parties' technical representatives in an attempt to reach agreement on the differences between the Government specifications and

the characteristics of appellant's standard computer. Appellant indicated that it was taking exception to four areas of the Purchase Description, namely:

1. Bandwidth
2. Potential Expansion
3. Data Preservation, and
4. Cycle Steal

20. It was determined by the Government's technical representatives that the only real problem with appellant's proposed computer was with data preservation. During the proposed evaluation period, the Government's technical representatives had raised the data preservation problem regarding several of the mini-computers but did not question appellant because they erroneously assumed that the power fail characteristic of appellant's equipment as described in the product briefs would perform the data save function.

Appellant proposed to include a ten minute data preservation capability. Paragraph 3.1.5 of the Purchase Description included in the Government's RFP and in the contract document requires that the data in the memories shall remain valid for not less than two hours after power has been turned off. Mr. Karlosky advised that appellant's engineering staff was working to decide what was the best and most cost effective solution to providing memory preservation.

21. At a 13 October 1976 meeting when the four technical exceptions were initially raised, appellant's sales engineer assured the Government that the February delivery date would be met.

22. On 10 November 1976, the contracting officer requested that appellant forward a signed copy of the contract and advised that the required training course outlines were delinquent.

23. By letter dated 17 November 1976, appellant advised as follows:

> During a telecon on 9/21/76 and in a TWX dated 9/22/76, DGC indicated that it would be willing to handle subject contract on the basis that an award would be made which DGC would have the option to reject or clarify. This was necessary because the quotation provided to White Sands was defective in a number of aspects and unauthorized by DGC's management.
>
> This letter provides certain required changes or clarifications which would allow DGC to accept subject contract when properly amended. Most of these matters were mentioned or implied in DGC's TWX dated 9/22/76 and noted above.

Appellant suggested clarification of paragraph J.11.1, Sections E, F, H, I, and J. The primary changes were to make the terms and

conditions of the document conform to appellant's GSA contract. The clarification to Section F read in part as follows:

> This Section should be changed to indicate that DGC is to provide the equipment, documents and software set forth in Section E, all of which is to conform to DGC's published specifications for such items.

24. Mr. Dardenau did not respond in writing to the purported award until 17 November 1976 because, as he testified, upon his review and determination that the contract document did not agree with what was offered for sale:

> "I contacted Mr. Karlosky indicating to him that this was not acceptable and that he was to deal with the customer to find out whether or not we could properly call out in the document -- and as Mr. Roberson indicated before, we expected there could be additional discussions but could be properly called out in the contract so that what we were offering for sale could be shipped, could be accepted and payment would result."

25. By TWX dated 22 November 1976, the contracting officer expressed his concern with appellant's clarifications and stated that the changes appellant desired prior to accepting the contract were at variance from the proposal which had been negotiated and that a valid contract already existed.

26. Appellant reiterated its view that the contract document did not represent an acceptance of the proposal as negotiated by the parties. Appellant's letter, dated 16 December 1976, states in part as follows:

> "Accompanying Data General's quotation were extensive descriptions of the products offered. These descriptions were obviously read and evaluated by White Sands personnel which is evidenced by both the verbal and written communications concerning the clarification of such descriptions. DGC concluded from the fact that we were selected for award that the products offered to White Sands were acceptable and that the final contract document would reflect the necessary clarifications and changes. This was the subject of Data General's letter dated November 17, 1976. Data General wishes to reiterate that that letter does not request any change which was not expressly nor implicitly a portion of Data General's offering and negotiations."

Appellant argued that the signature entrees in block 18 of the proposal were unauthorized, and that subsequent actions did not constitute

a ratification because they were conditioned upon receipt of a contract document that accurately reflected the negotiations.

27. The Government reviewed the procurement activities by the parties and concluded that appellant's refusal to proceed with the contract was a valid basis for terminating the contract for default. The Statement of Facts Relating to Decision to Terminate for Default states in part as follows:

> "f. At the time of contract award on 30 Sep 76, there were no known areas of disagreement between the Government and DGC. The DGC Sales Engineer had assured the TRASANA technical personnel that all PD requirements would be met and the Government accomodated [sic] all of the DGC exceptions to terms and conditions in the contractual document. The letter 'Notice of Award' incorporated all the various documents of communication between the parties.
>
> g. On 12 Oct 76, DGC personnel visited TRASANA technical personnel and met with Contracting personnel on 13 Oct 76. During these sessions, DGC stated there were four areas of the technical requirements to which they were not taking exception: (1) Bandwidth, (2) Potential Expansion, (3) Data Preservation, and (4) Cycle Steal. All of these areas were later resolved except Data Preservation. The DGC Sales Engineer stated on 13 Oct 76 that he was completely surprised that their minicomputer did not have this capability since their inexpensive NOVA model did and would check to see if it could be built in. He also stated verbally that Mr. Dandenau of DGC was ready to sign the contractual document once the technical problems were resolved.
>
> h. On 26 Oct 76, DGC notified the Government that they were still working on the Data Preservation problem and would provide the right method in several days. This was followed by a TWX of 12 Nov 76 in which DGC stated they would provide a battery back-up unit which would preserve data for 10 minutes. This was not a satisfactory solution because the specifications called for a Data Preservation period of two hours.
>
> i. On 22 Nov 76, a letter from DGC was received which, in addition to the Data Preservation issue, essentially demanded that the RFP terms and conditions be overridden by the terms and conditions of their GSA Contract. These changes were not acceptable and would have obviated the manner in which the equipment interfaces were to be demonstrated. The Government replied to this letter

> by TWX on 23 Nov 76, stating that until the executed contractual document is received, no modification of the contract will be considered."

28. In addition to advising that a computer had been earmarked for delivery in February 1977, Mr. Karlosky in late November 1976 provided the Government with a copy of the training course outlines, allowed the photocopying of his only copy of the "AOS" manual, advised that a one week introductory course to appellant's operating systems would be conducted starting 29 November 1976 and provided technical manuals. The training course was cancelled by appellant.

29. On 5 January 1977, the contracting officer terminated the contract for default.

30. Appellant advised the Government that at best, the contractual document provided to Data General constituted an unacceptable counter offer and filed a timely notice of appeal. In its notice of appeal, appellant stated its position that the Board was without jurisdiction. This appeal was subsequently docketed as ASBCA No. 21865.

31. On 9 November 1977, the contracting officer issued his final decision regarding reprocurement costs which stated in part as follows:

> Repurchase has been effected against your account from the next low offeror pursuant to the authority of the Default Clause in your contract referenced above. The repurchase contract totaled $163,432.00. Of this figure, however, $2,980.00 was for hardware to provide a channel with witch [sic] a Display Unit was interfaced and not required by Purchase Description 6181-T7A. The net repurchase figure is $160,452.00 and demand is hereby made for payment of excess costs in the total amount of $9,029,50.

The excess reprocurement costs were subsequently reduced to $8,824.30 because the shipping charges were less than estimated. Appellant's timely appeal was docketed as ASBCA No. 22568.

32. By letter dated 18 May 1977, appellant filed its "Motion to Dismiss for Lack of Jurisdiction" and supporting brief. The motion was based on appellant's position that a valid contract never came into being. The Board deferred its ruling on the motion pending a hearing on both the motion and the merits.

DECISION

Appellant is not making a claim pursuant to a contract but rather contends that the purported contract never came into being and as such the Government's actions terminating the contract for default and the subsequent assessment of reprocurement costs against appellant are

null and void. Appellant argues that its proposal was unauthorized; that the Government failed to accept the offer prior to appellant's withdrawal; and that the parties failed to reach a meeting of the minds. The Government argues that its issuance of a letter Notice of Award created a valid legally binding contract. The parties are in agreement that appellant refused to deliver the equipment as required by the terms of the contract document.

In order for the Board to ascertain the propriety of appellant's motion to dismiss for lack of jurisdiction, we must decide whether the word and conduct of the parties during negotiation resulted in a valid contract. As we said in Vitro Corporation of America, ASBCA No. 14448, 72-1 BCA ¶9287 at page 43,027:

> . . . the Board has inherent authority to determine the existence or nonexistence of a contract whenever such a determination is a necessary predicate to the resolution of a dispute alleged to arise under the terms of either an express or implied contract that allegedly provides an appropriate administrative remedy.

Turning to appellant's contention that the contract was invalid because appellant's proposal was submitted by its sales engineer who did not have authority to bind the company we are of the opinion that this argument is without merit. Any questions regarding the scope of Mr. Karlosky's authority were resolved by Mr. Dandeneau's subsequent actions. Mr. Dandeneau initially advised the Government that the proposal must have been signed with his authority. He subsequently conducted negotiations for his company with respect to the 9 September 1976 proposal and did not disaffirm Mr. Karlosky's authority until 21 September 1976 at which time Mr. Dandeneau announced that appellant was withdrawing from negotiations. During a telephone conversation with the contracting officer on 21 September 1976, Mr. Dandeneau, who was admittedly an authorized representative of appellant whose functions included entering into contracts of this nature, agreed to reinstate negotiations regarding Data General's proposal. These negotiations between the contracting officer and Mr. Dandeneau were with contractual intent and within the scope of the parties' authority. If the contract is invalid it is not because of the allegation that the agreement was not authorized.

Appellant argues that its proposal was an offer which was not accepted by the Government because the contract document was not signed by a Government representative. We find no merit in this argument. If the essential elements of a contract are present, acceptance may be inferred from the conduct of the parties. As early as 1919, the Supreme Court in a landmark decision held that formal execution of a contract document is not essential to the formation of a federal procurement contract. United States v. Purcell Envelope Co., 249 U.S. 313 (1919). The Court of Claims and Boards of Contract Appeals have consistently followed this precedent. See Superior Asphalt & Concrete Co., AGBCA No. 75-142, 77-2 BCA ¶12,851 and cases

cited therein. The forwarding of the unsigned contract document which attempted to express the final agreements of the parties with a notice of award is a legally sufficient procedure for acceptance. The Standard Form 33A instructions specifically provided for award of the proposal without the execution of a contract document by the parties.

We find no merit in appellant's argument that the use of a letter notice of award by the Government created an offer which could be accepted or rejected. Appellant had been specifically advised during negotiations that it was the Government's intent to award by the 30th of September using a letter notice of award. In the appeal of NYTEK Electronics, ASBCA No. 20019, 75-1 BCA ¶11,299 at page 53,869 we discussed the established rule that pursuant to paragraph 10(d) of Standard Form 33A, the Government's written acceptance of an offer is effective on the date that it is placed in the mail and stated:

> "The Comptroller General has consistently taken the same position. B-179731 of 25 February 1974, 74-1 CPD ¶99; 45 Comp. Gen. 700 (1966). Furthermore, the proposition that acceptance of an offer becomes effective with the mailing of the acceptance letter is supported by the weight of authority. 1 CORBIN ON CONTRACTS, Sec. 78, p. 245; 1 WILLISTON ON CONTRACTS, Sec. 81, pp. 266-67; Burton v. United States, supra at 384-386 and authorities cited therein; Julius Stebel and Gertrude Stebel d/b/a Chemical Service Company v. United States [4 CCF ¶60,211], 108 Ct. Cl. 35 (1947); cf. Hunt and Willett, Inc., et al. v. United States [9 CCF ¶72,848], 168 Ct. Cl. 256, 266 (1964); Crowe v. Continental Casualty Co., et. al., 245 F. Supp. 871 (E.D. La. 1965)."

The letter notice of award was an effective official written notice, in compliance with the method for making award described on the bottom of Standard Form 33 and if it encompassed all the essential elements of a contract it created a valid and binding contract. See American General Leasing, Inc. and Infodyne Systems Corp. v. United States, Ct. Cl. No. 255-77 decided 15 November 1978 and Grenell Manufacturing, Inc., ASBCA No. 12862, 69-1 BCA ¶7538.

We note in determining the legal sufficiency of a contract we look to whether the essential element of a contract was effected and whether the agreement was in violation of the law not whether the procurement procedures demanded by the Comptroller General were satisfied. In Keltec Industries, Inc., ASBCA No. 12624, 68-1 BCA ¶6989 at page 32,323 we stated:

> In evaluating a contract from the standpoint of its legality, it is necessary to distinguish those which are voidable because they do not conform to the high standards set by competent authority, consistent with the principles of competitive bidding,

> and those which are void because they are tainted with illegality due to the violation of statutes, or regulations which have the force and effect of law, or because they are against public policy. The Court of Claims has not denied the power of contracting officers to cancel contracts when they do not meet the standards set by the Comptroller General, but in those circumstances has held that the contracts were valid when made, and their cancellation is the equivalent of a termination for convenience. John Reiner & Company v. United States, 163 Ct. Cls. 381 (1963); Brown & Son Electric Company v. United States, 163 Ct. Cl. 465 (1963)."

Having determined that an authorized offer was made by appellant and that the procedure for acceptance of the proposal by the Government was legally sufficient, we are faced with the remaining question as to whether the contract document itself reflected the parties mutual interpretation of the proposed agreement as modified by written and oral negotiations. It is a basic contract principal that acceptance must be unequivocal and comply with the terms of the offer to create a binding statement. Williston in discussing this basic precept states:

> "In order to make a bargain it is necessary that the acceptor shall give in return for the offeror's promise exactly the consideration which the offeror requests. If an act is requested, that very act and no other must be given. If a promise is requested, that promise must be made absolutely and unqualifiedly. This does not mean necessarily that the precise words of the requested promise must be repeated, but by a positive and unqualified assent to the proposal the acceptor must in effect agree to make precisely the promise requested; and if any provision is added to which the offeror did not assent, the consequence is not merely that this provision is not binding, and that no contract is formed, but that the offer is rejected." 1 Williston on Contracts §73 (3rd Edition, 1957)

The Government's notice of award was clear and unequivocal in expressing an intent to enter into a binding contract. However, the Government's deletion of the order of precedence clause from the contract document as well as the failure to indicate that the computer to be delivered was to be appellant's standard product produced to Data General's specification rendered the document materially different from the terms and conditions negotiated by the parties. The Government's specification, included in the contract document, required a two hour data save function which was not required by appellant's specification.

In Penn-Ohio Steel Corporation v. United States, 173 Ct. Cl. 1064, the Court held that where the parties have agreed on the essential points of the procurement and the remaining terms and conditions can be reasonably ascertained from the circumstances surrounding the procurement the absence of a formally executed document will not prevent a binding agreement from arising. In the case before us, the contractor intended to provide only its standard product produced to its specifications and the contracting officer intended to accept only a unit which would comply with all the requirements set forth in the Government specification. These variant positions are so basic to the contract that it would be impossible constructively to determine the mutual intent of the parties and at the same time reach a fair and just result. Our inability to determine the essential terms of the contract and the resultant liabilities of the parties leads us to the conclusion that during negotiations the parties did not reach a meeting of the minds. Where the Government has been put on direct notice that the offeror's intent is to be bound by its specifications and that intent is different from the requirements set forth in the proposed contract document, the Government cannot compel the offeror to accept the award.

As we said in Dunrite Tool & Die Corporation, ASBCA Nos. 16708, 16885, 73-1 BCA ¶9940 at page 46,648 in discussing an attempted award which was not in conformity with the outstanding proposal:

> . . . the signing and mailing of the Notice of Award could not give rise to the making of a valid contract, and it was no more than a counter offer on the part of the Government requiring acceptance by appellant in order for a contract to arise.

A Notice of Award based on the terms and conditions of the contract document drafted by the Government was at best a counter offer which required acceptance by appellant before it became a valid and binding contract.

We are not convinced that the actions of the appellant subsequent to the letter Notice of Award manifested expressly or impliedly acceptance of the proposed counter offer issued by the Government. See Dunrite Tool & Die Corporation, supra, and Aero Corporation, ASBCA No. 8178, 1963 BCA ¶3665. The actions were merely preparatory to a contract and the record does not demonstrate that appellant undertook a substantial part of the performance requested. These actions, which relate to the delivery of technical manuals, the scheduling of training courses and the monitoring of the delivery schedule were of a preliminary nature with the expectation that the contract discrepancies would be finalized in the near future.

Having found that no valid contract came into existence, the appeals under ASBCA Nos. 21865 and 22568 are sustained.

Section 2. Consideration

A. Promise of Future Business

MAGNA INDUSTRIES, ELECTROMOTIVE DIVISION

ASBCA No. 22381 (1980)

In this appeal, appellant claims an equitable adjustment under its fixed price supply contracts for costs relating to a change in the length of a windshield wiper motor. Appellant argues it agreed to perform the change without cost to the Government provided respondent made the motor length change a permanent change to a contract drawing. Appellant alleges that the Government did not honor its commitment, thereby freeing appellant from its agreement to absorb the cost of the change.

Respondent denies the existence of any agreement concerning a permanent change to its contract drawing and argues in the alternative that since the drawing was changed for the following procurement, appellant is not entitled to recovery. Respondent also argues that appellant's claims are barred because appellant has signed a modification under each of the contracts in dispute waiving all claims as a result of the change in the length of the motor.

The parties have agreed to limit the appeal solely to the question of entitlement.

The contracting officer's final decision encompassed additional claim items which, by agreement of the parties, were not tried. The scope of the parties' agreement regarding these latter claim items is in dispute and will be the subject matter of a separate Board decision.

FINDINGS OF FACT

1. On 15 August 1975, Electromotive, a division of Magna Industries, was awarded Contract No. DAAE07-76-C-0791 (Contract No. 0791) by the U. S. Army Tank-Automotive Command. The fixed price supply contract was in the amount of $216,907.23 and required the delivery of 4,579 motors and motor bracket assemblies for windshield wipers.

2. On 1 December 1975, Contract No. DAAE07-76-C-1356 (Contract No. 1356) was awarded to Electromotive in the amount of $602,280.33 for delivery of 15,591 motors and motor assemblies.

3. For both contracts, the length of the motor was specified as 7.50 inches maximum on Contract Drawing No. 11644874. This drawing also contained the following:

6.8 FAILURE: AT THE CONCLUSION OF EACH OF THE ABOVE TESTS, THE MOTOR AND BRACKET ASSEMBLY MUST REMAIN OPERATIVE. FAILURE TO MEET REQUIREMENT SHALL BE CAUSE FOR REJECTION.

4. In June 1976, a dispute surfaced over the meaning of the term "operative" as it appeared in paragraph 6.8 of the drawing. The parties agreed that the term was ambiguous and by Amendment No. A00001 dated 11 August 1976 the contracts were amended unilaterally by the Government as follows:

> "In order to clarify the term 'Operative' as used in paragraph 6.8, Failure, pg. 9 of SQAP 11644874, the following test is added thereunder:
>
> > 'Test 301, Part II, Tab II of SQAP 11644874 shall be performed after each of the environmental tests required by same SQAP.'"

5. By letter dated 27 September 1976 appellant requested a meeting to discuss the impact of the environmental tests and advised that the most economic and expeditious way to overcome losses in efficiency created by the environmental testing was to increase the length of the motor.

6. A meeting was held on 4 October 1976 to discuss, among other things, the redesign of the motor. Appellant advised that the necessary power increase could be accomplished by the motor from 7.5 inches to 9 inches. Moreover, appellant advised that if the Government elected to go to the longer motor, and make that a permanent change, appellant would waive any increased cost incurred as a result of the change.

7. Appellant's offer to waive the additional cost for a permanent change of the motor length was confirmed in appellant's 6 October 1976 letter to the Army. Appellant believed that a permanent change on the drawing to a 9 inch motor would improve its competitive position regarding future procurements for windshield wiper assemblies. Appellant's president was aware that field problems were supplied by the previous supplier and that thousands of these units would have to be replaced. Appellant originally estimated that the cost for changing the length of the motor was between $100,000 and $200,000.

8. By letter dated 20 October 1976, the Army forwarded a proposed modification to Contract No. 0791. Proposed Modification No. P00002 in pertinent part reads as follows:

> "a. The length dimension of the motor assembly cited on Military Drawing No. 11644874 as 7.50 max. is hereby changed to '9.0 max.'.

* * *

d. As a result of this Supplemental Agreement, the contract price remains unchanged."

Appellant signed the modification on 26 October and returned it on that date. The record does not contain any cover letter from appellant returning the modification.

9. Modification No. P00002 (Contract No. 0791), as it appears in the Rule 4 submission, contains an additional paragraph which reads:

"e. As consideration to the Government for the dimensional change cited in paragraph 'a' above, the Contractor hereby waives any and all claims against the Government in connection with or as a result of Change Order A00001 dated 11 August 1976."

The print used in paragraph "e" differs from the print used in the four preceding paragraphs and appellant's president testified paragraph "e" was not a part of the modification when he signed the document. The contracting officer signed the modification on 4 November 1976. There is no evidence in the record that appellant was furnished a copy of the revised modification. We find that paragraph "e" was added after appellant returned its copy to the Government. The record does not disclose when Electromotive became aware of the revision.

10. Modification No. P00001 of Contract No. 1356 was signed by Electromotive on 17 November 1976 and by the contracting officer on 18 November 1976. Modification No. P00001 (Contract No. 1356) reads in part as follows:

"a. The length dimension of the motor assembly cited on Military Drawing 11644874 as 7.50 max. is hereby changed to '9.0 max.'. As a result of this change, the contractor hereby agrees to waive any and all claims against the Government arising as a result of Change Order A00001 dated 11 Aug 76.

11. Appellant's cover letter returning the executed modification stated as follows:

"Please find enclosed herewith, executed supplemental agreement DAAE07-76-C-1356 P00001 for your action.

"It was my understanding in our negotiations that the '9.0 Max.' would be permanently incorporated into the applicable drawings.

"It [sic] is [sic] is not, then all our engineering, tooling and testing would be lost without reimbursement or consideration.

"If you require any additional information, please contact me at your convenience."

12. On 3 March 1977, Invitation for Bids DAAE07-77-B-3280 (IFB No. 3280) was issued. IFB No. 3280, which solicited bids for 3,945 motors and bracket assemblies, was the first solicitation following the award of Contract Nos. 0791 and 1356. IFB No. 3280 included a drawing which specified a motor length of 7.50 inches maximum.

13. After receiving the solicitation for IFB No. 3280, appellant's president telephoned the Government's production specialist and advised that in accordance with their prior agreement, the solicitation was supposed to include a 9 inch motor. The production specialist subsequently brought the matter to the attention of his superiors and advised appellant that somebody in the Government had made a mistake.

14. Appellant was low bidder regarding IFB No. 3280 and was subjected to at least three pre-award surveys. The Government specifically reviewed appellant's bid to insure that appellant was going to supply a 7.5 inch length motor and advised appellant that the 9 inch motor was unacceptable.

15. Subsequent to approximately ten requests by the Government for extending bids, IFB No. 3280 was cancelled in April 1978. The cancellation was based on a specification deficiency, i.e., the length of the motor was specified as 7.5 inches maximum.

16. By letter dated 21 July 1977, appellant requested a schedule adjustment and an equitable adjustment for various claim items, including the Government's failure". . . to permanently approve the length dimension of the motor assembly cited on Military Drawing No. 11644874 from 7.50 max. to 9.0 max. . . . ." Appellant incurred additional costs in attempting to develop an acceptable 7.5 inch length motor.

17. The contracting officer issued her final decision on 23 August 1977 stating as follows:

"Pursuant to the Disputes Clause of the contracts, it is the determination of the contracting officer that your claim for upward equitable adjustment of the contract price be denied. Your request for schedule adjustment is however presently being considered by the buying activity inasmuch as the Government must decide whether to invoke its rights under the Default Clause. You will be advised when a decision has been reached.

This is the final decision of the Contracting Officer."

The document did not include any findings of facts nor did it state the Government's position as to why the claim was being denied. At the hearing, the Procurement Contracting Officer (PCO) implied that the modification executed by appellant did not obligate the Government to change the motor length for future solicitation because a PCO's authority does not extend beyond his authority to administer the contract which he has specifically in front of him. A timely appeal was filed.

18. On 26 August 1977, Drawing No. 11644874 was revised and the motor length was changed from "7.50 max." to "9.0 max.".

19. Solicitation DAAE07-78-R-5285 (RFP No. 5285) was issued on 11 July 1978 requesting proposals for 26,864 motors and bracket assemblies. RFP No. 5285 included the drawing requiring a 9.0 maximum length motor. Appellant did not receive the award.

DECISION

The facts as presented by the parties reflect, at best, unusual procurement practices. Appellant argues it entered into bilateral modifications under two separate contracts to change the length of the specified motor wherein it waived substantial claim costs and received as consideration the Government's promise to make a permanent change on contract drawings for future procurement. Appellant contends the failure by the Government to satisfy the condition subsequent dissolves the waiver agreements.

The Government argues that the bilateral modifications changed the length of the motor solely for Contract Nos. 1356 and 0791; that an agreement to specify the length of the motor for future procurement would be beyond the authority of the contracting officer; and arguing in the alternative, that even if an agreement as alleged by appellant had been executed, there was no failure of consideration because the subsequent procurement of the motors was based on the revised drawing.

The first questions to be answered are whether the parties' agreement regarding the change in the length of the motors is fully set forth in the bilateral modifications and whether the agreement is specifically limited to the two contracts in dispute. A review of the actions leading to the modifications yields a negative answer.

The dispute was initiated by a recognition that the specifications were defective and that the terms of the contracts had to be altered. Appellant requested a meeting to discuss the impact of the specification changes and proposed several options including waiving all claims if the 9 inch motor length was made a permanent change for future procurement. The Government is correct in arguing that no agreement was reached at the meeting. However, appellant's option which included waiving all claims was selected by the Government and included in Modification No. P00002 under Contract No. 0791 and Modification No. P00001 under Contract No. 1356 which were issued by the procurement office.

Modification P00002 to Contract No. 0791 is in direct response to appellant's letter of 6 October 1976 which confirmed appellant's offer to waive its claim costs if the military drawing was permanently changed to provide for a 9 inch maximum motor length. The modification does not use the word "permanent" but does provide that the motor length on Military Drawing No. 11644874 is changed from 7.50 inches maximum to 9.0 inches maximum. Appellant's interpretation that the motor length change on the drawing is a permanent change is reasonable. Its interpretation is consistent with the prior negotiations and is not in conflict with the specific language of the modification. In the appeal of Environmental Tectonics Corporation, ASBCA No. 21657, 79-1 BCA ¶ 13,796 at p. 67,576 we said:

> "The parol evidence rule, a rule of substantive contract law rather than a mere evidentiary rule, precludes evidence of any prior or contemporaneous oral agreement to contradict the terms included in an integrated confirmatory memorandum. Uniform Commercial Code (U.C.C.) §2-202. See, Restatement, Contracts (1932) §237. Nevertheless, evidence of 'consistent additional terms' is permitted to explain, supplement or clarify, rather than contradict, the terms set forth in the confirmatory writing. U.C.C. §2-202; United States v. Lennox Metal Manufacturing Co. [6 CCF ¶ 61,696], 225 F.2d 302 (2d Cir. 1955)."

The addition to the modification of a waiver of claims paragraph reflects the Government's contemporaneous understanding that the option proposed by appellant was the basis for the agreement. Under the facts of this appeal the unilateral addition of the waiver clause by the Government subsequent to appellant's signing of the modification has no bearing on the outcome of our decision. However, we are compelled to note that this practice is reprehensible and should not be condoned as acceptable procurement policy.

Modification No. P00001 under Contract No. 1356 included the waiver of claims paragraph in the copy executed by both parties. The waiver language does not bar appellant's claim because in accordance with the reasonable understanding of the appellant, the change on the military drawing was not limited to the contract in question. Moreover, appellant's cover letter returning the signed modification specifically advised the Government of its understanding that the motor length change was of a permanent nature.

Having decided that the change in the length of the motor on Military Drawing No. 11644874 was not limited to the two contracts before us, we must next resolve whether the modifications were authorized and included legal consideration. With respect to the authority question, respondent correctly concedes that that contracting officer is not empowered to bind the Government on future procurements. A contracting officer represents the Government in the administration of those contracts which have been assigned to him.

Government agencies are required to draft specifications and drawings to meet their minimum needs and can not be placed in the position of allowing bidders or contractors to dictate what specifications to prescribe. See Comp. Gen. Dec. B-195001, 79-2 CPD ¶ 13 (6 July 1979) and Comp. Gen. Dec. B-179762, B-178718, 74-1 CPD ¶ 257 (15 May 1974). Moreover, one procuring activity's minimum needs are not necessarily determinative of anothers minimum needs. Comp. Gen. Dec. B-194510, 79-2 CPD ¶ 9 (5 July 1979). The contracting officer's attempt to negotiate a modification using future procurement activity as consideration is beyond the scope of his authority.

We are unable to conclude that the promised action of the Government regarding future procurement is valid consideration for appellant's waiving its right to file claims under subject contract. An agreement not to litigate is sufficient consideration where there is a bona fide dispute. American Air Filter Company, Inc., ASBCA No. 14794, 72-1 BCA ¶ 9219. In this appeal, there was no color of dispute as the parties are in agreement that the original specifications were defective. The promise to restrict future procurement to the method specified on the changed drawing is unauthorized and contrary to procurement policy. The contracting officer may not employ a change in the terms of a contract so as to defeat or interfere with the purpose of competitive procurement. Comp. Gen. Dec. B-192279, 78-2 CPD ¶ 258 (6 October 1978)

The Government argues that the conduct of the parties reflects that the terms of the supplemental agreement were satisfied because all contracts for the motor units issued subsequent to appellant's contract were based on the revised drawing. We disagree. It is our opinion that, even assuming that the condition subsequent promised by the Government was not a nullity, it was violated by the issuance of IFB No. 3280 which specified a motor length of 7.50 inches maximum. Appellant complained of the situation and was advised that the 9 inch motor was unacceptable. The Government's attempts at procuring motors pursuant to IFB No. 3280, which lasted for a period in excess of one year, resulted in appellant's incurrence of cost to develop an acceptable 7.50 inch motor. These development and testing costs would not have been incurred but for the failure of the Government to permanently change the drawing for the length of the motor.

Accordingly, the appeal is allowed and the matter is remanded to the parties to negotiate an equitable adjustment for the change from a 7.50 inch to 9.0 inch maximum length motor under Contract Nos. 0791 and 1356.

B. Indefinite Quantity Contract

FEDERAL ELECTRIC CORPORATION

ASBCA No. 11726 (1968)

* * * * *

DECISION

The validity of a contract to manufacture and deliver a fixed quantity of goods against payment of the purchase price is well settled. But difficulties arise when, as here, the quantity of goods to be furnished by the seller to the buyer is not fixed beyond the "minimum quantity."

I

At the one end of the spectrum are contracts where the quantity to be sold is defined in terms of a narrow range and where the courts have spelled out an obligation of the seller to furnish the minimum quantity. Feuchtwanger v. Manitowoc Malting Co., 187 F. 713 (7th Cir. 1911). Similarly, the courts have held that reference to the actual requirements or needs of the buyer over a fixed period of time sufficiently defines the quantity to be furnished by the seller to the buyer so as to create a binding agreement. United States v. Purcell Envelope Co., 249 U.S. 313 (1919); Shader Contractors, Inc., et al. v. United States, 149 Ct. Cl. 535 (1960); Neil A. Goldwasser d/b/a/ Century Offset Co., ASBCA No. 7027, 61-2 BCA par. 3124; [For the sequel see 160 Ct. Cl. 450 (1963).] Bronze Marker Corp. ASBCA Nos. 5650, 6201, 60-2 BCA par. 2811; Lowell O. West Lumber Sales Co., ASBCA No. 2560 (1955).

At the other end of the spectrum are those agreements in which the seller does not become obligated to furnish any quantity of goods because the buyer is deemed not to have obligated itself to purchase any specific quantity of goods or, in some instances, services. Cold Blast Transportation Co. v. Kansas City Bolt & Nut Co., 114 F. 77 (8th Cir. 1902); Meredith v. John Deere Plow Co. of Moline, 89 F. Supp. 787 (S. D. Iowa, 1950), aff'd 185 F. 2d 481 (8th Cir., 1933). This rule has been applied equally to Government contracts. Willard, Sutherland & Co. v. United States, 262 U. S. 489 (1923); Atwater & Co. v. United States, 262 U. S. 495 (1923); Updike, Trustee v. United States, 69 Ct. Cl. 394 (1930); Sanz School of Languages, ASBCA Nos. 9571, 9572, 1964 BCA par. 4257. In all of these cases the obligation of the buyer to purchase any quantity of goods or services from the seller was deemed unascertainable either by reference to a minimum quantity (see Feuchtwanger, supra) or to the buyer's requirements (see U. S. v. Purcell Envelope Co., supra). Since the purchaser need only buy what he may wish or want, the seller did not become obligated to furnish anything. But once he had accepted the buyer's order, he became obligated to furnish at the contract price the specific quantity of goods

which by his acceptance of the order he had agreed to deliver. Willard, Sutherland & Co. v. United States and Atwater & Co. v. United States, supra.

In between these two poles is the range of contracts in which the total quantity of goods to be furnished by the seller is left indefinite but where the buyer undertakes an obligation to purchase at the minimum a fixed quantity of goods. Where this minimum quantity is purely nominal, the legal obligation of the seller to deliver goods at the contract price is no greater than if such nominal obligation to purchase goods was omitted from the contract terms. The Tennessee Soap Company v. United States, 130 Ct. Cl. 154, 158 (1954); see Neil A. Goldwasser, supra.

Thus, Tennessee Soap involved a contract for the purchase by the Navy of 120,000 pounds, more or less, of soap at about 8 cents per pound, for the purpose of replenishing the supply of vessels docking in United States ports. The minimum purchase to which the Navy had obligated itself was $10 worth of soap, or about 125 pounds. The plaintiff argued that it was not bound, because of the $10 minimum order, to deliver such indefinite amounts from time to time as the defendant might see fit to order and the court implicitly accepted this argument.

In Goldwasser this Board held that under a contract for the printing of a monthly newspaper the bargain was for the printing of the paper, as long as required, and not for a $100 minimum payment upon which the Government would be discharged of all further obligations to the contractor under its contract.

In both of the cited cases it was clear to the Court of Claims and to this Board that the minimum order was without business justification or value -- a sort of lagniappe to give the appearance of consideration.

The instant appeal differs sharply on the facts from these instances. For the minimum quantity, the purchase of which was "not optional" with but obligatory upon respondent (see International Fermont, Inc., ASBCA No. 9097, 1964 BCA par. 4290) constituted a substantial order in itself which any manufacturer of generator sets might well desire to fill, even if standing alone. [Appellant argues also that to be valid consideration for any promise of appellant, the contract itself must embody the order. However, the regulations cited by appellant by implication leave the choice of the form of the minimum quantity order, whether in the contract or by separate instrument, to the contracting officer. International Fermont, supra, upholds the latter form as sufficient.] Respondent's minimum purchase involved a substantial quantity of generators in each of the five size from 15 to 150 kw, and overall totalled between 12 and 13 percent in both quantity and value. Hence, we must determine to what extent the fact that respondent's minimum order under the contract was a substantial purchase of goods, involving an initial contract price of $2,893,884,

affects the applicability of the rule laid down in the Tennessee Soap decision. Neither party has cited decisions in which a contract for the delivery of supplies up to a maximum quantity, when ordered within a limited period of time, was held unenforceable as to goods as yet unordered, where, as here, a substantial minimum order for such goods was required and given by the Government. In International Fermont, Inc., supra, and Continental Electronics Corporation, ASBCA Nos. 8677, 8789, 1964 BCA par. 4287, cited by respondent, the issue before us here was apparently not raised and was not discussed by the Board. On the other hand, Tennessee Soap Company and Sanz, relied on by appellant, are prima facie distinguishable on their facts, since neither involves a substantial minimum order.

II

The basis on which indefinite quantity contracts not involving a substantial minimum order have been held unenforceable as to the delivery of goods not yet ordered has been lack of mutuality of obligation. The buyer was not required to order, hence the seller was not required to deliver. Willard, Sutherland & Co. v. United States, supra. Mutuality of obligation is required for the formation of a binding contract but the mutual obligations need not be equal as long as they provide consideration which the law deems sufficient. 1 WILLISTON, A TREATISE ON THE LAW OF CONTRACTS (3d ed. by W. H. E. JAEGER, 1957) sec. 105A, 101.

It is somewhat difficult to perceive why respondent's obligation to order 453 generator sets from appellant for a purchase price of almost $2,900,000 is not sufficient consideration in law and hence an obligation and promise providing consideration for appellant's counter-obligation or promise to deliver not only the 453 generator sets but additional units up to 3600 at the agreed upon prices. Inadequacy of consideration is generally not a proper subject of legal inquiry. But to the extent that total inadequacy of consideration sometimes is considered the equivalent of lack of mutuality of obligation (WILLISTON, op, cit., supra, at pp. 424-425), such inadequacy of consideration does not exist here. Moreover, a promise such as that made by respondent is sufficient as a matter of law to provide consideration not only for its exact counterpart, but also for additional "options" such as appellant here made to respondent. Ibid. Supported by consideration furnished by respondent such "options" are binding on appellant and cannot be withdrawn without cause.

The view as to mutuality of consideration adopted here has also been recently expressed by the Comptroller General (B-160063, dated 10 February 1967). After discussing the distinction between requirements contracts and those in which performance is "totally dependent upon the wish, will or want of one of the parties," he added:

> "We suggest, therefore, in the future that language be used in estimated quantity type contracts which is sufficient to obligate the Government so that contracts will not be open to the allegation that they are unenforceable

for lack of mutuality. This can be done simply enough with the insertion of a phrase to the effect that whatever quantities of the product in question which the using activity may need it will purchase from the contractor; or, if the using activity prefers, it may promise to purchase at least a stated minimum number of units from the contractor."

The instant contract effectively meets the test of this suggestion. The contract, in the absence of overriding considerations to the contrary, must, therefore, be held binding on appellant.

III

From what has been said above it follows that the rule of Tennessee Soap Company and similar decisions has no application here, unless the contract between the parties, in the light of all surrounding circumstances, must be read as expressing a different intent. We thus reach appellant's contention that it was not the intent of the parties that the minimum quantity order should create mutuality of obligation between them as to the entire contract.

Appellant argues that it clearly intended to accept a firm obligation only as to the minimum quantity order, and that as to all further quantities it merely reserved to itself the option, revocable at any time, to accept such orders for larger quantities up to 3600 units as respondent might thereafter issue. In support of its argument appellant cites the fact that it consistently took this position--beginning with its revocation letter of 29 March 1966. But this letter was written after the dispute between the parties arose, is self-serving, and cannot bolster appellant's position except to show that its position after the dispute arose was consistent. [As to the potential effect of inconsistent post litem motam positions on a contractor's claim see Willard, Sutherland & Co., v. United States and Atwater & Co. v. United States, both supra. Under these decisions appellant is bound to the contract prices for the minimum quantity order D. O. No. 33747 and the first additional order D. O. No. 34018.]

But to determine the parties intent we must go back further. There is nothing shown of the original negotiations of the parties which would indicate that appellant construed the contract terms solely as a kind of framework for orders which it might accept or decline to fill at will. On the contrary, the record discloses expressions of appellant's intent which, while not perhaps wholly conclusive, tend to contradict its later stand.

Appellant, in aid of its main arguments, has pressed certain other points which are equally unpersuasive. Clearly, in the light of the conclusion reached hereinafter, one cannot find in the terms of PART X of the contract schedule the kind of ambiguity to which the rule

called "Contra Proferentem" can apply. The language of PART X is unambiguous and can acquire the meaning now attributed to it by appellant only as a matter of law - a view already rejected herein - or by the proof of a specific intent of the parties as described by appellant. But contrary to appellant's argument, to apply the rule of interpretation against the drafter in the manner advanced here by appellant would be to frustrate what clearly appears to have been the intent of the parties. Yet, even if there were an ambiguity, the rule should not be mechanically applied to frustrate such intent. Shedd, Resolving Ambiguities in Interpretation of Government Contracts, 36 GEO. WASH. LAW REV. 1, 7-8, 21 (1967). Here quite clearly there is no place for the application of this rule.

Appellant has further argued that the presence of a convenience termination clause relieves respondent of all effectively binding obligation to order even the minimum quantity. That argument has heretofore been raised against the binding nature of requirements contracts and has been rejected conclusively both by this Board and the Court of Claims. Gulf Coast Aviation Co., Inc., ASBCA Nos. 10189 and 10380, 65-2 BCA par. 4928; Shader Contractors, Inc., ASBCA Nos. 3957 and 4276, 58-1 BCA par. 1579; Aetna Plywood & Veneer Co., ASBCA No. 2526 (1955); Shader Contractors, Inc. v. United States, supra. The argument can be no more effective here.

Finally, appellant has argued that each order by respondent is a separate contractual entity and that so considered, the minimum quantity order cannot be consideration for appellant's promise to supply generators in excess of the minimum quantity when ordered by the Government thereafter. There is no doubt that separate delivery orders, such as respondent used here, can for some purposes be considered as separate contracts. The decisions cited by appellant are now, however, as clearly applicable as might seem. For here, the several orders which might be given are tied together among themselves and with the minimum order for each class of generator sets by a sliding scale of unit prices operating cumulatively. Thus, each order can only be priced by reference to prior orders in each class. To that extent the contract on its face does not reflect the concept of separability of orders on which appellant relies. Moreover, to treat each D.O. given by respondent to appellant as a separate contract requiring its own consideration has been found by the Board to be contrary to the intent of the parties at the time when the contract was entered into. Just as the rule of "Contra Proferentem" will not be so applied, so appellant's separability interpretation will not be applied to thwart the intent of the parties.

Appellant was, therefore, bound to furnish to the Government generator sets, when ordered, up to the maximum quantity and, in the absence of a suitable price revision clause, at the prices stated in the contract.

IV

Appellant has argued that, even if the Board were to determine that appellant had entered into a binding contract for the delivery of up to 3600 generator sets, when ordered, the contract could not be used to reprocure 763 generator sets under D.O. Nos. 35775 and 41205, when respondent knew that this order would inflict a substantial loss upon appellant.

The contract, construed by the Board as binding upon appellant up to the maximum quantity for each class of generators, did not contain any limitation in its terms as to the causes or motives which might lead respondent to order generator sets from appellant within the maximum prescribed. As the events showed, the maximum was a generous figure, for respondent ordered only 2,633 generator sets out of a possible grand total of 3,600. There was nothing in the contract, in particular, which restricted respondent to order only quantities which had not yet been ordered from other contractors. On the contrary, one would assume that the contract, with its flexibility as to the number of generator sets to be delivered, thereunder, provided a suitable and ready means for reordering those quantities of generator sets which other contractors had failed to deliver. This Board has held that a contractor is not discharged from its obligation to furnish supplies in response to orders of the Government which were issued after the contractor had decided to discontinue the manufacture thereof as unprofitable and after the Government had become aware of this fact. Standard Steel & Tube Corporation, ASBCA 12076, 67-1 BCA § 6199; Lucas Aircraft Supply Co., ASBCA No. 11167, 66-1 BCA § 5671. The same rule applies where the contractor continues in the business of manufacturing the supplies contracted for, as appellant here did. Hence, there was nothing in the direct contractual relationship of the parties which required respondent to forego its contractual right to order generator sets at the contract price, although at a loss to appellant.

According to appellant, the situation here is different because the Government is reprocuring supplies on the delivery of which the original contractor is said to have inexcusably defaulted, and for the excess costs of which in the event of reprocurement he is said to be liable. Octagon Process, Inc., ASBCA No. 10371, 65-2 BCA § 5168, is cited by appellant in support of the proposition that on reprocurement the Government may pass up the lowest price bid by a prospective reprocurement contractor, if such price is known to inflict a loss upon him, and reprocure at a higher price, charging the defaulted contractor with the difference. But that is now the proposition for which Octagon stands. All that this decision held was that, where the Government before award became aware of a low bidder's mistake and hence was not entitled to hold him to his bid (see Framlau Corp., IBCA No. 228, 61-2 BCA § 3116), it fulfills its duty toward the defaulted contractor to mitigate damages by awarding the reprocurement to the next lowest bidder (who has thus become the lowest acceptable bidder).

Nor is the appellant served by the statement that reprocurement is not for the Government's account. The regulations which govern the contracting officer's conduct in letting reprocurement contracts require him to reprocure not, as appellant asserts (Br. p. 48), at a "reasonable" price but "at as reasonable a price as practicable" (ASPR 8-602.6(a)), that is, at the lowest practicable price. If he fails to do so, for instance by not securing savings reasonably available, the amount of excess costs resulting from his failure is "unnecessary" and, hence, uncollectible. National Robe Company, ASBCA Nos. 11227, 11333, 67-1 BCA § 6365.

Nor is there anything in the laws of the United States, applicable regulations, or the decisions of courts or contract appeals boards which requires a contracting officer to incur greater excess costs and thereby to create potential litigation and collection problems for the Government, when he can by permissible contractual action avoid or minimize the dangers presented by litigation as to the excusability or existence of a default, or the collectibility of the excess costs. Since repondent was entitled to procure the 763 Bogue units by ordering the same from appellant, the contracting officer was under no obligation to enter into an additional contract for their reprocurement unless he could do so at prices lower than appellant's.

It was perhaps this hope, tenuous as it might have been, which inducted SAMA to issue RFP's for the reprocurement of the Bogue units. If so, such hopes were disappointed. In the ensuing negotiations SAMA adopted the idea of ordering the Bogue units under Contract No. AF 04(606)-15369. A memorandum making certain concessions to appellant (ASBCA No. 11918, R4 doc. V) was drafted by the SAMA negotiators but was not accepted by appellant. Further price negotiations in March 1966 led to a tentative agreement on terms and prices, substantially higher than those listed in appellant's then-existing contract. This tentative agreement was, however, by its terms previously quoted, conditional upon availability of funds and approval by higher authority. Either or both must have been lacking for the agreement was not consummated, and in April 1966 the first of the disputed D.O.'s was issued to reprocure units which Bogue had failed to deliver. In the light of this record it cannot be said that SAMA's issuance of a RFP for the reprocurement of the Bogue units under a separate contract committed respondent to this course and therefore, barred it from obtaining these units by D.O.'s issued under appellant's existing contract.

Consequently the issuance of D.O. Nos. 35775 and 41205 must be upheld as valid against the attack that they could not be used to procure or reprocure the units on which Bogue had defaulted.

V

Accordingly, the three appeals challenging the validity of the several delivery orders issued by respondent under Contract No. AF 04(606)-15369 must be, and they hereby are, in all respects denied.

UNITED STATES v. PURCELL ENVELOPE COMPANY

249 U.S. 313 (1919)

Reprinted supra at p. 1-8

GOVERNMENT CONTRACT LAW CASES

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CHAPTER TWO

BASIC CONTRACT PRINCIPLES

Section 1. Contracting With the Sovereign

A. Power of the United States to Contract

UNITED STATES v. TINGEY

30 U.S. 114 (1831)

* * * * *

This suit was instituted in the Circuit Court by the United States against Thomas Tingey as one of the sureties of Lewis Deblois, who had been appointed a purser in the Navy of the United States.

* * * The Circuit Court * * * gave judgment against the United States, who prosecuted this writ of error.

* * * * *

This is a writ of error to the Circuit Court of the District of Columbia, sitting at Washington. The original action was brought by the United States upon a bond executed by Lewis Deblois, and by Thomas Tingey and others as his sureties, on the 1st of May, 1812, in the penal sum of ten thousand dollars, upon conditions that Deblois should regularly account, when thereto required, for all public moneys received by him from time to time, and for all public property committed to his care, with such person or persons, officer or officers of the Government of the United States as should be duly authorized to settle and adjust his accounts, and should moreover pay over, as might be directed, any sum or sums that be found due to the United States upon any such settlement or settlements, and should also faithfully discharge, in every respect, the trust reposed in him, then the obligation to be void, etc. In point of fact, Deblois was at the time a purser in the Navy, though not so stated in the condition; and there is an endorsement upon the bond, which is averred in one of the counts of the declaration to have been contemporaneous with the executing of the bond, which recognizes his character as purser, and limits his responsibility as such; and the bond was unquestionably taken, as the pleadings show, to secure his fidelity in office as purser.

* * * * *

There is no statute of the United States expressly defining the duties of pursers in the Navy. What those duties are, except so far as they are incidentally disclosed in public laws, cannot be judicially known to this Court. If they are regulated by the usages and customs of the Navy, or by the official orders of the Navy Department, they properly constitute matters of averment, and should be spread upon the pleadings. It may be gathered, however, from some of the public acts regulating the departments, that a purser, or as the real name originally was, a burser, is a disbursing officer, and liable to account to the Government as such. * * *

It is obvious that the condition of the present bond is not in the terms described by the Act of 1812, ch. 47, and it is not limited to the duties or disbursements of Deblois as purser, but creates a liability for all moneys received by him, and for all public property committed to his care, whether officially as purser, or otherwise.

Upon this posture of the case a question has been made and elaborately argued at the bar, how far a bond voluntarily given to the United States, and not prescribed by law, is a valid instrument, binding upon the parties in point of law; in other words, whether the United States have, in their political capacity, a right to enter into a contract, or to take a bond in cases not previously provided for by some law. Upon full consideration of this subject, we are of opinion that the United States have such capacity to enter into contracts. It is in our opinion an incident to the general right of sovereignty; and the United States being a body politic, may within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers, * * * To adopt a different principle would be to deny the ordinary rights of sovereignty, not merely to the general government, but even to the state governments within the proper sphere of their own powers, unless brought into operation by express legislation. A doctrine, to such an extent, is not known to this Court as ever having been sanctioned by any judicial tribunal.

* * * we hold that a voluntary bond taken by authority of the proper officers of the treasury department, to whom the disbursement of public moneys is entrusted, to secure the fidelity in official duties of a receiver or an agent for disbursery of public moneys, is a binding contract between him and his sureties, and the United States; although such bond may not be prescribed or required by any positive law. The right to take such a bond is in our view an incident of the duties belonging to such a department; and the United States having a political capacity to take it, we see no objection to its validity in a moral or legal view.

* * * * *

[However, the defendant in error pleads,] * * * after setting forth at large the Act of 1812 respecting pursers, * * * that before the execution of the bond, the Navy Department did cause the same to be prepared and transmitted to Deblois, and did require and demand of him that the same, with the condition, should be executed by him with

sufficient sureties, before he should be permitted to remain in the office of purser, or to receive the pay and emoluments attached to the office of purser; that the condition of the bond is variant, and wholly different from the condition required by the said Act of Congress, and varies and enlarges the duties and responsibilities of Deblois and his sureties; and

> that the same was under colour and pretence of the said Act of Congress, and under colour of office required and extorted from the said Deblois, and from the defendant, as one of his sureties, against the form, force and effect of the said statute, by the then Secretary of the Navy.

The substance of this plea is, that the bond, with the above condition, variant from that prescribed by law, was under colour of office extorted from Deblois and his sureties, contrary to the statute, by the then Secretary of the Navy, as the condition of his remaining in the office of purser, and receiving its emoluments. There is no pretence then to say that it was a bond voluntarily given, or that though different from the form prescribed by the statute, it was received and executed without objection. It was demanded of the party upon the peril of losing his office; it was extorted under colour of office, against the requisitions of the statute. It was plainly then an illegal bond; for no officer of the government has a right, by colour of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law. That would be, not to execute, but to supersede the requisitions of law. It would be different, where such a bond was by mistake or otherwise voluntarily substituted by the parties for the statute bond without any coercion or extortion by colour of office.

The judgment of the Circuit Court is Affirmed.

B. Sovereign Immunity from Suit

UNITED STATES v. SHAW

309 U.S. 495 (1940)

MR. JUSTICE REED delivered the opinion of the Court.

In 1918 Sydney C. McLouth contracted to construct nine tugs for the United States Shipping Board Emergency Fleet Corporation. On 24 May 1920, the contract was cancelled and the parties entered into a settlement agreement providing that McLouth was to keep as bailee certain materials furnished him for use in building the tugs and that the Fleet Corporation was to assume certain of McLouth's subcontracts and commitments. Among the commitments assumed was a contract of McLouth's to purchase lumber from the Ingram-Day Lumber Company. The Lumber Company obtained a judgment against McLouth for $42,789.96 for breach of this contract, Ingram-Day Co. v. McLouth, 275 U.S. 471, and McLouth having died in 1923, filed its claim on the judgment in the probate court of St. Clair County, Michigan. Subsequently, the United States obtained a judgment of $40,165.48 against McLouth's administrator, representing damages for the conversion of the materials left with McLouth as bailee, and claim on this judgment was filed in the probate court. The administrator, respondent here, having presented without success the Lumber Company's judgment to the General Accounting Office, sought to set off that judgment against the judgment of the United States. The probate court allowed the claim of the United States and denied the set-off, but its ruling as to the set-off was reversed on appeal to the Michigan Supreme Court. The administration then petitioned the probate court to grant statutory judgment of the balance due the estate. The court found that the claim of the United States, with interest, amounted to $49,442.41 and the Lumber Company's claim to $73,071.38 and "ordered, adjudged and ascertained" that the United States was indebted to the estate for the difference, $23,628.97, "and that such indebtedness be and the same is hereby allowed as and determined to be a proper claim which is owing to said estate of the United States of America." The probate court's judgment was affirmed on appeal.

On this certiorari we are concerned with the question whether the United States by filing a claim against an estate in a state court subjects itself, in accordance with local statutory practice, to be binding, though not immediately enforceable, ascertainment and allowance by the state court of a cross-claim against itself.

* * * * *

* * * There is no contention on the part of the respondent that the judgment is enforceable against the United States even in the limited sense of statutory direction to report the judgment to Congress as in the Court of Claims Act or the Merchant Marine Act. Execution against property of governmental agencies subjected to such procedure by statute is sometimes allowed, Federal Housing Administration v. Burr, ante, p. 242. The position taken is that the probate court judgment is a "final determination" of the rights of the litigants, howsoever such rights may later become important. We are not here concerned with the manner of collection. Such was the holding of the Supreme Court of Michigan.

* * * The order entered was a final determination of the amounts due the estate by the United States on this claim and cross-claim if the probate court had jurisdiction to render the order against the petitioner.

Whether that jurisdiction exists depends upon the effect of the voluntary submission to the Michigan Court by the United States of its claims against the estate. As a foundation for the examination of that question we may lay the postulate that without specific statutory consent, no suit may be brought against the United States, Kansas v. United States, 204 U.S. 331; United States v. Thompson, 98 U.S. 486, 489, 490; Buchanan v. Alexander, 4 How. 20. No officer by his action can confer jurisdiction, Stanley v. Schwalby, 162 U.S. 255, 270; Carr v. United States, 98 U.S. 433, 437. Even when suits are authorized they must be brought only in designated courts, Minnesota v. United States, 305 U.S. 382, 388. The reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants. A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen. By the act of 3 March 1797, and its successor legislation, as interpreted by this Court, cross-claims are allowed to the amount of the government's claim, where the government voluntarily sues. Specially designated claims against the United States may be sued upon in the Court of Claims or the district courts under the Tucker Act. Special government activities, set apart as corporations or individual agencies, have been made suable freely. When authority is given, it is liberally construed, Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381; Federal Housing Administration v. Burr, supra. As to these matters no controversy exists.

Respondent contends this immunity extends, however, only to original suits; that when a sovereign voluntarily seeks the aid of the courts for collection of its indebtedness it takes the form of a private suitor and thereby subjects itself to the full jurisdiction of the court. The complete examination into the cross-claim, despite attendant dislocation of government business by the appearance of important officers at distant points and the production of documents as evidence, to justify the allowance of an offset to the government's claim. It is pointed out that surprise is not involved as no cross-claim may be proven until after submission to and refusal by the government accounting officers. Respondent further insists that his position is supported by The Thekla, 266 U.S. 328, and subsequent decisions quoting its language. Emphasis is placed upon the fact that these probate proceeding are in rem or quasi in rem as were the libels in admiralty in The Thekla.

* * * * *

The Thekla turns upon a relationship characteristic of claims for collision in admiralty but entirely absent in claims and cross-claims in settlement of estates. The subject matter of a suit for damages in collision is not the vessel libeled but the collision. Libels and cross libels for collision are one litigation and give rise to one liability. In equal fault, the entire damage is divided. As a consequence when the United States libels the vessel of another for collision damages and a cross-libel is filed, it is necessary to determine the cross-libel as well as the original libel to reach a conclusion as to liability for the collision. That conclusion must be stated in terms of responsibility for damages. * * * There is little indication in the facts or language of The Thekla to indicate an intention to permit generally unlimited cross-claims. Quotations from The Thekla in later opinions of this Court are used to illustrate problems entirely apart from the one under consideration here.

The suggestion that the order of the probate court is in reality not a judgment but only a "judicial ascertainment" of credits does not affect our conclusion. No judgment against the United States is more than that. But such an entry, if within the competence of the court passing the order, would be res judicata of the issue of indebtedness, Williams v. United States, 289 U.S. 553, 564. The suggestion springs from the opinion in United States v. Eckford, 6 Wall. 484, 491. * * *

In the Eckford case this Court was dealing with the litigation at a more advanced stage than the present litigation has reached. The United States has sued Eckford's executors on his bond in the District Court for the Southern District of New York. They pleaded a set-off, a balance was found in their favor and a judgment entered that the executors were entitled to be paid the amount found. Suit in the Court of Claims was instituted by the executors, the record was proven, over objection, and judgment entered accordingly. Consequently a reversal of the Court of Claims was the only step necessary. This Court did not deal with the New York judgment.

We have considered respondent's further argument that sovereign immunity was waived when the United States took possession of the assets of its agent the Fleet Corporation prior to the institution of this action, and later, but prior to the entry of the probate judgment appealed from, assumed the Corporation's obligations by the act of 29 June 1936. We see nothing in these transactions which indicates an intention to waive the immunity of the United States in the state courts.

C. Defense of Sovereign Acts

HOROWITZ v. UNITED STATES

267 U.S. 458 (1925)

MR. JUSTICE SANFORD delivered the opinion of the Court.

This action was brought by Horowitz, under the Tucker Act (Act of 3 March 1887, 24 Stat. 505, c. 359; Jud. Code, § 145), to recover damages for the alleged breach of a contract relating to the purchase of silk from the Ordnance Department. The petition was dismissed, on demurrer, for failure to state a cause of action. 58 Ct. Cls. 189.

The petition alleges, in substance, these facts: On 20 December 1919, the claimant, a resident of New York, submitted a bid for certain Habutai silk offered for sale by the New York Ordnance Salvage Board. At the time the "Chief of the Textile Division of New York City," agreed, "on behalf of such Board," that the claimant would be given an opportunity to re-sell the silk before completing the payment of the purchase price, and that the "departments of the Government having jurisdiction in matters of this kind" would ship the silk--which was then in Washington--within a day or two after shipping instructions were given. On 22 December he was notified by the Board that the sale of the silk to him had been "approved"; and he thereupon paid part of the purchase price. On 30 January 1920, he sold the silk to a silk company in New York. On 16 February he paid the balance of the purchase price, and wrote the Board to ship the silk at once, by freight, to the silk company. Two days later he was notified by the Board that it had received the shipping instructions and had ordered the silk to be shipped. Thereafter the price of silk declined greatly in the New York market, until 4 March. On that date the "claimant learned . . .

that the silk was still in Washington, and had not been shipped because the Government through one of its agencies, the U.S. Railroad Administration, had prior to 1 March 1920, placed an embargo on shipments of silk by freight, and the shipment of Habutai silk for claimant had been held up." Afterwards the Government shipped the silk to the consignee, by express. It arrived in New York "on or about 12 March." The consignee then refused to accept delivery on account of the fall in prices. And "by reason of the Government's breach of the contract and agreement in placing an embargo, and failing to ship the silk either by express or freight prior to 4 March 1920, the price of silk having declined, the claimant was forced to sell the said silk for $10,811.84 less than the price the consignee had agreed to pay for same had it been delivered in time."

The petition alleges that the claimant is entitled to recover from the United States the said sum of $10,811.84, "for and on account of the violation of the said agreement;" and prays judgment therefor.

We assume, without determining, that the petition shows a valid contract with the Salvage Board for the sale of the silk and its prompt shipment after the receipt of shipping instructions. The sole breach of this contract which is alleged is the failure to ship the silk prior to 4 March 1920. This, according to the averment of the petition, was caused by an embargo, placed by the Railroad Administration on shipments of silk by freight. Neither the validity of this embargo nor its effect in delaying the shipment is challenged by the petition.

It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign. Deming v. United States, 1 Ct. Cls. 190, 191; Jones v. United States, 1 Ct. Cls. 383, 384; Wilson v. United States, 11 Ct. Cls. 513, 520. In the Jones Case, supra, the court said:

> 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 in 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 specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons. . .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.

It was upon this ground that the demurrer in the present case was sustained by the Court of Claims. We think this was correct, and the judgment is Affirmed.

D. Authority of the Contracting Officer

FEDERAL CROP INSURANCE CORP. v. MERRILL

332 U.S. 380 (1947)

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

We brought this case here because it involves a question of importance in the administration of the Federal Crop Insurance Act, 331 U.S. 798.

The relevant facts may be briefly stated. Petitioner (hereinafter called the Corporation) is a wholly Government-owned enterprise, created by the Federal Crop Insurance Act, as an "agency of and within the Department of Agriculture." Sec. 503 of Chapter 30, Act of 16 February 1938, 52 Stat. 72, 7 U.S.C. § 1503, as amended. To carry out the purposes of the Act, the Corporation, "Commencing with the wheat . . .crops planted for harvest in 1945" is empowered "to insure, upon such terms and conditions not inconsistent with the provisions of this title as it may determine, producers of wheat. . .against lost in yields due to unavoidable causes, including drought. . . ." 52 Stat. 74 § 508(a) as amended, 55 Stat. 255, in turn amended by the Act of 23 December 1944, Chapter 713, 58 Stat. 918, 7 U.S.C. (Supp. V, 1946), § 1508(a). In pursuance of its authority, the Corporation on 5 February 1945, promulgated its Wheat Crop Insurance Regulations, which were duly published in the Federal Register on 7 February 1945. 10 Fed. Reg. 1586.

On 26 March 1945, respondents applied locally for insurance under the Federal Crop Insurance Act to cover wheat farming operations in Bonneville County, Idaho. Respondents informed the Bonneville County Agricultural Conservation Committee, acting as agent for the Corporation, that they were planting 460 acres of spring wheat and that on 400 of these acres they were reseeding on winter wheat acreage. The Committee advised respondents that the entire crop was insurable, and recommended to the Corporation's Denver Branch office acceptance of the application. (The formal application itself did not disclose that any part of the insured crop was reseeded.) On 28 May 1945, the Corporation accepted the application.

In July, 1945, most of the respondents' crop was destroyed by drought. Upon being notified, the Corporation, after discovering that the destroyed acreage had been reseeded, refused to pay the loss, and this litigation was appropriately begun in one of the lower courts of Idaho. The trial court rejected the Corporation's contention, presented by a demurrer to the complaint, that the Wheat Crop Insurance Regulations barred recovery as a matter of law. Evidence was thereupon permitted to go to the jury to the effect that the respondents had no actual knowledge of the Regulations, insofar as they precluded insurance for reseeded wheat, and that they had in fact been misled by petitioner's agent into believing that spring wheat reseeded on winter wheat acreage was insurable by the Corporation. The jury returned a verdict for the loss on all the 460 acres and the Supreme Court of Idaho affirmed the resulting judgment. 67 Idaho 196, 174 P. 2d 834. That court in effect adopted the theory of the trial judge,

that since the knowledge of the agent of a private insurance company, under the circumstances of this case, would be attributed to, and thereby bind, a private insurance company, the Corporation is equally bound.

The case no doubt presents phases of hardship. We take for granted that, on the basis of what they were told by Corporation's local agent, the respondents reasonably believed that their entire crop was covered by petitioner's insurance. And so we assume that recovery could be had against a private insurance company. But the Corporation is not a private insurance company. It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures. Government is not partly public and partly private, depending upon the governmental pedigree or the type of a particular activity or the manner in which the Government conducts it. The Government may carry on its operations through conventional executive agencies or through corporate firms especially created for defined ends. See Kiefer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 390. Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority. See, Utah Power & Light Co. v. United States, 243 U.S. 389, 409; United States v. Stewart, 311 U.S. 60, 70 and see, generally, The Floyd Acceptances, 7 Wall. 666.

If the Federal Crop Insurance Act had by explicit language prohibited the insurance of spring wheat which is reseeded on winter wheat acreage, the ignorance of such a restriction, either by the respondents or the Corporation's agent, would be immaterial and recovery could not be had against the Corporation for loss of such reseeded wheat. Congress could hardly define the multitudinous details appropriate for the business of crop insurance when the Government entered it. Inevitably "the terms and conditions" upon which valid governmental insurance can be had must be defined by the agency acting for the Government. And so Congress has legislated in this instance, as in modern regulatory enactments it so often does, by conferring the rule-making power upon the agency created for carrying out its policy. See § 516 (b), 52 Stat. 72, 77, 7 U.S.C. § 1516 (b). Just as everyone is charged with knowledge of the United States Statutes at large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents. 49 Stat. 502, 44 U.S.C. § 307.

Accordingly, the Wheat Crop Insurance Regulations were binding on all who sought to come within the Federal Crop Insurance Act, regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance. The oft-quoted observation in Rock Island, Arkansas & Louisiana Railroad Co. v. United States, 254 U.S. 141, 143, that "Men must turn square corners when they deal with the Government", does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury. The "terms and conditions" defined by the Corporation, under the authority of Congress, for creating liability on the part of the Government preclude recovery for the loss of the reseeded wheat no matter with what good reason the respondents thought they had obtained insurance from the Government. Indeed, not only do the Wheat Regulations limit the liability of the Government as if they had been enacted by Congress directly, but they were in fact incorporated by reference in the application, as specifically required by the Regulations.

We have thus far assumed, as did the parties here and the courts below, that the controlling regulation in fact precluded insurance coverage for spring wheat reseeded on winter wheat acreage. It explicitly states that the term "wheat crop shall not include . . . winter wheat in the 1945 crop year, and spring wheat which has been reseeded on winter wheat acreage in the 1945 crop year." [Sec. 414.37 (v) of Wheat Crop Insurance Regulations, 10 Fed. Reg. 1591.] The circumstances of this case tempt one to read the regulation, since it is for us to read it, with charitable laxity. But not even the temptations of a hard case can elude the clear meaning of the regulation. It precludes recovery for "spring wheat which has been reseeded on winter wheat acreage in the 1945 crop year." Concerning the validity of the regulation, as "not inconsistent with the provisions" of the Federal Crop Insurance Act, no question has been raised.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE RUTLEDGE dissent.

MR. JUSTICE JACKSON, dissenting.

I would affirm the decision of the court below. If crop insurance contracts made by agencies of the United States Government are to be judged by the law of the State in which they are written, I find no error in the court below. If, however, we are to hold them subject only to federal law and to declare what that law is, I can see no reason why we should not adopt a rule which recognizes the practicalities of the business.

It was early discovered that fair dealing in the insurance business required that the entire contract between the policyholder and the insurance company be embodied in the writings which passed between the parties, namely, the written application, if any, and the policy issued. It may be well enough to make some types of contracts with the Government subject to long and involved regulations published in the Federal Register. To my mind, it is an absurdity to hold that every farmer who insures his crop knows what the Federal Register contains or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops. Nor am I convinced that a reading of technically-worded regulations would enlighten him much in any event.

In this case, the Government entered a field which required the issuance of large numbers of insurance policies to people engaged in agriculture. It could not expect them to be lawyers, except in rare instances, and one should not be expected to have to employ a lawyer to see whether his own Government is issuing him a policy which in case of loss would turn out to be no policy at all. There was no fraud or concealment, and those who represented the Government in taking on the risk apparently no more suspected the existence of a hidden regulation that would render the contract void than did the policyholder. It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street.

The Government asks us to lift its policies out of the control of the States and to find or fashion a federal rule to govern them. I should respond to that request by laying down a federal rule that would hold these agencies to the same fundamental principles of fair dealing that have been found essential in progressive states to prevent insurance from being an investment in disappointment.

MR. JUSTICE DOUGLAS joins in this opinion.

BROAD AVENUE LAUNDRY AND TAILORING v. THE UNITED STATES

Ct. Cl. No. 28-81 (1982)

NICHOLS, Judge, delivered the opinion of the court:

This case is an appeal under the Contract Disputes Act of 1978, 41 U.S.C. §601 and ff, seeking review of a decision of the Armed Services Board of Contract Appeals (ASBCA). Broad Avenue Laundry & Tailoring, ASBCA No. 25136, 81-1 BCA ¶14,895 (1980). It presents important questions whether respondent can repudiate a contracting officer's written modification of a fixed price contract and refuse to bear the pecuniary consequences on the ground that the modification was outside the contracting officer's authority, because based on a mistake of law.

The contract awarded July 2, 1979, ran a year from August 1, 1979, and required petitioner to operate a government-owned laundry service facility at Fort Rucker, Alabama. Petitioner succeeded a different previous contractor and inherited some of the latter's work force. The contract was labor intensive to the degree that the cost of performance varied almost directly with the applicable wage rates. These were set by collective bargaining and had to equal prevailing rates in the area as determined by the Labor Department under 41 U.S.C. §351 and ff, (Service Contract Act).

Shortly after work started under the new contract at previously established labor rates, the employees shifted their union affiliation, hoping to fare better with a new bargaining representative. The new man did indeed do better, obtaining from Mr. Hancock, owner of petitioner, in a December 1979 negotiation, an agreement for new and higher wage rates, but they agreed it would not be possible to put the new rates into effect unless the government would absorb the added cost of performance. Both therefore separately consulted Mrs. Helen E. Nicholson, the contracting officer, who said, if the Department of Labor (DOL) issued a new prevailing wage determination as a result of the new agreement, she would automatically include it (require it) in the contract and that petitioner could request a price adjustment. Apparently counting on the DOL, employer and employees formally agreed December 12, 1979, to take effect February 1, 1980. She sent a copy of the proposed new pay schedules to the DOL which determined that the newly bargained rates were the prevailing rates. Mrs. Nicholson incorporated the new prevailing rate into a modification of the contract (Mod. 12) which required petitioner to pay the new prevailing rates and for the life of the contract he did so. Petitioner then, on March 10, 1980, requested a contract price adjustment.

Neither party now contends that Mrs. Nicholson correctly applied the applicable law, as stated and construed in the DOL Regulation. It says, 29 C.F.R.§4.143 and ff,4.161, that wages effective at the start of an ongoing contract may be changed by "[a] change in the Fair Labor Standards Act minimum by operation of law * * *." She (not being an attorney) supposed that a new DOL prevailing wage determination effected a change "by operation of law." If she had read further, she

would have come across further language which makes it reasonably clear (to a lawyer) that a mere local prevailing wage determination, not based on new statute or regulation, does not force any change in wage rates under contracts actually in effect. "Such wage determinations are effective for contracts not yet awarded * * *."

On March 19, a price analyst questioned Mrs. Nicholson's wage rate modification and recommended that legal advice be sought. Thereafter occurred a painful correspondence between her and the office of the Staff Judge Advocate (SJA) in which a clearcut legal opinion was repeatedly withheld because the contracting officer failed to furnish an adequate file with her request for a ruling. Despite the apparent simplicity of the question, to a lawyer, she obtained a definite legal statement only on June 5. The issue was still not treated as settled within the command. Only on July 16, 1980, two weeks before expiration of the contract, did Mrs. Nicholson's successor, Mrs. Gloria G. Wheeler, issue a final ruling that the price adjustment was disallowed, though petitioner seems to have been made aware at an earlier date that it was in jeopardy. The contract of course included the usual disputes clause which required the contractor "to proceed diligently with performance of this contract, pending resolution of any request for relief * * * claim, appeal, or action * * *."

The contractor took a timely appeal to the ASBCA. The board relied in denying the claim mainly on the historic doctrine of Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947), that the government is not estopped by promise or undertaking of its officials outside the scope of their authority . So does respondent before us. We conclude that the act of Mrs. Nicholson, though erroneous, was within the scope of her authority. The government can be estopped by the promises of an official within the scope of her authority, as the ASBCA concedes, referring to George H. Whike Construction Co. v. United States, 135 Ct.Cl. 126, 140 F.Supp. 560 (1956). To the same effect see California-Pacific Utilities Co. v. United States, 194 Ct.Cl. 703, 720 (1971); Russell Corp. v. United States, 210 Ct.Cl. 596, 537 F.2d 474 (1976), cert. denied, 429 U.S. 1073 (1977), or by a contracting officer's waiver, Roberts v. United States, 174 Ct.Cl. 940, 357 F.2d 938 (1966)(to a price reduction for reduced cost under changes article).

The question clearly is not the general rule but its application to the facts of this case. The parties have discussed, and we take up, the following three lines of legal doctrine: 1, how the no estoppel rule applies to an official's undertaking based on a mistake of law, but otherwise within her jurisdiction, 2, whether the error here was "palpably illegal" it being the respondent's premise that a "palpably illegal" commitment cannot be the basis of an estoppel or other equitable claim by the other party, and 3, whether respondent by its acts and omissions breached its implied commitment to cooperate and act in good faith. We take these up in order, but our conclusions on the first two issues are dispositive.

I

The recent Supreme Court case of Schweiker v. Hansen, 450 U.S. 785 (1981) shows the doctrine that the government is not estopped by the unauthorized commitments of its agents is still alive and well. The facts, however, in that case reflect that the claimant sought to establish entitlement to Social Security benefits for which she had filed no written application, as the law affirmatively required her to do. The government agent's blundering statements were thought below to excuse this requirement, the substantive prerequisites to entitlement all being present. The Court in summarily reversing reiterated, however, at p. 788, its previous recognition in the Federal Crop Insurance case of "the duty of all courts to observe the conditions defined by Congress for charging the public treasury." Since Congress affirmatively required, on top of everything else, a written application, the blundering official could not excuse this requirement by means of his blunders.

The effort to use an official's errors to avoid compliance with an affirmative prerequisite to an entitlement, is a sure loser. A classic case in this court is Montilla v. United States, 198 Ct.Cl.48, 457 F.2d 978 (1972), where the reservist claimant sought to use the alleged erroneous statement of an Army officer to obtain entitlement to military retirement pay without earning "points" by training duty as the law requires. The noteworthy thing about Schweiker v. Hansen, is that except in that classic situation, it seems to recognize at least by reference to lower court decisions, that in cases other than this classic situation, estoppel by an agent's blunders is not impossible. A seventh circuit decision since Schweiker v. Hansen, takes this view. Portmann v. United States, No. 81-1390, slip op. (March 24, 1982). The claim of estoppel was against the U.S. Postal Service by the owner of a package lost in the mail. The blunder by the postal clerk was to assure the mailer that insurance offered by the Service included "document reconstruction" though in fact by regulation it did not. The court upheld the estoppel on consideration of all the factors. The fact the government had gone into the market place as vendor, and that the right claimed was contractual and not merely to an entitlement, were seen as distinguishing factors that justified an estoppel despite Schweiker v. Hansen.

Central to the ASBCA's and to respondent's argument here is the thesis, not clearly spelled out but necessarily implied, that any order or commitment by a contracting officer based on an incorrect idea of the law is necessarily unauthorized. But this cannot be true, and a moment's thought will show its fallacy. Payment of prevailing wages is one of the services required of petitioner by the contract. Performance of laundry service is another. Suppose the contracting officer decided to order some particular laundry service in a mistaken belief that the contract called for it. The order, if made with requisite formality, would be valid and effective even though based on a mistake of law. The contractor would under the disputes clause language already quoted be required to comply, perform the demanded service, and prosecute a claim for a constructive change order under disputes clause procedure. Even though under that procedure the

contractor might establish that the demand was based on a mistake of law, this would not prove that it was unauthorized. It was valid and effective to impose on the contractor a legal duty to obey the order, and on the government to pay for the services if the interpretation were held erroneous. If he refused to obey, he would be in default. The government, which clothes its contracting officers with authority to effectuate these consequences on the basis of a mistake of law, cannot now turn around and take the wholly inconsistent position that it did not authorize the contracting officer to make legal mistakes.

Of course, this cannot be carried too far. The orders must be within the officer's subject matter jurisdiction. This under the Service Contract Act includes employee wages. The order must not be contrary to any express authority limitation. The government could give the contracting officer a writing, saying she is not authorized to make mistakes of law, but only correct rulings. No such document is cited here. The order must not call on the contractor to do something illegal. We assume there is nothing in the Service Contract Act making it illegal to pay above the prevailing wage. If the contracting officer, e.g., ordered the contractor to discriminate among races in hiring employees for the job, the government could properly say the order was unauthorized. The order must be an order. The government would have a far stronger case to deny estoppel if the contracting officer merely opined orally that the Service Contract Act made the prevailing wage determination applicable to contracts previously awarded. The government did not employ the contracting officer to tender gratuitous legal advice to contractors. Cf. Mills v. United States, 187 Ct.Cl. 696, 410 F.2d 1255 (1969). We conclude that within the foregoing limitations, a contracting officer in Mrs. Nicholson's situation has actual authority to embody mistakes of law in her decisions and the government is estopped, having endowed her with the powers it has, to assert otherwise.

II

The petitioner cites a line of cases to establish that a contracting officer's decisions are not void merely because erroneous. These cases hold that a contract award is valid to endow a contractor with the right to a convenience termination, even though legally erroneous, because someone else was entitled to receive the award, if the illegality is not plain and palpable. John Reiner & Co. v. United States, 163 Ct.Cl. 381, 385 F.2d 438 (1963), cert. denied, 377 U.S. 931 (1964); Warren Brothers Roads Co. v. United States, 173 Ct.Cl. 714, 355 F.2d 612 (1965); and note also Manloading & Management Associates, Inc. v. United States, 198 Ct.Cl. 628, 461 F.2d 1299 (1972). The latter case involved statements at a prebid conference on a contract awarded in a year near its end, in which oral statements were made that the contract as awarded would be renewed for a later year. The court applied an equitable estoppel, noting that the government was acting in a "proprietary capacity," and that the representations did not nullify a "statutory requirement." 198 Ct.Cl. at 635, 461 F.2d at 1302-03.

Respondent naturally responds, yes, but the modification was palpably illegal here. We have some doubt whether the palpable illegality of a contract modification would make the modification void, as in that event the requirement of the disputes article would be nullified and the contractor would not be required to continue performance, pending resolution of the dispute by appeal procedure under the contract. It may be doubted, therefore, whether a contractor must scrutinize an order for palpable illegality, refuse to perform if it sees palpable illegality, and perform subject to resolution of the dispute on appeal only if the illegality, in its eyes, is not palpable.

If there can be a palpable illegality mandating refusal to comply with a contracting officer's directives, we do not think it present here. In the first place, Mod. 12 did not, by any view of the law, require petitioner to do anything illegal. In the second place, the regulation involved does indeed, as respondent says, read perfectly plainly to a lawyer. Counsel for both sides and we ourselves all read it the same way. But it was not perfectly clear to the contracting officer, Mrs. Nicholson, a lay person. Similarly in Portmann v. United States, supra, the meaning of the postal regulation as denying the insurance claimed was clear to the court, yet it was deemed significant that a lay person could easily misconstrue it. The horrid suspicion emerges that the regulation in our case is one of many put out by the government that is, to nonlawyers, completely opaque. In determining whether an illegality is palpable it must surely be reasonable to notice the attainments of the contractor. Palpable to whom? Petitioner is a small business, certified as such for award of small business set-asides. Apparently the named petitioner here is the name under which Mr. Hancock does business. Unlike General Motors, he had no lawyer at his elbow in the contract award and performance period. He appeared pro se before the ASBCA. He said it would take a "battery of lawyers" to interpret the regulation correctly. That body took note of his lack of legal skills, and in its best tradition, endeavored to protect him. We think it is with small dignity indeed that respondent argues that an illegality should be perceivable to Mr. Hancock that was not perceivable to its own contracting officer, a lay person also, but with 7 years of experience and ostensible full access to legal services, as to the reality of which, however, see our fact statement. The board, with its experience in these matters, did not question Mrs. Nicholson's competence or good faith. It was not surprised at her error. Mr. Hancock frankly didn't know. If he had read the regulation he still would not have known. He asked and got his answer, which respondent says he should have known was wrong.

III

What we have said should be, and is, sufficient to dispose of the case. Petitioner's final point is respondent's implied warranty that it will do nothing to hinder or obstruct performance by the other party, or make it more costly. Roberts v. United States, supra. This includes the obligation to supply information in respondent's possession that the contractor needs to have to perform speedily and economically. Examples are: Helene Curtis Industries, Inc. v. United

States, 160 Ct.Cl. 437, 312 F.2d 774 (1963) (information that plaintiff needed on machinery to perform with success); J. A. Jones Construction Co. v. United States, 182 Ct.Cl. 615, 390 F.2d 886 (1968) (information as to government plans for crash construction which would enhance labor costs "an essential element of the cause of action is defendant's knowledge of the plaintiff's ignorance." 182 Ct.Cl. at 623, 390 F.2d at 890-91); Maxwell Dynamometer Co. v. United States, 181 Ct.Cl. 607, 386 F.2d 855 (1967) (information that plaintiff was testing dynamometers in an unnecessarily expensive and impossible way); Hardeman-Monier Hutcherson v. United States, 198 Ct.Cl. 472, 458 F.2d 1364 (1972) (adverse sea and weather conditions at work site); Chris Berg, Inc. v. United States, 186 Ct.Cl. 389, 404 F.2d 364 (1968) (Typhoon conditions, Marcus Island).

The obstruction and hindrance by respondent present in this case resulted from the contracting officer's undertaking in December 1979, to decide a legal question, though she was a lay person, from her issuance of the erroneous and improper Mod. 12, and from her long delay in resolving the question of legality when raised. The findings do not reflect that the DOL expected that the new prevailing rates would apply to any ongoing already awarded contract, but as Mrs. Nicholson testified, unless they did, why did they bother to issue a prevailing rate that applied to no other body of workers? There was in point of fact a previous small change in the rates that was erroneously applied to the ongoing contract without controversy, and a price adjustment awarded. This established a precedent which may well have contributed to the larger error that is the subject of this lawsuit. Some little egg belongs on the DOL chin. Once the issue of legality was raised, March 9, the inexcusable delays in getting a legal ruling speak for themselves, and all to the great financial detriment of a small contractor, or would be but for our conclusions in Parts I and II.

It is unnecessary to do more than mention the possible application of the warranty rule to this case. It would add some support to our conclusions in Parts I and II. We do not pass on it because it is a prop we do not need.

The ASBCA's denial of entitlement is therefore reversed, and the cause is remanded to the board for determination of quantum.

CANNON CONSTRUCTION CO. v. U.S.

319 F. 2d 173 (Ct. Cl. 1963)
Reprinted infra. at page 11-4

WILLIAMS v. U.S.

127 F. Supp. 617 (Ct. Ct. 1955)
Reprinted infra. at page 2-92

KURZ & ROOT COMPANY, INC.

ASBCA No. 17146 (1974)
Monetary Limitations - Approval
Reprinted infra. at page 6-58

E. Uniform Commercial Code as Federal Law

KIRINN AND CO., INC.

ASBCA No. 14533 (1970)
Reprinted infra. at page 5-70

F. Federal Law Governs

CLEARFIELD TRUST COMPANY v. UNITED STATES

318 U.S. 363 (1943)

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

On April 28, 1936, a check was drawn on the Treasurer of the United States through the Federal Reserve Bank of Philadelphia to the order of Clair A. Barner in the amount of $24.20. It was dated at Harrisburg, Pennsylvania, and was drawn for services rendered by Barner to the Works Progress Administration. The check was placed in the mail addressed to Barner at his address in Mackeyville, Pa. Barner never received the check. Some unknown person obtained it in a mysterious manner and presented it to the J. C. Penney Co. store in Clearfield, Pa., representing that he was the payee and identifying himself to the satisfaction of the employees of J. C. Penney Co. He endorsed the check in the name of Barner and transferred it to J. C. Penney Co. in exchange for cash and merchandise. Barner never authorized the endorsement nor participated in the proceeds of the check. J. C. Penney Co. endorsed the check over to the Clearfield Trust Co. which accepted it as agent for the purpose of collection and endorsed it as follows: "Pay to the order of Federal Reserve Bank of Philadelphia, Prior Endorsements Guaranteed." Clearfield Trust Co. collected the check from the United States through the Federal Reserve Bank of Philadelphia and paid the full amount thereof to J. C. Penney Co. Neither the Clearfield Trust Co. nor J. C. Penney Co. had any knowledge or suspicion of the forgery. Each acted in good faith. On or before May 10, 1936, Barner advised the timekeeper and the foreman of the W.P.A. project on which he was employed that he had not received the check in question. This information was duly communicated to other agents of the United States and on November 30, 1936, Barner executed an affidavit alleging that the endorsement of his name on the check was a forgery. No notice was given the Clearfield Trust Co. or J. C. Penney Co. of the forgery until January 12, 1937, at which time the Clearfield Trust Co. was notified. The first notice received by Clearfield Trust Co. that the United States was asking reimbursement was on August 31, 1937.

This suit was instituted in 1939 by the United States against the Clearfield Trust Co., the jurisdiction of the federal District Court being invoked pursuant to the provisions of § 24 (1) of the Judicial Code, 28 U.S.C. § 41 (1). The cause of action was based on the express guaranty of prior endorsements made by the Clearfield Trust Co. J. C. Penney intervened as a defendant. The case was heard on complaint, answer and stipulation of facts. The District Court held that the rights of the parties were to be determined by the law of Pennsylvania and that since the United States unreasonably delayed in giving notice of the forgery to the Clearfield Trust Co., it was barred from recovery under the rule of Market Street Title & Trust Co.

v. Chelten Trust Co., 296 Pa. 230, 145 A. 848. It accordingly dismissed the complaint. On appeal the Circuit Court of Appeals reversed. 130 F. 2d 93. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problems raised and the conflict between the decision below and Security-First National Bank v. United States, 103 F. 2d 188, from the Ninth Circuit.

We agree with the circuit Court of Appeals that the rule of Erie R. Co. v. Tompkins, 304 U.S. 64, does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. This check was issued for services performed under the Federal Emergency Relief Act of 1935, 49 Stat. 115. The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state. Cf. Board of Commissioners v. United States, 313 U.S. 289. The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources. Cf. Deitrick v. Greaney, 309 U.S. 190; D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447. In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards. United States v. Guaranty Trust Co., 293 U.S. 340, is not opposed to this result. That case was concerned with a conflict of laws rule as to the title acquired by a transferee in Yugoslavia under a forged endorsement. Since the payee's address was Yugoslavia, the check had "something of the quality of a foreign bill" and the law of Yugoslavia was applied to determine what title the transferee acquired.

In our choice of the applicable federal rule we have occasionally selected state law. See Royal Indemnity Co. v. United States, supra. But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain. And while the federal law merchant, developed for about a century under the regime of Swift v. Tyson, 16 Pet. 1, represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions.

United States v. National Exchange Bank, 214 U.S. 302, falls into that category. The Court held that the United States could recover as drawee from one who presented for payment a pension check on which the name of the payee had been forged, in spite of a protracted delay on the part of the United States in giving notice of the forgery. The Court followed Leather Manufacturers Bank v. Merchants Bank, 128 U.S.

26, which held that the right of the drawee against one who presented a check with a forged endorsement of the payee's name accrued at the date of payment and was not dependent on notice or demand. The theory of the National Exchange Bank case is that he who presents a check for payment warrants that he has title to it and the right to receive payment. If he has acquired the check through a forged endorsement, the warranty is breached at the time the check is cashed. See Manufacturers Trust Co. v. Harriman National Bank Trust Co., 146 Misc. 551, 262 N.Y.S. 482; Bergman v. Avenue State Bank, 284 Ill. App. 516, 1 N.E. 2d 432. The theory of the warranty has been challenged. Ames, The Doctrine of Price v. Neal, 4 Harv. L. Rev., 297, 301-302. It has been urged that "the right to recover is a quasi contractual right, resting upon the doctrine that one who confers a benefit in misreliance upon a right or duty is entitled to restitution." Woodward, Quasi Contracts (1913) § 80; First National Bank v. City National Bank, 182 Mass. 130, 134, 65 N.E. 24. But whatever theory is taken, we adhere to the conclusion of the National Exchange Bank case that the drawee's right to recover accrues when the payment is made. There is no other barrier to the maintenance of the cause of action. The theory of the drawee's responsibility where the drawer's signature is forged (Price v. Neil, 3 Burr, 1354; United States v. Chase National Bank, 252 U.S. 485) is inapplicable here. The drawee, whether it be the United States or another, is not chargeable with the knowledge of the signature of the payee. United States v. National Exchange Bank, supra, p. 317; State v. Broadway National Bank, 153 Tenn. 113.

The National Exchange Bank case went no further than to hold that prompt notice of the discovery of the forgery was not a condition precedent to suit. It did not reach the question whether lack of prompt notice might be a defense. We think it may. If it is shown that the drawee on learning of the forgery did not give prompt notice of it and that damage resulted, recovery by the drawee is barred. See Ladd & Tilton Bank v. United States, 30 F. 2d 334; United States v. National City Bank, 28 F. Supp. 144. The fact that the drawee is the United States and the laches those of its employees are not material. Cooke v. United States, 91 U.S. 389, 398. The United States as drawee of commercial paper stands in no different light than any other drawee. As stated in United States v. National Exchange Bank, 270 U.S. 527, 534, "The United States does business on business terms." It is not excepted from the general rules governing the rights and duties of drawees "by the largeness of its dealings and its having to employ agents to do what if done by a principal in person would leave no room for doubt." Id, p. 535. But the damage occasioned by the delay must be established and not left to conjecture. Cases such as Market St. Title & Trust Co. v. Chelten Trust Co., supra, place the burden on the drawee of giving prompt notice of the forgery--injury to the defendant being presumed by the mere fact of delay. See London & River Plate Bank v. Bank of Liverpool, [1896] 1 Q.B. 7. But we do not think that he who accepts a forged signature of a payee deserves that preferred treatment. It is his neglect or error in accepting the forger's signature which occasions the loss. See Bank of Commerce v. Union Bank, 3 N.Y. 230, 236. He should be allowed to shift that loss to the drawee only on a clear showing that the drawee's delay in notifying him of the forgery caused him damage. See Woodward, Quasi Contracts (1913) § 25. No such damage has been shown by Clearfield Trust Co.

who so far as appears can still recover from J. C. Penney Co. The only showing on the part of the latter is contained in the stipulation to the effect that if a check cashed for a customer is returned unpaid or for reclamation a short time after the date on which it is cashed, the employees can often locate the person who cashed it. It is further stipulated that when J. C. Penney Co. was notified of the forgery in the present case none of its employees was able to remember anything about the transaction or check in question. The inference is that the more prompt the notice the more likely the detection of the forger. But that falls short of a showing that the delay caused manifest loss. Third National Bank v. Merchant's National Bank, 76 Hun 475, 27 N.Y.S. 1070. It is but another way of saying that mere delay is enough.

Affirmed.

G. Requirement of a Writing

U.S. v. AMERICAN RENAISSANCE LINES, INC.

C. A. D. C. (1974)

494 F2d 1059

WILKEY, Circuit Judge:

This appeal was taken from an order of the District Court which, in effect, held that the Commodity Credit Corporation (CCC), a government agency, could enforce an oral charter agreement with a private shipping firm, the American Renaissance Lines, Inc. (ARL). The District Judge denied defendant ARL's motion for judgment on the pleadings, however, believing that there was "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." The District Judge certified the oral contract question to this court for an interlocutory appeal. After consideration of the certified question, we view the matter differently from the District Court and remand for action consistent with this opinion.

I. THE NATURE OF THE CHARTER AGREEMENT

In May 1966 the CCC issued by telephone and telegraph a general invitation to private enterprise to bid on the carriage of a large amount of foodstuffs from the United States to South Vietnam. The invitation to bid required that all offers be delivered either in person or by telephone. Acting through its agent Universal Shipping Corporation, ARL entered a bid. On 9 May 1966 oral agreement was reached with CCC's agent, the Ocean Transportation Division of the Foreign Agricultural Service of the U.S. Department of Agriculture. ARL proposes the SS Eviliz to transport the foodstuffs under charter to the U.S. Government. The oral agreement was subject to the terms of the telegraphed invitation to bid, and the USDA Grain Charter Party (1 March 1963 Revision). On 11 May 1966 the parties orally agreed through their agents to allow ARL to substitute another ship for the SS Eviliz, which ARL had been unable to purchase.

ARL repudiated the oral agreement on 18 May 1966 and refused performance. However, ARL did offer by telegram to pay any extra storage charges until other carriage was obtained. This refusal of performance occurred before any written charter or contract had been signed. The failure of the agreement caused the Government additional storage, handling, and shipping costs, in the amount of $40,309.67.

In November 1971 the United States brought suit in District Court for the additional costs of $40,309.67 plus interest from May 1966. This dormant claim was thus revived 5½ years after the oral agreement had been breached, and several months after ARL had won a suit against the Government in the U.S. District Court for the Eastern District of New York on an unrelated admiralty action in the amount of $43,421.00. ARL answered the government complaint and sought a judgment on the pleadings, in part on the ground that the CCC could not enforce a government charter agreement onlt made orally. After denial of the motion by the District Court, ARL moved for reconsideration or, alternatively, certification of the oral contract question to the Court of Appeals for an interlocutory appeal. The District Court did not grant the substantive motion but did grant certification. We allowed the appeal by order of 13 October 1972.

II. THE ENFORCEABILITY OF THE ORAL CONTRACT BY THE GOVERNMENT

[1] The issue before this court is limited to the question whether the CCC, a government agency, can obtain damages for an unperformed oral contract for carriage. We believe that both the relevant statutes and regulations require that government contracts such as the charter agreement here be written in order to be enforceable by the Government. Hence, in answer to the certified question, we hold that this oral contract is unenforceable.

A. The Statute

In 1955 the Congress, troubled by executive spending, enacted § 1311(a)(1) of the Supplemental Appropriation Act. This section provided that

> After August 26, 1954 no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of-
>
> (1) a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form for a purpose authorized by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed.

The original purpose of the statute was to prevent executive officials from excessive or inappropriate spending.

The parties to this litigation urge contrary interpretations of this provision. On the one hand, the Government urges that the statute is simply a recordation statute to facilitate auditing and has no effect on government contracts with private parties. On the other hand, ARL argues that the provision, in conjunction with certain relations, established virtually a statute of frauds for such government contracts as involved here. Sustaining the government position here would remove reciprocally the protection of the Government which was the initial intent of the statute, and this we decline to do.

[2] We hold that the statute does establish a requirement that government contracts of this type be in writing, and that contracts which are merely oral are not enforceable. We agree with the Government that this statute does not follow the typical statute of frauds format. But we do not believe that to be determinative. Rather, we feel that the Congress was concerned that the executive might avoid spending restrictions by asserting oral contracts, and so enacted the requirement of a writing.

The Supreme Court long ago considered a similar question in Clark v. United States. Although the statute there involved has since been repealed, it was similar to the statute here in that it required government contracts of certain departments to be in writing. The Supreme Court held that this statute effectively established a statute of frauds. The oral agreement made by the Government to charter a steamer from a private party was hence void. The Court, however, did allow the owner of the steamer to recover from the Government for the value of services rendered, on a theory of quantum meruit. Justice Bradley wrote for the Court:

> The facility with which the government may be pillaged by the presentment of claims of the most extraordinary character, if allowed to be sustained by parol evidence, which can always be produced to any required extent, renders it highly desirable that all contracts which are made the basis of demands against the government should be in writing. Perhaps the primary object of the statute was to impose a restraint upon the officers themselves, and prevent them from making reckless engagements for the government; but the considerations referred to make it manifest that there is no class of cases in which a statute for preventing frauds and perjuries is more needed than in this.

While the Clark case dealt with a private party trying to collect from the Government, the principles enunciated above remain true when the situation is reversed and the Government is seeking damages. The requirement of a written contract protects both sides from the possibility of fraud or misinterpretation by the other. And, on the principle of mutuality, it is not appropriate for the Government to assert the lack of a written contract when it wishes an agreement to lapse, but to waive such an objection when it wishes to enforce an agreement.

In fact, if the Government's position of no mutuality were accepted, the agreement would not meet the basic contractual prerequisite of consideration from each contracting party. For if the Government could avoid its part of the bargain by asserting lack of a written contract, the Government would be making merely an illusory promise: The Government would pay the agreed price for the services only if it had complied with the statute (and regulations, infra). The Government could avoid payment by citing the statute and its own failure to follow its own regulations, and then the private party would be limited to quantum meruit. Such an arrangement clearly would not satisfy the requirement of mutual consideration.

The Supreme Court decision in 1915 of United States v. New York and Porto Rico SS Co. can be distinguished from the present case. In that earlier case, the Government sought to recover from a private steamship company which had not performed its written agreement to ship coal. The company raised as a defense the failure of the Government to comply with the exact writing requirements of the same statute as involved in Clark, by not producing proper copies and seals. The Court held that the Government could waive the requirements because it was the only intended beneficiary of the protection. The private company "needs no such protection against a written undertaking signed by himself." In the case at bar, however, what is lacking is not simply the proper form or seal but a written contract in its entirety. Such of the entire agreement as was made orally, and
no writing was sent until after the agreement was repudiated. ARL claims that vital provisions were never agreed upon, and disputes the CCC version of what was actually agreed to, e.g., whether long or short tons were meant is still in controversy. Protection for the private company, as well as the Government, is necessary under these circumstances.

A somewhat related issue was considered by the Court of Claims in Escote Manufacturing Co. v. United States. There the court stated that an oral contract to buy surplus government property was as binding on the private party as if it had been in writing. However, the facts in Escote are markedly different from this case. In Escote the private bidder had sent a written bid and check for deposit in response to the Government's invitation to bid for surplus goods. The Government then sent the bidder a letter containing three copies of a form headed "Invitation, Bid, and Acceptance" for signature by the bidder. The bidder sought to avoid the contract on the ground that the contracting officer of the Government had not signed the form but his name was only type-written. Thus, the issue was not whether there was a written agreement, but simply whether the signature of the contracting officer was required.

Although Escote was decided after the 1955 statute requiring written contracts, the Court of Claims stated that the parties had not identified any statute requiring a writing. The court felt that the contract forms sent by the Government to the private buyer, which were not signed, were merely part of the Government's bookkeeping system. At no time in its opinion did the court give consideration to the statute or regulations in effect here. Consequently, the Escote opinion is of limited value in deciding this case.

We view the statute as establishing a requirement that a government contract as involved here be in writing before either party may be allowed to obtain court enforcement of the agreement. The Statute admittedly is not phrased as the typical statute of frauds. It is more specific, in that it requires that the contract be supported by documentary evidence of a binding agreement in writing. Although the statute simply bars recording oral contracts as obligations of the Government, this does not mean that recordation is the only purpose or effect of the statute. If the Government does not fulfill the recordation requirements, it can neither automatically take the benefit of an agreement it has allegedly made, nor can it be hurt by another

party alleging an agreement. Mutuality of protection is thus provided, and we do not see by the Government's interpretation of the statute anything but one-sided protection would be afforded.

We believe that this interpretation of the statute is in accordance with the legislative intentions. The House Conference Report on the provision offers a succinct summary of the legislative view:

> Section 1311(a)(1) precludes the recording of an obligation unless it is supported by documentary evidence of a binding agreement between the parties as specified therein. It is not necessary, however, that this binding agreement be the final formal contract on any specified form. The primary purpose is to require that there be an offer and an acceptance imposing liability on both parties. For example, an authorized order by one agency on another agency of the Government, if accepted by the latter and meeting of specificity, etc., is sufficient. Likewise, a letter of intent accepted by a contractor, if sufficiently specific and definitive to show the purposes and scope of the contract finally to be executed, would constitute the binding agreement required.

B. The Regulations

Several regulations of the Executive branch further support our view that a written contract is necessary to bind ARL here. The regulations include general Federal Procurement Regulations and regulations specific to the CCC.

The Federal Procurement Regulations [FPR's] were promulgated pursuant to the Federal Property Act to regulate all government agency procurement. Specifically FPR § 1-1.208 provides a definition of contract:

> "Contract" means establishment of a binding legal relation basically obligating the seller to furnish personal property or non personal services (including construction) and the buyer to pay therefor. It includes all types of commitments which obligate the Government to an expenditure of funds and which, except as otherwise authorized, are in writing. In addition to a two-signature document, it includes all transactions resulting from acceptance of offers by awards or notices of awards: agreements and job orders or task letters issued thereunder; letter contracts; letters of intent; and orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance. It also includes contract modifications. (Emphasis added.)

FPR § 1-1.219 defines "contract modification" to be "written alteration."

The Government urges that § 1-1.208 merely says that a contract is the "establishment of a binding legal relation" and is broadly defined to include oral agreements. We believe that the Government has misinterpreted the definition. The regulation requires a writing, except as otherwise authorized. It does not require a formal two-signature document, but it does require some form of writing, whether letter of intent, or purchase orders, or some other written manifestation.

III. CONCLUSION

We conclude that an oral agreement for charter of a ship, such as involved in this case, is not sufficient to allow the Government to recover in a damage action for breach of contract. The applicable statute and regulations require a written agreement. We reach this conclusion not only on the basis of the statute and regulations, but also on two additional factors.

First, the parties themselves seem to have contemplated a written agreement, as indicated by the incomplete USDA Grain Charter Party which was to be used. Given the extent of the unfilled blanks in the form, it appears that the oral agreement did not represent a final meeting of the minds of the two parties.

Second, the nature of the contract at issue here is lengthy and complex. The parties do not agree now on all of the proposed terms of the agreement. Where such complex transactions are involved, there is a policy favoring written agreements.

Recapitulating our analysis of the position of the parties in regard to the statute, we can readily see that the wording of the 1955 Act, cast as it is in the phraseology "no amount shall be recorded as an obligation of the Government", and enacted for the primary purpose of keeping free-spending officials in check, does not carry an inescapable interpretation as a statute of frauds. Yet the 1955 statute does call for "documentary evidence of a binding agreement in writing between the parties thereto", and the impact of this requirement does fall inescapably on both the Government and the private party to the contract. Most persuasively perhaps, it appears impossible to give effect to the avowed primary objective of Congress without construing the 1955 Act as a statute of frauds. We have here the Government seeking damages on the basis of a purely oral agreement, admittedly incomplete or confused on some terms argued to be vital to the obligations of the parties, intended to be but never reduced to writing before repudiation. If we enforce the Government's claim here on a purely oral charter contract, the next case arising may well be similar to Clark v. United States, i.e., a claim by the private party likewise based on a purely oral agreement, in which the facts hypothetically might show that the government official, blithely ignored all the required written safeguards of the 1955 Act. If we adopt the Government's theory here, the very restricted interpretation of the 1955 Act, in our hypothetical next case the Government could not successfully urge the unenforceability of a purely oral charter--it would have been stripped of this external defense and concomitantly of

protection against the very internal abuses which even the Government here agrees was Congress' primary objective in the 1955 statute.

It is thus dubious that the Government would want to contract orally, or that it should. This decision, by requiring that the Government comply with statutes and its own regulations and by requiring a writing before an agreement of this type may be enforced by the courts, is in the long-range interest of the Government and the public.

THE NARVA HARRIS CONSTRUCTION CORPORATION v. THE UNITED STATES

Ct. Cl. Nos. 407-76, 422-76 (1978)

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

KUNZIG, Judge, delivered the opinion of the court:

This consolidated case comes before the court on defendant's second motion for summary judgment and plaintiff's opposition thereto. Plaintiff has petitioned this court for damages resulting from an alleged breach of contract by the Department of Housing and Urban Development (HUD). Defendant first moved for summary judgment on grounds that plaintiff's petitions failed to state a claim on which relief could be granted and that, even if HUD officials did purport to make the agreements alleged by plaintiff, they were acting beyond the scope of their legal authority. This court, by its order of September 30, 1977, denied defendant's motion, noting that defendant had failed to show that there existed no triable issues of material fact. We also noted, however that 31 U.S.C. § 200(a)(1)(1970), which may prevent enforcement of oral contracts against the Government, might provide a "short and conclusive answer to the petitions here" and render a trial unnecessary. Defendant has now, predictably, moved again for summary judgment, citing 31 U.S.C. § 200(a)(1). After a careful analysis of the arguments concerning § 200 put forward by both the defendant, and the plaintiff in opposition, we conclude that plaintiff may have a claim against the Government which is not precluded by § 200 and that a trial is, therefore, necessary.

Giving, as we must for purposes of withstanding this motion for summary judgment, full credence to plaintiff's allegations, the following scenario unfolds. In 1971, plaintiff entered into negotiations with Center Post Housing, Inc., the Presbyterian-University of Pennsylvania Medical Center, and representatives of the Philadelphia Regional Office of HUD (defendant here) to provide the services of general contractor for the development of the Center Post Housing Project. By September of 1971, before any written contracts were executed, plaintiff advised defendant that a preliminary investigation had demonstrated that the cost figures required by defendant were less than reasonable and necessary to develop and construct the project. Defendant thereupon told plaintiff that the contracts would have to be drafted with the lower figures, to get the project underway, but assured plaintiff that these cost figures would be increased at a later date in accordance with applicable HUD mortgage increase procedures.

Also in 1971, plaintiff entered into negotiations with Adventurers, Inc., the Philadelphia Council for Community Advancement, and the appropriate representatives of HUD for the Philadelphia Region, to serve as general contractor for the remodeling and partial renovation of the Kemble Park Apartments. Similarly, after an initial investigation, plaintiff informed all parties that the remodeling could not be accomplished for the costs required by defendant. Again,

to enable the project to proceed, defendant assured plaintiff that the cost figures would be adjusted at a later time in accordance with HUO procedures for increasing mortgage insurance.

In both cases, defendant's commitments were oral only. Relying on these representations, plaintiff proceeded with the two projects, and completed them both, to the satisfaction of all the parties. The mortgage insurance was not raised, and costs were not adjusted to reflect the true costs of construction in either project. On the Center Housing project, plaintiff claims that a balance of $226,313.10 is owing; on the Kemble Park Apartments, plaintiff claims $140,574.37 is owed.

Oefendant now moves for summary judgment on the ground that 31 U.S.C. § 200 precludes recovery by the plaintiff on the basis of an alleged oral contract. Citing United States v. American Renaissance Lines, 494 F.2d 1059 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974), the leading case interpreting 31 U.S.C. § 200, defendant argues that a clear written contract is required to bind the parties, where one of the parties is the Government. It seeks to bolster this assertion by submitting affidavits of Philadelphia Region HUD officials stating that HUO regulations did not allow the oral agreements alleged by plaintiff.

Defendant goes even further to argue that § 200 also precludes this court from finding an implied-in-fact contract or from awarding damages in quantum meruit based on the same nucleus of operative facts. It argues that finding an implied-in-fact contract or awarding quantum meruit damages would be the same as determining that § 200 did not apply at all, and further asserts that a quantum meruit recovery requires performance, which plaintiff here has not undertaken, beyond that which is already contractually obligated. Finally, the Government contends that this court does not have jurisdiction over pure quantum meruit claims because they spring from contracts implied-in-law.

Plaintiff's rejoinder centers on the argument that it was not Congress' intent, in passing § 200, "to allow the Government to repudiate at will contracts which by custom of trade are oral."

Plaintiff also asserts, however, that even if § 200 should be interpreted so as to apply to the alleged express oral contract, it should not be so broadly construed as to preclude any kind of a recovery by plaintiff. Plaintiff raises quantum meruit and implied-in-fact contract as two alternate theories under which it should be allowed to recover, both of which would require a trial. Plaintiff argues that, even though our previous order characterized this agreement as "actually more in the nature of an express contract not reduced to writing", additional facts (in addition to the express oral agreement negated by § 200) make a "meeting of the minds" a reasonable inference. And, where such an inference is possible, a contract implied-in-fact may exist. Algonac Mfg. Co. v. United States, 192 Ct.Cl. 649, 673-74, 428 F.2d 1241, 1255-56 (1970).

Because we see a valid distinction to be drawn between the naked, express oral contract at which § 200 may be directed, and the "additional facts" from which a contract implied-in-fact could be inferred, we agree with the plaintiff that a trial is necessary to determine whether such additional facts can be proved in the face of Government opposition.

We do not now decide whether the Government's interpretation of § 200 with regard to the express oral contract is correct. A stark assertion by an individual that a Government representative had orally promised some performance might, without more, be insufficient to bind the Government. Likewise, a stark assertion by the Government that some other person had orally promised performance might, without more, be insufficient to bind that other person to perform. See American Renaissance Lines, 494 F.2d at 1062-68.

We have great difficulty, however, in accepting the Government's further assertion that a reasonable interpretation of § 200 must, of necessity, preclude recovery through implied-in-fact contract or quantum meruit when such recovery would be based on the same basic operative facts. Were we to subscribe to such an argument, we would be facing the farcical situation of having the Government, in any situation where it was defending against an implied-in-fact contract claim, attempting to prove that there was, in actuality, an express oral contract which it had breached. Then, citing § 200 and applicable regulations, the Government could escape any liability whatsoever. Cf. American Renaissance Lines, 494 F.2d at 1063 (similar result dismissed as unsatisfactory in context of mutuality).

Even more importantly, such an interpretation would also, in practicality, have the effect of eliminating recovery against the Government in almost all cases where claims are based on implied-in-fact contract or quantum meruit. In almost all such cases, there is some sort of oral representation on the part of some Government agent. Although the party seeking to recover from the Government may not rely on the oral representation, and may rely totally on other, independent facts to establish the presence of an implied-in-fact contract, or to recover in quantum meruit, the Government now seeks to make the mere existence of the oral representation, characterized as an oral express contract not reduced to writing, sufficient to compel this court to close its eyes to all other surrounding facts. Clearly such an expansive interpretation of § 200 is unacceptable.

The Supreme Court, in discussing a statutory predecessor to § 200, recognized the possibility of recovery outside of the oral express contract which had not been reduced to writing. In Clark v. United States, 10 Ct.Cl. 604 (1874), rev'd, 95 U.S. 539 (1877), the Court of Claims had taken exactly the position which the Government now asserts and had denied recovery to a claimant against the Government on an oral contract. The Supreme Court, though recognizing that application of the statute was mandatory insofar as it precluded recovery based solely on an alleged express oral contract, reversed this court and allowed recovery on "an implied contract for a quantum meruit."

Since that early interpretation (and since the statute now in issue became effective in 1954) this court has often allowed recovery on an implied-in-fact contract, see, e.g. Algonac Mfg. Co. v. United States, 192 Ct.Cl. 649, 428 F.2d 1241 (1970). The failure, for whatever reason, of an attempt at an express contract, be it written or oral, is not enough, in itself, to deprive a party of a recovery for breach where sufficient additional facts exist for the court to infer the "meeting of the minds" necessary to separate an implied-in-fact from a pure implied-in-law contract. New York Mail and Newspaper Transportation Co. v. United States, 139 Ct.Cl. 751, 759, 154 F.Supp. 271, 278, cert. denied, 355 U.S. 904 (1957).

It appears from the record now before us -- which must be interpreted in a light most favorable to the plaintiff for purposes of withstanding defendant's motion for summary judgment -- that plaintiff may be able to prove facts, in addition to the alleged express oral contract, from which a contract may be inferred. If such be the case, the statutorily mandated preclusion of recovery on an oral contract (which we assume arguendo, without deciding) will not totally bar plaintiff's recovery in this action.

Accordingly, after a thorough consideration of the briefs and submissions of the parties, without oral argument, the defendant's motion, treated as a motion for partial summary judgment, is denied and this action is remanded to the Trial Division for further proceedings.

H. Separation of Powers

U.S. v. NIXON

41 L. Ed. 2d 1039 (1974)

APPEARANCES OF COUNSEL

Leon Jaworski and Philip A. Lacovara argued the cause for the United States.

James D. St. Clair argued the cause for the President.

OPINION OF THE COURT

Mr. Chief Justice Burger delivered the opinion of the Court.

This case (No. 73-1766) presents for review the denial of a motion, filed on behalf of the President of the United States, in the case of United States v. Mitchell (DC Crim No. 74-110), to quash a third party subpoena duces tecum issued by the United States District Court for the District of Columbia, pursuant to Fed Rul Crim Proc 17(c). The subpoena directed the President to produce certain tape recordings and documents relating to his conversations with aides and advisers. The court rejected the President's claims of absolute executive privilege, of lack of jurisdiction, and of failure to satisfy the requirements of Rule 17(c). The President appealed to the Court of Appeals. We granted the United States' petition for certiorari before judgment, and also the President's responsive cross-petition for certiorari before judgment, because of the public importance of the issue presented and the need for their prompt resolution, --US--, --, 41 L Ed 2d 231, 1134, 94 S Ct --, -- (1974).

On March 1, 1974, a grand jury of the United States District of Columbia returned an indictment charging seven named individuals with various offenses, including conspiracy to defraud the United States and to obstruct justice. Although he was not designated as such in the indictment, the grand jury named the President, among others, as an unindicted coconspirator. On April 18, 1974, upon motion of the Special Prosecutor, see n 8, infra, a subpoena duces tecum was issued pursuant to Rule 17(c) to the President by the United States District Court and made returnable on May 2, 1974. The subpoena required the production, in advance of the September 9 trial date, of certain tapes, memoranda, papers, transcripts, or other writings relating to certain precisely identified meetings between the President and others. The Special Prosecutor was able to fix the time, place and persons present at these discussions because the White House daily logs and appointment records had been delivered to him. On April 30, the President publicly released edited transcripts of 43 conversations; portions of 20 conversations subject to subpoena in the present case were included. On May 1, 1974, the President's counsel filed a

"special appearance" and a motion to quash the subpoena, under Rule 17(c). This motion was accompanied by a formal claim of privilege. At a subsequent hearing, further motions to expunge the grand jury's action naming the President as an undicted coconspirator and for protective orders against the disclosure of that information were filed or raised orally by counsel for the President.

On May 20, 1974, the District Court denied the motion to quash and the motions to expunge and for protective orders. -- F Supp -- (1974). It further ordered "the President or any subordinate officer, official or employee with custody or control of the documents or objects subpoenaed," id., at --, to deliver to the District Court, on or before May 31, 1974, the originals of all subpoenaed items, as well as an index and analysis of those items, together with tape copies of those portions of the subpoenaed recordings for which transcripts had been released to the public by the President on April 30. The District Court rejected jurisdictional challenges based on a contention that the dispute was nonjusticiable because it was between the Special Prosecutor and the Chief Executive and hence "intra-executive" in character; it also rejected the contention that the judiciary was without authority to review an assertion of executive privilege by the President. The court's rejection of the first challenge was based on the authority and powers vested in the Special Prosecutor by the regulation promulgated by the Attorney General; the court concluded that a justiciable controversy was presented. The second challenge was held to be foreclosed by the decision in Nixon v. Sirica, -- US App DC --, 487 F2d 700 (1973).

The District Court held that the judiciary, not the President, was the final arbiter of a claim of executive privilege. The court concluded that, under the circumstances of this case, the presumptive privilege was overcome by the Special Prosecutor's prima facie "demonstration of need sufficiently compelling to warrant judicial examination in chambers . . . ." -- F Supp, at --. The court held, finally, that the Special Prosecutor had satisfied the requirements of Rule 17(c). The District Court stayed its order pending appellate review on condition that review was sought before 4 p.m., May 24. The court further provided that matters filed under seal remain under seal when transmitted as part of the record.

On May 24, 1974, the President filed a timely notice of appeal from the District Court order, and the certified record from the District Court was docketed in the United States Court of Appeals for the District of Columbia Circuit. On the same day, the President also filed a petition for writ of mandamus in the Court of Appeals seeking review of the District Court order.

Later on May 24, the Special Prosecutor also filed, in this Court, a petition for a writ of certiorari before judgment. On May 31, the petition was granted with an expedited briefing schedule. -- US --, 41 L Ed 2d 231, 94 S Ct -- (1974). On June 6, the President filed, under seal, a cross-petition for writ of certiorari before judgment. This cross-petition was granted June 15, 1974, -- US --, 41 L Ed 2d 1134, 94 S Ct -- (1974), and the case was set for argument on July 8, 1974.

I.

JURISDICTION

The threshold question presented is whether the May 20, 1974, order of the District Court was an appealable order and whether this case was properly "in", 28 USC § 1254 [28 USCS § 1254], the United States Court of Appeals when the petition for certiorari was filed in this Court. Court of Appeals jurisdiction under 28 USC § 1291 [28 USCS § 1291] encompasses only "final decisions of the district courts." Since the appeal was timely filed and all other procedural requirements were met, the petition is properly before this Court for consideration if the District Court order was final. 28 USC § 1254(1) [28 USCS § 1254(1)]; 28 USC § 2101(e) [28 USCS § 2101(e)].

The finality requirement of 28 USC § 1291 [28 USCS § 1291) embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals. See, e.g., Cobbledick v. United States, 309 US 323, 324-326, 84 L Ed 783, 60 S Ct 540 (1940). This requirement ordinarily promotes judicial efficiency and hastens the ultimate termination of litigation. In applying this principle to an order denying a motion to quash and requiring the production of evidence pursuant to a subpoena duces tecum, it has been repeatedly held that the order is not final and hence not appealable. United States v. Ryan, 402 US 530, 532, 29 L Ed 2d 85, 91 S Ct 1580 (1971); Cobbledick v. United States, 309 US 323, 84 L Ed 783, 60 S Ct 540 (1940): Alexander v. United States, 201 US 117, 50 L Ed 686, 26 S Ct 356 (1906). This Court has

> "consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal." United States v. Ryan, 402 US 530, 533, 29 L Ed 2d 85, 91 S Ct 1580 (1971).

The requirement of submitting to contempt, however, is not without exception and in some instances the purposes underlying the finality rule require a different result. For example, in Perlman v. United States, 247 US 7, 62 L Ed 950, 38 S Ct 417 (1918), a subpoena had been directed to a third party requesting certain exhibits; the appellant, who owned the exhibits, sought to raise a claim of privilege. The Court held an order compelling production was appealable because it was unlikely that the party would risk a contempt citation in order to allow immediate review of the appellant's claim of privilege. Id., at 12-13, 62 L Ed 950. That case fell within the "limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." United States v. Ryan, supra, at 533, 29, L Ed 2d 85.

Here too the traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises. To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and present an unnecessary occasion for constitutional confrontation between two branches of the Government. Similarly, a federal judge should not be placed in the posture of issuing a citation to a President simply in order to invoke review. The issue whether a President can be cited for contempt could itself engender protracted litigation, and would further delay both review on the merits of his claim of privilege and the ultimate termination of the underlying criminal action for which his evidence is sought. These considerations lead us to conclude that the order of the District Court was an appealable order. The appeal from that order was therefore properly "in" the Court of Appeals, and the case is now properly before this Court on the writ of certiorari before judgment. 28 USC § 1254 [28 USCS § 1254]; 28 USC § 2101(e) [28 USCS § 2101(e)]. Gay v. Ruff, 292 US 25, 30, 78, L Ed 1099, 54 S Ct 608, 92 ALR 970 (1934).

II

JUSTICIABILITY

In the District Court, the President's counsel argued that the Court lacked jurisdiction to issue the subpoena because the matter was an intra-branch dispute between a subordinate and superior officer of the Executive Branch and hence not subject to judicial resolution. That argument has been renewed in this Court with emphasis on the contention that the dispute does not present a "case" or "controversy" which can be adjudicated in the federal courts. The President's counsel argues that the federal courts should not intrude into areas committed to the other branches of Government. He views the present dispute as essentially a "jurisdictional" dispute within the Executive Branch which he analogizes to a dispute between two congressional committees. Since the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case, Confiscation Cases, 7 Well 454, 19 L Ed 196 (1869), United States v. Cox, 342 F2d 167, 171 (CA5), cert denied, 381 US 935, 14 L Ed 2d 700. 85 S Ct 1767 (1965), it is contended that a President's decision is final in determining what evidence is to be used in a given criminal case. Although his counsel concedes the President has delegated certain specific powers to the Special Prosecutor, he has not "waived nor delegated to the Special Prosecutor the President's duty to claim privilege as to all materials . . . which fall within the President's inherent authority to refuse to disclose to any executive officer." Brief for the President 47. The Special Prosecutor's demand for the items therefore presents, in the view of the President's counsel, a political question under Baker v. Carr, 369 US 186, 7 L Ed 2d 663, 82 S Ct 691 (1962), since it involves a "textually demonstrable grant of power under Art II.

The mere assertion of a claim of an "intra-branch dispute", without more, has never operated to defeat federal jurisdiction; justiciability does not depend on such a surface inquiry. In United States v. ICC, 337 US 426, 93 L Ed 1451, 69 S Ct 1410 (1949), the Court observed, "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented." Id., at 430, 93 L Ed 1451. See also: Powell v. McCormack, 395 US 486, 23 L Ed 2d 491, 89 S Ct 1944 (1969); ICC v. Jersey City, 322 US 503, 88 L Ed 1420, 64 S Ct 1129 (1944); United States ex rel. Chapman v. FPC, 345 US 153, 97 L Ed 918, 73 S Ct 609 (1953); Secretary of Agriculture v. United States, 347 US 645, 98 L Ed 1015, 74 S Ct 826 (1954); FMB v. Isbrandsten Co. 356 US 481, 482 n 2, 2 L Ed 2d 926, 78 S Ct 851 (1958); United States v. Marine Bancorporation, -- US --, 41 L Ed 2d 978, 94 S Ct -- (1974), and United States v. Connecticut National Bank, -- US --, 41 L Ed 2d 1016, 94 S Ct -- (1974).

Our starting point is the nature of the proceeding for which the evidence is sought--here a pending criminal prosecution. It is a judicial proceeding in a federal court alleging violation of federal laws and is brought in the name of the United States as sovereign. Berger v. United States, 295 US 78, 88, 79 L Ed 1314, 55 S Ct 629 (1935). Under the authority of Art II, § 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government. 28 USC §§ 509, 510, 515, 533 [28 USCS §§ 509, 510, 515, 533]. Acting pursuant to those statutes, the Attorney General has delegated the authority to represent the United States in these particular matters to a Special Prosecutor with unique authority and tenure. The regulation gives the Special Prosecutor explicit power to contest the invocation of executive privilege in the process of seeking evidence deemed relevant to the performance of these specially delegated duties. 38 Fed Reg 30739.

So long as this regulation is extant it has the force of law. In Accardi v. Shaughnessy, 347 US 260, 98 L Ed 681, 74 S Ct 499 (1954), regulations of the Attorney General delegated certain of his discretionary powers to the Board of Immigration Appeals and required that Board to exercise its own discretion on appeals in deportation cases. The Court held that so long as the Attorney General's regulations remained operative, he denied himself the authority to exercise the discretion delegated to the Board even though the original authority was his and he could reassert it by amending the regulations. Service v. Dulles, 354 US 363, 388, 1 L Ed 2d 1403, 77 S Ct 1152 (1957), and Vitarelli v. Seaton, 359 US 535, 3 L Ed 2d 1012, 79 S Ct 968 (1959), reaffirmed the basic holding of Accardi.

Here, as in Accardi, it is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so. So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it. Moreover, the delegation of authority to the Special Prosecutor in this case is not an ordinary delegation by the Attorney General to a subordinate officer;

with authorization of the President, the Acting Attorney General provided in the regulation that the Special Prosecutor was not to be removed without the "consensus" of eight designated leaders of Congress. Note 8, supra.

The demands of and the resistance to the subpoena present an obvious controversy in the ordinary sense, but that alone is not sufficient to meet constitutional standards. In the constitutional sense, controversy means more than disagreement and conflict; rather it means the kind of controversy courts traditionally resolve. Here at issue is the production or nonproduction of specified evidence deemed by the Special Prosecutor to be relevant and admissible in a pending criminal case. It is sought by one official of the Government within the scope of his express authority; it is resisted by the Chief Executive on the ground of his duty to preserve the confidentiality of the communication of the President. Whatever the correct answer on the merits, these issues are "of a type which are traditionally justiciable." United States v. ICC, 337 US, at 430, 93 L Ed 1451. The independent Special Prosecutor with his asserted need for the subpoenaed material in the underlying criminal prosecution is opposed by the President with his steadfast assertion of privilege against disclosure of the material. This setting assures there is "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 US, at 204, 7 L Ed 2d 663. Moreover, since the matter is one arising in the regular course of a federal criminal prosecution, it is within the traditional scope of Art. III power. Id., at 198, 7 L Ed 2d 663.

In light of the uniqueness of the setting in which the conflict arises, the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability. It would be inconsistent with the applicable law and regulation, and the unique facts of this case to conclude other than that the Special Prosecutor has standing to bring this action and that a justiciable controversy is presented for decision.

III

RULE 17(c)

The subpoena duces tecum is challenged on the ground that the Special Prosecutor failed to satisfy the requirements of Fed Rule Crim Proc 17(c), which governs the issuance of subpoenas duces tecum in federal criminal proceedings. If we sustained this challenge, there would be no occasion to reach the claim of privilege as asserted with respect to the subpoenaed material. Thus we turn to the question whether the requirements of Rule 17(c) have been satisfied. See Arkansas-Louisiana Gas Co. v. Dept of Public Utilities 304 US 61, 64, 82 L Ed 1149, 58 S Ct 770 (1938); Ashwander v. Tennessee Valley Authority, 297 US 288, 346-347, 80 L Ed 688, 56 S Ct 466 (1936). (Brandeis, J., concurring.)

Rule 17(c) provides:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to thw trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

A subpoena for documents may be quashed if their production would be "unreasonable or oppressive", but not otherwise. The leading case in this Court interpreting this standard is Bowman Dairy Co. v. United States, 341 US 214, 95 L Ed 879, 71 S Ct 675 (1951). This case recognized certain fundamental characteristics of the subpoena duces tecum in criminal cases: (1) it was not intended to provide a means of discovery for criminal cases. Id., at 220, 95 L Ed 879; (2) its chief innovation was to expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials. Ibid. As both parties agree, cases decided in the wake of Bowman have generally followed Judge Weinfeld's formulation in United States v. Iozia, 13 FRD 335, 338 (SDNY 1952), as to the required showing. Under this test, in order to require production prior to trial, the moving party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; (4) that the application is made in good faith and is not intended as a general "fishing expedition."

Against this background, the Special Prosecutor, in order to carry his burden, must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity. Our own review of the record necessarily affords a less comprehensive view of the total situation than was available to the trial judge and we are unwilling to conclude that the District Court erred in the evaluation of the Special Prosecutor's showing under Rule 17(c). Our conclusion is based on the record before us, much of which is under seal. Of course, the contents of the subpoenaed tapes could not at that stage be described fully by the Special Prosecutor, but there was a sufficient likelihood that each of the tapes contains conversations relevant to the offense charged in the indictment. United States v. Gross, 24 FRD 138 (SDNY 1959). With respect to many of the tapes, the Special Prosecutor offered the sworn testimony or statements of one or more of the participants in the conversations as to what was said at the time. As for the remainder of the tapes, the identity of the participants and the time and place of the conversations, taken in their total context, permit a rational inference that at least part of the conversations relate to the offenses charged in the indictment.

We also conclude there was a sufficient preliminary showing that each of the subpoenaed tapes contains evidence admissible with respect to the offenses charged in the indictment. The most cogent objection to the admissibility of the taped conversations here at issue is that they are a collection of out-of-court statements by declarants who will not be subject to cross-examination and that the statements are therefore inadmissible hearsay. Here, however, most of the tapes apparently contain conversations to which one or more of the defendants named in the indictment were party. The hearsay rule does not automaticallly bar all out-of-court statements by a defendant in a criminal case. Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy. The same is true of declarations of coconspirators who are not defendants in the case on trial. Dutton v. Evans, 400 US 74, 81, 27 L Ed 2d 213, 91 S Ct 210 (1970). Recorded conversations may also be admissible for the limited purpose of impeaching the credibility of any defendant who testifies or any other coconspirator who testifies. Generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial. See, e.g., United States v. Carter, 15 FRD 367, 371 (DDC 1954). Here, however, there are other valid potential evidentiary uses for the same material and the analysis and possible transcription of the tapes may take a significant period of time. Accordingly, we cannot say that the District Court erred in authorizing the issuance of the subpoena duces tecum.

Enforcement of a pretrial subpoena duces tecum must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues. Without a determination of arbitrariness of that, the trial court finding was without record support, an appellate court will not ordinarily disturb a finding that the applicant for a subpoena complied with Rule 17(c). See, e.g., Sue v. Chicago Transit Authority, 279 F2d 416, 419 (CA7 1960); Shotkin v. Nelson, 146 F2d 402 (CA 10 1944).

In a case such as this, however, where a subpoena is directed to a President of the United States, appellate review, in deference to a coordinate branch of government, should be particularly meticulous to ensure that the standards of Rule 17(c) have been correctly applied. United States v. Burr, 25 Fed Cas 30, 34 (No. 14,692d) (1807). From our examination of the materials submitted by the Special Prosecutor to the District Court in support of his motion for the subpoena, we are persuaded that the District Court's denial of the President's motion to quash the subpoena was consistent with Rule 17(c). We also conclude that the Special Prosecutor has made a sufficient showing to justify a subpoena for production before trial. The subpoenaed materials are not available from any other source, and their examination and processing should not await trial in the circumstances shown. Bowman Dairy Co. supra; United States v. Iozia, supra.

IV

THE CLAIM OF PRIVILEGE

A

Having determined that the requirements of Rule 17(c) were satisfied, we turn to the claim that the subpoena should be quashed because it demands "confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce." App. 48a. The first contention is a broad claim that the separation of powers doctrine precludes judicial review of a President's claim of privilege. The second contention is that if he does not prevail on the claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the subpoena duces tecum.

In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of Marbury v. Madison, 1 Cranch 137, 2 L Ed 60 (1803), that "it is emphatically the province and duty of the judicial department to say what the law is." Id., at 177, 2 L Ed 60.

No holding of the Court has defined the scope of judicial power specifically relating to the enforcement of a subpoena for confidential presidential communications for use in a criminal prosecution, but other exercises of powers by the Executive Branch and the Legislative Branch have been found invalid as in conflict with the Constitution. Powell v. McCormack, supra; Youngstown, supra. In a series of cases, the Court interpreted the explicit immunity conferred by express provisions of the Constitution on Members of the House and Senate by the Speech or Debate Clause, US Const Art I, §6. Doe v. McMillan, 412 US 306, 36 L Ed 2d 912, 93 S Ct 2018 (1973); Gravel v. United States, 408 US 606, 33 L Ed 2d 583, 92 S Ct 2614 (1972); United States v. Brewster, 408 US 501, 33 L Ed 2d 507, 92 S Ct 2531 (1972); United States v. Johnson, 383 US 169, 15 L Ed 2d 681, 86 S Ct 749 (1966). Since this Court has consistently exercised the power to construe and delineate claims arising under express powers, it must follow that the Court has authority to interpret claims with respect to powers alleged to derive from enumerated powers.

Our system of government "requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch." Powell v. McCormack, supra, 549, 23 L Ed 2d 491. And in Baker v. Carr, 369 US, at 211, 7 L Ed 2d 663, the Court stated:

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

Notwithstanding the deference each branch must accord the others, the "judicial power of the United States" vested in the federal courts by Art III, § 1 of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. The Federalist, No. 47, p 313 (C. F. Mitteled 1938). We therefore reaffirm that it is "emphatically the province and the duty" of this Court "to say what the law is" with respect to the claim of privilege presented in this case. Marbury v. Madison, supra, at 177, 2L Ed 60.

B

In support of his claim of absolute privilege, the President's counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process. Whatever the nature of the privilege of confidentiality of presidential communications in the exercise of Art II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of presidential communications has similar constitutional underpinnings.

The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere, Humphrey's Executor v. United States, 295 US 602, 629-630, 79 L Ed 1611, 55 S Ct 869; Kilbourn v. Thompson, 103 US 168, 190-191, 26 L Ed 377 (1880), insulates a president from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential presidential communications.

However, neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without

more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art III. In designing the structure of our Government and dividing and allocating the sovereign power among three coequal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.

> "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v. Sawyer, 343 US 579, 635, 96 L Ed 1153, 72 S Ct 863, 26 ALR2d 1378 (1952) (Jackson, J., concurring).

To read the Art II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussion would upset the consitutional balance of "a workable government" and gravely impair the role of the courts under Art III.

C

Since we conclude that the legitimate needs of the judicial process may outweigh presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. The right and indeed the duty to resolve that question does not free the judiciary from according high respect to the representations made on behalf of the President. United States v. Burr, 25 Fed Cas 187, 190, 191-192 (No. 14, 694) (1807).

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and added to those values the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in presidential decision making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution. In Nixon v. Sirica, --US App DC --, 487 F2d 700 (1973), the Court of Appeals held that such presidential communications are "presumptively privileged," id., at 717, and this position is accepted by both parties in the present litigation. We agree with Mr. Chief Justice Marshall's observation, therefore, that "in no case of this kind would a court be required to proceed against the President as against an ordinary individual." United States v. Burr, 25 Fed Cas 187, 191 (No. 14,694) (CCD Va 1807).

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer." Berger v. United States, 295 US 78, 88, 79 L Ed 1314, 55 S Ct 629 (1935). We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Only recently the Court restated the ancient proposition of law, albeit in the context of a grand jury inquiry rather than a trial,

> "'that the public . . . has a right to every man's evidence' except for those persons protected by a constitutional, common law, or statutory privilege, United States v. Bryan, 339 US, at 331, [94 L Ed 884] (1949); Blackmer v. United States 284 US 421, 438, [76 L Ed 375, 52 S Ct 252]; Branzburg v. United States, 408 US 665, 688, (33 L Ed 2d 626, 92 S Ct 2646)(1972)."

The privileges referred to by the Court are designed to protect weighty and legitimate competing interests. Thus, the Fifth Amendment to the Constitution provides that no man "shall be compelled in any criminal case to be a witness against himself." And, generally, an attorney or a priest may not be required to disclose what has been

revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.

In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art II duties the courts have traditionally shown the utmost deference to presidential responsibilities. In C. & S. Air Lines v. Waterman Steamship Corp., 333 US 103, 111, 92 L Ed 568, 68 S Ct 431 (1948), dealing with presidential authority involving foreign policy considerations, the Court said:

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken in information properly held secret." Id., at 111, 92 L Ed 568.

In United States v. Reynolds, 345 US 1, 97 L Ed 727, 73 S Ct 528, 32 ALR 2d 382 (1953), dealing with a claimant's demand for evidence in a damage case against the Government the Court said:

> It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.
>
> No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest related to the effective discharge of a President's powers, it is constitutionally based.

The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty

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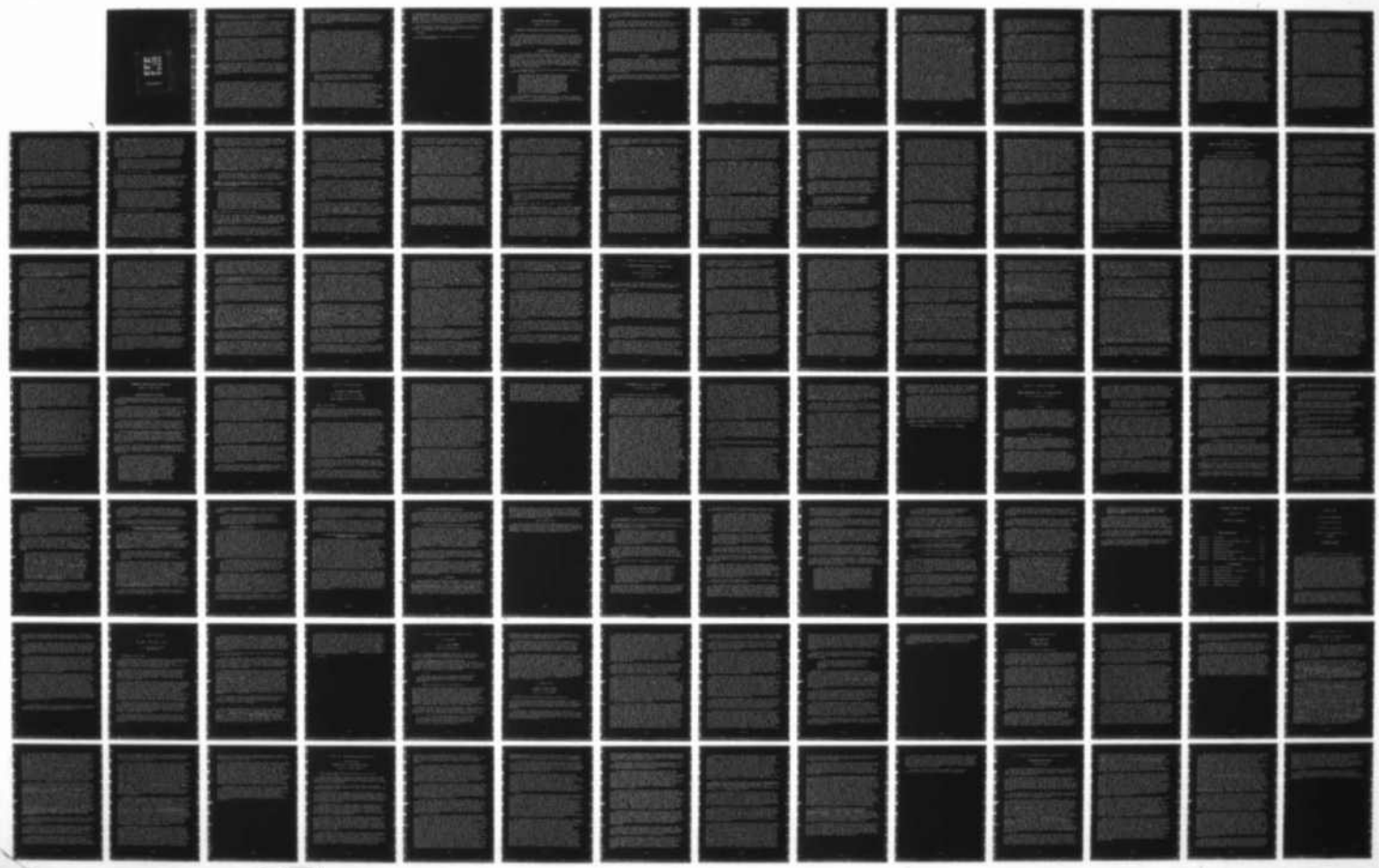

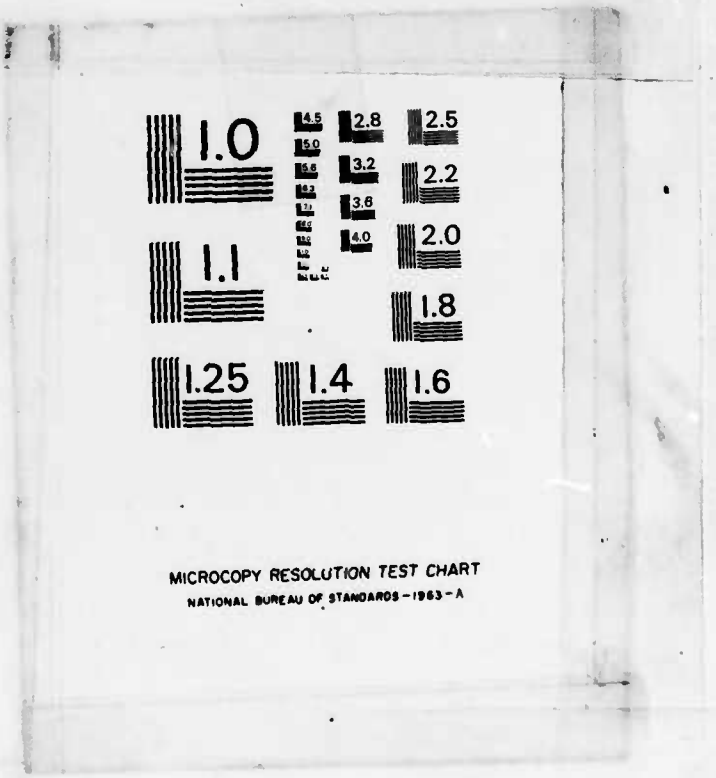
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without due process of law. It is the manifest duty of the courts to vindicate those guarantees and to accomplish that it is essential that all relevant and admissible evidence be produced.

In this case we must weigh the importance of the general privilege of confidentiality of presidential communications in performance of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the contest of a criminal prosecution.

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

D

We have earlier determined that the District Court did not err in authorizing the issuance of the subpoena. If a President concludes that compliance with a subpoena would be injurious to the public interest he may properly, as was done here, invoke a claim of privilege on the return of the subpoena. Upon receiving a claim of privilege from the Chief Executive, it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged and to require the Special Prosecutor to demonstrate that the presidential material was "essential to the justice of the [pending criminal] case." United States v. Burr, supra, at 192. Here the District Court treated the material as presumptively privileged, proceeded to find that the Special Prosecutor had made a sufficient showing to rebut the presumption and ordered an in camera examination of the subpoenaed material. On the basis of our examination of the record we are unable to conclude that the District Court erred in

ordering the inspection. Accordingly we affirm the order of the District Court that subpoenaed materials be transmitted to that court. We now turn to the important question of the District Court's responsibilities in conduction the in camera examination of presidential materials or communications delivered under the compulsion of the subpoena duces tecum.

E

Enforcement of the subpoena duces tecum was stayed pending this Court's resolution of the issues raised by the petitions for certiorari. Those issues now having been disposed of, the matter of implementation will rest with the District Court. "The guard, furnished to [the President] to protect him from being harassed by vexations and unnecessary subpoenas, is to be looked for in the conduct of the [district] court after the subpoenas have issued; not in any circumstances which is to precede their being issued." United States v. Burr, supra, at 34. Statements that meet the test of admissibility and relevance must be isolated; all other material must be excised. At this stage the District Court is not limited to representations of the Special Prosecutor as to the evidence sought by the subpoena; the material will be available to the District Court. It is elementary that in camera inspection of evidence is always a procedure calling for scrupulous protection against any release or publication of material not found by the court, at that stage, probably admissible in evidence and relevant to the issues of the trial for which it is sought. That being true of an ordinary situation, it is obvious that the District Court has a very heavy responsibility to see to it that presidential conversations, which are either not relevant or not admissible, are accorded that high degree of respect due the President of the United States. Mr. Chief Justice Marshall sitting as a trial judge in the Burr case, supra, was extraordinarily careful to point out that:

> "[I]n no case of this kind would a Court be required to proceed against the President as against an ordinary individual." United States v. Burr, 25 Fed Cases 187, 191 (No. 14,694).

Marshall's statement cannot be read to mean in any sense that a President is above the law, but relates to the singularly unique role under Art II of a President's communications and activities, related to the performance of duties under that Article. Moreover, a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any "ordinary individual." It is therefore necessary in the public interest to afford presidential confidentiality the greatest protection consistent with the fair administration of justice. The need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment. We have no doubt that the District Judge will at all times accord to presidential records that high degree of deference suggested

in United States v. Burr, supra, and will discharge his responsibility to see to it that, until released to the Special Prosecutor, no in camera material is revealed to anyone. This burden applies with even greater force to excised material; once the decision is made to excise, the material is restored to its privileged status and should be returned under seal to its lawful custodian.

Since this matter came before the Court during the pendency of a criminal prosecution, and on representations that time is of the essence, the mandate shall issue forthwith.

Affirmed.

Mr. Justice Rehnquist took no part in the consideration or decision of these cases.

ENTERTAINMENT BOOKING AGENCY

ASBCA No. 23761 (1979)

OPINION BY ADMINISTRATIVE JUDGE WATKINS PURSUANT TO RULE 12

This appeal was taken from the final decision of the contracting officer which denied appellant's claim for $2,000 which appellant asserts was the amount due for a performance scheduled on 16 December 1978. The contracting officer has denied the claim on the basis that no contract came into existence since the Installation Commander did not approve the contract as required by paragraph 14 of the General Provisions.

FINDINGS OF FACT

1. On 8 November 1978 two signatures were affixed to a document which called for a performance of Wayne Cochran and the C. C. Riders on 16 December 1978 at the Top Six Club, Fort Campbell, Kentucky for a stated price of $2,000. The two signatures were those of Bobby G. Helton, President of Entertainment Booking Agency and Major George T. Baldridge, the contracting officer. Below these signatures were spaces for "legal review" and "approval." In neither of these blank spaces did a signature appear.

2. Included within the general provisions of this document was paragraph 14 which reads:

> "If the cost of services under this contract exceeds $1,000.00, this contract, notwithstanding signature of the Contracting Officer, will not be effective and binding until approved by the Installation Commander. If the cost of the services under this contract exceeds $2,000.00, this contract, notwithstanding signature by the Contracting Officer, will not be effective and binding until reviewed by the supporting legal officer, as attested by signature and date, and approval by the Installation Commander."

3. The disputes clause, general provision 2, reads, "Except as otherwise provided in this contract, any dispute or claim concerning this contract . . ." or what has been styled the "all disputes" clause typical of some non-appropriated fund contracts.

4. On 12 December 1978, four days prior to the scheduled performance, the contracting officer telephoned appellant to advise that the installation commander had not approved the contract (Tr. 26).

5. Appellant's performers did not appear or perform on 16 December 1978. On 13 February 1979 appellant wrote the contracting officer requesting payment of $2,000. On 21 February 1979, the contracting officer issued a final decision denying the claim.

6. Appellant had known the contracting officer for a period of less than two months at the time the document was signed. During this period of time there were no contracts for entertainment which required the installation commander's approval. There were, however, two contracts which called for performance on 31 December 1978 which required approval of the installation commander. Neither of these contracts are in evidence but there was testimony that neither was approved and signed by the commander although both bands performed notwithstanding the lack of the installation commander's approval. Neither of these two contracts was made with appellant and it cannot be determined from the evidence of record the time that appellant became aware or was aware at all that the performance took place without the commander's approval of the contract.

DECISION

Paragraph 14 states a condition precedent. A contract with a condition precedent does not come into existence unless and until the condition precedent has occurred. Accordingly, no contract came into existence in this appeal since the installation commander did not approve the agreement unless there was a waiver of the condition precedent. We can find no waiver either through a course of conduct or by an apparent grant of authority to the contracting officer to waive the condition.

Since no contract came into being, we have, at best, an incomplete agreement which creates no rights, remedies or liabilities for either party. Appellant is not entitled to recovery and the appeal is denied.

J. Personal Immunity of Public Officials

BUTZ v. ECONOMOU

438 U.S. 478 (1978)
98 S.Ct.2894

Mr. Justice WHITE delivered the opinion of the Court.

This case concerns the personal immunity of federal officials in the Executive Branch from claims for damages arising from their violations of citizens' constitutional rights. Respondent filed suit against a number of officials in the Department of Agriculture claiming that they had instituted an investigation and an administrative proceeding against him in retaliation for his criticism of that agency. The District Court dismissed the action on the ground that the individual defendants, as federal officials, were entitled to absolute immunity for all discretionary acts within the scope of their authority. The Court of Appeals reversed, holding that the defendants were entitled only to the qualified immunity available to their counterparts in state government. Economou v. U.S. Dept. of Agriculture, 535 F.2d 688 (1976). Because of the importance of immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government, we granted certiorari. 429 U.S. 1089, 97 S.Ct.1097, 51 L.Ed.2d 534.

I

Respondent controls Arthur N. Economou and Co., Inc., which was at one time registered with the Department of Agriculture as a commodity futures commission merchant. Most of respondent's factual allegations in this lawsuit focus on an earlier administrative proceeding in which the Department of Agriculture sought to revoke or suspend the company's registration. On February 19, 1970, following an audit, the Department of Agriculture issued an administrative complaint alleging that respondent, while a registered merchant, had willfully failed to maintain the minimum financial requirements prescribed by the Department. After another audit, an amended complaint was issued on June 22, 1970. A hearing was held before the Chief Hearing Examiner of the Department, who filed a recommendation sustaining the administrative complaint. The Judicial Officer of the Department, to whom the Secretary had delegated his decisional authority in enforcement proceedings, affirmed the Chief Hearing Examiner's decision. On respondent's petition for review, the Court of Appeals for the Second Circuit vacated the order of the Judicial Officer. It reasoned that "the essential finding of willfulness . . . was made in a proceeding instituted without the customary warning letter, which the Judicial Officer conceded might well have resulted in prompt correction of the claimed insufficiencies." Economou v. U.S. Department of Agriculture, 494 F.2d 519 (1974).

While the administrative complaint was pending before the Judicial Officer, respondent filed this lawsuit in Federal District Court. Respondent sought initially to enjoin the progress of the administrative proceeding, but he was unsuccessful in that regard. On March 31, 1975, respondent filed a second amended complaint seeking damages. Named as defendants were the individuals who had served as Secretary and Assistant Secretary of Agriculture during the relevant events; the Judicial Officer and Chief Hearing Examiner; several officials in the Commodity Exchange Authority; the Agriculture Department attorney who had prosecuted the enforcement proceeding; and several of the auditors who had investigated respondent or were witnesses against respondent.

The complaint stated that prior to the issuance of the administrative complaints respondent had been "sharply critical of the staff and operations of Defendants and carried on a vociferous campaign for the reform of Defendant Commodity Exchange Authority to obtain more effective regulation of commodity trading." The complaint also stated that, some time prior to the issuance of the February 19 complaint, respondent and his company had ceased to engage in activities regulated by the defendants. The complaint charged that each of the administrative complaints had been issued without the notice or warning required by law; that the defendants had furnished the complaints to "interested persons and others without furnishing respondent's answers as well"; and that following the issuance of the amended complaint, the defendants had issued a "deceptive" press release that "falsely indicated to the public that [respondent's] financial resources had deteriorated, when Defendants knew that their statement was untrue and so acknowledge[d] previously that said assertion was untrue."

The complaint then presented 10 "causes of action", some of which purported to state claims for damages under the United States Constitution. For example, the first "cause of action" alleged that respondent had been denied due process of law because the defendants had instituted unauthorized proceedings against him without proper notice and with the knowledge that respondent was no longer subject to their regulatory jurisdiction. The third "cause of action" stated that by means of such actions "the Defendants discouraged and chilled the campaign of criticism [plaintiff] directed against them, and thereby deprived the [plaintiff] of [his] rights to free expression guaranteed by the First Amendment of the United States Constitution.

Th defendants moved to dismiss the complaint on the ground that "as to the individual defendants it is barred by the doctrine of official immunity . . .." The defendants relied on an affidavit submitted earlier in the litigation by the attorney who had prosecuted the original administrative complaint against respondent. He stated that the Secretary of Agriculture had had no involvement with the case and that each of the other named defendants had acted "within the course of his official duties."

The District Court, apparently relying on the plurality opinion in Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), held that the individual defendants would be entitled to immunity if they could show that "their alleged unconstitutional acts were within the outer perimeter of their authority and discretionary." After examining the nature of the acts alleged in the complaint, the District Court concluded: "Since the individual defendants have shown that their alleged unconstitutional acts were both within the scope of their authority and discretionary, we dismiss the second amended complaint as to them."

The Court of Appeals for the Second Circuit reversed the District Court's judgment of dismissal with respect to the individual defendants. Economou v. U.S. Department of Agriculture, 535 F.2d 688 (1976). The Court of Appeals reasoned that Barr v. Matteo, supra, did not "represen[t] the last word in this evolving area," 535 F.2d, at 691, because principles governing the immunity of officials of the Executive Branch had been elucidated in later decisions dealing with constitutional claims against state officials, e. g., Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1970); Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). These opinions were understood to establish that officials of the Executive Branch exercising discretionary functions did not need the protection of an absolute immunity from suit, but only a qualified immunity based on good faith and reasonable grounds. The Court of Appeals rejected a proposed distinction between suits against state officials sued pursuant to 42 U.S.C. § 1983 and suits against federal officials under the Constitution, noting that "[o]ther circuits have also concluded that the Supreme Court's development of official immunity doctrine in § 1983 suits against state officials applies with equal force to federal officers sued on a cause of action derived directly from the Constitution, since both types of suits serve the same function of protecting citizens against violations of their constitutional rights by government officials." 535 F.2d, at 695 n. 7. The Court of Appeals recognized that under Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), state prosecutors were entitled to absolute immunity from § 1983 damages liability but reasoned that Agriculture Department officials performing analogous functions did not require such an immunity because their cases turned more on documentary proof than on the veracity of witnesses and because their work did not generally involve the same constraints of time and information present in criminal cases. 535 F.2d, at 696 n. 8. The court concluded that all of the defendants were "adequately protected by permitting them to avail themselves of the defense of qualified 'good faith, reasonable grounds' immunity of the type approved by the Supreme Court in Scheuer and Wood." After noting that summary judgment would be available to the defendants if there were no genuine factual issues for trial, the Court of Appeals remanded the case for further proceedings.

II

The single submission by the United States on behalf of petitioners is that all of the federal officials sued in this case are absolutely immune from any liability for damages even if in the course of enforcing the relevant statutes they infringed respondent's constitutional rights and even if the violation was knowing and deliberate. Although the position is earnestly and ably presented by the United States, we are quite sure that it is unsound and consequently reject it.

In Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the victim of an arrest and search claimed to be violative of the Fourth Amendment brought suit for damages against the responsible federal agents. Repeating the declaration in Marbury v. Madison, 1 Cranch 137, 163, 2 L.Ed. 60 (1803), that "'[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws,'" 403 U.S., at 397, 91 S.Ct., at 2005, and stating that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty," id., at 395, 91 S.Ct., at 2004, we rejected the claim that the plaintiff's remedy lay only in the state court under state law, with the Fourth Amendment operating merely to nullify a defense of federal authorization. We held that a violation of the Fourth Amendment by federal agents gives rise to a cause of action for damages consequent upon the unconstitutional conduct.

Bivens established that compensable injury to a constitutionally protected interest could be vindicated by a suit for damages invoking the general federal-question jurisdiction of the federal courts, but we reserved the question whether the agents involved were "immune from liability by virtue of their official position," and remanded the case for that determination. On remand the Court of Appeals for the Second Circuit, as has every other Court of Appeals that has faced the question, held that the agents were not absolutely immune and that the public interest would be sufficiently protected by according the agents and their superiors a qualified immunity.

In our view, the Courts of Appeals have reached sound results. We cannot agree with the United States that our prior cases are to the contrary and support the rule it now urges us to embrace. Indeed, as we see it, the Government's submission is contrary to the course of decision in this Court from the very early days of the Republic.

The Government places principal reliance on Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed2d 1434 (1959). In that case, the acting director of an agency had been sued for malicious defamation by two employees whose suspension for misconduct he had announced in a press release. The defendant claimed an absolute or qualified privilege, but the trial court rejected both and the jury returned a verdict for plaintiff.

In the 1958 Term, the Court granted certiorari in Barr "to determine whether in the circumstances of this case petitioner's claim of absolute privilege should have stood as a bar to maintenance of the suit despite the allegations of malice made in the complaint." The Court was divided in reversing the judgment of the Court of Appeals, and there was no opinion for the Court. The plurality opinion inquired whether the conduct complained of was among those "matters committed by law to [the official's] control" and concluded, after an analysis of the specific circumstances, that the press release was within the "outer perimeter of [his] line of duty" and was "an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively." The plurality then held that under Spalding v. Vilas, 161 U.S. 483, 16 S.Ct. 631, 40 L.Ed. 780 (1896), the act was privileged and that the officer could not be held liable for the tort of defamation despite the allegations of malice. Barr clearly held that a false and damaging publication, the issuance of which was otherwise within the official's authority, was not itself actionable and would not become so by being issued maliciously. The Court did not choose to discuss whether the director's privilege would be defeated by showing that he was without reasonable grounds for believing his release was true or that he knew that it was false, although the issue was in the case as it came from the Court of Appeals.

Barr does not control this case. It did not address the liability of the acting director had his conduct not been within the outer limits of his duties, but from the care with which the Court inquired into the scope of his authority, it may be inferred that had the release been unauthorized, and surely if the issuance of press releases had been expressly forbidden by statute, the claim of absolute immunity would not have been upheld. The inference is supported by the fact that Mr. Justice STEWART, although agreeing with the principles announced by Mr. Justice Harlan, dissented and would have rejected the immunity claim because the press release, in his view, was not action in the line of duty. 360 U.S., at 592, 79 S.Ct., at 1350. It is apparent also that a quite different question would have been presented had the officer ignored an express statutory or constitutional limitation on his authority.

Barr did not, therefore, purport to depart from the general rule, which long prevailed, that a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers. The immunity of federal executive officials began as a means of protecting them in the execution of their federal statutory duties from criminal or civil actions based on state law. See Osborn v. Bank of United States, 9 Wheat. 738, 865-866, 6 L.Ed. 204 (1824). A federal official who acted outside of his federal statutory authority would be held strictly liable for his trespassory acts. For example, Little v. Barreme, 2 Cranch 170, 2 L.Ed. 243 (1804), held the commander of an American warship liable in damages for the seizure of a Danish cargo ship on the high seas. Congress had directed the President to intercept any vessels reasonably suspected of being en route to a French port, but the President had authorized the seizure of suspected vessels whether going to or from French ports, and the

Danish vessel seized was en route from a forbidden destination. The Court, speaking through Mr. Chief Justice Marshall, held that the President's instructions could not "change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass." Although there was probable cause to believe that the ship was engaged in traffic with the French, the seizure at issue was not among that class of seizures that the Executive had been authorized by statute to effect. See also Wise v. Withers, 3 Cranch 331, 2 L.Ed. 457 (1806).

Bates v. Clark, 95 U.S. 204, 24 L.Ed. 471 (1877), was a similar case. The relevant statute directed seizures of alcoholic beverages in Indian country, but the seizure at issue, which was made upon the orders of a superior, was not made in Indian country. The "objection fatal to all this class of defenses is that in that locality [the seizing officers] were utterly without any authority in the premises" and hence were answerable in damages.

As these cases demonstrate, a federal official was protected for action tortious under state law only if his acts were authorized by controlling federal law. "To make out his defence he must show that his authority was sufficient in law to protect him." Cunningham v. Macon & Brunswick R. Co., 109 U.S. 446, 452, 3 S.Ct. 292, 297, 27 L.Ed. 992 (1883); Belknap v. Schild, 161 U.S. 10, 19, 16 S.Ct. 443, 446, 40 L.Ed. 599 (1896). Since an unconstitutional act, even if authorized by statute, was viewed as not authorized in contemplation of law, there could be no immunity defense. See United States v. Lee, 106 U.S. 196, 218-223, 1 S.Ct. 240, 258-263, 27 L.Ed. 171 (1882); Virginia Coupon Cases, 114 U.S. 269, 285-292, 5 S.Ct. 903, 911-915, 29 L.Ed. 185 (1885).

In both Barreme and Bates, the officers did not merely mistakenly conclude that the circumstances warranted a particular seizure, but failed to observe the limitations on their authority by making seizures not within the category or type of seizures they were authorized to make. Kendall v. Stokes, 3 How. 87, 11 L.Ed. 506 (1845), addressed a different situation. The case involved a suit against the Postmaster General for erroneously suspending payments to a creditor of the Post Office. Examining and if necessary, suspending payments to creditors were among the Postmaster's normal duties, and it appeared that he had simply made a mistake in the exercise of the discretion conferred upon him. He was held not liable in damages since "a public officer, acting to the best of his judgment and from a sense of duty, in a matter of account with an individual [is not] liable in an action for an error of judgment." Having "the right to examine into this account" and the right to suspend it in the proper circumstances, the officer was not liable in damages if he fell into error, provided, however, that he acted "from a sense of public duty and without malice."

Four years later, in a case involving military discipline, the Court issued a similar ruling, exculpating the defendant officer because of the failure to prove that he had exceeded his jurisdiction or had exercised it in a malicious or willfully erroneous manner: "[I]t is not enough to show he committed an error of judgment, but it must have been a malicious and willful error." Wilkes v. Dinsman, 7 How. 89, 131, 12 L.Ed. 618 (1849).

In Spalding v. Vilas, 161 U.S. 483, 16 S.Ct. 631, 40 L.Ed. 780 (1896), on which the Government relies, the principal issue was whether the malicious motive of an officer would render him liable in damages for injury inflicted by his official act tnat otherwise was within the scope of his authority. The Postmaster General was sued for circulating among the postmasters a notice that assertedly injured the reputation of the plaintiff and interfered with his contractual relationships. The Court first inquired as to the Postmaster General's authority to issue the notice. In doing so, it "recognize[d] a distinction between action taken by the head of a Department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision." Concluding that the circular issued by the Postmaster General "was not unauthorized by law, nor beyond the scope of his official duties", the Court then addressed the major question in the case--whether the action could be "maintained because of the allegation that what the officer did was done maliciously?" Its holding was that the head of a department could not be "held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress, and in respect of matters within his authority", however improper his motives might have been. Because the Postmaster General in issuing the circular in question "did not exceed his authority, nor pass the line of his duty", it was irrelevant that he might have acted maliciously.

Spalding made clear that a malicious intent will not subject a public officer to liability for performing his authorized duties as to which he would otherwise not be subject to damages liability. But Spalding did not involve conduct manifestly or otherwise beyond the authority of the official, nor did it involve a mistake of either law or fact in construing or applying the statute. It did not purport to immunize officials who ignore limitations on their authority imposed by law. Although the "manifestly or palpably" standard for examining the reach of official power may have been suggested as a gloss on Barreme, Bates, Kendall, and Wilkes, none of those cases was overruled. It is also evident that Spalding presented no claim that the officer was liable in damages because he had acted in violation of a limitation placed upon his conduct by the United States Constitution. If any inference is to be drawn from Spalding in any of these respects, it is that the official would not be excused from liability if he failed to observe obvious statutory or constitutional limitations on his powers or if his conduct was a manifestly erroneous application of the statute.

Insofar as cases in this Court dealing with the immunity or privilege of federal officers are concerned, this is where the matter stood until Barr v. Matteo. There, as we have set out above, immunity was granted even though the publication contained a factual error, which was not the case in Spalding. The plurality opinion and judgment in Barr also appear--although without any discussion of the matter--to have extended absolute immunity to an officer who was authorized to issue press releases, who was assumed to know that the press release he issued was false and who therefore was deliberately misusing his authority. Accepting this extension of immunity with respect to state tort claims, however, we are confident that Barr did not purport to protect an official who has not only committed a wrong under local law, but also violated those fundamental principles of fairness embodied in the Constitution. Whatever level of protection from state interference is appropriate for federal officials executing their duties under federal law, it cannot be doubted that these officials, even when acting pursuant to congressional authorization, are subject to the restraints imposed by the Federal Constitution.

The liability of officials who have exceeded constitutional limits was not confronted in either Barr or Spalding. Neither of those cases supports the Government's position. Beyond that, however, neither case purported to abolish the liability of federal officers for actions manifestly beyond their line of duty; and if they are accountable when they stray beyond the plain limits of their statutory authority, it would be incongruous to hold that they may nevertheless willfully or knowingly violate constitutional rights without fear of liability.

Although it is true that the Court has not dealt with this issue with respect to federal officers, we have several times addressed the immunity of state officers when sued under 42 U.S.C. § 1983 for alleged violations of constitutional rights. These decisions are instructive for present purposes.

III

Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), decided that § 1983 was not intended to abrogate the immunity of state judges which existed under the common law and which the Court had held applicable to federal judges in Bradley v. Fisher, 13 Wall. 335 (1872). Pierson also presented the issue "whether immunity was available to that segment of the executive branch of a state government that is . . . most frequently exposed to situations which can give rise to claims under § 1983--the local police officer." Scheuer v. Rhodes, 416 U.S., at 244-245, 94 S.Ct., at 1690. Relying on the common law, we held that police officers were entitled to a defense of "good faith and probable cause", even though an arrest might subsequently be proved to be unconstitutional. We observed, however, that "[t]he common law has never granted police officers an absolute and unqualified immunity, and the officers in this case do not claim that they are entitled to one." 386 U.S., at 555, 87 S.Ct., at 1218.

In Scheuer v. Rhodes, supra, the issue was whether "higher officers of the executive branch" of state governments were immune from liability under § 1983 for violations of constitutionally protected rights. 416 U.S., at 246, 94 S.Ct., at 1691. There, the Governor of a State, the senior and subordinate officers of the state National Guard, and a state university president had been sued on the allegation that they had suppressed a civil disturbance in an unconstitutional manner. We explained that the doctrine of official immunity from § 1983 liability, although not constitutionally grounded and essentially a matter of statutory construction, was based on two mutually dependent rationales:

> "(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and thejudgment required by the public good."

416 U.S., at 240, 94 S.Ct., at 1688.

The opinion also recognized that executive branch officers must often act swiftly and on the basis of factual information supplied by others, constraints which become even more acute in the "atmosphere of confusion, ambiguity, and swiftly moving events" created by a civil disturbance. Although quoting at length from Barr v. Matteo, we did not believe that there was a need for absolute immunity from § 1983 liability for these high-ranking state officials. Rather the considerations discussed above indicated:

> "[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."

416 U.S., at 247-248, 94 S.Ct., at 1692.

Subsequent decisions have applied the Scheuer standard in other contexts. In Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975), school administrators were held entitled to claim a similar qualified immunity. A school board member would lose his immunity from a § 1983 suit only if "he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student." 420 U.S., at 322, 95 S.Ct., at 1001. In O'Connor v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975), we applied the same standard to the superintendent of a state hospital. In Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978), we held that prison administrators would be adequately

protected by the qualified immunity outlined in Scheuer and Wood. We emphasized, however, that, at least in the absence of some showing of malice, an official would not be held liable in damages under § 1983 unless the constitutional right he was alleged to have violated was "clearly established" at the time of the violation.

None of these decisions with respect to state officials furnishes any support for the submission of the United States that federal officials are absolutely immune from liability for their constitutional transgressions. On the contrary, with impressive unanimity, the Federal Courts of Appeals have concluded that federal officials should receive no greater degree of protection from constitutional claims than their counterparts in state government. Subsequent to Scheuer, the Court of Appeals for the Fourth Circuit concluded that "[a]lthough Scheuer involved a suit against state executive officers, the court's discussion of the qualified nature of executive immunity would appear to be equally applicable to federal executive officers." States Marine Lines v. Schultz, 498 F.2d 1146, 1159, (1974). In the view of the Court of Appeals for the Second Circuit,

> "it would be 'incongruous and confusing, to say the least' to develop different standards of immunity for state officials sued under § 1983 and federal officers sued on similar grounds under causes of action founded directly on the Constitution."

Economou v. U.S. Dept. of Agriculture, 535 F.2d, at 695, n. 7, quoting Bivens v. Six Unknown Fed. Narcotics Agents, 456 F.2d 1339, 1346-1347 (C.A.2 1972)(on remand).

The Court of Appeals for the Ninth Circuit has reasoned:

> "[Defendants] offer no significant reason for distinguishing, far as the immunity doctrine is concerned, between litigation under § 1983 against state officers and actions against federal officers alleging violation of constitutional rights under the general federal question statute. In contrast, the practical advantage of having just one federal immunity doctrine for suits arising under federal law is self-evident. Further, the rights at stake in a suit brought directly under the Bill of Rights are no less worthy of full protection than the constitutional and statutory rights protected by § 1983."

Mark v. Groff, 521 F.2d 1376, 1380 (1975).

Other courts have reached similar conclusions, e.g., Apton v. Wilson, 165 U.S.App. D.C. 22, 506 F.2d 83 (1974); Brubaker v. King, 505 F.2d 534 (C.A.7 1974); see Weir v. Muller, 527 F.2d 872 (C.A.5 1976); Paton v. La Prade, 524 F.2d 862 (C.A.3 1975); Jones v. United States, 536 F.2d 269 (C.A.8 1976); G. M. Leasing Corp. v. United States, 560 F.2d 1011 (C.A.10 1977).

We agree with the perception of these courts that, in the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by Bivens than is accorded state officials when sued for the identical

violation under § 1983. The constitutional injuries made actionable by § 1983 are of no greater magnitude than those for which federal officials may be responsible. The pressures and uncertainties facing decision-makers in state government are little if at all different from those affecting federal officials. We see no sense in holding a state governor liable but immunizing the head of a federal department; in holding the administrator of a federal hospital immune where the superintendent of a state hospital would be liable; in protecting the warden of a federal prison where the warden of a state prison would be vulnerable; or in distinguishing between state and federal police participating in the same investigation. Surely, federal officials should enjoy no greater zone of protection when they violate federal constitutional rules than do state officers.

The Government argues that the cases involving state officials are distinguishable because they reflect the need to preserve the effectiveness of the right of action authorized by § 1983. But as we discuss more fully below, the cause of action recognized in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), would similarly be "drained of meaning" if federal officials were entitled to absolute immunity for their constitutional transgressions. Cf. Scheuer v. Rhodes, 416 U.S., at 248, 94 S.Ct., at 1692.

Moreover, the Government's analysis would place undue emphasis on the congressional origins of the cause of action in determining the level of immunity. It has been observed more than once that the law of privilege as a defense to damages actions against officers of Government has "in large part been of judicial making." Barr v. Matteo, 360 U.S., at 569, 79 S.Ct., at 1338; Doe v. McMillan, 412 U.S. 306, 318, 93 S.Ct. 2018, 2027, 36 L.Ed.2d 912 (1973). Section 1 of the Civil Rights Act of 1871--the predecessor of § 1983--said nothing about immunity for state officials. It mandated that any person who under color of state law subjected another to the deprivation of his constitutional rights would be liable to the injured party in an action at law.

This Court nevertheless ascertained and announced what it deemed to be the appropriate type of immunity from § 1983 liability in a variety of contexts. Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); Scheuer v. Rhodes, supra. The federal courts are equally competent to determine the appropriate level of immunity where the suit is a direct claim under the Federal Constitution against a federal officer.

The presence or absence of congressional authorization for suits against federal officials is, of course, relevant to the question whether to infer a right of action for damages for a particular violation of the Constitution. In Bivens, the Court noted the "absence of affirmative action by Congress" and therefore looked for "special factors counselling hesitation." 403 U.S., at 396, 91 S.Ct., at 2004. Absent congressional authorization, a court may also be impelled to think more carefully about whether the type of injury

sustained by the plaintiff is normally compensable in damages, 403 U.S., at 397, 91 S.Ct., at 2005, and whether the courts are qualified to handle the types of questions raised by the plaintiff's claim, see id., at 409, 91 S.Ct., at 2011 (Harlan, J., concurring in judgment).

But once this analysis is completed, there is no reason to return again to the absence of congressional authorization in resolving the question of immunity. Having determined that the plaintiff is entitled to a remedy in damages for a constitutional violation, the court then must address how best to reconcile the plaintiff's right to compensation with the need to protect the decision making processes of an executive department. Since our decision in Scheuer was intended to guide the federal courts in resolving this tension in the myriad factual situations in which it might arise, we see no reason why it should not supply the governing principles for resolving this dilemma in the case of federal officials. The Court's opinion in Scheuer relied on precedents dealing with federal as well as state officials, analyzed the issue of executive immunity in terms of general policy considerations, and stated its conclusion, quoted supra, in the same universal terms. The analysis presented in that case cannot be limited to actions against state officials.

Accordingly, without congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials. The § 1983 action was provided to vindicate federal constitutional rights. That Congress decided, after the passage of the Fourteenth Amendment, to enact legislation specifically requiring state officials to respond in federal court for their failures to observe the constitutional limitations on their powers is hardly a reason for excusing their federal counterparts for the identical constitutional transgressions. To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head.

IV

As we have said, the decision in Bivens established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official. As Mr. Justice Harlan, concurring in the judgment, pointed out, the action for damages recognized in Bivens could be a vital means of providing redress for persons whose constitutional rights have been violated. The barrier of sovereign immunity is frequently impenetrable. Injunctive or declaratory relief is useless to a person who has already been injured. "For people in Bivens' shoes, it is damages or nothing." 403 U.S., at 410, 91 S.Ct., at 2012.

Our opinion in Bivens put aside the immunity question; but we could not have contemplated that immunity would be absolute. If, as the Government argues, all officials exercising discretion were exempt from personal liability, a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs. Moreover, no compensation would be available from the Government, for the Tort Claims Act prohibits recovery for injuries stemming from discretionary acts, even when that discretion has been abused.

The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees. The broad authority possessed by these officials enables them to direct their subordinates to undertake a wide range of projects--including some which may infringe such important personal interests as liberty, poverty, and free speech. It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.

Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it.
>
> United States v. Lee, 106 U.S., at 220, 1 S.Ct., at 261.

See also Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803); Scheuer v. Rhodes, 416 U.S., at 239-240, 94 S.Ct., at 1687-1688. In light of this principle, federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.

This is not to say that considerations of public policy fail to support a limited immunity for federal executive officials. We consider here, as we did in Scheuer, the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority. Yet Scheuer and other cases have recognized that it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment. We therefore hold that, in a suit for damages arising from unconstitutional action, federal executive officials

exercising discretion are entitled only to the qualified immunity specified in Scheuer, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business.

The Scheuer principle of only qualified immunity for constitutional violations is consistent with Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959); Spalding v. Vilas, 161 U.S. 483, 16 S.Ct. 631, 40 L.Ed. 780 (1896); and Kendall v. Stokes, 3 How. 87, 11 L.Ed. 506 (1847). Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law. But we see no substantial basis for holding, as the United States would have us do, that executive officers generally may with impunity discharge their duties in a way that is known to them to violate the United States Constitution or in a manner that they should know transgresses a clearly established constitutional rule. The principle should prove as workable in suits against federal officials as it has in the context of suits against state officials. Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss. Moreover, the Court recognized in Scheuer that damage suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. See 416 U.S., at 250, 94 S.Ct., at 1693. In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

V

Although a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations, our decisions recognize that there are some officials whose special functions require a full exemption from liability, e.g., Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646 (1872); Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). In each case, we have undertaken "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it."

In Bradley v. Fisher, the Court analyzed the need for absolute immunity to protect judges from lawsuits claiming that their decisions had been tainted by improper motives. The Court began by noting that the principal of immunity for acts done by judges "in the exercise of their judicial functions" had been "the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country." 13 Wall., at 347. The Court explained that the value of this rule was proved by experience. Judges were often called to decide "[c]ontroversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings." Such

adjudications invariably produced at least one losing party, who would "accep[t] anything but the soundness of the decision in explanation of the action of the judge." "Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge." If a civil action could be maintained against a judge by virtue of an allegation of malice, judges would lose "that independence without which no judiciary can either be respectable or useful." Thus, judges were held to be immune from civil suit "for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction."

The principle of Bradley was extended to federal prosecutors through the summary affirmance in Yaselli v. Goff, 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395 (1927), aff'g 12 F.2d 396 (C.A.2 1926). The Court of Appeals in that case discussed in detail the common-law precedents extending absolute immunity to parties participating in the judicial process: judges, grand jurors, petit jurors, advocates, and witnesses. Grand jurors had received absolute immunity "'lest they should be biased with the fear of being harassed by a vicious suit for acting according to their consciences (the danger of which might easily be insinuated where powerful men are warmly engaged in a cause and thoroughly prepossessed of the justice of the side which they espouse).'" Id., at 403, quoting 1 W. Hawkins, Pleas of the Crown 349 (6th ed. 1787). The court then reasoned that "'[t]he public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury.'" 12 F.2d, at 404, quoting Smith v. Parman, 101 Kan. 115, 116, 165 P. 663 (1917). The court held the prosecutor in that case immune from suit for malicious prosecution and this Court, citing Bradley v. Fisher, supra, affirmed.

We recently reaffirmed the holding of Yaselli v. Goff in Imbler v. Pachtman, supra, a suit against a state prosecutor under § 1983. The Court's examination of the leading precedents led to the conclusion that "the common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties." 424 U.S., at 422-423, 96 S.Ct., at 991. The prosecutor's role in the criminal justice system was likely to provoke "with some frequency" retaliatory suits by angry defendants. Id., at 425, 96 S.Ct., at 992. A qualified immunity might have an adverse effect on the functioning of the criminal justice system, not only by discouraging the initiation of prosecutions, see id., at 426 n. 24, 96 S.Ct., at 993, but also by affecting the prosecutor's conduct of the trial.

> Attaining the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence. . . . If prosecutors were hampered in exercising their judgment as to the use of . . . witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence.

Id., at 426, 96 S.Ct., at 993.

In light of these and other practical considerations, the court held that the defendant in that case was entitled to absolute immunity with respect to his activities as an advocate, "activities [which] were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." Id., at 430, 96 S.Ct., at 995.

Depite these precedents, the Court of Appeals concluded that all of the defendants in this case--including the Chief Hearing Examiner, Judicial Officer, and prosecuting attorney--were entitled to only a qualified immunity. The Court of Appeals reasoned that officials within the Executive Branch generally have more circumscribed discretion and pointed out that, unlike a judge, officials of the Executive Branch would face no conflict of interest if their legal representation was provided by the Executive Branch. The Court of Appeals recognized that "some of the Agriculture Department officials may be analogized to criminal prosecutors, in that they initiated the proceedings against [respondent], and presented evidence therein", 535 F.2d, at 696 n. 8, but found that attorneys in administrative proceedings did not face the same "serious constraints of time and even information" which this Court has found to be present frequently in criminal cases. See Imbler v. Pachtman, 424 U.S., at 425, 96 S.Ct., at 992.

We think that the Court of Appeals placed undue emphasis on the fact that the officials sued here are--from an administrative perspective--employees of the Executive Branch. Judges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities. This point is underlined by the fact that prosecutors--themselves members of the Executive Branch--are also absolutely immune.

> It is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as 'quasi-judicial' officers, and their immunities being termed 'quasi-judicial' as well.

Id., at 423 n. 20, 96 S.Ct., at 991.

The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location. As the Bradley Court suggested, 13 Wall., at 348-349, controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. See Pierson v. Ray, 386 U.S., at 554, 87 S.Ct., at 1217. Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.

At the same time, the safeguards built into the judicial process tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges. Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court. Jurors are carefully screened to remove all possibility of bias. Witnesses are, of course, subject to the rigors of cross-examination and the penalty of perjury. Because these features of the judicial process tend to enhance the reliability of the decision making process, there is a less pressing need for individual suits to correct constitutional error.

We think that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages. The conflicts which federal hearing examiners seek to resolve are every bit as fractious as those which come to court. As the Bradley opinion points out: "When the controversy involves questions affecting large amounts of property or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision, often finds vent in imputations of [malice]." 13 Wall., at 348, 20 L.Ed. 646. Moreover, federal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process. The proceedings are adversary in nature. See 5 U.S.C. § 555(b) (1976 ed.). They are conducted before a trier of fact insulated from political influence. See § 554(d). A party is entitled to present his case by oral or documentary evidence, § 556(d), and the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision. § 556(e). The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record. § 557(c).

There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is "functionally comparable" to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. See § 566(c). More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency. Prior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because they were required to perform prosecutorial and investigative functions as well as their judicial work, see, e. g., Wong Yang Sung v. McGrath, 339 U.S. 33, 36-41, 70 S.Ct. 445, 447-450, 94 L.Ed. 616 (1950), and because they were often subordinate to executive officials within the agency, see Ramspeck v.

Federal Trial Examiners Conference, 345 U.S. 128, 131, 73 S.Ct. 570, 572, 97 L.Ed. 872 (1953). Since the securing of fair and competent hearing personnel was viewed as "the heart of formal administrative adjudication", Final Report of the Attorney General's Committee on Administrative Procedure 46 (1941), the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners. They may not perform duties inconsistent with their duties as hearing examiners. 5 U.S.C. § 3105 (1976 ed.). When conducting a hearing under § 5 of the APA, 5 U.S.C. § 554 (1976 ed.), a hearing examiner is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions for the agency. 5 U.S.C. § 554(d)(2) (1976 ed.). Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. § 554(d)(1). Hearing examiners must be assigned to cases in rotation so far as is practicable. § 3105. They may be removed only for good cause established and determined by the Civil Service Commission after a hearing on the record. § 7521. Their pay is controlled by the Civil Service Commission.

In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women. We therefore hold that persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. Those who complain of error in such proceedings must seek agency or judicial review.

We also believe that agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought. The Commodity Futures Trading Commission, for example, may initiate proceedings whenever it has "reason to believe" that any person "is violating or has violated any of the provisions of this chapter or of the rules, regulations, or orders of the Commission." 7 U.S.C. § 9 (1976 ed.). A range of sanctions is open to it. Ibid.

The discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from that decision was less than complete. Cf. Imbler v. Pachtman, 424 U.S., at 426 n. 24, 96 S.Ct., at 993 n. 24. While there is not likely to be anyone willing and legally able to seek damages from the officials if they do not authorize the administrative proceeding, cf. id., at 438, 96 S.Ct., at 998 (WHITE, J., concurring in judgment), there is a serious danger that the decision to authorize proceedings will provoke a retaliatory response. An individual targeted by an administrative proceeding will

react angrily and may seek vengeance in the courts. A corporation will muster all of its financial and legal resources in an effort to prevent administrative sanctions. "When millions may turn on regulatory decisions, there is a strong incentive to counter-attack."

The defendant in an enforcement proceeding has ample opportunity to challenge the legality of the proceeding. An administrator's decision to proceed with a case is subject to scrutiny in the proceeding itself. The respondent may present his evidence to an impartial trier of fact and obtain an independent judgment as to whether the prosecution is justified. His claims that the proceeding is unconstitutional may also be heard by the courts. Indeed, respondent in this case was able to quash the administrative order entered against him by means of judicial review. See Economou v. U.S. Department of Agriculture, 494 F.2d 519 (C.A.2 1974).

We believe that agency officials must make the decision to move forward with an administrative proceeding free from intimidation or harassment. Because the legal remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal, we hold that those officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision.

We turn finally to the role of an agency attorney in conducting a trial and presenting evidence on the record to the trier of fact. We can see no substantial difference between the function of the agency attorney in presenting evidence in an agency hearing and the function of the prosecutor who brings evidence before a court. In either case, the evidence will be subject to attack through cross-examination, rebuttal, or reinterpretation by opposing counsel. Evidence which is false or unpersuasive should be rejected upon analysis by an impartial trier of fact. If agency attorneys were held personally liable in damages as guarantors of the quality of their evidence, they might hesitate to bring forward some witnesses or documents. "This is particularly so because it is very difficult if not impossible for attorneys to be absolutely certain of the objective truth or falsity of the testimony which they present." Imbler v. Pachtman, supra, 424 U.S., at 440, 96 S.Ct., at 999 (WHITE, J., concurring in judgment). Apart from the possible unfairness to agency personnel, the agency would often be denied relevant evidence. Cf. Imbler v. Pachtman, supra, at 426, 96 S.Ct., at 993. Administrative agencies can act in the public interest only if they can adjudicate on the basis of a complete record. We therefore hold that an agency attorney who arranges for the presentation of evidence on the record in the course of an adjudication is absolutely immune from suits based on the introduction of such evidence.

Ed. Note: Four justices dissent in part. They would have granted absolute immunity to the defendants.

Mr. Justice Rehnquist, The Chief Justice, Mr. Justice Stewart, and Mr. Justice Stevens.

Section 2. Quantum Meruit

YOSEMITE PARK AND CURRY COMPANY v. THE UNITED STATES

Ct. Cl. No. 375-75 (1978)

ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

KUNZIG, Judge, delivered the opinion of the court:

This action, arising from plaintiff's attempted recovery on a contract which defendant now contends is invalid and unenforceable under Government procurement law, is before the court on the parties' cross-motions for summary judgment. Although we agree with the defendant that a contract with terms such as the express written contract entered into by Yosemite Park and Curry Company (YPC or plaintiff) and the National Park Service (NPS) is rendered invalid as not in accordance with applicable Government procurement statutes and regulations, we conclude that plaintiff did perform and defendant did knowingly receive the benefit of certain bargained-for and agreed-upon services and that plaintiff is, therefore, entitled to recover in quantum meruit the reasonable value of the services rendered. Because a determination of the reasonable value of the benefit received by defendant is subject to proof of facts and is not ascertainable from the record now before us, we must remand this case to our Trial Division for further proceedings in accordance with Rule 131(c)(2).

The contractual relationship between plaintiff and the defendant, operating through the NPS of the Department of the Interior, began in May of 1963, when they executed a concession contract pursuant to 16 U.S.C. § 3 (1976). Under the terms of this agreement, defendant granted to plaintiff the right to establish certain public facilities and accommodations, including lodging, food and beverage services, and other merchandising operations, in Yosemite National Park, with plaintiff establishing reasonable rates and prices for its goods and services.

This contract also authorized the concessioner (plaintiff) to provide a transportation service within the Park, with fees to be paid by the public but subject to a review for reasonableness by the Secretary of the Interior. Various transportation services, including a shuttle bus, were begun by YPC under this contract.

On March 26, 1971, however, the Park transportation service was modified when the parties entered into a Memorandum of Agreement for the Furnishing of a Transportation System at Yosemite National Park (the Agreement). This Agreement arose, at least partially, from the successful experiment which YPC had conducted, beginning in February of 1970, in an effort to ease the ever increasing pollution and congestion in the Park, by operating its shuttle bus service without charge to the public. The NPS then decided, in July of 1970, to ban private automobiles from the Park. The Agreement was the natural outgrowth of this move toward overall public transportation in the Park.

Under the terms of the Agreement, plaintiff agreed to provide bus service to the public without charge and defendant agreed to reimburse YPC for its actual expenses plus a reasonable profit for providing this service. Addendum Number Two to the Agreement provided that plaintiff was able to recover federal income taxes as a reimbursable fixed cost and that plaintiff's annual operating fee was to be calculated as 12½ percent of its average gross investment in the transportation equipment employed in the service.

The form of the Agreement and its Addenda were selected and authorized by the NPS and all papers were drafted, approved and signed by a representative of the NPS. In addition, each document recited that it was entered into pursuant and subject to the original Concession Contract.

Plaintiff contends, and defendant does not contest: (1) that defendant's first two audits under the Agreement, dated August 1971 and August 1972, approved all costs and payments and made no objection to the validity of the Agreement or to any of the terms or provisions thereof; (2) that YPC invested, based on the required performance and expected income of the Agreement, over $459,000 in transportation equipment during fiscal year 1972, and spent many weeks formalizing optimum equipment, design, fuel, routes and schedules with NPS representatives; (3) that the audit for fiscal year 1973, in which the terms of the Agreement were first questioned, was subject to an unexplained "inordinate delay" at the hands of the Government of over 18 months while YPC continued to perform under the Agreement in expectation of complete reimbursement according to its terms; and (4) that, in approving the acquisition of YPC by MCA, Inc., in June of 1973, the NPS at no time questioned the validity of any of the contracts under which YPC was operating.

Finally, in letters dated June 2 and June 4, 1975, the NPS informed YPC that it would not pay plaintiff's invoices but, instead, would offset these charges against allegedly improper payments previously made by the Government. The NPS audit had determined that treating federal income taxes as reimbursable fixed costs and allowing more than 10 percent of the cost of the contract on a "cost-plus" contract violated federal procurement statutes and regulations.

Plaintiff, alleging that NPS now owes plaintiff $481,257.89, plus interest, on account of past transportation services rendered pursuant to the Agreement, has filed this action in an effort to recover those sums on which defendant has refused payment.

Defendant, in its motion for summary judgment, asserts that the plaintiff may not recover under the terms of the Agreement because those terms are not within the allowable guidelines established for federal procurement contracts by applicable statutes and regulations. Defendant relies particularly on 41 U.S.C. § 254(b)(1970) in contesting the 12½ percent allowance and on the federal procurement regulations, 41 C.F.R. § 1-15.205-41(a)(1)(1977), in arguing that YPC's federal income tax payments should not be reimbursable.

The Government notes that the relevant procurement statute makes it mandatory for executive agencies to follow the above-cited regulations in purchasing property or services, except in certain very limited circumstances, and reasons that the provisions which violate procurement statutes and regulations must be held unenforceable as a matter of law, citing Whiteside v. United States, 93 U.S. 247 (1876) and G. L. Christian & Associates v. United States, 160 Ct.Cl. 1, 312 F.2d 418, cert. denied, 375 U.S. 954 (1963).

Defendant anticipates the position of plaintiff by arguing that the Secretary of the Interior's general concession authority, delineated in 16 U.S.C. §§ 3, 17b, 20b(a)-(b) (1976) does not except the Agreement from the ambit of the procurement statutes and regulations. Nowhere in any of these sections, asserts defendant, is statutory language sufficiently explicit to render the generally effective procurement law "inapplicable pursuant to . . . any other law" within the meaning of 41 U.S.C. § 252(a)(2)(1970). In fact, the defendant continues, the explicit statement in § 17b, that the Secretary shall not be bound by "section 5 of title 41" (emphasis added) would appear to imply he is bound, as would be any Government procurement officer, by the other sections of that title, and that the very fact that 16 U.S.C. §3 specifically permits the Secretary of the Interior authority to enter into section 3 contracts "without advertising and without competitive bids" implies that other statutory requirements are applicable to concession contracts if they, in effect, serve to purchase goods or services.

Plaintiff counters with the argument that both the original contract and the Agreement were executed under the Secretary's broad concession authority and that, as concession contracts, these agreements were exempt from the restrictions of general procurement law.

Alternatively, plaintiff contends that, even if the Agreement does fall within the ambit of general procurement law, the defendant has not shown that the Agreement, in fact, violates the statutes and regulations cited by the Government. YPC argues that the Agreement involved experimental transportation schemes and should, therefore, have been subject to the alternate 15 percent limitation on research and development cost-plus contracts rather than the normal 10 percent limit, adding that the Government has not even demonstrated to the court that reimbursement to the plaintiff exceeded 10 percent of the cost of the contract (since the face of the Agreement called for reimbursement of 12½ percent on plaintiff's investment and the two percentages are not immediately comparable). YPC also contends that, since the regulation prohibiting federal income tax reimbursement was subject to deviation, the plaintiff was entitled to rely on the Government's approval of the Agreement in its first two audits in believing that the NPS had followed proper deviation procedures (see note 10, infra).

Additionally, plaintiff adds to its repertoire the argument that the Government should be estopped now to assert the invalidity of the Agreement under which the parties operated successfully for two years and under which the Government allowed the plaintiff to operate, with expectation of full reimbursement, for almost two years after first questions had arisen. YPC contends: (1) that it signed the Agreement reluctantly--only after insistent urging by NPS--and then proceeded to invest over $664,000 in transportation equipment; (2) that the Government was paid and accepted the required concession fees and accepted the full benefits of the Agreement for more than four years; and (3) that the Government continually encouraged plaintiff to perform under the Agreement and to increase its gross investment in transportation equipment. Plaintiff reasons that basic notions of fairness require that defendant be equitably estopped to change its position concerning the contract's validity.

Finally, YPC contends that, even if this court should now accept the Government's recently asserted position that the express written contract between the parties is invalid insofar as its provisions violate applicable procurement law, plaintiff should nevertheless be allowed to recover the reasonable value of the services it rendered to the Government on a quantum meruit theory. Ordinary principles of equity and justice, urges plaintiff, preclude the Government from retaining and accepting services and benefits while at the same time refusing to pay for them on the ground that the Agreement pursuant to which the benefits were conferred was invalid because it was unauthorized, did not follow proper form, or for some other reason.

Defendant, of course, takes a dim view of plaintiff's arguments. It first points to plaintiff's failure to demonstrate that the NPS contracting officer had the authority to enter into anything other than a procurement contract.

Defendant further notes that nothing in either the contract or the Agreement indicates that either was in any way an experimental or developmental contract which would arguably entitle YPC to a 15 percent, rather than a 10 percent, return. Even if the Agreement were an experimental contract, continues the Government, it would not justify the inclusion of federal income taxes as reimbursable fixed costs. Plaintiff's attempted "deviation" argument provides no more justification for such inclusion, since no deviation was sought or approved for the contract in question.

The Government responds to plaintiff's "percentage of contract cost versus percentage of gross investment" argument by asserting that the auditors found that the dollar figure representing 12½ percent of YPC's gross investment was actually in excess of 10 percent of estimated contract cost and, thus, violated the applicable statute and regulation. Defendant admits that such would not always be the case, but strongly contends that the combination of circumstances here yielded such a result.

On the issue of the Government's being estopped now to deny the validity of the Agreement, defendant submits that the doctrine of equitable estoppel is inapplicable where, as here, a Government officer executes a patently illegal contract, the limitations on the contracting officer's authority were published in the Federal Register, plaintiff is deemed to have knowledge thereof, and the responsible Government officials are under an actual duty to retain monies which would be in excess of legally allowable payments.

Finally, the Government urges that plaintiff should not be entitled to quantum meruit recovery in excess of the legally allowable amount on grounds that such a resolution would reach the exact result prohibited by statute and regulations.

While we agree with the Government that the admittedly broad concession granting authority of the Secretary of the Interior did not relieve the NPS of the duty of complying with generally applicable procurement statutes and implementing regulations in contracting with YPC for transportation services, we hold that plaintiff should be entitled to recover the reasonable value of the services which it rendered to the Government and for which the Government accepted full benefits for over four years, and, therefore, remand this case to the Trial Division for a determination of the reasonable value of those services.

Any consideration of this problem must begin with the maxim that the United States is not bound by its agents acting beyond their authority and contrary to regulations. See Federal Crops Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947); Porter v. United States, 204 Ct.Cl. 355, 366, 496 F.2d 583, 590 (1974), cert. denied, 420 U.S. 1004 (1975). "One who purports to contract with the United States assumes the risk that the official with whom he deals is clothed with actual authority to enter the contract alleged", Haight v. United States, 209 Ct.Cl. 698, 538 F.2d 346, cert. denied, 429 U.S. 841 (1976), and the United States will not be estopped to deny the acts of its agents who have acted beyond the scope of their actual authority. Putnam Mills Corp. v. United States, 202 Ct.Cl. 1, 9, 479 F.2d 1334, 1338 (1973); California-Pacific Util. Co. v. United States, 194 Ct.Cl. 703, 720 (1971).

With this line of reasoning established, it becomes evident that this case turns on the question of whether the broad power of the Secretary of the Interior to grant concessions in the course of administering National Parks relieves him, and through him the NPS, from compliance with the generally acceptable procurement guidelines.

We begin, as did the Government, with 41 U.S.C. § 252(a), which states unequivocally that executive agencies shall make all purchases of goods and services in compliance with the procurement statutes and implementing regulations--including those specifically discussed supra--except where those statutes and regulations are "made inapplicable pursuant to . . . any other law." Plaintiff's most substantial argument centers on the contention that the Secretary of the Interior's concession authority constitutes that other law. However,

after a careful reading of the statutory sections relied upon by plaintiff, and after a careful balancing of the arguments put forward by both of the parties, we are not convinced that the NPS (even though acting under the authority of the Secretary of the Interior) can avoid normal, legally mandated, procurement procedures, simply by characterizing the procurement of transportation services for the public as the granting of a "concession" to a specific contractor.

The most serious problem encountered in plaintiff's asserted rationale is that nowhere in the statutory language cited to us by the plaintiff is there any indication that Congress intended for the Secretary of the Interior to forego the requirements of either 41 C.F.R. § 1-15.205-41(a)(1) (1977) (pertaining to the non-reimbursable nature of federal income taxes) or 41 U.S.C. § 254(b) (1970) and 41 C.F.R. § 1-3.405-5 (c)(2) (1977) (pertaining to the 10 percent limit on cost-plus-a-fixed-fee reimbursements). Indeed, quite the contrary is the case. As noted by the defendant, Congress proved itself able explicitly to limit the applicability of certain parts of the procurement laws by providing that, in certain circumstances, the Secretary would forego normally required advertising and competitive bidding. Since Congress did not so much as mention any of the other procurement requirements, the natural implication must be that the legislature did not intend those other sections and implementing regulations to be limited.

To emphasize this point, it should be noted that there is no language in the cited sections of title 16 which is in any way inconsistent with the operations of the applicable procurement laws. The section particularly relied upon by plaintiff for the proposition that the Secretary could contract for "services . . . for the public . . . at rates approved by him . . ." (emphasis added) likewise does not preclude coincident coverage by procurement laws. Congress, deemed to have knowledge of its own statutory framework, could only have meant that the Secretary is free to set his own rates, so long as they did not exceed the statutory maximum. Similarly, nothing in the Secretary's grant of authority in any way contradicts the language or the applicability of the regulation prohibiting reimbursement for federal income taxes.

For these reasons, we can only conclude that Congress intended for the NPS, like all other executive agencies, to be bound by the procurement laws in the purchase of services, be they transportation services or some other variety, from a private contractor, whether that contractor is otherwise a "concessioner" or not. There is simply no basis for a conclusion that title 16 contains the "other law" necessary to render inapplicable the federal tax or 10 percent limitation provisions of normal procurement procedures.

Having determined that this contract for the purchase of transportation services between the NPS and YPC is within the purview of normal procurement statutes and implementing regulations, we are met with plaintiff's argument that defendant has not shown the Agreement now in issue to be in violation of those procurement laws.

YPC's "deviation" argument pertaining to the federal income tax reimbursement provision is so weak as to be nearly frivolous. The deviation procedures provided for the Department of the Interior in 41 C.F.R. § 14-1.009-2 were clearly not followed by the officers contracting with YPC and, without the approval required by that regulation, the officers lacked actual authority to deviate from Federal Procurement Regulations (FPR). Plaintiff's assertion concerning justified reliance to the contrary notwithstanding, a party contracting with the United States assumes the risk that the official with whom he deals is clothed with the actual authority to enter the subject contract sought to be enforced. Jackson v. United States, 216 Ct. Cl. ____, ____, 573 F.2d 1189, 1197 (1978). Thus, the allowance of federal income taxes as a reimbursable fixed cost is clearly in violation of procurement law and is, therefore, an invalid, unenforceable provision of the Agreement.

Plaintiff's additional assertion, that the contract either was not a "cost-plus-a-fixed-fee" contract or was not comparable to the normal "cost-plus-a-fixed fee" contract where the fixed fee is measured as a percentage of the "estimated cost of the contract", presents a more subtle problem. While we agree with the defendant that the contract, as structured, falls within the definition of a "cost-plus-a-fixed-fee" contract provided in the federal regulations, we can also understand plaintiff's position that it is really not comparable to a normal contract where the fixed fee is figured as a percentage of "estimated contract costs." Here, the fee was figured as a percentage of "average gross investment" in the equipment necessary to perform the contract, with, apparently, no allowance whatsoever for such costs as fuel, operation, or maintenance of that equipment. We cannot say, from the record now before us, why such a contract (purporting to allow, also, reimbursement for federal income taxes) was drafted. We are mindful, however, of the auditors' finding that the dollar amount of the fee involved here did, in fact, exceed 10 percent of the "estimated" cost of the contract." Also of interest here is the representation by plaintiff that, had the parties been aware of the illegality of certain provisions of the contract, it could have been drawn in several other ways so as to provide reasonable compensation in a legally acceptable fashion.

The obvious problem with the substance of the contract now before this court is that the parties attempted to combine two distinct functions, (1) the procurement of transportation equipment and (2) the actual daily operation of that equipment, and to provide for payment only through a 12½ percent allowance on equipment costs and, essentially, a credit on plaintiff's income taxes.

While it is clear that the Government may not now be estopped to deny the validity of the provisions in the express, written contract which are in violation of the FPR, see, e.g., Putman Mills Corp. v. United States, supra, and while it is clear that the Government could no longer be bound by these terms of the Agreement, it is equally clear that the Government bargained for, agreed to pay for, and received the benefit of YPC's services as both an owner and an operator of the transportation equipment in question over the four-year

period that YPC operated under the belief and on the representation of the NPS that the Agreement was valid. For this reason, we hold that plaintiff is entitled to a quantum meruit recovery for the reasonable value of the services received by defendant. Clark v. United States, 95 U.S. 539 (1877); Allstates Van Lines Corp. v. United States, No. 444-75 (Ct. Cl. Order entered Feb. 17, 1978).

Although the facts discussed above, including YPC's original hesitancy to enter into the contract and the NPS' continual urging for action which would have increased the price of performance, are initial indications that the price was, indeed, reasonable, we agree with defendant that the reasonable value of the benefit received by the NPS is a question of fact which is subject to further proof and which may be shown to be less than the amount claimed. For this reason, we are remanding this action to the Trial Division for further proceedings pursuant to Rule 131(c)(2).

In determining the amount which plaintiff is entitled to recover, the Trial Judge is instructed that we do not deem the Government to have assented to payment of more than 10 percent of the total costs of YPC's performance of the contract nor to reimbursement of federal income taxes, since such assent would have been patently illegal, see, e.g., W. Penn Horlogical Inst., Inc. v. United States, 146 Ct.Cl. 540 (1959). The amount of plaintiff's recovery is to be limited accordingly. However, we do determine that plaintiff is to recover the value of services rendered both in providing the equipment (i.e., the costs of ownership, including a reasonable return on money invested in the equipment, fixed costs, etc.) and in operating that equipment (maintenance, fuel, wages, etc.), and that, to the extent the value of plaintiff's service does not exceed the entire, total, provable costs YPC incurred in performance of the Agreement, plus 10 percent, plaintiff should be able to recover the full reasonable value of these services rendered.

For all the reasons discussed above, we hold that plaintiff is not entitled to enforcement of the provisions of the express, written contract at issue here since those provisions are invalid as violative of the applicable procurement law. We also hold, however, that plaintiff is entitled to recover as quantum meruit the reasonable value of the services (as limited above) which it rendered to NPS over the time period in question.

Accordingly, after a thorough consideration of all submissions of the parties, and after oral argument, defendant's motion for summary judgment is denied, plaintiff's cross-motion for summary judgment is denied, and this action is remanded to the Trial Division for further proceedings in accordance with the above opinion.

Section 3. Legal Effect of Regulations

G. L. CHRISTIAN AND ASSOCIATES v. UNITED STATES

312 F.2d 418

United States Court of Claims

Jan. 11, 1963

160 Ct. Cl. 1, 312 F.2d 418 (1963) rehearing denied 160 Ct. Cl. 58, 320 F.2d 345 (1963), cert. denied 375 U.S. 954 (1963), rehearing denied 376 U.S. 929 (1964), cert. denied 382 U.S. 821 (1965).

DAVIS, Judge.

This case, which involves claims totaling $5,156,144.50, grew out of the deactivation of Fort Polk, Louisiana, by the Department of the Army in 1958. At the time when the decision to deactivate Fort Polk was made, a large housing project, which was to consist of 2,000 dwelling units for the use of military personnel at Fort Polk, was being constructed under a contract that had previously been made by the Corps of Engineers pursuant to the provisions of the Capehart Act. The housing contract was terminated by the Corps of Engineers on February 5, 1958, after which numerous claims for damages were submitted to the Government. Most of the claims (from a numerical standpoint) were settled administratively; and the claims asserted in the present litigation remain for disposition because the particular claimants and the administrative agency could not agree on the amounts due the claimants. This suit therefore involves only the residue of the claims.

I

An unusual feature of the case is that the financial interests of the plaintiff, a joint venture consisting of eight individuals operating under the name of G. L. Christian and Associates, were not affected in any way by the termination of the Fort Polk housing contract. In order to explain this anomalous situation, the events that transpired in connection with the making of the contract will be summarized in some detail.

Pursuant to an invitation for bids issued by the District Engineer in charge of the Galveston District of the Corps of Engineers, the plaintiff, on November 16, 1956, submitted a bid on the construction of the Fort Polk housing project under the Capehart Act. The plaintiff's bid consisted of a basic bid plus certain added items. The District Engineer determined that the plaintiff was qualified by experience and financial responsibility to construct housing under the Capehart Act, and that its bid was the lowest acceptable bid submitted

in response to the invitation. The plaintiff's bid was thereupon accepted by the District Engineer in his capacity as contracting officer for the Government. The acceptance was in the form of a "letter of acceptability" dated December 17, 1956.

After its bid for the construction of the Fort Polk housing project was accepted, the plaintiff approached the H. B. Zachry Company in about January 1957 and endeavored to interest that company in forming a joint venture with the plaintiff to construct the project. Zachry was not interested in forming a joint venture with the plaintiff, and so informed it. However, Zachry did indicate a possible interest in obtaining an assignment of the Fort Polk housing project from the plaintiff and handling the job in its entirety. After further discussion, the plaintiff granted Zachry an option to acquire the plaintiff's entire interest in the Fort Polk project for $250,000.

Following these negotiations between the plaintiff and Zachry, the latter approached the Centex Construction Company, Inc., in about February 1957, and proposed that Centex enter into a joint venture with Zachry for the construction of the Fort Polk project. Both Zachry and Centex, which were highly competent construction companies with extensive experience in large-scale enterprises, made estimates regarding the prospective cost of constructing the project and the probable margin of profit in the job, under the price fixed in the plaintiff's bid and in the letter of acceptability. Upon the basis of these calculations, Zachry and Centex concluded that the project was feasible and potentially profitable. Consequently, they decided to take over the Fort Polk housing job from the plaintiff and construct the project as a joint venture.

In furtherance of the decision made by Zachry and Centex, Zachry exercised its option to acquire the Fort Polk project from the plaintiff for $250,000. A document on this matter was signed by Zachry and the plaintiff on March 14, 1957. This document provided that the consideration of $250,000 was to be paid by Zachry to the plaintiff as follows: $100,000 was to be paid "in cash upon approval by the proper governmental agencies of this assignment", an additional $75,000 was to be paid within 9 months, and the final installment of $75,000 was to be paid within 18 months. The document declared that, on the basis of such consideration, "Assignors [the plaintiff] hereby assign, transfer, set over and deliver unto H. B. Zachry Company all of their respective rights, titles and interest held or claimed by Assignors or either of them in and to" the Fort Polk housing job.

A written agreement for the construction of the Fort Polk housing project as a joint venture was entered into by Zachry and Centex on April 9, 1957. This agreement provided (among other things) that Centex would be the managing member of the joint venture and would be in charge of the construction of the project; that such funds as might be required by the joint venture for construction would be advanced in the proportions of one-third by Zachry and two-thirds by Centex; and that the profits (or losses) resulting from construction would be shared by the joint venturers in the proportions of one-third to Zachry and two-thirds to Centex.

Information regarding the existence of the agreements between the plaintiff and Zachry and between Zachry and Centex was furnished to the District Engineer by the attorney for Centex-Zachry at a conference in Galveston. The District Engineer orally expressed approval of the plan for the takeover of the Fort Polk housing job by Centex-Zachry from the plaintiff. It was agreed at the conference that the takeover would be accomplished by means of a formal assignment of the Fort Polk housing contract (when made) from the plaintiff to Centex-Zachry. Subsequently, however, higher authority in the Department of the Army took the position that a housing contract under the Capehart Act could not be assigned. Thereupon, another conference was held in Galveston between the attorney for Centex-Zachry and the District Engineer. At this conference, it was agreed (subject to the approval of higher authority in the Department of the Army) that the transfer of the Fort Polk housing job to Centex-Zachry would be accomplished by means of a subcontract from the plaintiff to Centex-Zachry that would cover the entire job.

After the approval of higher authority in the Department of the Army was obtained with respect to the plan for the transfer of the Fort Polk housing work from the plaintiff to Centex-Zachry by means of a subcontract covering the entire project, a document entitled "Agreement to Sub-Contract with Irrevocable Power of Attorney Attached" was entered into between the plaintiff and Centex-Zachry on June 27, 1957. The agreement stated that the plaintiff relinquished "all its right, title and interest in and to the proposed contract" for the construction of the Fort Polk housing project; that Centex-Zachry "hereby assumes all of the rights and obligations of G. L. Christian and Associates under the Letter of Acceptability * * * and the proposed contract, and further agrees to relieve and save harmless the said G. L. Christian and Associates from its obligations and responsibilities set forth in said Letter of Acceptability * * * and in the proposed contract"; and that Centex-Zachry "hereby covenant and agree to at all times save harmless and keep indemnified the said G. L. Christian & Associates * * * against any and all claims, suits, actions, debts, damages, costs, charges and expenses, * * * and against all liability, losses and damages of every nature whatsoever which G. L. Christian & Associates * * * shall or may at any time sustain or be put to by reason of the aforementioned letter of acceptability, * * * the proposed housing contract * * *, the Power of Attorney * * * made a part hereof, and by the execution of this agreement."

The power of attorney attached to and made a part of this "Agreement to Sub-Contract" irrevocably constituted and appointed Centex-Zachry as the plaintiff's "true and lawful attorney * * * to do any and every act and execute any and every power that Principal * * * might or could do or exercise" in connection with the construction of the Fort Polk housing project, including the authority "to make application for and receive all sums of money due or to become due." The instrument further stated that the plaintiff "hereby represents and agrees that said attorney in fact shall own and be entitled to all moneys and funds payable * * * under said Housing Contract, granting to said attorney in fact authority to collect said funds and to endorse all checks, bills or instruments in connection therewith."

The plaintiff made a profit of $171,516.68 in disposing of the Fort Polk housing job to Centex-Zachry for $250,000, and did not have anything further to do with that project. When a formal contract to cover the construction of the Fort Polk housing project was prepared and signed on July 29, 1957, the plaintiff's name was used as one of the parties to the contract, but the contract was signed on behalf of the plaintiff by Centex-Zachry. Thereafter, Centex (acting for Centex-Zachry) assumed the role of de facto prime contractor, negotiated with the persons interested in furnishing supplies, materials, or services in connection with the performance of the work under the contract, entered into numerous subcontracts, and began the construction of the project. None of these activities involved any expense to the plaintiff, and no claim is asserted against the Government in the present litigation on account of any losses allegedly sustained by the plaintiff in the form of unreimbursed expenses or anticipated profits.

The losses on which the present litigation is based were allegedly sustained by Centex-Zachry, the plaintiff's nominal subcontractor, and by certain of Centex-Zachry's subcontractors. These claimants are maintaining the present action in the name of the plaintiff, the nominal prime contractor, because they, having no privity of contract with the Government, cannot sue the Government in their own names. Severin v. United States, 99 Ct.Cl. 435, 442 (1943), cert. denied, 322 U.S. 733, 64 S.Ct. 1045, 88 L.Ed. 1567 (1944).

Generally, when a prime contractor's action against the Government is based on losses allegedly sustained by subcontractors, the possibility of recovery depends not only upon proof that the subcontractors actually sustained the alleged losses, but also upon proof that the prime contractor is liable to the subcontractors for the damages sustained by the latter. Continental Illinois National Bank & Trust Co. v. United States, 101 F.Supp. 755, 758, 121 Ct.Cl. 203, 244-245 (1952), cert. denied, 343 U.S. 963, 72 S.Ct. 1057, 96 L.Ed. 1361; J. L. Simmons Company, Inc. v. United States, Ct.Cl., decided July 18, 1962, 304 F.2d 886, 888-889. In the present case, the plaintiff is not under any liability to its nominal subcontractor, Centex-Zachry, or to the latter's subcontractors because of any losses which these claimants sustained when the Fort Polk housing contract was terminated by the Government. The plaintiff is insulated from such liability by the provision in the "Agreement to Sub-Contract" dated June 27, 1957, to the effect that Centex-Zachry will "at all times save harmless and keep indemnified the said G. L. Christian & Associates * * * against any and all claims, suits, actions, debts, damages, costs, charges and expenses, * * * and against all liability, losses and damages of every nature whatsoever" arising in connection with the Fort Polk housing contract.

However, the Government, though mentioning the point, has not stressed the Severin doctrine, and we do not believe that it applies in these circumstances. With the Government's full knowledge and assent, Centex-Zachry became in actual fact the prime contractor; it signed the contract with the Government on behalf of the plaintiff and took over the entire role of prime contractor, including the management of performance in the six months prior to the cancellation; the

defendant has settled with it a large part of the claims and has paid its subcontractors through it. For the purposes of the "Severin doctrine", the only fair position in this court is to treat Centex-Zachry as the prime contractor, to which the housing contract has been assigned with the defendant's full consent, and to disregard the nominal plaintiff as if it were no longer involved.

The question remains whether the Anti-Assignment Act absolutely precludes us from recognizing Centex-Zachry as the true party in interest. That statute (R.S. § 3737, 41 U.S.C. §15) speaks imperatively of annulling any Government contract which is transferred, but it has nevertheless been interpreted as being solely for the Government's own benefit and therefore as permitting the Government to assent to and recognize an assignment where it seems appropriate. Maffia v. United States, 163 F.Supp. 859, 862, 143 Ct.Cl. 198, 203 (1958); Thompson v. Commissioner, 205 F.2d 73, 78 (C.A.3, 1953); Federal Mfg. and Printing Co. v. United States, 41 Ct.Cl. 318, 321 (1906); 16 Op.Atty.Gen. 277 (1879); 15 Op.Atty.Gen. 235, 245-246 (1877); 5 Op.Atty.Gen. 738 (1821); but cf. 19 Op.Atty.Gen. 186 (1888). That was certainly done here. Before and during performance of the contract and after its termination, the Government recognized Centex-Zachry as the prime contractor and consented to its full participation in that capacity. It would be unreasonable for us to hold otherwise at this late stage.

II

The Government concedes that the claimants are entitled to be made financially whole, at least with respect to all reasonable expenses that they incurred in preparing to perform work under the Fort Polk housing contract, in partially performing that contract from August 1957 to January 1958, and in meeting the situation that arose when the contract was formally terminated by the Government early in February 1958. The controversy revolves around the proper amounts of the claimants' unreimbursed expenses and the legal question whether the claimants are entitled to recover for anticipated profits. At the time work was suspended in January 1958, the project was only 2.036% complete and the work was substantially behind schedule.

The principal legal question is whether the claimants should be permitted to recover for anticipated profits. In this connection, it is settled that, when the Government enters into a contract, it has rights and it ordinarily incurs responsibilities similar to those of a private person who is a party to a contract (Lynch v. United States, 292 U.S. 571, 579, 54 S.Ct. 840, 78 L.Ed. 1434 (1934); Perry v. United States, 294 U.S. 330, 352, 55 S.Ct. 432, 79 L.Ed. 912 (1935)), and if the Government terminates a contract without justification, such termination is a breach of the contract and the Government becomes liable for all the damages resulting from the wrongful act (United States v. Behan, 110 U.S. 338, 346, 4 S.Ct. 81, 28 L.Ed. 168 (1884); United States v. Spearin, 248 U.S. 132, 138, 39 S.Ct. 59, 63 L.Ed. 166 (1918)). The damages will include not only the injured party's expenditures and losses in partially performing the contract, but also, if

properly proved, the profits that such party would have realized if he had been permitted to complete the contract. Broadbent Portable Laundry Corp. v. United States, 56 Ct.Cl. 128, 132 (1921); see United States v. Behan, supra, 110 U.S. at p. 344, 4 S.Ct. at p. 83. The objective is to put the injured party in as good a position pecuniarily as he would have been in if the contract had been completely performed. Miller v. Robertson, 266 U.S. 243, 257, 45 S.Ct. 73, 69 L.Ed. 265 (1924); Needles for Use and Benefit of Needles v. United States, 101 Ct.Cl. 535, 619 (1944).

The right to recover for anticipated profits arises, however, only if the termination of the contract by the Government is wrongful and constitutes a breach. If the Government has reserved the right to terminate a contract for its convenience and then does so, there is no breach and normally there can be no recovery for the profits that would have been made if the Government had not exercised its reserved right. Davis Sewing Machine Co. of Delaware v. United States, 60 Ct.Cl. 201, 217 (1925), affirmed 273 U.S. 324, 47 S.Ct. 352, 71 L.Ed. 662 (1927); College Point Boat Corp. v. United States, 267 U.S. 12, 45 S.Ct. 199, 69 L.Ed. 490 (1925); De Laval Steam Turbine Co. v. United States, 284 U.S. 61, 73, 52 S.Ct. 78, 76 L.Ed. 168 (1931).

In the present case, although the Fort Polk housing contract did not contain any provision expressly authorizing the Government to terminate the contract for its convenience, the Government contends that the contract should be read as if it did contain such a clause. This argument is largely based upon Section 8.703 of the Armed Services Procurement Regulations. Section 8.703 provided (with an exception which is not pertinent here) that "the following standard clause shall be inserted in all fixed-price construction contracts amounting to more than $1,000," and then proceeded to prescribe a detailed termination clause that began with the unequivocal declaration that "the performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government", and included a formula which did not encompass anticipated profits. As the Armed Services Procurement Regulations were issued under statutory authority, those regulations, including Section 8.703, had the force and effect of law. See Williams v. Commissioner of Internal Revenue, 44 F.2d 467, 468 (C.A.8, 1930); Ex parte Sackett, 74 F.2d 922-923 (C.A.9, 1935). If they applied here, there was a legal requirement that the plaintiff's contract contain the standard termination clause and the contract must be read as if it did. College Point Boat Corp v. United States, supra; De Laval Steam Turbine Co. v. United States supra; Monolith Portland Midwest Co. v. R. F. C., 178 F.2d 854, 858 (C.A.9, 1949), cert. denied, 339 U.S. 932, 70 S.Ct. 668, 94 L.Ed. 1352 (1950).

The question of whether the regulations did govern the present contract depends upon Section 1.102 which limited their applicability to "purchases and contracts made by the Department of Defense * * * for the procurement of supplies or services which obligate appropriated funds * * *" (emphasis added). Plaintiff contends that

the Fort Polk housing contract did not "obligate appropriated funds." It points out that the construction of housing projects at military installations under the Capehart Act was financed by means of loans from private lending institutions, and the contractors and subcontractors doing the construction work were paid out of the proceeds of such loans. In this case, the money for the construction of the Fort Polk housing project was loaned by the Republic National Bank of Dallas, and the progress payments to Centex-Zachry and its subcontractors during the partial construction of the project were derived from the loans made by the Republic National Bank of Dallas.

On the other hand, the Government insists that it was anticipated that the cost of constructing the Fort Polk housing project would ultimately be liquidated out of appropriated funds, because it was expected that the housing project would be completed, that the dwelling units would be occupied by military personnel assigned to Fort Polk, and that the quarters allowances of such military personnel (provided for in the annual appropriations to the Department of the Army) would be used to pay off, over a period of years, the loans made by the Republic National Bank of Dallas. Also, the loans made by the bank for the construction of the Fort Polk housing project were insured by the Federal Housing Administration, and from the beginning there was at least a possibility that the F.H.A. might be compelled to make good on its commitments to the bank. As indicated in footnote 9, supra, on completion of the project or on termination of the contract, the Government specifically undertook (in the contract with plaintiff and accompanying agreements) to take over ownership of the mortgagor-corporations, to assume liability to the mortgagee for sums advanced, and pay the outstanding notes. Moreover, Centex-Zachry and its subcontractors have looked to the Government for settlement and payment of their claims, and have received very large amounts of appropriated funds in the partial settlements which have already been accomplished.

Despite the unusual character of the contract, we have little difficulty in reading the Procurement Regulations, especially the rule requiring the insertion of the standard termination clause, as applying to the present type of agreement which could and would obligate appropriated funds, ultimately if not immediately. As we see it, the primary aim of the exclusion of agreements which do not obligate appropriated funds is to put to one side the contracts of the conventional nonappropriated-fund instrumentalities of the armed forces, such as post exchanges, ships' stores, officers' clubs, and the like. The contracts of such agencies, although made by Government officers, do not bind appropriated funds, do not create a debt of the United States, and may not be vindicated in this court. Borden v. United States, 116 F.Supp. 873, 126 Ct.Cl. 902 (1953); Pulaski Cab Co. v. United States, 157 F.Supp. 955, 141 Ct.Cl. 160 (1958); cf. Standard Oil Co. of California v. Johnson, 316 U.S. 481, 485, 62 S.Ct. 1168, 86 L.Ed. 1611 (1942). Those are the contracts which the Procurement Regulations declare are to be governed by their own separate rules. But the Regulations do not intimate that contracts which obligate the United States, and create a debt of the United States upon which suit is and can be brought, are also excluded simply because the use or

obligation of appropriated funds is delayed and to some extent contingent. There is no doubt that the contract in this case bound the United States and that appropriated funds are importantly involved. The contractor and subcontractors did not hesitate to consider the United States, which of course pays through appropriated funds, liable for the cancellation of the contract. Large sums of appropriated monies were accepted after administrative settlement, and suit is now brought in a court whose judgments are payable through appropriated funds. It would be extraordinary, we think, if an agreement for the breach of which the United States must pay through appropriations was not deemed to obligate such funds.

The Congressional authorization for the contract, i.e., the Capehart Act itself, recognizes affirmatively that appropriated funds will be involved. One section authorized "to be appropriated such sums as may be necessary to provide for payment to meet losses from such guaranty" given by the Defense Department to the Armed Services Housing Mortgage Insurance Fund (12 U.S.C. § 1748b(b)(2)(1958 ed.)). Another provision permits the military departments to use "[a]ppropriations for quarters allowances or appropriate allotments" for the payment of principal, interest, and other obligations of mortgagor corporations acquired by the Government (42 U.S.C. § 1594b (1958 ed.)) (see footnote 9, supra). The Congress which passed the Capehart Act understood that in the long run the housing contracts thereunder could and would "obligate appropriated funds."

We are not, and should not be, slow to find the standard termination article incorporated, as a matter of law, into plaintiff's contract if the Regulations can fairly be read as permitting that interpretation. The termination clause limits profit to work actually done, and prohibits the recovery of anticipated but unearned profits. That limitation is a deeply ingrained strand of public procurement policy. Regularly since World War I, it has been a major government principle, in times of stress or increased military procurement, to provide for the cancellation of defense contracts when they are no longer needed, as well as for the reimbursement of costs actually incurred before cancellation, plus a reasonable profit on that work--but not to allow anticipated profits. In World War I, there was the Act of June 15, 1917, 40 Stat. 182, and the Dent Act of 1919, 40 Stat. 1272, both of which were held to prevent awards of prospective or possible profits. Russell Motor Car Co. v. United States, 261 U.S. 514, 523-524, 43 S.Ct. 428, 67 L.Ed. 778 (1923); Barrett Co. v. United States, 273 U.S. 227, 235, 47 S.Ct. 409, 71 L.Ed. 621 (1927); De Laval Steam Turbine Co. v. United States, 284 U.S. 61, 73, 52 S.Ct. 78, 76 L.Ed. 168 (1931). In World War II, the termination provisions used by the war contracting agencies (at least since late 1941) uniformly disallowed anticipated profits. See the opinion of Mr. Justice Douglas in United States v. Penn Foundry & Mfg. Co., 337 U.S. 198, 214-216, 69 S.Ct. 1009, 93 L.Ed. 1308 (1949), also 337 U.S. at 205-206, 69 S.Ct. at 1012-1013; Office of Contract Settlement, A History of War Contract Termination and Settlements (July 1947), pp. 1, 27. The same policy against unearned profits was embodied in the Contract Settlement Act (Act of July 1, 1944, 58 Stat. 649), Section 6(d) (5) which directed war contracting agencies, in

settling terminated contracts, to award "such allowance for profit on the preparations made and work done for terminated portion of the war contract as is reasonable under the circumstances"; the regulation issued by the Office of Contract Settlement specifically limited profit to preparations made and work done (32 C.F.R., 1944 Supp., Sec. 8006.3(c), p. 3065). Similarly, the Lucas Act of August 7, 1946, 60 Stat. 902, authorizing the departments and agencies "to consider, adjust, and settle equitable claims of contractors", limited the amount of the claim to "losses (not including diminution of anticipated profits) incurred * * *." Since World War II, the standard termination clauses promulgated by the Defense Department and its constituent agencies have taken the same tack. Literally thousands of defense contracts and subcontracts have been settled on that basis in the past decades.

This history shows, in our view, that the Defense Department and the Congress would be loath to sanction a large contract which did not provide for power to terminate and at the same time proscribe anticipated profits if termination did occur. Particularly in the field of military housing, tied as it is to changes and uncertainties in installations, would it be necessary to take account of a possible termination in advance of completion, and to guard against a common law measure of recovery which had been disallowed for so many years in military procurement. The experienced contractor in this case, for its part, could not have been wholly unaware that there might be a termination for the convenience of the Government, which the defendant would not deem a breach. Although the housing contract does not contain such an express provision, there are at least four references in it (and the accompanying agreements) to a "termination of the Housing Contract for the convenience of the Government" and to the Government's assumption of certain obligations in that event. These references must have had some meaning. For many years unearned profits have not been paid upon such terminations, and we think it probable, too, that Centex-Zachry knew of that general policy.

For all of these reasons, we believe that it is both fitting and legally sound to read the termination article required by the Procurement Regulations as necessarily applicable to the present contract and therefore as incorporated into it by operation of law.

It follows that Centex-Zachry and its subcontractors cannot recover unearned but anticipated profits.

CHAMBERLAIN MANUFACTURING CORPORATION

ASBCA No. 18103 (1973)

OPINION ON MOTION TO DISMISS

The Government has moved that so much of the Complaint herein as requests relief pursuant to the Government Property clause (ASPR 7-104.24(a)) be dismissed from this appeal from a partial termination for default.

It is undisputed that the clause was not expressly incorporated into the contract, inasmuch as it was not one of the clauses designated by an "X" in the space provided in the Invitation for Bids and thus was not incorporated by reference. It is equally clear that the contract authorized use of Government-owned property by the contractor in the performance of the contract and that Government-owned property was, in fact, used therein.

In opposition to the Government's motion to dismiss, appellant contends that the Government Property clause must be read into the contract inasmuch as ASPR requires that the clause be inserted in contracts "when a Department is to furnish to the contractor, or the contractor is to acquire Government property." (ASPR 7-104,24(a)).

Appellant cites G. L. Christian Associates v. United States, 160 Ct. Cl. 1; rehearing denied 160 Ct. Cl. 48, as authority for its contention. That case held that it was "both fitting and legally sound to read the termination [for convenience of the Government] article required by the Procurement Regulations as necessarily applicable to the present contract and therefore as incorporated into it by operation of law."

It is clear that the Court's decision in Christian was grounded largely upon the public procurement policy which undergirds the Termination for Convenience clause; to wit, the prohibition against recovery of anticipated but unearned profits. Thus, at page 15, the Court stated:

> We are not, and should not be, slow to find the standard Termination article incorporated, as a matter of law, into plaintiff's contract if the Regulations can fairly be read as permitting that interpretation. The Termination clause limits profit to work actually done, and prohibits the recovery of anticipated but unearned profits. That limitation is a deeply ingrained strand of public procurement policy. Regularly since World War I, it has been a major government principle, in times of stress or increased military procurement, to provide for the cancellation of defense contracts when they are no longer needed, as well as for the reimbursement of costs actually incurred before cancellation, plus a reasonable profit on that work--but not to allow anticipated profits.

The importance of the Termination for Convenience clause as a expression of public policy was emphasized in the court's denial of a rehearing in Christian. The court equated that policy with the Government's policies regarding contingent fees, anti-discrimination and cost-plus-a-percentage-of-cost contracting in stressing that "procurement policies set by higher authority [should] not be avoided or evaded (deliberately or negligently) by lesser officials or by a concert of contractor and contracting officer."

The Government Property Clause (see Appendix) bespeaks no procurement policy comparable to the policy against allowance of anticipated profits which the court in Christian determined to be of such paramount importance that incorporation of the Termination for Convenience clause into the contract by operation of law was mandated. Basically, the clause sets forth requirements for the management of the property, many of which would otherwise be reasonably inferred under the law of bailment, and provides for administrative resolution of problems which would otherwise be the bases for breach of contract actions. While certainly not unimportant, nothing contained in the clause approaches the stature of a public procurement policy so as to require its incorporation into the contract by operation of law.

Incorporation of a clause into a contract by operation of law is an extraordinary action and should be undertaken only under extraordinary circumstances. We fail to perceive such circumstances here. If incorporation of the provisions of the clause is essential to obtaining reimbursement for damages incurred by appellant as a result of the Government's alleged derelictions in providing the Government-owned property, reformation of the contract can be sought in court. Or a suit for breach of contract can be instituted. Moreover, the absence of the clause from the contract does not impair appellant's right to prove before this Board that Government caused delays in connection with furnishing the proper Government property constituted excusable cause for its default.

Also, although the Government has not questioned that the clause was mandated by ASPR 7-104.24(a), such applicability is not free from doubt since the property in question was being held by the appellant under the facilities contract and was merely "authorized" for use on an "as is" basis. We note further that the record, as now constituted, does not reveal that appellant's claim for equitable adjustment was ever presented to the contracting officer or decided by him. Therefore, unless documentation of that claim and decision can be entered into the record, appellant's request to this Board for such relief is premature.

Accordingly, the Government's motion is granted and so much of the Complaint as requests relief pursuant to the Government Property clause is hereby stricken. Appellant may amend its Complaint in light of this decision within thirty days of the date hereof.

WILLIAMS v. UNITED STATES

127 F. Supp. 617 (Ct. Cl. 1955),

cert. denied, 349 U.S. 938 (1955)

JONES, Chief Judge.

This case involves a contract between the plaintiffs and the defendant for the construction of a paved road at Fairbanks, Alaska. The facts have been set out in detail in our findings and will be referred to only to the extent necessary for an understanding of the issues which gave rise to the suit.

* * * * *

The other issue in the case involves questions of law and arises out of an entirely different set of facts from those just discussed. One of the items involved in the contract was the paving of the road with asphalt. In order to do this work, the plaintiffs had considered renting or buying an asphalt plant in the State of Washington. The rental cost of such a plant would have been approximately $10,700. After the job got under way, the plaintiffs learned that there was a plant located at Ladd Air Force Base which was under the jurisdiction of one Major Russell who was responsible for the maintenance of the roads at the Air Force Base. One of the plaintiffs made inquiry of Major Russell as to whether arrangements could be made for the plaintiffs to use the plant. Major Russell suggested that certain roads on the Base needed seal coating and if plaintiffs would do this work they could use the plant on the road job. After certain negotiations during which Major Russell represented that he had been given authority to enter into the agreement, the plaintiffs submitted a written proposal which was accepted by Major Russell as Air Installation Officer, whereby the plaintiffs agreed to seal coat the main paved roads on the Base in return for use of the asphalt plant to produce asphalt for the road job.

Upon the approval of that agreement by Major Russell, the plaintiffs proceeded to carry out their part of the agreement which they did by seal coating some nine or ten miles of roads in a manner satisfactory to the Air Force Base authorities. The value of such work was in excess of $10,000.

In the meantime, Major Russell had forwarded to his superior officer copies of the agreement which he had approved for seal coating of the roads in return for the use of the asphalt plant by the plaintiffs. Shortly after the seal-coating job had been completed but prior to the time when the asphalt plant had been delivered to the

plaintiffs, Major Russell's superior officer advised him that there was no authority for such an agreement and that work thereunder should be stopped immediately. Major Russell replied that the work had already been completed and urged that since the plaintiffs had carried out their part of the agreement and since the agreement was in the best interests of the Government, the plaintiffs should be permitted to use the asphalt plant. However, Major Russell's superior officer refused to change his position. Major Russell advised the plaintiffs of his inability to carry out the agreement but suggested that arrangements be made to have the plant borrowed by the Alaska Road Commission and then rented by the Commission to the plaintiffs. Major Russell stated that if this could be arranged he would arrange for payment for the work which had already been done by the plaintiffs at Ladd Field. As a result the asphalt plant was turned over by Major Russell to the Alaska Road Commission which in turn made it available to the plaintiffs at a rental figure of $1.30 per ton. In agreeing orally to that rental figure, the plaintiffs relied upon the assurance previously given by Major Russell that they would be paid for the work which they had already performed at Ladd Field.

The plaintiffs used the asphalt plant in paving the roads under their contract. At or about the time the paving was completed, Major Russell advised the plaintiffs that payment could not be made by the defendant for the seal-coating work which had been performed by them at Ladd Field. Thereupon the plaintiffs refused to sign a change order prepared by the Alaska Road Commission reducing the unit price of asphalt by $1.30 per ton. However, the contracting officer, in the final settlement under the plaintiffs' contract, directed that the change order be considered a written order changing the specifications and that the rental stipulated therein be deemed to be an equitable adjustment of the contract price. Upon completion of the contract, it was determined that 7,820.3 tons of asphalt had been actually used and accordingly $10,166.39 was deducted from payments to the plaintiffs. On appeal to the head of the department, the decision of the contracting officer was affirmed. No amount has been paid to the plaintiffs on account of the work which they did at Ladd Field.

[2] What the plaintiffs are suing for is the amount just referred to which was deducted from amounts otherwise due them under the contract involved in this proceeding. No question is raised by the defendant as to the fact that the plaintiffs performed the services or that the services were worth at least the amount now sued for. The sole defense of the defendant is that since Major Russell was not a contracting officer with full authority to bind the Government in the fullest contractual sense, the plaintiffs cannot recover on this item. Surely, compelling reasons would be required to have any court sanction any such inequitable result and we do not think such reasons exist. Whatever might be said with respect to the lack of authority on the part of Major Russell to enter into a binding contract, it is certainly true that the plaintiffs proceeded in an entirely appropriate and proper manner in entering into the agreement and did so only after they were assured by Major Russell that he had authority to do so. Likewise, Major Russell had also proceeded in good faith in the entire matter and had been assured by Washington that such an

arrangement would be satisfactory. The roads that were seal coated were wholly within the base where the contracting officer was located. It seems incredible that he did not know all about the agreement and by his inaction ratify it. Certainly he did not repudiate the agreement, and he did not appear as a witness. The plaintiffs carried out their part of the agreement for which the Government received the benefit. We feel that there then arose an implied contract under which the defendant was obligated to pay the value of the services rendered by the plaintiffs. Recovery is accordingly allowable for this item in the amount deducted under the contract, $10,166.39. * * *

* * * * *

BALTIMORE & O.R. CO. v. UNITED STATES

(261 U.S. 592) (1923)

Mr. Justice SANFORD delivered the opinion of the Court.

The Railway Company filed its petition, under the Dent Act (March 2, 1919 c. 94. 40 Stat. 1272 [Comp. St. Ann. Supp. 1919 §§ 3115 14/15e-3115 14/15e]), to recover compensation for constructing temporary barracks for the use of United States troops under an "implied agreement" alleged to have been entered into by it with the United States, in December, 1917, through Col. Kimball, Expeditionary Quartermaster of the War Department, at Locust Point, Baltimore, Maryland, acting under the authority of the Secretary of War. The Court of Claims, after a hearing on the merits, and upon its findings of fact, dismissed the petition (57 Ct. Cl. 140).

The material facts shown by the findings are these: The Railroad Company owned at Locust Point, a suburb of Baltimore, eight piers, which were guarded by its civilian employees. At the request of Col. Kimball, who was in charge of the expeditionary depot at Baltimore and of the supplies arriving for shipment to Europe, the company, in October, 1917, leased one of these piers to the Government. Two of the other piers with much other property belonging to the company were destroyed or damaged by a fire supposed to be of incendiary origin. Thereupon Col. Kimball and the president of the company separately requested the Secretary of War to send a guard; the vice president of the company offering to supply a wrecking train as quarters for them. Two companies of the National Guard were sent to Locust Point, with sufficient tentage. They were quartered for a time in the wrecking train furnished by the company. Their duty was primarily to protect the government property and the piers leased by it, sending patrols throughout the railroad yard to guard cars containing its property, and generally to guard all the piers and property at Locust Point. The company, however, also maintained the civilian guards and a fire department for all of its property, whether leased or not. Later, the wrecking train having been moved away by the company, the troops moved into tents. The weather during the fall and winter was very cold and inclement. Most of the soldiers were Baltimoreans and were frequently visited by their relatives. There was some sickness among the soldiers. Their relatives complained to the railroad officials of the hardship that they had to undergo in the tents; and these officials were anxious to make them as comfortable as possible. Several times in very cold weather Col. Kimball remarked to the company's agent at Locust Point, whose duty it was to confer with him on railroad matters, that the troops ought to have better quarters. On one occasion this agent suggested fitting up an unused transfer shed belonging to the company, standing near the pier that had been leased to the Government. Col. Kimball agreed that it would be a fine thing to make the men as comfortable as possible. He did not, however, ask that this work be done; and nothing was said about compensation. This agent having taken up with the company's officials the matter of fitting up the

transfer shed, its chief engineering draftsman was directed to see as to the adaptability of the transfer shed for barracks. He made blueprint plans for remodeling the shed; which he showed to the officer in command of the troops, to learn whether, in his opinion, they would satisfactorily house the troops. This officer, while not undertaking to approve the plans, suggested the amount of facilities that would be required. Nothing was said to him, however, about expense or compensation for the work. The construction of the temporary barracks was completed in the latter part of December; and the troops moved in. Two more piers were afterwards leased by the company to the Government. The barracks were occupied by the troops until May, 1919 and the piers were returned to the company in June, 1919. No government officials connected with the work at Locust Point had any authority to order the construction of the temporary barracks; and no orders were given by any of them for such construction. The subject of compensation was not mentioned in any conversations between these officers and the railroad officials until more than a week after the barracks had been completed, when the chief draftsman told the officer in command of the troops that he thought the Government should reimburse him for some of his trouble.

The Court of Claims made no finding as to the amount expended by the Company in constructing the temporary barracks; the company having as the court stated, submitted no evidence to establish the different items of its claim. In the absence of a finding as to the amount of the expenditures, as to which the company had the burden of proof, the judgment of the Court of Claims might be properly affirmed upon that ground. Crocker v. United States, 240 U.S. 74, 82, 36 Sup. Ct. 245, 60 L. Ed. 533. However, as the Government does not here question the amount of the claim, we pass to its further consideration upon the merits.

Upon the findings of fact we conclude that the petition was rightly dismissed, without reference to the amount of the claim, for two reasons:

1. The Dent Act authorizes the award of compensation for expenditures connected with the prosecution of the war when they were made by the claimant upon the faith of an "agreement, express or implied", entered into by him with an officer or agent acting under the authority of the Secretary of War or of the President, and such agreement was not executed in the manner provided by law. 40 Stat. 1272, 1273; American Smelting Co. v. United States, 259 U.S. 75, 79, 42 Sup. Ct. 420, 66 L. Ed. 833. The act was intended to remedy irregularities and informalities in the mode of entering into such agreements; not to enlarge the authority of the agents by whom they were made. To entitle the claimant to compensation under such an agreement it is essential that the officer or agent with whom it was entered into should not merely have been holding under the Secretary of War or the President, but that he should have been acting within the scope of his authority. It was not intended, for example, that an officer in one branch of the military service or one of inferior rank could bind the Government by an agreement as to matters relating to an entirely different branch of the service or within the control of his

superior officers, as to which he entered, although beyond his authority, should become binding upon the Government because it was made in the form of an express agreement not executed within the legal manner or of an implied agreement merely--that is, that his authority should be enlarged by the irregularity or informality with which it was executed. See United States v. North American Transportation & Trading Co., 253 U.S. 330, 333, 40 Sup. Ct. 518, 64 L. Ed. 935, and Portsmouth Harbor Land Co. v. United States, 260 U.S. 327, 43 Sup. Ct. 135, 67 L. Ed.--, decided by this Court, December 4, 1922.

Here, however, there is no finding that Col. Kimball had any authority to enter into the alleged agreement; and, on the contrary, such authority is negatived by the finding that none of the government officials connected with the work at Locust Point had any authority to order the construction of a temporary barracks.

2. The "implied agreement" contemplated by the Dent Act as the basis of compensation is not an agreement "implied in law", more aptly termed a constructive or quasi contract, where, by fiction of law, a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress, but an agreement "implied in fact", founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding. * * * That this provision of the Dent Act only to such actual agreements implied in fact from the circumstances, is not only indicated by its purpose, as expressed in the caption, of providing relief in cases of "contracts" connected with the prosecution of the war, but is conclusively shown by the fact that the "agreement" is described as one "entered into, in good faith", by the claimant, with an officer or agent of the Government, upon the faith of which expenditures have been made or obligations incurred, and which has not been executed as prescribed by law; this language aptly describing an actual agreement implied in fact, but being manifestly inapplicable to a constructive agreement implied by law.

Such an agreement will not be implied unless the meeting of minds was indicated by some intelligible conduct, act or sign. Woods v. Ayres, 39 Mich. 351, 33 Am. Rep. 396, and cases there cited. And so an agreement to pay for services rendered by the plaintiff will not be implied when they were rendered spontaneously, without request, as an act of kindness (Woods v. Ayres, 39 Mich. 351, 33 Am. Rep. 396); when the plaintiff did not expect payment, or under the circumstances did not have reason to entertain such expectation (Coleman v. United States, 152 U.S. 96, 99, 14 Sup. Ct. 473, 38 L. Ed. 368; Lafontain v. Hayhurst, 89 Me. 388, 391); when the defendant understood that the plaintiff would neither expect nor demand remuneration (Harley v. United States, 198 U.S. 235, 25 Sup. Ct. 634, 49 L. Ed. 1029); when unusual expenses were incurred, without special request or previous notice, and without any intimation or suggestion that compensation would be looked for or made (Baltimore & Ohio Railroad v. United States, 261 U.S. 385, 43 Sup. Ct. 384, 67 L. Ed.--decided by this court March 19, 1923); when the defendant neither requested the services nor assented to receiving their benefit under circumstances

negativing any presumption that they would be gratuitous (Railway Co. v. Gaffney, 65 Ohio St. p. 116, 61 N. E. 152; 2 Abb. Tr. Ev. [3d Ed.] 912, and cases there cited); and when the circumstances account for the transaction on a ground more probable than that of a promise of recompense. Wood v. Ayres, 39 Mich. 351, 33 Am. Rep. 396.

In the present case the findings of fact show that Col. Kimball, did not order the construction of the barracks, which was voluntarily undertaken by the company, without saying anything whatever about compensation, apparently from its own desire to provide for the comfort of the troops, who were guarding its property as well as that of the Government, after it had removed the wrecking train which it had offered to supply as their quarters. It does not appear from the findings that Col. Kimball requested the construction of the barracks; that the company intimated that it would expect payment from the Government or that Col. Kimball suggested that such payment would be made; or that the company in fact expected compensation. It is clear that these findings furnish no substantial basis for implying an agreement that the Government would pay the cost of the construction.

Hence, a second essential element in the establishment of the company's claim is lacking.

And the judgment of the Court of Claims is Affirmed.

Section 5. Equitable Estoppel

EMECO INDUSTRIES, INC. v. THE UNITED STATES

Ct. Cl. No. 547-71 (1973)

OPINION

PER CURIAM: This case comes before the court on plaintiff's motion, filed August 23, 1973, for judgment and for adoption of the recommended decision filed May 30, 1973, by Trial Judge Joseph V. Colaianni pursuant to Rule 134(h), defendant having withdrawn its previously filed notice of intention to except to said decision. Upon consideration thereof, without oral argument since the court agrees with the Trial Judge's decision, as hereinafter set forth, it hereby affirms and adopts the same as the basis for its judgment in this case. Therefore, plaintiff is entitled to recover and judgment is entered for plaintiff with the amount of recovery to be determined pursuant to Rule 131(c).

OPINION OF TRIAL JUDGE

COLAIANNI, Trial Judge: The claim in this case arises from a September 24, 1969, solicitation from defendant, acting through the Federal Supply Service of its General Services Administration, hereinafter referred to as "GSA", for the manufacture of 31,896 index card boxes. The solicitation indicated that the boxes were to be delivered in varying specified quantities to 1,500 addresses, and bids were requested F.O.B. destination.

Following the bid opening, defendant on October 16, 1969, requested a plant inspection report to determine if plaintiff's facilities were capable of producing the entire 31,896 boxes within the time specified by the solicitation. The inspection was completed on October 24, 1969, and the report indicated that plaintiff was capable of performing the contract within the 70 days required by the contract, notwithstanding that plaintiff had never manufactured index card boxes before. The report further noted that plaintiff had made arrangements to purchase four dies, at a total cost of $10,300, which were essential in order for it to manufacture the boxes. The dies were to be delivered within 30 days after defendant had approved plaintiff's preproduction sample.

In the meantime, although unknown to plaintiff, defendant on October 17, 1969, received a late bid from Art Steel Company, Inc. On October 22, 1969, following an investigation, defendant's contracting officer concluded that the late receipt of Art Steel's bid was due solely to a delay in the mail and that the bid should therefore be considered for award. Art Steel offered to build boxes to defendant's specifications at a price of $2.78 each, but limited its bid by the following clause, to only 29,183 boxes:

> Bidding on quantity less than specified, in accordance with provision contained in paragraph 10C of Standard Form 33A. Bid covers all quantities specified except 2,713 boxes for Navy requirements * * *.

The fact that Art Steel's offer to manufacture and ship 29,183 boxes was low was not communicated to plaintiff or any of the other six bidders whose offers had been opened on October 14, 1969.

Further, although the date of its occurrence is not established in the record, there is no doubt that the contracting officer signed plaintiff's offer to supply the entire quantity of boxes. Equally well established, however, is the fact that the signed contract was never delivered to plaintiff. The record also indicates that defendant originally intended to award the entire contract to a single bidder. However, following the receipt of Art Steel's late bid, the contracting officer apparently decided that it would be in the best interest of the Government to split the award between plaintiff and Art Steel. The offerors whose bids had been opened on October 14, 1969, were not told of defendant's intention to split the award.

Plaintiff on December 8, 1969, received defendant's December 3, 1969, purchase order for 2,713 boxes, representing the entire requirement of the Navy, at a total price of $8,247.52. The 2,713 boxes were to be shipped to 1,355 of the contract's 1,500 destinations. Immediately upon receipt of the purchase order, plaintiff set about to manufacture a preproduction sample by hand. After receiving defendant's approval of its preproduction sample, plaintiff began placing orders for the necessary dies. The dies and other necessary tooling were on hand by February 1970. Plaintiff had also, by December 16, 1969, begun to place orders for the necessary material for the production of the entire quantity of 31,896 boxes, and by February 23, 1970, all of the necessary material had been ordered.

Plaintiff began producing boxes on February 4, 1970. The 2,713 boxes covered by the December 3, 1969, purchase order were completed and delivered to the specified destinations within the agreed time. Plaintiff, however, did not discontinue production upon completion of the 2,713 boxes. Plaintiff, apparently with an eye towards manufacturing all of the 31,896 boxes called for by defendant's original solicitation, instead continued with the production of the remaining number of boxes.

During early March of 1970, while checking a delivery requirement with the Department of Defense, plaintiff accidentally, and for the first time, learned that defendant had placed an order for the remaining 29,183 boxes with Art Steel Company, Inc. Plaintiff immediately stopped its production process, but by this time it had already completed some 6,000 boxes over the 2,713 required by defendant's purchase order. In addition, plaintiff wrote a letter of protest to the defendant.

In an exchange of letters that followed, plaintiff learned of Art Steel's late bid to manufacture 29,183 boxes for delivery to the 145 destinations at a price of $2.78 each. Plaintiff was further advised that Art Steel's bid was determined to have been timely, since the delay in its arrival was found to be the fault of the Post Office. Defendant further advised plaintiff that Art Steel's bid, although not directed to the entire quantity of boxes stated in the solicitation, was still felt to be responsive since a partial bid was authorized by article 10(c) of the instructions that accompanied the solicitation. Defendant went on to admit that it had originally intended to award the entire contract at a single price to a single bidder, but that upon reflection it was felt to be in the Government's best interest to resort to a split award between plaintiff and Art Steel. After failing to resolve the matter on an informal basis, plaintiff filed suit in this court on July 19, 1971.

The questions which must be resolved are whether plaintiff was justified under the circumstances of this case in incurring expenses which would only have been required and necessary if it had been awarded a contract for manufacturing the entire quantity of boxes covered by defendant's solicitation, and, if it was, what is it entitled to recover?

I. Solicitation did not Preclude Split Awards

Plaintiff, in the main, argues that the solicitation as written was intended to obligate defendant to purchase the entire quantity of 31,896 boxes from a single source. Building on that theme, plaintiff argues that the solicitation was for a definite quantity and that a split award was therefore not permitted. In support of its position, plaintiff initially points to the schedule section of the solicitation which contains the following notation under the "Supplies/Services" column:

Definite Quantity Contract for FSC Class 7520--Box, Index Card

In addition, plaintiff argues that the continuation page of the solicitation was set up to require a single bid on the definite quantity of 31,896 boxes. Plaintiff further contends that defendant, by its own admission, intended to award the contract to a single bidder.

Finally, plaintiff argues that if the contract can be construed to permit partial awards to more than one source, it is ambiguous and defendant, as author of the contract, should suffer the consequences.

Defendant argues that the intention to award the contract to a single bidder does not appear in the solicitation, and that in any event--

> * * * in view of the fact that Art Steel's bid was responsive and low, the contracting officer had no choice except to make the award to Art Steel up to the limitation specified in * * * [Art Steel's] bid, as well as the * * * award to plaintiff for the balance of the quantity.

Defendant further contends that article 10(c) of the solicitation was designed to permit a bidder to place limitations on the quantities bid, and to reserve to the Government the right to make awards on such a basis unless the bidder otherwise specified in its bid.

A careful reading of article 10(c) supports defendant's position. In the first place, the article clearly allows the Government to-

> * * * accept any item or group of items of any offer, unless the offeror qualifies his offer by specific limitations.

Plaintiff placed no limitations on its bid. Going on, the article further provides that the--

> * * * Government reserves the right to make an award on any item for a quantity less than the quantity offered at the unit prices offered unless the offeror specifies otherwise in his offer.

Again plaintiff placed no conditions on its bid, and in the light of this defendant made an award to plaintiff for 2,713 boxes instead of the entire quantity of 31,896. Furthermore, plaintiff's argument that article 42, entitled "All or None" bids of the GSA supplemental provisions, prevented it from limiting its bid to an "all or none" offer, is incorrect. That article clearly was intended to limit the use of an "all or none" bid in requirements and indefinite quantity contracts. Since the solicitation in question is entitled a definite quantity contract, article 42 was clearly not applicable, and plaintiff could have conditioned or limited its offer.

Further, plaintiff's argument alleging an ambiguity in the terms of the solicitation is found to be unpersuasive. An objective reading of the entire contract fails to indicate the existence of an ambiguity with respect to the specifications. Article 10(c) clearly, and in bold face type, informs the bidders of their right, in the absence of language to the contrary in the schedule section of the solicitation, to submit offers on less than the quantity specified. Nothing in the schedule of the solicitation in question conflicts with the option given to the bidders by article 10(c). It is, accordingly, concluded that the terms of the specifications are clear and unambiguous.

In sum, there is nothing in the solicitation which precluded defendant from making a split award to both plaintiff and Art Steel Company, Inc.

II. Parties Did Not Enter Into a Formal Contract for Manufacture and Delivery of 31,893 Boxes

Plaintiff makes much of the fact that defendant's contracting officer signed the solicitation which plaintiff had filled out, signed, and submitted in time for the October 14, 1969 bid opening. Plaintiff contends that the signing of its solicitation by defendant's contracting officer amounts to an acceptance by defendant of its offer. Defendant, on the other hand, points out that a signed copy of plaintiff's solicitation has never been delivered to plaintiff. Defendant then argues that a binding contract cannot come into existence if defendant's acceptance was never communicated to the offeror. While the record is not clear, it appears that plaintiff was not aware that defendant had signed its solicitation until after the split awards to both it and Art Steel for the manufacture of the 31,896 boxes had been made.

Plaintiff's argument is unpersuasive, for while there is no single or best way for an acceptance to be communicated to an offeror, there is no doubt that an acceptance must be communicated. In a case involving a similar issue, this court, after a thorough review of relevant law, held that communication of an acceptance must be made before a valid contract can come into being. See Slobojan v. United States, 136 Ct. Cl. 620 (1956). Specifically, this court stated, at p. 626:

> The Federal courts follow the principles set forth above and hold that where the validity of a bilateral contract is involved it is necessary that acceptance of the offer be communicated to the offeror before a valid and binding contract is made. Burton v. United States, 20 U.S. 344, 384-385 (1906); Dickey v. Hurd, 33 F. (2d) 415, 418 (C.A. 1, 1929), certiorari denied, 280 U.S. 601; Barnebey v. Barron G. Collier, Inc., 65 F. (2d) 864, 868 (C.A. 8, 1933); Shubert Theatrical Co. v. Rath, 271 Fed. 827, 833-834 (C.A. 2, 1921). * * * This court has recently held that even if a letter containing an acceptance of an offer is mailed, the acceptance is not final until the letter reaches its destination, and can be withdrawn at any time prior to receipt by the offerer. Rhode Island Tool Company v. United States, 130 C. Cls. 698, 128 F. Supp. 417 (1955); Harvey Franklin Dick v. United States, 113 C. Cls. 94, 82 F. Supp. 326 (1949).

Plaintiff also argues that the purchase order for 2,713 boxes was merely defendant's way of making payment, and that a contract nonetheless existed for the definite quantity of 31,896 boxes. In support of its position, plaintiff points to box 27 of the solicitation, which is entitled "Payment Will Be Made By" and contains the insertion "To Be Shown On Orders Issued Under This Contract."

The mere statement of the proposal indicates the fallacy of plaintiff's position. The quoted language does indeed suggest a program by which payments were to be made, but that program presupposed the existence of a contract. As has been previously pointed out, no contract for 31,896 boxes was ever entered into by plaintiff and defendant.

In sum, it is concluded that the mere signing of plaintiff's offer by defendant's contracting officer did not result in a contract authorizing plaintiff to manufacture 31,896 recipe card boxes.

III. Defendant is Estopped to Deny the Existence of Contract With Plaintiff for 31,896 Boxes

The final question to be considered is whether or not sufficient grounds exist for applying the doctrine of equitable estoppel against the defendant. The recent case of Manloading & Management Assoc., Inc. v. United States, 198 Ct. Cl. 628, 461 F. 2d 1299 (1972), indicates that this court will, in appropriate cases, apply that doctrine to prevent defendant from denying the existence of a contractual agreement. In order to establish an estoppel it is necessary for plaintiff to show, as this court has previously held in the case of Stevens Manufacturing Co. v. United States, 80 Ct. Cl. 183, 192-93 (1934), that:

> * * * the party against whom an equitable estoppel is set up acquiesced in the transaction in such a manner as to change the relationship of the parties and make its repudiation of the proceedings contrary to equity and good conscience.

It is not, however, essential that the party against whom an estoppel is urged to have made a representation of any kind. See Robbins v. United States, 86 Ct. Cl. 39, 21 F. Supp. 403 (1937). This latter view is in accord with those cases that hold that a party who engages in a course of conduct, even without misrepresentation, upon which another party has a right to believe he is intended to act or upon which the first party intends him to act, will be estopped from repudiating the effect of such conduct. See United States v. Georgia-Pacific Co., 421 F. 2d 92, 96 (9th Cir. 1970). Of course, it is essential to a holding of estoppel against the United States that the course of conduct or representations be made by officers or agents of the United States who are acting within the scope of their authority. See United States v. Georgia-Pacific Co., supra, at 100-01; Manloading & Management Assoc., Inc. v. United States, supra, 198 Ct. Cl. at 634-35, 461 F.2d at 1302-03.

After a complete consideration of the controversy between the parties, it is concluded, for reasons which follow, that grounds for estoppel against the defendant exist.

The court in Georgia-Pacific, supra, at 96, indicated that the following four elements must be present in order to establish an estoppel:

> (1) The party to be estopped must know the facts: (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

A. Defendant Knew the Facts

As has been previously discussed, only defendant knew all of the facts and the complete story surrounding the solicitation in question. It should be initially pointed out that plaintiff submitted the lowest of the six bids which were received in time for the October 14, 1969, opening. The fact that defendant on October 17, 1969, received a bid from Art Steel that had been delayed by the Post Office was not made known to plaintiff or any of the five other bidders. Further, plaintiff was not aware of the October 22, 1969, decision by defendant's contracting officer to consider Art Steel's bid in making the award. The failure of defendant to so inform plaintiff appears to be particularly regrettable since plaintiff's offer was the lowest received at the public bid opening of October 14, 1969, and plaintiff could therefore reasonably conclude that it would be given the contract. In fact, the failure of defendant to notify plaintiff of the receipt of a lower successful bid is a violation of its own procurement regulation dealing with such matters, and which provides in pertinent part that:

> (2) Notification of rejection also shall be given to any unsuccessful higher bidder where the circumstances were such that he may have had reason to believe he might receive an award, e.g., the bidder was requested to extend his bid acceptance time or clarify his bid, or the bidder knew that his bid was the lowest received by bid opening time (but the lower successful bid was received late).

Further support for plaintiff's expectations can reasonably be inferred from defendant's request of October 16, 1969, to its resident inspector at plaintiff's plant to conduct a plant facility survey to determine if plaintiff was capable of satisfactorily performing the contract requirements, i.e., building 31,896 boxes within 70 days after being awarded the contract. As plaintiff further points out, the preaward on-site inspection is significant since defendant's own published regulations indicate that it is not necessary in connection with contracts of less than $10,000. Thus, plaintiff argues that the inspection was another reason why it could logically assume that it was being seriously considered to manufacture all 31,896 boxes.

Although the inspection was not completed until October 24, 1969, defendant made no attempt to inform plaintiff of Art Steel's late bid or to cancel the inspection because of the receipt of the late bid.

Furthermore, defendant was aware that plaintiff had never manufactured boxes before and that it was necessary for it to purchase dies at a cost of over $10,000 in order to be able to perform the contract. This is of particular importance since it is inconceivable that plaintiff would have incurred such an expense if it had known that it would only receive an $8,247.52 award.

Defendant obviously also knew that plaintiff's bid of $3.04 per box was an average that took into consideration the costs for manufacturing the 31,896 boxes, and, as well, the costs involved in shipping the boxes to the 1,500 addresses. It also goes without saying that defendant must have known that the Navy's portion of the solicitation, which called for 2,713 boxes to be sent to some 1,355 destinations, was the most costly and the least desirable segment of the contract.

B. Plaintiff Had Right to Act in Reliance on Defendant's Conduct

From the facts outlined in section III(A), it is not necessary to consider if defendant and/or its representatives intended that plaintiff act in reliance on defendant's actions and/or inactions, for it is clearly established that plaintiff had a reasonable right to act in reliance thereon. From all of defendant's actions or inactions, plaintiff could reasonably conclude that it was to receive the $96,963.84 contract for the entire quantity of boxes. It is only necessary to focus on a few of the above facts to illustrate why it was reasonable for plaintiff, being the low bidder at the October 14, 1969, bid opening, to assume that it would receive a contract for the entire quantity. Under the circumstances of this case, it is important to stress the failure of defendant to inform plaintiff of the receipt of Art Steel's late bid, for only when this is kept clearly in mind is one able to understand why plaintiff acted as it did. Along the same line, it is important to refrain from evaluating plaintiff's acts from a hindsight vantage point, based on all the facts, since all the facts were now known to plaintiff at the time it acted.

At the time plaintiff received the $8,247.52 order for the 2,713 boxes, it was unaware of Art Steel's bid. In addition, the Government had concluded an on-site inspection, which is not normally done where contracts of less than $10,000 are involved. Further, defendant knew that plaintiff, not previously having manufactured such boxes, would have to purchase dies that cost several thousand dollars more than the $8,247.52 award. Under these circumstances alone, it was reasonable for plaintiff to conclude that the 2,713 box award, which dealt solely with the Navy's requirements, was only the first of several orders, and that it would shortly receive orders for the Army, Marine and Air Force requirements.

C. Plaintiff Was Ignorant of True Facts

Plaintiff did not know of defendant's award to Art Steel to manufacture 29,183 boxes until, by chance, it was so advised in early March 1970. Until that time, plaintiff was under the impression that it had received the entire 31,896 box award. Moreover, by that time plaintiff had already procured the necessary dies, tooling and material to manufacture the entire quantity of boxes.

D. Plaintiff Relied on Defendant's Acts to Its Detriment

The record clearly establishes that plaintiff relied on defendant's action and/or inaction to its detriment. Specifically, upon receipt of the 2,713 order, plaintiff immediately ordered dies at a cost of $10,300. In addition, since plaintiff reasonably assumed that the order was only the first, and that others would follow until all 31,896 boxes were manufactured, material for the production of the entire quantity was immediately ordered. As further justification for its action, plaintiff explains that the solicitation required the entire 31,896 boxes to be produced within 70 days. Accordingly, plaintiff concluded that it would have to immediately assemble all of the necessary material, if it hoped to meet the 70-day delivery schedule.

Of course, plaintiff stopped its manufacturing process in early March of 1970 when it learned of defendant's award to Art Steel for the remaining 29,183 boxes. But by this time it had already ordered and received all of the necessary material and tooling for completion of the entire quantity of boxes.

It is found that defendant knew all of the facts surrounding the placement of awards to both plaintiff and Art Steel, and plaintiff did not; that plaintiff had a right to act in reliance upon defendant's conduct; and that in reliance upon defendant's action plaintiff incurred expenses in connection with the necessary dies, tooling and material to manufacture 31,896 boxes. It is, therefore, concluded that defendant is estopped to deny the existence of a contract with plaintiff for 31,896 boxes.

IV. Recovery

Having concluded that defendant is estopped to deny the existence of a contract with plaintiff for 31,896 boxes, it follows that plaintiff is entitled to recover. However, this court has already held in Manloading & Management Assoc., Inc. v. United States, supra, that in contracts, such as the one at bar, which contain a termination for convenience article, recovery must be calculated in accordance with that article and should not include prospective profits, or consequential damages. The parties have not addressed themselves to the

question of what plaintiff is entitled to recover on the basis of the termination for convenience article, and the record is accordingly devoid of the needed information to make the required calculations. It is, therefore, necessary that the amount of recovery be determined in subsequent proceedings under Rule 131(c), unless the parties are able to reach an agreement on that point.

CONCLUSION OF LAW

Upon the findings of fact and the foregoing opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover and judgment is entered to that effect. The amount of recovery will be determined in subsequent proceedings pursuant to Rule 131(c).

FINK SANITARY SERVICE, INC.

53 C.G. 502 (1974)

The Department of the Air Force issued invitation for bids (IFB) F11602-73-B-0671 on May 4, 1973. The solicitation (Standard Form 33,

and disposal services at Chanute Air Force Base, Illinois, on a requirements basis. The solicitation instructions and conditions provide at paragraph 9(a), Discounts:

> Notwithstanding the fact that a blank is provided for a ten (10) day discount, prompt payment discounts offered for payment within less than twenty (20) calendar days will not be considered in evaluating offers for award, unless otherwise specified in the solicitation. However, offered discounts of less than 20 days will be taken if payment is made within the discount period, even though not considered in the evaluation of offers.

Of the two bids received on June 14, 1973, the bid of C & S Sanitary Co. (C&S) was lower ($53,019 compared to Fink's bid of $53,760). However, Fink's bid offered a discount of 2 percent for payment within 10 days which the contracting officer initially considered in determining that Fink's bid was lower than that of C&S. Fink was thereafter advised on June 18, 1973, that it was the apparent low bidder.

The Air Force relates the subsequent events of June 25, 1973, as follows:

> On 25 Jun 73, Mr. Fink came to the Procurement Office with a letter verifying his bid price, giving references, equipment listing, and a financial statement. He was advised by Mr. Mannchen (Procurement Supervisor) that all factors pertaining to the pending contract must now be reviewed prior to awarding of the contract. Mr. Fink was told, for information purposes, that when the contract was awarded either by formal execution of the contract, or by written Notice of Award, it would carry contract number F11602-73-C-0183.

(The review here referenced was to have been a referral of the bidding documents to the Procurement Review Committee. We have been informally advised that this committee exists merely as a local management tool, serving as a quality control check. Its existence and utilization in no way limit the authority of the contracting officer.)

On the other hand, Mr. W. Raymond Fink, the owner of Fink Sanitary Service, Inc., by affidavit of October 10, 1973, stated:

> 4. * * * Procurement Officer Mannchen examined the documents requested by Lt. Telowicz and there was some discussion of the items thereon. Mr. Mannchen then went into the hallway of the building and spoke with some other member of the Procurement Office. Mr. Mannchen then returned and said 'Yes, things seem to be in order'; he then left the office saying that he would go down and get a contract number, returned with the number, wrote it on a card and gave it to me. He told me to refer to that number in any correspondence with regard to performance of the contract that would be typed for my signature.
>
> During the course of conversation I indicated to him that I would be purchasing a truck with which to perform the contract and he gave to me his name and telephone number so that if there was any difficulty I could get in touch with him because the contract was for me to commence work the following week.
>
> 5. At no time in the conversation did Mr. Mannchen advise me that any further formal action was necessary to complete formal award of the contract. He indicated only that a written contract would be prepared for my signature.

Fink advises that based upon the foregoing and because performance was to commence on July 1, 1973, the bidder purchased an additional refuse truck on June 26, 1973, to fulfill the contract requirements.

Upon further review of Fink's bid by a Procurement Review Committee on June 27, 1973, it was found that the 2-percent discount for payment within 10 days offered by Fink could not be considered in evaluating its bid since consideration of a 10-day discount was prohibited by paragraph 9(a), quoted above. See, also, paragraph 2-407.3(c) of the Armed Services Procurement Regulation (ASPR). As a consequence, the Fink bid was evaluated at its offered price, or $741 more than the C&S Sanitary Co. bid.

When this result was communicated to Fink, it offered to change the discount terms to 2-percent, 20 days.

Fink contends that the modification should have been accepted under ASPR 2-305 since the modification of an otherwise successful bid can be considered if it makes the terms of the bid more favorable to the Government. Fink's request was denied because it constituted a late bid modification, consideration of which is barred by paragraph 8(a) of the solicitation instructions and conditions. Moreover, it is contended that the 10-day discount was such an obvious mistake on the

face of Fink's bid, that the contracting officer had a duty under ASPR 2-406.1 to verify the bid, calling attention to the mistake. Lastly, it is contended that since, justifiably relied, to its detriment, on the contracting officer's representations, the Government is estopped to deny the existence of the contract.

Concerning the effect of ASPR 2-305, we observe that since the 10-day prompt payment discount could not be considered for evaluation purposes, Fink was never in fact the low bidder. Consequently, we agree that the late bid modification could not be relied upon to make Fink the lowest evaluated bidder.

Fink implies that it was prejudiced by the contracting officer's failure to verify promptly what was an apparent mistake on the face of the bid in offering a 10-day prompt payment discount. Specifically, Fink contends that after the June 14 opening, the contracting officer should have noted Fink's mistake and called it to its attention, citing ASPR 2-406.1. This action, it is alleged, would have made it improbable that Fink would have purchased an additional truck after receipt of the contract number.

In our opinion, the offer of a 10-day discount was not an apparent mistake which required the contracting officer to verify the bid under the provisions of ASPR 2-406.2. The offer of a 10-day discount period is not precluded by the invitation for bids nor does such an offer preclude the Government from taking advantage of the discount should the nondiscounted bid be low (see ASPR 2-407.3(d)).

If it is Fink's contention that either it intended a 20-day discount or that it was mistaken in believing a 10-day discount could be evaluated and would therefore have offered a 20-day discount had it properly read the IFB, we feel that no relief can be granted on either theory. ASPR 2-406.3(a)(3) states:

> (3) Where the bidder requests permission to correct a mistake in his bid and clear and convincing evidence establishes both the existence of a mistake and the bid actually intended, a determination permitting the bidder to correct the mistake may be made; provided that, in the event such correction would result in displacing one or more lower bids, the determination shall not be made unless the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself. If the evidence is clear and convincing only as to the mistake, but not as to the intended bid, a determination permitting the bidder to withdraw his bid may be made.

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

In the present case, even if we assume that a mistake has been proven, we can find no evidence on the face of the bid as to the actual intention of the bidder. Such evidence is required to displace a lower bidder. See 52 Comp. Gen. 604 (1973); B-174460, April 27, 1972; and B-164584, October 4, 1968. Thus, Fink cannot now substitute an acceptable discount term to make lower its evaluated bid price.

Regarding the issue of estoppel, we note that the Court of Claims in Emeco Industries, Inc. v. United States, No. 547-71, October 17, 1973, has recently reasserted the four elements propounded in United States v. Georgia-Pacific Company, 421 F. 2d 92 (9th Cir. 1970), that must be present in order to establish an estoppel:

1) the party to be estopped must know the facts;

2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;

3) the latter must be ignorant of the true facts;

4) he must rely on the former's conduct to his injury.

The present situation, however, differs from that set out in Emeco. There the Government was aware of all of the true facts when it acted so as to induce Emeco into acting to its detriment. In the instant case, as of June 25, the date of the Government's allegedly inducing actions, the procuring activity, by its own misfeasance, was not aware of the true facts. We believe that this mistake should not, however, be a basis for relieving the Government of liability. See 52 Comp. Gen. 215, 218 (1972).

In reasonably reconstructing the events of June 25, 1973, we feel that both parties left the meeting held on that day believing that Fink Sanitary Service should be the party performing refuse collection and disposal services commencing July 1, 1973. Indeed, we believe that the Government also was aware of Fink's plans to purchase an additional truck to accomplish this contract.

The agency's actions in giving the contract number to the apparent low bidder (whose status known to the other bidder, had not protested although known for a week) just 6 days prior to the commencement of the contract period is, we believe, an action which a reasonable bidder has a right to believe was intended for it to act upon--here to prepare for commencement of the contract.

We further believe that at the time Fink acted to its detriment in reliance upon the actions of the Government, the bidder was ignorant of the true facts--that actual award to Fink Sanitary Service was impossible since it was not in fact the lowest responsive bidder to the IFB.

In sum, we find that Fink has met the criteria set forth in Emeco and that the Government should be estopped to deny the existence of a contract between itself and Fink. However, the nature of the agreement so reached must be examined to determine the Government's liability, if any, for its failure to comply with the agreement.

In Emeco, the Court of Claims did not address itself to the important problem inherent in holding the Government liable on a contract which its agent (the contracting officer), as in the instant case, had no authority to enter. Emeco was not the lowest responsive, responsible offeror on the portion of the solicitation to which estoppel was applied. Neither, in fact, was Fink low bidder on this procurement. The general rule is that the contracting officer has no authority to award a contract to other than the lowest responsive, responsible offeror and that an award to another party is illegal. B-162535, October 13, 1967; B-149466, July 27, 1962; 38 Comp. Gen. 368 (1958). In such circumstances, the injured party is entitled only to the sale of the goods and services provided to the Governmet on a theory of quantum meruit. B-149466, 38 Comp. Gen. supra.

However, in 52 Comp. Gen., supra, at page 218, we stated that:

> * * * We are in agreement with the position of the Court of Claims that 'the binding stamp of nullity' should be imposed only when the illegality of an award is 'plain.' John Reiner & Co. v. United States, 325 F. 2d 438, 440 (163 Ct. Cl. 381) or 'palpable,' Warren Brothers Roads Co. v. United States, 355 F. 2d 612, 615 (173 Ct. Cl. 714). In determining whether an award is plainly or palpably illegal, we believe that if the award was made contrary to statutory or regulatory requirements because of some action or statement by the contractor (Prestex, Inc. v. United States, 320 F. 2d 367 (162 Ct. Cl. 620), or if the contractor was on direct notice that the procedures being followed were violative of such requirements (Schoenbrod v. United States, 410 F. 2d 400 (187 Ct. Cl. 627), then the award may be cancelled without liability to the Government except to the extent recovery may be had on the basis of quantum meruit. On the other hand, if the contractor did not contribute to the mistake resulting in the award and was not on direct notice before award that the procedures being followed were wrong, the award should not be considered plainly or palpably illegal, and the

contract may only be terminated for the convenience of the Government. John Reiner & Co. v. United States, supra; Brown & Son Electric Co. v. United States, 325 F. 2d 446 (163 Ct. Cl. 465).

Therefore, since in the instant case Fink neither directly contributed to the mistake upon which its bid was evaluated nor was it on direct notice prior to the "award" that a mistake had been made (also a requirement for estoppel), we are unable to say that such an "award", while improper, was plainly or palpably illegal. The agreement entered into between the Government and Fink is merely terminable for the convenience of the Government and not void ab initio.

Accordingly, we conclude that the contract, improperly "awarded" to Fink on June 25, 1973, although not illegal, should be terminated for the convenience of the Government since "award" was made to other than the lowest reponsive bidder.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the Congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510.

GOVERNMENT CONTRACT LAW CASES

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CHAPTER THREE

METHODS OF PROCUREMENT

A. Formal Advertising

Section 1. Late Bids

a. Authority of Bid Opening Officer

UHLHORN

41 Comp. Gen. 807
(B-148972) (1962)

* * * * *

The undisputed facts in the matter are as follows:

Lieutenant Commander S. J. Koonce, CEC, U.S. Navy, conducted the bid opening. Lieutenant Commander Koonce had set his watch by Western Union time, which was four minutes ahead of the correct time. At a time when his watch showed 3:00 P.M. and the Naval Observatory synchronized clock on the wall of the bid opening room showed 2:56 P.M. Lieutenant Commander Koonce announced that it was 3:00 P.M. and asked whether there were any additional bids. In the absence of a response he proceeded with the opening of bids on the Puerto Rico project. He was in the process of reading the first bid item of the first bid opened on that project when representatives of Uhlhorn entered the bid room, which was on the second floor, and attempted to submit a bid. At that time, the clock on the wall showed the correct time of 2:58 P.M. and Lieutenant Commander Koonce's watch showed 3:02 P.M. Lieutenant Commander Koonce stated it was after 3:00 P.M. and he therefore could not accept the Uhlhorn bid, despite the fact the wall clock showed 2:58 P.M. He refused to accept and hold the Uhlhorn bid unopened and instructed its representatives to be seated or to leave the room. They thereupon took seats with the bid still in their possession.

After completion of the reading of the other bids, the Uhlhorn representatives again approached Lieutenant Commander Koonce and stated they wished to protest his refusal to accept their bid. He again refused to accept the bid, whereupon the bid was opened and shown to him. Lieutenant Commander Koonce saw the amount thereon of what appeared to be the combination bid which was two million, nine hundred and some thousand dollars. The lowest bid which had been read

was in excess of $3,000,000 for the combined projects. The Uhlhorn representatives then left with their bid, went to pick up Mr. Uhlhorn at his hotel, and returned with Mr. Uhlhorn approximately 30 minutes later.

Upon their return, further conversation on the matter was had, and after receiving advice from the Area Public Works Officer, the Uhlhorn bid and some 45 pages of worksheets which Mr. Uhlhorn had brought with him were sealed and kept in the custody of the Navy. Subsequent examination of the bid reveals that the combination bid is in the amount of $2,959,400 and that the worksheets coincide with and support that figure.

The position taken by the bid officer is that he had authority to declare when the time for bid opening arrived and that this is conclusive on all bidders, regardless of the actual time. In this connection paragraph 2-402.1 of the Armed Services Procurement Regulation provides that the official designated as the bid opening officer shall decide when the time set for the bid opening has arrived, and shall so declare to those present. The Instructions to Bidders in this case provided also that no bid would be considered if received by the Navy after the reading of the bids had begun.

We do not construe the provisions of section 2-402.1, ASPR, as vesting in the bid opening officer any authority to arbitrarily determine a bid closing time earlier than the hour specified in the invitation for bids, at least in any case where such action operates to the detriment of a prospective bidder. Nor are we called upon in this case to decide what should be done in a case where significant bid information had been revealed by the premature reading of bids before the attempted tender of another bid. Only one bid had been read in the present case, that of a company which did not bid on the combined projects, and whose bid was the fourth lowest on the one project on which it did bid. It is therefore apparent that Uhlhorn had no possibility of advantage by reason of the fact that the reading of bids had begun, and we therefore do not regard the provision in the Instruction to Bidders as precluding consideration of its bid under the particular circumstances in this case.

* * * * *

For the reasons given it is our conclusion that the bid of Uhlhorn International was validly tendered to the Government prior to the bid opening hour and should be considered for award. * * *

b. Injunctive Relief

WILLIAM F. WILKE INC., v. U.S.

C.A. 4th Circuit (1973)
485 F2d 180

HAYNSWORTH, Chief Judge:

A disappointed bidder on a Government contract, we conclude, has standing to contest an award to another whose lower bid was tardy and wrongfully considered, but the District Court, under the circumstances, properly denied injunctive relief and limited the plaintiff to recovery of its bid preparation costs.

On February 20, 1973, the United States Army Corps of Engineers advertised for bids for barracks rehabilitation at Fort George C. Meade, Maryland. The advertisement specified that bids would be received until 3:00 P.M., March 13, 1973, at the office of the District Engineer in Baltimore, Maryland. At that time the bids would be publicly opened.

The time for opening arrived, and the box containing the submitted bids was brought into the room in which the opening was to take place. The Army's bid officer opened the box and began sorting out the bids. Minutes later at 3:04 P.M., a representative of A & M Gregos, Inc. came forward and placed Gregos' bid with the others. The bid was accepted, and the bid officer proceeded to make a bid opening announcement with the statement, "It is now three o'clock, time to open bids on Invitation No. DACA 31-73-B-0066. Are all bids in?" The first bid was then opened at 3:05 P.M. At the conclusion of the ceremony, Gregos proved to be the low bidder at $2,877,000. The next low bidder was the plaintiff, William F. Wilke, Inc., at $2,941,349.

Immediately after the opening ceremony, Wilke's representative orally protested the acceptance of Gregos' bid. This was followed by a telegram and a letter from Wilke, both asserting the tardiness of Gregos' bid. The Army considered Wilke's objection but finally decided to accept Gregos' bid nonetheless. A notice of award was issued to Gregos on March 28, 1973.

After being notified of this action, Wilke sought judicial relief in the United States District Court for the District of Maryland. That court granted a temporary restraining order on April 4, 1973, to stop the Army from taking further steps to effect performance of the contract.

After a hearing on Wilke's request for a preliminary injunction and submission of motions and memoranda by the parties, the District Court filed an opinion on April 16, 1973. To the extent that Wilke sought declaratory judgment, the court found Gregos' bid "untimely, nonresponsive, contrary to the terms of the invitation, void and of no effect." But the court declined to grant injunctive relief that would effectively put Wilke in the position of successful bidder. Pursuant to the Army's and Gregos' requests, Gregos was allowed to answer as a party defendant.

All parties unsuccessfully moved to have the judgment of the District Court altered.

For the reasons given therein, we affirm the District Court's opinion 357 F. Supp. 988 (D. Md. 1973). We agree that Gregos' bid was not timely filed under the terms of the invitation or the applicable statute and regulations. 10 U.S.C. § 2305(c); 32 C.F.R. §§1-101 et seq. Such a finding is consonant with the interpretations given by the Comptroller General's office.

Similarly, we agree with the District Court's denial of injunctive relief. Whether to grant such extraordinary relief has always been discretionary with the trial court. This is particularly true in a situation such as this where granting of any relief is unusual. M. Steinthal & Co. v. Seamans, 147 U.S. App.D.C. 221, 455 F.2d 1289 (1971). Further justification for limiting relief rests in the fact that Gregos gained no actual competitive advantage in its late bid submission. While there was a violation of the strict terms of the invitation, it was a technical violation only. No one suggests that Gregos had any more relevant information at 3:04 P.M. than at 3:00 P.M. Finally, Wilke is not denied a remedy altogether. It may still seek recovery of bid preparation costs in the Court of Claims. Keco Industries, Inc. v. United States, 428 F.2d 1233, 192 Ct.Cl. 773 (1970).

Since the District Court granted declaratory relief in favor of Wilke, it necessarily found that Wilke was entitled to judicial relief. We concur in that conclusion, but find that further discussion of that issue is necessary.

* * * * *

While those seeking Government contracts have no right to the award of a contract, they do have a right to reasonable treatment of their bids. Heyer Products Co. v. United States, 140 F. Supp. 409, 135 Ct.Cl. 63 (1956). See also Copper Plumbing & Heating Co. v. Campbell, 110 U.S.App.D.C. 177, 290 F.2d 368 (1961). This right derives from the combination of the statutory scheme regulating military procurement, 10 U.S.C. §§ 2301-2314, and the review provision of the Administrative Procedure Act, 5 U.S.C. § 702.

Because of the Army's acceptance of a tardy bid, Wilke lost any chance to be awarded the Fort Meade contract. Wilke thus suffered a financial loss as a result of the Army's failure to follow its own regulations and bid specifications. Similarly the public was wronged by the Army's disregard of express legislation. The general public, however, has no legal recourse. Only a party suffering an injury in fact has standing to protect this interest. Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). It is because of its injury that "[p]laintiff, and others like it, have a litigable interest in attempting to protect the public interest in the integrity of the competitive bidding process * * *." Lombard Corp. v. Resor, 321 F.Supp. 687, 692 (D.D.C. 1970).

Affirmed.

Section 2. Modification or Withdrawal of Bids

a. Withdrawal

E. J. B. SALES COMPANY

ASBCA No. 11956 (1967)

This is an appeal from a default termination of the above contract. Both parties submitted the appeal for decision on the record, consisting of Rule 4 documents, complaint and answer.

On 30 June 1966 appellant was awarded contract DSA-400-66-C-1096/PM404 for furnishing 15,931 "Box, Fiberboard, Corrugated, FSN 8115-179-0569" at unit and total prices of $.07145 and $1,138.27, FOB destination, on or before 19 August 1966. After award, appellant returned the contract to the Government with a covering message. The message dated 23 July 1966 stated:

* * *

> "We shall have to ask to withdraw on Bid DSA-400-66-B-4906 as we cannot supply the material at the prices that we quoted, because of an increase in price since that time.
>
> "We are returning the bid and thank you."

By letter dated 11 August 1966 appellant was advised that its bid had been accepted and it had a formal contract. Appellant was further advised that if delivery of the supplies was not made by 19 August 1966, the contract would be terminated for default. There is no evidence of a reply to this letter or that delivery was made by 19 August 1966. By telegram dated 23 September 1966 appellant was notified that the contract was terminated for default because of the failure to deliver the supplies in accordance with the delivery schedule. The TWX notice of default was confirmed by a letter notice dated 27 September 1966. Appellant filed a timely appeal.

Appellant alleges that its bid was based upon a quote received from a subcontractor, Fibre Container Corporation. After award of the contract an order was immediately placed with Fibre Container Corporation. The order was not accepted and appellant was informed

> "* * * #1 that there had been a price increase. #2 that the mill who supplied them would not honor this order because there was a shortage of corrugated board. #3 also that I could not write any new business as the mills would not take on any new accounts."

Although not stated, presumably appellant is contending that the failure to deliver the supplies was excusable because Fibre Container Corporation refused to accept appellant's order.

The Government does not challenge appellant's allegations. It argues that for appellant to be excused for its failure to deliver, the contract requires proof that the failure arose out of causes beyond the control of both appellant and its subcontractor, and without the fault or negligence of either of them. The Government contends that appellant neither alleged nor offered the required proof.

From the evidence submitted we assume that appellant did not enter into a subcontract with Fibre Container Corporation. It is therefore only necessary to consider and determine whether the failure to deliver was due to causes beyond the control and without the fault or negligence of appellant. Appellant has offered for the Board's consideration only the allegations in the complaint. It alleges receipt of a quote from Fibre Container Corporation prior to submission of bid and that firm's refusal to accept an order after appellant was awarded the contract. There is no proof in the record of these allegations. Even if we assume the allegations proven, they would not be sufficient to establish that failure to perform the contract arose out of causes beyond the control and without the fault or negligence of appellant. The Board finds that failure to deliver the supplies was not excusable. The appeal is denied.

b. Modification

LEITMAN v. UNITED STATES

104 Ct. Cl. 324 (1945)

WHITAKER, Judge, delivered the opinion of the court:

This is a suit for the recovery of the difference in the price at which plaintiff offered in writing to furnish an amount of helmet linings and the price at which he agreed to furnish them in subsequent telegrams, sent before the time for opening the bids, but received thereafter.

The defendant, through the Commanding Officer, Rock Island Arsenal, Illinois, invited bids for helmet linings in blocks of 50,000 up to 400,000 and an additional block of 100,000 for any amount that might be ordered between 400,000 and 500,000. Bids were to be opened at 9:00 A.M. on 25 July 1940.

On 23 July 1940, plaintiff submitted a bid of $1,690 per thousand for linings on quantities up to 50,000, the price being progressively lowered for blocks of 50,000 down to $1,440 per thousand for quantities amounting to between 400,000 and 500,000. In making this bid plaintiff had figured that it would require 2-1/3 feet of leather for each helmet lining. But early in the morning of the day the bids were to be opened plaintiff's representative made further calculations of the amount of leather necessary to be used, and having concluded that less than 2-1/3 feet per helmet would be required, he sent the Commanding Officer of the Rock Island Arsenal a telegram reducing all prices by $70.00 per thousand, and still later he sent another telegram reducing the prices by $100.00 per thousand. The first telegram was sent at 9:19 A.M. Eastern Standard Time (8:19 A.M. Central Standard Time--Rock Island is on Central Time). The second telegram was sent at 9:31 A.M. Eastern Standard Time (8:31 A.M. Central Standard Time).

The first one was received in the office of the Postal Telegraph Company at Rock Island, Illinois at 8:35 A.M. Central Standard Time, and the second one was received at its office at 8:55 A.M. Central Standard Time. However, they were not received at the Rock Island Arsenal until 10:40 A.M. Central Standard Time, an hour and forty minutes after the time set for the opening of the bids.

Plaintiff arrived at his office at about 12:00 o'clock on the morning of 25 July 1940, when he learned of the sending of the telegram. Two or three hours later he inquired at the Postal Telegraph Office as to the time the telegrams had been delivered. The following day the telegraph company informed him that they had been delivered at 10:40 A.M. on 25 July. On that day or the following day Leitman called the Rock Island Arsenal by long distance telephone and stated to Joseph Curley, the Chief of Procurement at the Arsenal, that he thought the telegrams had been sent in error, but that he assumed they would not be considered since they had arrived after the time for the opening of the bids. Curley told him that they probably would be considered since it appeared on the face of the bids that plaintiff was the low bidder, but that all papers had been sent to Washington for final determination of the low bidder and the question of whether or not the telegrams would be considered.

Plaintiff did not withdraw his telegraphic offer nor demand that they not be considered. However, he did send to Washington Arthur A. Gardner, his contact man with Government agencies. Gardner conferred with General Drewry and Frank J. Jervey, Head Ordnance Engineer, and together they made computations to determine the low bidder. At this time Gardner made no demand that the telegrams be disregarded, but after he had been advised that plaintiff's written bid was the lowest, he then said that the telegrams were based upon an erroneous calculation and that they had arrived after the time for the opening of the bids. He did not, however, even at this time, demand that they be disregarded. Instead, upon being advised by defendant's representatives that the two-day limit for acceptance of plaintiff's bid had expired and that, therefore, it was possible to reject all bids and readvertise, Gardner stated that plaintiff would prefer to run the

risk of loss rather than to have a readvertisement. Gardner thereupon handed defendant's representatives a letter signed by plaintiff, dated 29 July 1940, extending the period for acceptance until 5 August 1940.

Plaintiff's bid was accepted by telegram on 31 July 1940, and 428,045 helmet linings were ordered. The price to be paid was not stated in defendant's telegram because the Department in Washington had under consideration the question of whether or not plaintiff's telegrams should be considered.

On 10 August 1940, plaintiff received a formal written contract for 428,045 helmet linings at the price of $1,340.00 per thousand, which was the price stated in the last telegram. At no time prior thereto had plaintiff ever demanded that the telegrams be disregarded, although he had had several conferences with Curley, the Chief of Procurement at Rock Island, and, through his representative, with the Department in Washington. However, upon receipt of this contract plaintiff protested that his telegrams were based upon an error, that they had been received too late, and that the contract should be based upon the original bid. He stated, however, that he had placed his orders for materials and was proceeding to carry out the contract, but requested that a new contract based upon the prices stated in the original bid be sent to him for signature.

Defendant refused to modify the price and refused to pay plaintiff for deliveries until the original draft of the contract had been signed and vouchers based upon the prices stated therein should be submitted. Since plaintiff was unable to borrow the money to finance the carrying out of the contract, and in order to secure payment from the defendant for deliveries made, plaintiff on 20 January 1941, executed the contract upon the basis of the prices stated in the last telegram. He did this, however, under protest, claiming that he was entitled to a contract upon the basis of the prices stated in his original bid. Subsequent to the execution of the contract plaintiff submitted vouchers upon the basis of the prices stated therein, but all of these were submitted under protest.

Had there been no advertisement for bids in this case, but had the defendant asked only the plaintiff to submit an offer to furnish it with these helmet linings, and had plaintiff first submitted an offer in writing and then modified it by the two telegrams which he sent, there would be no doubt that plaintiff would have been obligated to furnish the linings at the price stated in the last telegram.

Plaintiff never withdrew the telegraphic modification of his bid. He allowed the offer to stand, without protest, until it had been determined that he was the low bidder anyway. Then, and only then, did his representative, whom he had sent to Washington, state that the offer made in the telegrams had been based upon a miscalculation. We have no doubt that plaintiff wanted the telegrams to be considered if this was necessary in order to make him the low bidder. Only when he learned that he was the low bidder did he intimate that he would like to have the telegrams disregarded, and, even then, when the suggestion was made that there might be a readvertisement, he did not

demand that the telegrams be disregarded, but said he would prefer to run the risk of loss. His offer to furnish the helmet linings at the prices stated in the telegrams remained in effect up until the time that he was notified that he was the successful bidder and that the contract would be awarded to him. When he received this notification he still did not demand that the telegrams be disregarded, although he had been notified that they might be taken into consideration in determining the price to be paid. The offer remained in effect until accepted.

If plaintiff is to be relieved from the offer made in the telegrams, it is only because of the provision of a War Department regulation, which was included in the instructions to bidders. This reads as follows:

> Unless specifically authorized, telegraphic bids will not be considered, but modifications by telegraph of bids already submitted will be considered if received prior to the hour set for opening.

Manifestly, the reason for the condition placed upon the consideration of a telegraphic modification was to put all bidders on an equal basis and to prevent any bidder from obtaining an advantage over others by permitting him to modify his bid after securing information as to other bids submitted. United States v. Brookridge Farm, 111 F. 2d 461, 463; 21 Op. A.G. 547-548. Therefore, where the bid submitted in time is the low bid, the reason for the rule against considering telegraphic modifications of it after the time for the opening of the bids does not exist, and in such case the rule should not be applied.

The limitation on the consideration of telegraphic modifications was not for plaintiff's benefit but to prevent plaintiff from obtaining an unfair advantage. If defendant, therefore, elects to consider a telegraphic modification received after the time for the opening of the bids, plaintiff cannot complain, nor can the other bidders, because plaintiff was already the low bidder.

There can be no possible reason why a low bidder cannot voluntarily decrease the amount of his bid. Plaintiff did decrease the amount of his bid before he had any information as to other bids submitted, and even after he learned that he was the low bidder he did not withdraw his offer. Even when he was advised that the time for acceptance of his offer had expired, and when, therefore, he could have withdrawn his bid with impunity, he did not do so, but extended the time for acceptance so as to make it a binding offer.

Plaintiff's defense that there was a mistake in his calculations, upon the basis of which the telegrams were sent, cannot be sustained. No showing whatsoever was made to support his statement that there had been a miscalculation.

Plaintiff's offer to furnish the linings at the prices stated in his last telegram remained in full force and effect until accepted by the defendant; plaintiff, therefore, was bound to furnish the linings at the price stated therein. He has been paid this price, and therefore, is not entitled to recover. His petition will be dismissed. * * *

* * * * *

Section 3. Evaluation of Bids

HERBERT COOPER CO.

38 Comp. Gen. 276
(136916) (1958)

To the Secretary of the Air Force, 6 October 1958:

Reference is made to your letter of 16 September 1958, requesting clarification of our decision to you of 25 August 1958, B-136916, concerning a probable infringement of a patent in the event of an award of a contract to the Herbert Cooper Company, Genesee, Pennsylvania, as the low bidder under Mobile Air Materiel Area Invitation for Bids No. 01-601-58-482, issued 9 June 1958, for procurement of 12,450 tube assemblies to connect oxygen masks with oxygen regulators.

The Herbert Cooper Company had been awarded two prior Air Force contracts for assemblies of the type advertised under the invitation of 9 June 1958, but on 8 July 1958, Fred T. Roberts and Robert Eldon Roberts filed an action against the Herbert Cooper Company in the United States District Court for the Middle District of Pennsylvania, alleging patent infringement and requesting injunctive relief. Due to the urgency of the Government's requirements, the Air Force specifically authorized the Herbert Cooper Company to proceed with its method of manufacture, whether or not such methods infringed the patents involved, thereby subjecting the United States to possible liability under the provision of section 1498, Title 28, United States Code.

Section 1498, Title 28, United States Code, was designed for the purpose of furnishing patentees adequate compensation for the use of their patents by or on behalf of the Government, and at the same time preventing the obstruction of Government activities by disputes or litigation between private parties respecting such patents. However, it has been held that the Government may properly protect its interests by securing indemnity agreements from its suppliers to cover possible losses occasioned the Government by reason of patent infringements by its suppliers. Dearborn Chemical Co. v. Arvey Corp., 114 F. Supp. 369. Also, it appears that section 1498 would be no defense to a suit by the owner of a patent against a licensee for royalties. See Yassin v. United States, 76 F. Supp. 509, 110 Ct. Cl. 211.

It was pointed out in our decision of 25 August 1958, that Invitation No. 01-601-58-482 incorporated the standard clauses entitled "Notice and Assistance Regarding Patent Infringement"; "Authorization and Consent"; and "Patent Indemnity (Not Predetermined)". It must be assumed that the authorization and consent clause was included for the purpose of invoking the provisions of section 1498, Title 28, United States Code, so that, in conjunction with a bidder's required agreement to indemnify the United States

against loss, all bids would be for consideration on a common basis, whether or not the equipment which the Government desired to purchase could be produced by some of the bidders without infringing one or more existing patents. In such circumstances, it was concluded that it would be improper to reject the low bid of the Herbert Cooper Company and make an award to one of the licensees of Fred T. Roberts and Robert Eldon Roberts, either pursuant to the invitation for bids or by negotiation under the exception provided in 10 U.S.C. 2304(a) (10), applicable where "it is impracticable to obtain competition".

We indicated that the advertisement made in the Cooper case was not inconsistent with the decisions rendered in 13 Comp. Gen. 173 and 14 Comp. Gen. 298, which were cited by your Department. You again refer to and quote from the first of these decisions in support of the proposition that the Government should ordinarily purchase patented articles from the patentees or their licensees where there is no doubt as to the validity of the patents concerned.

Although you state that the decision of 25 August 1958, was dispositive of the particular facts presented, you request clarification of its broader implications since there will be a recurring need to procure patented articles, including those involved in the Cooper case. It is suggested that the indiscriminate use of the right afforded to the Government under 28 U.S.C. 1498 would be inimical to and destructible of the public policy considerations underlying the patent law. It is our view, however, that section 1498 appears clearly to constitute a modification of the patent law by limiting the rights of patentees insofar as procurement of supplies by the Government may be concerned, and by vesting in the Government a right to the use of any patents granted by it upon payment of reasonable compensation for such use. We believe that the statute is not consistent with any duty on the part of a contracting agency of the Government to protect the interests of patentees or licensees with respect to articles which it proposes to purchase, since the statute itself defines and provides an exclusive remedy for enforcement of the patentee's rights as to the Government. Any other interpretation would appear to us to impose an impossible burden upon Government procurement officials to determine the applicability and validity of any patents affecting any articles desired.

Where the procurement is to be made by formal advertising, it is our opinion, notwithstanding what was said in 13 Comp. Gen. 173, that there is no alternative to the securing of the maximum amount of competition from firms qualified and willing to undertake the production of the articles, subject, of course, to their willingness and ability to indemnify the Government against claims of patentees. There may be certain conditions indicating that it is impracticable to secure competition in a given case, in which event the authority to negotiate under 10 U.S.C. 2304(a) (10) might properly be exercised, but we believe that the armed services have no authority to dispense with the requirements of formal advertising solely on the ground that such procedure would tend to impair the integrity of the patent system. The

Congress has made no exception to the advertising statutes in that respect and has specifically provided patentees a remedy in the Court of Claims for any patent infringements involved in the production of articles for the United States.

In the Cooper case it was considered that the bids received in response to the invitation--which varied even between licensees--conclusively established the existence of competition, thus negativing the departmental suggestion to the effect that it would be proper to reject all bids and negotiate with the licensees of the Roberts' patents because it was impracticable to secure competition.

Nor do we believe that negotiation under 10 U.S.C. 2304(a)(10) would be authorized in other cases merely on the basis that the procurement involved patented articles, but rather that the determining factor should be whether or not it seems likely that persons or firms other than a patent holder, capable of performing in accordance with the Government's specifications, would be interested in submitting bids. What is a fair and reasonable price under such circumstances probably could not be definitely ascertained except under formal advertising conditions. It is apparent that negotiation would in those circumstances be in contravention of the general requirement of 10 U.S.C. 2304(a) that "Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising".

Section 4. Mistake in Bid

WENDER PRESSES, INC. v. THE UNITED STATES

170 Ct. Cl. 483 (1965)

PER CURIAM: This is another case in which a contractor claims it should be relieved of its contract obligations on the ground that it made a mistake in its bid. With respect to its failure to consummate the purchase of one item of surplus property included in its contract, plaintiff seeks rescission of this portion of the contract and recovery of its bid deposit of $1,550.30 made on such item. Plaintiff did not claim a mistake nor advise defendant of it until after the contract came into being.

It is plain that plaintiff may recover only if defendant's responsible officials knew or should have known of the mistake at the time the bid was accepted. This court has so held many times. Allied Contractors Inc. v. United States, 159 Ct. Cl. 548, 310 F. 2d 945 (1962); Alabama Shirt & Trouser Co. v. United States, 121 Ct. Cl. 313 (1952); Hyde Park Clothes, Inc. v. United States, 114 Ct. Cl. 424, 84 F. Supp. 589 (1949); Massman Construction Co. v. United States, 102 Ct. Cl. 699, cert. denied, 325 U.S. 866 (1945); Dougherty & Ogden v. United States, 102 Ct. Cl. 249 (1944); Rappoli Co., Inc. v. United States, 98 Ct. Cl. 499 (1943); Alta Electric & Mechanical Co. v. United States, 90 Ct. Cl. 466 (1940).

Since plaintiff did not directly apprise defendant of the mistake prior to the acceptance of plaintiff's bid, as was, for instance, the situation in Rhode Island Tool Co. v. United States, 130 Ct. Cl. 698, 128 F. Supp. 417 (1955), Alta Electric & Mechanical Co., supra, and Rappoli Co., Inc., supra, so that there is no showing of any actual knowledge, the only question is whether defendant's officials should have known of the mistake. Included in this problem is the question of whether, even though they could not have known with certainty from the bid data that a mistake had been made, there nevertheless was enough to have reasonably cast upon defendant's officials the duty to make inquiry, which inquiry would have led to the requisite knowledge. See Doke, Mistakes in Government Contracts--Error Detection Duty of Contracting Officers, 18 Sw. L.J. 1 (1964). For although an award normally results in a binding contract fixing the parties' rights and obligations (United States v. Purcell Envelope Co., 249 U.S. 313 (1919)), so that "Ordinarily no relief will be granted to a party to an executory contract in the case of a unilateral mistake", Saligman v. United States, 56 F. Suppl. 505, 507 (E.D. Pa., 1944), nevertheless an acceptance of a bid containing a palpable, inadvertent, error cannot result in an enforceable contract. Moffett, Hodgkins & Clarke Co. v. Rochester, 178 U.S. 373 (1900); United States v. Metro Novelty Manufacturing Co., 38 F. Supp. 568 (D. Md., 1941). An "offeree will not be permitted to snap up an offer that is too good to be true; no agreement based on such an offer can then be enforced by the acceptor." 1 Williston, Contracts (3d ed. 1957) § 94.

The task of ascertaining what an official in charge of accepting bids "should" have known or suspected is, of course, not always an easy one. Mistake-making contractors will naturally seek to impose upon such officials a rather high level of brilliance for the purpose of detecting the error. If, for instance, the knowledge of the Government's "staff of experts" available to the contracting officer is imputed to such officer (Saligman v. United States, supra, p. 507) then what the contracting officer "should" have known would cover a very wide range indeed. However, the test here, as in so many areas, must be that of reasonableness, i.e., whether under the facts and circumstances of the particular case there were any factors which reasonably should have raised the presumption of error in the mind of the contracting officer, Welch, Mistakes in Bids, 18 Fed. B.J. 75, 83 (1958), without making it necessary for the agency's experts in every case to assume "the burden of examining every * * * bid for possible error by the bidder". Saligman v. United States, supra, p. 508.

There is here no contention that the contracting officer had himself, prior to the bid opening, estimated a price for the property in question substantially different from that of plaintiff's bid (cf. Allied Contractors, Inc. v. United States, supra; Frazier-Davis Construction Co. v. United States, 100 Ct. Cl. 120 (1943)) or that he had knowledge of previous purchases of the same or similar article at substantially different prices. Welch, Mistakes in Bids, supra, at p. 83. Instead, reliance is placed only on the alleged wide range in the bids and the inferences that defendant's contracting officer should have drawn therefrom. Limiting ourselves to this one factor, plaintiff is correct that where it is obvious from the range of bids itself that a mistake must have been made, or that there is a real possibility of such error, and the Government has done nothing by way of making appropriate inquiry, relief will be afforded. Universal Transistor Products Corp. v. United States, 214 F. Supp. 486 (E.D.N.Y. 1963); Alta Electric and Mechanical Co. v. United States, supra; Kemp v. United States, supra; Saligman v. United States, supra; C. N. Monroe Manufacturing Co. v. United States, 143 F. Supp. 449 (E.D. Mich. 1956).

Applying the above tests to the instant fact situation, it cannot be concluded, upon the basis of the record presented on these motions, that the disparity in bids constituted constructive notice of the possibility of error.

Bid Item 34 of the surplus Government property herein involved denominated a "lathe, chucking right angle carriage", was accompanied by a long description of its type and equipment. The description closed with the information that the lathe's condition was "Used-Fair" and that defendant's acquisition cost had been $50,072.

Plaintiff's bid set forth the figure of $7,751.51 for this item. The second highest bid was $3,441. Three other bids were also received in the amounts of $2,429.99, $1,511 and $288, respectively. Plaintiff says its bid, actually intended to apply instead to Item 33 (a different kind of lathe) but mistakenly inserted for Item 34 during

the process of transposing the figures from its worksheets to the bid form, was so much higher than the other Item 34 bids that defendant should at least have been required to make inquiry about the possibility of error before accepting it.

However, the Item 34 range of bids in and of itself is not shown to be so great as to have reasonably created a suspicion of error. To be sure, plaintiff's bid was 125 per cent higher than the second highest. But the second highest was 42 per cent higher than the third, 128 per cent higher than the fourth, and 1,095 per cent higher than the fifth. The fourth bid was 424 per cent higher than the fifth. There was thus a wide range on a percentage basis between the various bids, the difference between plaintiff's bid and the second highest being even less than the differences between some of the other bids. As compared with the differences between the second, third, fourth and fifth bids, none of which are also claimed to have been the results of mistakes, plaintiff's high bid did not tower over the second. As the court said in Alabama Shirt & Trouser Co. v. United States, supra: "The bid was low, but the whole set of bids covered so wide a range of prices that the price, in itself, would not necessarily have put the Government's agents on notice that it was made by mistake." * * * And this is especially so when plaintiff's bid of approximately $7,750 is compared to an original acquisition cost of over $50,000.

Furthermore, as surplus property, a wider range of bids would not be unexpected. United States v. Sabin Metal Corp., 151 F. Supp. 683 (S.D.N.Y. 1957), aff'd., 253 F. 2d 956 (C.A. 2, 1958). It is true that, where the price bid is so obviously disproportionate to the value of the article as to alert the contracting officer to the strong possibility of error, the contract resulting from the acceptance of the bid is subject to rescission. C.N. Monroe Manufacturing Co. v. United States, supra, United States v. Metro Novelty Manufacturing Co., supra. Ascribing a value to used surplus property in "fair" condition is, however, most difficult. Here, much naturally depends upon "the use to which the property was to be put by the particular bidder or the chance of resale thereof. The mere difference in the prices bid for such property would not necessarily put the contracting officer on notice of a mistake as would a like difference in the prices quoted on new equipment, supplies, etc., to be furnished". United States v. Sabin Metal Corp., supra, at 689.

In Sabin Metal, the bids for the surplus aircraft engine parts which the Air Force had scrapped but which were still "in original manufacturer's pack" ranged from $337.28 to $9,351.30, the second highest bid being $4,642.71. No relief was afforded the high bidder which had a multiplication error in computing its bid. Plaintiff's attempt to distinguish the Sabin Metal case on the ground that what was involved there were "scrap" airplane engine parts as distinguished from an operating machine, though used, is not persuasive. With surplus used machines or parts, the line between what one buyer may consider as scrap and what another may consider as still usable, if a buyer could be found, may well not be precise. Evidently the $288

bidder on the item here involved considered the lathe to have only scrap value, but the others nevertheless presumably felt that it still had some potential usable value.

Nor is there anything shown to indicate that it should have been obvious to the contracting officer that plaintiff's bid on Item 34 was actually intended to apply to the adjacent Item 33. Item 33 was described as a vertical turret lathe, its condition also being set forth as "Used-Fair" and its acquisition cost as $54,780. The bids on that item ranged from a high of $10,800 to a low of $288. Thus, it was the same general type of equipment on Item 34, in the same condition, in approximately the same acquisition cost area, and with a bid range going down as low as for Item 34. (Evidently the low bidder considered that machine also to be worth only scrap value, although plaintiff says it had a much greater market value than Item 34.) There was thus nothing to make it apparent that plaintiff's bid was intended to apply to the Item 33 lathe instead of the Item 34 lathe.

Considering all aspects of this case on the record as presented on these motions, recovery is not possible. The parties agree there is no genuine issue as to any material fact and neither seeks a trial, nor does plaintiff demonstrate that it would be able to prove more at a trial than is shown by the record herein presented. Consequently, plaintiff's motion for summary judgment should be denied, defendant's cross-motion granted, and plaintiff's petition dismissed.

Section 5. Responsiveness/Responsibility

a. Responsiveness

PRESTEX INC. v. THE UNITED STATES

162 Ct. Cl. 620 (1963)

JONES, Chief Judge, delivered the opinion of the court:

Plaintiff was awarded a contract on January 29, 1960, to supply the United States Military Academy with 25,000 yards of white duck cloth to be used in making summer uniforms for the cadets, for a total contract price of $16,447.50.

After testing a sample of the finished cloth, the defendant refused to accept delivery because the cloth failed to conform to the advertised specification.

Plaintiff now sues for damages for breach of contract, asking that it be reimbursed in an amount equal to the difference between the contract price and the resale price (approximately $10,000), or, in the alternative, that it be placed in the position it occupied before the transaction took place, with the amount of recovery to be determined pursuant to Rule 38(c).

The defendant moves for summary judgment, contending that it is not liable under an express contract because the agreement, being predicated upon a bid which was not responsive to the advertised specification, was invalid ab initio and that, alternatively, it is not liable under an implied contract because it received no benefits from plaintiff's attempted performance.

The contract at issue involved the Academy's 1959 supply of the white duck cloth for summer uniforms, the technical description of which is stated in military specification MIL-D-1645. This same material conforming to the same specification had been in use at the Academy at least since 1952, and plaintiff or its president had been identified with the source of supply since that date. In 1958, the plaintiff had fulfilled a contract for the Academy in compliance with specification MIL-D-1645.

The bid which resulted in plaintiff's contract was in response to a second invitation for bids, all bids (there were only two in both instances) having been rejected as too high in comparison with plaintiff's 1958 price. As customary, both invitations required that the material conform to military specification MIL-D-1645, and both of plaintiff's bids offered to furnish material conforming to that specification. However, in plaintiff's response to the second

invitation it inserted with pen and ink an exception to the specification, the legal effect of which is the primary issue in this case. Plaintiff stated this exception to military specification MIL-D-1645 in the following words: "Bidding on enclosed sample 35/36."

These cryptic words together with the sample constituted the exception in its entirety. Since the specification expressly provided for a width of 29½-30 inches, and since the sample enclosed was similar in appearance to white duck conforming to the specification, it was difficult to determine, without a laboratory test, that plaintiff's bid sample differed substantially from the advertised specification except as to its width which was not considered by the contracting officer a material deviation. However, it was lighter in weight, had a lesser thread count, and was only two-ply instead of four-ply as called for in the written specification.

It was on the basis of this second bid incorporating this sample that the contracting officer awarded the contract now sued upon. The contract was for 25,000 yards of white duck at a price of $.6579 per linear yard for a total contract price of $16,447.50. It provided that the cloth was to conform to specification MIL-D-1645 per sample submitted 35/36 inches. The specification required the contractor to submit, before commencing production, a sample of the finished cloth to the contracting officer for approval.

On April 11, 1960, plaintiff submitted the required "pre-production" sample, although it was hardly preproduction, since the initial and only production run in the manufacturing process had been for the entire contract quantity or 25,000 yards. There were no facilities at West Point for testing textiles, and hence plaintiff's "preproduction" sample was forwarded to a laboratory to determine whether the finished cloth proposed to be supplied would conform to specification MIL-D-1645.

The tests disclosed that the "preproduction" sample (and hence the bid sample) failed to conform to the required specification with respect to weight, thread count, yarn for filling, and sizing content. When plaintiff was informed of these deviations from the specification, it replied that its intention always had been to comply with the sample, not with the specification. Plaintiff was then advised that the material submitted by it had been found inferior and unuseable for the purpose of manufacturing white uniforms for cadets' summer wear and that consequently the preproduction sample was rejected. Plaintiff was requested "to locate material meeting the specification requirements." This the plaintiff failed to do. It is defendant's position, therefore, that no valid contract ever came into existence. Plaintiff appealed this decision of the contracting officer to the Armed Services Board of Contract Appeals. This appeal was dismissed for lack of jurisdiction. On June 12, 1961, the Comptroller General decided that since the bid did not conform to the invitation there was no valid contract, and since the Government had not accepted delivery of the nonconforming cloth, nor retained any tangible benefits from the other party, no recovery could be had on a

quantum meruit basis. Plaintiff then solicited bids for the sale of the rejected material and, on July 24, 1961, sold it to the highest bidder at a price of $0.265 per yard for a total price of $6,832.56.

In moving for summary judgment, defendant argues that the effect of the various statutes and regulations pertaining to formal advertising in the letting of public contracts is that the contract awarded must be the contract advertised and that, if it is not, the Government is not bound, since defendant's contracting agent could not bind the Government beyond his actual authority.

On the question of validity of the contract, we are of the opinion that the defendant is essentially correct. It is a well recognized principle of procurement law that the contracting officer, as agent of the executive department, has only that authority actually conferred upon him by statute or regulation. If, by ignoring statutory and regulatory requirements, he exceeds his actual authority, the Government is not estopped to deny the limitations on his authority, even though the private contractor may have relied on the contracting officer's apparent authority to his detriment, for the contractor is charged with notice of all statutory and regulatory limitations.

Reviewing the facts of this case briefly, we find that the defendant advertised for certain material expressly required to conform to military specification MIL-D-1645. Upon the basis of this advertisement, the contracting officer awarded plaintiff the contract incorporating not only the named specification, but also whatever exceptions were implied in the like-appearing sample which plaintiff tied to its bid, the full import of which was not to be discovered until later. It is contended that in doing so the contracting officer violated specific statutory and regulatory requirements pertaining to the bid and award of public contracts and that, since plaintiff is charged with knowledge of these limitations on the contracting authority, the Government is free to disavow the contract, even though the plaintiff may have relied on it to its detriment.

The law applicable to the issue of validity is clear. The Armed Services Procurement Act of 1947, continuing previous policy, provides that Government contracts for the procurement of supplies shall be made by formal advertising and that the contract shall be awarded to the responsible bidder whose bid conforms to the invitation. Implementing the general rule, the Armed Services Procurement Regulations require the contracting officer to reject any bid which fails to conform to the essential requirements of the invitation. This applies unless the invitation for bids authorized the submission of alternate bids, and the supplies offered as alternates meet the required specifications. Such an alternative is not present in the invitation involved in this case. Rejection of irresponsive bids is necessary if the purposes of formal advertising are to be attained, that is, to give everyone an equal right to compete for Government business, to secure fair prices, and to prevent fraud. Indeed, where the specifications in the invitation to bid are at variance with the

contract awarded the successful bidder, the resulting contract may be "so irresponsive to and destructive of the advertised proposals as to nullify them." Such a contract in effect would be one issued without competitive bidding and therefore invalid.

We must conclude, then, that the contract which concerns us here is invalid and without binding effect on the Government if the plaintiff's exception to the specification was at such variance with the advertised proposals as to nullify them.

The Comptroller General has many times considered the legal effect of deviations from advertised specifications. The rule generally applied in these situations is that deviations may be waived by the contracting officer provided they do not go to the substance of the bid or work an injustice to other bidders. A substantial deviation is defined as one which affects either the price, quantity, or quality of the article offered. The pertinent question for us is whether plaintiff's sample represented a substantial deviation. Without question it did, certainly as to price and--almost as certainly--as to quality.

Plaintiff is of the opinion that there was no real difference between the cloth which it submitted as a sample (presumably identical to the finished cloth) and the specification cloth, but the tests made on the "preproduction" sample completely refute this conclusion. Specification MIL-D-1645 required that the yarn for filling be four-ply and that the thread count per inch be 112 per inch for warp and 32 for filling. In comparison, the sample failed to comply as to weight (only 7.8 ounce), thread count (warp 91 and filling 28), yarn for filling (two-ply), and sizing content (2.1 percent instead of a maximum of 2 percent). These deviations can hardly be termed less than substantial, with a direct effect on the quality of the cloth.

Furthermore, plaintiff admits that cloth conforming to the specifications was considerably more expensive to weave because the "very high sley of the fabric (112 threads per inch for the warp) made the cloth economically unfeasible to weave since a tremendous quantity of seconds would result." Plaintiff was therefore awarded a contract for material cheaper than that advertised for, without the knowledge of other bidders, actual or potential, and to their unquestioned disadvantage.

To permit the contracting officer to accept a bid under these circumstances would render meaningless the whole procedure of letting public contracts on an open competitive basis. We therefore conclude that the agreement entered into between plaintiff and defendant on January 29, 1960, did not result in a valid contract.

Having nevertheless gone to the expense of manufacturing all the material required by the attempted contract and in reliance on it, plaintiff contends that in justice it is entitled to be reimbursed in an amount sufficient to restore it to a position of status quo. Plaintiff makes a cross motion for summary judgment on the issue of liability, with the amount of recovery to be determined under Rule 38(c).

Even though a contract be unenforceable against the Government, because not properly advertised, not authorized, or for some other reason, it is only fair and just that the Government pay for goods delivered or services rendered and accepted under it. In certain limited fact situations, therefore, the courts will grant relief of a quasi-contractual nature when the Government elects to rescind an invalid contract. No one would deny that ordinary principles of equity and justice preclude the United States from retaining the services, materials, and benefits and at the same time refusing to pay for them on the ground that the contracting officer's promise was unauthorized, or unenforceable for some other reason. However, the basic fact of legal significance charging the Government with liability in these situations is its retention of benefits in the form of goods or services.

Nowhere is this more clearly demonstrated than in New York Mail and Newspaper Transportation Company v. United States, decided by this court in 1957, which is the case upon which plaintiff relies in support of its alternate claim alleging in effect an implied contract entitling it to a quantum meruit recovery.

In that case, the New York Mail and Newspaper Transportation Company sued the Government for its breach of contract for the rental of pneumatic tubes in New York for the transmission of mails for the period dating from January 1, 1951, through December 31, 1960. The contract provided for an annual rent payable not on a rate per annum, but in an amount varying from year to year, depending upon operating and general expenses, and for the assumption by the Government of the cost of converting the system from DC to AC electricity.

After using the service for 3 of the 10 years stipulated in the contract, the defendant, on the basis of a report indicating that by discontinuing the tube system and using trucks instead the Post Office Department would save annually approximately $7,000,000, closed down the tube service in December 1953. It notified plaintiff that it considered the contract "null and void" because not let by proper competitive bidding; but added that if the contract was in fact valid it was thereby cancelled.

This court agreed with the defendant on the question of validity, holding that, since the contract did not meet the terms of the advertisement and was executed largely by negotiation, it was invalid. The court relied on Clark v. United States, where the party performing under an enforceable contract was said to be entitled to recover the fair value of his property or services received and used as upon an implied contract for quantum meruit. We held that the contractor was entitled to recover for his services rendered, but such recovery was not to be limited to a strict quantum meruit because there had been a bona fide purpose to render services to the United States under an agreement fully approved by the Postmaster General. This meant that in addition to what plaintiff was entitled to receive at the contract price for services actually rendered during the 3 years the contract had been treated as valid, including franchise taxes for that period

and the cost of the power conversion which the Government had agreed to pay, it should be permitted to recover the cost of carriers purchased for use on the system.

Since the carriers were still in process of manufacture and were not to be installed until the latter part of 1954, almost a year after the rescission, plaintiff herein relies heavily on this item of recovery to substantiate its own claim. There is no difference, it argues, between a set of new carriers not installed and 25,000 yards of cloth made up but not delivered; if one is compensable, the other should be also.

The central fact of New York Mail and Newspaper Transportation Company, which plaintiff completely overlooks, is that for 3 years the United States had elected to treat the contract involved therein as valid and subsisting. It freely used the services promised with the full approval of the Postmaster General, and it apparently paid plaintiff its contract price without complaint. In truth, as to the years 1951, 1952, and 1953 the contract was completely executed on one side and substantially so on the other. The defendant at time of rescission was found to owe only for certain additional expenses analogous to termination expenses. In view of these facts it was reasonable for the court to treat the contract as severable and as ratified as to the 3 years already performed. As to the carriers, the central operative fact was not the particular items of expense found to be compensable, but the fact that the United States had received the benefit of services over a period of years for which plaintiff was entitled to be reimbursed. Whether or not a particular item was included in the over-all amount allowed is of little significance.

A review of the facts in the case at bar reveals that it is readily distinguishable from New York Mail and Newspaper Transportation Company. Plaintiff's contract was wholly executory, and nothing in defendant's conduct suggests a ratification. On the contrary, it repudiated the contract promptly upon testing the sample of finished cloth and discovering that it deviated from the advertised specifications. No part of the order was accepted or used by defendant; nor was it unjustly enriched in any other way.

It is inescapable that plaintiff's difficulties are the result of its own ill-advised actions. As a result of having had the material manufactured, it apparently considers the contract an executed one so far as it is concerned. We are unable to give it that legal effect, for production under the contract was expressly conditioned upon the submission and approval of a "preproduction" sample. Plaintiff chose to ignore this requirement of the specification.

Plaintiff invited the illegal award by submitting a sample--not called for by the invitation--which was misleading both in appearance and in written description and varied from the cloth that had been used for summer uniforms at the Academy for many years, a fact well known to the plaintiff. Accordingly, we conclude that the defendant is not liable for plaintiff's expense incurred in the manufacture of the material under the agreement.

Defendant's motion for summary judgment is granted and plaintiff's motion is denied. The petition is dismissed.

b. Distinguishing Responsiveness from Responsibility

WERNER-HERBISON-PADGETT

B-195956 (1980)

Werner-Herbison-Padgett (WHP) protests the award of a contract for construction of racquetball courts to Charles H. Reed Export, Inc. (Reed), by the Army Corps of Engineers, pursuant to invitation for bids (IFB) No. DACA51-79-B-0055.

WHP contends that Reed is nonresponsible because, among other things, that firm is an export firm relying entirely on subcontractors and lacking technical and financial qualifications and is not a regular dealer or manufacturer within the meaning of the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1976). WHP also contends the low bid of Reed was nonresponsive because design drawings and details submitted with the bid did not show compliance with the specifications as required by the IFB.

The bid opening on July 24, 1979, was attended by a WHP representative who examined Reed's bid and its enclosures. WHP's protest was received in this Office on September 5, 1979.

Our Office does not consider issues as to whether a bidder is a regular dealer or manufacturer within the meaning of the Walsh-Healey Act, since such matters are by law for the contracting agency's determination in the first instance, subject to the Secretary of Labor's review. Schering Corporation, B-193872, March 30, 1979, 79-1 CPD 221. Where the status of a small business is challenged, Section 501 of Pub. L. 95-89, 91 Stat. 561, amending section 8(b) of the Small Business Act of 1958, requires the Small Business Administration to rule on the issue as to whether a bidder is a regular dealer or manufacturer and to forward a finding of nonqualification to the Secretary o r final determination. Bethpage Industries, Inc., B-189912, January 20, 1978, 78-1 CPD 54; Charles J. Dispenza and Associates, B-190660, February 6, 1978, 78-1 CPD 102. Moreover, this Office does not review affirmative determinations of responsibility except where the protester alleges fraud on the part of procuring officials or where the solicitation contains definitive responsibility criteria which allegedly have not been applied. School Transportation Co., Inc., B-192799, January 10, 1979, 79-1 CPD 12. Neither exception applies here.

The Army contends that as the protest was filed approximately 25 working days after bid opening, it is untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(2) (1979), which requires protests to be filed not later than 10 working days after the basis for protest is known or should have been known. However, timeliness is not measured from bid opening, as we believe grounds for protest do not arise until

the protester has learned of agency action or intended action which is inconsistent with what the protester believes to be incorrect or inimical to its interest. See, e.g. Action Manufacturing Company, B-186195, November 17, 1976, 76-2 CPD 424; Carco Electronics, B-186747, March 7, 1977, 77-1 CPD 172. There is no indication in the record that WHP did not protest within 10 working days of the time it learned the Army had found Reed's bid to be acceptable. Thus, resolving any doubts with respect to timeliness in favor of the protester, we find the protest timely. Ikard Manufacturing Company, B-192578, February 5, 1979, 79-1 CPD 80.

During its technical review of Reed's drawings, the Army noted that they showed a thickness of 13/16 inch for the side and rear wall panels of the racquetball courts where the specifications required a thickness of 1 1/8 inches. It was determined that this was a minor or insignificant deviation and within an acceptable tolerance for side and rear wall panels according to current racquetball industry practice. At the request of the Army, Reed submitted revised drawings showing a thickness of 1 5/32 inches for all wall panels. The Army contends that as the specifications were clearly performance specifications and the bidders were not advised that failure to submit the drawings prior to bid opening would result in rejection of the bid, the drawings clearly relate to responsibility rather than responsiveness. We do not agree.

There is a definite distinction between questions related to bid responsiveness and those concerned with bidder responsibility. "Responsibility" as employed in Federal procurements refers to a bidder's ability or capacity to perform all of the contract requirements within the limitations prescribed in the solicitation. "Responsiveness" concerns whether a bidder has unequivocally offered to provide the product in total conformance with the material terms and specifications of the solicitation. J. Baranello and Sons, 58 Comp. Gen. 509 (1979), 79-1 CPD 322. The determination of responsiveness must be made from the bid documents as of the time of opening. Lift Power Inc., B-182604, January 10, 1975, 75-1 CPD 13.

When data is needed to determine a bidder's ability and capacity to perform a contract, failure to submit such data with the bid, even though the IFB may so require, does not compel rejection of the bid. Because the need relates to a bidder's responsibility, the data may be furnished after bid opening up to the time of contract award. 52 Comp. Gen. 389 (1972); Thermal Control Inc., B-190906, March 30, 1978, 78-1 CPD 252. When data is needed to determine if the product offered will comply with the specifications, the need relates to responsiveness and the failure to provide the data or the provision of data showing compliance with the specifications, requires bid rejection because a nonresponsive bid cannot be made responsive after bid opening through the submission of additional information. 46 Comp. Gen 434 (1966).

The solicitation required the courts to be "in strict accordance" with the specifications and further required submission of construction drawings which were to be in sufficient detail to indicate compliance therewith. The solicitation also provided that any exceptions or qualifications to its conditions will be cause for disqualification. Although the specifications were called "performance specifications", they contained detailed design, material and dimensional requirements with no indication of acceptable tolerances within which a bidder could deviate. Moreover, it is an established legal principle that a trade or business practice or procedure, such as the one the Army apparently relied upon here, may not supersede or alter the clear and unambiguous terms of the solicitation. The Murphy Elevator Company, Incorporated, B-180607, April 2, 1974, 74-1 CPD 164. We believe the drawings were clearly required in order to evaluate the compliance of the courts with the specifications and that they relate to responsiveness rather than to responsibility. Moreover, even if the drawings were requested to aid in the determination of responsibility, they may nevertheless render a bid nonresponsive where, as here, they indicate that the bidder does not intend to comply with a material IFB requirement. Palmetto Enterprises, Inc., et al., B-193843, August 2, 1979, 79-2 CPD 74; Test Drilling Services Co., B-189682 September 15, 1977, 77-2 CPD 193.

While it is true minor deviations having only an insignificant effect on price, quantity, quality or relative standing of the bidders can be cured or waived, we do not believe that a bid offering panels approximately 28 percent thinner than the specifications require can reasonably be considered as deviating in a "minor" respect or as having an insignificant effect upon quality. 51 Comp. Gen. 518 (1972). Moreover, the Army did not accept the bid as submitted but required Reed to revise its drawings showing a panel thickness in excess of that specified. Such a required revision seems inconsistent with a position that the deviation was minor or insignificant.

Defense Acquisition Regulation (DAR) § 202.5(b) provides that descriptive literature shall not be required unless it is needed to determine before award whether the product offered meets the specifications and to establish exactly what the bidder proposes to furnish. DAR § 2-202.5(d)(1) provides that when such literature is required, the IFB must clearly state the purpose for which it is required, the extent to which it will be considered in the evaluation and the rules which will be applied if a bidder fails to furnish it before bid opening or if it does not comply with IFB requirements. Moreover, the IFB must contain a provision substantially as in DAR § 7-2003.31 when the descriptive literature is required. DAR § 2-202.5 (d)(2). That provision specifically states failure to furnish the data or failure of the data to show compliance with the specifications will require rejection of the bid.

Although, as pointed out above, the IFB here clearly stated the drawings were required to determine compliance with the specifications and that any exceptions or qualifications to the IFB conditions would be cause for disqualification, the IFB did not contain the provision set out in DAR § 7-2003.31(a). While the absence of the required

provision may indicate a procedural deficiency, such a deficiency does not alter the fact that the drawings were required explicitly to determine compliance of the product offered with the specifications nor does it convert a matter of responsiveness to one of responsibility. Thus, we do not agree that the lack of an explicit statement in the IFB to the effect that the failure to submit drawings would render a bid nonresponsive demonstrates that the drawings were only an aid to determining whether a bidder understood the specifications.

Accordingly, we conclude that Reed's bid must be rejected as being nonresponsive and this protest is sustained. By letter of today, we are recommending to the Secretary of the Army that this procurement be reviewed in light of our decision and that Reed's bid not be accepted.

AD-A139 152 GOVERNMENT CONTRACT LAW CASES(U) AIR FORCE INST OF TECH 3/13
WRIGHT-PATTERSON AFB OH SCHOOL OF SYSTEMS AND LOGISTICS
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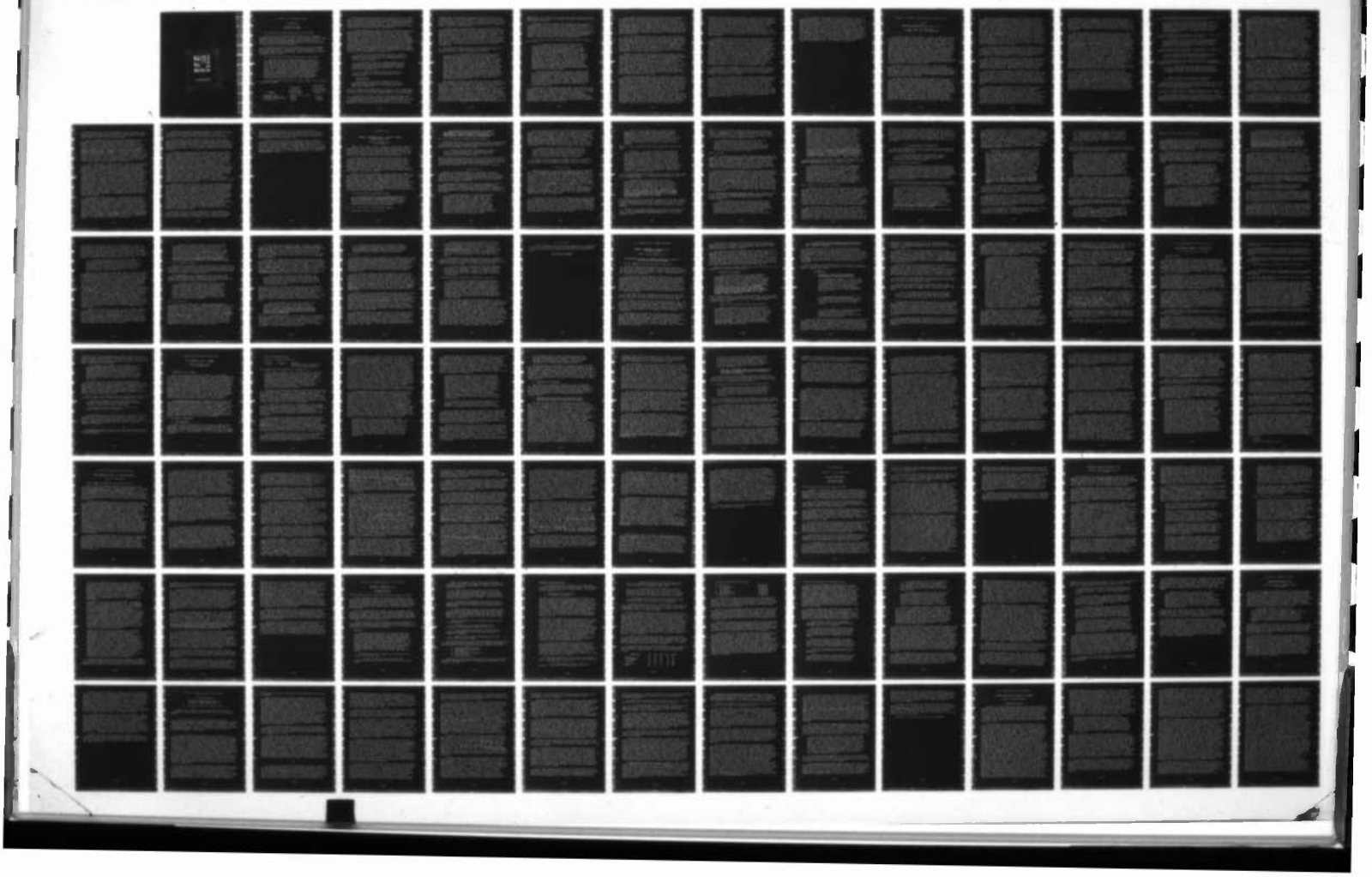

MICROCOPY RESOLUTION TEST CHART
NATIONAL BUREAU OF STANDARDS-1963-A

Section 6. Brand Name or Equal

A. DALKIN CO.

43 Comp. Gen. 761
(B-153717) (1964)

To the Director, Defense Supply Agency, 4 June 1964:

We refer to a letter dated 2 April 1964, from Mr. George W. Shelhorse, Assistant Counsel, furnishing a report and documents on the protest filed with our Office by the A. Dalkin Company, a division of American Machine and Foundry Company, against the proposed cancellation by the Defense General Supply Center of a contract awarded to that company for beverage dispensers.

Invitation for Bids No. DSA 4-64-1069 was issued on 20 December 1963, soliciting bids for furnishing 50 beverage dispensers on an F.O.B. destination basis. Amendment 1 to the Invitation was issued on 24 December 1963, increasing the total number of dispensers to be purchased from 50 to 150.

The Invitation carried the following purchase description:

> FSN 7320-977-3726 DISPENSER, BEVERAGE, ELECTRICALLY REFRIGERATED: Single bowl, transparent unbreakable plastic; 4 gallon beverage capacity; approx. dimensions of unit 23 in. high, 17 in. deep, 15 in. wide; furnished 1/6 hp hermetically sealed refrigeration unit, adjustable beverage temp. control, sterilizer lamp, cabinet access panels, drip tray, 7 ft. (min) power cord with grounded connection, pump or stirring apparatus to provide continuous beverage circulation through bowl and cooling area; electrical characteristics 115 volts, AC, 60 cycle, single phase; proof of compliance with UL and NSF requirements must be furnished Jet Spray Corp. Model No. JS-6 "or equal."

Bids were opened as scheduled on 20 January 1964. Four bids were received as follows:

Bidder	Sub-Item 001 75 each F.O.B. Tracy Defense Depot	Sub-Item 002 75 each F.O.B. Defense General Supply Center
Jet Spray Corp.	$176.00 (F.O.B. origin)	
Hedeman Products, Inc.	199.00	$199.00
Pro-Craft Engineering Co.	122.50	122.50
A. Dalkin Co.	175.00	175.00

Pro-Craft Engineering Company, the low bidder, bid on its "Model WC-3". Pro-Craft's bid was rejected as nonresponsive for failure to meet the specific requirements set forth in the purchase description since the literature attached to Pro-Craft's bid described the Model WC-3 as having a three gallon capacity. The contracting officer reports that Pro-Craft also had not furnished data necessary to determine that the item complied with UL requirements.

A. Dalkin Company, the second low bidder, submitted a bid on the American Machine and Foundry Company "Sir Culator" Model CD-30 as an equal item with descriptive literature attached. This literature indicated that the item offered by A. Dalkin Company was a seven gallon, 1/4 h.p. unit, 31-1/4 inches high, 16 inches wide and 18-3/4 inches deep. The Sir Culator unit was a larger item which exceeded the capacity requirements specified in the Invitation and, according to the contracting officer, was considered from a technical standpoint to be a superior item. The contracting officer reports that it was determined that the Sir Culator unit would be satisfactory for the Government's requirements and that award should be made to A. Dalkin. In that connection, a document entitled "DETERMINATION AND FINDINGS" dated 27 January 1964, signed by the contracting officer and submitted as part of the record before us, recites that:

> 2. This bid (A. Dalkin) was sent to Dir., Technical Operations for evaluation, and they suggested that Dir., Supply Operations be contacted as to the acceptability of a larger capacity machine.
>
> 3. Mr. Robert Riley, Dir., Supply Operations, was contacted and in turn spoke with Colonel Dibble and an agreement was reached that the larger capacity machine would be satisfactory for the requirements of the Air Force (only recorded user).
>
> 4. Mr. Riley initialed Comment No. 2 from Dir., Technical Operations, indicating acceptance of the suggested item.
>
> Determination
>
> On the basis of the above information, it is determined that an award will be made to the American Machine and Foundry Company for the brand name Item specified in their bid.

Award of contract DSA-4-020650-TP521 was made to A. Dalkin Company, a division of American Machine and Foundry Company, on 31 January 1964, for 150 units of its Sir Culator, Model CD-30, at a unit price $175.

The contracting officer reports that beverage dispensers are in short supply with back orders on hand. On 20 February 1964, the A. Dalkin Company was telephonically requested by the procuring agency to accelerate delivery to the maximum extent at no cost to the Government. On 26 February and 3 March 1964, the A. Dalkin Company

advised that 75 units would be shipped on 20 March 1964, and 75 on 27 March 1964. (The contract requires shipment of all 150 units to both destinations by 17 July 1964.) It is reported that the first 75 units are packed and ready for shipment while the remaining units are ready for packing. However, due to subsequent events, as described below, no deliveries have been made.

By letter dated 11 February 1964, to the contracting officer, Pro-Craft Engineering Company protested the rejection of its bid contending that, in his opinion, it was not mandatory to bid on a four gallon dispenser and it, therefore, bid on the type it thought would meet with the most favor in a "tight-money" budget situation. Pro-Craft alleged that it manufactured dispensers in all sizes from 3 gallons up to and including 12 gallons and that, had it been aware that it was mandatory to bid on a 4 gallon unit, it certainly would have done so. In response to Pro-Craft's protest the procurement was reviewed and it was again determined that Pro-Craft's bid was nonresponsive.

In conjunction with the review of the rejection of Pro-Craft's bid, the award to A. Dalkin Company was also reviewed. The contracting officer reports that upon such review:

> * * * It was determined that the bid of A. Dalkin Company was not responsive to the specific requirements of 4 gallons beverage capacity, 1/6 h.p. refrigeration unit; and that the bid did not offer a sterilizer lamp. The award to A. Dalkin Company was therefore not the contract on which bids were requested and was an illegal award. On 12 March 1964 A. Dalkin Company was notified telephonically of the Government's intention to cancel the award and that no shipments should be made. The Company asserted that cancellation will result in substantial costs to that firm. These costs allegedly will result primarily from packaging in accordance with requirements set forth on page 4 of the Invitation for Bids; from overtime expended in attempting to comply with the Government's request for acceleration; from inclusion of an optionally available unbreakable plastic bowl; and from holding these quantities. * * *

The contracting officer contends that the contract awarded to A. Dalkin Company contained material variances from the Invitation and was not the contract on which bids were requested. Such a contract, he states, is invalid and confers no rights on the purported contractor, citing Prestex, Inc. v. United States, Ct. Cl. No. 415-61, decided 12 July 1963, 320 F. 2d 367. He further states that the illegality of the award results from a violation of the requirements of 10 U.S.C. 2305(c) which provides, in substance, that awards shall be made to the responsible bidder whose bid conforms to the Invitation for Bids and will be most advantageous to the United States, price and other factors considered. Thus, he asserts, the present case is distinguishable from John Reiner and Company v. United States, Ct. Cl. No. 431-57, decided 13 December 1963, 325 F. 2d 438, since, unlike the

Reiner case, the illegality of the award here results from a violation of a statute rather than a violation of any higher standard than that required by the statute.

Although, as above indicated, the contracting officer believes that the award to A. Dalkin Company was illegal he, nevertheless, recommends that after the award is canceled he be authorized to accept delivery of the 150 units without sterilizer lamps and to pay a reasonable price therefor not to exceed the contract price. He notes, in justification for such procedure, that the firm has produced in good faith and in fact has accelerated production at the Government's request. He also points out that the contractor has offered to install a sterilizer lamp at no cost to the Government.

In his letter of 2 April 1964, the Assistant Counsel states, in part, that:

> * * * the Dalkin Division bid was not determined to be non-responsive on the question of whether it offered an item equal to the Jet Spray model. It was determined to be non-responsive because it did not meet all the specific minimum requirements set forth in the purchase description, even though in some respects it exceeded those requirements. A comparison of the low bid and that of the Dalkin Division with each of the specific requirements is also attached. While the costs of some of the specific requirements, such as the sterilizer lamp, may be relatively minor, they are nevertheless specific requirements. If the specific requirements are not regarded as minimum requirements then the low bid of Pro-Craft Engineering Company could also have been considered responsive and the award tc the Dalkin Division would have been to other than the low bidder.
>
> The information contained in the report indicates that all of these requirements may not actually be necessary to serve the Government's needs, which would make the procurement objectionable on the ground that it did not permit full and free competition. This fact alone might not require a determination that the award is illegal. However, an award on a bid which is non-responsive to the stated terms of the Invitation has no validity and confers no rights on the purported contractor.

The facts and circumstances outlined above fairly support a conclusion that the Sir Culator model offered by A. Dalkin is, in nearly all material respects, equal to the brand name specified and, in some respects, exceeds the minimum requirements of the purchase description. In that connection it is noted that the Assistant Counsel's letter concedes that A. Dalkin's bid was determined to be non-responsive because it failed to meet all of the specific minimum requirements set forth in the purchase description, and not because it was not equal to the brand name specified.

In his report the contracting officer cites three requirements in the purchase description which he has determined were not met by A. Dalkin's bid: 4 gallons beverage capacity, 1/6 horsepower refrigeration unit, and sterilizer lamp. While it is true that the Sir Culator unit deviates from these cited requirements, the deviations as to beverage capacity and horsepower of the refrigeration unit exceed the minimum standards and, insofar as these features are concerned, it would appear that the Sir Culator model is technically superior to the brand name specified. Moreover, it was expressly determined that the larger capacity machine would be satisfactory for the requirements of the using activity.

* * * The Assistant Counsel's letter concedes that the cost of the sterilizer lamp "may be relatively minor" and also indicates that the requirement for the lamp, along with other specific requirements, may not actually be necessary to serve the Government's needs. This is further confirmed by the contracting officer's recommendation that he be authorized to accept delivery of all 150 units without sterilizer lamps. In view of these circumstances, it is apparent that, while A. Dalkin's bid was not responsive to the sterilizer lamp requirement, its failure to conform with that portion of the purchase description is not one of major proportions.

Moreover, we cannot agree with the Assistant Counsel's observation that "If the specific requirements are not regarded as minimum requirements then the low bid of Pro-Craft Engineering Company could also have been considered responsive * * *". A comparison of Pro-Craft's bid with the specific purchase description requirements shows that its bid failed to conform to the requirements for: (1) 4 gallons beverage capacity, (2) sterilizer lamp, (3) 7 ft. (min) power cord with grounded connection, and (4) proof of compliance with U.L. requirements. These deviations in Pro-Craft's bid, and especially the 3, rather than 4, gallon beverage capacity deviation, constitute a much more serious failure to conform to the specific requirements than does A. Dalkin's bid which, as we have seen, failed only in regard to the sterilizer lamp.

We have construed the words "or equal" when used in conjunction with a brand name purchase description, to mean that an alternate item must be equal to the product specified, insofar as the needs of the procuring agency are concerned, but not necessarily an exact duplicate thereof in detail or performance. 38 Comp. Gen. 291, and decisions cited therein. See, also, paragraph 1-1206.4(a) of the Armed Services Procurement Regulation (ASPR) which states, in part, that bids shall not be rejected because of minor differences in design, construction, or features which do not affect the suitability of the products for their intended use. Had the purchase description in this case contained, in addition to the brand name or equal description, only those salient characteristics which were essential to the needs of the Government in accordance with ASPR 1-1206.2(b), A. Dalkin's bid would clearly have been responsive to the Invitation for Bids. However, the fact remains that, the bid of A. Dalkin Company was not completely responsive to the terms of the Invitation for Bids in that it failed to offer a sterilizer lamp. Had this matter been brought to our

attention prior to award of the contract it seems clear that the best interests of the United States would have required cancellation of the Invitation and a readvertisement of the Government's needs. However, the deviation in the bid was, concededly, a deviation to a requirement in the purchase description which is actually unnecessary to the Government's needs. We also note that the award was made in good faith and that the contractor, at the express request of the Government to expedite deliveries, has expended substantial sums of money in preparing to meet its obligations under the contract. In view of the foregoing it is our opinion that the best interests of the Government would not be served by canceling the contract awarded to A. Dalkin Company.

In reaching this conclusion we are not unmindful of the holding in the Prestex case, which was cited by the contracting officer as authority for cancellation of the contract. While we think that Prestex correctly expresses the law on questions of bid responsiveness to Government invitations we are of the opinion that the facts and circumstances of the present case are clearly distinguishable from those involved in Prestex. The Court of Claims noted in Prestex that the deviations in the plaintiff's bid to the specific requirements of the specifications were substantial and the award to the plaintiff operated to the unquestioned disadvantage of the other bidders. Also of significance is the fact that the uniform cloth submitted by the plaintiff was found by the Government to be inferior and unusable for its intended purpose. In the instant case, as we have previously stated, A. Dalkin's bid offered to furnish an item which in many respects is superior to that described in the invitation; the deviation was minor and, in fact, the item requirement to which the deviation was made is unnecessary to the Government's needs.

With respect to the Reiner case, which was also cited by the contracting officer, no more need be said than that we are in complete disagreement with the philosophy that this Office applies higher or different standards than are applied by the courts in determining whether a contract award is illegal.

The award in this case was made to A. Dalkin on the basis of furnishing its Sir Culator Model CD-30 in accordance with ASPR 1-1206.4, which provides that award documents shall identify, or incorporate by reference an identification of, the specific products which the contractor is to furnish and such identification is to include any brand name and make or model number, descriptive material, and any modifications of brand name products specified in the bid. Since A. Dalkin's descriptive literature did not describe a sterilizer lamp and its bid did not modify the brand name product specified to include the lamp, A. Dalkin did not offer to furnish the lamp and award of the contract did not obligate it to do so. Therefore, our Office will not object to delivery of all units under the contract without the attached sterilizer lamp.

This procurement is an example of the difficulties all too frequently encountered in procurement utilizing brand name or equal purchase descriptions. In future procurements involving such purchase descriptions the Government's actual needs should be determined in advance of the issuance of the Invitation for Bids and only such actual needs should be set forth as salient characteristics. See, in that connection ASPR 1-1206.2(b) which specifies that "Brand name or equal purchase descriptions should set forth those salient physical, functional, or other characteristics of the referenced products which are essential to the needs of the Government." [Emphasis supplied.] Also, in the future, if reasonable tolerances respecting the physical or functional characteristics of equipment are generally acceptable to your agency (as appears to be the case in the instant procurement), the salient characteristics in the purchase description should be stated in approximate terms. See B-136574, 14 August 1958.

Section 7. Protest - Right to Award - Standing to Sue

a. Roles

BROOKFIELD CONSTRUCTION CO., INC. v. U.S.

224 F. Supp. 94 (1964)(DCDC)
Affirmed, 339 F. 2d. 753 (CADC)(1964)

* * * * *

The salient facts are as follows: On June 1, 1964, the Architect of the Capitol issued an Invitation for Bids for the construction of an underground garage for the Additional House Office Building in process of erection near the Capitol in Washington, D.C. One of the requirements was that every proposal should be accompanied by a bond for at least ten per cent of the amount bid. The offers were to be opened at 3:00 P.M. on July 15, 1964. The two plaintiffs, in a joint venture, submitted a proposal of $11,735,000. It was accompanied by a bond for only $1,000,000, instead of $1,173,500, as was required by the invitation. This deficiency was due to an inadvertent error on the part of the surety company which wrote the bond. Unfortunately, the plaintiffs did not discover the mistake until the last minute. They immediately communicated with the surety company, and at 3:24 P.M. on 15 July, which was shortly after the bids were opened, the surety telegraphed to the Architect of the Capitol increasing the bond to a proper amount. The plaintiffs' proposal turned out to be the lowest, the next bid being $35,000 higher.

On August 10, 1964 plaintiffs received a notice from the Architect of the Capitol rejecting their bid. This action was taken because of the inadequacy of the bond submitted when the proposals were opened. The conclusion was reached that the insufficiency should not be waived and that the correction made subsequently to the opening of the bids should not be considered. Accordingly, the contract was awarded to the next lowest bidder.

The intervening events may be briefly summarized as follows: On July 22, 1964 - a week after the bids were opened - the Architect wrote to the Comptroller General requesting his views as to whether it was mandatory to exclude the lowest bid because of the deficiency of the bid bond. The Comptroller General answered on August 3, that it would be proper to do so. The Architect acting pursuant to the direction of the House Office Building Commission, wrote to the Comptroller General again on August 5, in the light of what apparently was deemed to be his somewhat ambiguous advice, and inquired "whether the low bid should be rejected as a matter of law". The Comptroller General replied on 6 August that the plaintiff's proposal should be barred. On the basis of this advice and pursuant to the direction of the Commission, the Architect of the Capitol then formally rejected the plaintiff's bid and awarded the contract to the next lowest bidder.

The plaintiffs requested the Comptroller General to reconsider his ruling. He responded by an elaborate and detailed letter of September 11, adhering to his prior opinion. Government counsel contended at the oral argument that an undesirable practice had occasionally arisen among some bidders of purposely accompanying their offers either by an inadequate bond or by no bond at all in order to be in a strategic position of either curing the defect or abandoning the project after the bids were opened and they were able to perceive what their rivals had proposed. Counsel indicated that in order to eliminate such maneuvers the Comptroller General deemed it necessary to enforce the requirements to the letter even though occasionally hardship might result from an inadvertent mistake on the part of a bona fide bidder. It is not for the Court to pass on the motivation of the Comptroller General's exercise of his discretion. There is no suggestion, however, that in this instance the defect in the bond was due to anything but an innocent error, which the bidders took steps to rectify immediately upon its discovery.

This action was thereupon brought against the Architect of the Capitol, the members of the House Office Building Commission being later joined as additional parties defendant, for relief in the nature of mandamus, to require the defendants to consider the plaintiffs' proposal and to award the contract to the lowest bidder whose offer was responsive to the invitation, i.e., to the plaintiffs.

The plaintiffs moved for a preliminary injunction to restrain the Architect from executing a contract with any other person, or from issuing a notification to proceed with the performance of such a contract, if already executed. The defendants countered by a motion to dismiss the complaint on the grounds that the plaintiffs lacked standing to sue and that the complaint failed to state a claim on which relief may be granted. Both motions were argued together.

At the outset it is necessary to consider the scope of the authority of this Court to review executive action, such as was taken in this instance. There seems to be a growing tendency to resort to the courts for relief from governmental acts claimed to be harsh, unjust, inexpedient or undesirable. Such efforts ignore some basic and fundamental principles that are well known but often overlooked in the turmoil of activities of everyday life. Simple and elementary as they are, it appears desirable to recall and analyze them from time to time.

The framers of the Constitution of the United States created a popular form of Government, specifically, to use the technical nomenclature of political science, a representative republic. Sovereignty was lodged in the people of the United States. The powers of the Federal Government were divided among three coordinate branches. The legislative power was delegated to representatives elected for comparatively short terms of years. They were vested with the authority to make laws, as well as with the control of the purse, in order that no money might be expended by the Government except pursuant to appropriations voted by the national legislature. The executive branch was to be headed by the President, likewise elected

for a comparatively short period. He executes the laws, conducts foreign relations and is Commander in Chief of the Armed Forces. The third division is an independent judiciary composed of judges who are not subject to popular election, but hold office by a permanent tenure. Their function is to decide controversies between one person and another, and between any person and the Government. None of the three branches is superior to either of the other two. All three are coordinate.

The leading members of the Constitutional Convention of 1787 combined profound scholarship and learning with practical experience. They had a thorough knowledge of history of governments of various types, dating back to the days of antiquity, and were well versed in the literature of political science and cognate subjects. Among the treatises familiar to them and that had an influence on their thinking were Montesquieu's Spirit of the Laws, and John Locke's Second Essay of Civil Government. Both of these classics developed the theory of separation of powers. One of the outstanding contributions of the Founding Fathers to political institutions was actually to bring into being a popular form of Government in which a separation of powers was a principal feature. It may be interesting to observe that it radically differs from popular governments of the parliamentary type, which had their origin and greatest growth in Great Britain. In a parliamentary form of Government there is no separation between the legislative and the executive branches. In fact, the executive is a part of the legislature. The heads of government departments for the time being are the principal members of the majority party that controls the legislative body. In Great Britain, while judges are entirely independent and hold office by a permanent tenure, nevertheless, the leading judicial officer, the Lord Chancellor, is a member of the Cabinet and thus a part of the legislative and executive establishment and of the Government in power at any one time.

In the United States supreme power is not vested in the judiciary. The courts are not superior to either of the other two branches of Government and have no power of supervision or control over them. Were the fact otherwise, we would cease to have a popular form of government, but instead would be governed by a group of several hundred Federal judges holding office by permanent tenure. Technically the Federal Government would no longer be a republic but would become an aristocracy. This is not what the Founding Fathers contemplated or created. As it is, the courts may not step in and stay or control executive action unless the executive or administrative officer acts in excess of his statutory authority, or in a manner repugnant to a provision of the Constitution of the United States.

These fundamental theories have often been expressed in different ways. Thus Madison said in The Federalist, No. 48:

> "It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and completely administered by either of the other departments. It is equally evident, that neither of them ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers."

Chief Justice Taney concretely formulated some of these ideas in Decatur v. Paulding, 14 Pet 497, 515. He stated:

> "The interference of the courts with the performance of the ordinary duties of the executive departments of the Government, would be productive of nothing but mischief; and we are quite satisfied, that such a power was never intended to be given to them."

Mr. Justice Holmes enunciated a similar thought in Missouri, Kansas & Texas Ry. Co. v. May, 194 U.S. 267, 270:

> ". . . it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

Chief Justice Stone, when an Associate Justice, eloquently discussed this subject in his dissenting opinion in United States v. Butler, 297 U.S. 1, 78, 87:

> ". . . while unconstitutional exercise of power by the executive and legislative branches of the Government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."
>
> * * * * *
>
> "Courts are not the only agency of Government that must be assumed to have capacity to govern."

While these statements are found in a dissenting opinion, there appears to have been no difference of views as to these basic principles, the disagreement between the majority and minority being only in their specific application.

This court had occasion to consider and apply some of those doctrines in another aspect in Trimble v. Johnston, 173 F. Supp. 651.

These fundamental propositions lead to the corollary that the judicial branch of the Government may not be vested with any powers that are not judicial and that the authority of the courts is limited to determining actual and justiciable cases and controversies.

The Federal Courts may not render advisory opinions, Hayburn's Case, 2 Dall. 408; Muskrat v. United States, 219 U.S. 346, 361; Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249, 259, et seq.; Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239 et seq. For example, the authority to declare statutes unconstitutional is not a plenary power that is exercised in vacuo, as Chief Justice Marshall demonstrated with the precision of an Aristotelian syllogism in Marbury v. Madison, 1 Cranch 137. If a justiciable controversy is presented to a court and the case may be governed both by a statutory provision and by a clause in the Constitution, and the former is found to be repugnant to the latter, the courts must determine the controversy in accordance with the Constitutional provision, and ignore the statute, since the Constitution is the supreme law of the land. The statutory provision is then a nullity insofar as that case is concerned. Necessarily under our system of jurisprudence the case becomes a precedent for future controversies involving the same questions. See also Chicago & C. Railway Co. v. Wellman, 143 U.S. 339, 345. Similarly, in order to secure a determination by a court, the party bringing the matter to its attention must have a standing to sue. In other words, he must be personally aggrieved or affected in the legal sense by the action of which he complains. A person may not submit a question to the courts for decision if his interest is no different from that of any other citizen, for then there exists no justiciable controversy, Massachusetts v. Mellon, 262 U.S. 417, Frothingham v. Mellon, 262 U.S. 447; Alabama Power Co. v. Ickes, 302 U.S. 464.

The Supreme Court crystallized the application of these principles in connection with the authority of the Courts vis-a-vis the executive officers of the Government in Larson v. Domestic & Foreign Corp., 337 U.S. 682. That case involved a dispute concerning the construction of a contract made with a Government agency. It was claimed in behalf of the contractor that the agency was violating his contract rights. The Supreme Court held that the courts may not step in and either stay or compel executive action unless the executive official was acting in excess of his statutory authority or transgressed a Constitutional limitation. The mere fact that he might be acting erroneously or perhaps even tortiously does not vest the courts with jurisdiction to interfere.

In addition, there are several well known subordinate principles. The Government may not be sued except by its consent. The United States has not submitted to suit for specific performance or for an injunction. This immunity may not be avoided by naming an officer of the Government as a defendant. The officer may be sued only if he acts in excess of his statutory authority or in violation of the Constitution for then he ceases to represent the Government.

In the case at bar it cannot be said that the various Government officials involved are acting illegally or in excess of their statutory powers. In its ultimate analysis, the plaintiffs' real complaint in its essence is that the Government officers are too rigid and inflexible in applying the pertinent rules of law and in declining to make an exception and relieve the plaintiffs of the harsh consequences

of an inadvertent error which they promptly tried to rectify. The plaintiffs are in effect asking this Court to require the defendants and the Comptroller General to exercise a certain degree of leniency toward them in a spirit of sweet reasonableness.

This is a tempting and alluring invitation because the result to the plaintiffs seems harsh and in addition the Government loses $35,000 as a result of the adamant attitude of the Comptroller General. We must be guided, however, by the implications of Chief Justice Stone's sage admonition that the only check upon the courts' exercise of power is their "own sense of self-restraint", United States v. Butler, Supra. The Court has no such dispensing power as the plaintiffs would have it invoke. For the Court to interject itself in a manner sought by them would contravene the principles that we have just discussed. It would be an unwarranted assumption of a power to control and supervise executive action--an authority that the courts do not possess. Since the defendants have done nothing that is illegal or in excess of their statutory authority, the courts with their limited power have no authority to interfere.

In this connection, it seems desirable to give some consideration to the role of the Comptroller General in a situation of the type presented here. The Comptroller General is the head of the General Accounting Office. Unlike heads of most departments and establishments of the Government, he occupies a dual position and performs a two-fold function. First, he makes investigations of matters relating to the receipt, disbursement and application of public funds, and reports the results of his scrutiny to the Congress with appropriate recommendations. In addition he pursues investigations that may be ordered by either House of Congress, or by any Committee of either House, in matters relating to revenue, appropriations or expenditures, 31 U.S.C. § 53. In performing these functions the status of the Comptroller General is that of an officer of the legislative branch of the Government. The Congress has comprehensive authority to undertake investigations in aid of legislation, or in connection with the appropriation of funds. Investigations are an aid to legislation and to the making of appropriations and are therefore auxiliary to the basic functions of the Congress. The Congress may conduct investigations either through Committees or through an official such as the Comptroller General.

The Comptroller General has also a second status as the chief accounting officer of the Government. His second principal function is that of approval or disapproval of payments made by Government departments and other agencies, as well as of settling and adjusting accounts in which the Government is concerned, 31 U.S.C. § 71. This is an executive function and in performing it the Comptroller General acts as a member of the Executive Branch of the Government. The dual status of the General Accounting Office is not anomalous, for many regulatory commissions fulfill in part a legislative function and in part carry out executive duties, Humphrey's Executor v. United States, 295 U.S. 602. Cf. Myers v. United States, 272 U.S. 52. Thus we have developed in comparatively recent years a fourth type of Government agency - one that combines two kinds of basic powers.

The Office of Comptroller General examines all vouchers and scrutinizes all payments made by Government disbursing officers. In case any payments are found excessive, improvident, or illegal, the accounts of the disbursing officers may be surcharged accordingly.

The Comptroller General may also transmit such items to the Department of Justice with a view to bringing judicial proceedings in order to secure refunds from persons to whom erroneous payments have been made. The Comptroller General is not a law officer. He does not render legal opinions. His decisions are binding and conclusive only on the Executive branch of the Government, particularly on disbursing officers.

As a matter of convenience, the Comptroller General may render advance rulings on questions whether certain payments, if made, would or would not be approved by him, 31 U.S.C. 74, 3d paragraph. Such a course is conducive to fairness and efficiency. While the statute expressly authorizes the Comptroller General to do so, it would seem that even in the absence of an explicit provision such an activity would impliedly be within his functions. Technically a decision of the Comptroller General upon a question so submitted to him, is not a legal opinion, but a ruling or an announcement that if certain payments were made by disbursing officers in the future, they would be passed or disallowed. The disapproval would be binding and conclusive on the disbursing officer but not upon the person to whom the payment might be made. It would still be open to the latter to contest any claim for refund and interpose any defense that he may have. If the disbursing officer on the basis of the advance ruling of the Comptroller General declines to make a payment, it is open to the claimant to pursue a judicial remedy by way of a suit for money damages either in the Court of Claims or in an appropriate United States District Court, as the case may be.

Applying these principles to the case at bar, the decision of the Comptroller General in this instance is equivalent to an announcement that if the contract were made with the plaintiffs, he would disallow any payments that might be made by any disbursing officer thereunder. As a practical matter, no disbursing officer would make any such payments in the face of this ruling. To be sure, it would still be open to the plaintiffs to bring suit against the United States in the Court of Claims for any amount claimed to be due under the agreement. It was proper and prudent, however, for the Architect of the Capitol, acting under the direction and supervision of the House Office Building Commission, to decline to enter into a contract under such circumstances, because it would be undesirable and inexpedient to take a step that might tie up a large Government building project in litigation. As a matter of fact, in light of the ruling of the Comptroller General the plaintiffs would be buying a law suit if the contract were awarded to them.

This Court may not set aside the decision of the Comptroller General, first, because it is not erroneous as a matter of law, but merely refuses to make an exception to a rigid rule and also, because no justiciable controversy is presented, since theoretically the

Comptroller General's ruling is in its legal effect merely an announcement that he would disallow any payments under any contract based on the plaintiffs' bid. By ineluctable logic the conclusion inescapably follows that this Court may not interfere and require a reconsideration of the plaintiffs' bid.

In addition, the plaintiffs are confronted with a procedural obstacle. The rule of law requiring Government contracts to be let to the lowest responsible bidder after advertising, has been held to exist solely for the advantage of the Government, rather than for the benefit of prospective bidders. A disappointed bidder has no standing to sue in order to secure an award of the contract to him. Perkins v. Luken Steel Co., 310 U.S. 113, 126; Friend v. Lee, 95 U.S. App. D.C. 224; 227; 221 F. 2d 96.

b. Standing to Sue

SCANWELL INDUSTRIES, INC. v. DAVID D. THOMAS, ADMINISTRATOR, FAA

CADC No. 22,863 (1970)
424 F2d 859

TAMM, Circuit Judge: This is an appeal from an order entered in the district court dismissing the appellant's complaint for lack of jurisdiction. The district court was mislead by precepts which on careful examination are more rhetorical than guiding. The suit was dismissed on the ground that plaintiff lacked standing to sue; this appeal raises important questions concerning that concept.

The transaction involved resulted from the issuance by the Federal Aviation Administration of an invitation for bids (IFB) for instrument landing systems to be installed at airports to guide aircraft along a predetermined path to a landing approach. Such systems are designed to make the approach of aircraft to airports safer, a result which the FAA sought to attain by carefully circumscribing the criteria for bids in such a way to preclude bids from producers who did not already have operational systems installed and tested in at least one location.

When the bids for the instrument landing systems were opened, it was discovered that appellant's was the second lowest bid. The lowest bid was entered by Airborne Instrument Laboratory, a division of Cutler-Hammer, Inc. Appellant alleged in the district court that appellee Cutler-Hammer's bid was nonresponsive to the IFB in that Cutler-Hammer did not have a system installed in one location, nor did it have a certificate of performance based on an FAA flight check. Appellant therefore sought to have the action of the FAA in granting the contract to defendant Cutler-Hammer declared null and void as a violation of statutory provisions controlling government contracts and the regulations promulgated thereunder.

The Code of Federal Regulations provides:

> To be considered for award, a bid must comply in all material respects with the invitation for bids so that, both as to the method and timeliness of submission and as to the substance of any resulting contract, all bidders may stand on an equal footing and the integrity of the formal advertising system may be maintained.

41 C. F. R. § 1-2.301(a) (1969) (emphasis added).

The regulations go on to state that:

> Any bid which fails to conform to the essential requirements of the invitation for bids, such as specification, delivery schedule or permissible alternates thereto, shall be rejected as nonresponsive.

41 C. F. R. § 1-2.404-2(a) (1969) (emphasis added).

Appellant urges that it can seek review of a contract award which is in violation of the regulations governing the issuance thereof by virtue of section 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (Supp. IV 1965-68), which provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Appellant asserts that the action of the FAA in granting this contract to an allegedly nonresponsive bidder is arbitrary, capricious and a violation of the statutory provisions governing contracting, and that it can therefore be set aside under section 10(e) of the Administrative Procedure Act, 5 U. S. C. § 706 (Supp. IV 1965-68).

I. Standing to Sue

Whether a frustrated bidder for a government contract has standing to sue, alleging illegality in the manner in which the contract was let, is a question of major importance and can be dealt with only on the basis of a thorough review of the law of standing. Much that can be easily recognized in this area cannot be defined except with the greatest difficulty.

Standing has been called one of the most amorphous concepts in the entire domain of the public law. That this statement is undoubtedly true is evidenced by the mental gymnastics through which the courts have passed in determining standing issues. Professor Davis describes the circuity of reasoning which surrcunds these issues as follows:

> A plaintiff who seeks to challenge governmental action always has standing if a legal right of the plaintiff is at stake. When a legal right of the plaintiff is not at stake, a plaintiff sometimes has standing and sometimes lacks standing. Circular reasoning is very common, for one of the questions asked in order to determine whether a plaintiff has standing is whether the plaintiff has a legal right, but the question whether the plaintiff has a legal right is the final conclusion, for if the plaintiff has standing his interest is a legally-protected interest, and that is what is meant by a legal right.

The law of standing as developed by the Supreme Court has become an area of incredible complexity. Much that the Court has written appears to have been designed to supply retrospective satisfaction rather than future guidance. The Court has itself characterized its law of standing as a "complicated specialty of federal jurisdiction." United States ex rel. Chapman v. FPC, 345 U.S. 153, 156 (1953). One cannot help asking why this should be true. Is there something innately different about the standing questions which arise in the state courts which makes them easier of solution than their federal counterparts? Or is it true, as Professor Davis has stated, that:

> "[t]he difference is that the federal courts have invented a law of standing that is too complex for the federal courts to apply consistently, whereas the state courts, relatively speaking, have perceived the merits of the simple proposition that those who are in fact adversely affected should be allowed to challenge?"

In order to answer the question whether there is a valid basis for the complexities surrounding the federal standing criteria, it will be useful to consider the early landmark cases in this area.

A. The Early Cases

The most famous early cases denying standing were the companion cases of Massachusetts v. Mellon and Frothingham v. Mellon, 262 U.S. 447 (1923), in which the Court said that the Commonwealth could not sue because its own rights were not involved, and that the individual taxpayer could not sue because the interests of the taxpayer are so "comparatively minute and indeterminable" and that the taxpayer's contentions, even if proved, would have too "remote, fluctuating and uncertain" an effect on payments out of the Treasury. 262 U.S. 487. (The overruling of Frothingham in Flast v. Cohen, 392 U.S. 83 (1968), will be discussed infra). This, the initial criterion for establishing standing to sue, was a showing that a legal right of the plaintiff was violated. As the Court pointed out in Edward Hines Trustees v. United States, 263 U.S. 143, 148 (1923), the plaintiff "must show also that the order alleged to be void subjects them to legal injury, actual or threatened."

A subsequent opinion by Mr. Justice Brandeis which clarified that criterion was written the following year in The Chicago Junction Case, 264 U.S. 258 (1924). Standing was upheld therein for six competitors to challenge the validity of an Interstate Commerce Commission decision allowing the New York Central Railroad to acquire an independent terminal railroad in Chicago. The decision was attached on the ground that there was no evidence to support a finding that the acquisition would be in the public interest as required by the statute. The Court distinguished its prior decision by stating that:

"This loss is not the incident of more effective competition. Compare Edward Hines Trustees v. United States, 263 U.S. 143, 148. It is injury inflicted by denying to the plaintiff's equality of treatment . . . By reason of [the Interstate Commerce Act] the plaintiffs, being competitors of the New York Central and users of the terminal railroads theretofore neutral, have a special interest in the proposal to transfer the control to that company."

264 U.S. at 267. Professor Jaffe has construed this case to mean that:

"Standing . . . is made to rest on a determination that an interest intended by statute to be protected has been denied that protection. It should be stated somewhat more sharply just what this did and did not mean in the context. It did not mean that there was a right that competition not be diminished. The plaintiff could not win simply by showing such diminution. It did mean that the agency was required by the statute to have regard to competition as one factor in its decision; that it must, if it disregards the effect on competition, give a reasoned explanation. It is in this sense that the "legal right" criterion is most appropriately applied as a generalizing concept to administrative law."

A clear statement of the basis of this principle is found in the Court's subsequent opinion in Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137-38 (1939):

The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the Government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent. The principle is without application unless the right invaded is a legal right, -- one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege. (Emphasis added.)

This case held that a private electric producer did not have standing to challenge governmental subsidy of competition. This line of cases securely entrenched the legal right doctrine in the federal law of standing. Inconsistencies resulting from this doctrine are readily apparent.

The need for a broader criterion was met by the decision of the Court in FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940), which is the leading case on the "person aggrieved" criterion for standing to sue.

With this case the broader concept of standing gained tremendous ground. In Sanders the Court granted standing to a plaintiff who could not demonstrate an infringement of a legally protected right. This the Court did through its interpretation of the Communications Act of 1934, saying of section 402(b)(2) thereof:

> "[Congress] may have been of the opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal."

309 U.S. at 477.

The only apparent difference between Tennessee Electric Power and Sanders is that in Tennessee Electric there was no statutory provision granting judicial review to the courts, whereas in the latter case there was such an express provision. If this is true, the "legal right" doctrine is certainly dead wherever there is express "person aggrieved" language in the relevant statute, and there is a strong argument for the proposition that the same result should obtain when section 10 of the Administrative Procedure Act applies.

At this point in the development of the law of standing the Court evidently perceived the need to promulgate a standard which would provide redress for legitimate grievances in cases in which the plaintiff asserted a position which protected a public rather than a specific private interest; for this purpose it was recognized that the legal right doctrine was needlessly harsh and restrictive. Thus the Court made clear in Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14 (1942), that "these private litigants have standing only as representatives of the public interest." In using these words to find that a radio station which would in all probability suffer economic injury if the FCC granted a rival license was a person aggrieved under the statute, the Court opened the door to the next logical step, which Judge Frank took the following year.

In Associated Industries of New York State, Inc. v. Ickes, 134 F. 2d 694, 704 (2d Cir.), vacated as moot, 320 U.S. 707 (1943), Judge Frank, after emphasizing the above-quoted language from Scripps-Howard, said:

> "[W]e believe that the usual "standing to sue" cases can be reconciled with the Sanders and Scripps-Howard cases, as follows: While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring a suit for the judicial determination either of the constitutionality of a statute or the scope of powers conferred by a statute upon Government officers, it can constitutionally authorize one of its own officials, such as

the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the Government. Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibit-ing Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals. (Emphasis added.)"

This court has read the above language with approbation. In National Coal Ass'n v. FPC, 89 U.S. App. D.C. 135, 191 F. 2d 426 (1951), Judge Bazelon, speaking for the court, said:

"We agree with the rationale which [the Ickes] case draws from the Supreme Court's decisions in the Sanders and Scripps-Howard cases: '* * * one threatened with financial loss through increased competition resulting from a Commission's order is 'aggrieved' . . . . The 'person aggrieved' review provision [is] a constitutionally valid statute authorizing a class of 'persons aggrieved' to bring suit in a Court of Appeals to prevent alleged unlawful official action in order to vindicate the public interest, although no personal substantive interest of such persons had been or would be invaded. . .'"

89 U.S. App. D.C. 137, 191 F. 2d 464-65.

In essence this is precisely what the appellant sought to do in the case at bar; there is no right in Scanwell to have the contract awarded to it in the event the district court finds illegality in the award of the contract to Cutler-Hammer. Thus the essential thrust of appellant's claim on the merits is to satisfy the public interest in having agencies follow the regulations which control Government contracting. The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a "private attorney general."

For this reason one of the things implicit in Judge Frank's statement strikes us as being of the utmost importance: When the Congress has laid down guidelines to be followed in carrying out its mandate in a specific area, there should be some procedure whereby those who are injured by the arbitrary or capricious action of a governmental agency or official in ignoring those procedures can vindicate their very real interests, while at the same time furthering the public interest. These are the people who will really have the

incentive to bring suit against illegal Government action, and they are precisely the plaintiffs to insure a genuine adversary case or controversy. As the Supreme Court has recently said, the need is for parties with "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination" of complex legal issues. Baker v. Carr, 369 U.S. 186, 204 (1962).

B. The Administrative Procedure Act

The law of standing was greatly modified by the passage of the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (Supp. IV 1965-68), section 10 which states that:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

5 U.S.C. § 702 (Supp. IV 1965-68).

It has been forcefully argued that the legislative history of this section can be reasonably interpreted to support the "aggrieved in fact" theory because that language appears in the reports of both the Senate and House committees; in each the statement is found that "[t]his subsection confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute." This language did not appear in the statute itself, however, and the Attorney General stated that the provision was reflective of existing law.

In order to meet the objections of various parties to language in the statute, the Senate Report which accompanied the Act stated that:

> "(1) One agency objects to the recognition of a right of review in public contract and other cases where Congress has not specifically provided for judicial review. But . . . the so-called nonstatutory or common-law type of review was recognized by the Attorney General's Committee as properly obtaining wherever special statutory review is not provided by Congress and legislation does not indicate that judicial review is precluded or withdrawn. The exceptions stated in the introductory clause of section 10 appear to set forth the proper type of issues not subject to judicial review. If a party can show that he is "suffering legal wrong" as provided in subsection (a), he should have some means of judicial redress."

S. Doc. No. 248, 79th Cong., 2d Sess. 37-38 (1946) (emphasis added).

The view that the Act was reflective of existing law was supported by the opinion of this court in Kansas City Power & Light Co. v. McKay, 96 U.S. App. D.C. 273, 225 F. 2d 924 (D.C. Cir.), cert. denied, 350 U.S. 884 (1955), in which Judge Washington stated that the section was declaratory of existing law. The weight of that decision has been greatly reduced, however, by the decision of the Supreme Court in Hardin v. Kentucky Utilities Co., 390 U.S. 1, statutory grant of standing in actions by competitors to enforce statutes protecting competitive interests. The interpretation of the McKay case is further weakened by the language of the Supreme Court in Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967), in which Mr. Justice Harlan said for the court:

> "[A] survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress . . . . Early cases in which this type of judicial review was entertained, e.g., Shields v. Utah Idaho Central R. Co., 305 U.S. 177; Stark v. Wickard, 321 U.S. 288, have been reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action. . . The legislative material elucidating that seminal act manifests a Congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's "generous review provisions" must be given a "hospitable" interpretation. . . . [I]n Rusk v. Cort, [369 U.S. 367 (1962)] . . . at 379-380, the Court held that only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review. (Emphasis added.)"

There is no evidence of a contrary legislative intent which affects the appellant's position in the current case. If anything, the legislative intent with respect to the field of Government contracting in general seems to run in precisely the opposite direction, that is, in favor of review.

Appellee makes much of the Supreme Court's decision in Perkins v. Lukens Steel Co., 310 U.S. 113 (1940), in which the Public Contracts Act was interpreted to be an enactment for the protection of the Government rather than for those contracting with the Government. The plaintiff in that case was therefore denied standing to secure review of wage determinations allegedly arrived at as a result of erroneous statutory interpretation.

It must be remembered that Perkins was decided during the heyday of the legal right doctrine, and before the passage of the Administrative Procedure Act. The Court therefore followed the reasoning of its earlier cases in declaring:

"We are of opinion that no legal rights of respondents were shown to have been invaded or threatened in the complaint upon which the injunction. . . was based . . . Respondents, to have standing in court, must show, an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law."

310 U.S. at 125.

Professor Davis has very discerningly seen the fallacy of the Court's thinking in this decision and has devised a more logical and more consistent basis for viewing such situations:

"What the court did not inquire into in the Lukens opinion is why the companies which are adversely affected by the asserted misinterpretation of the statute should not be enlisted as natural law enforcers, whether or not a legal right of the companies is violated. The opinion was written in terms of what "the Government" may do in making contracts; a more refined view would be that Government officers were making contracts on behalf of the Government, that Congress is also a participant in the exercise of the Government's proprietary functions, and that the most practicable way to keep the Government's contracting officers within their statutory powers is by letting complainants like those in the Lukens case obtain judicial review of the officers' action."

This is a powerful argument for allowing the plaintiff in the current case the requisite standing to challenge the Governmental action of which it complains. Regardless of the merits of plaintiff's case, it should be granted the right, if possible, to make a prima facie showing that the Government's agents did in fact ignore the Congressional guidelines in the manner in which they handled the granting of the contracts. If there is arbitrary or capricious action on the part of any contracting official, who is going to complain about it, if not the party denied a contract as a result of the alleged illegal activity? It seem to us that it will be a very healthy check on Governmental action to allow such suits, at least until or unless this country adopts the ombudsman system used so successfully as a watchdog of Government activity elsewhere.

Appellee's reliance on Perkins is ill founded. In 1952 the Walsh-Healey Public Contracts Act was amended; during floor debate on the Fulbright Amendment, 66 Stat. 308, 41 U.S.C. § 43a (1964), its proponent said:

"Mr. FULBRIGHT. . . . There has been no reasonable means by which interpretations might be challenged. It was tried in the Lukens Steel case, in which it was held that the parties seeking to challenge the interpretation had no standing in court to do so. It is our purpose, by this amendment, to overturn that decision."

* * * * *

98 Cong. Rec. 6531 (1952) (emphasis added).

* * * * *

This portion of the legislative history of the amendments to the Public Contracts Act shows without question that there is not only no Congressional intent to limit review under that Act but rather that there is actually an affirmative intent of the legislature to grant review in circumstances which warrant it. Indeed, one of the primary effects of the Fulbright Amendment was to make the Administrative Procedure Act specifically applicable.

The trend of cases, both in this Circuit and in the Supreme Court, indicates that allegations of illegality such as those made by the appellant in the current case are a sufficient basis for standing. The court had occasion to review the application of the Public Contracts Act in Friend v. Lee, 95 U.S. App. D.C. 224, 221 F. 2d 96 (1955), and delimited standing under its provisions on the following terms:

> "Plaintiff contends that the contract between the defendants and Avis is illegal on the ground that it was entered into without previous advertising for proposals, as 41 U.S.C.A. § 5 requires. But assuming arguendo that the statute is applicable and may have been violated, plaintiff, nevertheless, has no standing to sue to invalidate the contract. Statutes regulating the contracting procedures of officers of the Federal Government are enacted solely for the benefit of the Government and confer no enforceable rights upon persons dealing with it. Perkins v. Lukens Steel Co. . . . In consequence, plaintiff cannot contest the award of the contract to Avis, either as a bidder or in his capacity as a citizen generally. . . ."
>
> ". . . Contracting officers of the Federal Government have the duty to select the contract most advantageous to the Government, and advantage is not measured exclusively in terms of price; it includes other factors such as judgment, skill, ability, capacity and integrity. . . . The final selection of contractor involves discretion and is not subject to review by the judicial branch of the Government. . . . Since plaintiff has alleged no facts which tend to show that defendants have through conspiracy, fraud, malice or coercion abused their discretion in awarding the contract, Alabama Power Co. v. Ickes . . . does not suggest a different conclusion. . . ."

"We do not need to determine for the purposes of the instant case whether plaintiff has standing to sue under Section 10 of the Administrative Procedure Act . . . as a person suffering a legal wrong, i.e., the arbitrary destruction of his business, or whether the court may proceed in the exercise of its general equitable powers. Suffice it to say, that where, as here, there is a prima facie showing of arbitrariness on the part of Government officials in regulatory action taken by them, sufficient to threaten substantial injury to the party affected, the injured party is entitled to be heard."

95 U.S. App. D.C. at 227-29, 221 F. 2d at 100-102 (emphasis added).

This case is clearly on point and, contrary to appellees' arguments, supports in very explicit terms the position of the appellant. It is indisputable that the ultimate grant of a contract must be left to the discretion of a Government agency; the courts will not make contracts for the parties. It is also incontestible that that discretion may not be abused. Surely there are criteria to be taken into consideration other than price; contracting officers may properly evaluate those criteria and base their final decisions upon the result of their analysis. They may not base decisions on arbitrary or capricious abuses of discretion, however, and our holding here is that one who makes a prima facie showing alleging such action on the part of an agency or contracting officer has standing to sue under section 10 of the Administrative Procedure Act.

We recently held that a party who submitted a sealed bid for the purchase of oil leases could challenge the grant of the leases to a bidder whose documents were not signed. Superior Oil Co. v. Udall, No. 22, 192 (D.C. Cir. Jan 6, 1969). It is noted in that case that the Comptroller General has said that:

. . . when a bid is nonresponsive in a material respect, it cannot be corrected even though the nonresponsiveness may be due to mistake or oversight.

(Slip op. at 8; emphasis in original.) In allowing that suit without denying standing to Superior Oil because it was a competitive bidder for a Government contract, the court impliedly held that such persons have standing to sue in the event the contract is illegally awarded. This case is clearly on point and materially assists the appellant's case. More recent statements of this court which specifically relate to the standing issue are also relevant.

Subsequent to the Superior Oil decision this court had the opportunity to review important questions of standing in National Ass'n of Securities Dealers, Inc. v. SEC, No. 20, 164 (D.C. Cir. July 1, 1969), petition for cert filed, 38 U.S.L.W. 3185 (Nov. 18, 1969). Although the court could not agree in that case on the precise basis for granting standing to the plaintiffs, it stated in the brief per curiam portion of the opinion that "[w]hile a majority of the court has reservations about standing, these doubts have been resolved in favor

of reaching the merits in cases of this consequence." Slip op. 4. Here again is a statement, this time by this very court, which indicates that the criteria for standing in the Federal system are so amorphous that even the judges of the United States Courts of Appeals are in doubt as to the proper guidelines to be followed. We think it time that such doubts were resolved in favor of hearing cases in which the public interest demands a hearing on the merits. As Chief Judge Bazelon said in his concurring opinion (Slip op. at 25):

> the basic justification for entertaining competitors' suits to challenge administrative action as statutory aggrieved parties (intended beneficiaries, or licensees) is to vindicate a public interest, and not a private right. The absence of a statutory aid to standing in this case is adventitious, and I would grant appellants standing to assert the public interest without it."

The issue of standing to sue was next raised in this court in Air Reduction Co., Inc. v. Hickel, No. 22, 847 (D.C. Cir. Sept 22, 1969). In that case the court specifically met the contention that the regulations of the Secretary of the Interior are beyond challenge, even if not Congressionally authorized, and granted standing to a competitor to protest regulations applicable to purchases of helium by contractors of Federal agencies as being beyond the power of the Secretary. This case is analogous to the present case in which the appellant seeks to challenge an exercise of discretion on the part of a Government contract official as being beyond his statutory authority. In Air Reduction the court was not called upon to pass on the standing of the competitor under the Administrative Procedure Act. Rather, in that case the appellee was held to be specifically within the scope of the court's ruling in Gonzalas v. Freeman [9 CCF § 72,558], 118 U.S. App. D.C. 180, 334 F. 2d 570 (1964), which held that standing exists in one who currently has a beneficial business relationship for supplying the needs of the Government to challenge the unlawful termination of that relationship. This case expands on the logic of that decision; here we hold that one who has a prospective beneficial relationship has standing to challenge the illegal grant of a contract to another, which is precisely what this court did in Superior Oil v. Udall, supra p. 19.

Climaxing the growing trend of cases in this jurisdiction which have expanded the criteria for granting standing to sue by virtue of a recognition of the logic of the aggrieved-in-fact criteria is the recently decided case of Curran v. Laird, No. 21,040 (D.C. Cir. Nov. 12, 1969) (en banc). Although the majority in that case found that the appellant had standing because of a legally protected right under the Merchant Marine Act of 1936 and the Cargo Preference Act, which evidenced a statutory intent to protect American seamen against foreign competition, the majority did say that:

> Obviously no simple touchstone can be provided for determination of standing question. Each case turns on the nature of the parties, the grievances and the statutory provisions involved. However, it is clear that with the approach charted in Abbott Laboratories, a person aggrieved in fact may properly invoke not only the letter of the Administrative Procedure Act and its "generous" review provisions, but a broad conception that Congress is "hospitable" to the maintenance of complaints against officials charged with disregarding its substantive mandate.

Slip op. 6-7 (emphasis added).

There are no Supreme Court cases which go directly to confirming an expanded role for section 10 of the Administrative Procedure Act in this context. However, Professor Davis has pointed out several recent Supreme Court cases which find standing simply on the basis that the plaintiff has suffered a "palpable injury".

In Bantam Books, Inc. v. Sulliven, 372 U.S. 58 (1963), for example, publishers of books discontinued by wholesalers at the admonition of defendant Rhode Island Commission to Encourage Morality in Youth were allowed to sue, the Court saying that:

> [P]ragmatic considerations argue strongly for the standing of publishers in cases such as the present one. The distributor who is prevented from selling a few titles is not likely to sustain sufficient economic injury to induce him to seek judicial vindication of his rights. The publisher has the greater economic stake, because suppression of a particular book prevents him from recouping his investment in publishing it. Unless he is permitted to sue, infringements of freedom of the press may too often go unremedied.

372 U.S. at 65 n. 6.

The Court also allowed suit in Cramp v. Board of Public Instruction, 368 U.S. 278 (1961), on the ground of palpable injury to the plaintiff, a public school teacher who was allowed to sue for an injunction and declaratory judgment that a loyalty oath was unconsitutionally vague. As Professor Davis has pointed out, the holding of that case is clearly inconsistent with the language of Tennessee Electric Power Co. v. TVA, supra p. 7, which held that one threatened by injury from Governmental action could not challenge that action "unless the right invaded is a legal right,--one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." It has been suggested that such a provision has always been unsound and is no longer valid in light of the recent trend of cases.

The final case cited which rests upon a finding of a "palpable injury" but nothing more is City of Chicago v. Atchison, Topeka & Santa Fe R. Co., 357 U.S. 77 (1958). In that case the Court said that "[i]t is enough, for purposes of standing, that we have an actual controversy before us in which [the plaintiff] has a direct and substantial personal interest in the outcome." 357 U.S. at 83. This holding is also obviously inconsistent with the holding in Tennessee Electric Power Co.

It may well be argued that the Supreme Court has applied this broadened theory of standing only in situations in which the plaintiff had a constitutional right which was being infringed. It will therefore be argued that these decisions are quite narrow, as is the decision in Flast v. Cohen, 392 U.S. 83 (1968), although this decision has been touted as the case which will lead to the downfall of traditional notions of standing. Flast, which overrules, at least in part, Frothingham v. Mellon, 262 U.S. 447 (1923), does rest on a narrow and carefully devised "nexus" between two constitutional provisions:

> [W]e hold that a taxpayer will have standing consistent with Article III to invoke Federal judicial power when he alleges that Congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.

392 U.S. at 105-106. In order to meet this nexus the taxpayer must establish his status and the type of legislation which is being challenged on the one hand, and on the other he must allege a violation of a constitutional provision which specifically limits the authority under which the challenged legislation was passed. Obviously the precise holding of this case is very narrow, but it does point the direction through a careful delineation of the issues properly raised by standing questions. Thus the Court pointed out that:

> Despite the complexities and uncertainties, some meaningful form can be given to the jurisdictional limitations placed on Federal court power by the concept of standing. The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a Federal court and not on the issues he wishes to have adjudicated.

392 U.S. at 99 (emphasis added). The Court went on to say that the principal question is whether there is a "proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." Id. at 100. Thus, even though a party may have standing, the courts will sometimes be forced to decline to pass on his request for review because the subject matter is not properly reviewable. The Court therefore concluded that:

> [I]n terms of Article III limitations on Federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.

Id. at 101.

It seems clear to us that, although this language was used in the context of a case deciding constitutional issues, it addresses itself to situations in which no constitutional question may be presented. A person injured by Governmental activity which goes to non-constitutional areas of his well-being is just as interested in judicial review of that activity as one whose constitutional rights are being trammeled, and we perceive no logical reason for denying standing to one whose rights in the activity which infringes his rights in the former area.

Thus, in spite of the fact that the Supreme Court has not yet chosen to hold that the Administrative Procedure Act applies to all situations in which a party who is in fact aggrieved seeks review, regardless of a lack of legal right or specific statutory language, it is clearly the intent of that Act that this should be the case. The undermining of this court's narrow construction of that statute in the McKay case through the Hardin case and the "hospitable" view which the Court has recently taken of construction of its provisions in Abbott Laboratories leads us to believe that a decision for standing is both sound law and in accord with the recent trend of decisions in the Supreme Court.

Of course it is true that the grant of standing must be carefully controlled by the exercise of judicial discretion in order that completely frivolous lawsuits will be averted. There must be a practical separation of the meritorious sheep from the capricious goats--a recognition that cucullus non facit monachum. However, responsible Federal judges will be able to discern a case in which there is injury in fact, a sufficient adversary interest to constitute a case or controversy under Article III, and an otherwise reviewable subject matter to prevent the dockets from becoming overcrowded. The court should have discretion to grant standing, provided the other criteria listed above are properly met.

The spectre of opinion a Pandora's box of litigation has always seemed groundless to us, particularly in the area of standing to sue. Certainly the same hue and cry went up when the states relaxed the criteria for standing to sue; but so far the dockets in the states have not increased appreciably as a result of new cases in which standing would previously have been denied. We agree with the analysis of our sister Circuit in Scenic Hudson Preservation Conference v. FPC, 384 U.S. 941 (1966):

> We see no justification for the Commission's fear that our determination [granting standing] will encourage 'literally thousands' to intervene and seek review in future proceedings. We rejected a similar contention in Associated Industries, Inc. v. Ickes . . . noting that 'no such horrendous possibilities' exist. Our experience with public actions confirms the view that the expense and vexation of legal proceedings is [sic] not lightly undertaken.

The fundamental problem is that the early cases, in rhetoric always impressive but in understandability often determinedly so obscure as to deftly puncture the bubble of that very rhetoric, gave birth to an unruly concept. It has been pointed out that:

> The cases indicate no appreciable difference between one who has an 'interest', one who is 'adversely affected', and one who is 'aggrieved'. True, each concept becomes a receptable for ideas about standing, but what is read into any one concept could just as readily be read into either of the others.

This leads to the unfortunate and intolerable result that:

> One who is seriously harmed by reviewable administrative action which is illegal or even unconstitutional is often denied judicial review on account of lack of standing. The law of standing is fundamentally artificial to the extent that one who is in fact harmed by administrative action is held to lack standing to challenge the legality of the action. The artificiality--frequently running counter to natural instincts of judges--results in a complexity that is so great that the Supreme Court often violates the principles that the Court has laid down for its own guidance.

Of course we make no decision regarding the merits of the appellant's case; the language of this opinion should not be construed in any way to make any judgment as to the correctness of appellant's allegations. The complaint herein was dismissed as a matter of law for insufficiency under Rule 12 of the Federal Rules of Civil Procedure; we must therefore treat the allegations thereof as being true in the light most favorable to appellant. It may well be that the district court, after a full hearing on the merits, will conclude that appellee Thomas, through his agent, properly exercised discretion in awarding the contract in question, if indeed there was discretionary action to be taken. That court may find, on the other hand, that the contract was illegally awarded because there is no discretion to ignore the regulations regarding responsiveness of bids. In reaching the correct analysis of the threshold question of standing the court must look not to the merits of the petitioner's case but rather to his status. See Flast v. Cohen, 392 U.S. 83 (1968).

V. Conclusion

For the foregoing reasons we hold that appellant has standing to bring suit in the district court, and that the case will be remanded to the district court for a hearing on the merits of appellant's claim.

Reversed and remanded.

G. Standing to Sue - Negotiated Award

HERBERT SCHOENBROD, AS TRUSTEE, ETC. v. THE UNITED STATES

410 F. 2d 400 (1969)(Ct. Cl.)

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT

Durfee, Judge, delivered the opinion of the court:

On June 20, 1962, the Department of the Interior issued an Invitation for Proposals for processing and selling Alaska sealskins for the account of the United States. Eighty firms were solicited and raw skins were furnished to eleven of them for sample processing. Five proposals were submitted.

The samples which were submitted were subjected to a series of inspections and tests. While this was going on, discussions were being held with the participating firms, concerning the nature and character of the services, the production desired, and the financial responsibility and technical facilties of the respective firms. No discussions were held at that time relating to price. On March 1, 1963, it was determined that negotiations be conducted with five firms, with the view to the execution of a contract with one of them. The firms were ranked, and negotiations were conducted according to this order of priority.

In conformity with this procedure, negotiations were held with Supara, Inc., which had been ranked first. For the first time, price was discussed and a contract was entered into on March 14, 1963.

As a result of the awarding of the contract to Supara, Inc., protests were filed on behalf of the two leading competitors, Pierre Laclede Fur Company and Fouke Fur Company. Their principal complaints were the failure of the Department of the Interior to call for the inclusion of pricing factors in the initial proposals and its failure to consider pricing aspects of the proposals of all contenders competitively.

These protests were submitted to the Department of the Interior and to the Comptroller General. The latter issued his decision on October 10, 1963, which invalidated the awarding of the contract because the Department was without authority to negotiate the contract without soliciting firm proposals from all responsible offerors, including price considerations. 43 Comp. Gen. 353. After the contract was rescinded and new bids were announced, Fouke Fur Company was awarded the contract.

Plaintiffs are claiming that the cancellation of the award is a breach of contract. The basic issue is whether Federal Procurement Regulations were contravened in the awarding of the contract. Both sides have moved for summary judgment.

The contract at issue was awarded under the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471 et. seq., as amended (1964). The Federal Procurement Regulations, in effect at the time this alleged contract was awarded, state that they are "prescribed by the Administrator of General Services under the Federal Property and Administrative Services Act of 1949, * * *." 41 C.F.R. s 1-1.003 (1963 ed.). A careful study of these regulations, as well as the Interior Department's guidelines implementing them, shows that the procedures employed here were not those which were required.

General policies for public contracts are set forth in 41 C.F.R., Subpart 1-1.3. Section 1-1.301 states:

> Methods of procurement.
>
> It shall be the objective to use that method of procurement which will be most advantageous to the Government--price, quality, and other factors considered. Procurement shall be made on a competitive basis, whether by formal advertising or by negotiation, to the maximum practical extent, in accordance with the policies and procedures set forth in this chapter. Procurement shall be effected by advertising for bids and thereafter awarding a contract to the lowest responsible bidder, except that when authorized procurement may be effected by negotiation in accordance with part 1-3 of this chapter. [Emphasis supplied]

Thus, in general, price is a factor to be considered. Part 1-3 of 41 C.F.R. deals with "Procurement by Negotiation." Even when procurement is effected by this method, price is still an important factor. Section 1-3.102 states:

> Factors to be considered in negotiated contracts.
>
> Whenever property or services are to be procured by negotiation, offers shall be solicited from all such qualified sources as are deemed necessary by the contracting officer to assure full and free competition, consistent with the procurement of the required property or services, in accordance with the basic policies set forth in this Part 1-3, to the end that the procurement will be made to the best advantage of the Government, price and other factors considered. ***Negotiation shall thereupon be conducted with due attention being given to the following, and any other appropriate factors:

(a) Comparison of prices quoted and consideration of other prices for the same or similar property or services, ***. [Emphasis supplied]

The provisions of Title III of the Federal Property and Administrative Services Act of 1949 and the Federal Procurement Regulations were adopted by the Department of the Interior to govern the procurement of personal property and nonpersonal services, "unless an exception is made by the Secretary for any purchase or class of purchases, * * *." 41 C.F.R. § 14-1.102. By virtue of this adoption, the element of pricing intended to be considered by the Federal Procurement Regulations was also intended to be considered by the Department.

The importance of considering price as an element for consideration is borne out by the Department of the Interior Departmental Manual. Subpart 404.1 states:

7. Procedures.

A. Contracts for Other than Professional Architectural or Engineering Services.

(1) Solicitation. Whenever a contract (other than a contract for professional architectural or engineering services) is to be negotiated, price quotations and all other necessary information shall be solicited from such qualified sources as are deemed necessary by the contracting officer to assume adequate competition. * * *

* * * * *

(3) Considerations Governing Awards. It is the responsibility of the contracting officer conducting negotiations to give consideration to the following and any other applicable factors:

* * * * *

(c) Prices quoted, and consideration of other prices for the same or similar supplies or services, with due regard to cost of transportation, cash discounts, and any other factors relating to prices.

Plaintiffs contend that their services were unique, and that they were therefore exempt from the general rules governing negotiated contracts. 41 C.F.R. § 1-3.805(a)(2) provides that when negotiations are being conducted with several offerors, all of the offerors shall be given an opportunity to submit pricing revisions in their proposals as may result from the negotiations. Sec. 1-3.805(d) says that the procedures in subparagraphs (a), (b) and (c) of § 1-3.805 "may not be

applicable in appropriate cases when procuring research and development, or special services (such as architect-engineers services) or when cost-reimbursement type contracting is anticipated." [Emphasis supplied.]

Plaintiffs' contract is clearly not one for research and development, nor is it a cost-reimbursement contract. Although plaintiffs argue that their services were "special", we believe that the Regulation contemplates professional services in which bidding on the basis of price is considered unethical. This is exemplified by the Interior Departmental Manual, Subpart 404.1.7.A, supra, which mandates price quotations for contracts "Other than Professional Architectural or Engineering Services."

Since plaintiffs' services were clearly not "professional" or "special," they should have been governed by 41 C.F.R. § 1-3.805(a)(2). Thus, the use of procedures consonant with those to be afforded professionals (as spelled out in Subpart 404.1.7.B of the Manual), was a violation of both the Federal Procurement Regulations and the Department of the Interior Manual. In addition, 41 C.F.R. § 1-3.102, relating to solicitation of offers, was not followed.

Our conclusion that applicable regulations were not followed is based not only on a reading of their plain meaning, but also on the clear legislative intent embodied in them.

The House and Senate Reports on the Federal Property and Administrative Services Act, supra, contain identical language concerning the procurement principles sought to be established. They state:

> Title III extends to the General Services Agency the principles of the Armed Services Procurement Act of 1947, * * *. II. Rept. No. 670, 81st Cong., 1st Sess. (1949) p. 6 and S. Rept. No. 475, 81st Cong., 1st Sess. (1949) p. 5.

The Armed Services Procurement Act of 1947, ch. 65, § 2, 62 Stat. 21, as recodified in 41 U.S.C. ch. 3 (1964), was finally passed after deleting authority to negotiate contracts for the purpose of securing a particular quality of goods, in order to prevent possible administrative abuse. S. Report No. 571, 80th Cong., 1st Sess. (1947) p. 3. This deletion occurred despite the plea of the Assistant Secretary of the Navy for such authority, who believed that the quality of military procurement should not be compromised by mandatory considerations of price.

If price considerations were considered important in the area of military and defense procurement, where quality and reliability are of great importance, it would seem strange indeed that the competitive aspect of pricing should not be applicable in the procurement of sealskins.

In Paul v. United States, 371 U.S. 245 (1963), the Supreme Court examined 10 U.S.C. § 2305(c), the recodification (without substantial change) of the Armed Services Procurement Act of 1947, and the Regulation under it. Since Title III of the Federal Property and Administrative Services Act extended the principles of the Armed Services Procurement Act to the General Services Agency, it is of more than passing interest to note what the Court said there with respect to the policy underlying the Regulation:

> The Armed Services Procurement Regulation speaks in unambiguous terms of a policy "to use that method of procurement which will be most advantageous to the Government--price, quality, and other factors considered." The Regulation states, "Such procurement shall be made on a competitive basis, whether by formal advertising or by negotiation, to the maximum practicable extent * * *." Whatever method is used--formal advertising or negotiation--"competitive proposals" must be "solicited from all such qualified sources of supplies or services as are deemed necessary by the contracting officer to assure such full and free competition as * * * to obtain for the Government the most advantageous contract-price, quality, and other factors considered." If advertising for bids is used, the contract is to be awarded "to the lowest responsible bidder." Moreover, even when advertising for bids is not used, competitive standards are not relaxed. The policy is "to procure supplies and services from responsible sources at fair and reasonable prices calculated to result in the lowest ultimate over-all cost to the Government." "The fact that a procurement is to be negotiated does not relax the requirements for competition." "Whenever supplies *** are to be procured by negotiation, price quotations * * * shall be solicited from all such qualified sources of supplies or services as are deemed necessary * * * to assume full and free competition * * * to the end that the procurement will be made to the best advantage of the Government, price and other factors considered." The Regulation then specifies 20 separate considerations for the selection of a supplier in case of a negotiated procurement. The first of these is a "comparison of prices quoted." [citations to the Regulation are omitted] Id. at 252-3.

The emphasis on competition in the Armed Services Procurement Regulations, and on price as one of the major--if not the most important--competitive factors, is apparent from the foregoing quotation. The Federal Procurement Regulations are almost word for word the same as the ASPR, and as has already been mentioned, are but an extension of the ASPR's policies. When both the plain language of the Regulations and the policy inherent in them support the Government's view that proper procedures were not followed, it is difficult to understand how plaintiffs can complain that their contract was valid. This is especially true since "Regulations reasonably

adapted to the administration of a Congressional act, and not inconsistent with any statute, have 'the force and effect of law.'" [citing cases] G. L. Christian and Associates v. United States, 160 Ct. Cl. 58, 65, 320 F. 2d 345, 350, cert. denied 375 U.S. 954 (1963).

Having come to the inevitable conclusion that applicable procurement regulations were not followed, we next conclude that there was no breach of contract when defendant rescinded the contract, since it was initially invalid. The contracting officer has only that authority actually conferred by statute or regulation. Prestex Inc. v. United States, 162 Ct. Cl. 620, 625, 320 F. 2d 367, 371 (1963); cf. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). Furthermore, the Government is not estopped to deny the limitations of his authority. Prestex Inc., supra.

It makes no difference that the Department of the Interior had used the procedure employed here in an earlier contract with Fouke. That contract was entered into in 1947, before the enactment of the Federal Property and Administrative Services Act. Moreover, it was not until March 10, 1959, that the Department of the Interior was authorized to utilize the provisions of Title III of the Federal Property and Administrative Services Act of 1949, 24 F.R. 1921 (March 17, 1959), 41 C.F.R. § 14-1.101; it was not until January 26, 1962 that the Department of the Interior actually adopted regulations implementing Title III, 27 F.R. 776 (January 26, 1962), 41 C.F.R. § 14-1.102. Finally, assuming arguendo that the Government had erroneously used these same procedures in other procurements, that is no reason to force the Government to use a practice which is forbidden by applicable regulations.

This is a case in which we find the illegality in the award to be plain on the face of the statute and the regulations unlike those cases in which we gave the contractor the benefit of the doubt because invalidity was not clear and the contrary position was reasonable. See John Reiner & Co. v. United States, 163 Ct. Cl. 381, 386-80, 325 F. 2d 438, 440-42 (1963), cert. denied 377 U.S. 931 (1964); Brown & Son Electric Co. v. United States, 163 Ct. Cl. 465, 325 F. 2d 446 (1963); Coastal Cargo Co. v. United States, 173 Ct. Cl. 259, 351 F. 2d 1004 (1965); Warren Bros. Roads Co. v. United States, 173 Ct. Cl. 714, 355 F. 2d 612 (1965). Where illegality is clear, we have no choice but to hold the award and contract to be invalid.

Since the Department of the Interior's regulations, based on the Federal Procurement Regulations mandated by the Federal Property and Administrative Services Act of 1949, were not followed, the contract at issue here was invalid and of no effect. Therefore, the rescinding of the contract was not a breach.

Accordingly, defendant's motion for summary judgment is granted, plaintiffs' cross motion is denied, and the case is dismissed.

d. Arbitrary/Capricious Rejection of Bid

HEYER PRODUCTS COMPANY v. UNITED STATES

177 F. Supp. 251 (Ct. Cl. 1959)

WHITAKER, Judge.

Plaintiff's petition alleges that the defendant, through the Ordnance Tank Automotive Center, Ordnance Corps, Department of the Army, issued an invitation to it and to others to bid on 5,500 low voltage circuit testers; that it put in a bid of $205,975, which it says was the low bid, but that the contract was awarded to the Weidenhoff Company, whose bid was $190,043 higher. Under these facts, it alleges that it had a legal right to an award of the contract, and, hence, it is entitled to recover the expense it incurred in putting in its bid and its loss of profit.

Before going further, let us say that the only question with which we are confronted, of course, is whether or not plaintiff's rights have been violated, not whether or not the award of this contract was in the public interest. Even should we think the expenditure of the Government's money was wasteful and that proper care was not taken to protect the public treasury--upon which we express no opinion--that is beside the point in this case. Unless we find that plaintiff has been deprived of some right, it cannot recover, however improvident the Government's agents may have been.

In our former opinion on defendant's motion to dismiss, delivered on May 1, 1956, 140 F. Supp. 409, 135 Ct. Cl. 63, we held that plaintiff's petition contained sufficient allegations to make out a case of discrimination against it and of favoritism toward the successful bidder, and that, if the allegations were true, it would be impossible to conclude that that bid had been accepted which was most advantageous to the Government, as required by the Armed Services Procurement Act of 1947 (62 Stat. 21). Nevertheless, we said that that act afforded plaintiff no basis for recovery of his loss of profits, because it was passed for the benefit of the Government, and not for the benefit of the bidder.

We add that plaintiff cannot recover its loss of profits on a contract implied in law, because Congress has not consented to suits on such quasi-contracts.

However, we said that by the solicitation for bids, the Government impliedly promised that it would give honest and fair consideration to all bids received and would not reward any one of them arbitrarily or capriciously, but would award the contract to that bidder whose bid in its honest judgment was most advantageous to the Government. If in the instant case the OTAC, in rejecting plaintiff's bid, did not act in good faith, but arbitrarily and capriciously, it breached its implied promise when it solicited bids, for the breach

of which plaintiff may recover the expenses it had incurred in submitting its bid.

So the question before us is, was plaintiff's bid rejected in good faith or arbitrarily or capriciously? If its rejection was not fraudulent nor arbitrary nor capricious nor as unreasonable as to necessarily imply bad faith, plaintiff has established no right of recovery.

Defendant says it was rejected because the sample plaintiff submitted did not comply with the specifications. The invitation for bids provided:

"Bid sample must be furnished for test and evaluation."

* * * * *

"(c) Item being furnished as same must conform in every respect to the item the facility intends supplying to meet the Government requirements."

"(d) Any sample failing in any portion of tests will be deemed sufficient basis for rejection."

It cannot be denied that plaintiff was a responsible contractor who had been in the business of manufacturing automotive test equipment for 25 years, and had manufactured thousands of low voltage circuit testers both for the Government and for such manufacturers as General Motors, Ford, Chrysler, Standard Oil, and others. This being so, if the sample it was required to submit with its bid complied with the specifications, there would seem to be no justification for rejecting its bid and awarding the contract to Weidenhoff, whose bid was almost twice that of plaintiff's. Defendant suggests no justification other than the failure of the sample to comply with the specifications. So, if the sample did comply with them, the conclusion must be that there was gross discrimination against plaintiff in favor of Weidenhoff, which would be a breach of the Government's implied promise that no bid would be arbitrarily rejected, and that that bid would be accepted which in the honest judgment of the awarding authority was most advantageous to the Government.

We proceed to inquire whether plaintiff's sample complied with the specifications. The defendant's agents and officials say it did not in several respects. * * *

* * * * *

The most serious of the defects listed is that the voltmeter readings were more than 2 percent low of full scale deflection at 9 to 10 volts on the 0-10 volt range, and that they were more than

2 percent low of full scale deflection from 90 to 100 volts on the 0-10 volt range. This means that in measuring a 9-volt current and a 10-volt current and also a 90-volt current and a 100-volt current, the meters registered inaccurately by more than 2 percent. The specifications in paragraph 3.1.13 provided:

> "3.1.13 Meters.-One voltmeter and one ammeter shall be provided and securely attached to the instrument panel. The meters shall conform to specification JAN-I-6 and have movements suspended in jewel bearings and an overall accuracy within 2 percent of full scale deflection. The current requirements for full scale deflection of the meter needle shall be as specified in 3.1.13.5.1 and 3.1.13.5.2, and they shall be noted in a legible manner on the meter dial face."

It is apparent, then, that the samples submitted by plaintiff failed to comply in a vital respect with the requirements of the specifications. What the defendant ordered was something to determine the voltage of the current being transmitted. It wanted to know this accurately, but it had to know it within 2 percent of the exact amount. If what the plaintiff was supplying was inaccurate to a greater extent, it was of no use to the defendant because it did not measure the current accurately enough.

This certainly was sufficient ground to reject what the plaintiff offered to supply. The invitation for bids quoted above provides:

> "Item being furnished as same [as the sample] must conform in every respect to the item the facility intends supplying to meet the Government requirements.
>
> "Any sample failing in any portion of tests will be deemed sufficient basis for rejection."

* * * * *

It seems obvious to us that OTAC was fully justified in rejecting plaintiff's bid for the failure of its sample to comply with the specifications. Certainly its rejection was not arbitrary or capricious or in bad faith. Since it was not, plaintiff is not entitled to recover, whether or not defendant was justified in letting the contract to Weidenhoff.

* * * * *

[Although not required to do so, the court determined that OTAC accepted Weidenhoff's bid in good faith as the one most advantageous to the Government.]

e. Arbitrariness/No Rational Basis Test

M. STEINTHAL & CO. v. SEAMANS

147 U.S. App. D.C. 221
455 F2d 1289 (1971)

LEVENTHAL, Circuit Judge:

This case involves a protest by a bidder for a Government contract. Plaintiff-appellee Steinthal & Co. contests a determination by the Air Force rejecting what Steinthal alleges was the lowest bid on a contract to supply parachutes and directing a readvertisement of bids. The District Court granted a permanent injunction restraining the Secretary of the Air Force from opening bids submitted pursuant to the readvertisement and from awarding a contract for the parachutes to any bidder other than Steinthal. At the oral argument, on the application of intervenor-appellee Pioneer Parachute Co. for a stay pending appeal, the parties agreed that this court could proceed to dispose of the merits of the appeal. In view of the urgency of the situation, we issued an order within a few days after oral argument, reversing the ruling of the District Court and dissolving the permanent injunction in order to allow the Air Force to open the resolicited bids and to award a contract for the parachutes.

In Scanwell Laboratories, Inc. v. Shaffer [14 CCF § 83,394] we held that a bidder for a Government contract had standing under the Administrative Procedure Act to obtain judicial consideration of a claim of illegality in the award of the contract to another. In this opinion we consider the approach that is appropriate when an action under Scanwell, claiming that procurement officials have acted arbitrarily or capriciously, confronts the court with technical and complex issues of interpretation of procurement regulations. It is being issued simultaneously with the opinion in Wheelabrator Corp. v. Chafee, #24705, which involves related considerations.

I. THE PRESENT CONTROVERSY

A. The Background

On May 1, 1970, the Secretary of the Air Force, Robert Seamans (appellee), issued an invitation for bids [IFB#1] through the Department of Procurement and Production [DP&P] Kelly Air Force Base, San Antonio, Texas. The IFB covered a contract involving the production and delivery of 1040 parachutes. The delivery schedule of IFB#1 provided:

Part III Desired Delivery

Delivery is desired as follows:

140 days	170 days	200 days
40	40	80 and continue at the rate of 80 each per month thereafter

This schedule was made subject to a slippage provision:

> If the bidder is unable to meet the above delivery schedule, he may, without prejudice to the evaluation of his bid, set forth below the delivery schedule he is prepared to meet, provided, in no event shall the bidder's delivery schedule [extend beyond 30 days] after completion date of each increment specified above, as bids proposing delivery after that period will be considered nonresponsive to the invitation and will be rejected. If the bidder does not state a different delivery schedule, the Government's desired delivery schedule will apply.

The brackets surrounding the phrase "extend beyond 30 days" were not in slippage clause as issued. They have been used to signify the fact that this phrase was deleted by an amendment issued June 1 [amended IFB]. This amendment also revised the delivery schedule by providing that the first shipment would be due 120 days after the award. The bid opening was extended from June 2 to June 30 in order, as the record shows, to allow a third manufacturer to qualify for the bidding by satisfying the Air Force's requirements.

The intention of those drafting the amendment of the slippage clause, as the record indicates, was to respond to the delay occasioned by the deferral of the opening of bids from June 2 to June 30, and to the need of the buyer for the first 40 parachutes by January 15, 1971, by deleting the entire slippage provision. The intent was to provide for a mandatory schedule of delivery of the parachutes.

Although none of the prospective bidders questioned the provisions of the amended IFB, each of the three bids opened on June 30 reflected a different interpretation of its provisions. Pioneer Parachute Co., Inc., interpreted the amended IFB to establish a required delivery of the first shipment of parachutes within the stated 120 day period. M. Steinthal and Co. concluded that the amendment called for a desired delivery schedule and submitted a bid providing for delivery within 150 days of the award. A third bidder's response provided for initial delivery within 170 days of the award.

The third bidder specified the lowest price, but its parachute did not meet specifications. Steinthal's price was lower than Pioneer's, but Pioneer protested the award of the contract to Steinthal contending that Pioneer had submitted the only bid responsive to the delivery schedule in the amended IFB.

Pioneer's protest was originally considered by Joseph R. Blazi, the Contracting Officer at Kelly Air Force Base. On July 8 he issued a Statement of Facts and Findings in which he denied the protest and recommended award of the contract to Steinthal. Mr. Blazi found that the deletion of "extend beyond 30 days" rendered the amended IFB "subject to two possible interpretations": (a) as specifying a mandatory schedule; however he noted that this ignored the presence of "desired" in the delivery schedule, and the absence of "required". (b) as providing a desired delivery schedule, with delivery required only within a reasonable time after the desired date. His analysis, set forth in the footnote, culminated in the opinion that the second construction should be adopted, although he expressly concluded that he found it impossible to state whether this interpretation advanced by Steinthal was more sound than Pioneer's "mandatory" interpretation and he could "only conclude that neither interpretation is superior to the other." He recommended award of the contract to Steinthal since he found that directing a readvertisement of bids after opening would cause substantial prejudice to Steinthal but would only slightly disadvantage Pioneer because, as he found on the basis of his experience with these contractors, Pioneer's bid would not have been lower even if it had proposed the same delivery schedule as Steinthal.

This Statement of Facts and Findings was then submitted by the contracting officer to Air Force Logistics Command at Dayton, Ohio (HQ AFLC). Subsequently, he received a list of Comments which contained "certain basic rules that must be adhered to" in formal advertising, stressing the need to preserve a competitive bidding system by solicitations permitting competition on an equal basis, without deviations from delivery provisions through waiver or reservation to the contracting officer of freedom to determine whether delivery time should be a factor in the award. The Comments also directed specific criticism at the following two determinations in the Statement: (1) where an IFB contains only a desired schedule, award can be made on a schedule, such as that proffered by Steinthal, that is reasonable in relation to the desired schedule; and (2) based on pricing experience, Pioneer would not have been the low bidder even if Pioneer's delivery schedule were the same as that of Steinthal. The position of HQ AFLC on these two issues was tersely stated:

> The Comp. Gen. * * * has overruled prior decisions permitting open ended delivery requirements. Further, the ASPR has specific provisions concerning time of delivery and how it will be set forth in solicitation * *; no authorization is given for open ended delivery provisions. How much Pioneer's bid would be reduced if based on a different delivery schedule is pure conjecture and we are not aware of any procedure that can be applied to permit evaluation under such circumstances. The facts in this case present a compelling reason to reject all bids and readvertise.

The contracting officer then reevaluated his findings in light of the Comments, determined that the invitation should be cancelled because of the ambiguity in the delivery schedule, and informed the parties on July 17 that there would be a readvertisement. Pioneer immediately protested the cancellation to the DP&P and requested a determination of "where [the] ambiguity exists." On July 20, the contracting officer issued a telegram in which he more fully explained his cancellation decision. On July 21, Grason Keene, another contracting officer at DP&P, responded specifically to Pioneer's protest, concluding that the IFB was ambiguous because subject to more than one reasonable interpretation:

> 2. With specific reference to your question regarding ambiguity the IFB as amended resulted in two reasonable interpretations as to delivery schedule. First the schedule contained in the IFB indicates a required delivery to commence in 120 days after award. This interpretation results from the deletion of the phrase /extend beyond 30 days/ /amendment No. 1/ and therefore results in having the effect of placing a zero in the space provided or in other words allowing no extension whatsoever. However another equally reasonable interpretation of the deletion of the specific limitation with the other language remaining is that it results in an open ended delivery schedule thereby permitting bidders to determine their own amount of extension with the only limitation being one of reasonableness.
>
> 3. Since more than one reasonable interpretation can be applied based on, the delivery schedule as amended is ambiguous. Therefore your protest is considered to be without any reasonable degree of foundation and is denied.

On July 20 DP&P issued a new solicitation for bids (IFB#2) which expressly provided a required delivery schedule. Both Pioneer and Steinthal then protested to the Comptroller General the cancellation of the amended IFB and the readvertisement. On August 13, the day before bids were scheduled for opening, the Comptroller General denied both protests and upheld the cancellation because the delivery schedule in IFB#1 as amended represented "an inadequate expression of the Government's needs" for immediate delivery.

Steinthal then filed this action in the District Court alleging that the cancellation of the amended IFB was arbitrary and capricious and requesting injunctive relief to prevent the opening of bids under IFB#2 and the award of the contract to any other bidder. Pioneer intervened. The Secretary of the Air Force filed a motion to dismiss, or alternatively for summary judgment. The District Court, after oral argument, denied the Secretary's motion and granted plaintiff Steinthal's motion for a permanent injunction, enjoining the opening of new bids and the awarding of a contract to anyone other than plaintiff Steinthal

for the reasons that (1) there is and was no basis for any new solicitation and (2) plaintiff [Steinthal] would be unduly prejudiced by the issuance of and [sic] award pursuant to any such new solicitation, the previous solicitation * * * having been properly issued.

Pioneer appealed, and we granted a temporary stay and set argument to consider Pioneer's motion for stay pending appeal. At the oral argument on September 10, 1970, both Steinthal and the Government acquiesced in Pioneer's request for immediate determination on the merits of the appeal from the permanent injunction. This court issued a judgment on September 17, 1970, reversing the District Court and dissolving its injunction in order "to permit the Air Force to open the resolicited bids and to award a contract for the parachutes." Judge Tamm dissented.

B. The Merits of the Appeal

The District Court based its injunction on the ground that "the cancellation [of the amended IFB] on the basis of ambiguity in the delivery schedule [was] arbitrary and without legal foundation." We conclude that Steinthal has not met the heavy burden resting on anyone seeking reversal of a determination by procurement officials that there is ambiguity in a bid invitation which warrants readvertisement.

1. The District Court Failed to Consider the Entire Administrative Process of Review of Bid Protests.

The District Court found (1) that there was a substantial basis in fact for the conclusions of the contracting officer, Mr. Blazi, in his Statement of Facts and Findings of July 8, and (2) that there was no rational basis for his subsequent refutation of these findings, or any other rational basis for the Air Force to reverse the award determination of Mr. Blazi. We disagree. The regulations establish a chain of review for consideration by the Air Force of bidder protests made prior to the award of a contract. The contracting officer is required to submit a Statement of Facts and Findings to HQ AFLC, which is authorized to "render final decisions on protests * * * which are lodged at no higher than Major Command levels." In accordance with this procedure, Mr. Blazi, after requesting a legal memorandum from the Chief of Procurement Law at Kelly Air Force Base, prepared a Statement which reveals that he ultimately rejected the conclusion of that officer that "the weight of law in such a situation would support cancellation of [the amended IFB] and readvertisement." HQ AFLC then provided the contracting officer with its Comments explicating its disagreement with the Statement and concluding that "[t]he facts in this case present a compelling reason to reject all bids and readvertise." Mr. Blazi's reconsideration of his prior decision and cancellation of bids, in the light of the legal interpretation provided by his superiors in the chain of command who were authorized to "render the final decision" in bid protest, does not provide a sound basis for condemnation of the executive action as arbitrary or capricious. Reconsideration at an action level in the

light of legal analysis provided at a review level is an entirely reasonable corollary of the review process. The review process is a legitimate check on the decision-making process in the executive branch of Government as it is in the judicial branch.

The cancellation of bids by the contracting officer following review of his Statement was reasonable, even if we assume, for purposes of this decision, that the District Court correctly found that the reasoning underlying the cancellation was the same as the analysis that had been supplied to him and rejected six days before his Statement. It seems to us neither strange nor unreasonable that a contracting officer might not be convinced by the analysis in an advisory opinion of a legal official in the contracting office, an opinion that was designed to aid him in the preparation of his recommendation, and nevertheless accept guidance to the same effect provided by the officials authorized to review his Statement and to render final decision on a protest. This reversal of view may be attributed to the greater care and reflection that an official naturally accords to any determination pinpointed by his superior as questionable, and to a recognition of the breadth of experience and awareness of Government practice and precedents reasonably ascribable to the higher command.

We are, finally, concerned that the District Court did not even consider the opinions of the Comptroller General denying the protests of Pioneer and Steinthal and upholding the Government's cancellation of the bids under the amended IFB. We are not called upon to make a formal determination concerning the controversy over the legal authority of the Comptroller General to issue decisions in bid protests, and the effect of such determinations on agency procurement policies. Certainly we must acknowledge that the office headed by the Comptroller General provides unique experience in the area of Government procurement and a tradition of care and objectivity, including freedom from prior involvement in the matter at hand, that would have provided "the court with additional guidance in resolving the issues before it.

The above discussion illuminates our concern with the responsibility of courts to consider the totality of the administrative process in their review of agency action. Such an approach would serve to ensure the requisite judicial deference to well-reasoned judgments of agency officials acting within the confines of their statutory delegated authority and their own agency regulations. In the field of Government procurement the courts must be sedulous to heed the admonition that their authority to vacate and enjoin action that is illegal must be exercised with restraint less the courts fall into the error of supposing that they may revise "action simply because [they] happen to think it ill-considered, or to represent the less appealing alternative solution available." Calcutta East Coast of India and East Pakistan/USA Conference v. Federal Maritime Commission, 130 U.S. App. D.C. 261, 264, 399 F. 2d 994, 997 (I968). As we there said:

> A court has no warrant to set aside agency action as arbitrary or capricious when those words mean no more than that the judges would have handled the matter differently had they been agency members. Judicial intervention must, instead, be rested upon a demonstration that the agency action has transgressed the statutory boundaries. Id.

2. There was a Reasonable Basis for the Cancellation of Bids Under the Amended IFB Because of an Ambiguity in the Delivery Schedule.

We now consider, with the above prospective, whether the cancellation of the bids after opening was in contravention of the ASPR regulations, which have the force and effect of law, governing the Air Force's consideration of bid protests.

Cancellation of bids after opening is limited by ASPR:

> The preservation of the integrity of the competitive bid system dictates that after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsible bid, unless there is a compelling reason to reject all bids and cancel the invitation.

However, the regulations do permit the contracting officer to cancel bids if he determines that one of certain factors is present including "inadequate or ambiguous specifications cited in the invitation."

In contending that the cancellation in the instant case is not consistent with the Air Force's own regulations, plaintiff Steinthal rests almost entirely on the contracting officer's Statement of July 8 (supra, at note 8 and text thereto). We begin our analysis with that document and note at the outset that this initial Statement plainly reflects recognition by the contracting officer himself of the ambiguity in the provisions of the amended IFB. What initially led the contracting officer to recommend the award of the contract to Steinthal was his balancing of that ambiguity against what he discerned to be the prejudice to the respective parties resulting from a cancellation and readvertisement. It is beyond dispute, however, that the Statement was not an unequivocal assertion that the delivery schedule was a required schedule, as appellee Steinthal would have us believe and as the District Court found in its Memorandum Opinion.

Thereafter, when the contracting officer received the Comments from HQ AFLC he found that it undermined two principal bases of his decision: (1) HQ AFLC stated that open-ended delivery requirements defined only by a test of reasonable time, which was the predicate of Steinthal's bid and of the contracting officer's recommendation for approval of that bid, were not permitted under its interpretation of ASPR or under recent Comptroller General opinions. (2) HQ also highlighted the "conjecture" in his Statement regarding Pioneer's bid and his conclusion that Pioneer's bid would not have been lower even if it had used the "desired" delivery schedule interpretation followed by

Steinthal. The contracting officer then reevaluated his Statement, in light of these remarks by a reviewing authority, and notified the parties of the cancellation and of the reasons therefor.

Under these circumstances, we consider the cancellation of bids to be in conformity with ASPR and, therefore, neither arbitrary nor capricious. And our conclusion stands firm even if it is assumed, for purposes of decision, that it is permissible for a contracting officer to take note of a bid ambiguity and to consider it offset by the prejudice that he concluded would result to the parties from cancellation. However it certainly was reasonable for the contracting officer, after the Comments indicated that certain of his legal premises were erroneous and that his analysis of prejudice to Pioneer was speculative, to reconsider the significance of the ambiguity in the delivery schedule and to determine that, under the regulations, the ambiguous specifications warranted cancellation of the bids.

II.

We have identified what we conclude was an error by the District Court in this case. But we think the particular error in this case is symptomatic of a more fundamental error in the approach of the District Court, in a misunderstanding and hence misapplication of the Scanwell opinion in which this court opened up the judicial forum for review of pre-procurement decisions of contracting officials which allegedly contravene either statutory limitations on the agency's authority or the agency's self-promulgated regulations. In subsequent decisions we have suggested the judicial responsibility to consider carefully and attentively the peculiar circumstances of each case, with a view towards limiting the instances of unnecessary judicial intervention into the procurement process. However, it is appropriate at this juncture to undertake a more specific delineation of the relevant considerations for taking account of this strong public interest in avoiding disruptions in procurement, and for withholding judicial interjection unless it clearly appears that the case calls for an assertion of an overriding public interest "in having agencies follow the regulations which control Government contracting." Scanwell Laboratories, Inc., v. Shaffer, supra note 1, 137 U.S. App.D.C. at 376, 424 F. 2d at 864.

The need for this undertaking is underscored by our experience with the manner in which cases after Scanwell have entered the judicial arena. After the agency has reached a decision, the losing bidder has rushed into court seeking to halt the particular procurement and to obtain an immediate judicial reconsideration of the agency's determination. The court is at one and the same time confronted with a number of technical procurement statutes and regulations, contract provisions and specifications, and asked to determine expeditiously whether the procurement should proceed.

With this background of the nature of procurement litigation in mind, we focus on two interrelated principles which we deem of especial importance for judicial consideration of emergency challenges to determinations of procurement officials: (1) courts should not overturn any procurement determination unless the aggrieved bidder demonstrates that there was no rational basis for the agency's decision; and (2) even in instances where such a determination is made, there is room for sound judicial discretion, in the presence of overriding public interest considerations, to refuse to entertain declaratory or injunctive actions in a pre-procurement context.

In opening the courthouse doors to challenges of procurement determinations, Scanwell provided protection against illegal Governmental action. This was salutory not only for the relatively few cases that might result on court intervention, but also for the greater number of cases which would be handled with greater care and more diligence within the Government because of the awareness of the availability of judicial scrutiny. However, Scanwell and its progeny impose a concomitant responsibility upon the courts to study these cases attentively and to exercise with restraint the power to enjoin a procurement program. The court is obligated to restrict its inquiry to a determination of whether the procurement agency's decision had a reasonable basis. This inquiry must fully take into account the discretion that is typically accorded officials in the procurement agencies by statutes and regulations. Such discretion extends not only to the evaluation of bids submitted in response to a solicitation but also to determination by the agency with respect to the application of technical, and often esoteric, regulations to the complicated circumstances of individual procurements. The soundness of this approach is underscored by the special terminology and doctrines that have evolved in ASPR, and what might fairly be called the "common law of Government procurement"--a body of rulings and determinations emanating from executive officials and the uniquely situated Comptroller General, quasi-judicial boards, and courts. If the court finds a reasonable basis for the agency's action, the court should stay its hand even though it might, as an original proposition, have reached a different conclusion as to the proper administration and application of the procurement regulations. Otherwise, the courts would become the forum for all manner of objections to procurement decisions--objections that counsel can readily relate to the language of some provision or other in some procurement regulation--and would be propelled without adequate preparation into a tangle of complex statutory and decisional rules. The sometimes esoteric nature of this inquiry is exemplified by the references in the footnote to the contentions made in the case before us including, e.g., the significance of the use of capital letters for key words rather than ordinary print.

The judicial discretion to decline to entertain actions seeking declaratory or injunctive relief, on the grounds of equitable considerations or of concepts of the "public interest", may also be involved. The availability of a damages remedy in the Court of Claims, which in many cases will compensate the frustrated bidder's realized financial losses (i.e., the bid preparation costs) resulting

from the illegal agency action, provides a sound equitable basis for the exercise of this discretion in considering whether to entertain a suit for injunctive relief. We are not referring solely to the public interest in the smooth flow and expeditious completion of the procurement process, but more specifically to the additional public interest consideration that obtains when what is involved is an item like parachutes and a short delivery schedule. This kind of urgent matter should not arise often, but when it does arise there is discretion in the District Court to decline to consider the prayer for injunctive or declaratory relief, and to leave the bidder solely to his damages remedy. To avoid any confusion, it is not being stated here that the damages available to the disappointed bidder, which do not comprehend anticipated profit, are automatically an "adequate" legal remedy as to warrant dismissal for want of equity of every injunction action regardless of the strength of plaintiff's claim on the merits. Gould Inc. and Eltra Corp. v. Chafee, 46 U.S. App.D.C. 206, 450 F.2d 667 (decided June 30, 1971); John Reiner & Co. v. United States, 325 F.2d 438, 163 Ct.Cl. 381 (1963). But as appears from settled precedent, supra note 41, there is discretion under doctrines of public interest to withhold relief even assuming the private bidder cannot be made completely whole in damages.

It would be intolerable for any frustrated bidder "to render uncertain for a prolonged period of time Government contracts which are vital to the functions performed by the sovereign." Blackhawk Heating and Plumbing Co. v. Driver, supra note 33, 140 U.S.App.D.C. 31, 433 F.2d at 1141. The frivolous lawsuit can, of course, be terminated swiftly by the summary judgment procedure in the Federal Rules of Civil Procedure. Id. However, even assuming a colorable claim by the disappointed bidder, it does not follow that he is entitled to an evidentiary hearing and judicial determination of the merits of his claim before termination of the Procurement process. Procurement agencies are required to decide many close and complex questions. Only when the court concludes that there has been a clear violation of duty by the procurement officials should it intervene in the procurement process and proceed to a determination of the controversy on the merits. This principle, as applied in the procurement field, would be an updated analogue of the traditional doctrine that mandamus should be issued to compel performance only when there has been a clear violation of an official duty of what has come to be labeled a "ministerial" duty, a duty not involving any room for discretion.

In the more relaxed context of an action for damages, the court has an effective opportunity to give careful consideration to the controversy at hand, to probe the various and interrelated provisions of regulations, contract terms and specifications, questioning technical witnesses if necessary, reviewing pertinent administrative procedures and practices that give content as well as background to generalized regulations.

But when the court is thrust into the vortex of emergency litigation in which bidders are seeking immediate, injunctive relief, and all parties are seeking expedited determination, it is difficult in the time available for the court to become steeped in the pertinent learning. Consequently, courts should be reluctant to intervene absent a clear showing of illegality by the party attempting to overturn the agency determination.

The present case is an apt illustration of the problems created by precipitate judicial involvement in the procurement process. The District Court, in effect, acted upon its own view of whether there was an ambiguity in the Government's invitation for bids. If the Government had contracted with either Steinthal or Pioneer and a dispute had arisen over the meaning of the delivery schedule, the court would have been faced with a familiar judicial problem of contractual interpretation; it might decide that, regardless of the intention of the Government's draftsman, the amended IFB gave the contractor reasonable latitude as to the time of delivery. Such a decision might very well be upheld by this court since it involves the resolution of a contractual ambiguity, and under familiar legal doctrine a court may well construe a provision strictly against the Government draftsman, giving the benefit of any doubt to the private party who did not draft the particular provision.

The problem in the instant case, however, was totally different and clearly unfamiliar to the judicial process of conflict resolution. From the viewpoint of the procurement program, the contracting officials were not faced with the issue of how the ambiguity should be resolved but rather with the question of whether there was an ambiguity which resulted in an inequality among the bidders and therefore warranted readvertisement. The balancing of the public interest in free and fair competitive bidding against both the fairness to the parties and the Government's contractual needs requires informed judgments by officials continuously faced with such decisions, not by the courts which are unfamiliar with, and ill-equipped to handle, problems couched in these procurement policy terms. (See note 40, supra.).

There are several other factors relevant to the consideration of Government procurement cases which serve to illuminate the principles of judicial restraint articulated above. We have noted that the denial of injunctive relief may mean that a bidder in fact deprived of legal rights cannot obtain recovery for loss of anticipated profits. Although this is, of course, a possibility, it is not one so poignant or painful as it might initially appear to those schooled in private contract controversies. A fundamental difference between Government procurement and private contract litigation is evidenced by the clause, standard and required in Government contracts, whereby the Government reserves the right, even in the case of a duly executed contract, to terminate the contract "for the convenience of the Government." Even if this clause is omitted from a particular contract it will be incorporated into the contract by operation of law since it is required by ASPR and this requirement has the force and effect of law. G. L. Christian and Assoc. v. United

States, 312 F.2d 418, 160 Ct.Cl. 1; 320 F.2d 345, 160 Ct.Cl. 58, cert. denied 375 U.S. 954, 84 S.Ct. 444, 11 L. Ed.2d 314 (1963). The termination-for-convenience clause "lodge[s] in the contracting officer the fullest of discretion to end the work 'in the best interests of the Government.'" Nolan Bros., Inc. v. United States, 405 F.2d 1250, 1253, 186 Ct.Cl. 602, 606, (1969). On the basis of the contracting officer's wide, though not completely unbridled, discretion under this clause to terminate a contract for the best interests of the Government, the courts have denied the contractor recovery for anticipated profits. See Nolan Bros., Inc., id. and cases cited therein. Indeed there may be "adequate cause" for termination, asserted as a defense to a breach action, even though it may not have been known at the time the action was taken by the Government's contracting officer. College Point Boat Corp. v. United States, 267 U.S. 12, 45 S.Ct. 199, 69 L.Ed. 490 (1925).

Another element in the controversy at bar that merits careful attention is the importance in Government procurement of the position of the General Accounting Office.

A court's reluctance to interfere with the executive procurement process should be especially strong where, as here, the General Accounting office had made a determination upholding the procurement officials on the merits. The Court of Claims--a constitutional court whose special expertise in the field of Government contracts guides us as a matter of strongest comity, if not requirement--voiced the stature of the GAO in the procurement area in these terms in its Reiner opinion:

> Here, termination would have been invoked in deference to the Comptroller General's declaration that the contract should be cancelled. The contracting officer did not agree with that opinion, but it is the usual policy, if not the obligation, of the procuring departments to accommodate themselves to positions formally taken by the General Accounting Office with respect to competitive bidding. That office as we have pointed out, has special concern with, and supervision over that aspect of procurement. It would be entirely justifiable for the contracting officer to follow the general policy of acceding to the views of the Accounting Office in this area even though he had another position on the particular issue of legality or propriety. He would not be allowing the Comptroller General to dictate the termination of the contract but, rather, would be using termination as a means of minimizing a conflict with another arm of Government properly concerned with the contractual problem. It cannot be contrary to "the best interests of the Government"--the controlling standard of the termination clause--to end a contract which the Comptroller General has branded as incorrectly advertised.

Recently this court, citing Reiner, reaffirmed this analysis in Schoonmaker v. Resor. In that case we upheld the Defense Department's action rejecting bids for generator sets, even assuming that that department had reversed its initial procurement determination solely to eliminate a difference of opinion with the General Accounting Office which had held the invitation ambiguous. In reversing an injunction requiring that the contract be awarded to the low bidder, we noted that the District Court had failed to examine the findings of the Comptroller General. On our examination we concluded that the Comptroller General, who was mindful that generally the integrity of the bidding system may be impaired unless contracts are awarded to the lowest responsible bidder, was not arbitrary or capricious in concluding that in the particular case, the invitations were ambiguous and failed to provide clear and objective instructions, and that the dominant public interest lay in requiring that the bidding instructions be such as to insure free and fair competition.

Finally, in pointing out that in a suit by a disappointed bidder under Scanwell to enjoin the action of a contracting officer, the court may properly take into account the concurrence of the General Accounting Office, we think it appropriate to observe that the GAO is an arm of the legislature which is independent of the executive branch, and has an accumulated experience and expertise attested to by a substantial volume of bid protest cases filed and decided, a volume that has been increasing markedly in recent years.

The significance of the GAO's review procedure is discussed in Wheelabrator Corp. v. Chafee, Nos. 24705 and 24729, 147, U.S. App. D.C.--, 455 F.2d 1306, decided this day, and as is noted therein may warrant the court's exercise of its jurisdiction to issue a preliminary injunction by means of an order limited in duration to the time needed for GAO disposition of a pending protest.

The GAO's decision is not necessarily dispositive, however, and we take occasion to point out that there certainly may be instances where the District Court will find procurement illegality that the GAO failed to recognize, or at any event failed to correct.

We do not recede from our expression in Scanwell of the beneficial purposes served by frustrated bidders who, as "private attorney generals", can aid in furthering the public interest in the integrity of the procurement process. The courts are properly concerned that the procurement activities of the Government be carried out in accordance with the applicable statutes and agency regulations and that these Governmental functions not be permitted to deteriorate into actions reflecting personal predelictions of administrative officials, whether ascribable to whim, misplaced zeal, or impermissible influence. However, the public interest in a Government procurement process that proceeds with expedition is likewise of importance. The court must refrain from judicial intervention into the procurement process unless the actions of the executive officials are without any rational basis.

Reversed.

TAMM, Circuit Judge, dissents.

f. Arbitrariness-Bid Preparation Costs

KECO INDUSTRIES, INC. v. THE UNITED STATES

203 Ct.Cl. 566 (1974)

Davis, Judge, delivered the opinion of the court:

This suit by a disappointed bidder for the recovery of bid preparation costs comes to the court for the second time. Our earlier decision, Keco Industries, Inc. v. United States, 192 Ct.Cl. 773, 428 F. 2d 1233 (1970), held that the claimant had standing to sue and denied defendant's motion for summary judgment, remanding the case to the trial division for fact-finding. A trial has been had, and plaintiff now takes exception to the findings and opinion of Trial Judge Mastin G. White and to his conclusion that Plaintiff's petition should be dismissed.

The disputed procurement was for ground air conditioners, which are gasoline-powered cooling devices used to service military aircraft before flight. The Department of the Air Force, through the San Antonio Air Material Area (SAAMA), originally issued an invitation when a briefing conference revealed confusion in the bidder's minds about technical proposals sent to a number of firms, as the first part of a two-step advertised procurement. Of the companies solicited, three replied, but only two submissions were found to be technically acceptable--the proposal of plaintiff Keco Industries, and that of Acme Industries. Acme's proposal requested two departures from the specifications; both concerned the Government-furnished equipment. One deviation was the use of V-belt (indirect) drive rather than direct drive to power the Government-furnished compressor; the other was the use of a generator rather than a battery to power the cooling fan motor (the generator and battery were both components of the Government-furnished engine). The Government acquiesced and timely amended the final specification to permit both design changes as authorized alternatives. Acme received the contract award after its bid, based on these alternatives, was found to be substantially lower than Keco's.

During performance, Acme encountered difficulty in implementing the two specification deviations which it had requested. Adaptation of this particular compressor to V-belt drive required a costly bearing assembly, and the 25 amphere generator accompanying the Government-furnished engine could not provide sufficient power to drive the cooling fan motor (a 100 amphere alternator was needed). Both problems were solved by the Government's issuance of formal change orders, sanctioning the required modifications and increasing the contract price.

Learning of these changes, plaintiff Keco filed a protest with the General Accounting Office, arguing that Acme should bear the cost of the modifications necessary to accommodate the specification changes which Acme itself had sought in its technical proposal. In his first decision (B-162538, August 15, 1968), the Comptroller General held for Acme on one of the items but agreed that Acme was financially responsible for the other alteration. However in January 1969 he reversed himself after Acme requested reconsideration. Briefly, the later opinion found that information in the hands of Air Force personnel "* * * was sufficient to require such personnel to question the feasibility of the Acme design shown in its technical proposal, and since the answer to the problem was readily available to the Air Force but not to Acme, such information may be considered as tantamount to actual knowledge." On this theory, the Comptroller General withdrew his partial opposition to Air Force payment to Acme of the full costs of the change orders.

Plaintiff then brought suit in this court, asserting that the Government had acted arbitrarily and capriciously and breached its implied promise fairly and honestly to consider the Keco bid. The damages sought were bid preparation expenses and anticipatory profits. Defendant moved for summary judgment, urging that Keco lacked standing to bring suit, and that the pleadings did not present enough of a suggestion of arbitrary and capricious action to warrant a trial. As noted above, this motion was denied (except as to the claim for anticipatory profits), and trial was directed and held. The trial judge found that, at the time when the Government accepted Acme's proposal, the former did not know that the proposal was unworkable and would have to be changed. The judge also determined that the defendant's action in awarding the contract to Acme did not amount to arbitrary or capricious action in regard to this plaintiff. We affirm and adopt these conclusions.

I.

It is clear, in the first place, that plaintiff did not prove that the pertinent Air Force officials had actual knowledge that Acme's technical proposal would be unworkable without major changes. Plaintiff has shown us no reason why this trial finding as to actual knowledge should be disturbed. Indeed, had plaintiff launched a solid challenge to this finding, the court would be well within discretionary limits in refusing even to consider the argument, because plaintiff filed very sketchy and incomplete proposed findings before the trial judge, without citation to the record. See Rule 134 (d)(1) and (g); WRB Corp. v. United States, 183 Ct. Cl. 409, 417 (1968). In any case, the very most that can be said, on this record, is that the interested Air Force officials have access to data which, if they had considered it (which they did not), might well have raised questions about the technical feasibility of Acme's proposal.

II.

Having reached this conclusion, the trial judge did not go further and decide whether the failure of the officials to search out and consult all the information available to them constituted a lack of due diligence. Rather, he assumed that such conduct on the part of the Government's procurement people would not provide a basis for recovery of bid preparation expenses by Keco, since he found that in this instance the Air Force's decision to permit Acme's requested deviations was reasoned, even if incorrect or negligent.

To test the correctness of this holding that simple negligence is not enough to ground recovery here, it will be helpful to start by surveying, generally, the several types of claims disappointed bidders may present, and the varying considerations pertinent to these different classes of demands for compensation. The proper treatment of the specific situation now before us follows, we think, from certain of the overall principles which should govern the various kinds of actions for monetary relief by rejected bidders.

In the process of procurement by formal advertising, the awardee must ordinarily fulfill three main requirements: (1) his bid must be the one "most advantageous to the Government, price and other factors considered"; (2) he must be adjudged "responsible", (i.e., able and willing to perform the contract); and (3) his bid must be "responsive", (i.e. conform in all material respects to the invitation). ASPR §§ 2.103, 2.407-1:FPR §§ 1-2.103, 1-2.407-1. In certain procurements the awardee must clear another hurdle or two as well; he must show that he is a "small business" concern, or that performance will take place in a "labor surplus area", etc. Conceivably, the Government may err in making any of the above determinations with respect to any bidder. And if it does, a frustrated bidder may feel that such irregularities (in the treatment of his bid or that of a competitor) deprived him of a fair shot at the contract.

But if one thing is plain in this area it is that not every irregularity, no matter how small or immaterial, gives rise to the right to be compensated for the expense of undertaking the bidding process. So it has been, and continues to be, necessary to develop rules and standards for judicial review of the various administrative steps in the process, and the scope of the duties owed at each stage by the Government to the allegedly aggrieved participant.

The ultimate standard, is, as we said in Keco Industries I, supra, whether the Government's conduct was arbitrary and capricious toward the bidder-claimant. We have likewise marked out four subsidiary, but nevertheless general, criteria controlling all or some of these claims. One is that subjective bad faith on the part of the procuring officials, depriving a bidder of the fair and honest consideration of his proposal, normally warrants recovery of bid preparation costs. Heyer Products Co. v. United States, 135 Ct. Cl. 63, 140 F. Supp. 409 (1956). A second is that proof that there was "no reasonable basis" for the administrative decision will also suffice, at least in many situations. Continental Business Enterprises v. United

States, 196 Ct. Cl. 627, 637-38, 452 F. 2d 1016, 1021 (1971). The third is that the degree of proof of error necessary for recovery is ordinarily related to the amount of discretion entrusted to the procurement officials by applicable statutes and regulations. Continental Business Enterprises v. United States, supra, 196 Ct. Cl. at 637, 452 F. 2d at 1021 (1971); Keco Industries, Inc. v. United States, supra, 192 Ct. Cl. at 784, 428 F. 2d at 1240. The fourth is that proven violation of pertinent statutes or regulations can, but need not necessarily, be a ground for recovery. Cf. Keco Industries I, supra, 192 Ct. Cl. at 784, 428 F. 2d at 1240. The application of these four general principles may well depend on (1) the type of error or dereliction committed by the Government, and (2) whether the error or dereliction occurred with respect to the claimant's own bid or that of a competitor.

A. Because of the complexity of the formal advertising process, it is best to separate out the various steps and to treat first with errors charged with respect to the plaintiff's own bid. A disappointed bidder may, for instance, allege that his own bid was improperly read or evaluated as to the "price and other factors" criterion. As we have said, it is enough for recovery if an adequate showing is made that the Government acted in bad faith, e.g., by predetermining the awardee or by harboring a prejudice against the plaintiff. Heyer Products Co. v. United States, supra, 135 Ct. Cl. at 69-71, 140 F. Supp. at 413-14 (1956). And suits for injunction in other courts, dealing with this matter, have held that relief should be granted when the Government awards a contract without any reasonable basis for its actions. M. Steinthal & Co. v. Seamans, 455 F. 2d 1289, 1301 (C.A.D.C. 1971); Rudolph F. Matzer & Assoc., Inc. v. Warner, 348 F.Supp. 991, 994-95 (M.D. Fla. 1972). This is the standard we accepted in Continental Business Enterprises, supra. Although based on external facts and circumstances rather than a showing of animosity toward plaintiff or favoritism for a competitor, this principle is not far removed from the bad faith test; courts often equate wholly unreasonable action with conduct motivated by subjective bad faith. Cf. Rudolph F. Matzer & Assoc., Inc. v. Warner, 348 F. Supp. at 995. It would be premature to comment on whether negligence in lesser degree, in the "price and other factors" evaluation of a bidder's own bid, can sometimes, in certain situations, suffice for recovery. But it is worth noting that procurement officials ordinarily have a high degree of discretion in determining whether a bid is "most advantageous to the Government."

A bidder may also contend that his bid was improperly rejected as nonresponsive. The regulations provide that an awardee's bid must "comply in all material respects with the invitation" (ASPR § 2.301(a); FPR § 1-2.301(a)), and list specific instances of nonconformity which require rejection of the bid (ASPR § 2.404-2; FPR § 1-2.404-2). If a defect fits within the narrow category of mandatory rejection (e.g., failure to state a price, if required), then the disqualified bidder would have little room for argument. If, on the other hand, the existence vel non of a defect involves the exercise of judgment, or if it is an irregularity minor enough to be waivable under ASPR § 2.405 or FPR § 1-2.405, then the cognizable complaint

is that this discretion was clearly abused in the particular circumstances. Presumably, a showing that there was clearly no reasonable basis for the official action would be enough. It is much less clear whether there could be specific situations in which some lesser showing would suffice.

A party submitting a responsive and low bid may still be adjudged not "responsible", and thus denied the award. ASPR § 2.404-2(g); FPR § 1-2.404-2(e). Ordinarily, the contracting officer will have very wide discretion in making this determination (standards are set forth at ASPR § 1.900 et seq. and FPR § 1-1.1203), and thus a complaining bidder would normally have to demonstrate bad faith or lack of any reasonable basis in order to prevail.

If a prospective Government contractor clears all these requirements in an advertised procurement, he may still be found ineligible for award in some cases, e.g., where the contract has been "set aside" for a small business or for a labor surplus area concern. In each such case, there are procedures for determining eligibility, and the degree of leeway granted Government officials by those procedures would ordinarily frame the appropriate standard for judicial review.

B. Because the selection of an awardee from a raft of competitive bidders in a comparative process, a prospective contractor may complain, as here, that Government actions favoring another bidder - without any misreading or misevaluation of the claimant's own bid - prejudice the complainant's chances for the award. Of course, where such favoritism or discrimination stems from subjective bad faith (e.g., predetermination of the award), the rejected bidder can recover under the rule of Heyer Products Co., supra. We held in Keco Industries, Inc. I that such bad faith exists prima facie when the Government accepts a bid knowing that costly changes will be required because of the bases on which the competitor bid.

But in those cases where dishonesty and bad faith are absent, the rules governing the claimant's rights when the Government errs with respect to his own bid need not automatically be carried over, in every instance, to the comparable situation where the objective error solely concerns a competitor's proposal. As our prior decisions have implicitly recognized, the Government's duty to treat a bid honestly and fairly runs first of all to the enterprise submitting that bid. Cf. Heyer Products Co., v. United States, 135 Ct.Cl. 63, 140 F. Supp. 409 (1956); Continental Business Enterprises v. United States, 196 Ct. Cl. 627, 452 F. 2d 1016 (1971). The procuring agency's enforceable responsibility to a bidder to read or evaluate properly his competitor's bid may be appreciably less in certain situations. (One relevant factor in this connection is that, although the harm asserted is that the plaintiff would likely have received the award but for incorrect preference given his successful competitor's bid, there is no assurance that any bidder would have obtained the award since the Government retains in its discretion, the right to reject all bids without any liability. Robert F. Simmons & Assocs. v. United States, 175 Ct.Cl. 510, 360 F. 2d 962 (1966); ASPR § 2.404 et seq., FPR § 1-2.404 et seq.).

For instance, there would seem to be a strong presumption against entitlement to bid preparation expenses where the allegation is that the Government incorrectly adjudged a competitor to be "responsible" prior to contract award. As we have noted, procurement officials have a great deal of discretion in making this determination (aside from a prior suspension or debarment), and some of the criteria are not readily susceptible to reasoned judicial review. See ASPR §§ 1.900 et seq.; FPR § 1-1.1203. In addition, correct appraisal of the responsibility of a prospective contractor is clearly in the self-interest of the procuring agency; there is a built-in stimulus against error. If the determination is erroneous, and the contractor ultimately defaults on his obligation, the Government will likely suffer substantial delay and inconvenience, even though the defaulting party will be liable to answer in damages, including perhaps reprocurement costs. See, e.g., ASPR §§ 8.707, 8.709; FRP §§ 1-8.707, 1-8.709. Absent fraud or bad faith, it is not easy, therefore, to conjure up situations in which a disappointed bidder could recover bid preparation expenses under the claim that a defendant wrongly appraised the awardee as "responsible".

Again, it may be that even a proven violation of some procurement regulation, in selecting the competitor, will not necessarily make a good claim. Not every regulation is established for the benefit of bidders as a class, and still fewer may create enforceable rights for the awardee's competitors. Cf. Chris Berg, Inc. v. United States, 192 Ct. Cl. 176, 182-83, 426 F. 2d 314, 317 (1970). On the other hand, it could be--we do not decide--that competitors do have an enforceable right against the making of an award to a clearly nonconforming bidder, even where the agency failed to appreciate that the bid was materially nonresponsive. Cf. Prestex Inc. v. United States, 162 Ct Cl. 620, 320 F.2d 367 (1963); Albano Cleaners, Inc. v. United States, 197 Ct. Cl. 450, 455, 455F. 2d 556, 559 (1972); ASPR § 2.301; FPR § 2.301. Or it could be that a claim will follow from the defendant's failure to pursue the established procedures in selecting an awardee in a small business or labor surplus area set-aside. Cf. Allen M. Campbell Co. v. United States, 199 Ct. Cl. 515, 520-21, 467 F. 2d 931, 933-34 (1972); Mid-West Constr., Ltd. v. United States, 181 Ct. Cl. 774, 782-83, 387 F. 2d 957, 961-62 (1967); Otis Steel Products Corp. v. United States, 161 Ct. Cl. 694, 699-700, 316 F.2d 937, 940 (1963).

We mention these varying situations, not presented in this case, only to stress the possibility of separate rules for separate classes of problems. The point is that, in those instances in which the alleged Government wrongdoing concerns only the prevailing bid and not the claimant's own rejected proposal, there should be careful examination of the claimant's particular rights and interests with respect to that specific type of misconduct. There may well be no one umbrella rule or principle for all such cases.

III

With this general background, the remaining issues in this case can be readily resolved. We have held in Part I, supra, that plaintiff has failed to prove that the Air Force had actual knowledge that the Acme proposal would not work without costly changes. Accordingly, the rule of Heyer Products, Co., supra, does not apply. It may be--this factual question does not have to be decided--that the procuring officials were negligent or less diligent than they should have been in investigating and evaluating whether the Acme bid was the more advantageous to the Government. But even on this assumption we agree with the Trial Judge that the Air Force made a reasoned, if erroneous, decision; like him, we cannot say that there was no reasonable basis for the official action. There may have been some lack of care but certainly the negligence was not gross nor was the decision irrational or totally lacking in reason. That being so, Keco has no meritorious claim.

The mere failure to exercise due diligence in the appraisal of the advantageousness of a competitor's bid, when that omission amounts to simple negligence, is not a sufficient showing of arbitrary or capricious conduct to warrant recovery of bid preparation expenses. The Government's duty to exercise care in evaluating the "price and other factors" of a bid runs first to the proponent of that bid and to the public and its representatives, and only then to another bidder. The responsibility to the latter is too attenuated to justify assessing damages for simple negligence, especially in light of the broad discretion of procurement officials in that aspect of the bid process. Moreover, litigation which second-guesses bid determinations, through efforts to show ordinary lack of due care in appraising competing proposals, should not be encouraged where the award was rational and made in good faith. The interference from such suits, and their impact upon contracting activities, would exact too great a price in the procurement process. Cf. Continental Business Enterprises, Inc. v. United States, supra, 196 Ct. Cl. at 639, 452 F. 2d at 1022.

IV

* * * * *

Plaintiff argues that our opinion in Keco Industries, Inc. I gave carte blanche to prove any instance of arbitrary and capricious conduct in awarding this contract. It is not clear that the specific language alluded to (192 Ct. Cl. at 784, 428 F. 2d at 1240) was meant to cover anything other than the Air Force's permission to Acme to use V-belt drive and a generator-powered cooling fan motor--the only specific defects referred to in the petition. But even if the court contemplated that other defects might be raised in the future, the opinion in no way dispensed with the normal rules of pleading and trial practice. At best, the court indicated that other instances of Government misconduct could be shown if properly and timely brought into the case.

It is undisputed that the only specific acts of Government wrongdoing mentioned or referred to in the petition (as originally filed or as amended) were the two with which the Trial Judge dealt. Plaintiff contends, however, that it preserved other possible bid-procedure defects by alleging in its petition, generally, a violation of "Section 2, Paragraph 5" of the Armed Service Procurement Regulations. This is apparently a reference to the four-page section in ASPR describing the two-step formal advertising. The citation obviously falls far short of the specificity called for by Rule 33(b), which requires that: "In all averments (1) of fraud * * * (2) of mistake, or (3) of action alleged to be arbitrary, capricious, so grossly erroneous as to imply bad faith, the circumstances constitute fraud, mistake, or arbitrary, capricious or erroneous action shall be stated with particularity. ***" A naked allegation of arbitrary and capricious action is not sufficient to trigger a trial. Greenway v. United States, 163 Ct. Cl. 72, 82 (1963). Plaintiff did plead with particularity the circumstances surrounding the Government's acceptance of Acme-requested departures from the specifications, but no allegation was made or suggested as to a material nonconformity in Acme's bid. The petition simply did not present those additional grounds.

For these reasons, we hold that plaintiff is not entitled to recover. The petition is dismissed.

B. Negotiation

Section 1. Use of Negotiation

DIALIGHT CORPORATION

46 Comp Gen 600
[B-160332] (1967)

To the Secretary of the Navy, January 9, 1967:

It appears that on May 31, 1966, the Navy Purchasing Office, Washington, D.C., received two requisitions for supplies from the Naval Electronics Systems Command. Requisition No. 63133-6146-4458 requested the procurement of 4,600 Lampholders, Dialco Corporation #7538 or equal. Both requisitions were assigned an issue priority designator 2 under the Uniform Materiel Movement and Issue System.

* * * The Navy Purchasing Office then determined that the procurement of the lampholders would be set aside 100 percent for participation of small business concerns, whereas procurement of the lamps would be made on an unrestricted basis.

The contracting officer further reports that because of the urgent nature of the requirements it was determined to negotiate the lamp requirement in lieu of formally advertising it and that it was also determined to use negotiation in lieu of small business restricted advertising in the case of the lampholders. Quotations for the lampholders were solicited from four small business firms by telephone on July 11, 1966.

The contracting officer advises that the Dialight Corporation was not solicited in the case of the lampholders since its status as a large business concern (over 1,000 employees) excluded it from participation. Solicitation of offers for supplying the lamps was made by telephone on the same date, and was limited to the same four small business firms. No explanation is given as to why Dialight was not solicited with regard to the procurement of lamps.

The prospective offerors were advised that quotations would be considered if received not later than July 19, 1966, and that the requirement for the lampholders was restricted to small business concerns, with the appropriate size standard being indicated.

It is reported that on July 14, 1966, the Navy Purchasing Office received a telephone call from the President of Dialight advising that he had received information from a dealer in his products that the Navy Purchasing Office was soliciting quotations for equipment citing a Dialco brand or equal, and that his firm as the manufacturer of that brand was excluded from the competition; that he requested a review of the set-aside determination be made and that he be informed of the

results; and that on July 20, 1966, Dialight was notifed by telephone that past procurement history of the lampholders indicated that the set-aside was appropriate.

Three quotations were received on each of the procurements. The Eldema Corporation, a small business concern, submitted the lowest quotation in each case and it appears that on August 4, 1966, award was made. It is reported that the ordered supplies have been delivered. By letter dated July 27, 1966.

* * * Dialight's protest was that it had not received a request for a quotation on products of its own manufacture. The Navy Purchasing Office, however, by letter dated August 4, 1966, disregarding the basic element of the protest, summarily returned the letter to Dialight with the nonresponsive explanation that it would not be considered because the protest against the size classification had not been made in time under ASPR 1-703. In that regard ASPR 1-703(c)(2)(ii) provides that an appeal from a product classification determination by a contracting officer must be taken not less than 5 working days before the bid opening or the deadline for submitting proposals or quotations where this date or deadline is 20 or less days after the issuance of the invitation for bids or request for proposals or quotations. (As detailed above the deadline for submitting quotations in this instance was July 19, 1966.) Dialight answered by letter dated August 5, 1966, reiterating the protest against the fact that they were not given consideration in requesting a formal or even an informal bid for their own product, stating "How could we possibly have appealed a classification if we weren't even given an opportunity of making such a protest within the time permitted?"

Under 10 U.S.C. 2304(a)(2) supplies may be purchased by negotiation when the public exigency will not permit the delay incident to advertising. As noted above, the purchase requisitions in question were assigned an issue priority designator 2 under the Uniform Materiel Movement and Issue Priority System. When this is the case ASPR 3-202.2(vi) provides that the "public exigency" exception to formal advertising may be used with no further justification being required. While the "public exigency" justification for negotiation clothes the contracting officer with a considerable degree of discretion in determining the extent of the negotiation consistent with the exigency of the situation, 10 U.S.C. 2304(g) and ASPR 3-202.2 require that even where authority exists to negotiate procurements, proposals should be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured. It is obvious that, except in unusual circumstances, where supplies are described in specifications by a brand name, or equal, maximum competition cannot be obtained unless bids, proposals, or quotations are solicited from the manufacturer of that brand. In this instance the contracting officer has not given any reason for failing to give Dialight the opportunity to compete in the procurement of the lamps, and we must therefore conclude that Dialight was improperly denied opportunity to compete in that procurement. Further, it would appear that the contracting officer, by soliciting

quotations for the lamps only from small business concerns, also made that procurement a 100 percent small business set-aside contrary to the agency determination that the procurement should not be set aside.

Additionally, while ASPR 3-510(c)(ii) permits the oral (including telephonic) solicitation of proposals or quotations in appropriate cases, that regulation provides that oral solicitation is not justified solely because of the assignment of a high issue priority designator; that certain documentation is required as a prerequisite to oral solicitation; and that the oral method of solicitation shall not be used without prior approval at a level higher than the contracting officer. In this regard, the file transmitted here did not contain such required documentation or in any way indicate that the oral method of solicitation had been previously approved at a higher level.

Therefore, while practical considerations preclude our disturbing the award made to Eldema Corporation, we recommend that all proper and necessary actions be taken to preclude a recurrence of this situation, and to assure that the maximum competition envisaged both by law and regulation will be obtained.

TIDEWATER PROTECTIVE SERVICES, INC.

B-186233 (1977) (Reconsideration)
77-1 CPD 361

The Department of the Air Force requests reconsideration of our decision in the matter of Tidewater Protective Services, Inc., and Others, B-186233, December 3, 1976, 56 Comp. Gen. _____, 76-2 CPD 462, in which we held that the Air Force had not sufficiently justified the use of negotiation in lieu of formal advertising to satisfy its requirements for hospital aseptic management services (HAMS).

The HAMS procurement covered 14 Air Force hospitals and was for general housekeeping services such as floor maintenance, vacuuming, wall and window cleaning, and curtain cleaning, along with more management-oriented services including training of employees in infections control, establishing written procedures to guide personnel in providing a hygienic environment, and establishing a quality control program. The specific housekeeping tasks were described in detailed specifications; the management-oriented services were described in more general terms.

The procurement was negotiated under 10 U.S.C. 2304(a)(10) (1970) which provides for negotiation of contracts for "property or services for which it is impracticable to obtain competition." The Determination and Findings (D&F) supporting the negotiation procedure stated that "negotiation * * * is necessary to insure effective control of micro-organism growth * * *. The control of micro-organism in hospital critical areas * * * is of the utmost importance in order to optimize a healthful and safe patient environment and to insure continued accreditation * * *. The technical specification is not sufficiently detailed to permit formal advertised bidding." The Air Force further explained to us that HAMS procurements had been advertised at one point, but that approach "proved to be totally unsatisfactory" because "a comprehensive technical evaluation", rather than a pre-award survey, was necessary to insure that Air Force needs would be met. This evaluation, we were informed, was to concern itself primarily with the management-oriented services regarded by the Air Force as necessary to insure that the minimum needs of HAMS would be satisfied. Further, the Air Force reported, since various commercial firms each had their own management techniques and programs, any attempt by the Air Force to specify a particular technique or program would have the effect of reducing competition.

We held that, on the record before us, the Air Force had not made a persuasive case for treating the HAMS procurement as coming within the exception of 10 U.S.C. 2304(a)(10) from the statutory requirement for formal advertising. We pointed out that: (1) the impossibility of drafting specifications regarding "coordination of work tasks", one of the management functions referred to by the Air Force, was "not a reason sufficient to justify negotiation" since that effort "is generally required without specification"; (2) the Air Force, in any event, had admitted it could develop a specification, "thereby

negating any claim that it is 'impossible'" to do so; (3) the fact that competition might theoretically be lessened "by use of adequate specifications" did not justify negotiation "since it seems that a basic specification listing fundamental needs could be developed without unduly limiting competition"; and (4) the difficulties reportedly encountered by the Air Force when using formal advertising seemed to be "linked * * * with what it felt was a lower level of quality of service than that considered desirable", but that the statute does not permit the use of negotiation under such circumstances to secure a higher level of service. See Nationwide Building Maintenance, Inc., 55 Comp. Gen. 693 (1976), 76-1 CPD 71.

In requesting reconsideration, the Air Force states that we made an error in emphasis in concluding that negotiation was not justified because it was not impossible for the Air Force to draft specifications. What must be considered, according to the Air Force, is whether it is impossible to draft adequate specifications, as provided by Armed Services Procurement Regulation (ASPR) § 3-210.2 (1976 ed.) which implements 10 U.S.C. 2304(a)(10). The Air Force states that it cannot draft adequate specifications because its minimum needs can be satisfied only by a management effort that cannot be defined in advance. For example, the Air Force reports:

> " * * * provision of hospital aseptic management services (HAMS) is a highly specialized service effort. Furthermore, there is no simple or basic definition of what constitutes such services. * * *
>
> "There is no documented direct correlation between the incidence of * * * infection and the level of pathogenic micro-organisms in the hospital environment. Therefore, the Air Force * * * cannot in terms of micro-organism counts per a given area define an acceptable level of asepsis * * *. The most aseptic environment obtainable at a reasonable price is the minimum need of the Government. * * *
>
> " * * * the management methodologies developed by private industry for the provision of these services are unique and may be proprietary to the respective companies. These methodologies, which change and develop with experience, are essentially what is being purchased in HAMS procurement. Each company's methodology is unknown to the Air Force, in detail, prior to negotiation.
>
> "Therefore, the preparation of standard detailed specifications would not merely restrict competition * * * but would also prevent obtaining the minimum Government requirement for the most current and advanced aseptic management services commercially available at a reasonable price. It is reasonable to assume that * * * management which provides not only for training, procedures and quality control but also provides a complete overall company management system will provide the minimum requirements of the Government.

"Quality control in a hospital environment cannot be accomplished by only a visual inspection as it can be for regular janitorial services. To appear to be clean is not sufficient, for it is the hospital's responsibility to maintain an aseptic environment. The company's quality control program must assure the aseptic environment. Part of this program requires not only locally performed inspections but also requires a company's management system that is structured to support the local personnel in identifying and correcting deficiencies. This must be accomplished prior to the aseptic environment being endangered.

"Air Force hospitals are a small segment of the universe of hospitals serviced by the HAMS industry. Standardization of management approaches, with precise and detailed specifications, would prevent the Air Force's ability to exploit continuing improvement in the management techniques of hospital aseptic services."

The Air Force further explains its position as follows:

" * * * The Air Force cannot draft adequate specifications because the services to be procured, the management function of hospital aseptic services, are incapable of precise definition or adequate description. Management science is an abstract discipline; it does not lend itself to quantification in specification format. The practice of management science requires flexibility and judgment and cannot be effectively accomplished through 'pat' predetermined solutions. In fact, it would be impossible to define by specification all conceivable management situations requiring action. The dynamics of the management services required in HAMS falls within this abstract realm as opposed to a concrete, task only oriented requirement.

"The HAMS requirement dramatically differs from normal janitorial services. The essence of HAMS is a management service, not the mere furnishing of a labor force or 'elbow grease'. Negotiation affords the Air Force, through evaluation of technical proposals, the opportunity to examine an offeror's understanding of the technical requirement and the capability of his management system to accomplish performance of the requirement. The offeror's management system is extremely important in that the requirement itself is for a management service. The management system must be capable of maintaining currency with the state-of-the-art and providing specific technical support to the on-site delivery of the service.

"It must be remembered that what is being procured by this solicitation is not only the physical labor involved with cleaning a hospital, but rather the management planning, controlling, directing and coordinating functions (including quality control and training) encompassed by the role of the manager of aseptic services. For the first time the cleaning of critical care areas such as operating rooms will be accomplished by contract personnel. Assuring asepsis conditions in critical care areas is the function of management. That management function is the heart of this procurement.

"Management in the context of hospital aseptic management services is a constantly changing function. The management function requires constant attention to the every changing art of aseptic procedures and coordination and direction of training, procedures and quality control systems. Management methodology, the process of management which is critical to performance of the management function, is almost as diverse as the number of potential sources. In addition, not only is management methodology something that is unique to each management service, but the adequacy of management methodology, the actual minimum need of the Air Force, cannot be insured through the unyielding imposition of objective procedures which is the essence of an 'advertised' procurement. The adequacy of management methodology in this procurement can only be assessed by the application of subjective analysis to the offerors' proposals. This is the essence of a 'negotiated' procurement.

"Simply put, the key point to be grasped in this entire reconsideration is that the Air Force cannot adequately define the function of management in the present procurement. If it could do so by task description, as it admittedly can for janitorial services, then this battle would need not be fought. The elemental fact, however, is that the Air Force cannot definitize the methodology of management necessary in this instance for accomplishment of the Air Force's minimum needs. The function is a cerebral function, a process of intensive coordination and direction, a process which requires a high degree of flexibility in order to achieve its goal. To require that the function be definitized as a collection of physical acts (similar to janitorial services) is to destroy the possibility of achievement of that very item the Air Force requires, the flexibility and freedom inherent in the concept of effective, efficient and successful management."

The heart of this Air Force position, it appears, is twofold. First, under the HAMS program, it is essentially buying management

management services to be procured cannot be adequately described in a specification so as to permit full and free competition under formal advertising procedures.

In originally considering this matter, it was our view that the D&F, along with the amplifying Air Force statements contained in the record, did not establish that the Air Force was purchasing management services. Rather, it appeared that the Air Force was buying janitorial services, and that the management-oriented tasks to which the solicitation referred were an inherent part of providing those janitorial services. Thus, we felt that the detailed specifications covering the housekeeping tasks, when combined with indications in the record that the Air Force could specify what it wanted in the way of management, mandated the conclusion that the determination that the "proposed contract is for services for which it is impracticable to obtain competition by formal advertising" was "not rationally founded."

We think it is axiomatic that management is an inherent and often essential part of any procurement contract. What is usually being purchased, however, is not management itself, but rather the goods or services that management can provide. For that reason, management in most cases is a responsibility matter--that is, it is a basic consideration in a determination as to whether a prospective contractor has the capacity, tenacity and perseverance to adequately perform the contract. See District 2, Marine Engineers Beneficial Association--Associated Maritime Officers, AFL-CIO, B-181265, November 27, 1974, 74-2 CPD 298; Hydromatics International Corporation, B-180669, July 29, 1974, 74-2 CPD 66; see generally ASPR § 1-903.

For this reason, we think any assertion by a procuring agency that it must purchase management services apart from the basic product or services sought must be subject to close scrutiny, since it is apparent that an agency could attempt to justify negotiation in lieu of formal advertising merely by reciting the need to procure management services for which adequate specifications cannot be drafted even when a relatively uncomplicated product or basic service is being procured. We agree with the Air Force's position that its HAMS needs can be satisfied by a particularly effective management on the part of its HAMS contractors. However, we do not agree that the Air Force is actually "purchasing" management services in this regard.

Nonetheless, upon reconsidering this entire matter, and particularly in view of the Air Force's statement that its minimum needs can be satisfied in this area only by the best available services, we believe the Air Force could properly justify negotiating for its HAMS requirements.

As we pointed out in our prior decision, it is clear from the legislative history of the Armed Services Procurement Act of 1947 (10 U.S.C. chapter 137) that Congress did not intend to allow agencies to

suggested that the Air Force was seeking a desired, "higher level of quality service * * * than that thought obtainable under * * * formal advertising." We think the Air Force has now made it clear that the quality of service it seeks is not merely "desired" but is that actually demanded by its minimum needs. Of course, an agency's determination of its minimum needs is not subject to objection by this Office absent bad faith or arbitrary action. Julie Research Laboratories, Inc., 55 Comp. Gen. 374 (1975), 75-2 CPD 232; 53 Comp. Gen. 270 (1973). The record now before us affords us no basis for finding bad faith or arbitrary action on the part of the Air Force. Its statements to the effect that crucial health concerns, with possible life and death consequences, are involved, with the result that the Air Force's minimum needs can be satisfied only by the best available service that will bring about the highest possible aseptic environment, are not contradicted by anything in the record and appear to be reasonable under the circumstances.

Neither can we disagree with the Air Force's conclusion that it cannot prepare an adequate specification describing those minimum needs. We think the Air Force has reasonably established that its view of the best available services will depend extensively on management techniques and approaches and that it cannot describe those techniques and approaches in sufficient detail to permit competition under formal advertising.

Therefore, we now conclude that the Air Force may negotiate its HAMS procurements without running afoul of the Armed Services Procurement Act. Accordingly, our prior decision is modified to the extent that it holds the Air Force to be without authority to negotiate the HAMS procurement and recommends against the exercise of contract options. However, we believe that the original D&F utilized by the Air Force to justify negotiation should be revised to reflect in appropriate detail why it is impracticable to formally advertise.

Section 2. Evaluation Factors - Cut-off Date

SAM HARRIS ASSOCIATES, LTD.

50 Comp. Gen. 117
(B-169429) (1970)

To the Director, Office of Economic Opportunity, August 21, 1970:

Further reference is made to the protest of Urbanetics, Inc., against the award by the Office of Economic Opportunity of fixed-price contract No. B00-5099 to Sam Harris Associates, Ltd. (Harris) for a survey of minority manufacturing firms. This matter was the subject of reports dated May 4 and 21, 1970, with supporting documents from the Associate Director for Administration, and the Office of the General Counsel.

The record shows that the subject contract was awarded under request for proposals (RFP) No. PD-012, which was issued on January 20, 1970, pursuant to the authority set forth in Federal Procurement Regulations (FPR) 1-3.210(a)(13). The contracting officer had determined that adequate specifications could not be drafted to obtain the requirement on a formally advertised basis.

The RFP stated that a firm fixed-price award was contemplated but that alternate proposals would be considered. The specific work requirements to be accomplished and the criteria for evaluating proposals were set forth in the RFP as follows:

Specific:

> The Contractor shall provide all necessary qualified personnel, facilities, materials, and services (including travel and per diem) required to identify and collect data on minority manufacturing firms through the continental United States with the capacity to produce products and services required by cooperating government procurement agencies. Identification of these firms shall be limited to those located in urban and rural poverty areas with coordination from Small Business Administration and Office of Economic Opportunity. The Contractor shall develop an equitable distribution of the firms between urban and rural areas.
>
> In performance of this contract, the Contractor shall conduct the following work:
>
> 1. Evaluate not less than three hundred (300) minority business enterprises utilizing Exhibit "A" attached hereto.

NOTE: The Contractor shall notify each firm being evaluated that under no circumstances should it believe that the submission of this data makes it eligible to receive a federal subcontract.

2. Prepare a listing of as many firms as possible including name, address, telephone, product line or major line, and where possible list last contract and the product line furnished to the Federal Government, list equipment on hand and the capacity of this equipment. Exhibit "A" shall be used for this listing.

3. Collaborate and coordinate Contractor's efforts through consultations with OEO personnel and Small Business Administration officials charged with the administration of Section 8(a).

4. Submit materials, reports, and lists weekly during the operation of the contract and at the end of the contract period submit to the Contracting Officer, Office of Economic Opportunity and Small Business Administration twenty (20) copies of a final report, within ten (10) days after completion of the contract.

Technical proposals will be evaluated pursuant to the following factors:

1. Demonstration of an understanding of the objectives, goals and major concepts of the study.

2. Prior experience and capability of the Offeror's staff in performing work of the type required by this request for Proposals.

3. Technical qualifications and capability of the staff assigned to this project.

The contracting officer states that 11 companies submitted proposals by the closing date of February 19, 1970, and the following six were determined to be acceptable and within a competitive range:

1. Sam Harris Associates, Ltd.
2. Transcendental Corporation
3. Urbanetics, Inc.
4. Roy Littlejohn Associates,Inc.
5. BLX Group, Inc.
6. Koba Enterprises, Inc.

The selection panel, which consisted of four OEO employees and three Small Business Administration employees, evaluated the Harris proposal as follows:

Sam Harris Associates, Ltd.

This contractor won our nomination to do the subject survey of minority businesses because we feel that they will produce a more accurate and reliable product. The strength of this proposal is in:

1. The quality of the personnel
2. The proposed procedure

Sam Harris, (who will give 30 percent of his time to this project), Walter Cooper and Ted Ledbetter are three of the most experienced and knowledgeable people in the area of minority enterprise. They have been involved with the major business development programs of SBA, EDA and OEO's Title IV program. Ken Brown, project manager, has experience with McKinsey and Company and as director of Economic Research for the New York City Department of Commerce and industrial development. The backgrounds of the other project participants add up to the most experienced and knowledgeable staff of any of the proposed staff of any of the proposed projects, by far.

In addition, the methodology of this proposal offers a much better chance of having a reliable quality than any other of the proposals reviewed. The contractor will use ten (10) in-house surveyors who will be deployed throughout the country. They will hold interviews directly and on-site with the firms. Each of those surveyors is to conduct three to five business surveys per week. The surveyors will personally observe the operations of the firms and make their presentation in proposed supplemental reports which each member would submit in addition to the questionnaire. The reports would include information on the physical facilities, the estimated capacity and the ability of the firms to produce quality products based upon uniformly prepared criteria for evaluating such firms.

The information submitted by the team members to the Washington headquarters would be reviewed by a panel of three professional persons with experience in this area. This panel would be available for solving all problem cases in-house whenever these occur. The procedure issues consistent information and eliminates the necessity for training a large number of subcontractors' staffs over which the prime contractor has no control.

We recognize that Harris has bid above the allocated price. There are three areas of effort which we feel can be cut in the negotiation. They are:

1. The requirement to identify additional products. (last item in Task #3--page III-7).

2. Identification of grouping of manufacturing firms for integrative production relationships (Task #5 first sentence, first paragraph--page III-9).

3. The proposal calls for weekly trips back to Washington for project staff. We do not think that more than four trips per staff member are necessary. Of course, it may be that given per diem, etc., the cost to the government will not be much affected by eliminating this travel.

In any event, we think that the Harris proposal is considerably superior to its nearest rival and some extra cost to assure uniformity of survey results is warranted.

In subsequent negotiations Harris deleted from its proposal the three areas shown above. Additionally, Harris reduced the number of researchers from 10 to eight and changed its proposal from a cost-reimbursement type to a fixed-price basis.

The record indicates that representatives of the other five concerns in the competitive range were also contacted concerning their offers and given 24 hours to submit revisions to their proposals. The negotiator states that the negotiations with these concerns were "preliminary" and did not involve any price discussions. Although it appears that the proposals of Urbanetics and the other four concerns were considered weak in the area of obtaining uniform survey results, in that they proposed to rely excessively on third parties for the research duties or did not propose to use sufficient researchers in the field for collecting the data, the record indicates that those offerors were not informed of such weaknesses. Urbanetics was the only offeror which failed to submit a proposal revision; however, only Harris and Transcendental were regarded as having made substantial changes in their proposals.

In regard to the negotiations which took place with Urbanetics, the contract negotiator states that he asked a representative of the concern if he cared to make any change in his proposal. The representative stated that he did not know where any changes could be made, and that Urbanetics would not revise its proposal.

A point system was used to rate the proposals which was based on points assigned to each evaluator's choice for first (20), second (15), third (10), and fourth (5). This resulted in rankings as follows:

Contractor	1st	2nd	3rd	4th	Total
Sam Harris	40	45	10	0	95
Transcendental	40	30	0	0	70
Littlejohn	0	15	40	0	55
B L K	0	30	0	15	45
Urbanetics	40	0	0	0	40
Koba	20	15	0	0	35

The prices after negotiations were:

1.	Urbanetics	$38,042.62
2.	Roy Littlejohn	40,734.00
	alternate	40,224.00
3.	BLX Group	50,036.00
4.	Transcendental	53,161.00
5.	Koba Enterprises	56,411.00
6.	Sam Harris	75,000.00

It is reported that further price negotiations were conducted with Harris on the basis of total dollars, and its price was reduced to $72,000. It is also reported that negotiation of price did not take place with other firms because no other technical proposal, as originally submitted or as modified, was determined to be technically equivalent to the Harris proposal.

Pursuant to the determination that Harris had submitted the best proposal, an award was concluded with that concern for a firm fixed-price contract of $72,000 on March 23, 1970, which was in excess of the $60,000 originally allocated for the procurement. We have been informally advised that performance of the contract was completed in late June in accordance with the 90-day period of performance stipulated in the RFP.

Urbanetics protested the award of this Office claiming that the areas in which its proposal was considered technically deficient were not fully set forth in the RFP as requirements or as evaluation factors. In addition, the company maintains that no meaningful negotiations ever took place between it and OEO, and that it should have been advised of the alleged deficient areas of its proposal.

The decisions of this Office have consistently held that an RFP must advise offerors of all evaluation factors and of the relative important of each factor. 49 Comp. Gen. 229 (1969); B-169645, July 24, 1970; B-167054, January 14, 1970. In the instant case it is the apparent position of your agency that all work requirements and evaluation factors were stated as fully as possible at the time the solicitation was issued, and that your agency did not desire to restrict the approaches an offeror could consider in accomplishing the work by listing detailed specifications in the RFP. However, we note that the Harris proposal was considered superior partly because the company proposed to hold on-site interviews with the firms, observe their facilities and operations, and submit supplemental reports containing information in addition to the information called for by Exhibit A of the RFP.

In such connection the Harris proposal states:

> Since as we have noted the approach which we could propose to utilize is diagnostic and analytical in nature, we deem it necessary to obtain more information than reflected in the questions itemized in Exhibit A to the RFP for this proposal. Although we would not alter the basic format of the questionnaire, it seems that the instrument should be modified and/or an approach adopted which would permit such more information to be obtained during an interview and permit supplementation by observational analyses. The refinement of the suggested survey instrument and the development of observational methods required to make the survey sufficiently analytical to obtain the objectives stated earlier would be accomplished during the first three weeks of the project.
>
> We deem it necessary to not only seek additional information from the interviewees but to also observe the production, and assess the adequacy of management, the productive facilities and other factors which would influence the potential for expanded production. An example of the additional information which we consider necessary to obtain during the interview includes but is not limited to:
>
> Age and health conditions of management personnel as well as their related prior business, employment and training experience.
>
> The age of the firm; its annual growth (both in dollar volume and employment) since its inception and the major factors which have contributed to its growth, as well as an identification of what are considered to be impediments to further growth.
>
> The average volume of inventory, the peaks and troughs in the production cycle; the methods used to finance inventory; the quality of the work force; the type of training provided as well as an indication of whether the employees are unionized.
>
> A listing of equipment by type, age, and fair market value for existing firms as well as new businesses.
>
> The nature of quality control methods and the adequacy of supervision, physical facilities, and plant layout as well as the accessibility of the plant's location to major rail and truck routes.

An identification of the firm's indebtedness, i.e., long-term and short-term; its access to long- and short-term credit; its relationship to its creditors, i.e., credit rating; and the maximum size of the line of credit which it has been able to obtain.

An assessment of the firm's excess productive capacity and management's opinion about the maximum extent to which it could expand production within a six months' period of time given its existing physical facilities, the availability of land and a maximum of a 20 percent increase in capital for equipment, modification of its productive facilities and the financing of inventory.

In addition to seeking the above information through interviews, the personnel conducting the survey would, on the basis of predetermined criteria, make judgments about the firm's management, the efficiency of operations, plant layout, quality of work force and financial capacity to support an expanded level of production. Additionally, the survey personnel would identify operational deficiencies, management weaknesses, deficiencies in the firm's capital structure and other obstacles which would have to be overcome before the firms could meet performance standards required by government contracts. * * *

The specific work requirements of the RFP clearly showed that the information specified in Exhibit A should be obtained and used as the basis for evaluating and listing the minority firms. Paragraph 11 of Exhibit A required identification of the person from whom the information was obtained. The RFP did not indicate that on-site observations were either expected or desired or that such a procedure would be a factor for consideration in the evaluation. It further appears that your agency was in agreement with Harris that on-site surveys, and information in addition to that specified in Exhibit A, would be beneficial in accomplishing the agency's needs and that your agency was willing to make additional payment for the extra efforts involved. We believe therefore that the RFP should have been amended so that all procedures and information deemed essential to proper performance of the contract would have been shown, in order that the proposals and their evaluation would have been based on uniform requirements and criteria.

Since it appears that on-site surveys by contractor personnel were actually considered necessary by your agency for obtaining the uniformity and reliability needed in the reports, and such a procedure warranted the payment of a higher contract price, we are not persuaded by the statements in the report of May 21 indicating that all of the six proposals were acceptable; that the evaluation criteria were not changed; and that on-site surveys were not set out in the

specifications because the offerors were expected to specify the manner in which the work would be accomplished. Likewise, we reject the argument advanced in the report that negotiations with the offerors for on-site surveys would have been prejudicial to Harris, and would in effect be taking the benefit of its thinking, experience, and expertise, and giving it to others. The proposition of on-site interviews and observations of manufacturing plants and their operations does not present a new method of acquiring data or of making evaluations. The Harris proposal in offering such an approach, introduces neither a technical breakthrough nor a novel concept for obtaining the requirements specified in the RFP. Also, it appears from the Harris proposal that the actual basis for conducting on-site interviews and surveys was for the primary purposes of obtaining data other than that required by Exhibit A.

FPR 1-3.805-1 requires that discussions be conducted with all offerors within a competitive range, price and other factors considered. It is a well-established principle in Federal procurements that such discussions must be meaningful and furnish information to all offerors within the competitive range as to the areas in which their proposals are believed to be deficient so that competitive offerors are given an opportunity to fully satisfy the Government's requirements. 47 Comp. Gen. 336 (1967). When negotiations are conducted the fact that initial proposals may be rated as acceptable does not invalidate the necessity for discussions of their weaknesses, excesses or deficiencies in order that the contracting officer may obtain that contract which is most advantageous to the Government. We have stated that discussions of this nature should be conducted whenever it is essential to obtain information necessary to evaluate a proposal or to enable the offeror to upgrade the proposal. Thus, where an offeror failed to pass a bench-mark test, that factor alone should not have precluded discussions to determine whether the proposal could be improved. 47 Comp. Gen. 29 (1967). Moreover, we have held that meaningful discussions must be conducted with concerns in a competitive range even in the negotiation of research and development contracts where the offeror's technical approach and experience are of critical importance, and conformity with detailed specifications is not the standard for award. B-168485, March 30, 1970.

Additionally, we note that the RFP did not inform the offerors of the relative importance of the evaluation factors. The decisions of this Office have consistently held that such omission is contrary to the dictates of sound procurement policy. See 50 Comp. Gen. 5. (1970), and other decisions to the same effect cited therein.

Regarding the statements in the report of May 21 defending the award to the highest offeror, and the lack of price negotiations with the competitive offerors, on the basis that although the competitive proposals were acceptable they were not technically equivalent to the Harris proposal and price negotiations with the other offerors would have served no useful purpose since no other proposal was being considered for award, your attention is directed to 43 Comp. Gen. 353 (1963). After referring to the legislative histories of the Federal

Property and Administrative Services Act. 40 U.S.C. 471 note, and the Armed Services Procurement Act of 1947, 41 U.S.C. 151 note (1952 ed.), it is stated at pages 370 and 371 of the decision:

> Notwithstanding the above, the Senate Armed Services Committee deleted this provision from the bill and explained its action on page 3, S. Rept. No. 571, 80th Congress, as follows:
>
> The bill was amended by deleting the authority to negotiate contracts for the purpose of securing a particular quality of materials. Your Committee is of the opinion that this section is open to considerable administrative abuse and would be extremely difficult to control. For this reason it has been eliminated.
>
> As indicated by the legislative history of the Federal Property and Administrative Services Act, 40 U.S.C. 471 note, that act was intended to extend the same procurement principles to civilian agencies of the Government as had previously been conferred upon the military departments by the Armed Services Procurement Act of 1947. See page 6, H. Rept. No. 670, and page 5, S. Rept. No. 475, 81st Congress.
>
> The rejection by the Congress of this request for negotiation authority must therefore be construed as a prohibition against the negotiation of contracts without price competition, where the failure to obtain price competition is based solely upon a determination by the contracting agency that a particular prospective contractor will deliver supplies and/or services of a higher quality than any other contractor. 41 Comp. Gen. 484.

Accordingly, we must conclude that the subject contract was awarded under procedures which failed to observe established principles of negotiated competitive procurement. Since the contract was completed in June we do not believe it would be in the public interest for this Office to undertake remedial action in the matter. However, we are calling this procurement to your particular attention so that appropriate action will be taken to insure that in future procurements the RFP's are prepared, negotiations are conducted, and evaluations are made in accordance with such established principles. Furthermore, any numerical rating system established or used by your agency should be structured to ensure that the evaluation criteria and their relative importance are set out in RFP, and that proposals are in fact evaluated in accordance with such criteria.

In furtherance of our mutual interest in the full observance of sound procurement policies, the following matter is also brought to your attention.

The report of May 21 states that all offerors were given an equal time to revise their proposals but that a common cutoff date for negotiations was not prescribed since the promulgation of such a date would have allowed some concerns more time to prepare revisions than other offerors. It also expresses the view that "In any event, the requirements for a common cutoff date should be considered de minimis." In this connection FPR 1-3.805-1(b) provides, in pertinent part:

> Whenever negotiations are conducted with several offerors, while such negotiations may be conducted successively, all offerors selected to participate in such negotiations (see § 1-3.805-1(a)) shall be offered an equitable opportunity to submit such price, technical, or other revisions in their proposals as may result from the negotiations. All such offerors shall be informed of the specified date (and time if desired) of the closing of negotiations and that any revisions to their proposals should be submitted by that date.

We have held that a similar provision in ASPR 3-805.1(b) requires the establishment of a common cutoff date to properly close negotiations. 48 Comp. Gen. 536. Any suggestion that a common cutoff date for all offerors concerns a trivial matter should be dispelled by the holding in our recent decision of July 2, 1970, 50 Comp. Gen. 1.

The report of May 21 also indicates that a proposal revision favorable to the Government should be considered even if submitted after the common cutoff date. If such action were permitted, without opening up new negotiations for all offerors in the competitive range, it is apparent that the purposes for establishing a common cutoff date for the close of negotiations would be frustrated. In this connection our Office has held that to properly terminate the close of negotiations all offerors are being asked for their "best and final" offer, and not merely to confirm their prior submission; and that any revision to their proposal must be submitted by the common cutoff date. B-167417, September 12, 1969.

OPERATIONS RESEARCH, INC.

Comptroller General B-178001 (1974)
53 C.G. 860

The Navy has requested reconsideration of our decision 53 Comp. Gen. _____ (B-178001, February 14, 1974), in which we concluded that Operations Research, Inc. had been improperly denied an opportunity to submit a revised proposal after it had been found to be in the competitive range. The basis for that conclusion was our holding that once an offeror is determined to be in the competitive range, the offeror must be given an opportunity to submit a revised proposal before it can be eliminated from the competitive range. The Navy urges that we clarify and revise this holding in view of ASPR 3-805 as revised by Defense Procurement Circular (DPC) #110.

> The new ASPR 3-805.2(a) provides that:
> * * * When there is doubt as to whether a proposal is within the competitive range, that doubt shall be resolved by including it. The initial number of proposals considered as being within the competitive range may be reduced when, as a result of the written or oral discussions, any such proposal has been determined to no longer have a reasonable chance of being selected for award.

Although the procurement involved in this case occurred prior to the effective date of DPC #110, the Navy argues that our holding cannot be applied prospectively without coming into conflict with the revised ASPR 3-805.2(a), which does not explicitly require submission of a revised proposal as a condition precedent to eliminating an offeror from the competitive range.

We understand that ASPR 3-805.2(a) was promulgated partially in response to our decision reported at 52 Comp. Gen. 198 (1972), in which we held that a contracting agency should not be required to hold discussions with an offeror once it is determined that the offeror's proposal, initially within the competitive range, is no longer within the acceptable range. However, as we pointed out in our prior decision in this case, it was the examination of the protester's revised proposal which revealed serious deficiencies and which led the contracting agency to view the proposal as no longer in the competitive range. We did not hold then, nor do we now believe, that contracting officials in general should be free to reject proposals once considered acceptable without providing the offeror an opportunity to submit revised proposals.

However, in view of DPC #110, we agree with the Navy that under certain circumstances it would not be inappropriate for contracting officers to eliminate proposals from the competitive range without t benefit of submission of revised proposals. We are in favor of the broad approach expressed in DPC #110, which calls for the resolution of doubts in favor of allowing proposals into the competitive range, because it tends to maximize competition. Under this approach, we understand that proposals may be considered to be in the competitive range because they may be susceptible to being made acceptable or because doubts as to whether the proposals should be in the competitive range are to be resolved in favor of the proposals. Howeve in the course of written or oral discussions, it may well become cle that the proposals do not belong in the competitive range.

As the Navy points out, "the discussion process itself is frequently far more revealing than a bare reading of technical proposal and can demonstrate that a determination to include a given proposal within the competitive range was erroneous * * *." Accordingly, in those situations where discussions relating to an ambiguity or omission make clear that a proposal should not have been in the competitive range initially, we believe it would be proper to drop the proposal from the competitive range without allowing the submission a revised proposal. In all such cases, the reasons for the revised determination should be made clear to the offerors whose proposals a eliminated. To the extent of the foregoing, our decision at 53 Comp Gen. _____ (B-178001, February 14, 1974) is modified.

However, we remain of the view that in general a proposal initially included in the competitive range should not be rejected without giving the offeror an opportunity to submit a revised or bes and final proposal to serve as the basis for award or establishing a new competitive range.

Section 4. Small Business 8(a) Set-Aside.

a. Constitutionality

RAY BAILLIE TRASH HAULING, INC. v.
Thomas S. Kleppe, Admr, S.B.A.

C.A. (5th Circuit) Case No. 72-1163 (1973)

WISDOM, Circuit Judge: On reconsideration sua sponte, we withdraw our opinion dated January 5, 1973 and issue the following opinion.

* * *

In this case the plaintiffs attack the Small Business Administration's program for awarding government procurement contract to small business concerns owned by "socially or economically disadvantaged persons". 13 C. F. R. § 124.8-1(c). The district court hel that the section 8(a) program is not authorized by statute and denies due process and equal protection in violation of the Fifth and Fourteenth Amendments. We reverse.

I.

The plaintiffs-appellees, Ray Baillie Trash Hauling, Inc., Leonard Santo, d/b/a L & J Waste Service, and C. Lewis Jones, d/b/a/ Southern Florida Sanitation Company of Dade County, Inc., are engagec in the business of collecting and hauling refuse to disposal sites. They qualify as small business concerns under both the Small Business Act, 15, U. S. C. § 631 et. seq., and the applicable regulations of the Small Business Administration. All American Waste, Inc., named a a defendant, is a black-owned firm that competes with the plaintiffs in the business of collecting and hauling refuse and also qualifies a a small business concern. The dispute in the present case relates tc a contract for the collection and removal of refuse from Homestead A Force Base in Homestead, Florida. In 1968 and 1969, the Small Business Administration and the Department of the Air Force, pursuant to a joint program, set aside the contracts for placement with small business concerns. The Air Force awarded the contracts after formal advertising and competitive bidding restricted to small business concerns. Jones and Santo successfully bid for the contract in 1968 and 1969 respectively.

In 1970, the Small Business Administration promulgated new regu lations establishing a "section 8(a) program" providing for assistan to small business concerns owned by disadvantaged persons. 13 C. F. R. § 124.8-1. As part of the program, the SBA secured a prime contract from the Air Force for the collection and removal of refuse

SBA and the Air Force for a one-year period commencing July 1, 1970 at $65,000.

Upon being advised that the SBA intended to enter into a second subcontract with All American for the performance of the prime contract services at Homestead for the fiscal year 1971, the plaintiffs demanded an opportunity to compete for the contract. They did not apply for participation in the program and they did not contend that they were eligible. The SBA rejected the demand and later executed the second subcontract with All American. On June 29, 1971, th plaintiffs commenced the present action for injunctive and declarator relief in the District Court for the Southern District of Florida. The defendants were the Administrator of the Small Business Administration, the Secretary of the Department of the Air Force, the Contracting Officer assigned to Homestead Air Force Base, and All American Waste, Inc. In the complaint, the plaintiffs sought a permanent injunction enjoining the SBA from letting the Homestead contract under the section 8(a) program without competitive bidding. At the same time, they filed a motion for a temporary restraining order and a preliminary injunction.

With the consent of the parties, the district court issued an order directing that the second subcontract be held in abeyance for thirty days and that the prior contract with All American be extended until further order. Later orders of the court extended this period until judgment on the merits.

On October 29, 1971, the district court entered its judgment 334 F. Supp. 194. The court found that the SBA's section 8(a) program, providing for assistance to small business concerns owned by disadvantaged persons, was not authorized by the Small Business Act and violated the federal statutes requiring competitive bidding in government procurement. The court also found that the primary criterion for the program was race, color, and ethnic origin, that whites were ineligible for program benefits except on a token basis, and that the plaintiffs, as "nonminority" owned firms, were denied due process and equal protection of the laws. The court concluded that the subcontract awarded to All American was illegal and ordered that the Homestead contract be awarded as soon as possible on the basis of the maximum competitive bidding practicable among the plaintiffs and other similarly situated small business concerns. The defendants appealed

* * * * *

III.

As stated in the regulations promulgated by the SBA, the purpose of the section 8(a) program is "to assist small business concerns owned by disadvantaged persons to become self-sufficient, viable businesses capable of competing effectively in the market place." 13 C. F. R. § 124.8-1(b). Authority for the program is derived from section 8(a) of the Small Business Act, 15 U. S. C. 637(a), empowering the SBA to enter into all types of contracts (including contracts for

other departments and agencies of the federal government and to arrange for the performance of such contracts by negotiating or otherwise letting subcontracts to small business concerns. In awarding subcontracts under the section 8(a) program, the SBA limits eligibility to small businesses "owned or destined to be owned by socially or economically disadvantaged persons." 13 C. F. R. § 124.8-1(c). As the regulations recognize, this "often includes, but is not restricted to, Black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos and Aleuts." Id.

The district court held that the SBA's section 8(a) program was statutorily unauthorized, that the SBA's powers under section 8(a) of the Small Business Act are limited to periods of emergency, and that the SBA was bound by other statutes requiring government procurement contracts to be awarded competitively. We disagree.

A. The declared policy of the Small Business Act is to "aid, counsel, assist, and protect . . . the interest of small business concerns in order to preserve free competitive enterprise [and] to insure that a fair proportion of the total purchases and contracts or subcontracts for the property and services of the Government . . . be placed with small businesses enterprises." The Act is premised on the idea that "the essence of the American economic system is free competition," "that the preservation and expansion of such competition is basic not only to the economic well-being but to the security of the Nation. Such security and well being cannot be realized unless the actual and potential capacity of small business is encouraged and developed." 15 U. S. C. § 631.

To accomplish this goal, Congress vested the Small Business Administration with broad powers and responsibility over the economic life of small business concerns, to provide technical and managerial aids, and to assist small business concerns in obtaining government contracts. 15 U. S. C. §§ 636, 638, 644. Most importantly in section 8(a) of the Act the SBA is authorized to enter into procurement contracts with other federal agencies and to arrange for the performance of those contracts by subcontracting with small business concerns, 15 U. S. C. §§ 637(a). This section unequivocally states that the SBA is empowered to let subcontracts to "small business concerns or others." 15 U. S. C. § 637 (a) (2). In accordance with this statutory mandate, the SBA adopted its section 8(a) program through which government procurement contracts are awarded to small business concerns owned by disadvantaged persons.

The plaintiff contends, however, that the section 8(a) program is unauthorized because it is not specifically mentioned in the statute. This argument is without merit. The complex and volatile nature of problems, including allocation of government procurement contracts, often causes Congress to cast its statutory provisions in general terms, leaving to the agency the task of spelling out the specific regulations and programs. In this manner, agency expertise may be fully employed in dealing with such programs. The agency may evaluate the competing alternatives and formulate the policy best [illegible] the attainment of the statutory goal. Furthermore, the

agency is left free to respond to the demands of changing circumstances or conditions unanticipated by Congress. Indeed, an agency could easily be prevented from serving its intended purpose if burdened wit specific statutory regulations and programs.

So it is with the case at bar. Congress has declared that the actual and potential capacity of small business concerns must be deve loped and that a fair proportion of total purchases and contracts of the federal government must be placed with such firms. 15 U.S.C. § 631. It has given the SBA the statutory authority and necessary discretion in awarding subcontracts to accomplish that goal. The discretion as to which firms shall receive subcontracts is left to th SBA. 15 U.S.C. §637. It must select the programs that will insure current facts. It is not the duty of the courts to evaluate the argu ments regarding allocation of government procurement contracts or to consider the wisdom of the present programs. American Trucking Ass'ns v. Atchinson, Topeka & Santa Fe Ry., 1967, 387 U.S. 397, 87 S. Ct. 1608, 18 L. Ed. 2d 847. Rather, our task is limited to determini whether the SBA has abused its discretion or exceeded its statutory authority in adopting the section 8(a) program. There is ample indication that small business concerns owned by disadvantaged persons have traditionally received a disproportionally small number of government procurement contracts. It is certainly reasonable, therefore, for the SBA to make a special effort to alleviate this imbalance. Section 8(a) of the Act provides the authority to do so.

Furthermore, the plaintiffs cannot complain because a specific type of small business concern is the primary beneficiary of the present program. It is well settled that an agency need not "strike at all evils at the same time", Semler v. Dental Examiners, 1935, 294 U.S. 608, 610, 55 S. Ct. 570, 79 L. Ed. 1086, but may "reform one step at a time, addressing itself to the phase of the problem which seems most acute." Williamson v. Lee Optical Co., 1955, 348 U.S. 483, 489, 75 S. Ct. 461, 99 L. Ed. 563. See Katzenbach v. Morgan, 1966, 384 U.S. 641, 86 S. Ct 1717, 16 L. Ed. 2d 828; Roschen v. Ward, 1929, 279 U.S. 337, 49 S. Ct. 336, 73 L. Ed. 722. Since the present program is a reasonable means of promoting the statutory goal, we fi that the SBA has not abused its discretion or exceeded its statutory authority.

The SBA's program is also supported by congressional and presidential mandates issued after the passage of the Act. The first of these mandates is contained in the 1967 Amendment to the Economic Opportunity Act, 42 U. S. C. 2701 et seq. This amendment directs th SBA to "assist in the establishment, preservation, and strengthening of small business concerns . . . with special attention to small bus ness concerns (1) located in urban or rural areas with high proportions of unemployed or low-income individuals; or (2) owned by low-income individuals." 42 U. S. C. 2901. In addition, the Administrator of the SBA is specifically instructed to "take such steps as may be necessary and appropriate, in coordination and cooperation with the heads of other Federal departments and agencies so that contracts, subcontracts, and deposits made by the Federal

Government or in connection with a program aided with Federal funds are placed in such a way as to further the purposes of this subchapter." 42 U.S.C. 2906c(a).

In response, the plaintiffs contend that the Economic Opportunit Act prohibits the case since section 2949(2) provides that financial assistance may not include the procurement of plant or equipment, or goods or services. 42 U.S.C. 2949(2). This section, however, clearly applies to grants in kind and does not preclude awards of sub contracts for the performance of services. On the contrary, financia Order No. 11625, 36 Fed. Reg 19967 (1971). In terms substantially identical to the SBA's section 8(a) program, the order defines "minority business enterprise" as a business enterprise that is owned or controlled by one or more socially or economically disadvantaged persons." Id.

The presidential mandates for the SBA's section 8(a) program are found in Executive Orders 11458, 11518, 11625. In the first order, issued March 5, 1969, the President instructed the appropriate federa departments and agencies to establish programs to strengthen minority business enterprise. Exec. Order No. 11458, 34 Fed. Reg. 4937 (1969) In the second order, issued March 21, 1970, the President called for increased representation of the interests of small business concerns, particularly minority-owned business enterprises." Exec. Order No. 11625, 36 Fed. Reg 19967 (1971). In terms substantially identical to the SBA's section 8(a) program, the order defines "minority business enterprise" as "a business enterprise that is owned or controlled by one or more socially or economically disadvantaged persons." Id.

The SBA's section 8(a) program clearly promotes the goals articu lated in both the 1967 Amendment to the Economic Opportunity Act and the executive orders. We conclude that there is ample support for th section 8(a) program.

B. In reaching the conclusion that the SBA's powers under section 8(a) of the Small Business Act may be used only in periods of emergency, the district court relied on the fact that the statutory prototype of section 8(a), sections 714(b)(1)(B), (C) and 714(b)(2) o the Defense Production Act Amendments of 1951, was first enacted to increase the participation of small business concerns in the production of war material during the Korean War. Defense Production Act Amendments of 1951, 65 Stat. 140, 141 §§ 714(b)(1)(B), (C), and 714 (b)(2). In addition, the court noted that the regulations first promulgated by the SBA after the passage of section 8(a) stated that the authority to subcontract would be used only in periods of emergency. 13 C. F. R. § 124.8-1 (1958).

We are not persuaded by this restrictive interpretation of section 8(a). There can be no more reliable an indication of legislati intent than the specific statutory words selected by Congress in deli neating the powers conferred. Section 8(a) unambiguously provides that the SBA is empowered to act "whenever it determines that such

action is necessary." 15 U.S.C. § 637(a). This broad mandate answe the argument that Congress intended to restrict section 8(a) to periods of emergency.

We therefore conclude that the SBA'a authority to use its power under section 8(a) is not limited to periods of emergency.

C. As an additional ground for its decision, the district cour held that section 8(a) prohibits the SBA's action awarding the Homestead contract to All American without formal advertising or com petitive bidding. Again, we disagree.

Section 8(a) empowers the SBA to arrange for the performance of prime contracts by "negotiating or otherwise letting subcontracts." 15 U.S.C. 637(a)(2). The statute does not require the SBA to engag in competitive bidding. The plaintiffs contend, however, that to construe the phrase "or otherwise letting" as permitting the SBA to dispense with competition would be inconsistent with the congression intent expressed in other statutes requiring competition in governme procurement. These statutes recognize, however that competition may be dispensed with when other statutes so provide, 41 U.S.C. 252(c)(10). Both exceptions are applicable here.

First, section 8(a) of the Small Business Act clearly constitut specific statutory authority to dispense with competition. 15 U.S.C 637(a). It provides that the SBA may let subcontracts by negotiation or any other method.

Second, competition is impractical in the present case. The pu pose of the Act is to assist small business concerns. The Act is based on the premise that such firms are unable to compete effective in the marketplace and therefore cannot secure government procuremen contracts awarded through competitive bidding. By increasing their participation in government procurement, however, these firms can eventually become self-sufficient, viable businesses capable of competing effectively in the marketplace. Private negotiation of subcontracts is the best means of accomplishing this goal. To require competitive bidding would be contrary to the basic rationale of the Act. Even if competition were limited to small business concerns, there would still be many small business concerns that would never receive government procurement contracts. This result would clearly frustrate the Congressional intent to assist small businesses.

Kleen-Rite Janitorial Services, Inc. v. Laird, D. Mass. 1971, F Supp., [September 21, 1971, No. 71-1968], supports the SBA's authori to institute the section 8(a) program. In Kleen-Rite, the plaintiff sought to enjoin the SBA and the Department of Defense from awarding subcontract for janitorial services to a small business concern owne by socially and economically disadvantaged persons. In denying the injunction, the court held that the SBA had specific statutory authority to administer its section 8(a) program and that there was statutory or constitutional duty to offer the subcontract for competitive bidding.

Space Services of Georgia, Inc. v. Laird [18 CCF 81,789], D. C. D. Conn. 1972, F. Supp., [No. 15,170; August 17, 1972] and Fortec Constructors v. Kleppe [18 CCF 81,723], D. D. C. 1972, F. Supp. [No. 1755-72; October 11, 1972], also uphold the legality of the section 8(a) program. The present case is on all fours with those cases.

We conclude, therefore, that subcontracts under the section 8(a) program may be awarded on a noncompetitive basis.

D. The plaintiffs also contend that in awarding the Homestead contract the SBA violated section 124.8-1(d)(3) of the applicable regulations, which provides that "procurements [under section 8(a) will not be considered where . . . (3) . . . small business concerns are dependent in whole or in significant part on recurring Government contracts." 13 C. F. R. § 1248-1(d)(3). It is clear from the evidence presented to the district court, however, that the plaintiff who had previously been awarded the Homestead contract failed to perform the required services and abandoned the contract after nine and a half months. Thus, the SBA was not depriving the plaintiffs of a renewal of an existing contract by placing the Homestead contract under the section 8(a) program.

E. Finally, the plaintiffs contend that the SBA's section 8(a) program, by using the government's lending and contracting powers to enhance All American's competitive position, violates due process. In effect, the plaintiffs argue that the section 8(a) program enabled All American to receive a premium price above that which would have prevailed under competitive bidding and that All American has since used this premium to submit low bids for private commercial contracts, causing the plaintiffs to lose some of their customers to All American.

It has long been recognized that the government, like private individuals and businesses, has the power "to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." Perkins v. Lukens Steel Co., 1939, 310 U.S. 113, 127, 60 S. Ct. 869, 84 L. Ed. 1108. In exercising this power, of course, the government remains subject to the constitutional requirement of due process. But in the case at bar we cannot accept the plaintiff's argument that the section 8(a) program is unconstitutional because the plaintiffs may be disadvantaged competitively. There is no constitutional duty to offer government procurement contracts for competitive bidding. The SBA has the statutory authority to assist small business concerns through private placement of contracts. We have already held that the SBA has not abused its discretion in adopting the section 8(a) program. The program may produce some inequalities among small business concerns as a class. But in the area of socio-economic legislation, the government's action must be upheld if it is rationally related to a proper government purpose. Dandridge v. Williams, 1970, 397 U. S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491; Walters v. St. Louis, 1954, 347 U. S. 231, 74 S. Ct. 505, 98 L. Ed. 660. We hold that it is.

IV.

We now consider the district court's decision that the SBA's section 8(a) program is unconstitutional because "the primary criterion for eligibility is race, color, or ethnic origin: and that the [p]laintiffs have been excluded from consideration because of their race." As we have stated, to have standing to litigate, a party must show that he has incurred or is in immediate danger of incurring some direct and personal injury resulting from a statutory or constitutional right designed to protect that party. Moose Lodge No. 107 v. Irvis, supra; Sierra Club v. Morton, Organization, Inc. v. Camp, supra. In this case the plaintiffs have failed to meet that requirement with respect to the issue of the SBA's alleged discrimination in administering the section 8(a) program. The plaintiffs never applied for participation in section 8(a) program. Furthermore, they do not even contend that they are socially or economically disadvantaged and therefore eligible for participation in the program. Thus, whatever the outcome of the litigation, the plaintiffs will not be directly affected.

Most directly in point is Moose Lodge No. 107 v. Irvis, supra. There, the Supreme Court held that the plaintiff did not have standing to litigate the question involving the membership qualifications of the Moose Lodge because he did not attempt to become a member; he did have standing to litigate the issues concerning the Lodge's guest policies because he was refused service while a guest. In discussing the standing requirement, the Court stated, 32 L. Ed. 2d at 634:

> Any injury to appellee from the conduct of Moose Lodge stemmed not from the Lodge's membership requirements, but from its policies with respect to the serving of guests of members. Appellee has standing to seek redress for injuries done to others. [Citations omitted.] While this Court has held that in exceptional situations a concededly injured party may rely on the constitutional rights of a third party in obtaining relief, Barrows v. Jackson, 346 U.S. 249, 97 L. Ed. 1586, 73 S. Ct. 1031 (1953), in this case appellee was not injured by Moose Lodge's membership policy since he never sought to become a member.

It follows from Moose Lodge that the plaintiffs in the present case have no standing to litigate the issue of racial discrimination in the administration of the section 8(a) program because they did no even apply for participation in the program.

In Space Services of Georgia v. Laird, supra, the district court dismissed a similar challenge to the SBA's section 8(a) program on th ground that the plaintiff could "complain that there is discriminatio in the administration of the program only if he had tried to become a member of the class eligible for the program." Again, in Fortec Constructors v. Kleppe, supra, the district court held that the plaintiff had no standing to raise the issue of racial discrimination

because he had not applied for participation in the program. The court concluded that "[since] the plaintiffs have never sought to be eligible for the section 8(a) program, and never having had an 8(a) contract to gain, they cannot now allege that a contract was lost.... Solely on the basis of some generalized interest in the fair administration of a program, plaintiffs cannot attack the award as racially discriminatory."

In effect, the plaintiffs are asking this Court to resolve a question that is not now before us. We must decline the invitation. See United States v. Raines, 1960, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524. Otherwise, the grasp of our decree would exceed its proper reach. We therefore conclude that it was error for the district court to consider the issue of racial discrimination in the administration of the program.

The decision of the district court must be REVERSED.

b. Small Business Size Standards

SYSTEMS AND APPLIED SCIENCES v. SANDERS

DC DC, No. 82-1834 (1982)

MEMORANDUM OPINION

Plaintiffs in these consolidated cases are all participants in the Small Business Administration's (SBA) Section 8(a) minority small business and capital ownership development program, 15 U.S.C. §637(a), 13 C.F.R. Part 124, which have been found in size reviews under 13 C.F.R. Part 121 to be other than small, but have not been afforded a full hearing on the record in accordance with the Administrative Procedures Act, 5 U.S.C. §§554-557. The single issue in these cases is whether, under these circumstances, SBA may refuse to award §8(a) contracts to plaintiffs on the basis that they have been found to be other than small.

The section 8(a) program, originally a response to the 1967 report of the Commission on Civil Disorders, is intended to increase the level of business ownership by minorities so that they have a better opportunity to become an integral part of the free enterprise system. S.Rep. No. 1070, 95th Cong., 2d Sess. 1, reprinted in 1978 U.S. Code Cong. & Ad. News 3835, 3836. The operation of the program involves SBA contracting directly with a federal procuring agency to supply goods or services, and then subcontracting on a sole source basis to a small business owned by a socially or economically disadvantaged person. Until 1978 the program was operated under SBA's general authority to enter contracts with government agencies and arrange for their performance by letting subcontracts to small businesses. The reservation of contracts for socially or economically disadvantaged concerns was an administrative practice without specific statutory guidance. In 1978, Congress amended the Small Business Act to codify the program and correct what it perceived as its weaknesses and failings. Management assistance to 8(a) firms was increased in the hope that the unacceptably low number of such firms that had as yet left the program and succeeded in the competitive market could be increased. Id., S.Rep. No. 1070 at 8, 1978 U.S. Code Cong. & Ad. News 3842. To correct perceived inequitable determinations of eligibility under the administrative program, section 8(a) itself was amended to provide objective criteria for eligibility for the program, Id., S.Rep. No. 1070 at 15, 1978 U.S. Code Cong. & Ad. News 3849; 15 U.S.C. §637(a)(4)-(7)(Supp. IV 1980). A socially and economically disadvantaged small business concern is defined as one which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, and whose management and daily business operations are controlled by one or more such individuals. 15 U.S.C. §637(a)(4). Socially disadvantaged hndividuals are defined as those who have been subject to racial or ethnic prejudice or cultural bias. 15 U.S.C. §637(a)(5). Economically disadvantaged individuals are defined as those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital

and credit opportunities as compared to others in the same business area who are not socially disadvantaged. 15 U.S.C. §637(a)(6). In addition to these requirements, eligibility for the 8(a) program depends upon a finding by the Administrator that with contract, financial, technical, and management assistance, the concern can perform contracts which may be awarded, and has reasonable prospects for success in competing in the private sector. 15 U.S.C. §637(a)(7). These eligibility determinations, with the exception of whether a group has been subject to prejudice or bias such that its members will be considered socially disadvantaged, which is to be made by the Administrator, are to be made by the Associate Administrator for Minority Small Business and Capital Development (AASMB-COD). 15 U.S.C. §637(a)(8). Following these provisions concerning eligibility for the program is a section which deals with denial of assistance to concerns which have previously been deemed eligible. This provision lies at the heart of this dispute, and will be quoted in full.

> Within ninety days after the effective date of this paragraph, the Administration shall publish in the Federal Register rules setting forth those conditions or circumstances pursuant to which a firm previously deemed eligible by the Administration may be denied assistance under the provisions of this subsection: Provided, that no such firm shall be denied total participation in any program conducted under the authority of this subsection without first being afforded a hearing on the record in accordance with chapter 5 of Title 5.

15 U.S.C. §637(a)(9). The regulations implementing §637(a)(9), codified at 13 C.F.R. Part 124, provide that a business may leave the program either by completion, that is when the concern has achieved the goals set forth in its business plan and has attained demonstrated ability to compete in the market place without assistance under the 8(a) program, 13 C.F.R. 124.1-1(d); or by termination prior to completion for a variety of causes, including failure to continue to meet the eligibility standards for the program, repeated inadequate performance of contracts, violations of SBA regulations and reporting requirements, failure to reasonably pursue competitive and commercial business, and criminal convictions. 13 C.F.R. 124.1-1(e). In either case a hearing on the record is provided at the option of the firm. The procedures for adjudicative proceedings to be used in effecting the completion or termination of a section 8(a) business concern are set out in detail at 13 C.F.R. 124.10.

The Small Business Act was further amended in 1980 to, among other things, require that a fixed graduation date be set in the business plan of each concern participating in the 8(a) program. P.L. 96-481, 15 U.S.C. §636(j)(10)(A)(i). The statute provides that these determinations, called fixed program participation terms (FPPTs), shall not be considered a denial of total participation for the purposes of section 637(a)(9), that is, they do not require an APA hearing.

In May 1981, SBA directed that regional administrators initiate Part 121 reviews of a list of 50 of the largest 8(a) participants to determine whether they were in fact still small, and therefore meeting the eligibility requirements of the program. Termination of completion proceedings were to be instituted against those firms found large. Unlike termination or completion proceedings under 13 C.F.R. Part 124, which are pertinent only to the 8(a) program, size determinations under Part 121 apply to all small businesses. For the purpose of 8(a) contracts, the size standards for Government procurement apply. 13 C.F.R. 121.3-8. All parties agree that 8(a) concerns are subject to the Section 121 size standards and size review procedures applicable to all small businesses, with the exception that plaintiffs and SBA argue that an extra layer of review is to be accorded 8(a) firms. Size determinations are made by the regional director, and may be appealed to the Size Appeals Board. 13 C.F.R. §121.3-4, 3-6. All plaintiffs here have been found other than small either by their regional directors, or at both the regional and Size Appeals Board levels, but have not been accorded an APA hearing on the record.

SBA's stance concerning companies in plaintiffs' position is that they are still full participants in the 8(a) program until officially terminated after being provided the option of a hearing on the record. Such firms are eligible for contracts, although SBA retains the discretion in regard to these and all 8(a) firms as to whether to award any particular contract to any concern. Size may play a role in this discretion. For example, SBA might decide to give the contract to a smaller 8(a) firm which needs the support more than a larger one, or in accordance with a plan to wean a relatively successful concern from the 8(a) program, SBA may decide that it has already supplied enough contract support to that firm for the year. Until June of this year, SBA practiced this policy, and plaintiffs remained eligible, and in some cases received, new 8(a) contracts even after their adverse size determinations. On June 16, 1982 the General Accounting Office (GAO) rendered a decision concerning the protest of the award of a contract to plaintiff Systems and Applied Sciences Corporation (SASC). In the Matter of Computer Data Systems, Inc., File B-205521. The GAO found that although SASC was entitled to a hearing on the record prior to termination from the 8(a) program due to size, it should not receive the contract which was the subject of the protest, and should be suspended from further 8(a) contracting unless the adverse size determinations were formally reversed. In response to this decision, which SBA felt constrained to follow, despite its continuing contrary position, all regional directors and procuring agencies were notified by SBA that 8(a) concerns which had been the subject of adverse size determinations should not be considered for further contracts.

Plaintiff SASC brought the first of these actions. On July 1, 1982 this Court entered a temporary restraining order requiring SBA to treat plaintiff as a full participant in the 8(a) program unless and until the procedures required by 13 C.F.R. Part 124 for completion or termination were completed. At that time, the Court had before it two parties with essentially the same legal position, except as to the propriety of SBA's actions to comply with the GAO decision. Subsequently, two parties with an adverse legal position to both

plaintiff and SBA sought to intervene. Computer Data Systems, Inc. (CDSI), the protestant in the GAO decision, was granted intervention as a party defendant as of right. Planning Research Corporation, (PRC), the incumbent contractor on the contract which was the subject of the GAO decision, was granted status as amicus curiae. Plaintiffs in the other two consolidated cases, although in basic agreement with plaintiff SASC's legal position, have filed additional papers to expound their reasoning. All parties agreed that all pleadings, however denominated would be considered arguments on the merits, and a final hearing on the merits was held July 16, 1982.

To summarize the positions of the parties, plaintiffs and SBA argue that 8(a) concerns remain full participants in the program until termination or completion pursuant to the procedures provided at 13 C.F.R. 124 or until the expiration of their fixed terms. Defendant-intervenor and amicus argue that plaintiffs, as businesses which have been found to be other than small, do not qualify for any assistance under the 8(a) program, for which status as a small business is a prerequisite. According to their analysis, 15 U.S.C. §637(a)(9) providing for a hearing on the record prior to denial of assistance applies only to the determinations concerning social and economic disadvantage outlined in §637(a), which are eligibility factors peculiar to the 8(a) program. Questions concerning size are to be decided by the same procedures as are applicable to non-8(a) concerns provided at 13 C.F.R. 121. In accordance with those regulations, a concern found to be other than small in a formal determination by the regional director is immediately ineligible for any assistance under the Small Business Act or Small Business Investment Act of 1958 under the relevant size standard. 13 C.F.R. §121.3-4(d). The regulations also provide that decisions of the Size Appeals Board shall be "final." 13 C.F.R. §121.3-6(a). Defendant-intervenor and amicus argue that SBA has exceeded its authority in promulgating the regulation at 13 C.F.R. §121.3-17, which provides that in the case of 8(a) firms, "[s]ize determinations under Part 121 on initial entry into the 8(a) program or on program completion or termination are advisory to the ASMSB-COD; and/or to the Administrative Law Judge in 8(a) proceedings under Part 124," because the regulation as currently interpreted allows continued 8(a) contract support to firms found other than small under the Part 121 procedures. Alternatively, defendant-intervenor and amicus urge the conclusion reached by GAO, that although plaintiffs are entitled to a hearing on the record on the issue of size before they can be completely excluded from the program, they may not be awarded contracts after an adverse size determination under Part 121. Under this theory, 13 C.F.R. §121.3-17 means that the Associate Administrator retains discretion, and a hearing on the record is available, only upon, as the regulation states, initial entry or program completion or termination, and not with regard to the denial of particular contracts because of an adverse size determination. In this situation, it is argued, plaintiffs have not been denied total participation in the 8(a) program without a hearing in violation of §637(a)(9), because they can still receive technical assistance under the program, perform existing contracts and options thereon, and remain eligible for contracts whose size standard they do not exceed.

AD-A139 152 GOVERNMENT CONTRACT LAW CASES(U) AIR FORCE INST OF TECH 4/13
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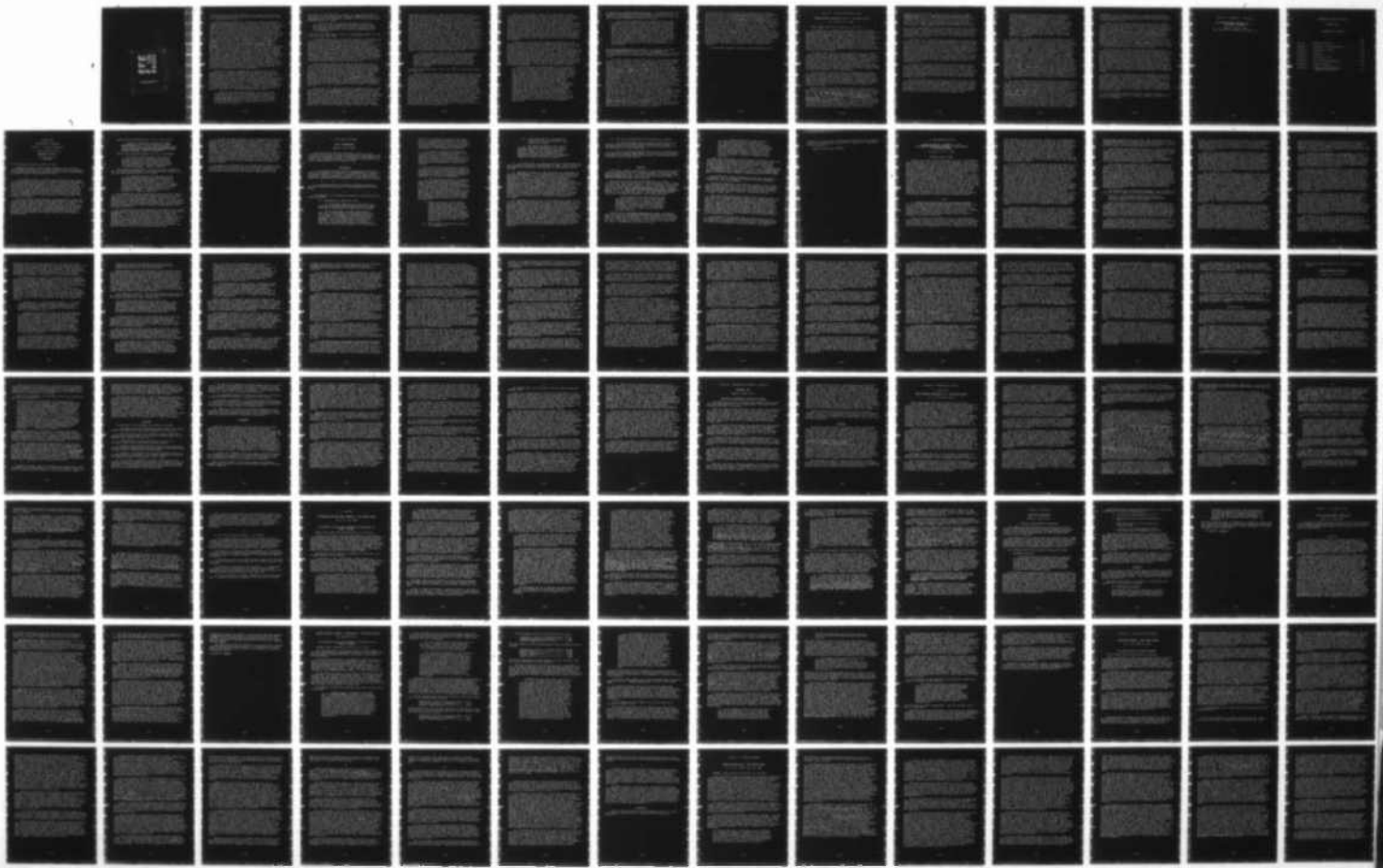

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NATIONAL BUREAU OF STANDARDS-1963-A

If their adverse size determinations are ultimately reversed, they will resume eligibility for contracts in the category for which they were found other than small.

Unfortunately, Congress has not made its intent regarding the question presented here explicit, which appears to have resulted in a somewhat self-contradictory stance on the part of the SBA. On the one hand it asserts that 8(a) participants must meet the size standards applicable to all concerns under the Small Business Act set forth in Part 121. On the other hand, SBA has taken the position that size determinations under part 121 are only advisory to the AAMSB-COD, and that it need not institute termination proceedings against a firm subject to an adverse size determination at all if factors other than size counsel that the concern should remain in the program. See Defendant's Motion for Summary Judgment at 4-5; In the Matter of Computer Data Systems, Inc. -- Reconsideration, File B-204421.3, B-205521.4 at 3 (July 26, 1982); Cal Western Packaging Corp. v. Collins, Civil Action No. 80-2548 (D.D.C., Defendant's Memo in Response to the Court's Order of July 28, 1981 at 3-6, filed September 28, 1981; Letter from Donald W. Farrell, Associate General Counsel, SBA, to Charles Kratzer, Office of General Counsel, GAO Re: Computer Data Systems, Inc., B-205521, dated March 15, 1982, and filed March 23, 1982). Further, while size determinations by regional directors are effective immediately, and decisions of the Size Appeals Board are final with regard to non-8(a) small businesses, 8(a) concerns are afforded additional procedural safeguards, during the pendency of which they remain eligible for contract assistance. Judging by the example of plaintiff SASC, whose petition for reconsideration of the Size Appeals Board was pending for ten months, and for whom an administrative hearing has not yet been scheduled, the interim time pending final determination can be substantial.

Neither the statutory language nor the legislative history resolves explicitly whether §637(a)(9) was meant to apply to size determinations. However, without any indication in the legislative history whatsoever that it was not intended to apply to size determinations, we cannot interpret its broad language, providing that "no such firm shall be denied total participation in any program conducted under the authority of this subsection without first being afforded a hearing on the record ...", to exclude any considerations of program eligibility, including size. Moreover, there is language in the legislative history supporting this view. The Conference Report to the 1978 bill which enacted §637(a)(9) states:

> Finally, the conference substitute gives due process guarantees to all firms in the program. Once a firm is certified as eligible it cannot be terminated, graduated, or in any other way removed from participation in the program, without the opportunity for a full hearing on the record according to the terms of the Administrative Procedure Act at the option of the firm.

H.R. Rep. No. 1714, 95th Cong., 2d Sess. 23, reprinted in 1978 U.S. Code Cong. & Ad. News 3897, 3884. (Emphasis added.) The Senate's understanding of the program was reflected in its report on the 1980 Amendments, where it stated,

> For firms that are admitted into SBA's 8(a) procurement and 7(j) capital ownership development programs, only three options are available for a firm to leave the program: (a) voluntary withdrawal; (b) termination proceedings; and (c) "graduation."

S. Rep. No. 974, 96th Cong., 2d Sess. 18, reprinted in 1980 U.S. Code Cong. & Ad. News 4953, 4970

We therefore agree with the plaintiffs and SBA to the extent that prior to involuntary termination from the program for any reason, including size, except by expiration of the fixed program participation term, a hearing on the record must be provided. It is true that this means that Size Appeals Board decisions do not have the finality for 8(a) concerns that they do for other small businesses. We do not know with certainty why Congress provided procedural protections for 8(a) concerns not available to other small businesses with regard to size determinations. Perhaps it is because of the greater, programmatic, impact of a size determination on an 8(a) firm, perhaps it is because of the generally favored position afforded socially and economically disadvantaged concerns in the Act. In any case, it is clear that Congress did afford that extra protection.

We do not agree, however, that SBA has the discretion not to institute termination proceedings following an adverse decision on size, or not to terminate if the size determination is not reversed. It is beyond doubt, and SBA admits, that small business status under the Act is an absolute prerequisite to participation in any of its programs, including the 8(a) program, and that the size standards delineated in 13 C.F.R. Part 121 apply to 8(a) concerns. What §637(a)(9) affords 8(a) concerns is extra procedural protections regarding such determinations, not an exemption, at the discretion of SBA, from the size requirements. Congress could have legislated such an exemption, and SBA could have administratively created different size standards for 8(a) as opposed to non 8(a) concerns. Neither has done so.

The question still remains whether 8(a) concerns must be, as the GAO and the court in Cal Western decided, suspended from contracting after an adverse size determination and pending a final decision on termination. Without any specific guidance in the statute or legislative history on this point, we must decide the question based upon the overall purposes and policies of the statute and regulations. We conclude that contract assistance cannot continue after an 8(a) firm has formally been found other than small. First of all, the 8(a) program was intended to help small disadvantaged businesses become viable parts of the free enterprise system. Congress never intended

firms which are not small to benefit from the program, and has repeatedly expressed concern that firms were staying in the program too long, and that too few were graduating into the market place. In 1978, an eligibility requirement that the firm have reasonable prospects for success in competing in the private sector was enacted, and an extensive technical and management assistance program was provided to complement the contract program so that firms could outgrow their need for contract support. In 1980, Congress, still not satisfied with the progress of 8(a) firms in completing the program, required fixed graduation dates for each firm. Congress conceived the 8(a) program as a means by which disadvantaged firms could enter the free market place, making room for new firms to enter the program; not as an ongoing support system for a few firms. Since the number of available 8(a) contracts is limited, prolonged stays in the program by a few firms deprive other small and disadvantaged concerns of the possibility of receiving that support. Also, the letting of contracts on a sole source basis to 8(a) concerns makes those contracts unavailable to non-8(a) small businesses and large businesses. Obviously this is not justified where the previously eligible 8(a) firm is no longer a small business. The Senate Report on the 1980 Amendments to section 8(a) quoted Senator Morgan to the effect that:

> It has not been the goal of the program to keep certain firms on Government contracts forever. The ultimate goal of most minority firms is to get their operations going and then move off into successful competition in the private sector. The continued participation of a few firms, in the absence of some compelling need, only injures those other small businessmen who could enter the marketplace through the 8(a) program.

S. Rep. No. 974, 96th Cong. 2d Sess. 22, 1980 U.S. Code Cong. & Admin. News 4953, 4974.

Therefore we know that while Congress wished to provide 8(a) concerns with a hearing on the record before termination, it also wished to move firms which no longer need it away from contract support as expeditiously as possible. It is contrary to the purposes of the Act to allow large firms to receive contract support pending a lengthy administrative procedure. Also, firms in plaintiffs' position have already received all the procedural safeguards afforded non-8(a) businesses before they are terminated from contract eligibility for being other than small. Consider the anomaly if two firms, one 8(a) and the other non-8(a) undergo the same size review procedures. The 8(a) firm, which is larger, is found to be other than small, while the non-8(a) firm is found to be small. Under the plaintiffs' and SBA's position, the 8(a) firm could receive contracts on a sole source basis, possibly depriving the truly small business of an opportunity to obtain that contract under the small business set-aside program. The large 8(a) firm's continued receipt of contracts could also deprive other 8(a) firms of those contracts, or prevent eligible firms from entering the 8(a) program at all.

While it is true that an 8(a) firm is deprived of all 8(a) contract support based upon a finding that it is other than small in its primary field of operation, while a non-8(a) firm can be found large in one category, and still apply for contracts in other categories, it is also true that the 8(a) firm could apply for contracts available to non-8(a) small businesses outside the category in which it was found to be large. Therefore, if an 8(a) firm is not eligible for new 8(a) contracts after an adverse size determination, it still has been afforded all the rights of a non-8(a) small business, and in addition, cannot be entirely terminated from the 8(a) program without a hearing on the record. Firms in plaintiffs' position have the right to complete existing contracts and obtain modifications and options on those contracts with the financial, technical and management support which Congress has found to be so important to the program.

Accordingly, we interpret the language in §637(a)(9) to the effect that an 8(a) firm cannot be denied total participation in the program without a hearing on the record to mean that such a firm can be denied contract support, but not total participation in the program, and not, as plaintiffs and SBA argue, that such firms may not be denied any degree of participation at all. Further, based upon the statutory mandate to serve only small businesses and congressional policy regarding the 8(a) program as outlined above, we conclude the SBA does not have the discretion to award 8(a) contracts to firms which have been found other than small in a size review. This is the same conclusion that was reached by the GAO in the decision and reconsideration of the CDSI protest, and which was reached in the case of Cal Western Packaging. In the words of the Comptroller General:

> We agree that the size determination is not conclusive and that the ultimate arbiters of SASC's size eligibility for the 8(a) program are the associate Administrator and the Administrative Law Judge in termination proceedings. From this proposition, however, it does not follow that the Size Appeals Board size determination is utterly without effect. SBA officials with especial expertise in assessing compliance with size standards have determined, after affording SASC an opportunity to present facts and arguments, that SASC does not meet the size standard applicable to its principal business activity. To continue to award contracts under 8(a) in the face of such a determination raises serious questions concerning the SBA's compliance with the Act. The court in Cal Western recognized this and ruled that unless and until the final arbiters of the issue determine the firm to be small, further awards would violate the letter and spirit of the Small Business Act. Under the particular circumstances of this case, we believe that the logic of Cal Western is controlling.

In the matter of Computer Data Systems, Inc. -- Reconsideration, File B-205521.3, B205521.4 at 6 (July 26, 1982). Although plaintiffs and SBA claim that Cal Western is distinguishable on various grounds, we find its broad language to encompass these cases.

> This provision [§637(a)(9)] is designed to insure that a company is not permanently excluded from the 8(a) program until a hearing is held. However, it does not require the agency to continue to award contracts to a company which has been found in violation of the size standards. If the company is ultimately exonerated, contract awards may resume, but until then a company which is not a small business may not receive awards on the theory that it is. Thus, the company is not denied total participation in the 8(a) program; it is simply temporarily suspended until its eligibility can be finally determined. Any other result would violate both the letter and the spirit of the statute by allowing businesses which are not small to gain the benefits of the 8(a) program.

Cal Western Packaging Corp. v. Collins, Civil Action No. 80-2548 (D.D.C. decided April 20, 1982). Even if Cal Western were distinguishable, as the preceding discussion indicates, the conclusion in these cases has been reached upon independent examination of the issue.

Plaintiffs and SBA claim that the denial of new contract support without a hearing on the record is a constitutional violation of due process of law. However, a trial-type hearing is rarely required prior to the termination of governmental benefits. All that is required is "the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976), quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965). SBA size determinations require notice to the affected business, and in fact are based primarily on facts and allegations supplied by the parties (the concern whose size is under question and any protestants involved in the proceeding). The burden is on the concern whose size is under consideration to submit full information to SBA to establish its small business size. 13 C.F.R. §121.3-4(c). Thus, plaintiffs had notice of the size review, and an opportunity to make written submissions to defend their size status. Basic due process protections are provided before any contract support is denied on the basis of size eligibility. Then, in the case of all small businesses, after contract support has been withdrawn, there is a right to appeal to the Size Appeals Board. The Size Appeals Board considers the appeal based upon written submissions, or in its discretion, conducts an oral inquiry. 13 C.F.R. 121.3-6(e). Thereafter in the case of 8(a) firms only, there is an opportunity for a full evidentiary hearing on the record. Final agency decisions are appealable to the courts. Oklahoma Aerotronics, Inc. v. United States, 661 F.2d 976 (D.C. Cir. 1981). Plaintiffs' due process rights have not been violated by the denial of 8(a) contract assistance after a formal size determination and pending a final decision on program termination.

Finally, this Court, at the time of the issuance of the temporary restraining order in the Systems and Applied Sciences case predicted that plaintiff had a strong likelihood of success on the merits. Also, in an earlier case, Amex Systems, Inc. v. Cardenas, 519 F. Supp. 537 (D.D.C. 1981), this Court remarked that in some future case, a plaintiff might be able to establish that it was impermissably denied an 8(a) contract because it was undergoing a size review. (The stage of the size review in such a hypothetical case was not specified). In both of those instances, the Court only had parties before it which were aligned on this issue. Under CDSI and PRC were granted defendant-intervenor and amicus status, respectively, no participant before this Court had expounded the position that new contracts should be unavailable to 8(a) concerns which were the subject of adverse size determinations. The Court has also been provided, since the issuance of the temporary restraining order, with the more extensive reasoning supporting the GAO decision in the CDSI protest in GAO's reconsideration of that opinion. With the benefit of further briefing, oral argument, and additional research, today's conclusion was reached.

An appropriate judgment accompanies this memorandum opinion.

Section 5. Proposal Preparation Costs

MORGAN BUSINESS ASSOCIATES, INC. v. THE UNITED STATES

No. 274-78 Ct. Cl. 1980

DAVIS, Judge, delivered the opinion of the court:

In response to a request by the Government, plaintiff Morgan Business Associates, Inc. (Morgan) submitted a proposal concerning the development and management of certain conferences for the Energy Research and Development Administration (ERDA). After the proposal was received by ERDA, it was somehow lost, and was never considered by the contracting officer. Plaintiff brought this suit for its bid preparation costs, asserting that the defendant was arbitrary and capricious in failing to consider the proposal. The case is before us on cross-motions for summary judgment, based on a stipulation of facts. We conclude that the stipulated facts fail to establish that plaintiff was injured by the defendant's breach of duty, and we therefore hold for the Government.

In October 1976, the San Francisco Operations Office of ERDA issued a request for proposals on development and management of ERDA conservation research and technology conferences. Contract award was to be by negotiated procurement. Morgan submitted its proposal by certified mail. This proposal was received by the designated office before the deadline, but thereafter it was misplaced or lost. Accordingly, it was never evaluated by the Technical Advisory Board convened to consider the proposals submitted, nor was it appraised by the contracting officer. After negotiation with other proposers, four contracts were awarded to others than Morgan.

In January 1977, after an exchange of communications between plaintiff and ERDA, the failure to consider the Morgan proposal was discovered. On the suggestion of the agency, plaintiff submitted a copy of its proposal for informal evaluation. Gail Garbarini, then employed at Department of Energy headquarters, reviewed the proposal under the evaluation criteria of the request for proposals, and determined that plaintiff would not have been chosen for negotiation leading to an award.

Morgan's claim raises issues not settled in the decisions in which the court has considered a party's right to recover bid preparation costs. See Heyer Products Co. v. United States, 135 Ct. Cl. 63, 140 F. Supp. 409 (1956); Keco Industries Inc. v. United States, 192 Ct. Cl. 773, 428 F.2d 1233 (1970)(Keco I); Keco Industries Inc. v. United States, 203 Ct. Cl. 566, 492 F. 2d 1200 (1974)(Keco II); Burroughs Corp. v. United States, Ct. Cl. No. 251-78 (March 19, 1980). There the Government had invited bids or proposals and had actually considered and rejected the plaintiff's submission. The focus of the controversy was on how the Government had treated that bid. The complaint was either that the consideration of plaintiff's bid or

proposal had been arbitrary, capricious, or in bad faith, Heyer Products, supra; see also Continental Business Enterprises Inc. v. United States, 196 Ct. Cl. 627, 452 F.2d 1016 (1971), or that the consideration and acceptance of a competitor's bid or proposal was arbitrary, capricious, or in bad faith, with resulting detriment to the plaintiff, Keco II, supra, Burroughs Corp., supra, see also McCarty Corp. v. United States, 204 Ct. Cl. 768, 499 F.2d 633 (1974).

In this case, however, plaintiff's proposal, though received by ERDA, was never considered by the contracting officer or the Technical Advisory Board. We must decide whether, under the facts given to us, the Government's total failure to consider the proposal submitted in response to its invitation creates a claim for bid preparation costs enforceable in this court.

The parties ask us to adopt opposite approaches which have broad sweep and are by their nature outcome determinative. Defendant urges a two-part test. It contends that plaintiff must first show that the loss of the proposal was a result of more than simple negligence. It suggests this is mandated by our conclusion in Keco II, supra, that in that instance simple negligence was not enough to establish a right to recover bid preparation costs. The argument continues that plaintiff must also show that the Government's failure to consider its bid properly was the cause of its failure to receive a contract. In other words, Morgan must show that, but for the Government's breach of duty, it would have received a contract. Defendant analogizes this to the requirement that a plaintiff show "proximate cause" to recover in a negligence action.

Plaintiff, on the other hand, asserts that the failure to consider a proposal is a per se violation of 10 U.S.C. § 2304(g)(1976), and governing procurement regulations, and that this alone is sufficient to establish a right to bid preparation costs. It argues that to require plaintiffs whose bids are lost to prove that the loss was due to gross negligence or bad faith would impose an insurmountable burden of proof and create an enormous opening for covert misconduct by federal officials.

We think that the parties' approaches are each too broad in that they ignore the general teaching of the Heyer line of decisions that each bid-preparation claim must be judged in the circumstances forming the basis of the challenge. Defendant misreads our opinion in Keco II, supra, to say that a negligent action by the Government can never be the basis of a recovery of bid preparation costs. The holding in that case was quite narrow, as the pertinent language shows:

> The mere failure to exercise due diligence in the appraisal of the advantageousness of a competitor's bid, when that omission amounts to simple negligence, is not a sufficient showing of arbitrary and capricious conduct to warrant recovery of bid preparation expenses. The Government's duty to exercise care in evaluating the 'price and other factors' of a bid runs first to the proponent of that bid and to the public and its representatives, and only then to another bidder. The responsibility to the latter is too attenuated to justify assessing damages for simple negligence, especially in light of the broad discretion of procurement officials in that aspect of the bid process. [Id. at 579, 492 F.2d at 1206-07.]

The facts in this case are significantly different from the context of Keco II. The challenge here is not to the manner of the Government's consideration of a bid or a proposal, but to a complete failure to give any consideration. Moreover, the challenge concerns plaintiff's own proposal, not that of a competitor. The duty to evaluate proposals runs directly to the proponent of that proposal--Morgan in this instance. Finally, the contracting officer has no discretion as to whether to give initial consideration to a proposal which is submitted in a timely manner. He must do so. In Heyer Products, supra, we held that when the Government issues an advertisement for bids it creates an implied promise to give fair and honest consideration to the bids submitted in response. Id. at 69, 140 F.Supp. at 412-13. At the minimum, this is a promise that a bid will be considered if properly submitted. Similarly, we have said that "every bidder has the right to have his bid honestly considered by the Government." Keco I, supra, at 780, 428 F.2d at 1237. The problem of whether consideration has been "honest" may necessitate an examination of motive or intent, but this assumes that there has been some kind of consideration by the appropriate procurement official. When the Government fails completely to consider a proposal or a bid which is properly received, there is a prima facie breach of the duty to give consideration and the question of motive or intent does not arise.

We reject, however, plaintiff's proposition that any breach of the duty to give consideration creates an immediate entitlement to bid preparation costs. Morgan emphasizes that failure to consider its proposal was a violation of statute and procurement regulations, but we have said that "proven violation of pertinent statutes or regulations can, but need not necessarily, be a ground for recovery." (emphasis added) Keco II, supra, at 574, 492 F.2d at 1204. See also Burroughs Corp., supra, sl. op. at 11-15. Acceptance of plaintiff's theory would make the Government an insurer for a party's bid preparation expenses whenever a bid or proposal is lost. This could lead to the far-fetched result that the Government might be responsible for paying bid preparation costs for a proposal that is wholly inadequate on its face, one which would be summarily rejected after even a single reading, or one which has no real chance of acceptance. Bid preparation expenses are a cost of doing business that are "lost" whenever

the bidder fails to receive a contract. We cannot assume that a plaintiff has always and necessarily been damaged by the Government's failure to consider its proposal--but that is the end-result of the rule Morgan puts forward.

Conversely, we are not persuaded by the Government's argument that plaintiff must show that, but for the failure to consider its proposal, it would have received a contract. The analogy to proximate cause in negligence does not fit. If plaintiff sued in negligence, and could show proximate cause, its measure of damages would be lost profits as well as bid preparation costs. Heyer Products, supra, established that a claim for bid preparation costs was based on a breach of an implied promise relating to consideration of the bid itself, and that there was no basis to award lost profits. In addition, it would be virtually impossible for the plaintiff to make a "but for" showing. As we noted in Keco I, supra, since 10 U.S.C. § 2305(c)(1976) gives the head of an agency authority to reject all bids if he determines rejection to be in the public interest, there can be no certainty about the results of any bid or proposal.

We hold, rather, that when the Government completely fails to consider a plaintiff's bid or proposal, the plaintiff may recover its bid preparation costs if, under all the facts and circumstances, it is established that, if the bid or proposal had been considered, there was a substantial chance that the plaintiff would receive an award--that it was within the zone of active consideration. If there was no substantial chance that plaintiff's proposal would lead to an award, then the Government's breach of duty did not damage plaintiff. In that situation a plaintiff cannot rightfully recover its bid preparation expenses. This principle of liability vindicates the bidder's interest and right in having his bid considered while at the same time forestalling a windfall recovery for a bidder who was not in reality damaged.

Morgan has failed to show that it had a substantial chance of receiving an award. The only evidence in the stipulated record, Ms. Garbarini's opinion, indicates that plaintiff's chances for an award were not substantial. Plaintiff's arguments concerning Ms. Garbarini's qualifications and motivations go only to the weight we should give this evidence. In opposing the Government's motion for summary judgment, plaintiff must do more if we are to disregard the only evidence in the record on the point. Morgan has failed to offer any rebuttal evidence or even to attempt to meet its burden of persuasion on the issue.

For this reason, plaintiff's motion for summary judgment is denied and defendant's motion for summary judgment is granted. The petition is dismissed.

Section 6. Suspension - Due Process

OLD DOMINION DAIRY PRODUCTS, INC. v. SECRETARY OF DEFENSE

CADC No. 79-0981 (1980)
See Chapter Four, Section 8c, at page 4-111

GOVERNMENT CONTRACT LAW CASES

CHAPTER FOUR

LIMITATIONS ON SPENDING

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CHAPTER FOUR

LIMITATIONS ON SPENDING

Section 1. Funding Limitations

a. Specific Appropriation

SECRETARY OF STATE

42 COMP. GEN. 226
[B-150074]

To the Secretary of State, October 29, 1962:

Reference is made to letter dated October 5, 1962, from the Acting Deputy Under Secretary of State for Administration concerning the proposed construction of a pneumatic tube delivery system between the White House and the Department of State.

* * * * *

It is further stated in the letter that sufficient funds remain in the Department's no year account "19X0536, Extension and Remodeling of the State Department Building", to cover the estimated cost of $234,000 for the installation of the secure pneumatic tube system. We are advised that your Department is of the opinion that these funds can be used, since the basic legislative history discloses that the need for a pneumatic tube system for the Department was recognized. In this connection reference is made in the letter to the Hearings before a Subcommittee of the House Committee on Appropriations, 85th Congress, 1st Session.

The Acting Deputy Under Secretary for Administration states that in one instance a sum of $2,435,00 was headed "Special Items" and that included in this sum was money for pneumatic tubes. He further states, however, that the tubes were specifically justified as being within the Department and that a further examination of the legislative history of the extension and remodeling appropriations for the building in question does not disclose any specific reference to extension of the pneumatic tube system beyond the State Department Building proper.

* * * * *

Section 3678, Revised Statutes, 31 U.S.C. 628 states:

> Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others. [Emphasis supplied.]

Section 3733, Revised Statutes, 41 U.S.C. 12, provides:

> No contract shall be entered into for the erection, repair, or furnishing of any public building, or any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose. [Emphasis supplied.]

The pertinent language used in the acts (79 Stat. 689 and 71 Stat. 56) making appropriations for the extension and remodeling of the State Department Building is as follows:

> For expenses necessary for planning, and the extension and remodeling, under the supervision of the General Services Administration, of the State Department Building, Washington, D.C., and for expenses necessary for providing temporary office space, including payment of rent in the District of Columbia, alterations, purchase and installation of air conditioning equipment, to remain available until expended.*** [Emphasis supplied.]

The language used in the quoted appropriation provision makes it clear that the funds contained therein are available--as far as pertinent here--for a specific purpose, namely, the extension and remodeling of the State Department Building. Hence, it is our opinion that only those items which may be considered part of the extension and remodeling of the State Department Building may legally be charged against the appropriation "19X0536 Extension and Remodeling, State Department Building."

The construction of a secure pneumatic tube communications system between the State Department Building and the White House would not be encompassed in the ordinary usage of the phrase "extension and remodeling, *** of the State Department Building." Further, the appropriation in question was not made for "general purposes" but for (as far as pertinent here) the specific purpose of extending and remodeling the State Department Building. It is our view that the construction of a pneumatic tube system between the building in question and the White House would not be reasonably related to the specific purpose for which the appropriation was made.

It is true that under the general rule of appropriation construction an express statutory provision is not required for every item of expenditure, but an appropriation in general terms for a particular purpose is available for expenditures necessary to accomplish that purpose, except as to expenditures in contravention of some statutory provision or for which other appropriations are more specifically available. However, the construction of a pneumatic tube system between the White House and State Department Building is not necessary to accomplish for which the appropriation involved here was made, i.e., to extend and remodel the State Department Building. This particular appropriation was not made for and is not available for the general purpose of enabling your Department to carry out the responsibilities imposed on it by law in connection with the conduct of foreign affairs.

In light of the foregoing you are advised that the appropriation "19X0536 Extension and Remodeling, State Department Building," is not available to pay the cost of constructing a secure pneumatic tube system between the White House and the State Department Building.

b. Multi-Year Procurement

VARO, INCORPORATED

ASBCA No. 13739 (1969)

This appeal arose from the Government's failure to allot $384,952.31 to fund the FY-1968 third program year requirements under a multi-year procurement contract for bomb racks, while awarding to another firm a separate contract in the amount of $700,845.74 to procure a larger quantity of the identical items.

* * * * *

STIPULATION

1. The parties stipulate that the following may be taken as facts for the purpose of submitting this proceeding for a decision on the record, subject to the right of the parties to submit briefs, affidavits, and other documents in support of their position and to object to the materiality or relevancy of any fact herein stipulated.

* * * * *

5. Certain provisions of the Contract Schedule and General Provisions relating to the issues in this proceeding are set forth below:

* * * * *

(d) Paragraph 57 of the General Provisions of the Contract provides as follows:

> 57. CANCELLATION OF ITEMS (NOV. 1963)
>
> (a) This clause applies only in the event this contract is awarded on the alternative basis for award described in the Schedule as 'Multi-Year Procurement.
>
> (b) As used herein, the term 'cancellation' means that the Government is cancelling, pursuant to this clause, its Program Year requirements for items as set forth in the Schedule for all Program Years subsequent to that in which notice of cancellation is provided. Such cancellation shall occur only if, within the time period specified in the Schedule, or such further time as may be agreed to, the Contracting

Officer (i) notifies the Contractor that funds will not be available for contract performance for any subsequent Program Year; or (ii) fails to notify the Contractor that funds have been made available for performance of the Program Year requirement for the succeeding Program Year.

(c) Except for cancellation pursuant to this clause or for termination pursuant to the 'Default' clause, any reduction by the Contracting Officer in the quantities called for under this contract shall be considered a termination in accordance with the 'Termination for Convenience of the Government' clause of this contract.

(d) In the event of cancellation pursuant to this clause, the Contractor shall be paid, as consideration therefor, a cancellation charge not to exceed the cancellation ceiling described and separately set forth in the Schedule as being applicable at the time of cancellation.

(e) The cancellation charge is intended to cover only expenses reasonably necessary for production which would have been equitably amoritized in the unit prices for the entire quantity of the Multi-Year Procurement, but which, because of the cancellation, are therefore not so amortized. The cancellation charge shall be computed and claim therefor made as would be applicable under the 'Termination for Convenience of the Government' clause of this contract, except that the cancellation charge shall not include any amount for:

(i) Labor, materials or other expenses incurred for production of the cancelled items; provided, that initial costs, preparatory expenses and other nonrecurring costs reasonably and necessarily incurred by the contractor and its subcontractors, but exclusive of any costs allocable to the completed supplies paid or to be paid for at the unit price, may be included in such charge; and

(ii) which payment has already been made to the Contractor; or

(iii) anticipated profit on the cancelled items, or on the cost included in the cancellation charge.

(f) Any quantities added to the original contract quantities through exercise of the Government option in the 'Option for Increased Quantity' clause of this contract shall be subtracted from what would otherwise be considered the quantity cancelled for the purpose of computing allowable cancellation charges."

* * * * *

12. On 29 March 1968, the Contracting Officer notified Appellant that, pursuant to clause 57, CANCELLATION OF ITEMS, "funds will not be allotted for the FY-68 multi-year portion" of the Contract (Rule 4, Tab 1-B).

13. Appellant contends (a) funds sufficient for performance of the full requirements of the FY-68 program year of the Contract were available to Respondent, (b) the award of the Contract to Aircraft Hydroforming, Inc., on 27 March 1968 in the total amount of $700,845.74 is conclusive evidence that funds in the amount of $384,052.31 for full performance of the FY-68 program year of the Contract were available to Respondent, (c) the Contracting Officer was obligated under clause 58 (LIMITATION OF PRICE AND CONTRACT, or OBLIGATIONS) to notify Appellant that funds were available for performance of the full requirements of the FY-68 program year of the Contract and so to modify the amount of funds described in the Schedule as available for contract performance, and (d) the cancellation of the FY-68 program year requirements should be construed as a constructive termination for convenience for purposes of settlement.

14. Respondent contends that (a) the funds used in award of the contract under the RFP were properly used in that procurement; (b) the contract awarded under the RFP of 5 February 1968 provided for the Government's existing delivery requirements which were different from Appellant's Contract for the FY-68 program year and further provided for the Government's requirement of quantities which exceeded the option quantities provided for in Appellant's Contract; (c) there were no funds made available to the Contracting Officer for the purpose of, and sufficient for, performance of the full requirements for the FY-68 program year under Appellant's Contract; (d) the Contracting Officer properly issued the cancellation notice in accordance with clause 57 of the Contract; and (e) the settlement resulting from the cancellation of the FY-68 program requirements from subject Contract should properly be made under the cancellation provisions of the Contract.

15. The issue to be decided in this proceeding is whether

(a) The Contracting Officer properly cancelled the FY-68 multi-year program requirement under the provisions of subject Contract, which limits the settlement claim to that provided for in the Cancellation of Items clause; and

(b) The Contracting Officer was in error in cancelling the FY-68 multi-year program requirements, in which event the settlement claim would be processed under the Termination for Convenience of the Government clause of the Contract.

* * * * *

DECISION

The nature, purposes and provisions of the Multi-Year Procurement clauses incorporated into this contract pursuant to ASPR 1-322 have been exhaustively treated in our recent decision in the appeal of ITT Federal Laboratories, etc., ASBCA No. 12987, 69-2 BCA par. 7849, August 11, 1969, and need not be repeated.

The underlying issues pose the problem when, or in what circumstances, may the cancellation of Items, Clause No. 57 be invoked in a Multi-Year Procurement contract. The institutional history which clarifies the meaning of a standard clause in a government contract may be consulted. Deloro Smelting and Refining Co., Ltd. v. United States, 161 Ct. Cl. 489, 495. In this instance appellant supplies the Minutes of the ASPR Committee dated 17 July 1967, ASPR Case 62-217 (Multi-Year Procurement Procedures), which relevantly read:

> The concept of multi-year procurement was discussed at length to the effect that a multi-year procurement is not a variant of the option procedure, but rather is a contract binding the government to purchase the entire multi-year procurement quantity unless (i) the requirement is cancelled, or (ii) funds for the items are not made available.

The decision in ITT Federal Laboratories, supra, consistently holds that multi-year procurements are not option or call contracts, which are separately provided for in ASPR; consequently such contract "does not afford to the Government the election to buy or not to buy any year's requirement on the basis of the condition of the market." Id., Note 5. The decision then went on to say:

> . . . From the contract itself, and from its administrative history, as reflected in par. 1-322 of ASPR and the relevant decisions of the Comptroller General, it is clear that appellant intended to commit itself to furnish to the Government the stated quantities of the specified items during a multi-year period at a level price and that the Government intended to obligate itself to buy each successive fiscal year requirement from appellant. . . .

Any other construction on the Government's obligation to buy each successive year's requirement during the multi-year procurement period, because of availability at cheaper prices or desire for accelerated deliveries, would render the contract a "one-sided bargain, bordering upon a lack of mutuality. . . ." E. H. Sales, Inc. v. United States, 169 Ct. Cl. 269, 273. The "desire to save money is a poor reason to break an outstanding promise." Saul Friedman d/b/a M. & E. Equipment & Parts Company v. United States, 162 Ct. Cl. 390, 402.

We conclude that funding successive program year requirements is mandatory under the language of Clause 57, and the precedents construing it with two exceptions.

Of the two exceptions to the mandatory funding of later fiscal year procurements after the first, i.e., cancellation of the requirements and the nonavailability of funds, the parties have stipulated that the Government's requirements for the units called for in the FY-68 program years were not reduced or eliminated, but were increased. (Stip. par. 7)

This leaves the availability of funds as the remaining issue. On that score the Government awarded a contract for a larger quantity of the same units, including the FY-68 program year requirements (Stip. paras. 4, 7, 10 and 11), to Aircraft Hydroforming two days before notifying appellant that funds would not be "allotted to" its FY-68 program. Under the statutes and regulations, the contracting officer could not legally obligate funds and award to Aircraft until such funds were received, available for obligation and adequate in amount. The act of obligating the increased amounts to another procurement is incontrovertible evidence of the availability of the funds for allotment to appellant's contract.

In the premises the Government had no right to refuse to allot the funds which were available to appellant's FY-68 procurement, save and except upon a termination for its convenience. We conclude that the effect of the Government's failure to fund the final year of

appellant's contract was a termination of that quantity for the convenience of the Government, as provided in Clause 57(c), paragraph 5 of the Stipulation.

Appeal sustained and remanded.

* * * * *

c. Reprogramming Actions

BLACKHAWK HEATING & PLUMBING CO., INC.
AND DONOVAN CONSTRUCTION COMPANY, A JOINT VENTURE
v. THE UNITED STATES

No. 364-74, Ct. Cl. (1980)

OPINION OF TRIAL JUDGE

WIESE, Trial Judge: This action arises out of an alleged breach, by the Government, of a contract settlement agreement. The controversy centers upon the final article of that agreement which provided that the Government's liability was to be "contingent upon the availability of appropriated funds from which payment in full can be made." Two basic issues are raised. The first requires a determination as to the meaning of the contract language in dispute; the second, a determination as to whether there occurred an unavailability of appropriated funds within the meaning of that language. On the basis of the accompanying findings of fact and for the reasons set forth in this opinion, it is concluded: (i) that the contractor is entitled to a judgment of $2,000,000 together with interest on that amount, at the contract rate of 9.75 percent per annum, from December 10, 1973, until the date of payment; (ii) that the contractor is also entitled to the interest due on $6,000,000, again applied at the contract rate of 9.75 percent per annum, for the period from December 10, 1973, through January 3, 1974; (iii) that the Government is not liable for the remainder of the amounts in issue; and (iv) that, excepting the payments here determined to be owing to the contractor, the parties are no longer bound by the terms of their settlement agreement.

I. Facts

A. Negotiation and Execution of the Settlement Agreement. On June 29, 1967, the Veterans Administration awarded the joint venture of Blackhawk Heating & Plumbing Company, Inc. and Donovan Construction Company (hereinafter referred to as plaintiff or the contractor), a fixed-price contract for the construction of a medical, surgical and neurological hospital, together with related improvements, at the Veterans Administration Hospital complex at Northport, Long Island, New York.

During the course of performance various claims and disputes arose between the parties most of which, despite negotiations aimed at resolving them, remained in issue at the time the work was completed and the project accepted by the Government. Thereafter, efforts to bring these areas of disagreement to an end by means short of litiga-

tion continued to receive the parties' attention. In mid-September 1973, this being some 15 months after the work had been completed and also after various settlement offers had been made and rejected by both sides, the Administrator of Veterans Affairs (the Administrator) decided that the best interests of the Government would be served if the contractor's claims (which totaled in excess of $16.3 million) could be resolved in their entirety for a figure not in excess of $10.4 million. Negotiations directed towards the accomplishment of this objective began in mid-October 1973 and near the end of this same month, the parties had arrived at a compromise figure of $10.3 million and had achieved what was then thought would be the final text of their agreement. However, as we shall come to see, there were some changes that would be made.

As to the details of the negotiations that had transpired to this point, it is necessary to identify only two particulars. The first had to do with the scope and type of audit that the Government would perform in order to verify the contractor's claimed costs. On this matter, the Government's position had been that the contractor's total cost claim should be broken down into its constituent components on a claim-by-claim basis and the Government should be entitled to test the reasonableness and the appropriateness of each of the costs so identified under the standards or criteria of the Federal Procurement Regulations. The contractor resisted this effort (as it had all along) believing, among other reasons, that the complexity of the construction job itself (there having been more than 300 change orders issued over a course of performance that extended three years beyond the initially-scheduled completion date) defied any accurate means of cost presentation and subsequent third-party audit evaluation. The merits of the contractor's arguments gained the day; thus the agreement that was drafted (as well as the agreement that was later to be executed) specifically recited that the "Government agrees that if * * * Contract Costs are charged in accordance with company policies and generally accepted accounting principles, the Government accepts them as reasonable and necessary for the purposes of this equitable adjustment and settlement, and the reasonableness and necessity of these costs shall not result in an adjustment of the Settlement Price."

The second and more important point that bears upon the settlement agreement concerns the matter of its funding. In the earlier settlement negotiations on this contract, as well as through several preceding settlement agreements which these same parties had entered into in connection with other unrelated Veterans Administration construction projects, the contractor had been made generally aware of the fact that payment of a settlement amount required the agency to rely upon appropriated funds initially earmarked for other construction project purposes. This fund shifting procedure, known more generally in the Veterans Administration as the reprogramming procedure, had been explained to the contractor as an administrative mechanism that involved, first of all, a notification to the pertinent

Congressional appropriations committees (those concerned with the Veterans Administration's budget) of the agency's decision to effect a settlement by a shifting of unobligated funds and secondly, a waiting period to allow for any committee response or reaction.

Returning now to the narration of events, it soon developed that the text of the agreement that had resulted from the parties' October negotiations was seen, upon in-house review in the agency (and before being signed there), to require certain changes and additions. Of these, the only matter of importance concerns the Veterans Administration's insistence that there be added to the agreement a provision making the Government's liability under the agreement subject to the availability of appropriated funds.

What prompted the Government's demand for the addition of such a clause is of lesser importance than what was said about it to the contractor at the time it came to be considered. As to the first point, it is enough to say that the General Counsel of the Veterans Administration, though he had been told that funds tc pay the settlement were available (that is, would be available upon the completion of a reprogramming action) nevertheless considered it a good idea to add the contingency language. The Associate General Counsel of the Veterans Administration, being the individual who had been assigned the role of chief negotiator in this settlement, went along with the idea because he saw such a provision as a means of protecting the certifying officer (the individual who was to sign the agreement on behalf of the Government) against any possible violation of the Anti-Deficiency Act.

The language which the Government proposed to add, and which, in fact, was later included in the executed agreement, read as follows:

> Article 8. The Government's obligation hereunder is contingent upon the availability of appropriated funds from which payment in full can be made.

When this language was first presented to the contractor (in a telephone conference between the Associate General Counsel and the contractor's attorney), the question immediately asked was what the language meant. When told that the clause meant that no legal liability should arise until there were funds available for the payment of the settlement, the contractor's attorney responded by asking whether the Government had the money with which to pay the settlement. The answer given was "[y]es, we have the money, money is not a problem."

This last answer then led to the question why, in view of the availability of funds for payment, there should be any need at all for the proposed contract language. The Associate General Counsel answered by saying that the Administrator and the General Counsel were concerned about a possible violation of the Anti-Deficiency statute and the added contract language would offer protection against this

concern. Still not satisfied (and understandably so) the contractor's attorney questioned why, if money was not a problem, there should be any concern with a violation of the statute. The response to this last question was simply that the Administrator and the General Counsel were insisting upon the inclusion of the contingency language in the agreement.

With this conversation as background, the contractor's attorney contacted the joint venture's principals (Mr. Donovan, the president of Donovan Construction Company and Mr. Machata, the president of Blackhawk Heating & Plumbing Company) to discuss the matter with them. What developed from these conversations was a collective assessment that the Government, although it had the money to satisfy the settlement amount ($10.3 million), was nevertheless insisting upon the inclusion of the contingency language in order to give total assurance to the Government's signatory that the agreement could be executed without risk, that is, without fear that the agreement might exceed the limits of appropriated funds.

What prompted this understanding on the contractor's part was an experience shared in an earlier settlement agreement with the Veterans Administration, identified as the Brooklyn settlement. In that case, the settlement agreement had not included language similar to the contingency language now being proposed and, at the time of its intended execution, the contracting officer balked at signing the agreement because of his belief that the agency did not have sufficient funds to pay the settlement. (As it turned out, the contracting officer had not been made aware that funds to pay the settlement were to become available through the reprogramming of monies initially earmarked for another construction project.) To the plaintiff this earlier experience was relevant because it explained why the Government should now be insisting upon contingency language while asserting, at the same time, that funds were available with which to honor the settlement obligation. Accordingly, it was decided that the contractor would accept the contingency language which the Government had proposed.

On November 1, 1973, the parties met to execute the settlement agreement. The agreement, as it then stood, included the contingency language (incorporated as Article 8 of the agreement) and reflected certain other changes (not otherwise relevant here) which the Government had also found necessary to include. On this occasion, the purpose of the contingency language again surfaced. As his own testimony recounts it, the Associate General Counsel had been surprised at the contractor's ready acceptance of the contingency language and, because of this, questioned the contractor's understanding of it. The contractor's attorney answered by repeating what he previously had been told, namely, that the language was to protect the certifying officer against a possible violation of the Anti-Deficiency Act. The Associate General Counsel endorsed this interpretation but then added the following: "There is one more contingency and that is if there

were an affirmative action by the Congress, that would prevent the Administrator from paying." To this identification of an added purpose for the contingency language the contractor gave no verbal response. Rather, as the Associate General Counsel described it, "the reaction was really a shrug-off." Thereafter, no more was said on the subject; the agreement was signed.

B. Obstacles to Implementation of the Agreement. Following the signing of the settlement agreement, the Veterans Administration initiated the actions necessary to carry out the agreement. Essential contract documentation was prepared, instructions regarding an audit of the contractor's books and records were transmitted to the Defense Contract Audit Agency and letters informing of the reprogramming of funds were forwarded to the various Congressional committee members concerned with the agency's appropriations.

By December 7, 1973, the examination of the contractor's books and records had progressed to a point where the auditors were able to advise the Veterans Administration that, on the basis of a selective review of the contractor's claimed costs, sufficient verification as to the total amount of those costs had been established so as to permit the agency to proceed in accordance with its obligation under Article 7(b) of the settlement agreement, namely, to pay $8,000,000 not later than 40 days after the settlement agreement's execution. (The agreement called for two principal payments, one of $8,000,000 to be paid within 40 days of settlement execution; the second, covering the remainder of $2,300,000 was to be paid within 90 days of settlement execution. Sums not paid when due were subject to interest at 9.75 percent per annum.)

However, despite the necessary audit verification, the amount then due was not paid to the contractor. What caused the agency to stay its hand were letters received from Senators Vance Hartke (Chairman, Committee of Veterans Affairs, United States Senate) and William Proxmire (Chairman, Subcommittee on HUD-Space-Science-Veterans, United States Senate), and from Representative Edward P. Boland (Chairman, Subcommittee on HUD-Space-Science-Veterans, House of Representatives), each expressing to the Administrator serious concern about the settlement agreement. The letters focused on a report that had been received from the General Accounting Office concerning the propriety of the settlement and all urged the Administrator to desist from the reprogramming action.

The admonition to put aside the reprogramming action was not acceded to by the Administrator--at least not initially. On December 7, 1973, the Administrator responded to the concerns that had been raised about the settlement agreement. In separate letters of this date to Senators Proxmire and Hartke (and presumably also to Representative Boland) the Administrator made reference to the written answers which the agency had provided to the General Accounting Office on December 4, 1973 (copies of which had also been sent to the present addressees) and then went on to point out that the settlement

agreement which had been concluded was not only fair both to the Government and the contractor but also that "[c]ommencing today, if we do not make this payment [$8,000,000], interest charges of nearly $2,200 per day must be paid under the agreement." The Administrator concluded by saying "I, therefore, deem it in the best interest of the Government to proceed in the immediate future with orderly and substantial fulfillment of the terms of the settlement agreement."

The Administrator's decision to go forward with the settlement payment was met with an immediate, although not direct, response from the interested members of the Congress. In hearings then being held before the Senate Appropriations Committee on H.R. 11576, a bill entitled the "Supplemental Appropriations Act, 1974," Senator Proxmire offered an amendment aimed at restricting the Veterans Administration's contract settlement authority. (The specific language of this legislation is given at a later point.) Following discussion of this matter on the floor of the Senate (see 119 CONG. REC. 41054, 41057-41064 (1973), the issue was referred to a conference committee. In that committee's report, H.R. Rep. No. 93-736, 93d Cong., 1st Sess. (1973), the action that was taken was reported as follows:

> Amendment No. 7: [The conferees agree] * * * to insert language requiring independent audit and approval through the appropriations process of Veterans Administration contract settlements, with an amendment to exclude settlements of $1,000,000 or less. * * *
>
> Although this provision confirms current understandings or reprogramming authority, the conferees recognize that it could place a hardship on contractors who have recently negotiated a settlement with the Veterans Administration, but have not been paid by the agency. The conferees agree that a secured advanced payment in an amount not to exceed $6,000,000 can be made in such situations prior to the effective date of this bill, provided that such payment is formally approved by the Office of Management and Budget, with the understanding that an independent audit will ultimately be performed and that final payment will be subject to Congressional approval.
>
> It is the sense of the conferees that all claims against the Veterans Administration should be processed through the agency board of contract appeals unless there is adequate legal analysis, audit information, and claim documentation to show that settlement outside the board of contract appeals is in the best interests of the Government. This procedure should be taken into consideration when appropriations are requested to fund such claims. It is

further the sense of the conferees that when funds are requested to settle such claims, the sum should include funds to pay interest on the claim settlement.

Notwithstanding the position expressed in the conference report, the General Counsel's office of the Veterans Administration held to the view that the agency could proceed with payment according to the terms of the settlement agreement. The language of the conference report, said this office, "does not have the force and effect of law, but reflects the views of the conferees as to an action which they feel would be suitable for the Agency to take regarding an already existing settlement agreement * * *." The Administrator, however, was of a different mind; his decision was to adhere to the conferee's views. Accordingly, on January 3, 1974, a payment of $6,000,000 was transmitted to the contractor in payment of a portion of the principal amount then due under the settlement agreement.

On the same day, January 3, 1974, the Supplemental Appropriations Act, 1974, was enacted into law. Section 301 of this statute (Pub. L. No. 93-245, 87 Stat. 1071, 1072) provided that:

> * * * No funds appropriated in this or any other Appropriation Act for any fiscal year shall be used to make a settlement of any construction contract by the Veterans Administration in an amount in excess of $1,000,000 which has not been audited independently as to the reasonableness and appropriateness of expenditures and which has not been provided for specifically in an Appropriations Act.

Following enactment of the statute, there was, for a time, no change in position on the part of the Veterans Administration. In particular, on the matter of the audit's scope, the Veterans Administration remained committed to the conduct of an audit that complied, in the main, with the type of audit that had been agreed upon in the settlement agreement.

Word of the agency's position soon found its way back to the Congress and was there met with immediate disapproval. On May 30, 1974, Senator William Proxmire wrote the Administrator to voice his strong displeasure with the agency's intention to continue with a limited audit contrary to the language of the statute and of the conferees' report. The letter concluded with the following statement:

> The conferees on H.R. 11576 recognized the hardship this language might create in the Northport case by approving an advance payment in an amount not to exceed $6,000,000 in the case of contract settlements negotiated but not paid, providing the payment was made before the bill was enacted into law. We both know that this language was included solely to reach an accommodation in the Northport

case. Of course such an accommodation would have been unnecessary if, as you seem to be arguing in your discussions with GAO, the agreement could be carried out in good faith without regard to Congressional action which occurred after the agreement was reached. If you accept the fact that you must return to the Congress for approval of any payments in excess of $6 million, as the law requires, it is beyond me why you believe you can ignore the law's mandate for an audit "as to the reasonableness and appropriateness of expenditures."

Should you persist in your refusal to sanction an audit "as to reasonableness and appropriateness of expenditures" I can assure you that I will recommend that the Senate HUD-Space-Science-Veterans Appropriations Subcommittee simply decline to consider any further request for funds to make payments in pursuance of the Northport settlement. To do otherwise would be to flout a law passed by the Congress six short months ago.

Again rebuffed in its effort to carry out the terms of the settlement agreement, the Veterans Administration responded as it had once before--it acceded to Congressional direction. Thus, on June 19, 1974, it advised the contractor that it would be necessary to expand the audit to include reasonableness and appropriateness of expenditures as those terms were used and understood in the applicable provisions of the Federal Procurement Regulations.

The contractor opposed this turn in position. There then followed an exchange of views of the subject in which neither side was able to accommodate the other's position. The contractor insisted upon adherence to the terms of the settlement agreement; the agency responded by saying that the mandate of the statute had to be followed and that absent this, Congress would not make the necessary funds available. On September 23, 1974, the contractor made a written demand for the payment of all unpaid sums under the settlement agreement together with the interest due thereon. Payment was not made and this suit followed.

II. Discussion

The controversy in this case focuses, in the main, on the meaning to be given to Article 8 of the settlement agreement. As the facts themselves might have foretold, on this issue the parties now stand sharply divided. Both sides take, as their starting position, the fact that the settlement agreement was concluded in light of the appropriations that became available through the enactment into law, on October 26, 1973, of Pub. L. No. 93-137, an act which made

available $68,343,000 to the Veterans Administration for expenditure on major construction projects. Both sides also identify reprogramming considerations as a reason for the existence of Article 8.

It is in their perception of those considerations, however, that the parties differ greatly. To the contractor, Article 8 was meant only to give recognition to the fact that the settlement negotiations had not identified the appropriation status of the relevant account from which the settlement funds were to be drawn. For that reason it became, as the contractor now puts it, "entirely feasible to the Plaintiffs that the Defendant would require a clause that would protect the Certifying Officer in the event that for some unknown reason, the Defendant's concurrent representation as to the availability of funds, viewed in its normally understood context, proved to be inaccurate."

The Government espouses a much different position. Its contention is that Article 8 was not concerned simply with the remote possibility of a shortfall in appropriated funds. Rather, the major purpose of the article was to recognize the risks inherent in the shifting of appropriated funds--risks which might materialize in the form of a Congressional disapproval of a reprogramming action or in some other form of interdiction by the legislature which would produce an equivalent result, namely, render appropriated funds unavailable for payment of the settlement amount. It is the Government's position that the contractor was fully aware of the limitations governing the agency's use of appropriated monies, specifically, that a reprogramming action could not go forward absent Congressional approval and, beyond this, that the contractor had also specifically been told that the Government's liability should not survive an affirmative action by the Congress that would prevent the Administrator from paying the settlement amount.

There are then, two distinct problems involved in the interpretation of Article 8 each of which focuses upon the contractor's understanding. The first, or what might here be best called the primary issue, is concerned with the agency's reprogramming procedure; the second is concerned with other contingencies bearing upon the availability of appropriated funds. Each of these matters is discussed in the section A that follows. In section B, consideration is given to the relationship between Article 8 and the later facts of the case.

A. 1. The Primary Issue: The Agency's Reprogramming Procedure. In considering the intended relationship between Article 8 and the agency's reprogramming procedure, one can begin with what is not debated: the contractor was generally aware of the fact that payment of a settlement amount required the agency to shift funds from a source for which they may initially have been earmarked. This much the contractor acknowledge. Indeed, it was precisely this knowledge,

gained from the parties' earlier experience in the Brooklyn settlement, that led the contractor, in the case of the instant settlement, to accept as plausible the seeming contradiction between the Government's insistence upon Article 8 and its simultaneous assurances that funding was not a problem. What the contractor had learned from this earlier situation was that, until a reprogramming action had been completed, there could be a need, although perhaps no more than a technical one, to protect a certifying officer who was entering into an obligation chargeable to an account then temporarily exhausted of appropriated funds. The risk perceivable in such circumstances was that, because of concurrent obligations or planned commitments, existing appropriations might not actually be sufficient to permit the contemplated transfer of funds.

But it is a long step to read into this basic level of understanding the further proposition now asserted by the Government: that the contractor knew and understood that a reprogramming action would require Congressional approval. Neither as a proposition of law nor as an issue of fact can that argument be sustained.

The reprogramming procedure in issue in this case was first put into use by the Veterans Administration in the latter part of 1969. It was a self-created administrative mechanism whose main apparent purpose was to keep the Congressional appropriations committees (those concerned with the agency's budget) informed of the manner in which appropriated funds were being spent, in particular of those expenditures for project cost increases which required the use of funds that the budget process had initially earmarked for other construction projects. Although it was the case during the period pertinent to this suit (1969-73) that the agency's receipt of lump-sum appropriations left it free to depart from budget projections in its obligation of those funds, it made for better relations with Congress (the appropriations committees), and thereby facilitated the process of obtaining replacement appropriations, to alert the appropriations committees to those expenditures that diverted funds from the objectives for which they had been appropriated.

But of more importance to this case than the objectives of the reprogramming procedure is the fact that that procedure was adopted by the agency in service of its own needs; it was not created in response to any statutory directive. Nor, for that matter, was it ever elevated to the status of a published regulation. This being the case, the reprogramming procedure cannot be passed off now as anything more than what it plainly was: an informal working arrangement between the agency and the Congressional appropriations committees with whom the agency had to deal. Its requirements do not have the force and effect of law. It follows, therefore, that a failure on the part of the agency to observe the requirements of its reprogramming procedure could offer no legal basis for challenging the legality of the expenditure involved, 55 Comp. Gen. 307, 327 (1975); similarly, the

failure of the appropriations committees to acquiesce in the agency's decision to satisfy an obligation through a reprogramming action would not support a claim of unavailability of appropriated funds based on such grounds.

That the present conclusion marks no new departure from the Veterans Administration's own prior understanding of the matter is readily apparent from the record. Without exception, every Government witness who had had any substantial involvement with the instant settlement, from the Administrator on down, conceded that a negative Congressional response to an intended reprogramming imposed a practical rather than a legal impediment to the agency's right to effect payment under the settlement agreement. Only now, in this lawsuit, does the Government seem to argue otherwise. For the reasons given, the contention must be rejected.

Similary unacceptable is the argument that Congressional approval of a reprogramming action, even if not legally required, was nevertheless the ground rule to which the agency always adhered. The contractor flatly denies any such knowledge or understanding of the reprogramming procedure or of any purpose on the part of the Government to include such a condition within the meaning of Article 8. On this point, the record stands convincingly in the contractor's favor.

Not the least of the problems that the Government's argument must face up to is the fact that the Associate General Counsel (the agency's chief negotiator in the instant settlement) made it a specific point in his testimony to state that "I was very careful in my testimony to stay away from the fact that I ever said that it [reprogramming] required Congressional approval. What I said was that money to pay the settlement required reprogramming and that reprogramming was a process where you advised the Congress, but I have never said or taken any position that I advised this contractor that an approval was a requisite."

The Government attempts to overcome the force of this statement by claiming, first of all, that the Associate General Counsel was without authority to conclude any agreement that ran counter to established procedures, and secondly, that, in the negotiations which led to the parties' earlier settlement agreements, the contractor had been repeatedly alerted to the conditional availability of appropriated funds when applied to settlement purposes. Neither argument gains the Government much.

As to the first point, it is sufficient to point out that the reprogramming procedure itself, meaning the document describing it, makes no mention whatever of a need for Congressional approval. The procedure speaks only of advising the appropriations committees of the Congress of cost increases on projects for which construction funds have been appropriated and, so far as pertinent here, of the method by

which the increase will be funded, i.e., whether from savings, from project cancellations, or, from unobligated balances earmarked, but not immediately required for, other specific projects. On the face of it, therefore, the Associate General Counsel's statement disavowing Congressional approval as a required element of the reprogramming procedure was surely not a statement out-of-step with that procedure.

As to the contention that earlier settlement discussions had brought home the fact that settlement funds were always viewed in the agency as being of a conditional nature--i.e., available through a reprogramming action only if given Congressional approval--this too is a position falling short of the facts.

Among the several Government witnesses who testified in this case with respect to discussions had with the contractor in the preceding settlement negotiations, there was not one whose testimony would measure up to what the Government now claims was said. These witnesses identified Congressional involvement in the reprogramming procedure in various ways but the theme was always the same: the Congressional role was a purely passive one.

According to their various accounts, the purpose of the reprogramming notice had been explained to the contractor in these terms: (i) to give Congress an opportunity to object; (ii) to obtain a tacit approval from Congress; (iii) to obtain a clearance from Congress; and (iv) to touch base with Congress. Indeed, to underscore the point, witnesses who did, at first, mention Congressional approval as being an essential ingredient of the reprogramming procedure either corrected such testimony on their own or yielded the point on cross-examination. There is simply nothing in the recounting of the parties' earlier dialogues that would establish what the Government now claims was the case, namely, that the contractor had been repeatedly put on notice that Congressional committee approval was the indispensable requisite to a reprogramming action in the absence of which the agency would not proceed with payment.

Nor might the contractor have been cautioned to draw any different conclusions about the matter from the text of the earlier settlement agreements. None of these agreements contained any contingency language, this despite the fact that all depended upon reprogramming actions to generate the funds necessary for their payment. While these "omissions" are now said to have been a mistake, the court sees it otherwise. The agreements were not made conditional upon the availability of appropriated funds for, until the happening of the events which triggered this lawsuit, the agency never had occasion to deal with a negative Congressional reaction to a notice of reprogramming. In short, as was the case with the testimony that has here been recounted, the written agreements too never gave the matter of an adverse Congressional reaction a second thought.

The Government attempts to make much of the fact that the contractor, in pursuing certain follow-up matters connected with the parties' Hines Hospital settlement of February 1970, had occasion to refer to or to identify Congressional approval as an element of the reprogramming procedure. These two instances, the details of which are left to a footnote, are much too insubstantial to overcome the negation of position that pervades all the rest of the Government's proof. Indeed, considering that proof, it would be far more reasonable to assign to the contractor's isolated use of the term "Congressional approval" nothing more than a perfunctory meaning, to wit: an approval role in name only.

The point bears repeating that nowhere in the Government's proof --be it in the reprogramming procedure itself or in what was said about that procedure during the various settlement negotiations or in the written agreements which followed them--does one even come close to finding any verification of the contention that, in the absence of Congressional approval of a reprogramming action, the Veterans Administration would not consider, either as a matter of established procedure or settled practice, appropriated funds to be available for payment of a settlement. And even if one looked only to the agency's actions in this case rather than to its words, the proof would still be lacking. After-the-fact rationalization cannot obscure what those actions so plainly show: it was obedience to political pressure rather than allegiance to established procedures which dictated the decision not to go forward with the reprogramming.

Such being the state of the proof, it cannot now be accepted that a requirement calling for Congressional approval of the reprogramming action was subsumed in the meaning of Article 8. Insofar as reprogramming was concerned, that article means no more than what the contractor had been told by the Associate General Counsel: it was to guard against a violation of the Anti-Deficiency Act, a precaution mutually understood to have been taken in the light of an uncertainty concerning the source from which appropriated funds were to be drawn.

2. The Additional Meaning of Article 8. It will be recalled from the facts earlier given that, at the time the settlement agreement was signed, the Government took occasion to declare that Article 8 was intended not only to guard against a violation of the Anti-Deficiency Act but was also meant to protect the Government from liability in the event of an affirmative action by the Congress that would prevent the Administrator from paying. Not unexpectedly, the Associate General Counsel's statement is now the subject of much argument, the most serious thrust of which is the plaintiff's contention that the words are deserving of no legal significance whatever.

The argument draws heavily on the attendant circumstances; they are indeed disconcerting. By the witness' own account of it, the exchange which brought out his statement occurred during a conversational lull and while the parties were awaiting the arrival of the

contracting officer, all this, the court might add, being just shortly before the agreement was to be signed. Further--and this again is according to the declarant's account--the full purpose of Article 8, as then revealed by the Government, not only carried beyond the contractor's own announced understanding of the matter, but represented an expression of intent that had never previously been revealed to the contractor. Despite, this, the Government's statements are said to have elicited no more than a shrug-off, and this not even from the contractor's attorney--the party to whom they had been addressed--but from the sponsor of the joint venture, Mr. Donovan. No less troubling is that not one further word of explanation was given nor was any confirmation of understanding sought. The Associate General Counsel simply assumed that the concerns subsumed in this added purpose for Article 8 were judged to be as remote to the contractor as they then were to the Government. Silence seeming in order, the matter was therefore simply dropped.

Despite this background and the uncertainties of communication that it would suggest to all, the court cannot place the Government's words in limbo--to treat them simply as utterances that may be ignored. Had Article 8 been the subject of prolonged or intensive prior discussion, then perhaps it would be in order to dismiss the Government's statements as no more than spurious afterthoughts deserving of no attention.

But such was not the situation here. Article 8 was a last minute interjection that was introduced by the Government at a point when the negotiating representatives had assumed that a completed agreement had already been achieved. Its purpose was discussed between the parties --at the time it was first raised--only in the briefest of fashion and the understanding of the clause which the contractor had arrived at prior to the date of signing was as much, if not more, the product of its own perception of the Government's concerns than of any clear expression of purpose from the Government itself.

As has been noted in this opinion, the parties' views did correspond, at least insofar as a primary meaning for Article 8 was concerned. However, the circumstances out of which that understanding evolved should have cautioned all to seek verification, for certainly a clause of such seeming importance to the Government would warrant more than just the cursory attention that had been given it up to this point in time.

Indeed, it was precisely this purpose which prompted the Government to address the subject at the time of signing. In terms of time, place, and manner, the Government's articulation of purpose may surely not be praised. The dialogue had been initiated at the last moment because of a lingering uncertainty on the Government's part that the contractor appreciated the full intended meaning of Article 8; it elicited a response that confirmed that uncertainty and ended with a surmise that, by a shrug, it had been manifested that all was now understood.

Yet, despite these attendant deficiencies, it must be concluded that at least enough was said to have placed the contractor on notice that Article 8 was intended to reach beyond immediate concerns with the sufficiency of existing appropriations. In other words, the contractor was made aware that there was more to Article 8 from the Government's point of view than the contractor had first thought. Whether that additional purpose was actually understood is, of course, another matter.

The record as it stands is susceptible to two interpretations. The first is that there was no agreement reached at all between the parties. An inferable absence of mutual understanding would follow from the fact that, while each of the parties had been made aware that his own understanding of Article 8 was at odds with the other, neither attempted to clarify the matter. The contractor sought no further explanation; the Government provided none. This then, would be a plain case of an absence of mutual understanding attributable to mutual fault. RESTATEMENT (SECOND) OF LAW, CONTRACTS § 21A(1)(b), Comment d (Tent. Draft Nos. 1-7, 1973). The other reading that may be given to the record--and this seems the more realistic one--is to conclude that the contractor understood what the Government had said--for the words were certainly plain enough--but thought the likelihood of an affirmative action by Congress so remote as to require no comment. This was the conclusion which the Associate General Counsel drew from the contractor's shrug--it was both an acknowledgement of understanding and a dismissal of concern. Since this conclusion not only fits the facts but also preserves the benefit of the parties' agreement, it represents the preferable interpretation to apply. See Consumers Ice Co. v. United States, 201 Ct. Cl. 116, 123-24, 475 F.2d 1161, 1165 (1973). Accordingly, for the reasons stated, it is concluded that Article 8 not only comprehends a concern with the Anti-Deficiency Act but also was intended to free the Government from its liability under the settlement agreement in the event there should occur an affirmative action by the Congress that would prevent the Administrator from paying.

B. The Application of Article 8 to the Facts. In considering the meaning of Article 8 in light of the facts that transpired here, one conclusion that may be immediately drawn is this: the Government's failure to have paid timely, and, in full, the first principal payment due under the settlement agreement was a breach of contract. At the time that payment became owing neither of the contingencies subsumed in Article 8 had been realized. Appropriated monies then were available to the agency, as was plainly evidenced by the reprogramming notice that had been transmitted to the Congressional committees, and there had occurred no legislative action of a character sufficient to prevent the Administrator from paying. All that had occurred to that point was Congressional disapproval of the intended reprogramming and that disapproval, for the reasons earlier explained, can have no bearing upon the parties' rights and obligations under the settlement agreement.

The contractor's entitlement to the second principal payment is another matter. That payment was not due until the end of January 1974, some three weeks after the enactment of Pub. L. No. 93-245, 87 Stat. 1071. The issue is whether this statute, now 31 U.S.C. § 700d (1976), has any bearing upon the parties' rights and obligations under the settlement agreement. The answer is that it does.

The statute (the text of which appears in an earlier part of this opinion) narrowed the agency's authority with respect to construction contract settlements by imposing upon all such settlements, when exceeding $1,000,000 in amount, the dual requirements of an independent audit as to reasonableness and appropriateness of expenditures and specific recognition in an appropriations act.

But of more immediate importance to this case than the restrictions of authority announced by the statute is the fact that these restrictions were meant to apply, not just prospectively, but to existing appropriations as well. This is evident from the act's language: its requirements are addressed to "funds appropriated in this or any other Appropriation Act for any fiscal year." The language, being so plainly all inclusive, must displace that general presumption which accords to Congress an intent that statutes are to have a prospective application only. Sea-Land Service, Inc. v. United States, 204 Ct. Cl. 57, 78, 493 F.2d 1357, 1369, cert. denied, 419 U.S. 840 (1974).

Any doubt as to the correctness of this reading would have to be relinquished in light of the legislative history. This clearly reveals that Congress intended to bring the instant settlement within the reach of the statute by restricting the use of the funds out of which that settlement was to be paid. Since Congress has the power to amend an appropriations act, United States v. Dickerson, 310 U.S. 554 (1940); Los Angeles v. Adams, 556 F.2d 40, 48-49 (D.C. Cir. 1977), and did so here, the consequences must be as the statute directs: appropriated funds shall not be used in the payment of a construction contract settlement exceeding $1,000,000 in the absence of a specified audit and recognition of the settlement in an appropriations act. By virtue of these substantive limitations on the use of appropriated funds, the Veterans Administration was prevented from paying the remainder of the amount due on the settlement.

The question that remains is whether, notwithstanding these statutory restrictions, the resulting failure of a second payment is actionable in this court. It is not. The restraint on the agency's spending authority that took place was precisely the sort of condition to which the parties had made their settlement agreement subordinate, namely, an affirmative action by the Congress that would prevent the Administrator from paying. "[W]here * * * liability rests wholly upon the authority of an appropriation they must stand and fall together, so that when the latter is exhausted the former is at an end * * *." Shipman v. United States, 18 Ct. Cl. 138, 147 (1883).

Cases such as Corliss Steam-Engine Co. v. United States, 10 Ct. Cl. 494 (1874), aff'd, 91 U.S. 321 (1875), and Seatrain Lines, Inc. v. United States, 99 Ct. Cl. 272 (1943), dictate no different conclusion. Those cases, like the one at hand, involved an executive department's inability to pay a contract amount because of disabling language in a later-passed appropriations act. But, unlike this case, the right to the payments there involved was absolute; not conditional. Hence, a breach of contract action survived the expenditure restrictions that had been placed upon the agency's appropriations. The rationale of these decisions is that a contract of the United States, if valid when made, is to be governed by the same rules that apply to contracts between private parties. Here, however, the Government's liability was conditioned upon the continuing availability of appropriated funds to the agency. The risk perceived in this contingency having come about, the Government's liability, by the terms of the agreement, was thereby extinguished.

It should be made clear that what has been said concerning the unavailability of appropriated funds applies only to the second principal payment that was due to the contractor under the settlement agreement. Only as to that payment is the Government's liability discharged. As to the first principal payment, however, appropriated funds were available at the time that payment fell due. To have paid only $6 million on January 3, 1974, when, in fact, the settlement agreement had specified an $8 million payment by December 10, 1973, was a violation of the Government's contract obligation. The occurrence of those later events, the results of which have here been held to excuse the Government from any further contract liability, have no bearing upon the preceding breach and the damages entitlement that flows therefrom. The right to the first payment was a vested right. RESTATEMENT (SECOND) OF LAW, CONTRACTS § 281, Comment a (Tent. Draft No. 9, 1974); RESTATEMENT OF LAW, CONTRACTS § 608, Comment d (1932).

Accordingly, the contractor is entitled, first of all, to a judgment for the principal amount remaining due on the first payment, namely, $2 million. Additionally, since the settlement agreement provided that interest at the rate of 9.75 percent per annum would accrue on any principal amounts not paid when due, the contractor is therefore also entitled to interest, first, for the failure to have been paid on time; second, for the later failure to have been paid in full. By way of interest then, the contractor is entitled to the contract-specified rate, 9.75 percent per annum, on $6,000,000 for the period from December 10, 1973 (the due date), until January 3, 1974 (the date of partial payment), and, on the balance of the first payment still owing ($2,000,000), from December 10, 1973, until the date said amount is finally paid.

A final consequence of the statute that needs to be addressed concerns the Government's position that the contractor should be obliged to honor the settlement agreement by submitting to the audit called for by the statute and, by such action, facilitating the future availability of appropriated funds.

This position has many problems; not the least among these is that the form of audit contemplated by the statute--examination of the reasonableness and appropriateness of expenditures--introduces the very type of audit which the contractor had rejected in the first place. To now insist upon adherence to these altered audit standards would, on the facts of this case, be equivalent to imposing upon the contractor an agreement that was never made. This the Government cannot do. Absent the reservation of such a right, the Government cannot enforce the benefits of the settlement agreement against the contractor, and, at the same time, vary its own obligation thereunder. Chicago & Northwestern Ry. v. United States, 104 U.S. 680, 684 (1881).

The limitations on spending authority that now must govern the agency's actions under 31 U.S.C. § 700d (1976), serve also to discharge the contractor from any further obligations under the settlement agreement. RESTATEMENT (SECOND) OF LAW, CONTRACTS §§ 281, 284 (Tent. Draft No. 9, 1974).

CONCLUSION OF LAW

Upon the findings of fact and the foregoing opinion, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover the sum of $2,000,000, plus interest on that amount at the contract-specified rate of 9.75 percent per annum from December 10, 1973, until the date payment is made and that plaintiff is also entitled to interest only, on the sum of $6,000,000, at 9.75 percent per annum from December 10, 1973 until January 3, 1974.

The judgment entered herein shall be without prejudice to the parties' rights to pursue further relief in an appropriate forum in connection with the contract claims underlying the settlement agreement brought into issue in this case. If in further proceedings the defendant is found liable on the underlying contract claims in an amount greater than the non-interest amount of the court's judgment, in that event only the non-interest portion of the court's judgment, not the interest portion, shall be treated as an offset against such additional liability. The court does not pass on the question of whether, if the amount for which defendant is held liable in further proceedings is less than the principal amount of the settlement, the defendant shall have the right to sue plaintiff for the excess or to collect the excess by other methods.

Except as above provided and contemplated, all obligations contemplated by the settlement agreement are forever discharged.

d. Duty to Fund Changes/"Limitation of Government's Obligation" Clause

AEROJET-GENERAL CORPORATION

ASBCA No. 13,548 (1970)

This appeal followed denial by the contracting officer of appellant's request that additional funds be allotted to the subject contract, pursuant to Clause 66, General Provisions "A" thereof, entitled "Limitation of Government's Obligation" and Clause 55, ibid, entitled "Allotment of Funds." Relief request originally by the appellant was (1) that the Board determine that appellant is entitled to the allotment of additional funds and (2) that the Board determine that appellant is entitled to an equitable adjustment because of the failure of the Government to allot funds as required by the contract. Only questions of entitlement have been submitted to the Board at this time.

* * * * * * * * *

The dispute now before us arose in May, 1968, during conferences between the parties concerning additional funding for Item 1 (the research and development portion of the contract). The record does not contain testimony concerning the content of these conferences, however, the positions taken by the parties are reflected in correspondence and other documents which are in the record. As an outgrowth of the conferences, the Government sent a proposed supplemental agreement to appellant, which was numbered P142. This proposed agreement increased the billing price of Item 1, "as an interim measure," from $187,560 to $319,506 per motor delivered or static fired. It also allotted an additional $1,480,000 to the amount set forth in Clause 66 of General Provisions "A", theretofore $13,706,000, "thereby completing the allotment of funds and rendering inapplicable said Clause 66 and the 'Special Termination Costs' clause." (Rule 4, Tab C)

On June 4, 1968, appellant returned the proposed supplemental agreement unexecuted. Appellant stated: "The effect of this Supplemental Agreement if accepted by the contractor is to increase the R&D contract funds by $1,480,000. At the same time, however, it terminated the Government's obligation to provide additional funds for the R&D segment of the *** total package contract." Appellant adverted to the description in the Request for Proposals of the procurement as a "package buy," and also to the fact that there was only one target cost, target profit, target price and one ceiling for the entire package. (Rule 4, Tab D)

The letter went on to refer to a statement in the RPF "that the proposed incentive plan should provide for trade-offs of total cost versus performance, reliability and schedule." It was appellant's opinion that a majority of the performance trade-offs would be determined during the R&D phase of the program.

During the conferences, the Government offered the following for appellant's consideration:

> Each item of work on the contract has a specified price in the schedule of the contract. Included among these items is 'Item 1 - R&D' with a tentative price. In the definitive contract there are two work statements (one for R&D and one for production) and two sets of terms and conditions applicable to R&D and production respectively. The R&D General Provisions Clause 66 entitled 'Limitation of Governments Obligation' states as follows: 'Of the total price of Item 1, (referring to the tentative price set forth in the Schedule), the sum of $_____ is presently available for payment and allotted to this contract.' The Air Force has therefore concluded that the contractor agreed to accept separate funding limits on R&D and production and that the stated price for Item 1 as amended by subsequent changes represents the limit of the Air Force's R&D funding obligation. (Underscoring supplied.)

Appellant called its attention to its previous and present disagreement with the above conclusions. It stated that the item prices, particularly that for Item 1 (R&D) were tentative prices for budgetary management and were not intended by the parties as task price ceilings; on the contrary, it asserted, it was understood that funding limitations would be increased as necessary.

Appellant's closing paragraphs emphasized that there was one contract, upon completion of which "the contractor's total expended costs will be compared to the total target cost to determine his overrun or underrun and proportionate incentive share. At that point in time our expended R&D and production costs will be lumped together to determine the final contract price. What a strange anomaly that this can be done once the contract is being performed." Appellant requested reconsideration of the Government's position, and asked that additional "R&D funding" be provided as required, without the qualification that it represented total funding under Item 1.

* * * * * * * * *

Appellant contends, under the circumstances outlined above, that the Government's misinterpretation of the Progress Payments clause and refusal to provide further funding for Item 1 as of May 27, 1968,

constituted constructive changes of the contract, and that it is therefore entitled to an equitable adjustment. Subsidiary to this contention, appellant argues that the Government was obligated, under the contract, to allot funds up to the ceiling price so long as the contract was viable, regardless of whether appellant was engaged in the performance of Item 1 or the remaining items, or both.

The Government contends that it had no obligation to provide funds for the performance of Item 1 after it had declared this Item to be "fully funded", because although there was a single contract document, the contract was separable into two parts. It concedes, however, that after the last unit of all items is delivered, appellant will be entitled to be paid the then ceiling price for the entire contract regardless of the amounts expended in the performance of any one or more items. The effect of the Government's position is therefore, in our opinion, that appellant must provide interim financing for the performance of each item within the stated obligated funds, although it may finally be entitled to payment for the delivered motors, up to the ceiling price for the entire contract.

DECISION

On the basis of the foregoing, we conclude as follows:

1. The subject contract provided for single target cost, target profit and target price, and a single maximum or ceiling price.

2. The said contract did not provide for either target cost, target profit or target price, or a ceiling or maximum price for any separate item listed in the contract.

3. Designation of a "total target price" for Item 1 by unilateral change order constituted a contract change.

4. Refusal to make progress payments, solely on the basis that requested progress payments would or did exceed limitations based upon a price of Item 1, constituted a contract change.

5. Appellant is entitled to an equitable adjustment based upon increased costs of performance of the subject contract as a result of the changes mentioned in conclusions 3 and 4 above.

6. At the time of issuance of contract change notices, the contract provisions obligated the Government to increase the allotment of funds to the said contract from time to time, in amounts at least equal to the increased costs demonstrated by appellant to have been incurred in the performance of the changed work.

7. At the time of issuance of contract change notices, or at the time of increase of allotments to the contract, whichever is later, the Government is obligated under the contract to increase the total target cost, total target profit (if applicable), total target price, maximum or ceiling price, and interim billing price.

8. The Government failed to increase the allotment of funds and the pricing elements mentioned in conclusions 6 and 7 above.

9. Pursuant to paragraph (5) of Clause 66, General Provisions "A," appellant is entitled to an equitable adjustment for any increase in cost resulting solely from the Government's failure to allot sufficient funds in a timely manner, as concluded above.

10. Appellant is entitled to an equitable adjustment for any increased cost resulting from the refusal of the Government to make progress or delivery payments based solely upon limitations of prices which the Government failed to increase as stated above.

DISCUSSION

I

Although this case presents a rather complicated contractual situation, the issues concern ordinary aspects of contract administration. The complications of the contractual situation arise because the subject contract concerns a multiple number of items; one of the items is purchased from an appropriation account different from all the others; the contract contains incentive-pricing features, such features being numerous and concerning cost, performance and schedule objectives; the contract is incrementally-funded; and there is provision for progress payments. Additionally, contract administration became complicated because there were numerous changes, and there was apparently some concurrency of R&D and production efforts. None of the foregoing complications stem solely from characterization of the contract as a "total package contract", "a total package procurement concept contract", "a package buy", or a "total package buy."

In light of the foregoing, we do not propose to analyze the arguments presented to us, based on the special characteristics of whatever a package procurement (or any of the other descriptive terms) is, and the state of mind that it produces in a contractor.

The first real issue in this case is whether the Government properly refused to make a progress payment when requested to do so by Request Number 104.

Whether the request for progress payment No. 104 was properly refused does not present a funding question. However, the refusal was based upon the philosophy underlying the previous funding determination made by unilateral Change Order P-142, subsequently affirmed in the contracting officer's decision here on appeal. That reasoning was that the subject contract was in effect a cover sheet for two or more separate contracts. If this is correct, then the contracting officer's direction to submit separate progress payment requests is appropriate; and if that direction is appropriate, then a fortiori the limits of progress payments for each portion of the contract (assuming there are only two, namely, R&D and production) must be based upon whatever might be the "total contract price" of the portion concerned, and the contract price of items to be delivered under the portion concerned. However, we do not agree that the underlying reasoning is correct.

Appellant, as we have stated previously, emphasizes strongly that the package feature of the contract impels a post hoc conclusion that the contract is a single entity. Whether this is correct is not necessary to this decision. In our opinion the contract provisions themselves impel this conclusion.

In our opinion, the record is clear that the contracting officer believed that the "Limitation of Government Obligation" and "Allotment of Funds" clauses had the effect of imposing a ceiling price on the R&D work, or at the very least a limitation of price in the nature of the effect of a Limitation of Cost clause in the cost-reimbursement type procurements. We regard the clause in the subject contract as having principally interim effect during performance of the contract, important effect in the event of termination prior to completion of performance, but, by its own terms, no effect at the completion of the contract.

The contracting officer testified that he directed appellant to continue work on Item 1 (regarding it as a separate contract) after he declared unilaterally that separate portion of the contract to be "fully funded." Inconsistently, however, he conceded that regardless of appellant's expenditures in the performance of Item 1, it could nevertheless, through the medium of being paid the single ceiling price under the entire contract, be reimbursed for expenditures over the supposed ceiling price for Item 1. We are of the opinion that a ceiling must be a permanent pricing structure which pervades an entire contract from beginning to end (which, of course, can be appropriately altered); while it is possible to have funding and contractual milestones of one sort or another, it is a contradiction of concepts to speak of an amount as being a ceiling temporarily, and then be superseded by another ceiling at a later time. That is, unless clearly spelled out in the contract.

We are impressed with the fact that clear spelling out of the Government's present position would have been a simple task. For example, instead of stating in the schedule, "The price of this Item is ***", the contract could have stated a target cost, target profit, target price and ceiling price for each item, or groupings of items. This, incidentally, would be very important if the intent of the parties were actually to have separate and severable contract portions, since it is well-known that R&D work is usually priced with higher profit ratios than is production work.

By the same token, if it were actually the intention of the parties that the Government should make progress payments only up to a limitation of 70% of a certain amount of dollars, that could have been stated in the progress payments clause applicable to Item 1, in General Provisions "A", in one of two ways. There could simply have been a statement that progress payments would be made up to X dollars; or the description "Total Contract Price" could have been defined differently from the ASPR and Instruction Sheet definition so as to refer to the contract price for Item 1.

It is significant that neither a ceiling price for Item 1, nor a special limitation on progress payments relating to Item 1, were discussed during the negotiations.

On the basis of the contract, as written, we cannot spell out either of these special situations now contended by the Government. Appellant's interpretation not only falls within the realm of reasonableness, but we find it impossible to arrive at any finding of intent contrary to that preferred by appellant.

We think it should be clarified that the alleged failure of the Government to allot sufficient funds to the performance of Item 1 does not have a direct bearing on the insufficiency of the progress payments in the period October - December, 1968. The record shows that Item 1 at those times (and after May 27, 1968) was "funded" for more than $25 million. The costs incurred as of December 3, 1968, amounted to about $29.7 million (assuming they were all reimbursable under the applicable cost principles). Progress payments of 70% of this amount would have been slightly under $21 million. Thus the allotment of funds as of December 3, 1968 (the date of the revised request No. 104), were clearly sufficient to make all the progress payments that appellant would have been entitled to, but for the other erroneous limitations imposed by the Government.

Accordingly, we conclude that the direction of the contracting officer that appellant submit separate request for progress payments for the R&D and production portions of the contract, thus also requiring that limitations of progress payments be based upon an assumed separate ceiling price for Item 1, constituted a change to the contract, for which appellant is entitled to an equitable adjustment.

The funding issue is a little more intricate than the progress payments issue.

First, it is clear that the failure of the Government to allot additional funds is sufficient for timely performance of the contract, the incurrence of additional costs by the appellant solely because of such failure, and the subsequent allotment of additional funds by the Government, entitle appellant to an equitable adjustment in the appropriate target, billing and ceiling prices. (See, quotation from subparagraph (5) of Clause 66, General Provisions "A", above.) Also, failure to agree upon such an equitable adjustment constitutes a dispute cognizable under the Disputes clause. (Ibid.)

When the dispute arose between the parties initially and up to the time that the contracting officer decided that Item 1 was "fully-funded", that dispute was on the basis that the Government had not sufficiently funded the contract insofar as the undefinitized change orders were concerned. At that time, appellant estimated the value of those changes at about $11 million; the Government considered their value to be slightly over $5.3 million. In a very solicitous gesture, the Government also reserved more than $2 million and allotted that amount to the contract in order to increase the billing price (thus enabling appellant to liquidate progress payments at a more rapid rate, and increasing eligibility for further progress payments). We do not find it necessary to decide the correctness of the Government's action at that time, since, under Clause 66, General Provisions "A", we are concerned only with the sufficiency of allotments "for timely performance of the contract."

Up to the time of the contracting officer's decision (of August 1, 1968), the record does not contain evidence of insufficient funding for timely performance of the contract. Appellant had not up to that time been denied any requested progress payments. The record does not show that deliveries of motors under Item 1 at that time were of such magnitude that funds allotted could not cover interim billing price totals.

The facts adduced to leading to a finding that the change orders issued required appellant to perform the changed work, and the contracting officer freely admitted that he did require such work after having announced "full funding" of Item 1. Thus the case falls squarely within the pattern of Douglas Aircraft Company, Inc., ASBCA No. 10495, 66-2 BCA § 6049. Regardless of the sufficiency of the funding at the time the change orders were issued, the Government remained under an obligation to fund at least any increased cost demonstrated by appellant, on an incremental basis, as the work progressed. Appellant's testimony was that as of May 7, 1969, the estimated incurred cost on Item 1 was more than $36.2 million.

(Tr. p. 113) Funds allotted through that date amounted to $31.6 million; however the billing prices had not changed to match even the allotment of funds, so that appellant at that time was not able to bill for delivered motors, and incurred increased cost in the performance of the changed work. (Tr. p. 114) It is implied that such increased cost consisted in the main of the cost of financing the changed work. This has been held to be properly includable in an equitable adjustment, under a fixed-price contract. R. W. Borrowdale Company, ASBCA No. 11362, 69-1 BCA § 7564, affirmed on motion for reconsideration in 69-2 BCA § 7881; Bell, et al. v. United States, 186 Ct. Cl. 189, 404 F. 2d 975 (1968). However, the provisions of Clause 66, General Provisions "A" obviate reliance on these cases. Subparagraph (5) requires merely incurrence of additional costs if allotments are not sufficient for timely performance of the contract.

We do not decide at this time the extent to which additional funds must be allotted, because under the stipulation of the parties to exclude determination of amount at this time we are unable to find the particular dates and state of progress under the contract when funding became insufficient for payment for delivered motors. For the guidance of the parties, however, we can state categorically that any equitable adjustment need not be based upon the concept of full funding as of May 27, 1968. The parties agreed upon an incremental funding scheme, and, to the extent that incremental funds were sufficient to make either progress payments or payments for delivered motors, the Government complied with the contract. We can also observe the likelihood that the failure to make progress payments may at some time or other have been concurrent with the failure to provide sufficient incremental funding; to the extent that this will be shown to have occurred, the equitable adjustment must assure that no duplication occurs.

Accordingly, this appeal is sustained to the extent stated above. The matter is remanded to the parties for the purpose of negotiating an equitable adjustment of the target cost, target profit (if affected), target price and ceiling price of the entire contract. In the event negotiations fail to result in agreement, the contracting officer shall issue a unilateral determination from which further appeal may be taken to the Board.

Section 2. Assignment of Contract - Novation

ISOTOPES, INC.

ASBCA No. 15663 (1973)

DECISION ON GOVERNMENT'S MOTIONS TO DISMISS

The Government has moved to dismiss these appeals on the ground that the named appellant is not a proper party. The parties were afforded a hearing on the motions.

ASBCA No. 15663 involves a claim for cost overrun and increase in fee in the total amount of $6,530 under a CPFF contract (hereinafter referred to as TRITON I) awarded to Hazelton Nuclear Science Corporation (hereinafter HNS), executed 21 February 1966. In ASBCA No. 15874 the contractor is seeking recovery of a cost overrun and additional fee in the total amount of $5,210 under another CPFF contract (hereinafter referred to as Flambeau) with HNS, executed 22 March 1966.

HNS at the time these contracts were executed was a wholly-owned subsidiary of Isotopes. The proposal culminating in the Flambeau contract was submitted by HNS. That which led to the TRITON I contract was submitted by Isotopes but, at the request of the Navy, based principally on administrative convenience, the contract was awarded to HNS (ASBCA No. 15663, R4-5).

By resolution dated 18 April 1967 Isotopes merged HNS into itself, assuming all the liabilities and obligations of HNS. A certificate of the merger, filed with the Secretary of State of the State of California on 11 July 1967, appears in the record (ASBCA No. 15663, R4-17)

By letter of 2 August 1967, Isotopes initiated a request to the Department of Defense to novate the Flambeau and TRITON I contracts along with several other contracts between military departments and HNS. For reasons not explained in the record, the request to novate Flambeau and TRITON I was not honored (R4-C). The written record contains no response from DOD to the request for novation of these two contracts and no testimony was elicited at the hearing to clarify this matter.

Following the merger of HNS with Isotopes, the Navy and Isotopes dealt with each other both in correspondence and in conference as the contracting parties (ASBCA No. 15663, R4-12, 14, 16, 17, 18, 19, 20, 21, 23, 26; ASBCA No. 15874, R4-E, 3, 7, 8, 9, 10, 11, 14).

The claims which gave rise to these appeals were both filed by Isotopes (ASBCA No. 15663, R4-23, dated 28 August 1968; ASBCA No. 15874, R4-8, dated 13 September 1968). Subsequent correspondence concerning both claims including preliminary denials by the contracting officer, was between Isotopes and the Navy. At no time prior to the issuance of the contracting officer's final decisions did he make objection or even make comment to Isotopes as to its being the proper party to make the claims, or to its carrying on correspondence and negotiations concerning them. There is no indication or allegation that the making and pursuing of the claim by Isotopes in any way prejudiced the Government. From the time the claims were first advanced until the final decisions denying them were issued none of the letters written by the Government concerning them was addressed to HNS. However, the final decisions were addressed to HNS, c/o Isotopes, Inc.

Appeals from both denials were taken by and in the name of Isotopes. As far as we can determine it was not until the Government filed its answers to the complaints in these appeals that it first raised an objection to Isotopes as the proper party to make the claims and take the appeals.

DECISION

We hold that from the time of the merger of HNS into Isotopes, when the former ceased to exist, Isotopes was the real party in interest with respect to these contracts, having succeeded to all the interests and rights of HNS in claims arising under these contracts. We further hold that Isotopes lawfully acquired its right, title and interest in these contracts by operation of law without violation of 31 U.S.C. Sec. 203 or 41 U.S.C. Sec. 15, the anti-assignment statutes. See Seaboard Air Line Railway v. United States, 256 U.S. 655 (1921); Consumer's Ice Company v. United States, Ct. Cl. No. 815-71, 16 March 1973; see also Aerospace Support Equipment, Inc., ASBCA No. 13579, 71-1 BCA par. 8904. The Government has recognized Isotopes as successor in interest by dealing with it, since the merger, in matters relating to the contracts and these particular claims. We find no prejudice to the Government in permitting Isotopes to pursue these appeals in its own name. We think that it would be proper, even at this time, for the Department of Defense to novate these contracts but attach no significance as far as these appeals are concerned to its failure to have honored Isotope's earlier request that it do so.

The Government's motions to dismiss these appeals are denied. The Board will shortly schedule a hearing on the merits of the appeals unless, because of the relatively small monetary amounts involved, the parties would prefer to submit them on the written record.

Section 3. Assignment of Claims

a. Priorities

GREAT AMERICAN INSURANCE CO. v. THE UNITED STATES

Ct. Cl. No. 151-72 (1974)

Cowen, Chief Judge, delivered the opinion of the court:

In this case, we are once again asked to determine the rights of several parties to priority in the balance due under a Government contract. On June 24, 1970, the United States, through the Department of the Navy, contracted with T. G. Williamson, doing business as Williamson Construction Company, for the replacement of exterior siding on Johnson Housing (MEMQ), Naval Air Station Memphis, Millington, Tennessee. Plaintiff, Great American Insurance Company, executed both performance and payment bonds for the contract pursuant to the Miller Act, 49 Stat. 793 (1935), as amended, 40 U.S.C. §§ 270a-270e (1970). On October 19, 1970, the contractor assigned to Boulevard State Bank all moneys due or to become due under the contract, and on the same day, the assignee bank gave notice of the assignment to plaintiff and defendant.

In this action, plaintiff seeks reimbursement from the Government for payments made to laborers and materialmen under the terms of the surety's payment bond. The defendant asserts a right to $10,200 of the contract balance on the basis of a change order dated August 16, 1971, which assessed that amount against the contractor as liquidated damages for delay in completing the contract. Defendant further contends that in the event this court determines that any amount paid by defendant to the assignee bank was in fact erroneously paid, then defendant is entitled to a judgment against both the assignee and the contractor to the extent the surety is awarded a recovery herein. The Government has impleaded the contractor and the assignee bank as third-party defendants in this suit, and they contest their liability to the defendant.

The case is before the court on the parties' cross-motions for summary judgment, and there are no factual issues except those relating to the Government's right to judgment against the contractor.

The total contract price for the construction project was $102,564. During the performance of the contract, the defendant made two progress payments to the Boulevard State Bank. The first payment was made on December 3, 1970, in the amount of $42,660 (excluding retainages), and the second progress payment was on January 6, 1971, in the amount of $31,160 (excluding retainages).

On March 26, 1971, the final housing units in the project were accepted by defendant as complete. Following completion of the contract, on May 10, 1971, Great American advised the defendant in writing that it had notice of unpaid claims of subcontractors in excess of $31,000, which amount exceeded the unpaid contract balance then being held by the Government ($28,718). Great American then requested that the surety's name be added as joint payee in any future payments to the contractor or that all future payments be withheld. Also, on May 10, 1971, the contractor requested that a "final payment" be made on the contract in the amount of $28,718.

The Government officer responsible for administering the contract took the position that payment could be withheld at the request of the surety only if the surety presented evidence of actual payment of the contractor's obligations, together with a court order or a written agreement signed by all parties. On May 19, 1971, the Government made a payment designed on the voucher as "Third Partial Payment" in the amount of $7,108 (excluding retainages) to the assignee bank.

On June 29, 1971, the contractor filed a petition in bankruptcy, and on July 1, 1971, he was adjudicated a bankrupt. The contractor alleges that notice of the bankruptcy was given to the United States by mailing notice on or about July 1, 1971, to the District Director of Internal Revenue, at Wichita, Kansas, and to the United States Attorney in Topeka, Kansas.

During the pendency of the bankruptcy, Williamson applied to the District Court for the District of Kansas for an order restraining the plaintiff from pursuing the prosecution of pending suits against the bankrupt. Williamson's application referred to two suits brought in the Western District of Tennessee by the subcontractors, Willey Painting Corporation and Crump Line & Cement Company, against the surety under the payment bond. In these actions, the surety asserted a claim for a judgment over and against Williamson for the amount of any judgment entered against the surety in favor of the subcontractors.

By order of September 14, 1971, the referee in bankruptcy refused to enjoin the prosecution of the suits in the Western District of Tennessee, because he found that the surety's suit was necessary to enable the surety to pursue the contract retainages under the contract between the bankrupt and the United States. The referee further found that the subject matter of the litigation in Tennessee did not constitute an asset of the bankrupt's estate, and the referee also ordered the trustee to abandon any claim to any retainage funds held by the United States under the contract in question. On March 3, 1972, T. G. Williamson received a discharge in bankruptcy by order of the district court for the District of Kansas.

It is established that during September 1971, the plaintiff surety discharged all claims made against it by reason of its payment bond. In so doing, the surety paid out $32,772.49, which exceeds the surety's total claims in this action.

There are three distinct contract funds in issue: (1) the $7,108 payment made to the assignee bank on May 19, 1971; (2) $10,200 claimed and retained by the Government as liquidated damages pursuant to the change order of August 16, 1971; and (3) a contract retainage in the amount of $11,400, which the Government admittedly holds as a stakeholder.

I

The principal issues raised by this case concern the $7,108 payment made to the assignee bank, and the liability of the contractor or the assignee bank to the defendant for its erroneous payment of that amount. We have repeatedly held that the surety who satisfies the contractor's obligations to pay laborers and materialmen under the payment bond has an equitable interest, superior to the interest of the contractor's assignee or the contractor's trustee in bankruptcy, in the unpaid contract balance held by the Government as a stakeholder. See, e.g., Argonaut Insurance Co. v. United States, 193 Ct. Cl. 483, 496, 434 F. 2d 1362, 1369 (1970); National Surety Corp. v. United States, 132 Ct. Cl. 724, 728-29, 133 F. Supp. 381, 384, cert. denied, 350 U.S. 902 (1955); Continental Casualty Co. v. United States, 145 Ct. Cl. 99, 169 F. Supp. 945 (1959). On May 10, 1971, when plaintiff notified defendant of the unpaid claims of laborers and materialmen and asserted a claim to the unpaid contract balance, the defendant still held a total of $28,718, including the $7,108 in question. At that time, the Government asserted no claim to the $7,108 so that the Government held that amount as a stakeholder with full knowledge that both the surety and the assignee claimed a right to the money. Relying primarily on our decisions in Fireman's Fund Insurance Co. v. United States, 190 Ct. Cl. 804, 421 F. 2d 706 (1970); Home Indemnity Co. v. United States, 180 Ct. Cl. 173, 376 F. 2d 890 (1967); Newark Insurance Co. v. United States, 144 Ct. Cl. 655, 169 F. Supp. 955 (1959), the plaintiff argues that, upon notification of the claims of laborers and materialmen, the Government had a duty to withhold payment of the $7,108 to protect the interests of the surety, and that the Government should be held liable to the plaintiff in the amount of the erroneous payment to the assignee bank.

The third party defendant Boulevard State Bank, on the other hand, contends that the defendant is not liable to the plaintiff for the $7,108 for two reasons: (1) the $7,108 payment was a progress payment and not a final payment so that the surety may not recover from the defendant under the rationale of our decisions in Argonaut Insurance Co. v. United States, supra; Fireman's Fund Insurance Co. v. United States, supra; Home Indemnity Co. v. United States, supra, and

Newark Insurance Co. v. United States, supra; and (2) that the rights of a payment bond surety are limited to the 10 percent retainage held by the Government.

Although the Government does not concede its liability, it acknowledges with admirable candor that there are no significant distinctions between this case and our prior decisions holding that the Government will be liable to the surety if, after due notification of the claims of laborers and materialmen, it wrongfully pays the final contract payment to the contractor or his assignee. Although the payment voucher designated the $7,108 payment as the "Third Partial Payment" and there were additional funds to be paid on the contract, the $7,108 was a contract payment made after the contract had been completed and accepted. Moreover, it was a payment made after the surety had given the defendant due notice that the contractor had failed to pay the claims of the subcontractors, which claims (approximately $31,000) then exceeded the balance due on the contract and held by the Government as a stakeholder ($28,718). As in our previous decisions on this point, we hold that the Government improperly abandoned its role as a stakeholder and elected to decide the merits of the conflicting claims by paying the amount in dispute to the assignee without a valid reason for doing so. Therefore, the Government is liable for the $7,108 improperly paid to the assignee.

Secondly, it has often been recognized that a surety's claim to the unpaid contract balance is not limited to the 10 percent retainage as the third-party defendant Boulevard State Bank contends. See, e.g., Argonaut Insurance Co. v. United States, 434 F. 2d at 1369-70; Framingham Trust Co. v. Gould-National Batteries, Inc., 427 F. 2d 856, 857 (1st Cir. 1969); National Shawmut Bank of Boston v. New Amsterdam Casualty Co., 411 F. 2d 843, 848-49 (1st Cir. 1969) In re Dutcher Construction Corp., 378 F. 2d 866, 869-71 (2d Cir. 1967); Reliance Insurance Co. v. Alaska State Housing Authority (323 F. Supp. 1370, 1373, (D. Alaska 1971); National Surety Corp. v. United States, 319 F. Supp. 45, 49-50 (N.D. Ala. 1970). Here, the surety's monetary obligation to the laborers and materialmen exceeded the total unpaid balance on the contract (including the retainage) and the plaintiff has priority over the assignee for the entire contract balance.

The contractor, G. T. Williamson, argues that the surety is estopped to pursue its claim against the defendant for any amount in excess of the retainage existing on September 14, 1971, because of the referee's order entered September 14, 1971, on Williamson's "Motion to Restrain and Enjoin further Pending Suits against Bankrupts." The contention is rejected, because it is clear that the order did not in any way attempt to limit the surety's action against the defendant to the 10 percent retainage.

II

In view of its liability to the surety for the $7,108 paid to the assignee bank, the defendant seeks recovery of this amount from the bank. The defendant says, quite correctly, that in Newark Insurance Co. v. United States, 149 Ct. Cl. 170, 181 F. Supp. 246 (1960), hereinafter referred to as Newark II, this court held that the Government is entitled to recover such an erroneous payment even though the recipient is an assignee who received the payment under the Assignment of Claims Act.

Newark II was decided by a divided court. The present active judges believe the Judge Madden's dissent is more consistent with the language of the statute, as amended, the legislative history, and the other case authority, all as cited below. Reluctant as we are to overrule a decision of this court, we are constrained to do so here.

The 1951 amendment to the Assignment of Claims Act provides in part:

> In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment. 65 Stat. 41 (1951), currently codified in 41 U.S.C. § 15 (1970).

The broad language of the amendment was intended to encourage private financing of public contracts and to counteract certain rulings by the Comptroller General which operated to deter banks and other financing institutions from making loans to Government contractors.

As a general rule, the Government has a right to recover funds which its agents have erroneously paid to another. See United States v. Wurts, 303 U.S. 414 (1938). However, this general rule does not apply when an Act of Congress expressly bars recovery. In the Wurts case, the Supreme Court stated:

> * * * The Government's right to recover funds, from a person who received them by mistake and without right, is not barred unless Congress has "clearly manifested its intention" to raise a statutory barrier. Id. at 416.

The Government's claim against the assignee bank falls within the class of cases where Congress has expressly debarred the Government's right to recover.

Within the terms of the amendment, the $7,108 payment was an amount "received under the assignment." It makes no difference, as far as the Boulevard State Bank is concerned, that the Government's agent failed to recognize the surety's superior equitable interest in such payment. The Government paid the money in question to the bank as the contractor's assignee, and the assignee is entitled to retain the funds in the absence of a showing of fraud on its part. See American Fidelity Co. v. National City Bank of Evansville, 266 F. 2d 910, 916 (D.C. Cir. 1959). Cf. Industrial Bank of Washington v. United States, 424 F. 2d 932, 935 (D.C. Cir. 1970).

III

As we have noted above, the bank is not required to refund the erroneous payment of $7,108 because of the Assignment of Claims Act. However, this does not leave the Government without a remedy, since in paying the bank, the Government was satisfying a debt of the contractor to the assignee bank.

Under the facts before us, the contractor thus received a double benefit which he would not have obtained were it not for the operation of the Assignment of Claims Act. His debt to the bank and his liability for restitution to his surety are both relieved by the Government's double payment of the $7,108. We do not believe that Congress intended, by enacting the Assignment of Claims Act, to strip the sovereign of all its historical rights to recover ex aequo et bono the erroneous payments made by its public officers. Cf. Wisconsin Central R.R. v. United States, 164 U.S. 190, 212 (1896). Otherwise, there would be an unjust enrichment of the contractor. See Restatement of Restitution § 1 (1937). We therefore hold that the Government is subrogated to the bank's claim on the debt that was satisfied by the payment of the $7,108.

Third-party defendant Williamson has countered the Government's claim by a general denial of liability and with an additional defense that he was discharged from his particular debt by the referee's order dated March 3, 1972, which is a discharge in bankruptcy. The Government asserts the discharge to be ineffective against its subrogated debt for several reasons. While recognizing that Congress specifically made contingent claims capable of proof (11 U.S.C. § 103 (a)(8)), the Government asserts that its claim was not discharged because it was "too" contingent. The thrust of the Government's argument is that until the surety filed its claim against the Government, the contingency mentioned in section 103 (a)(8) was not created and hence could not have been discharged, because the surety filed its claim after the adjudication in bankruptcy. This is a persuasive

argument, and with supporting affidavits or documentary evidence, could be sufficient to render judgment for the Government against the contractor. However, there are gaps in the record which need to be illuminated by trial or by stipulation. We do not know what debts due the Government, established or contingent, were included in the schedule of obligations filed by the contractor in his application to the bankruptcy court.

The Government also argues that the head of the contracting agency (the Secretary of the Navy) was not duly notified of the first meeting of creditors as prescribed by 11 U.S.C. 94(e). However, Williamson, the bankrupt, shows by documentary evidence that a notice of the first meeting of creditors was mailed to the United States attorney in Topeka, Kansas. It is possible that the United States attorney forwarded this notice to the Secretary of the Navy so that he had actual notice. The documents before us raise a doubt as to whether the notice requirement was fulfilled. Conceivably, the Secretary of the Navy was listed on the general schedule of creditors of the contractor. In sum, there are factual issues which preclude the rendition of judgment for the Government against the contractor for the $7,108 paid to the assignee bank.

IV

Included in the unpaid balance on the contract is the sum of $10,200, which the Government asserts the right to retain under a change order executed August 16, 1971. It is well settled that the right of the United States to collect debts due it by a contractor, by offsetting these obligations against the funds retained under a Government contract, is superior to claims of a surety based upon the discharge of its obligations on its payment bond. United States v. Munsey Trust Co., 332 U.S. 234 (1947); United States Fidelity and Guaranty Co. v. United States, 201 Ct. Cl. 1, 12, 475 F. 2d 1377, 1378 (1973).

Plaintiff concedes the Government's right of setoff as stated in the cited cases, but argues that it is entitled to a court trial to determine whether the Government's assessment of liquidated damages against the contractor was proper. This plea comes far too late and is rejected on that ground. Neither the contractor nor the surety, for itself or in behalf of the contractor, appealed from the assessment of liquidated damages. Consequently, the change order of August 16, 1971, is final and binding on the contractor and the surety as well.

V

There remain for disposition only the contending claims of the assignee bank and the surety to $11,400 of the contract balance, which the Government acknowledges it holds purely as a stakeholder. As we recognized in part I of this opinion, the plaintiff as surety has a claim to the unpaid contract balance at the time of notification ($28,718) which is superior to that of the bank. Consequently, the plaintiff is entitled to recover the $11,400 still held by the Government.

VI

In view of the foregoing opinion, it is ordered:

(1) the cross-motion of plaintiff, Great American Insurance Company, for summary judgment is granted to the extent that plaintiff is entitled to recover the $7,108 which defendant erroneously paid to the assignee bank on May 19, 1971, plus the contract retainage of $11,410 which defendant holds as a stakeholder. Judgment is hereby entered for plaintiff against defendant for the sum of $18,518;

(2) plaintiff's cross-motion against defendant for the recovery of $10,200, deducted by defendant as liquidated damages, is denied and defendant's motion for summary judgment as to such liquidated damages is granted;

(3) defendant's motion for summary judgment against the Boulevard State Bank for recovery of the $7,108 paid to the bank on May 19, 1971 is denied;

(4) defendant's claim against the contractor, T. G. Williamson, for recovery of the $7,108 paid to the assignee bank is hereby remanded to the trial division of this court for determination of the factual and legal issues pertinent to the claim, and

(5) the cross-motion for summary judgment of the Boulevard State Bank is, except as stated in paragraph (3) of this part VI, denied.

b. Set-off

CONTINENTAL BANK AND TRUST COMPANY v. THE UNITED STATES

189 Ct. Cl. 99 (1969)

ON DEFENDANT'S MOTION AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

COWEN, Chief Judge, delivered the opinion of the court:

Plaintiff, Continental Bank and Trust Company, a Pennsylvania banking corporation, sues to recover $43,848.41 to which it alleges it is entitled as assignee of a contract between the defendant and the General Development Corporation. Plaintiff lent funds to General Development for the performance of the contract. The funds have been repaid; however, plaintiff asserts that General Development is otherwise indebted to it, and that it is, accordingly, entitled to the funds still owing on that contract by the Government. This case is before the court on cross-motions for summary judgment.

The pertinent facts, which, for purposes of this motion, the defendant admits, are as follows:

On February 23, 1965, the defendant, acting through its Department of the Army, awarded the General Development Corporation of Elkton, Maryland, Contract No. DA-18-035-AMC-459(A). Thereafter, to secure anticipated performance loans, General Development assigned plaintiff all proceeds of that contract. The disbursing and contracting officers were duly notified of the assignment, and received copies of the assignment instrument. The assignment instrument, dated March 15, 1965, in pertinent part provided:

> For and in consideration of the sum of $1.00 and in further consideration of loans about to be made to General Development Corporation we hereby assign and set over and transfer unto the Broad Street Trust Company * * * all of our right, title and interest to all moneys that are now due or to become due and not already paid under * * * contract No. DA-18-035-AMC-459(A), and the total amount of said contract being $445,950.00 and further we hereby are giving and granting unto the Broad Street Trust Company full power and authority to demand and receive the same to its own use, and upon receipt thereof to give a discharge for the same.

> General Development Corporation represents and warrants that it has made no prior assignment or other disposition of moneys and claims hereby assigned [and such moneys and claims] shall not be subject to reductions or setoff for any indebtedness of the company to the United States of America, arising independently of the above mentioned purchase order.

As permitted by the Assignment of Claims Act of 1940, as amended [41 U.S.C. § 15, 31 U.S.C. § 203 (1964)], the contract included the standard Defense contract Assignment of Claims clause, which provided that "[a]ny * * * assignment or reassignment shall cover all amounts payable under this contract and not already paid"; and that payments to be made to the assignee of the contract would not be subject to reduction or set-off for any liability of the contractor-assignor arising "independently" of the contract. ASPR 7-103.8.

On or about November 15, 1965, Contract No. DA-18-035-AMC-459(A) was terminated for the convenience of the Government. All of General Development's obligations thereunder have been fulfilled. Still outstanding, however, and at issue in this litigation, is $43,848.41 due General Development under the terms of the convenience termination. The defendant concedes that it is indebted to General Development in the sum of $100,141.05 under the terms of the convenience termination. Plaintiff here seeks $43,848.41 of that sum, the amount to which General Development is indebted to it.

All advances made by plaintiff for the performance of the contract have been repaid, but plaintiff claims that General Development is indebted to plaintiff in the sum of $43,848.41 on other loans secured by the assignment.

On September 15, 1966, an involuntary petition in Bankruptcy was filed against General Development Corporation in the United States District Court for the District of Maryland; and, on October 6, 1966, the corporation was adjudged bankrupt. As of that date, General Development was indebted to the Government in the sum of approximately $332,602.26 for excess costs and other damages resulting from the company's performance under seven Army contracts. No moneys were owed to defendant by General Development under the instant contract.

By letter under date of November 16, 1967, plaintiff demanded that defendant proffer $43,848.41. The defendant refused; and on June 14, 1968, plaintiff brought action to recover that sum in this court.

On May 22, 1969, the trustee in bankruptcy moved to intervene in this action. Thereafter, on June 3, 1969, the court allowed a motion by the trustee to withdraw its motion to intervene; and the trustee no longer asserts any interest in the sum plaintiff seeks.

Since 1792, Federal statutes have restricted the assignment of Government contract claims. 1 Stat. 245 § 1 (1792). Such assignments were invalid with respect to the Government until 1940, when "to assist in the national-defense program", the anti-assignment statutes were amended to permit the assignment of contracts for more than $1,000 as collateral for performance loans made by financial institutions. This was intended to broaden the base of competitive bidders to include small companies which, because of their inability to finance the cost of contract performance and the statutory prohibition against assignment of the proceeds of the contract, were unable to undertake the performance of Government contracts. H.R. Rep. No. 2925, 76th Cong., 3d Sess. 2 (1940). To the extent pertinent to this case, the Assignment of Claims Act of 1940, as amended, provides:

> No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.
>
> The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: Provided: *** 3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing; 4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.
>
> Notwithstanding any law to the contrary governing the validity of assignments, any assignment, pursuant to this section, shall constitute a valid assignment for all purposes.

* * * * *

> Any contract of the Department of Defense, *** or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may *** provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or set-off and if such provision or one to the same general effect has been at anytime heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to any assignee of any moneys due or to become due under such contract *** shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of (1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract, (2) fines, (3) penalties ***, or (4) taxes, social security contributions, or the withholding or non-withholding of taxes or social security contributions, whether arising from or independently of such contract. 41 U.S.C. § 15 (1964).

The defendant agrees that the assignment before the court comes within the "purview and intent" of the Assignment of Claims Act of 1940, and that it applies to all of the contract proceeds. Also, the defendant concedes that funds were advanced by plaintiff "for the performance of said Government contract." However, the defendant argues that it is, nonetheless, entitled to set off General Development's indebtedness to it (under the aforementioned Army contracts) against the sums admittedly due under the terms of the convenience termination, because the loans made for the performance of Contract No. DA-18-035-AMC-459(A) have been repaid. In the circumstances of this case, defendant says the "no set-off" provisions of the contract and Act do not apply.

This case thus raises a narrow issue regarding the extent of the applicability of the "no set-off" provisions. The language of the Act, its legislative history, and the cases which have interpreted it, are instructive.

As noted earlier, and acknowledged by the defendant, the Act, as amended, provides that assignments thereunder "shall cover all amounts payable under such contract and not already paid * * *" [Emphasis supplied]; and permits the inclusion in Government contracts of provisions to the effect that payments to assignees "shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States * * * which arises independently of such contract[s]."

There is no question in this case but that the indebtedness the defendant asserts it may set off against the amounts due under the convenience termination arose "independently" of the subject contract. The legislative history of the 1940 Assignment of Claims Act indicates that it was just this type of indebtedness which Congress determined should not be set off against contract proceeds. In explanation of the "no set-off" provision, which he offered as an amendment to H.R. 10464 [76th Cong., 3d Sess. (1940)], Senator Barkley stated:

> * * * [T]he amendment merely provides that when a contractor, in order to obtain money so that he may perform his contract with the Government under the defense program, assigns his contract to a bank or trust company in order to get money with which to proceed with the work, it shall not be permissible to offset against the claim or contract later an indebtedness which the contractor may owe the Government on account of some other contract or some other situation. * * * 86 Cong. Rec. 12803 (1940) [Emphasis supplied.]

See Central Bank v. United States, 345 U.S. 639 (1953); Esther H. Rose v. United States, 179 Ct. Cl. 224, 230-31, 373 F. 2d 963, 966 (1967); Joseph H. Coleman v. United States, 158 Ct. Cl. 490, 492-93 (1962); and Chelsea Factors, Inc. v. United States, 149 Ct. Cl. 202, 181 F. Supp. 685 (1960), for cases in which the statutory provision against set-offs was considered and interpreted.

After carefully reading its provisions, we find nothing in the language of the applicable statute which supports defendant's contention. Moreover, the legislative history of the 1951 amendments to the Assignment of Claims Act of 1940 indicates that Congress considered and declined to enact a provision which would have assured the construction the defendant asserts.

In 1951, following a series of decisions of the Comptroller General narrowly construing the "no set-off" provision of the 1940 Act, Congress amended the Act to prohibit set-off or reduction for renegotiation, fines, and certain tax and penalty indebtedness, "whether arising from or independently of" assigned contract. 41 U.S.C. § 15 (1964) [See text of statute, supra]. In comments to the Senate Committee on Banking and Currency on the proposed legislation, Acting Comptroller General Frank L. Yates noted that the set-off and reduction limitations afforded excessive protection, "due to the fact that the prohibitions against withholding or recovery apply to all assigned payments * * *" [Emphasis added]; and suggested that the "no set-off" provision be revised to require assignees to release their assignments upon repayment of performance loans and provide that the limitations not apply to "payments in excess of amounts paid or loaned to the assignor under any factoring arrangement, loan, discount, or advance made in connection with or secured by the assignment." S. Rep. No. 217, 82d Cong., 1st Sess. 8 (1951) [Emphasis added].

Thereafter, the Committee revised its originally introduced bill [S. 998, 82d Cong., 1st Sess. (1951)] to reflect the Acting Comptroller General's set-off and reduction limitation suggestion. The Committee Report stated:

> * * * [T]he amendment would continue the provision of the present law that, if an assigned contract contains a "no set-off" clause, payments made by the Government to the assignee bank will not be subject to reduction or set-off because of any claims of the Government against the contractor which arise independently of the contract, but it would also be made clear that the assignee would be protected against set-off on account of claims of the Government against the contractor arising from renegotiation, fines, and penalties--claims which are ordinarily regarded as arising outside of the assigned contract. In any event, however, where the Government has claims against the contractor, the Government would be allowed to withhold, out of payments due an assignee bank, any amounts in excess of the bank's interest in loans secured by such assignments. S. Rep. No. 217, 82d Cong., 1st Sess., 2-3 (1951) [Emphasis added].

On April 11, 1951, the amended S. 998 was reported out in the Senate.

The Senate, however, further amended S. 998. On April 24, 1951, H.R. 3692, a similar bill, was reported out in the House of Representatives [H.R. Rep. No. 376, 82d Cong., 1st Sess. (1951)]. The Senate Committee on Banking and Currency preferred H.R. 3692 to S. 998; and on April 25, 1951, Senator Robertson, speaking for the Committee, offered an amendment to S. 998, which had the effect of substituting the language of H.R. 3692 for that in the Committee bill. Among the differences between the bills was the absence of a set-off and reduction limitation provision in H.R. 3692 similar to that included in the amendment to S. 998 as a result of the Acting Comptroller General's comments. Senator Robertson explained:

> * * * The protection afforded the assignee against claims, including those involving the so-called "no set-off" clause, would be limited under S. 998 to amounts loaned or advanced by the assignee, whereas H.R. 3692 would not impose such limitations. The reason for this difference is that as a practical matter it would be difficult to determine the exact amounts loaned or advanced where several contracts are assigned to an assignee and provision is made for revolving credits. 97 Cong. Rec. 4350 (1951) [Emphasis added].

The substitutionary amendment was adopted; and on April 25, 1951, S. 998, as amended, passed the Senate. On May 1, 1951, the House passed the Senate bill; and on May 15, 1951, S. 998 was signed by the President and thereby enacted into law.

This court has heretofore pointed out that "[t]he progressive liberalization of the Act by its various amendments manifests the purpose of Congress to effectively protect assignments in accordance with the Act." Joseph H. Coleman, supra, 158 Ct. Cl. at 492-93.

The cases on which defendant relies were decided on the basis of facts which are not presented in this case. Beaconwear Clothing Co. v. United States, 174 Ct. Cl. 40, 355 F. 2d 583 (1966) is inapplicable here, since in that case, the contractor-assignor, at the time of suit, was no longer indebted to the assignee, and the assignee released the assignment. Here, General Development is acknowledged to be indebted to plaintiff and there has been no assignment release. Similarly, Chattanooga Wheelbarrow Co. v. United States, Civil No. 4755 (E.D. Tenn., January 26, 1967; reh. denied, April 14, 1967), and McPhail v. United States, 149 Ct. Cl. 179, 181 F. Suppl. 251 (1960), involved questions of assignment validity. Admittedly, there is no such issue in this case.

In apparent recognition of the lack of support for its position in the decisional law, defendant resorts to the contention that the set-off is permissible in this instance, since under the common law of assignments, plaintiff's interest in the assigned collateral ceased when the loan made for the performance of the contract was repaid. 6 C.J.S. Assignments § 93. This argument ignores the modern trend away from tying particular loans to particular security. Furthermore, the adoption of such a rule for the statutory assignment involved here would impair the familiar revolving credit financing device to which Congress referred when deleting the previously discussed set-off and reduction limitation provision from the 1951 amendments to the Act. As this court noted in Chelsea Factors, Inc., supra, * * * :

> The 1940 Amendment to the Assignment of Claims Act was intended to facilitate the financing of Government contracts by private capital in the way in which private capital normally operates in financing the country's economy. [Emphasis added].

For the reasons stated, plaintiff's cross-motion for summary judgment is granted, and the defendant's motion for summary judgment is denied. Plaintiff is entitled to recover the amount General Development is indebted to plaintiff on loans secured by the assignment. The amount of the recovery, which shall not exceed $43,848.41, plus accrued interest thereon from November 16, 1967, to date of payment, shall be determined pursuant to Rule 131(c)(2).

Section 4. Discounts

KLEEN-RITE CORPORATION

ASBCA No. 23690 (1979)

OPINION BY ADMINISTRATIVE JUDGE ROWE

This appeal has been submitted for decision without an oral hearing on the issue whether the Government's payment on appellant's invoice of $20,520.90 was made within the prompt payment discount period, so as to permit the Government to keep the discount of $2,052.09 which it deducted.

There appears to be no dispute about the subsidiary facts. Under appellant's contract to perform security guard services the Government received appellant's monthly voucher on 29 March 1977 for services performed during the period 1 March 1977 through 31 March 1977. After deducting $2,052.09, the Government made payment. For the reasons stated below we infer the payment was mailed on 21 April 1977.

The Discounts clause of the contract provides as follows:

> DISCOUNTS (1971 NOV)
>
> In connection with any discount offered, time will be computed from the date of completion of performance of the services or from the date correct invoice or voucher is received in the office specified by the Government, if the latter is later than date of completion of performance. Payment is deemed to be made for the purpose of earning the discount on the date of mailing of the Government check.

On 25 November 1977 appellant wrote to the contracting officer to request payment of the discounted amount stating, inter alia. that the discount period "started April 1, 1977 to expire April 20, 1977." The Government denied the claim on 1 February 1978 on the ground that the services for which payment was made were not completed until the close of business on 31 March 1977, and that the check issued in payment was dated 21 April 1977. Both parties have referred to the date on the check, rather than its mailing date, but there is no contention it was mailed later than its date, and the standard voucher form 1034 in the record contains the date "Apr 21 '77" in the PAID BY block. In addition the Government affirmatively pleaded 21 April as the mailing date and appellant has not denied that fact.

Appellant disputed the Government's position in a letter dated 9 February 1978 on the following grounds:

A. Services were completed March 31, 1977.

B. The effective date invoice received April 1, 1977.

C. Check dated April 21, 1977 (one day over discount period).

D. In order to earn prompt payment discount check would have to be dated April 20, 1977.

The record indicates that the parties' respective counsel discussed the matter and that appellant was satisfied with the Government's oral explanation, which included a reference to this Board's decision in the appeal of Oswald Schicker Manufacturing Company, ASBCA No. 20774, 76-1 BCA §11,801, concerning the general rule that when time is to be computed from a particular day, the first day is excluded and the last day is included in the computation. However, on 29 November 1978, appellant wrote the Government to contend the Government's position was totally erroneous and misrepresented the law.

This appeal followed. Appellant filed a complaint in which it stated that it believed the Government's explanation in its February 1978 letter was made in good faith, but it had determined that the explanation was erroneous, and reiterated its claim. Appellant's complaint stated no grounds for its belief that the Government's position was erroneous, and it has filed no brief.

DECISION

The only apparent theory on which appellant could recover would be to conclude, contrary to its own assertion, that the "effective" date of its invoice was 31 March 1977, when contract performance and invoice submission were complete. Thus, payment on 21 April 1977 would be one day late.

But against that theory is a provision in the contract, not referred to by the parties, as follows:

J.8 Submission of Invoices

The Contractor shall submit invoices on a monthly basis covering the services performed during the month immediately preceding the month during which the invoice is prepared. Such invoices shall be

> forwarded to the SO, who will certify thereon that the services required during the invoice period was (sic) performed in an acceptable manner. Such invoices will then be forwarded to designated paying office for execution of public vouchers and payments.

Since this clause provides for submission of invoices no earlier than the first day of the month following the performance of the services, the invoice was not effective until 1 April, and payment by 21 April was payment within twenty days.

The appeal is denied.

Section 5. Limitation of Cost

UNITED SHOE MACHINERY CORPORATION

ASBCA No. 11936 (1968)

The appellant seeks to recover $23,997.40, by which amount actual costs exceeded estimated costs under a CPFF contract. The contracting officer refused payment under authority of the "Limitation of Cost" article of the contract.

* * * * *

DECISION

The Limitation of Cost article is designed to permit the procuring agency to decide whether or not it will expend funds on a contract in excess of its initial funding. The CPFF contractor may cease work when the scheduled amount is reached, but is not entitled to further payment, as a matter of contractual right, if it continues work after the estimated ceiling is reached. Whether it will pay an overrun is discretionary with the agency. See discussion in The Marquardt Corporation, ASBCA No. 10154, 66-1 BCA par. 5576.

The appellant contends that this case presents an exception to the above-stated general rule, and falls within several of the areas in which we have previously allowed payment of cost overruns. Its principal argument is that the overhead and G&A rates negotiated by the sponsor agency are binding upon the contracting officer. ASPR 3-706 is, it says, a mandatory direction that the contract be modified to incorporate the negotiated rates. The appellant actually cited 3-705, but this specifies procedure where the contracting officer negotiates the rates. Further, it contends, this is merely a ministerial act which the contracting officer must perform and, where he fails to do so, the Board should order it done. Appellant then concludes that when the contract is amended to include the negotiated rates, the appellant would be entitled to payment of the overrun representing the difference between provisional and negotiated rates. In this it relies upon Baird-Atomic, Inc., ASBCA No. 10824, 66-1 BCA par. 5616. We can agree that the rates are binding. Raytheon Co., ASBCA Nos. 6984 and 6985, 1964 BCA par. 4284. The wording of the regulation is certainly directive. We do not agree that amendment of the contract to incorporate the negotiated rates would override the Limitation of Cost article. The Board has held in a number of appeals that the contractor may not recover cost overruns created, as here, by the negotiation of indirect cost rates higher than provisional rates. The Marquardt Corporation, supra; ITT-Kellogg Division, ASBCA No. 9108, 65-1 BCA par. 4635. The incorporation of the negotiated rates

by contract modification would add nothing unless the funding was increased. Such rates would be on a par with all other allowable costs in the contract, reimbursable only up to the cost ceiling.

Baird-Atomic, Inc., supra, did not turn upon the mere fact that the negotiated rates were added by contract modification. Reimbursement was allowed because the Board found that the wording of the particular supplemental agreement indicated an intention to modify the Limitation of Cost article to permit such payment. The procuring agency has shown no such intention in this case.

Appellant next says that it is entitled to the overrun because its accounting system, approved by the Government, was known by the Government to be incapable of producing current overhead rate information, and was incapable of producing such information. It argues that where the cost limitations were exceeded because of the contractor's inability to ascertain during contract performance whether the provisional rates were sufficient to cover all allowable costs, overruns would be allowed. Citing Comp. Gen. Decs. B-137343, B-143892, and B-127863; ITT-Kellogg Division, supra. All three of the Comptroller General decisions cited were unpublished advisory opinions to the contracting agencies, which had requested advice as to whether overruns caused by adjustment in overhead rates, might be properly funded. The Comptroller General replied that since in those cases the contractor could not ascertain that the final rates would result in an overrun, payment might be properly made. There is no doubt that here payment might be properly made, but that is not the issue involved. The question before us is whether the appellant is contractually entitled to such payment, and the aforementioned decisions do not dictate the affirmative. ITT-Kellogg Division merely distinguishes the cited Comptroller General decisions on the facts.

Appellant further contends that the court of Claims, in Scherr & McDermott, Inc., 175 Ct. Cl. 440 (1966), put the burden of proof that the contractor knew his overhead costs on the Government, and directed payment of the overruns where it failed to carry this burden. The contract involved in Scherr & McDermott, Inc. stated that the contractor would be reimbursed for actual overhead costs on the basis of audits performed by the contracting agency. The agency delayed audit until after contract performance. Under those circumstances the court placed the burden of knowledge on the Government. It then found that the failure to audit prevented the contractor from making timely request for an increase in the ceiling price.

Under this contract the initial burden is upon the appellant. Negotiations of final overhead rates were to be initiated by the appellant's proposal. The Limitation of Cost article imposes duties of notice, and a consequent duty to maintain such accounting and internal financial reporting system as will enable it to report when costs near or reach the maximum allocated funds. Beckman & Whitley, Inc., ASBCA No. 9904, 65-2 BCA par. 5246; PRD Electronics, Inc., ASBCA

No. 7713, 1962 BCA par. 3282. The contractor is not relieved of th nsibility by Government approval of its accounting system for billings under cost-reimbursement type contracts.

We have found that the appellant's accounting and financial reporting system did not advise management of actual overhead rates as they were incurred, thus in the instant case appellant was not aware when the cost ceiling was reached. The information was available, however, from which sufficient data could have been developed to permit appellant to comply with the notice requirements of the Limitation of Cost article. With the development of its proposed overhead and G&A rates for FY 1962, appellant actually knew that the rates experienced exceeded the provisional rates, but continued to bill the latter. Since compliance with the Limitation of Cost article was not impossible the overrun is not required to be funded. General Electric Company, ASBCA No. 11990, 67-1 BCA par. 6377.

Appellant next contends that the uniformly-followed practice by the Government of funding overruns created by final rate negotiation requires, under all of the facts of this case, the following of that practice here. Citing Clevite Ordnance, Division of Clevite Corp., ASBCA No. 5859, 1962 BCA par. 3330; The Bendix Corporation, ASBCA No. 8761, 65-1 BCA par. 4773. Appellant did establish that its overruns under cost-reimbursement type contracts and subcontracts had been regularly funded and paid for a number of years. Some of these contracts were with the Air Force.

In Clevite the pattern of reimbursing overruns had been on the same contract and its predecessors in the same development program; the parties were aware of the overrun in costs as they were incurred; the same persons were involved for both parties; the authorized representative of the contracting officer had assured the contractor that the overrun which led to dispute would be funded, while urging that the contractor continue performance. The contractor, in reliance thereon, did continue performance. Under these essential elements of estoppel the Board ordered the overruns paid. In the instant case the parties were not aware of the overrun during contract performance. The same persons were not involved in funding overruns on other contracts. And there was neither assurance from the Government that overruns would be paid, nor reliance by the appellant upon past funding of overruns to induce continued performance.

In The Bendix Corporation, supra, the history of funding past overruns was only one of the factors which led the Board to conclude that the Government had actually agreed to fund the overruns, and that the actual dispute was over the reimbursable amount thereof. In General Electric Company, supra, the facts were similar to those in the present appeal. There had been a history of funding past overruns, some of them involving the same persons who had denied the overrun under dispute. The Board held that the fact that other contracts had been funded had no effect upon the Limitation of Cost

clause in the contract in question. To the extent that some language in Bendix and similar cases might indicate that the mere fact that overruns in past instances were paid dictates payment of all such overruns, they must be considered as effectively overruled by General Electric Company.

The appellant must bear the burden of an accounting and financial reporting system which did not permit it to comply with the requirements of the Limitation of Cost article, or to protect it from the consequences thereof.

The appeal is denied.

GENERAL ELECTRIC COMPANY, A CORPORATION v. THE UNITED STATES

442 F2d 420 (1971)

ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

COLLINS, Judge, delivered the opinion of the court.

The case arose from a cost overrun under a contract between plaintiff and defendant's Department of the Army. The relevant facts were stipulated in proceedings before the Armed Services Board of Contract Appeals.

Plaintiff, General Electric, and defendant entered into the contract involved in this case on September 19, 1963. The contract, which involved research and development work relative to a chemical/biological warning system, was negotiated and was of the cost-plus-incentive-fee variety. All work under the contract was required to be completed by May 31, 1964. The final report was received by the Government project manager, in time, on June 8, 1964.

At the outset, the amount of the contract, including target fee, was $800,000. The contract was amended, however, at a later time to increase the total amount, including target fee, to $835,800. The incentive formula provided for a 15-cent increase in the target fee for every dollar by which allowable costs fell short of the target cost and for a 15-cent reduction in the target fee for every dollar by which allowable costs exceeded the target cost.

The contract provided that allowable costs would include, among other things:

> 2. Indirect Costs: Allowances for indirect costs, including independent research and development, not otherwise reimbursable as a direct charge hereunder, at such provisional billing rates as may be acceptable to the Contracting Officer. It is understood and agreed that such rates shall be provisional rates for billing purposes only and shall be subject to negotiations and revision to the final negotiated indirect cost rates, based upon Government audit of the Contractor's books and records on a fiscal year basis ending 31 December of each year, and in accordance with the terms of the General Provision of this contract, entitled "Negotiated Overhead Rates."

Also included in the contract was the standard Negotiated Overhead Rates clause which provided that allowable indirect costs under the contract would be arrived at by the use of negotiated overhead rates, and furthermore:

> (d) The results of each negotiation shall be set forth in a modification to this contract, which shall specify (i) the agreed final rates, (ii) the bases to which the rates apply, and (iii) the periods for which the rates apply.
>
> (e) Pending establishment of final overhead rates for any period, the Contractor shall be reimbursed either at negotiated provisional rates as provided in the Schedule or at billing rates acceptable to the Contracting Officer, subject to appropriate adjustment when the final rates for that period are established. To prevent substantial over or under payment, the provisional or billing rates may, at the request of either party, be revised by mutual agreement, either retroactively or prospectively. Any such revision of negotiated provisional rates provided in the Schedule shall be set forth in a modification to this contract.

Pursuant to ASPR § 3-706, the military departments maintained at the time of this contract an inter-service committee, commonly referred to as the Tri-Services Committee, which negotiated final overhead rates with contractors having cost-reimbursement type contracts with more than one military department. The ASPR section provided that, after a determination of final overhead rates by the Tri-Services Committee, "[e]ach Military Department shall thereupon amend or supplement the affected contracts in accordance with the rates and other data set forth in the negotiation report or summary."

For the calendar year 1963 the provisional billing rates applicable to the contract were as follows:

Engineering, Drafting & Laboratory Rates--	133.0%
Independent Research & Development--------	1.8%
General & Administrative-----------------	11.7%

Final overhead rates for 1963 were negotiated in 1965 and were incorporated into the contract by the contracting officer on May 2, 1966. The final rates were as follows:

Engineering, Drafting & Laboratory Rates--	139.7%
Independent Research & Development--------	1.8%
General & Administrative-----------------	12.4%

For the calendar year 1964 the provisional rates were:

Engineering, Drafting & Laboratory Rates--	155.0%
Independent Research & Development--------	1.8%
General & Administrative-----------------	14.6%

The final rates for 1964 were negotiated in 1965 and 1966 and were as follows:

Engineering, Drafting & Laboratory Rates--	169.80%
Material Rates----------------------------	11.58%
General & Administrative-----------------	14.85%
Transfer Expense--------------------------	1.70%
CIRP--------------------------------------	2.05%

Unlike the final rates for 1963, however, the final rates for 1964 were never incorporated into the contract.

Plaintiff's request of the contracting officer on December 16, 1966, for additional funds owing to the difference between the provisional and final overhead rates for 1963 and 1964 was denied. The contracting officer's decision was based on plaintiff's failure to give notice to the Government of the possibility of a cost overrun in accordance with the contract's Limitation of Cost clause (hereinafter LOCC):

> LIMITATION OF COST (FEB. 1959) (ASPR 7-402.2)
> (a) It is estimated that the total cost to the Government, exclusive of any fixed fee, for the performance of this contract will not exceed the estimated cost set forth in the Schedule, and the contractor agrees to use his best efforts to perform the work specified in the Schedule, and all obligations under this contract within such estimated cost. If at any time the contractor has reason to believe that the costs which he expects to incur in the performance of this contract in the next succeeding sixty (60) days, when added to all costs previously incurred, will exceed seventy-five percent (75%) of the estimated cost then set forth in the Schedule, or if at any time, the Contractor has reason to believe that the total cost to the Government, exclusive of any fixed fee, for the performance of this contract will be substantially greater or less than the then estimated cost thereof, the Contractor shall notify the Contracting Officer in writing to that effect, giving the revised estimate of such total cost for the performance of this contract.

> (b) The Government shall not be obligated to reimburse the Contractor for costs incurred in excess of the estimated cost set forth in the Schedule, and the Contractor shall not be obligated to continue performance under the contract or to incur costs in excess of the estimated cost set forth in the Schedule, unless and until the Contracting Officer shall have notified the Contractor in writing that such estimated cost has been increased and shall have specified in such notice a revised estimated cost which shall thereupon constitute the estimated cost of performance of this contract. When and to the extent that the estimated cost set forth in the Schedule has been increased, any costs incurred by the Contractor in excess of such estimated cost prior to the increase in estimated cost shall be allowable to the same extent as if such costs had been incurred after such increase in estimated cost.

It was the contracting officer's opinion that General Electric, in failing to give notice as to the possibility of an overrun, "did thereby deprive the Government of its prerogative to prevent and avoid a cost overrun."

Plaintiff's timely appeal to the Armed Services Board of Contract Appeals was denied. General Electric Co., 69-1 BCA § 7708 (ASBCA 1969).

The parties stipulate that utilizing the final negotiated overhead rates would result in adding $71,209.86 ($168 for 1963 and $71,041.86 for 1964) to the contract cost. It is also stipulated that applying the 15 percent incentive formula to the increase in cost results in a $10,656.28 decrease in the fee. Finally, the parties stipulate that reducing the increase in cost by the reduction in the incentive fee yields $60,385.58 and that this is the amount plaintiff is seeking.

For the reasons set forth below, we find that plaintiff is entitled to recover in full.

The contracting officer erred in assuming that plaintiff was required to give timely notice of the overrun before it was incurred. By its own terms, paragraph (a) of the LOCC relieved General Electric of the notice requirement. Paragraph (a) provides that "[i]f at any time the Contractor has reason to believe" that a cost overrun is imminent the contractor is required to so notify the contracting officer. If the contractor has no reason to believe that an overrun

is imminent, he is not required to give notice. As pointed out below, at no time during performance of the contract did General Electric have reason to know of its overruns. It was, therefore, excused from the notice requirement.

In General Electric Co. v. United States, 188 Ct. Cl. 620, 412 F. 2d 1215 (1969), this court dealt with the LOCC and the role of the contracting officer. In that case the court, citing board decisions, stated that under the clause "although the Government is not compelled to fund an overrun in the absence of proper notice, it is within the discretionary authority of the contracting officer to allow the additional costs." Id. at 627, 412 F. 2d at 1220. See United States Shoe Mach. Corp., 68-2 BCA § 7328, at 34,091 (ASBCA 1968); The Marquardt Corp., 66-1 BCA § 5576, at 26,069 (ASBCA 1966). As we view it, the question in this case is whether the contracting officer abused his discretion in refusing to allow the additional costs incurred by General Electric.

On the facts of this particular case, we are of the opinion the contracting officer abused his discretion under the LOCC and that the board erred in supporting his decision.

As noted briefly above, the LOCC does not require the contracting officer to deny additional funding, where the contractor incurs a cost overrun, without first obtaining the contracting officer's approval. The clause appears to anticipate that in some circumstances where advance authorization is not given it would be inequitable for the Government to refuse additional funding. For example, in Scherr & McDermott, Inc. v. United States, 175 Ct. Cl. 440, 360 F. 2d 966 (1966), it was held that the contractor was relieved of the requirement of obtaining prior approval for an increase in the contract's cost limitation where the contractor's inability to determine actual overhead was traceable to the Government's failure to audit.

In the present case it is not argued that plaintiff's failure to timely seek advance authorization for the overrun is in any way attributable to fault on the Government's part. It is contended, however, and supported by the board's opinion, that General Electric, through no fault or inadequacy of its own, had no notice itself of the overrun until well after completion of its performance. The board stated that the accounting evidence was generally consistent with plaintiff's contention that:

> * * * at the completion date of 31 May 1964 and at the time the supplement to the final report was made in July-August 1964, its current cumulative expenditures and commitments, based in part upon its then cumulative year-to-date actual overhead rates, were within the total estimated cost of the

> contract and therefore there was no revised estimate of the total estimated cost which could then be given.

69-1 BCA § 7708, at 35,779. In effect, the board agreed with plaintiff's argument that obtaining advance approval for the overrun in this case was impossible. The Government advances two arguments with respect to plaintiff's expressly waived reliance on the theory of impossibility before the board and, second, that the board made no findings as to whether plaintiff had knowledge, beforehand, of the overrun. We do not think these arguments are supportable. Although plaintiff's counsel did assert before the board that plaintiff was not "affirmatively relying" on a theory of impossibility, he also stated:

> With regard to the question raised by the Government concerning notice * * * it is appellant's position there are sufficient facts in this record to rebut any claim the Government may make us to either the applicability of that clause [the LOCC] or the timing of any notice allegedly required under it.

Record at 10. On oral argument before this court counsel for plaintiff explained that he had disavowed "affirmative reliance" on the theory that notice was impossible in order to avoid having the burden of proof on that issue. However, we are satisfied that plaintiff's counsel never waived the theory.

With respect to defendant's contention that the board made no findings as to plaintiff's knowledge of the overrun before it was incurred, we need only refer to the board's statement (to which reference has already been made) that the accounting evidence was generally consistent with plaintiff's contention that it had no advance notice of the overrun. Although the board may not have made a finding of fact, in the technical sense of the term, relating to plaintiff's knowledge or lack of knowledge of its overrun during contract performance, the board did state as a fact that the accounting evidence generally supports the plaintiff's position. Although this statement is perhaps not as conclusive as it might be, it represents the board's considered appraisal of all the accounting evidence. Moreover, defendant has not called our attention to any "substantial" evidence that plaintiff did indeed have advance knowledge of the overrun. Under these circumstances this case appears to be one of those "situations in which the court would be warranted, on the basis of the administrative record, in granting judgment for the contractor without the need for further administrative action." United States v. Carlo Bianchi & Co., 373 U.S. 709, 717 (1963); see Sherwin v. United States, 193 Ct. Cl. 436 F. 2d 992 (Jan. 1971).

Notwithstanding its above-quoted statement, the board sustained the contracting officer's decision. It did so on the ground that "absent either Government fault or intervention causing post-performance overhead rate increases within the contractor's accounting period, the risk of such increases in overhead cost ratio, whether or not foreseeable during performance, clearly must be the contractor's * * *." 69-1 BCA § 7708, at 35,780. This allocation of risk by the board was erroneous--it totally ignores the discretion of the contracting officer in allowing or denying additional funding for cost overruns. Clearly, where the contracting officer possesses such discretion it can scarcely be said that the contractor assumes the risk of a cost overrun incurred without prior authorization.

As stated above, it is our opinion that the contracting officer in the present case abused his discretion under the LOCC in refusing to fund the overrun. The board found that General Electric could not have known of the overrun in time to notify the contracting officer and receive the latter's approval for an increase in funding. Moreover, there is no claim that General Electric was in any way to blame for its lack of timely knowledge of the overrun or that its accounting procedures were inadequate. Furthermore, there is no evidence in the record that the Government was displeased with General Electric's performance under the contract. Under these circumstances we hold that the contracting officer did not have discretion to refuse additional funding.

In so holding, we are comforted by the Comptroller General who stated as follows in a 1964 opinion:

> The making of an equitable adjustment at this time for overhead costs which exceeded allowances to the Arthur D. Little Company at the provisional rates might be proper since this Office has allowed similar claims where it appeared that contract cost limitations were exceeded solely because of the contractor's inability to ascertain during contract performance whether the specified provisional overhead rates in their contracts were sufficient to cover all allowable types of overhead costs.

B-137343 (Aug. 12, 1964) (unpublished). See also B-127863 (June 6, 1956) (unpublished).

We would stress that our decision in this case is not intended to encourage contractors to utilize less than fully acceptable accounting procedures. Where a contractor fails to obtain advance approval for an overrun and later claims that the giving of timely notice was impossible, the contractor's accounting methods and procedures should be a matter for the contracting officer's first concern.

In summary, we hold that a contracting officer abuses his discretion under paragraph (b) of the Limitation of Cost clause if he refuses to fund a cost overun where the contractor, through no fault or inadequacy on its part, has no reason to believe, during performance, that a cost overrun will occur and the sole ground for the contracting officer's refusal is the contractor's failure to give proper notice of the overrun.

Because of our disposition of this case we intimate no opinion as to plaintiff's alternative argument that the Negotiated Overhead Rates clause necessarily prevails over the LOCC. Furthermore, since we do not deal with plaintiff's alternative argument and since defendant admits that there is no showing that the funding of plaintiff's overrun by the Government would violate the Anti-Deficiency Act, 31 U.S.C. § 665 (1964), we express no opinion as to the act's applicability in cost overrun situations.

Plaintiff's motion for summary judgment is granted, defendant's cross-motion for summary judgment is denied, and judgment is entered for plaintiff in the amount of sixty thousand three hundred and eighty-five dollars and fifty-eight cents ($60,385.58).

THE BOEING COMPANY v. THE UNITED STATES

Ct. Cl. No. 268-79C (1982)

ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

DAVIS, Judge, delivered the opinion of the court:

This case presents a contest over the amount owed to plaintiff, The Boeing Company (Boeing), by the defendant for certain costs incurred under a cost-plus-fixed fee contract between the Air Force and Boeing. The more precise issue is whether claimant properly allocated home office tax expenses to its various divisions. We affirm the decision of the Armed Services Board of Contract Appeals (ASBCA), denying plaintiff's claim.

In September 1972, Boeing was awarded a research and development contract by the Air Force. Payment was to be on a cost-plus-fixed fee basis; costs were generally defined in the agreement; and the fixed fee set. The contract included a "Cost Accounting Standards" clause which required that the contractor comply with all cost accounting standards in effect on the date of the award of the particular contract and any standards effective at the time future Government contracts were entered into by that contractor during this contract's performance period. Cost Accounting Standards were promulgated by the Cost Accounting Standards Board (CASB) pursuant to 50 U.S.C. App. §2168 (1976).

The present dispute centers on Cost Accounting Standard 403 (CAS 403), 4 C.F.R. § 403 (1981), which was included in this contract as of January 1, 1974. It provides the method by which Government contractors are to allocate home office expenses to different segments of a corporate organization. The home office expenses now involved are several types of state and local taxes: real property; personal property; sales; use; business and occupation; and fuel and vehicle taxes. The controversy focuses first on the meaning of CAS 403 as applied to these expenses of Boeing, and then on the validity of the standard if its meaning is other than Boeing claims.

I

Boeing manufactures aircraft and other products for commercial and Governmental use. Its Washington State business, that part of its operation with which we are concerned in this proceeding, was conducted through a corporate headquarters in Seattle and several

operating divisions (segments) and subsidiaries. Boeing operates several Seattle-area plants, each of which is assigned to one division for administrative and maintenance purposes. This is usually the segment that predominantly uses the facility, most often the Commercial or Aerospace division, although most of the plants are utilized by all of the divisions. Control of a plant shifts along with usage--if another division becomes the predominant user of the facility, it assumes control over it.

Each Boeing division that controls the property, manufactures the goods or makes the sale subject to taxation, initially determines and records the amount of tax costs it incurs. Sales taxes are paid by each division and the other expenses are reported to the headquarters in the State of Washington and paid by the main office. The latter expenses are then allocated back to each segment and further allocated to particular contracts.

The specific question concerns Boeing's method of allocating its Washington state and local tax expenses between its various divisions. It has distributed these costs to each segment in proportion to the number of employees working in each segment; this is known as the employee base or headcount allocation system. The contracting officer disallowed part of plaintiff's claimed tax costs because they were derived by the headcount method which he held does not comply with CAS 403. According to the contracting officer, CAS 403 mandates the use of an assessment base method of tax cost allocation. Under this method, costs are allocated by using the base which was used to measure the particular tax. For example, because property taxes are assessed on the value of property, segment A would be allocated the property taxes attributable to the property it controls.

This contracting officer's decision was upheld in comprehensive opinions by the Armed Services Board of Contract Appeals. The Boeing Co., ASBCA No. 19,224, 77-1 BCA ¶ 12,371, confirmed on reconsideration, The Boeing Company, ASBCA No. 19,224, 79-1 BCA ¶ 13,708. That tribunal held that CAS 403 requires that home office expenses be identified with and allocated to particular segments, if possible. It found that the tax costs before us could be specifically identified by use of an assessment base method of allocation. Boeing's headcount method was rejected as not complying with the requirement that cost be specifically identified with a division to the maximum extent practical.

Plaintiff appeals to this court and both parties have moved for summary judgment.

II

The initial problem is the proper meaning of CAS 403. Boeing claims that the ASBCA's interpretation is inconsistent with this

court's prior rulings in Boeing Co. v. United States, 202 Ct. Cl. 315, 480 F. 2d 854 (1973)(Boeing I) and Lockheed Aircraft Corp. v. United States, 179 Ct. Cl. 545, 375 F. 2d 786 (1967); that the CASB did not intend to overrule those earlier decisions and did not reject the "broad benefits" test they enunciated. We are also told, in this connection, that CAS 403 utilizes the same allocation concepts as the former regulation, Armed Services Procurement Regulation (ASPR) §15-201 et seq. In Boeing's view, the new standard does not mandate use of the assessment base method but is flexible in permitting any approach which measures benefits to the receiving segments from the tax expenditures.

A. The fundamental flaw in this analysis is its failure to recognize the importance of the new provision in CAS 403 requiring that costs be allocated directly to segments. The portion of the new standard that is controlling in this case is 403.40. It provides for a three tier process for allocating home office expenses. CAS 403.40(a)(1), 4 C.F.R. § 403.40(a)(1)(1981).

A prime requirement is direct allocation of these expenses "to the maximum extent practical." If direct allocation of the individual expenses is impractical, they must be grouped into homogeneous pools and allocated according to criteria prescribed in 403.40(b). Under that subsection, central payments made by the home office are to be allocated directly to the individual segments if they can be so identified. 4 C.F.R. § 403.40(b)(4)(1981). Otherwise, they are to be distributed "using an allocation base representative of the factors on which the total payment is based." Id. Expenses not directly allocable and not subject to grouping in pools are considered residual expenses and are allocated "by means of a base representative of the total activity of [each segment] * * *" 4 C.F.R. § 403.40(c)(1981). Allocation as a residual expense is to be minimized. 4 C.F.R. § 403.40(a)(1)(1981).

The primary question, then, is whether the two opposed accounting methods in dispute--the headcount method and the assessment base method--specifically identify tax expenses with individual segments. The parties agree that the assessment base method does directly allocate the tax expenses to individual Boeing divisions. Transcript at 580, Testimony of Dr. Howard Wright, June 3, 1975. See The Boeing Co., ASBCA No. 19,224, 77-1 BCA ¶ 12,371 at 59,891; The Boeing Co., ASBCA No. 19,224, 79-1 BCA ¶ 13,708 at 67,236 (reconsideration decision). Plaintiff also concedes that the headcount method is not a means of direct allocation but a surrogate measure of business activity. By the literal terms of the new accounting standard, therefore, the assessment base system is permissible and the headcount approach seems improper.

Contrary to Boeing, this standard of direct allocation is a new requirement. The regulation construed in Lockheed and Boeing I, old ASPR § 15-201, -202, -203, -205, 32 C.F.R. § 15.201 et. seq. (1974),

did not call for specification identification for tax expenses. The old ASPR contained a direct identification provision in 15-202(a). However, that provision applied only to direct costs, defined as those "which can be identified specifically with a particular cost objective." 32 C.F.R. § 15.202(a)(1974). Tax costs are considered indirect, defined as those "which, because of * * * [their] incurrence for common or joint objectives, * * * [are] not readily subject to treatment as a direct cost." 32 C.F.R. § 15.203(a)(1974). Both of our prior decisions treated the taxes there involved as indirect costs and did not apply the direct identification section. Lockheed, 179 Ct. Cl. at 558, 564, 375 F. 2d at 793, 797; Boeing, 202 Ct. Cl. at 320, 321, 480 F.2d at 857; The Boeing Co., ASBCA No. 11866, 69-2 BCA ¶ 7898 at 36,749, 36,752-754. But the indirect cost section in the former ASPR did not require specific identification--merely compliance with "generally accepted accounting principles", 15.203(d), and distribution based on the benefits accruing to the several cost objectives." 15.203(c). In contrast, as we have pointed out, CAS 403 generally mandates direct allocation of home office expenses whether considered as direct or as indirect. 4 C.F.R. § 403.40(a)(1), (b)(4). That requirement is both new and important.

Boeing rests secondarily on the provision of the new accounting standard limiting application of the specific identification requirement to circumstances where it is "practical." See 4 C.F.R. § 403.40(a)(1); note 5, supra. The company defines practical, not as economically feasible, but as capable of "fair and accurate cost accounting." It then defines fair accounting as being able to measure benefit to the segments from community services and, since it concludes that an assessment basis does not accurately measure such benefit, it reasons that that formula is an improper allocation method. We do not agree.

First, tax costs fall under 403.40(b)(4), note 6, supra, not (a)(1), as indirect costs requiring groupings into logical and homogeneous pools prior to allocation to segments. See generally 32 C.F.R. § 15.203(b)(1974). The language of 403.40(b)(4) does not contain the limiting phrase, "to the maximum extent practical", found in (a)(1).

Second, assuming that the language in (b)(4) requiring specific identification "to the extent that all such payments or accruals * * * can be [so] identified", includes the practicality limitation, we agree with the ASBCA that "practical" in its common usage means no more than economically feasible. As interpreted by plaintiff, the term would be merely a superfluous repetition of the explicit requirement in other parts of CAS 403 that the allocation system for home office expenses be based on a beneficial or causal relationship (see note 5, supra)--a requirement which we discuss next.

CAS 403 requires, in addition to direct allocation, that home office expenses be "allocated on the basis of the beneficial or causal relationship between supporting and receiving activities." 403.40(a)(1), 4 C.F.R. § 403.40(a)(1)(1981); see note 5, supra. Plaintiff equates this with the old ASPR standard in that both (it is said) emphasize the importance of measuring the beneficial relationship between the expenses and the corporate segments and both contain a causal relationship element. Boeing then reads cause, in the context of tax expenses, as the need for the community services financed by the taxes, and benefit as the provision of the services, e.g., police and fire protection, by the community (this is sometimes called the "broad benefits" test).

We cannot, however, accept this "broad benefits" test as the sole controlling element under CAS 403. It is important at once to recognize, as Boeing does not, that neither Boeing I nor Lockheed rejected the assessment base as failing to meet the criterion of the prior regulation. All the court did there was to indicate that the assessment basis method was not the only permissible system under the then ASPR, but that the headcount method was permissible at that time. There was no analysis of, or ruling on, the benefit aspects of direct assessment. Lockheed, 179 Ct. Cl. at 553-54, 555, 565, 375 F. 2d at 791-92, 798; Boeing, 202 Ct. Cl. at 320, 480 F. 2d at 857; The Boeing Co., 69-2 BCA, at 36,752-753; 70-1 BCA, at 38,552 (distinguishing General Dynamics which upheld assessment basis as meeting the benefits test). See General Dynamics, ASBCA No. 13,868,69-2 BCA ¶ 8044.

Moreover, the prior ASPR interpreted in those earlier cases did not contain a requirement of causal relationship. The language cited by Boeing, "with due consideration of the reasons for incurring the costs", 32 C.F.R. § 15.203(b)(1974), concerned formation of the logical cost groupings, not how those costs were to be allocated after being placed in pools.

The turning point in this case is, as the ASBCA held, that the assessment base method, incorporated into CAS 403, does measure a beneficial or causal relationship, as broadly conceived in our prior cases, between home office tax expenses and the receiving segments. The ASBCA recognized that, while the need for tax-funded public services is a cause of the taxes and that the receipt of the services is a benefit to the divisions, these are not the only benefits or causes. 77-1 BCA, ¶ 12,371 at 59,891. Other causes of these taxes include the control over the property, or the purchase or business transaction which results in the tax levied. These causes squarely support, and relate to, the assessment base method.

As for a beneficial relationship, claimant argues too far in saying that the broad benefits test precludes use of an assessment basis. If benefit is defined broadly, and it is, see Lockheed, 179 Ct. Cl. at 561-62, 375 F. 2d at 795-96, then it is satisfied by the assessment system. The benefit here, commensurate with the causal

relationship discussed above, is not the benefit of receiving tax-paid services but the advantages to the segments of having the home office pay their taxes, including reducing the administrative burden and preventing tax liens and seizures.

The broad benefit test does not require a one-to-one relationship between benefit and tax cost. Lockheed, 179 Ct. Cl. at 563-64, 375 F. 2d at 797. In fact, the only evidence before the ASBCA on this issue indicated that there is no statistical correlation between headcount and tax expenditures (number of employees in a locality as compared to the amount of taxes paid). 77-1 BCA ¶ 12,371 at 59,878-879. Plaintiff offers no example where a specific identification/causal allocation does not also include some concept of broad and general benefit.

Support for the inference that the CASB believed that an assessment base approach, as embodied in CAS 403, would comply with the beneficial or causal relationship requirement is found in the illustrative examples given in CAS 403.60. That subsection lists as acceptable bases for allocating central payments or accruals (and, specifically, state and local income taxes and franchise taxes): "Any base or method which results in an allocation that equals or approximates a segment's proportionate share of the tax imposed by the jurisdiction in which the segment does business, as measured by the same factors used to determine taxable income for that jurisdiction." 4 C.F.R. § 403.60 (1981). These examples are illustrative, and were not intended to be exclusive. Nevertheless, the example indicates that the CASB considered that an assessment base approach, the one used in the illustration, satisfies that board's notion of the beneficial or causal relationship test. See 403.60(c).

B. Claimant also makes some minor challenges to the conclusion that assessment base allocation is called for by CAS 403 with respect to taxes. It is contended that 403.40(a)(1) requires all taxes to be placed in a single pool but that assessment base does not allow for this kind of pooling and this does not comply with CAS 403. The ASBCA correctly answered this argument in its determination that the argument's "fallacy derives from the appellant's conception of all taxes being for the same purpose, i.e. the funding of community services and so all includable in one pool with one (head count) base. We perceive no difficulty in treating each tax with a different assessment base separately and directly allocating those which may be specifically identified thereby with an individual segment and that which is not so identifiable being distributed on a base representative of the factors on which it is based." 77-1 BCA ¶ 12,371 at 59,896.

Boeing also claims that the assessment base method violates the anti-double counting provision in 402.20, 4 C.F.R. § 402.20 (1981). Again, the ASBCA properly pointed out that "a direct allocation of a particular tax cost to a segment on the basis of the tax assessment

base would not involve double counting so long as the same tax cost was not retained in a pool and again allocated to the segment from that pool." 79-1 BCA ¶ 13,708 at 67,239.

III

Assuming plaintiff can challenge contract provisions it has agreed to, compare Sandnes' Sons, Inc. v. United States, 199 Ct. Cl. 107, 113, 462 F.2d 1388, 1392 (1972) with Rough Diamond Co. v. United States, 173 Ct. Cl. 15, 351 F.2d 636 (1965), cert. denied, 383 U.S. 957 (1966), we now explore Boeing's challenge that the interpretation we have just upheld in Part II, supra, violates the authorizing legislation.

As a general rule, "Where there is a 'broad Congressional grant of administrative authority to prescribe rules and regulations to effectuate the provisions of the Act * * * our scope of review is limited * * * [t]his court * * * can invalidate such a regulation only if it clearly contradicts the terms or purposes of the statutes.'" Boeing, 202 Ct. Cl. at 340, 480 F. 2d at 868-69 (1973). The CASB was thus permitted to adopt reasonable regulations not clearly disallowed by a statute. See Boeing, 202 Ct. Cl. at 339, 480 F. 2d at 868.

In this light, we have to reject the contentions that the assessment base method infringes the uniformity and cost accuracy requirements of the Defense Production Act Amendments of 1970, 50 U.S.C. § 2168 (1976), and the policy of encouraging competition among potential contractors embodied in the Armed Services Procurement Act of 1947, 10 U.S.C. §§ 2301 et seq. (1976)(ASPA).

As to the alleged failure of the assessment basis to result in accurate cost accounting, that point is, for the most part, a reprise of plaintiff's earlier claim that the method does not comport with CAS 403. AS we have said, while the "causal or beneficial relationship" measured by CAS 403 differs from that used in Lockheed, it is still a permissible measure. Our holding in Boeing I sustaining a regulation precluding reimbursement to Government contractors for commercial inventory tax expenses indicates that allocation schemes which do not fully and meticulously measure tax-funded community services comply with statutory requirements of accuracy and fairness. The CASB is given by its statute broad authority to promulgate regulations; the only limitation is that the regulations "achieve uniformity and consistency." 50 U.S.C. App. § 2168(g)(1976). CAS 403 achieves this by treating tax expenditures in the same way, and does not exceed the CASB's authority.

Plaintiff's second statutory argument, that CAS 403 results in differing treatment of contractors in different states allegedly reducing their competitiveness, was expressly rejected by this court in Boeing I as a ground for voiding a comparable cost regulation.

202 Ct. Cl. at 340-41, 480 F.2d at 869. The court in Boeing I likewise rejected any Fifth Amendment claim arising out of the same argument of disparate treatment. 202 Ct. Cl. at 342-43, 480 F.2d at 870.

IV

Another assault on the validity of CAS 403 concerns the manner in which it was promulgated. The assertion is that the CASB failed to comply with the notice and comment requirements of the Cost Accounting Standards Act. See 50 U.S.C. App. § 2168(i)(A)(1976). We do not find this to be so.

One contention is that the CASB failed to indicate more clearly that the new cost standard would require use of the assessment base allocation system for tax expenses, and would differ from the prior method upheld in Boeing I and Lockheed. But the statute requires prior disclosure of the terms and substance of the proposed rule, not an analysis of its ramifications. The fact that the notice need not even state with detailed specificity all of the rules which may later be adopted is indicative of the less than full explanation required to satisfy the regulatory procedures. See California Citizens Bank Assn. v. United States, 375 F. 2d 43, 48 (9th Cir.), cert. denied, 389 U.S. 844 (1967). Aside from the language of the income tax example in 403.60, which will next be discussed, the rule (i.e. CAS 403) was adopted as proposed and the plaintiff had sufficient information from which it could have gleaned the change in the new standard from the prior ASPR.

The only modification from the draft to the final rule was in the income tax example in 403.60. The income tax illustrative base was changed from one allocating expenses based on profit or loss of each segment to one based on the "same factors used to determine taxable income for that jurisdiction." Boeing complains that this was a substantial change which should have been first issued as a proposal subject to comment for a period of thirty days. That argument makes far too much of very little.

For one thing, the change in the income tax example did not affect application of the assessment base method. That system is required because of the direct identification provision for indirect costs--a provision which was already in the draft. The income tax illustration does not determine the proper allocation method but is only instructive as to the intent of the CASB with respect to what is a "beneficial or causal" relationship. And for that purpose it was helpful but not decisive.

Even if the change in the illustration was really material to this case, it was within the range of permissible alterations after a period of administrative comment. The particular change was made in

response to critical comments by a majority of those commenting on this point. 4 C.F.R. § 403, Preamble A, Part 7 (1981). The fact that changes were possible should not have been unexpected since the CASB specifically requested comments on the income tax example. 37 Fed. Reg. 13,064 (1972). A new notice is not required when an agency "adopts the suggestions of interested parties." Ethyl Corp. v. EPA, 541 F.2d 1, 48 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976). Accord, Northwest Airlines, Inc. v. Goldschmidt, 645 F.2d 1309, 1319-20 (8th Cir. 1981); Trans-Pacific Freight v. FMC, 650 F.2d 1235, 1248 (D.C. Cir. 1980).

V

Boeing's final charge is that the CASB was unconstitutionally constituted and its acts void, including the promulgation of cost accounting standards. The difficulty plaintiff sees is that the members of the CASB were not appointed by the President with the advice and consent of the Senate, as said to be required by the Appointments Clause of the Constitution, Art. II, § 2, cl. 2.

The argument for this position is by no means insubstantial, but we need not consider or rule upon it. Even if we were to accept plaintiff's full constitutional contention, we could not hold Boeing entitled to the monetary relief it seeks in this case. The reason is that the Department of Defense itself adopted CAS 403 and that Department had the independent authority to accept the standard on its own. Under the same general authority which grounded adoption of the Armed Services Procurement Regulations, the Defense Department could adopt or accept any permissible cost standard, no matter who the proposer. The Department did this in Defense Procurement Circular 99, establishing the relevant CASB standards (including CAS 403) as the Department's own. The Department was not deprived of its authority to adopt these standards because it may have assumed mistakenly (if plaintiff is right as to the legal ineffectiveness of the CASB and its productions) that the law compelled it to do so. Whatever the departmental motivation, that agency permissibility established the standard and intended to do so. Even if the Cost Accounting Standards Act was invalid, the law would still not limit the sources from which the Defense Department could find and pick its cost standards--so long as those standards were substantively proper (as we have held, supra).

If it be necessary--which we do not think--that the CASB and its standards must have sort of official standing in themselves, the principle of the de facto officer prevents in this case the past acts of the CASB from being held invalid. See Buckley v. Valeo, 424 U.S. 1, 142-43 (1976). As in that case (concerning the Federal Election Commission), the past acts of the CASB would be "accorded de facto validity." Equity and practicality demand that result. The number of contracts which would need to be altered, the amount of moneys involved, and the agreement by the contractors to the CAS 403

standards would justify nonretrospective application of any current ruling of unconstitutionality of the method of appointment of the CASB members.

VI

Throughout this litigation the parties have treated the Renton business and occupation tax separately. Defendant concedes that the Renton tax cannot be identified directly with Boeing's segments because it is expressed on a sliding scale, the tax per employee declining as the total number of employees increases, based on the number of Boeing employees in Renton. Plaintiff argues that its head-count method should apply, allocating the Renton tax according to the total number of employees of each segment as a percentage of the total work force.

The ASBCA, pursuant to 403.40(b)(4), allocated the tax between the segments according to the proportion of the number of employees of that segment in Renton as a percentage of the total Renton Boeing work force. This method is consistent with the standard's requirement that "payments or accruals which cannot be identified directly with individual segments shall be allocated to benefited segments using an allocation base representative of the factors on which the total payment is based." 403.40(b)(4). This result harmonizes with our analysis in this opinion, and we affirm the ASBCA's conclusion on this point, as well as on the other taxes now before us.

Conclusion

For the foregoing reasons, we grant defendant's motion for summary judgment, deny plaintiff's cross-motion, and dismiss the petition.

Section 7. Progress Payments

MARINE MIDLAND BANK v. THE UNITED STATES

Ct. Cl. No. 308-81C (Aug. 25, 1982)

BENNETT, Judge, delivered the opinion of the court:

This case presents several difficult and interesting questions of first impression: (1) under the standard "title vesting" clause for Federal procurement contracts, what is the nature of the interest taken by the Government to secure its progress payments to a contractor, and (2) upon the insolvency of a contractor to which such payments have been made, what is the resolution of the conflict between that interest and a floating lien security interest of a general creditor of the contractor? The case is now before the court on cross-motions for summary judgment, and there has been briefing and oral argument. We conclude: (1) that the Government takes an interest in the nature of a lien, and (2) that such lien is paramount to private floating liens. As will be explained fully below, since the collateral in this case did not have value in excess of the Government's lien interest, this results in a holding for defendant.

On December 20, 1977, Bond Trailer Division, Inc., a Virginia company, executed a written guarantee to plaintiff Marine Midland Bank to pay certain indebtedness to plaintiff of a third party. Bond secured this guarantee by executing a floating lien security interest in favor of plaintiff, allegedly perfected by plaintiff under applicable state law by January 9, 1978.

Bond was exclusively a Government contractor, engaged in the production of munition trailers for the Air Force and the Navy. Bond's two contracts with the Air Force were dated June 30, 1976, and March 3, 1978, and its contract with the Navy was dated May 9, 1978. All three of these contracts, whether by their original terms or by amendment, included a clause which provides that upon the Government's making of progress payments title shall "forthwith vest" in the Government:

> to all parts; materials; inventories; work in progress * * * theretofore acquired or produced by the Contractor and allocated or properly chargeable to this contract under sound and generally accepted accounting principles and practices * * * [and] to all like propery thereafter acquired or produced by the Contractor as aforesaid * * * upon said acquisition, production or allocation.

This clause is from Federal procurement regulations, 32 C.F.R. § 163.79-2 (1981), and pertinent parts thereof are included as an appendix to this opinion.

The dispute in this case arose when the party for which Bond was acting as guarantor defaulted under its obligations to plaintiff. Upon plaintiff's subsequent demand upon Bond, and Bond's refusal to pay, plaintiff instituted proceedings in May 1979, in state court in Virginia, to obtain physical possession of Bond's collateral. This basically was its plant and all of its inventory, as covered by the floating lien. In June 1979, however, the United States intervened in the state proceedings, claiming that plaintiff could not take possession of the inventory because it belonged to the Government pursuant to the title vesting clauses in its contracts. The case was then removed to the United States District Court for the Western District of Virginia. Those proceedings were stayed in their turn when Bond initiated bankruptcy proceedings in the bankruptcy court in that district, and the result of that action, as pertinent to the case as it now stands before this court, was that the property claimed both by plaintiff and the Government was abandoned by the bankruptcy court under an agreement between plaintiff and defendant that defendant would take possession of the inventory subject to defendant's payment of $250,000 should it be judicially determined that plaintiff's security interest was paramount to the interest asserted by the Government. The district court then transferred the case here for that determination.

As a preliminary matter, we note that it is indisputable that physical possession of Bond's inventory is properly with the Government. United States v. Ansonia Brass & Copper Co., 218 U.S. 452 (1910). Especially when defense procurement is involved, the Government's title vesting provisions certainly operate to prevent the actual possession of goods contracted for by the Government from passing to anyone else. United States v. Digital Prod. Corp., 624 F. 2d 690 (5th Cir. 1980); In re American Boiler Works, Inc., 220 F.2d 319 (3d Cir. 1955). It is also indisputable that the Government's taking of possession put the collateral beyond the reach of any interest that plaintiff may have had. "[Government] property, for the most obvious reasons of public policy, cannot be seized by authority of another sovereignty against the consent of the Government." Ansonia Brass & Copper Co., 218 U.S. at 471. Plaintiff claims, however, that the extinction of its interest in the collateral is compensable as a fifth amendment taking, under the rule of Armstrong v. United States, 364 U.S. 40 (1960)(where the Government takes title to property, to which a valid lien had attached, the lien is extinguished and its value is recoverable in an action for taking).

I

Of initial, and critical, importance in this case is the nature of the interest taken by the Government for its payment of progress payments. If the Government took title to Bond's inventory, in the traditional sense, then it becomes important whether plaintiff's lien attached before title vested. If so, then plaintiff's interest was compensably taken, under Armstrong. If not, then plaintiff's lien never actually had anything to attach to because the property belonged to the Government. Plaintiff would have no recovery in that situation. If, however, the Government took a lien interest, instead of traditional title, then the next question becomes one of priorities, whether it is the Government's lien or plaintiff's that is paramount. These are widely divergent lines of inquiry.

Defendant argues that the plain meaning of its title vesting clause is that the Government takes title in the traditional sense, that the Government simply owns inventory subject to the operation of the clause. Plaintiff, on the other hand, argues that a full reading of the clause, and of the regulations that govern its use, shows that the Government means only to take a security interest to secure its progress payments, and that title in the traditional sense is not contemplated at all.

Plaintiff's assertion is the correct one. As will be made clear, the progress payments in this case were loans from the Government to Bond, to be repaid by withholding an appropriate amount of the contract price ultimately owing on full performance. In the interim, the Government took an interest in Bond's inventory as security, as defined by the title vesting clause. This interest was far less than full ownership.

The title vesting clause comes from 32 C.F.R. Part 163, entitled "Defense Contract Financing Regulations", which implements the authorization under 10 U.S.C. § 2307 (1976) for agencies to make advance, partial, progress and other payments to Government contractors. The regulatory structure that Part 163 sets up is a detailed and complex framework for advancing funds to contractors under appropriate guidelines and protections. The goal of the system, as articulated in Subpart B--"Basic Policies" is "[t]he providing of funds for payment of expenses of performance of contracts [as] an essential element of defense production." Section 163.18. Further, "Prudent contract financing supports procurement and production * * * by providing necessary funds to supplement other funds available to contractors for contract performance." Id.. Recognizing the risks inherent in loaning money, however, the regulations provide that such financing must be designed to minimize monetary loss to the Government. Section 163.19. The various types of advance payments are granted only in a set order of preference, all of which succeed private financing on reasonable terms, section 163.22, and financing is not allowed at all unless the contractor appears properly creditworthy. Sections 163.24 and 163.27.

Financing through progress payments is conditioned on use of the title vesting clause at issue in this case. Section 163.79. "Title" to a contractor's inventory is taken by the Government to secure the advance of progress payments, which the contractor repays by having the sum of the progress payments deducted from amounts due upon final performance. Sections 163.81 and 163.81-3. While defendant argues that this scheme has the Government "buy" a contractor's inventory with its progress payments, this is not how the regulations read. Progress payments are made, and then they are "liquidated" by decreasing the contract price. Id. They are not partial purchases, but loans.

This conclusion is reinforced by the text of the title vesting clause itself, which makes clear that the Government does not take ownership to the covered inventory in any normal sense of the word. According to paragraph (d) of the clause: (1) title transfer does not affect the "handling and disposition" of covered property under other sections of the contract; (2) production scrap may be sold without the Government's approval; (3) upon completion of the contract, title will revest in the contractor to any covered materials that were not incorporated into the final product; and (4) the Government will accept no inventory-related liability for the covered inventory. Paragraph (e) of the clause keeps the risk of loss on the contractor unless expressly assumed by the Government, and paragraph (h) allows the Government, upon declaring default, to force the revesting of inventory in the contractor by compelling the repayment of progress payments. "Title" is meant to carry no risks for the Government and is shifted back to the contractor when it would be unneeded or undesired. In short, the Government takes an interest in the contractor's inventory but does not want, and does not take, any of the responsibilities that go with ownership.

The question raised, then, is what title vesting means for the purposes of the Government's financing program, when it is evident that "title" is not used literally in the title vesting clause or the regulations. Indeed it would do violence to the system that the clause and regulations set up to say that the Government "owns" covered property when it is apparent that the Government specifically exempts itself from most of the incidents of ownership. Reading the clause and all of the regulations together, it is plain that ownership is not taken, but rather that the Government takes a security interest in the contractor's inventory, to secure the funds loaned to the contractor through progress payments. Such an interest is readily identifiable in common parlance as a lien, as plaintiff argues, despite the use of the term "title."

By way of rebuttal, defendant presses on this court a number of cases in which courts seem to have read "title" for its plain meaning, and suggests that these cases be followed here. We read some of these cases, however, to involve only the special right of the Government to take possession of property that it has contracted for and not to

involve any of the general aspects of title as the word is commonly used. Such cases should not be read for more than what they are. Other cases show only why the Government originally chose and used the word "title," for legal settings that are no longer current, and we do not find them to have present applicability. None of these cases deals with title as ownership, and none of them is inconsistent with deciding in the case before us that the Government took a lien on Bond's inventory, as measured by the progress payments advanced to Bond.

The most readily explained of the Government's cases are those which do not involve any competing claims in the value of property that the Government has contracted for and only involve the Government's right to the physical possession of that property upon the bankruptcy of the contractor. As we have said earlier, the Government's right to possess such property cannot be questioned, and it is entirely accurate and appropriate for an opinion in a case that is solely on possession to recite that "title means title." The possessory aspect of traditional title is indisputably encompassed by "title" as it is used in the title vesting clause, at least to insure possession upon a contractor's insolvency, but these cases say nothing on whether other attributes of traditional title are also encompassed by the term. No other issue than mere possession is present. We see that it involves no inconsistency to say that "title" under the title vesting clause gives the Government a possessory right and still to leave open whether another party must be compensated for a lost interest.

An illustration of a case purely on possession is United States v. Ansonia Brass & Copper Co., 218 U.S. 452 (1910), where workmen's and materialmen's liens were argued as validly attaching to a ship, built by a contractor that had become solvent, to which the Government had taken title. This argument was rejected with the passage quoted earlier in this opinion, that no interest deriving from a sovereignty other than the United States can be forced onto United States property without the Government's consent. Id. at 471. The Supreme Court was clear that the Government's actual possession of the ship could not be interfered with, and for that purpose the Government's "title" included a possessory right. It is important, however, that the value of the workmen's and materialmen's liens was not a part of the case--only whether those liens could attach to Government property. The Court was not presented with an argument that the extinction of the liens upon the Government's possession of the ship was compensable as a taking, such as plaintiff argues in the present case, and the Court's opinion should not be read to indicate any negative inference. See Armstrong v. United States, 364 U.S. 40 (1960)(explaining this aspect of Ansonia).

Similar cases, involving only possession, are ones between the Government and a bankrupt contractor's trustee in bankruptcy, when the trustee attempts to sequester property that is covered by a title vesting clause. Such attempts are perfunctorily dismissed because the Government's right to the physical possession of such property simply cannot be defeated. See United States v. Digital Prod. Corp., 624 F.2d 690 (5th Cir. 1980); In re American Boiler Works, Inc., 220 F. 2d 319 (3d Cir. 1955). In none of these cases, however, is there an issue of the value of the property, and they have no applicability to the case now before us, where plaintiff does not dispute the Government's possession of Bond's inventory and claims only under the fifth amendment that the Government's possession has resulted in a taking of the value of its loan.

Another category of cases argued by the Government is represented by Boeing Co. v. United States, 168 Ct. Cl. 109, 338 F. 2d 342 (1964), cert. denied, 380 U.S. 972 (1965). Although the particular legal issue in Boeing involved the tax consequences of title vesting, the opinion includes a discussion of "title" as lien, which characterization is rejected in favor of a more literal reading of title. While this seems directly contrary to the conclusion reached in the present case, Boeing comes from a legal setting in which it was necessary to characterize title vesting fairly literally in order to preserve the legality of the Government's practice of making progress payments, and this explains the difference. To understand Boeing properly is to begin to understand why the word "title" was originally chosen by the Government and why a literal reading no longer makes sense.

In 1823 Congress enacted a strict prohibition on advances of Government funds, Pub. L. No. 17-9, 3 Stat. 723, and it is still on the books, in only slightly amended form, at 31 U.S.C. § 529: "No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law." For the field of Government contracts, the plain result of this prohibition was to ban advance payments, partial payments, progress payments and other types of payments advanced to contractors before contract completion, and a way around it became necessary if such payments were to be made, as difficult procurements seemed at times to require. The Government's title vesting program was developed as the answer, conditioning progress payments on the vesting of title, on the theory that there was no "advance" of public money if the Government took something of value for its payments. And it was important to this system to construe the Government's vesting of title literally, in order to make progress payments look like partial purchases. See C. S. McClelland, The Illegality of Progress Payments as a Means of Financing Government Contractors, 33 NOTRE DAME LAW. 380 (1958).

In 1948, however, Congress began to narrow the prohibition, by enacting a specific exception to allow advance payments to contractors on negotiated contracts for military procurement. Armed Services Procurement Act of 1947, Pub. L. No. 80-65, 62 Stat. 21. This was followed one year later with a very similar provision for nonmilitary procurement, Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-288, 63 Stat. 377 (1949), and finally, in 1958, Congress wholly abrogated the prohibition by broadening the allowance to progress payments, partial payments and other payments and by extending the coverage to advertised contracts as well, both military and nonmilitary. Pub. L. No. 85-800, 72 Stat. 967 (codified at 10 U.S.C. § 2307 and at 41 U.S.C. § 255).

The 1958 enactment, then, removed the reason that title vesting had been construed literally before, because it removed the need to make progress payments appear like partial purchases. The 1958 Act cleared the way for just the type of examination of the title vesting clause and regulations that we engaged in earlier in this opinion, to determine exactly the kind of interest that the Government has provided for itself. That examination concluded that the interest plainly is not ownership and has the nature of a lien. Thus, although we understand why the word "title" is used in the clause, for what was once a very important purpose, we see no present reason to call the Government's lien interest anything other than what it is, as the clause and regulations show it to be.

This background explains Boeing, which involved contracts dated before the 1958 legislation, and so a literal reading of "title" for the purposes of title vesting was still necessary. We only need note for the present case that the contracts were entered into after 1958 and that it would not be reasonable to read the present title vesting clause and supporting regulations literally at all, as we have discussed at length above.

The Government presses another case, In re Double H Prod. Corp., 462 F.2d 52 (3rd Cir. 1972), which also seems to read title vesting according to a plain meaning, even though it deals with post-1958 contracts. Double H is much like the present case, involving the Government and a floating lien creditor of a bankrupt contractor, and the opinion rejects an argument that the Government's interest should have a lien characterization. We read Double H, however, to do no more than to illustrate yet another ground on which the Government's use of the word "title" was important, but now is largely outdated.

The revised version of Article Nine, "Secured Transactions", of the Uniform Commercial Code was put forth only 10 years ago, and it has received widespread acceptance only in the last 5 years. One of the principal reforms of the new Article Nine was the establishment of a coordinated system for setting priority of competing security

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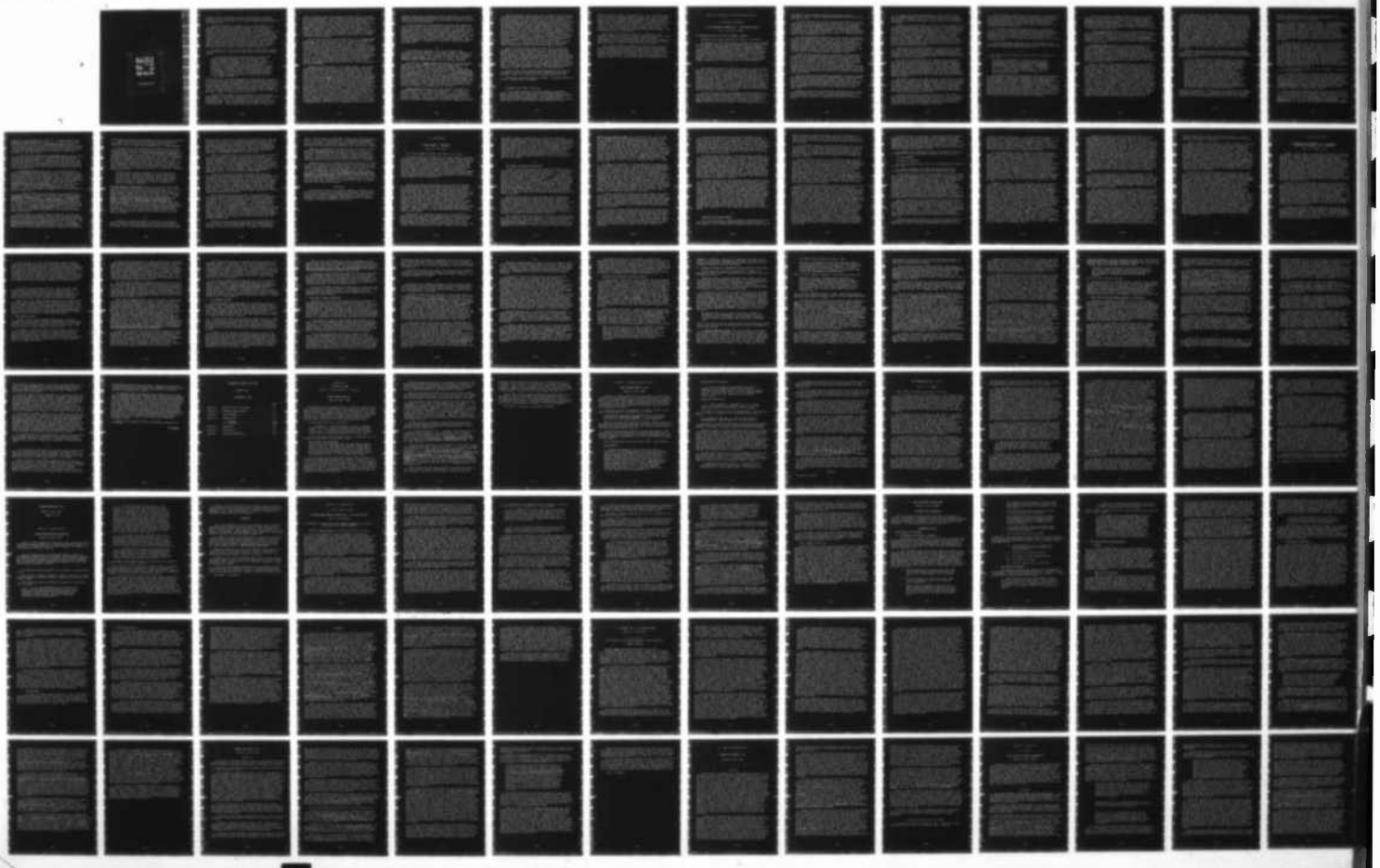

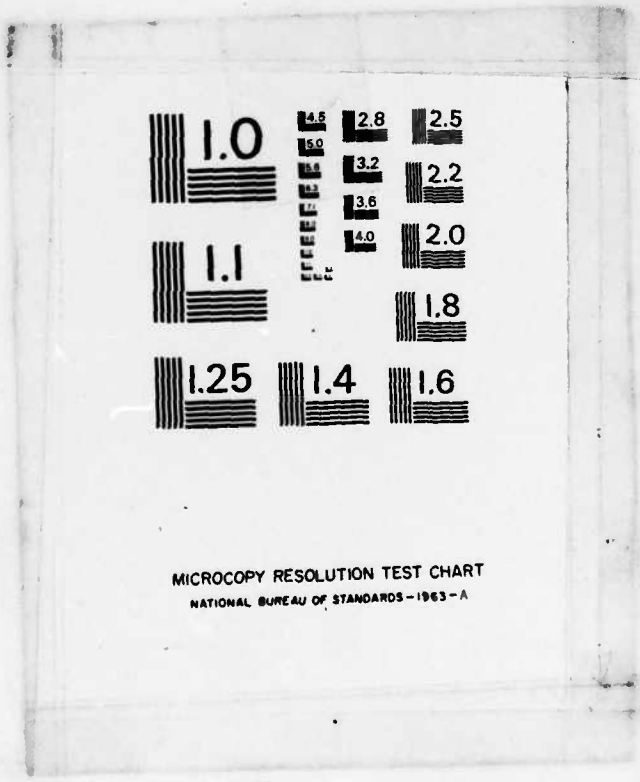
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interests, and it eliminated the need for many of the fictional devices that were used to circumvent certain inequities and inconsistencies in the old system. It is one of these now outmoded devices that concerns us.

Before Article Nine's changes, a lien interest taken by a purchase money lender often was subordinated to the floating lien interest of a pre-existing general creditor. This was unfair, however, because the value that the purchase money lender added to the debtor was not expected by the general creditor to be available as collateral--it was not present in the debtor when the general creditor calculated the amount of its loan--and it was a windfall for the law to make it subject to the general creditor's interest. It would have worked no harm to the general creditor to allow the purchase money lender simply to take out of the debtor just what it put in, thus putting the general creditor back in the position it was in when it made its loan, but it often destroyed the purchase money lender's interest to have the general creditor's interest come first.

As Comment 3 to U.C.C. § 9-312 explains, purchase money lenders then had to resort to fictional devices, and a title device was most common:

> Prior law, under one or another theory, usually contrived to protect purchase money interests over after-acquired property interest * * *. For example, in the field of industrial equipment financing it was possible, by manipulation of title theory, for the purchase money financier of new equipment (under conditional sale or equipment trust) to protect himself against the claims of prior mortgagees or bondholders under an after-acquired clause in the mortgage or trust indenture: the result was arrived at on the theory that since "title" to the equipment was never in the vendee or lessee there was nothing for the lien of the mortgage to attach to.

We note that this is closely analogous to the Government's position in the present case, where the Government has paid money into a debtor for a specific purpose and has taken back "title" in whatever is identified to that purpose. Defendant's briefs are full of assertions, in arguing against the validity of plaintiff's lien interest, that since "title" to the contractor's inventory was vested in the Government, there was nothing to which plaintiff's lien could attach. Clearly the Government simply is arguing an old title device.

Article Nine's reform of this situation is to allow purchase money lenders to come ahead of general contractors, section 9-312, and more generally to treat title devices and lien interests alike, recognizing that there is no difference in the effect that they are intended to have. Section 9-202 specifically makes title to collateral immaterial: "Each provision of this Article with regard to

rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor." And the Comment to section 9-101 reinforces this: "Rights, obligations and remedies under the Article do not depend on the location of title (Section 9-202). * * * The scheme of the Article is to make distinctions, where distinctions are necessary, along functional rather than formal lines." Thus Double H is explained, as a case on the common pre-Code practice of using a title device to avoid the inequity of giving priority, in property covered by a special loan of money, to a general creditor who would take such an interest as a windfall. This device is no longer necessary, however, given the new common understanding and treatment of purchase money interests.

Both parties also discuss the significance of In re Murdock Mach. & Eng'r Co., 620 F.2d 767 (10th Cir. 1980), a case which dealt with the attempts of a Government contractor's supplier to halt the delivery of steel, while still in transit, upon the supplier's discovery that the contractor had become insolvent. The dispute in the case was between the supplier and the Government, with the Government claiming that title to the steel had vested in the Government pursuant to a title vesting clause and that it was therefore entitled to take the steel without payment. The Tenth Circuit resolved the case by finding: (1) on the special facts before it, that the state enactment of U.C.C. Article Nine applied and (2) that the closest analogue in Article Nine was to the right of a supplier to halt deliveries as against the interest of a good faith purchaser for value. The supplier in Murdock was found to have that right, and the Government was required to pay.

Murdock may seem applicable to the present case, in the analogy between the Government, under its title vesting clause, and a good faith purchaser for value, because this would seem to have more in common with a "title" characterization of the Government's interest under title vesting than a "lien" characterization. Apart from the great difference in the factual situation, however, which alone may be enough to distinguish Murdock, there is a more fundamental difference. The Tenth Circuit was faced with the task of fitting the Government's title vesting practice into the complex and self-contained system of Article Nine, and it chose the good faith purchaser for value analogy as the best it could find. While this may well have been the best "fit" under the circumstances, we are not sure that it should have any applicability outside of Article Nine. As explained fully below, the Federal common law, and not Article Nine, governs the present case, and construing title vesting for its purposes is very different. We do not have to fit title vesting into a system in which it was never intended to be a part. Rather we can read the Government's title vesting clause and regulations for what they really are written to be, a very reasonable financing structure using paramount liens to secure progress payments. Murdock and our case do not conflict. The court in Murdock focused on the peculiar circumstances involving an innocent

seller of goods to an insolvent contractor rather than on the overall problems of Government procurement. It did not focus on nor did it rule on the validity of the title vesting clause as between a floating lien holder and the Government.

In sum, we hold that the Government's title vesting clause and regulations provide for the taking of an interest in the nature of a lien. Full title, in the plain sense, certainly is not meant, as an examination of the clause and regulations show. We recognize that the Government's use of the word "title" has had an important history, both to avoid the ban on advances of public money and as a way to circumvent floating lien interests of general creditors, and that it has an important present use in insuring that the Government may take actual possession of the inventory of a bankrupt contractor. There is no reason, however, in theory or in case law, to read the word for more than that.

II

The second major question in this case is which of the conflicting security interests in the value of Bond's inventory, the Government's or the plaintiff's, should take priority. That such a question of priorities is one of Federal law was settled in United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979). The only remaining issue is what the Federal rule of decision should be.

The question in Kimbell Foods involved the conflicting security interests of private lenders and certain Government agencies, the Small Business Administration (SBA) and the Farmers Home Administration (FHA). This was a question of Federal common law, since the Court decided that Federal law should control the ordering of priorities but also since no statute did so. See Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). In choosing the source of the Federal rule of decision, the Court made reference to the standard practice of both the SBA and the FHA of conforming many functions to state practice and noted that general commercial lending schemes would be greatly upset if those agencies were not also to follow state laws in their lending programs. Since the Court saw little reason for Federal uniformity, it concluded that the state enactments of Article Nine would be used as the Federal law for the case.

Kimbell Foods specifically left open, however, the ability to fashion uniform rules in cases that required it. "Of course, formulating special rules to govern the priority of * * * Federal * * * liens * * * would be justified if necessary to vindicate important national interest." 440 U.S. at 740. And especially where state practices would not be affected by such a uniform Federal rule, it is entirely reasonable and appropriate to impose one. See id. at 739-40.

The case before us clearly calls for a uniform rule of decision. Government procurement is not carried out from small regional offices, as the functions of the SBA and FHA often are, and individual state practices generally are not followed. Quite to the contrary, it is one of the primary purposes of the extensive and detailed regulations for Federal procurement to promote standardization and uniformity throughout the Federal system. Indeed, specifically for the purposes of the present case, it was the explicit desire of Congress itself, when it enacted the 1958 authorization for advance, progress, partial and other payments, that "uniform Government-wide regulations * * * be developed to guide the exercise of the * * * advance payment (and progress payment) authority." [1958] US. CODE CONG. & AD. NEWS 4027. This desire is reflected in the implementing regulations at 32 C.F.R. § 163.16: "Uniform financing policies and, so far as practicable, uniform procedures and standard forms are to be used by the Departments * * *." Thus it is clear that Kimbell Foods' resort to state laws would not be appropriate in this case, as contrary to evident Congressional intent and established Federal practice.

The rule of decision we choose for this case is to make the Government's security interest under its title vesting procedures paramount to the liens of general creditors. We believe that this merely follows the modern practice of giving priority to purchase money interests, as we consider purchase money to be closely analogous to the Government's progress payments, and we lay down nothing new or unexpected. The Government should be able to take out of the contractor the value that it has put in, if that value is identified with specific property, and it does not hurt a general creditor if this is done. We note also that giving the Government an interest only to the extent of its progress payments prevents the Government from taking possession to more value than it has put into the contractor.

In this case, since it appears from uncontested facts that the Government's security interest in Bond's inventory was not fully satisfied, there is no excess value to satisfy plaintiff's lien.

Accordingly, plaintiff's motion is denied. Defendant's motion is granted. The petition is dismissed.

FRIEDMAN, Chief Judge, concurring:

In one respect the court's analysis produces a paradoxical result. The court recognizes that if the Government had title to Bond's property and if the plaintiff's lien on that property attached before the Government's title vested, the invalidation of the plaintiff's lien by the Government's title would constitute a compensable taking by the United States of the plaintiff's security

ported to "acquire title" to the property, in fact it acquired only a lien to secure the progress payments it made. The court then holds that, as a matter of Federal law, the Government's security interest prevails over the plaintiff's state-created lien without regard to whether that lien antedated the Government's. The result is that the lesser security interest the Government has in Bond's property as a result of the court's holding (a lien on, rather than title to, the property), gives the Government greater rights in that property (priority for its lien over the plaintiff's possible prior lien) than it would have had if it had title.

The reason for this result, however, is convincing. The Government obtains a lien only to secure its progress payments. Those payments necessarily increase the value of Bond's assets. Accordingly, it is fair and appropriate that the Government should be given priority with respect to the additional value its own monetary advances created. That is all the court's decision does.

As a matter of Federal procurement law and policy, there is no convincing reason why the plaintiff's floating lien should prevail over the Government with respect to property values the Government created. By definition the plaintiff could not have looked to those subsequently created values to protect its claim at the time its security interest arose. No unfairness results from protecting the Federal interest by thus limiting the reach of the plaintiff's lien.

Section 8. Conflict of Interest-Fraud-Integrity

a. Conflict of Interest

K & R ENGINEERING COMPANY INC. v. THE UNITED STATES

Ct. Cl. No. 84-77 (1980)

ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

FRIEDMAN, Chief Judge, delivered the opinion of the court:

The plaintiff in this action seeks to recover $132,000 in damages for the alleged breach of a contract terminated by the Government for its convenience. The Government has moved for summary judgment on (1) its affirmative defense that an unlawful arrangement between the plaintiff and one of the Government's agents rendered the contract unenforceable against the Government, and (2) its two counterclaims for the amounts the Government previously paid under this and other contracts tainted by the same illegal arrangement. We hear oral argument, in which the plaintiff did not participate. We find that there is no issue as to any material fact, and grant the Government summary judgment both on the defense and on the counterclaims.

I.

The sordid tale that led to this lawsuit began in 1972 when the plaintiff became interested in bidding on certain contracts let by the Army Corps of Engineers. It sought the assistance of Allen I. Swenson, then the Chief of the Plant Branch of the St. Louis District of the Corps, who had the principal administrative authority over such contracts in that region. The initial contact was made through a friend of Swenson, Earl D. Whitmore, Jr., who informed Swenson that he had friends, later identified as John C. Ray and Carl Jaycox, the onwers, directors, and officers of the plaintiff, who were interested in obtaining such contracts. He told Swenson that if their company received some of this work, they would make it worth Swenson's while. Swenson thereafter assisted the plaintiff in obtaining and performing the three contracts involved in this case.

In 1973, Swenson's office was assigned the administration of a contract for the rehabilitation of bulkheads at Lock and Dam No. 25 on the Mississippi River (the bulkhead 25 contract). With Swenson's help, the plaintiff bid on and received the contract for this work. Shortly thereafter, bids were sought on a contract for similar rehabilitative work at Lock and Dam No. 26 (the bulkhead 26 contract).

The plaintiff also received this work, again with Swenson's assistance. Both of these projects were completed, and the plaintiff was paid in full.

The third contract the plaintiff received with Swenson's aid was entered into in 1974 and was for the rehabilitation of two barges. In 1975, before work was completed under this contract, the Government terminated the contract because of the plaintiff's unsatisfactory performance. At that time, the Government had made partial payments to the plaintiff totalling $138,366.68. It is the termination of this contract and the Government's continuing refusal to complete payments under it that prompted this suit.

The initial agreement between Swenson, Ray, Jaycox, and Whitmore had been that Swenson would receive 5 percent of the face value of any contract he helped the plaintiff procure. Before the bulkhead 25 contract was completed, however, the arrangement was altered to give Swenson 25 percent of the profits under these contracts. (Whitmore under either system was to receive a share equal to Swenson's.) Swenson received a total of $15,581 as his share of the profits under the two bulkhead contracts; he received nothing from the barge contract, which was terminated before it yielded a profit.

Swenson provided various forms of assistance to the plaintiff in connection with the letting and performance of the contracts. With respect to the bulkhead 25 contract, he gave the plaintiff advance notice of the invitation for bids so that it could prepare its bid. He informed the plaintiff of the maximum amount the Corps would pay, so that its bid would be below that figure. In drafting the specifications, he set a short time for performance, which would have necessitated overtime costs. He told the plaintiff, however, that the deadline could be safely violated, enabling the plaintiff to bid lower than others by not including the overtime costs seemingly required for timely performance.

After the plaintiff was awarded the bulkhead 25 contract, Swenson was appointed Contracting Officer's Representative. He was therefore the Corps official with principal and direct responsibility for dealing with the plaintiff and supervising its work. After high water levels allegedly increased the plaintiff's costs, Swenson told Ray that it was possible to obtain additional money from the Corps. He then recommended to the Corps that it pay the plaintiff to cover these costs.

Swenson gave the work only perfunctory inspections, and, in fact, instructed the plaintiff on ways to reduce costs by cutting corners. He also allowed the plaintiff to use Government employees and machinery without requiring an appropriate reduction of the contract price.

The events surrounding the bulkhead 26 contract were similar. After it became apparent that this work was needed, Swenson advised the plaintiff to submit a bid on it. At the same time, he attempted (but failed) to have the new project treated as part of the bulkhead 25 contract.

Swenson again was responsible for writing the specifications and administering the contract. The plaintiff again was low bidder, and Swenson recommended awarding the contract to it. As with the bulkhead 25 contract, Swenson had Government personnel and equipment supplied to the plaintiff. He used a short completion date, and told the plaintiff that it would be able to exceed this date as it could the one in the bulkhead 25 contract. He failed to inspect the work adequately, although he admitted he had strong suspicions that the plaintiff was cutting corners. He permitted the plaintiff to disregard a contract specification, which resulted in an easier job for the plaintiff but incomplete painting of some difficult-to-reach areas, without reducing the contract price.

Swenson once again provided substantial assistance to the plaintiff with respect to the barge contract. The plaintiff's bid, again the lowest, was approved by Swenson, who recommended awarding the contract to the plaintiff even though the plaintiff had never before attempted a project of this scope and Swenson himself had doubts about its ability to perform adequately.

As with the two bulkhead contracts, Swenson and the plaintiff discussed ways of cutting corners on the contract, and Swenson procured contract modifications beneficial to the plaintiff. Swenson permitted the plaintiff to spray paint over wet surfaces although he knew that the practice was unsatisfactory. When the plaintiff had trouble in performing the work specified in the contract, Swenson suggested that it could claim additional funds and time for performance by alleging defective specifications and practical impossibility. Swenson personally drafted the letter to the Corps signed by Ray that made such claims.

The scheme started to fall apart because the plaintiff was unable satisfactorily to complete the barge contract. Ray notified the Corps by letter on December 1, 1974, that the plaintiff was ceasing work on the barges at the direction of Swenson. He stated that the owner of the barges, Army Troop Support Command, "fends [sic] my work 100% totally unacceptable [sic]," but that "Mr. Swenson has never before found difficulties with the exterior work and we were never notified that there were any defects in that work."

Swenson resigned from the Corps on February 27, 1975, after discovery that he owned 25 percent of Pilot Services, Inc., a company which had done work for the Corps under contracts for which Swenson was responsible. Although the remaining shares of Pilot were held equally by Ray, Jaycox, and Whitmore, the connection between the plaintiff and Pilot was not noticed at that time.

Following further dispute over the specifications and plaintiff's performance, the Government terminated the contract on October 22, 1975. The plaintiff and the Government then entered into termination settlement negotiations. During the settlement negotiations the United States Attorney advised the Corps that a grand jury was investigating the possible bribery of Swenson by the plaintiff, and the Corps suspended negotiations.

Ray and Jaycox subsequently pleaded guilty to violations of 18 U.S.C. § 201(f) (bribery of a public official), and Whitmore to a violation of 18 U.S.C. § 371 (conspiracy), all growing out of their dealings with Swenson regarding the bulkhead contracts. Swenson pleaded guilty to a violation of 18 U.S.C. § 208 (conflict of interest), arising out of his dealings with yet another firm of which he was part owner.

The plaintiff made another request for final payment shortly after Ray and Jaycox were sentenced, which the Corps again denied, and the plaintiff thereafter timely filed this suit.

II.

A. The conflict-of-interest statute (18 U.S.C. § 208(a)) is violated when

> an officer or employee of the Executive branch of the United States Government . . . participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a . . . contract, claim, controversy, . . . or other particular matter in which, to his knowledge, he . . . has a financial interest.

The undisputed facts show that Swenson's activities violated this criminal statute. Swenson was an employee of the Executive branch. In that capacity he participated "personally and substantially" in various aspects of the letting, administration, and performance of the three contracts here involved. He knowingly had a "financial interest" in those contracts. In its brief the plaintiff "admits that it's [sic] two officers and only stockholders, John C. Ray and Carl Jaycox, entered into an agreement with Allen I. Swenson, . . . whereby they would pay Swenson 25% of the profits realized on all contracts which plaintiff had or would obtain from the Corps of Engineers." No more was required to establish a violation by Swenson of the statute and, indeed, the plaintiff does not deny his violations.

B. The next question is whether Swenson's violations preclude the plaintiff from recovering damages for termination of the barge contract. The decision of the Supreme Court in United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961), requires an affirmative answer to that question. (In point III infra we discuss the question whether those violations also permit the Government to recover from the plaintiff the amounts it already has paid the plaintiff under all three contracts.)

1. Mississippi Valley involved the interpretation and application of the predecessor conflict-of-interest statute, 18 U.S.C. § 434, which differed in substance from the present statute only in that its scope was narrower. The Supreme Court's decision in Mississippi Valley and the Court's explication of the policies the conflict-of-interest statute is intended to serve are therefore equally applicable to the present statute.

Mississippi Valley grew out of a contract between the Atomic Energy Commission and Mississippi Valley Generating Company ("Generating Company") for the construction of an electric power plant. Eight months after the contract was signed and after the Generating Company had done some preliminary work under the contract, the Government terminated it. The Generating Company sued for the amount it had spent in connection with the contract. The Government defended on various grounds, but primarily on the ground that the contract was unenforceable because of an illegal conflict of interest involving Adolphe H. Wenzell.

Wenzell had been a vice president and director of First Boston Corporation, a major financial institution. Without severing his relationship with First Boston, Wenzell acted as a part-time uncompensated consultant to the Government in its negotiations with the Generating Company, providing advice first on interest costs for any financing undertaken for the project and later on the total cost of the project. He was actively involved on the Government's behalf in the negotiations, on occasion serving as the Government's sole representative in meeting with Generating Company officers. Among other things, Wenzell, in his capacity as a First Boston officer, wrote a letter to the Generating Company at its request on First Boston stationery in which he furnished his opinion about the probable interest rates for financing the project. Subsequently, in part on the basis of this letter, the sponsors of the project retained First Boston as co-financing agent. Because of its extensive involvement in the financing of major power projects, from the outset it was considered likely that First Boston would participate in the project. Both Wenzell and First Boston were aware that Wenzell's dual position raised serious questions under the conflict-of-interest law.

The Supreme Court held that Wenzell had violated the conflict-of-interest statute and that that violation barred the Generating Company from enforcing the contract. With respect to the former, the Court stated that "[t]he obvious purpose of the statute is to insure honesty in the Government's business dealings by preventing Federal agents who have interests adverse to those of the Government from advancing their own interests at the expense of the public welfare." 364 U.S. at 548. It explained that "[t]his broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government." Id. at 549. It also stated that "the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest Government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation." Id. at 550. The Court ruled that Wenzell violated the statute "by entering into a relationship which made it difficult for him to represent the Government with the singleness of purpose required by the statute." Id. at 559.

The Court relied upon the same policy consideration in holding that Wenzell's violations barred the Generating Company from enforcing the contract, even though the statute did not explicitly provide that remedy (id. at 563):

> As we have indicated, the primary purpose of the statute is to protect the public from the corrupting influences that might be brought to bear upon Government agents who are financially interested in the business transactions which they are conducting on behalf of the Government. This protection can be fully accorded only if contracts which are tainted by a conflict of interest on the part of a Government agent may be disaffirmed by the Government. If the Government's sole remedy in a case such as that now before us is merely a criminal prosecution against its agent, as the respondent suggests, then the public will be forced to bear the burden of complying with the very sort of contract which the statute sought to prevent. Were we to decree the enforcement of such a contract, we would be affirmatively sanctioning the type of infected bargain which the statute outlaws and we would be depriving the public of the protection which the Congress has conferred.

Because of the importance of maintaining the "integrity of the Federal contracting process and . . . protect[ing] the public from the corruption which might lie undetectable beneath the surface of a contract conceived in a tainted transaction," id. at 565, the Court rejected

the claim that nonenforcement was a harsh remedy against the Generating Company, which had no control over Wenzell s activities and was not itself involved in any wrongdoing.

2. The present case is an even stronger one than Mississippi Valley for denying enforcement of the contract. In Mississippi Valley there was no actual corruption shown by either Wenzell or the Generating Company. Neither of them directly profited from the conflict-of-interest position Wenzell occupied; Wenzell did not attempt to use his position with the Government to further First Boston's interests. Enforcement of the contract was denied not because Wenzell himself had been corrupt but because he had entered into "a relationship which made it difficult for him to represent the Government with the singleness of purpose required by the statute." Id. at 559.

In the present case, in contrast, there was actual corruption of both the plaintiff and Swenson. The plaintiff's officers agreed to pay and did pay Swenson a percentage of plaintiff's profits on all contracts under Swenson's authority. In return for this payoff, Swenson helped the plaintiff obtain contracts it otherwise might not have received. He also condoned and aided violations of the contract and other improprieties that undoubtedly increased the Government's cost or denied the Government advantages it could have obtained if its representative had been concerned solely with protecting and promoting the Government's interests. The dealings between plaintiff and Swenson constituted the very conduct the statute was designed to reach, "preventing Federal agents who have interests adverse to those of the Government from advancing their own interests at the expense of the public welfare." Id. at 548.

3. The two grounds upon which plaintiff attempts to avoid this result are unconvincing.

a. Plaintiff stresses that Swenson was "never charged nor convicted of a violation of 18 U.S.C. Section 208 relative to any alleged conflict of interest involving this Plaintiff" and "Ray and Jaycox were convicted of a violation of 18 U.S.C. Section 201 [bribery of public officials] relative to the bulkhead 25 and 26 contracts", not the barge contract on which the plaintiff brings this action. Nothing in Mississippi Valley, however, indicates or even suggests that a criminal conviction is necessary before enforcement of a contract tainted by a conflict of interest may be denied.

Wenzell was neither criminally charged nor convicted of a violation of the conflict-of-interest statute. Indeed, even an acquittal in a criminal case would not necessarily preclude a finding in a civil case that the acquitted party had engaged in the conduct the criminal statute prohibits. See, e.g., United States v. Acme Process Equipment Co., 385 U.S. 138 (1966) (United States had right to cancel contract because of payments that violated Anti-Kickback Act, despite

acquittal of Anti-Kickback Act violators in criminal prosecution); Nibali v. United States, 218 Ct. Cl. _____, 589 F.2d 514 (1978). Enforcement of the contracts in Mississippi Valley was denied to further the public policy of the conflict-of-interest statute "to protect the public from the corrupting influences that might be brought to bear upon Government agents who are financially interested in the business transactions which they are conducting on behalf of the Government." 364 U.S. at 563.

b. The plaintiff contends that Mississippi Valley does not apply here because the "Government has failed to show that the alleged conflict of interest on behalf of Swenson in any way adversely affected the barge contract." It states that it "was the low bidder on the barge contract, it performed the work on the exterior of the barge according to the specifications and only failed to perform the work on the interior of the barge because the Government's specifications were defective."

As Mississippi Valley makes clear, it is the potential for injuring the public interest created by a conflict of interest that requires invalidation of the tainted contract. It therefore is immaterial whether the particular taint has or has not in fact caused the Government any financial loss or damages. What the statute condemns is the inevitable taint of the contract itself that results when it is the product of a conflict of interest. As this court stated in Michigan Steel Box Co. v. United States, 49 Ct. Cl. 421, 440 (1914), tainted contracts are disaffirmed because of "the breach of the agent's . . . duty toward those he has undertaken to represent . . . and not [because of] the quantum of damage to the one or the amount of benefit to the other."

C. Plaintiff contends that regardless of the applicability of Mississippi Valley, it is entitled to recover under a theory of quantum valebat or quantum meruit. It points out that in Mississippi Valley the Court denied recovery quantum valebat on the ground that the Government had received nothing from the Generating Company, and it indicated that "such a remedy is appropriate only where one party to a transaction has received and retained tangible benefits from the other party. See Crocker v. United States, 240 U.S. 74, 81-82." 364 U.S. at 566 n.22. It argues that since the work it did under the barge contract benefitted the Government, it is entitled to recover under those theories.

Whatever may be the appropriateness of allowing such recovery where the Government has received benefits under the tainted contract, recovery is not permissible where, as here, the firm seeking recovery itself was involved in the corruption of the Government official. See Atlantic Contracting Co. v. United States, 57 Ct. Cl. 185 (1922). To the contrary, the same reasoning that led the Court in Mississippi Valley to invalidate the contract because of a conflict of interest--that to permit recovery under such a contract would be "affirmatively

sanctioning the type of infected bargain which the statute outlaws and . . . depriving the public of the protection which Congress has conferred", (364 U.S. at 563)--also requires rejection of the plaintiff's claim for money under quantum meruit or quantum valebat.

The courts have rejected similar claims covering the value of goods provided or services rendered under contracts that were unenforceable because tainted. In Pan American Petroleum & Transport Co. v. United States, 273 U.S. 456 (1927), the Government sought cancellation of contracts and leases that "were obtained and consummated by means of conspiracy, fraud and bribery." Id. at 486. In defense, Pan American claimed that if the contracts were voided, it was entitled to credit for the value of fuel oil and various services it had supplied as consideration under those contracts and leases. The Court disagreed, noting that the "general principles of equity" on which Pan American relied "will not be applied to frustrate the purposes of its laws or to thwart public policy." Id. at 506. The Court stated (id. at 509):

> The petitioners stand as wrongdoers, and no equity arises in their favor to prevent granting the relief sought by the United States. They may not insist on payment of the cost to them or the value to the Government of the improvements made or fuel oil furnished as all were done without authority and as means to circumvent the law and wrongfully to obtain the leases in question.

See also Rankin v. United States, 98 Ct. Cl. 357, 367 (1943) ("The plaintiff could not recover on an express contract, so it is equally fatal to the theory of recovery on an implied contract, notwithstanding any benefit which may have accrued to the Government."); Shasta County v. Moody, 90 Cal. App. 519, 523-24, 265 P. 1032, 1034 (Dist. Ct. App. 1928) ("The contracts in the case at bar . . . are against the express prohibition of the law, and courts will not . . . permit a recovery upon a quantum meruit or quantum valebat.") (emphasis in original); Armco Drainage & Metal Products, Inc. v. County of Pinellas, 137 So. 2d 234 (Fla. Dist. Ct. App. 1962) (fact that county ordered and used the goods does not permit recovery where contract for their procurement was void); McNay v. Town of Lowell, 41 Ind. App. 627, 84 N.E. 778 (1908) (fact that town had used coal received under an illegal contract and had made no offer to return coal of like quantity and value did not entitle seller of coal to retain its value).

III.

In addition to opposing plaintiff's claim for the balance due under the barge contract, the United States has counterclaimed to recover the amount it already paid plaintiff under that contract and the amounts it previously paid under the bulkhead 25 and 26 contracts.

The Government is entitled to recover on its counterclaims. The protection of the integrity of the Federal procurement process from the fraudulent activities of unscrupulous Government contractors and dishonest Government agents requires a refund to the Government of sums already paid the plaintiff no less than it requires nonenforcement of the contract not yet completed. The policy considerations enunciated in Mississippi Valley and discussed above are just as applicable to the former situation as to the latter.

Effective implementation of the conflict-of-interest law requires that once a contractor is shown to have been a participant in a corrupt arrangement, he cannot receive or retain any of the amounts payable thereunder. Permitting the contractor to retain amounts already received would create the danger that "[m]en inclined to such practices, which have been condemned generally by the courts, would risk violation of the statute knowing that, if detected, they would lose none of their original investment, while, if not discovered, they would reap a profit for their perfidy." Town of Boca Raton v. Raulerson, 108 Fla. 376, 379, 146 So. 576, 577 (1933).

To deny the Government recovery of amounts paid under such tainted contracts would reward those contractors who can conceal their corruption until they have been paid. The policy underlying the conflict-of-interest statute requires that the contractor be required to disgorge the amounts received under the tainted contract no less than it requires denial of recovery under the contract. The anomaly of the contrary result is demonstrated here in the barge contract, where the plaintiff had received part payments when the fraud was discovered. If, as we hold, the plaintiff cannot recover any additional amounts allegedly due under the contract, whey should it retain amounts it already has received?

We are dealing here with a situation in which the entire contracting process, from Whitmore's first solicitation of Swenson to the termination of the barge contract, was fraught with fraud and corruption. The contracts themselves were each infected by this corruption, and each was void ab initio. If the Government had discovered the illicit arrangement earlier, it could and would have refused to make further payments owing at that time on any of the three contracts. The Government's rights to avoid payments on tainted contracts should not depend on the happenstance of the date payment is made. "There should, logically, be no difference in ultimate consequence between the case where a [contractor] has been paid under an illegal contract and the one in which payment has not yet been made." Gerzog v. Sweeney, 22 N.Y.2d 297, 305, 292 N.Y.S.2d 640, 644, 239 N.E.2d 521, 523 (1968).

Plaintiff argues, however, that we have held that before the United States may recover amounts paid under an illegal contract, it must show that it suffered a pecuniary loss from the transaction. Neither of the cases it cites so held. In Crovo v. United States,

100 Ct. Cl. 368 (1943), the Government did not prove the existence of either a fraud or any pecuniary loss. In Charles v. United States, 19 Ct. Cl. 316 (1884), on the other hand, the Government recovered a payment made upon a fraudulently prepared voucher without any indication that the Government had suffered pecuniary loss from the payment.

Moreover, the argument is inconsistent with the basic principles applied in Mississippi Valley that once corruption is proven, all financial considerations, such as damage to one party or benefit to the other, are irrelevant to the Government's right to disavow the contract. The same principle also requires refund of amounts paid under the tainted contracts, and the question whether the Government suffered pecuniary loss from the contracts similarly is irrelevant.

Apparently there are no Federal decisions dealing with the right of the United States to recover money paid under a contract that subsequently is determined to have been illegal. Several state courts, however, have permitted state and local governments to recover. See, e.g., S. T. Grand, Inc. v. City of New York, 32 N.Y.2d 300, 344 N.Y.S.2d 938, 298 N.E.2d 105 (1973); Shasta County, supra; Town of Boca Raton v. Raulerson, supra; Armco Drainage, supra; McNay, supra; Beakley v. City of Bremerton, 5 Wash.2d 670, 105 P.2d 40 (1940). We apply the same salutory principles to the Federal conflict-of-interest law, and hold that a contractor who has participated in an illegal conflict-of-interest situation is not entitled to retain the amounts received under the tainted contract.

CONCLUSION

The Government's motion for summary judgment is granted. The plaintiff is not entitled to recover on its petition. The Government is entitled to recover on its counterclaims for the amounts it previously paid under the bulkhead 25 and bulkhead 26 and the barge contracts. The case is remanded to the Trial Division to determine the amount of recovery pursuant to Rule 131(c).

B. False Claims

UNITED STATES v. BORNSTEIN

96 S. Ct. 523 (1976)

Mr. Justice STEWART delivered the opinion of the Court.

The False Claims Act provides that the United States may recover from a person who presents a false claim or causes a false claim to be presented to it a forfeiture of $2,000 plus an amount equal to double the amount of damage that it sustains by reason of the false claim. This case presents two interpretative problems that arise when the United States sues a subcontractor under the Act on the ground that the subcontractor has caused the prime contractor to present false claims: First, how should the number of $2,000 forfeitures be counted? Second, when the United States has already recovered damages from the prime contractor because of the subcontractor's fraud, what effect does that recovery have upon the Government's right to recover double damages from the subcontractor?

I

In 1962, the United States entered into a $2,100,000 contract with Model Engineering and Manufacturing Corporation, Inc. (Model), for the provision of radio kits. Each kit was to contain electron tubes that met certain specifications. Model subcontracted with United National Labs (United) to supply these tubes at a price of $32 each. The tubes that United sent to Model under this subcontract were not of the required quality, but were falsely marked by United to indicate that they were. United sent at least 21 boxes of these falsely marked tubes to Model, in three, separately invoiced shipments. The radio kits that Model in turn shipped to the United States contained 397 of those falsely marked tubes. Model sent 35 invoices to the Government for the radio kits, and each invoice included claims for payment for the falsely marked tubes that had been supplied to Model by United. After the Government discovered the fraud, it recovered $40.72 per tube from Model and also retained the falsely marked tubes.

Subsequently, the Government brought this civil action in a Federal district court under the False Claims Act against United and two of its owner-officers, the respondents Philip L. Bornstein and Gerald Page. The complaint alleged that United was liable for 35 $2,000 forfeitures--one forfeiture for each invoice that it had "caused" Model to submit, and also claimed damages of $16,205.54, consisting of $40.82 per tube for 397 tubes. The trial court agreed

that there had been 35 forfeitures, but rules that before the Government's damages could be doubled, they were to be reduced by the amount of Model's payment to the United States. The court accordingly computed double damages at only $79.40 and awarded the Government a total of $70,079.40. 361 F. Supp. 809. On cross-appeals the Court of Appeals agreed with the trial court on the double-damages issue, but concluded that since there had been only one subcontract involved, there should be only one statutory forfeiture. Accordingly, the appellate court held that United was liable for only $2,079.40. 504 F.2d 368. We granted the Government's petition for certiorari to consider the statutory questions presented. 420 U.S. 906, 95 S.Ct. 823, 42 L.Ed.2d 835.

II

The Number of Statutory Forfeitures

The False Claims Act provides that a person "who shall do or commit any of the acts prohibited by" § 5438 "shall forfeit and pay to the United States the sum of two thousand dollars . . ." Rev. Stat. § 3490. Section 5438 makes it illegal for a person to present or cause to be presented "for payment or approval . . . any claim upon or against the Government of the United States . . . knowing such claim to be false, fictitious, or fraudulent." It is settled that the Act permits recovery of multiple forfeitures and that it gives the United States a cause of action against a subcontractor who causes a prime contractor to submit a false claim to the Government. See United States ex rel. Marcus v. Hess, 317 U.S. 537, 63 S.CT. 379, 87 L.Ed. 443. The precise issue presented here is whether the subcontractor should be liable for each claim submitted by its prime contractor or whether it should be liable only for certain identifiable acts that it itself committed.

The legislative history of the Act offers little guidance on how properly to determine the number of forfeitures. The Act was originally aimed principally at stopping the massive frauds perpetrated by large contractors during the Civil War. There is no indication that Congress gave any thought to the question of how the number of forfeitures should be determined in cases involving subcontractor fraud. But the absence of specific legislative history in no way modifies the conventional judicial duty to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question.

The respondents defend the decision of the Court of Appeals that held them liable for only one forfeiture. In reaching this conclusion the Court of Appeals relied principally on its earlier decision in United States v. Rohleder, 157 F.2d 126 (CA3), where it found that 16 forfeitures were appropriate because 16 contracts were involved. The Rohleder court had relied in turn on this Court's decision in United

States ex rel. Marcus v. Hess, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443. The Hess case involved several electrical contractors who had collusively bid on 56 Public Works Administration projects. The District Court in Hess had imposed 56 forfeitures, rejecting the defendants' claim that only one forfeiture should have been imposed because there had been only one fraudulent scheme. This Court concluded that the District Court was correct because the incidence of fraud on each separate project was clearly individualized. 317 U.S., at 552, 63 S.Ct. at 388. No party argued in this Court that more than 56 forfeitures should have been imposed, and no statement in the Hess opinion expressly limited the number of imposable forfeitures to the number of contracts involved in a case. Hess simply approved the result reached by the District Court which had found that "in each project there was a single, false, or fraudulent claim." 41 F.Supp. 197, at 216.

The Hess case, therefore, in no way stands for the proposition that the number of forfeitures is inevitably measured by the number of contracts involved in a case. Such an automatic measurement would ignore the plain language of the statute, as the present case itself illustrates. United is liable under the statute only because it engaged in conduct that caused false claims to be submitted to the United States. While it is true that no false claims would have been submitted had United and Model not entered into a contractual relationship, the entry into that relationship did not in itself cause the submission of any false claims. Had United shipped tubes of the required quality to Model, no false claims would have been presented. By the same token, Model was not caused to file a false claim until it received shipments of falsely branded tubes from United. The language of the statute focuses on false claims, not on contracts. See n. 4, supra. That language does not support a conclusion that United is chargeable with only one forfeiture in this case.

To equate the number of forfeitures with the number of contracts would in a case such as this result almost always in but a single forfeiture, no matter how many fraudulent acts the subcontractor might have committed. This result would not only be at odds with the statutory language; it would defeat the statutory purpose. Such a limitation would, in the language of the Government's brief, convert "the Act's forfeiture provision into little more than a $2,000 license for subcontractor fraud."

At the other extreme, the Government urges that 35 forfeitures should be assessed, in accord with the position of the District Court, which ruled that "[United's fraudulent] acts caused Model to submit thirty-five false claims, each of which constituted a separate violation justifying a separate forfeiture." 361 F.Supp., at 879. The difficulty with this position is that it fails to distinguish between the acts committed by Model and the acts committed by United. The distinction is a critical one, because the statute imposes liability only for the commission of acts which cause false claims to be presented.

If United had committed one act which caused Model to file a false claim, it would clearly be liable for a single forfeiture. If, as a result of the same act by United, Model had filed three false claims, United would still have committed only one act that caused the filing of false claims, and thus, under the language of the statute, would again be liable for only one forfeiture. If, on the other hand, United had committed three separate such causative acts, United would be liable for three forfeitures, even if Model had filed only one false claim. The Act, in short, penalizes a person for his own acts, not for the acts of someone else.

The Government's claim that United "caused" Model to submit 35 false claims is simply not accurate. While United committed certain acts which caused Model to submit false claims, it did not cause Model to submit any particular number of false claims. The fact that Model chose to submit 35 false claims instead of some other number was, so far as United was concerned, wholly irrelevant--completely fortuitous and beyond United's knowledge or control. The Government suggests that United assumed the risk that Model might send 35 invoices when United sent the falsely branded tubes to Model. The statute, however, does not penalize United for what Model did. It penalizes United for what it did. The construction given to the statutory language by the District Court is, therefore, no more satisfactory than the interpretation adopted by the Court of Appeals.

A correct application of the statutory language requires, rather, that the focus in each case be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures. In the present case United committed three acts which caused Model to submit false claims to the Government--the three separately invoiced shipments to Model. If United had not shipped any falsely branded tubes to Model, Model could not have incorporated such tubes into its radio kits and would not have had occasion to submit any false claims to the United States. When, however, United dispatched each shipment of falsely marked tubes to Model, it did so knowing that Model would incorporate the tubes into the radio kits it later shipped to the Government, and that it would ask for payment from the Government on account of those tubes. Thus, United's three shipments of falsely branded tubes to Model caused Model to submit false claims to the United States, and United is thus liable for three $2,000 statutory forfeitures representing the three separate shipments that it made to Model.

III

Computation of Double Damages

In the District Court "[t]he Government has established that the per unit cost to replace the [falsely branded] tubes was $40.82." 361 F.Supp., at 875. Finding that the Government had already received

$40.72 per tube as damages from Model, the Court concluded, and the Court of Appeals agreed, that the Government's total statutory damages were $79.40--double the 10 cent difference per tube between its replacement costs and the payment already received from Model for the 397 tubes.

The Government argues that both courts were wrong, and that its damages under the Act should be calculated by doubling the amount of its original loss and only then deducting Model's payment from that doubled amount. We agree that the Government's damages should be doubled before any compensatory payments are deducted, because that method of computation most faithfully conforms to the language and purpose of the Act.

Although there is nothing in the legislative history that specifically bears on the question of how to calculate double damages, past decisions of this Court have reflected a clear understanding that Congress intended the double-damages provision to play an important role in compensating the United States in cases where it has been defrauded. "We think that the chief purpose of the [False Claims Act's civil penalties] was to provide for restitution to the Government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the Government would be made completely whole." United States ex rel. Marcus v. Hess, 317 U.S. 537, 551-552, 63 S.Ct. 379, 387-388, 87 L.Ed. 443. For several different reasons, this make-whole purpose of the Act is best served by doubling the Government's damages before any compensatory payments are deducted.

First, this method of computation comports with the Congressional judgment that double damages are necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims. Second, the rule that damages should be doubled prior to any deductions fixes the liability of the defrauder without reference to the adventitious actions of other persons. The position adopted by the Court of Appeals would mean that two subcontractors who committed similar acts and caused similar damage could be subjected to widely disparate penalties depending upon whether and to what extent their prime contractors had paid the Government in settlement of the Government's claims against them. Just as fortuitous acts of the prime contractor should not determine the liability of the subcontractor under the forfeiture provision of the Act, so likewise the prime contractor's fortuitous acts should not determine the liability of the subcontractor under the double-damages provision. Third, the reasoning of the Court of Appeals and the District Court would enable the subcontractor to avoid the Act's double-damages provision by tendering the amount of the undoubled damages at any time prior to judgment. This possibility would make the double-damages provision meaningless. Doubling the Government's actual damages before any deduction is made for payments previously received from any source in mitigation of those damages forecloses such a result.

For these reasons we hold that, in computing the double damages authorized by the Act, the Government's actual damages are to be doubled before any subtractions are made for compensatory payments previously received by the Government from any source. This method of computation, which maximizes the deterrent impact of the double-damages provision and fixes the relative rights and liabilities of the respective parties with maximum precision, best comports in our view with the language and purpose of the Act.

The judgment is reversed, and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

Reversed and remanded.

Mr. Justice STEVENS took no part in the consideration or decision of this case.

Mr. Justice REHNQUIST, with whom THE CHIEF JUSTICE and Mr. Justice WHITE join, concurring in part and dissenting in part.

I join the opinion of the Court with respect to Part III's treatment of the double damages issue. But the narrow construction of the False Claims Act adopted by the Court in Part II of the opinion, while not repugnant to the face of the statute itself, is by no means the only permissible construction of that language. Because that construction, as applied to the facts of this case, leads to an arbitrary result providing a windfall for those who would seek to defraud the Government, I would construe the statute somewhat differently than does the Court. Instead of concentrating in isolation on the "conduct of the person from whom the Government seeks to collect the statutory forfeitures," as the Court does, I believe that the statute requires inquiry as to the relationship, in terms of proximate cause and foreseeability, between the conduct of such person and the number of false claims actually presented to the Government.

Section 3490 provides that any nonmilitary person "who shall do or commit any of the acts prohibited by any" of the provisions of § 5438 "shall forfeit and pay" $2,000 to the United States. The "act" which is prohibited by the first clause of § 5438, at issue here, is the "mak[ing] or caus[ing] to be made, or present[ing] or caus[ing] to be presented for payment . . . any claim . . . against the Government . . . knowing such claim to be false, fictitious, or fraudulent . . ." That which is proscribed, then, is the causing to be presented a false claim against the Government with knowledge of the falsity of the claim.

Reading the pertinent portion of the above to impose liability only for the "commission of acts which cause false claims to be presented", the Court construes this language to require the trier

of fact to "focus in each case . . . upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures." It then goes on to hold, apparently as a matter of law, that "the three separately invoiced shipments to Model" were the causative "acts" to which forfeiture liability attaches. As may be more readily seen from an examination of the facts of this case, this extremely narrow construction and application produce a result which bears little relationship to the Congressional purpose.

The stipulated facts reveal a complex and altogether deliberate scheme to palm off cheaper, surplus tubes to the prime contractor, Model. Model had contracted to build radio kits for use by the Army. The specifications for the component parts reflected the Army's understandable desire that military equipment be long-lasting and reliable. The radios were to contain new 4X150G electron tubes bearing markings that, pursuant to the underlying military procurement specifications, showed they were manufactured in a plant whose quality-control standards measured up to certain Government requirements and were "source" inspected and approved by a Government inspector at the plant during manufacturing. As far as the military was concerned (as opposed to commercial buyers), Eimac was the only authorized manufacturer. Tubes made by Eimac at its designated plant, accompanied by the proper "source" inspection and stamped accordingly, were the only ones qualified to receive genuine affixations. These stringent requirements were reflected in Eimac's market price of $40 per tube.

Respondents, however, with full awareness of what was required under Model's contract, got themselves caught between that market price and their own promise to deliver some 1,000 tubes at $32 each. Model had already rejected United's first shipment of 120 surplus tubes; with none of them bearing the requisite markings, nonconformity was obvious. The only way respondents were going to profit under their contract with Model was to ship electron tubes that had the appearance of being new and geuine JAN-type electron tubes, bearing markings as if they had been produced by Eimac under the strictures of the Government inspection process. To that end, they bought several hundred surplus tubes, at $17.50 each, from a distributor of Eimac and affixed, on each one, the JAN stamp, a "Manufacturer's Qualification Code" (Eimac's) and an "acceptance" date, all of which markings were palpably false and designed to deceive Model. To complete the illusion, respondents sent the falsely stamped tubes to a testing laboratory where, after inspection, 21 packing lists (referencing the serial numbers) were prepared, each stamped, falsely, with a facsimile of a Government inspector's "Eagle" stamp. The 21 boxes were then combined in three separate shipments, respondents certifying with each shipment that the tubes conformed to the contract. Duped into accepting the tubes as genuine, Model paid each of the three invoices and incorporated the fraudulent tubes into the radio kits. Model was paid, of course, on 35 separate invoices.

Applying its construction of the statutory language to this multifaceted shell game, the Court concludes that the only "acts" which "caused" the submission of false claims were the three separately invoiced shipments, reasoning that but for the shipment of "falsely branded" tubes the radio kits, and in turn Model's claims to the Government, would have been genuine. However, the three invoiced shipments were among a host of fraudulent acts, with respect to each of which it could be said that "but for" that act Model's claims to the Government would have been genuine. Had respondents not falsely marked each of the 300 odd tubes which were actually shipped to Model, or had the 21 packing lists covering them not been falsely stamped, it could equally well be said that Model would have submitted no false claims to the Government respecting the tubes supplied by respondents. Thus, on the basis of "but for" causation, which is all the Court's justification really amounts to, there is no support whatever for picking the No. 3 in preference to the No. 21, or for picking either of those numbers in preference to the total number of tubes each of which was falsely marked. The only way these various "acts" can be distinguished from one another, so far as causation is concerned, is their proximity in time to the submission of the false claims by Model.

The Court's construction of the statute, as applied to these facts, leads to a result which is not only arbitrary but has the effect of allowing those who would defraud the Government to minimize their potential penalties by shipping all of their rotten eggs in one basket. I believe that a somewhat different construction is at least equally consistent with the language and would produce a result far more consistent with the Congressional purpose to penalize those who would defraud the Government.

The "act" proscribed is the causing to be presented a false claim to the Government with knowledge of its falsity. The Court simply counts the number of causative acts irrespective of the number of false claims actually submitted because the latter number is, in the words of the Court "wholly fortuitous." But the foregoing examination has shown that the Court's preference for focusing on the "acts" of the subcontractor in isolation leads to an equally fortuitous result. I think that Congress intended the trier of fact in cases such as this to consider not only the "act" of the subcontractor, but also the number of false claims which the various act or acts of the subcontractor caused to be submitted. The first clause of § 5438 by its very terms focuses on protecting the Government not simply from fraud "in the air" but from the presentation for payment of fraudulent claims. The Court notes with approval cases involving prime contractors where the number of imposable forfeitures has turned on the number of false payment demands made upon the Government. Ante, at 528, n. 4. If a prime contractor utilized an innocent agent to present a single false claim to a Government agency, but in fact the agent proceeded to split that claim up into multiple invoices, it would mock the statute to suggest that the prime could avoid multiple

forfeitures by claiming that he was unable to foresee his agent's conduct. The Court's construction does indeed suggest that in that case the prime could cry "fortuity."

There is nothing on the face of the statute, however, to indicate Congressional intent to treat deceitful prime and subcontractors according to the mechanics of the underlying fraud. Instead, the verbal linkage of "acts", "causes", and "false claim" is couched in general terms pointing to a uniform construction: the number of imposable forfeitures in each case under the first clause is keyed to the number of false claims submitted. The language further suggests an interpretation in terms of traditional concepts of causation. Such concepts, whether denominated "proximate cause" or "legal" cause, frequently result in the imposition of liability even upon a negligent actor for consequences of which he could not have been absolutely certain at the time he acted, so long as those consequences might reasonably have been foreseen. See W. Prosser, The Law of Torts §§ 42, 43 (4th ed. 1971); Restatement (Second) of Torts § 435 (1965). I would remand this case to the District Court for assessment of forfeiture liability under this standard.

There may well be room for inference on the part of the trier of fact in this case, if not on the present record on such additional record as could be compiled on remand, that respondent subcontractor knew or had reason to believe that the prime contractor would assemble and forward finished products to the Government at routine and regular intervals. Nor would it be unforeseeable under such a set of circumstances that the prime contractor would regularly invoice the Government for the customary progress payments. I am unwilling to accept the flat conclusion that it was "wholly beyond" the subcontractor's ability to foresee that 35 false claims would be generated by his fraud. Evidence such as the terms of the prime contract, and the subcontract, the subcontractor's experience in business generally and in Government procurement particularly, and the closeness of the working relationship between the subcontractor and the prime contractor could well be relevant to such an inquiry. But the fact that the subcontractor loses "control" over the actual number of false claims his actions have caused to be submitted to the Government, once the prime contractor has been tricked into paying for fraudulent goods, cannot be of controlling significance if he could have foreseen the number or even the order of magnitude of the claims which would be ultimately submitted by the prime. Given a statute which punishes intentional deception, deception which is abundantly made out on this record, I cannot agree with the Court's sharply restricted test for determining the number of forfeitures for which these respondents are liable.

c. Integrity/Due Process

OLD DOMINION DAIRY PRODUCTS, INC., APPELLANT v.
SECRETARY OF DEFENSE, ET AL., APPELLEES

CADC, No. 79-0981, (1980)

EDWARDS, Circuit Judge: This case raises significant questions concerning the manner in which a Government agency (in this case the Department of Defense) may deal with prospective Government contractors. In 1979, appellant, Old Dominion Dairy Products, Inc. (ODDPI), was denied a substantial Government contract, for which it was low bidder, pursuant to a determination by the Government agency's contracting officer that Old Dominion "lacked integrity." At approximately the same time when appellant's bid was being rejected on the first contract, ODDPI bid for a second Government contract and was once again the low bidder. However, based on the earlier determination that Old Dominion "lacked integrity", the contracting officer assigned to handle the second contract concluded that ODDPI had "knowingly and substantially overbilled the Government" in past dealings with the agency. As a consequence of this finding, the ODDPI bid on the second contract was also rejected for an alleged lack of responsibility and integrity.

Since the loss of the Government contract work threatened the very existence of the business, ODDPI immediately filed this suit in District Court upon being notified of the bid rejections. Old Dominion sought declaratory and injunctive relief on the grounds that (1) the agency's contracting officers had no rational basis for determining that Old Dominion lacked integrity, and (2) the agency's contracting officers denied Old Dominion due process of law, in violation of the Fifth Amendment, in determining that ODDPI lacked integrity without giving ODDPI notice of the charges against it or any opportunity to respond to those charges. For relief, Old Dominion sought cancellation of the two contracts awarded to other contractors, new awards of those contracts to ODPPI, and a declaration that Old Dominion did not lack integrity.

Following a three-day evidentiary hearing on the merits, the Honorable Gerhard A. Gesell, District Judge, rejected Old Dominion's claims and entered judgment for the Government. Old Dominion Dairy Products, Inc. v. Brown, 471 F. Supp. 300 (D.D.C. 1979). Old Dominion then brought this appeal, again claiming that the contracting officers lacked a rational basis for their decisions and that, in any event, ODDPI had been denied due process of law.

We are mindful of the fact that Government agencies require sufficient latitude to ensure the efficient functioning of agency operations, and that the imposition of stringent due process requirements on every Governmental decision could have devastating effects on the conduct of Government business. Nevertheless, we hold that when the Government effectively bars a contractor from virtually all Government work due to charges that the contractors lacks honesty or integrity, due process requires that the contractor be given notice of those charges as soon as possible and some opportunity to respond to the charges before adverse action is taken. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

I.

Old Dominion Dairy Products, Inc. is a small business owned primarily by its President, Joel M. Turner, and his family. Old Dominion manufactures and processes dairy products in various countries throughout the world. Almost one hundred percent of the ODDPI operation is directed at obtaining Government contracts to supply dairy products to United States military bases overseas.

Beginning in 1970, ODDPI performed contracts on Government bases in Taiwan, Cuba, Spain, Okinawa, Korea and Puerto Rico. The gross sales on these contracts totalled over thirty million dollars. Prior to the present controversy, no serious problems had existed in the performance of any of the ODDPI contracts. Old Dominion was regularly solicited by the Government to bid on overseas milk contracts; no claim or determination had ever before been made challenging ODDPI's responsibility or integrity as a Government contractor.

A. The Okinawa Contract

On April 8, 1974, the Government awarded ODDPI a contract (hereinafter contract 5016) to deliver milk products on the island of Okinawa. The contract had an original term of one year, with provisions for annual one-year renewals for a total of four years. The contract was set to finally expire on June 30, 1979.

In October of 1978, the Pacific Air Force (PACAF) Contracting Center on Okinawa requested an audit of ODDPI's home office in Virginia Beach, Virginia. An audit was conducted by the Defense Contract Audit Agency (DCAA) beginning in late January 1979. In February of 1979, the contract price analyst at the PACAF Contracting Center in Okinawa, Ms. Rita L. Wells, was sent to assist with the audit of the ODDPI home office.

Following the compilation of the audit data, Ms. Wells prepared a report analyzing and evaluating the information obtained. The report noted three "irregularities" in the performance of contract 5016. Each one of the alleged irregularities involved what later proved to be seriously disputed interpretations of certain complex provisions in the contract between ODDPI and the Government. Ms. Wells concluded that the alleged "irregularities indicate an unsatisfactory record of integrity." More specifically, Ms. Wells stated in the report that these discrepancies "show a lack of business integrity. The only reason the contractor would have for the above discrepancies would be to recoup undue monies under the contract."

In light of the impending termination of contract 5016 on June 30, 1979, in November of 1978 the PACAF Contracting Center in Okinawa solicited bids for a new contract to run for three years beginning July 1, 1979. Old Dominion was one of nine contractors solicited and, in January of 1979, ODDPI submitted an initial price proposal. Two other bidders responded to the solicitation. Following receipt of the initial proposals, negotiations were scheduled with each contractor. Negotiations with ODDPI were scheduled for March 19-21, 1979. Final bids were due on March 26, 1979.

Senior Master Sergeant Juan B. Trevino was chosen as contracting officer for the new Okinawa milk contract. In order to fulfill his duty under applicable regulations to award a contract only to a contractor whom he determined to be "responsible", Sergeant Trevino requested information on ODDPI's performance under the old contract from the administrative contracting officer, Mr. Fred Artibee. On March 21, 1979, Mr. Artibee provided Sergeant Trevino with a copy of Ms. Wells' audit report. Sergeant Trevino reviewed the report and concluded that Old Dominion was not dealing honestly with the Government and was "fraudulently receiving undue profits under the current contract." On that same day, a determination was made that ODDPI lacked integrity within the meaning of Defense Acquisition Regulation 1-903.1 (32 C.F.R. 1-903.1) and was thus not "responsible." Although Sergeant Trevino had a number of telephone conversations with Old Dominion executives between March 21 and March 26, he did not at any point notify Old Dominion of the charges against it or indicate that the responsibility of ODDPI was in question.

On March 26, 1979, best and final offers were submitted by ODDPI and two other contractors. Old Dominion's final proposed price was $8,746,378. On that day, Trevino placed a written determination of nonresponsibility, with supporting documents (including the audit report), in the contract file. On the following day, Trevino awarded the contract to Foremost Blue Seals, a Japanese contractor, for 2,085,167,081 yen. At the dollar/yen ratio quoted for March 28, 1979, the contract award to Foremost was for $10,122,169, or approximately $1,375,000 higher than ODDPI's best and final offer.

Upon receiving notice that it had been denied the contract, Old Dominion requested a statement of reasons for the determination of nonresponsibility, a cancellation of the award to Foremost, an award of the contract to ODDPI, and removal of the determination of nonresponsibility from the contract file. Sergeant Trevino responded simply that the finding of nonresponsibility was based on the lack of a "satisfactory record of integrity." He refused to cancel the award to Foremost, and stated that "since a determination of nonresponsibility is required to be maintained in the file, removal of that determination is not possible."

In so doing, Sergeant Trevino admitted that, but for the determination of nonresponsibility, Old Dominion would have otherwise received the contract. Defense Acquisition Regulation provides that "when a bid or offer on which an award would otherwise be made is rejected because the prospective contractor is found to be nonresponsible, a determination of nonresponsibility shall be made, signed, and placed in the file". More importantly, the Government has never denied that, but for the determination that Old Dominion lacked integrity, ODDPI would have otherwise received the contract. No other reason has ever been suggested.

B. The Yokohama Contract

Simultaneous with the negotiations for the Okinawa contract, a similar milk contract became available for military installations in Yokohama, Japan. On December 18, 1978, the PACAF Contracting Center in Yokohama solicited bids for the supply of dairy products. As with the Okinawa contract, best and final offers were due on March 26, 1979. The proposed contract was for one year beginning July 1, 1979, with four one-year renewal options. The contracting officer in charge of negotiations was William P. Barrett.

Old Dominion was again one of three contractors to submit initial bids. In anticipation of a possible award to ODDPI, Barrett sent two letters requesting performance data on Old Dominion's two existing contracts at Okinawa and Korea. The report from Korea indicated that performance was "at least satisfactory"; a reference was also made to the fact that an audit was currently being conducted of Old Dominion by DCAA.

On March 21, 1979, Barrett received an electronic report from Colonel Damm, Chief of the PACAF Contracting Center on Okinawa. The report from Colonel Damm began with the following statement: "Under the provisions of DAR 1-902 a determination is hereby made that Old Dominion Dairy Products is not a responsible contractor for failing to meet the DAR 1-903.1(iv) requirement wherein a prospective contractor to be declared responsible must meet the minimum standard of having a satisfactory record of integrity." Transmitted after this opening statement was a copy of Ms. Wells' report.

Based on this communication, Mr. Barrett concluded that Old Dominion had "knowingly and substantially overbilled the Government." Barrett based this conclusion solely on the communication from Colonel Damm and the report of Ms. Wells. At no point between March 21 and March 26 did Barrett inform ODDPI of the allegations in the report, or notify Old Dominion that its integrity was in issue.

On March 26, 1979, Old Dominion submitted a best and final offer for the Yokohama contract of $1,161,388.98. On that date, however, Mr. Barrett made a determination that ODDPI was a nonresponsible contractor due to a lack of a satisfactory record of integrity, and placed that determination and the March 21 report from Okinawa in the contract file. The contract was awarded to Servrite International, the next low bidder, at a price of $1,272,873.43.

As with the Okinawa contract, the record here is clear that, but for the finding of a lack of integrity, Old Dominion would have otherwise received the Yokohama contract. The Government has never suggested that any other reason motivated the award to Servrite, a substantially higher bidder.

C. The District Court Proceedings

Faced with a total loss of its primary source of business, Old Dominion filed suit in the United States Court on April 6, 1979, seeking declaratory and injunctive relief. Old Dominion claimed that there was no basis for the finding of a lack of integrity, and that Old Dominion was therefore entitled to receive the two disputed contract awards. In addition, ODDPI alleged that the manner in which the Government rejected its two bids had denied Old Dominion due process of law. On April 11, the District Court heard and denied ODDPI's motion for a temporary restraining order. A hearing on Old Dominion's motion for a preliminary injunction was scheduled for April 30, 1979.

On the morning of April 30, Old Dominion was notified in court that it was formally suspended under Defense Acquisition Regulation 1-605 (32 C.F.R. 1-605) from bidding on contracts with the Department of Defense. A three-day evidentiary hearing was then conducted on ODDPI's motion. Following the presentation of evidence, the parties agreed to submit the case for final determination on the merits. On May 2, 1979, the District Court took the case under advisement.

In a six-page Memorandum Opinion, the Honorable Gerhard A. Gesell, entered judgment for the Government on May 14, 1979. 471 F.Supp. 300. The court noted that a contracting officer "enjoys a very wide range of discretion" in determining whether a contractor is responsible, and concluded that the audit report "provided ample basis for the rejections which were thus clearly reasonable under all the circumstances." Id. at 302-303. The court also summarily concluded that ODDPI's due process claim was "without merit." The court emphasized that this was particularly true in view of the initiation of

proceedings under the suspension regulations which, the court noted, "will provide plaintiff with an 'opportunity to clear [its] name.'" Id. at 303. As a result of these conclusions, the court rejected Old Dominion's request for injunctive or declaratory relief and dismissed the complaint.

Although technically not a part of the District Court proceeding, on May 25, 1979, Old Dominion's request for a hearing under the suspension regulations was denied. With these facts in mind, we turn to consider appellant's claims.

II.

Appellant's first argument on appeal is that the District Court erred in holding that the contracting officers had a rational basis for determining that Old Dominion lacked integrity. On the basis of the record presented in this case, we agree with the District Court that a reasonable basis did exist.

Appellant concedes that the standard of review with respect to decisions made by the contracting officers is very narrow. As stated in Keco Industries, Inc. v. United States, 492 F.2d 1200, 1203 (Ct. Cl. 1974), the ultimate standard is "whether the Government's conduct was arbitrary and capricious toward the bidder-claimant." Concerning a determination of nonresponsibility, the court in Keco Industries specifically stated that contracting officers "have very wide discretion," and that a complaining bidder "would normally have to demonstrate bad faith or lack of any reasonable basis in order to prevail." Id. at 1205. In describing the reasonable basis test, the court elsewhere noted that, "although based on external facts and circumstances rather than a showing of animosity toward plaintiff or favoritism for a competitor, this principle is not far removed from the bad faith test; courts often equate wholly unreasonable action with conduct motivated by subjective bad faith." Id. at 1204.

In the present case, there are no grounds for overturning the careful decision of the District Court, made after hearing three full days of testimony, that a reasonable basis did exist to justify the actions of the contracting officers. Appellant has never alleged any bad faith on the part of the contracting officers. Nor can it be said that the officers acted arbitrarily. Pursuant to existing regulations, the contracting officers solicited information from military bases at which appellant was currently providing services in an effort to determine whether ODDPI would be a responsible contractor on the new contracts. Each officer determined ODDPI to be nonresponsible on the basis of a detailed audit report which raised the possibility that Old Dominion had violated the terms of an existing contract and overcharged the Government. On these facts, the District Judge properly found that the contracting officers had a reasoned basis upon which to act.

III.

Appellant's second argument on appeal is that the District Court erred in holding that ODDPI did not have a due process right to notice of the charges of a lack of integrity and of at least a minimal opportunity to respond to those charges before being denied the Government contracts. Appellant raises a difficult and novel question of law, which must be considered in light of the interests of all parties involved.

As stated at the outset, Officer Trevino received Ms. Wells' report on March 21, 1979. On that same day, the report was transmitted to Mr. Barrett at Yokohama. During the five remaining days before the deadline for best and final offers, numerous discussions were held between the Government and Old Dominion. In none of those discussions was any reference ever made to the fact that Old Dominion had been determined to be nonresponsible for lack of integrity. No notice of any kind was ever given to Old Dominion that its responsibility was even in issue. Moreover, this was not a case where denial of one contract at least gave the contractor "constructive" notice of the allegations against it; appellant in this case was denied a second contract before it received any notice of the denial on the first contract. In the present case, a determination that Old Dominion lacked integrity was made and communicated through Government channels without ODDPI having any notice that the determination had been made. This failure of notice persisted even though negotiations and conversations were conducted between Government officials and ODDPI executives during a period of five days before adverse action was taken against ODDPI on the basis of a lack of integrity.

Appellant contends that in so acting the Government deprived ODDPI of due process of law in violation of the Fifth Amendment. Old Dominion does <u>not</u> claim to have had a "property" interest in the contract awards. Rather, appellant claims that a "liberty" interest was violated, i.e. a right to be free from stigmatizing Governmental defamation having an immediate and tangible effect on its ability to do business.

In addition, appellant does not contend that due process requires a formal hearing before determination of a lack of integrity may be made. Appellant claims only a right to be <u>notified</u> of the allegations against its integrity, and an opportunity to immediately present, in whatever time is available, facts and arguments to persuade the contracting officer that the allegations lack merit. Appellant argues that such notice and a minimal chance to respond will at least allow it an opportunity to preserve contract awards which, but for the allegations of lack of integrity, would otherwise have been made to the contractor.

The Government presents three arguments in opposition to appellant's due process claim. First, the Government asserts that a corporation may not possess a due process liberty right. Second, the Government claims that even if such a right may exist, appellant's allegations fall far short of demonstrating any injury to a cognizable liberty interest in this case. Finally, the Government argues that if a due process liberty right does apply to Old Dominion in this situation, the suspension regulations provide sufficient due process protection. We consider each of these contentions in turn.

A. Existence of a Corporate "Liberty" Interest

The Government's first claim, that a corporation may not possess a due process liberty interest, is without merit. The definition of liberty under the Fifth or Fourteenth Amendment has never been stated with exactness. Nevertheless, it is clear that the concept encompasses more than mere freedom from bodily restraint, and includes "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Admittedly, a corporation may not be bodily seized. Nor may it marry or bring up children. But a corporation may contract and may engage in the common occupations of life, and should be afforded no lesser protection under the Constitution than an individual to engage in such pursuits.

The Government would limit a corporation to due process rights founded on "property" interests. Chief Justice Burger, however, while still a member of this court, made clear in Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964), that it is not the entitlement to a Government contract which gives a Government contractor standing to challenge the procedures by which that contractor is barred from Government business. Considering the right of (among others) the "Thos. P. Gonzalez Corporation" to challenge a debarment from Government contracts on due process grounds, the Chief Justice stated:

> Thus to say that there is no 'right' to Government contracts does not resolve the question of justiciability. Of course there is no such right; but that cannot mean that the Government can act arbitrarily, either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for Government contracts.

(emphasis in original). Id. at 574. Similarly, we hold that Old Dominion is entitled to challenge the Government actions in this case on due process grounds, notwithstanding the fact that ODDPI had no "property" interest in the contract awards.

B. Presence of Injury to a Cognizable Liberty Interest in This Case

The most difficult question presented here is whether the Government conduct injured a cognizable liberty interest in this case. We hold that it did.

Appellant claims in essence that ODDPI has a right to be free from "stigmatizing" governmental defamation having an immediate and tangible effect on its ability to do business. Appellant argues that the Government may not brand or stigmatize a contractor as "nonresponsible" due to a "lack of integrity" without granting the contractor notice of the specific charges against it so as to afford the contractor an opportunity to clear its name.

We recognize at the outset the significant effect the Government conduct had on Old Dominion in this case. A determination was made that Old Dominion "lacked integrity" and that determination was communicated through official Government channels and would likely continue to be communicated every time Old Dominion bid for a contract. As a result, ODDPI lost two substantial contracts which it otherwise would have received. This sudden loss of Government work effectively put Old Dominion out of business. We again note the words of Chief Justice Burger in Gonzalez v. Freeman, 334 F.2d 570, 574 (D.C. Cir. 1964), in commenting upon the effect of debarment on a Government contractor:

> We need not resort to a colorful term such as 'stigma' to characterize the consequences of such governmental action, for labels may blur the issues. But we strain no concept of judicial notice to acknowledge these basic facts of economic life.

With this in mind, we turn to consider whether the governmental action in this case, carried out with absolutely no notice to the appellant, violated due process.

In Board of Regents v. Roth, 408 U.S. 564 (1972), the Supreme Court considered the circumstances in which the refusal of a public university to reemploy a nontenured university instructor implicated due process "liberty" interests. The Court noted that a simple refusal to rehire, without more, did not trigger due process requirements. Based on facts of that nature in that case, the Court in Roth held that the nonrenewal of the contract of the instructor, without any type of specific notice or a hearing, did not violate due process.

The Supreme Court emphasized, however, that:

> The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case.

408 U.S. at 573 (emphasis supplied). The Court also stated that

> Similarly, there is no suggestion that the State, in declining to reemploy the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case.

Id. at 573-574 (emphasis supplied). These concepts were recently reaffirmed by the Supreme Court in Owen v. City of Independence, Mo., 100 S.Ct. 1398, 1406 n. 13 (1980).

The case before us is clearly the "different case" alluded to in Roth. Old Dominion was denied the renewal of the Okinawa contract solely on the basis of Sergeant Trevino's determination that Old Dominion "lacked integrity." As stated in Roth, "where a person's good name, reputation, honor, or integrity is at stake because of what the Government is doing to him, notice and an opportunity to be heard are essential." Id. at 573, quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). Ms. Wells' report concluded that Old Dominion's actions under the old contract "show a lack of business integrity. The only reason the contractor would have for the above discrepancies would be to recoup undue monies under the contract." Officer Trevino concluded from this report that "Old Dominion was fraudulently receiving undue profits under the current contract". Officer Barrett concluded from the report that Old Dominion had "knowingly and substantially overbilled the Government". There can be no doubt that Old Dominion's good name and integrity were at stake, or that Old Dominion was in effect charged with dishonesty.

Furthermore, it cannot be disputed that the Government action in this case effectively foreclosed Old Dominion's freedom to take advantage of other Government employment opportunities, and barred ODDPI from all public employment. As illustrated by the Yokohama contract, the determination that Old Dominion lacked integrity would follow ODDPI in any attempt to procure Government work. This is particularly true in light of the Government's admission at oral argument that the

case would be no different if eight contracts had been denied. As noted above, the Government action in this case had the effect of putting Old Dominion out of business.

These actions were taken without any amount of due process. Despite the fact that numerous conversations were conducted between ODDPI and the Government, between the time the determination was made and the time the contracts were denied, at no point was it even mentioned that the integrity of Old Dominion was in issue. Old Dominion never received any notice of the charges against it. Needless to say, ODDPI was never afforded the slightest opportunity to respond to those charges.

We hold that the present case parallels the situation anticipated by the Supreme Court in Roth, and that a due process liberty right was violated. To rule otherwise would drain Roth of meaning, something that the Supreme Court has taken pains not to do. See Paul v. Davis, 424 U.S. 693, 709-710 (1976); Bishop v. Wood, 426 U.S. 341, 347-350 (1976).

This conclusion is consistent with other cases handed down in this Circuit. In Rolles v. Civil Service Commission, 512 F.2d 1319 (D.C. Cir. 1975), Officer Rolles of the Air Force Reserve received an administrative reprimand which alleged that he had prepared an incorrect or false voucher and had diverted an Air Force aircraft to an Air Force base for his personal benefit. The officer was given no opportunity to respond to the charges. Yet, based on those accusations, and with "whirlwind speed", Rolles was transferred out of active military reserve status and, as a result, removed from the Civil Service. This court found such conduct "totally repugnant to due process." Id. at 1321. Since "in effect appellant was removed from his Civil Service position as a direct result of charges made by General Hoff that amounted to accusations of dishonesty", the court held that a liberty interest had been violated and that Rolles had a right to respond to the allegations and attempt to clear his name. Id. at 1325. In Mazaleski v. Treusdell, 562 F.2d 701 (D.C. Cir. 1977), this court refused to find that a due process liberty interest was implicated when a Government employee was dismissed for reasons of unsatisfactory job performance and insubordination. The court expressly stated, however, that the employee was not terminated for grounds of dishonesty, noting that dismissals in such a case have been held to affect liberty interests. Id. at 714.

In response to appellant's claim that a liberty interest was violated in this case, the Government argues that the injury to ODDPI was essentially an injury to reputation, not actionable in light of Paul v. Davis, 424 U.S. 693 (1976). We find that reliance on Paul v. Davis is totally misplaced in this case.

In Davis, the Chief of Police in Louisville, Kentucky circulated to merchants a flyer containing the caption "ACTIVE SHOPLIFTERS" and five pages of mug shot photos, including that of Edward Davis. The flyer was brought to the attention of Davis' employer, who demanded an explanation. After hearing Davis' story, the employer informed Davis that he would not be fired. Nevertheless, Davis brought suit in federal district court claiming that he had been improperly stigmatized by Government action without due process of law.

The Supreme Court noted that Davis' complaint appeared to state a classic case of defamation. The Court held, however, that Davis had not been deprived of a liberty interest protected by the Fourteenth Amendment and actionable under 42 U.S.C. § 1983. As stated by the Supreme Court, "while we have in a number of our prior cases pointed out the frequently drastic effect of the 'stigma' which may result from defamation by the Government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." 424 U.S. at 701. The Court observed that any other construction of the Fourteenth Amendment "would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment." Id. at 699.

We think that the cases distinguished by the Court in Paul v. Davis are much more applicable to the present case. For instance, the Court cited United States v. Lovett, 328 U.S. 303 (1946), where the Supreme Court held that an Act of Congress which prohibited payment of any salary to three Government employees was an unconstitutional bill of attainder. The Court in Davis highlighted the statement in Lovett that "what is involved here is a Congressional proscription of [these employees], prohibiting their ever holding a Government job." 328 U.S. at 314; see 424 U.S. at 702. Similarly, the Court in Davis carefully reviewed the multiple opinions of the Justices in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951), and concluded that "at least six of the eight Justices who participated in that case viewed any 'stigma' imposed by official action of the Attorney General of the United States, divorced from its effect on the legal status of an organization or a person, such as loss of tax exemption or loss of Government employment, as an insufficient basis for invoking the Due Process Clause of the Fifth Amendment." 424 U.S. at 704-705 (emphasis supplied). Finally, the Court in Davis considered the case of Cafeteria Workers v. McElroy, 367 U.S. 886 (1961), where the Supreme Court held that the discharge of an employee of a Government contractor did not violate due process. The Court in Davis noted the passage of the opinion in McElroy where the Court stated: "Finally, it is to be noted that this is not a case where Government

action has operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity." 367 U.S. at 898; see 424 U.S. 705 (emphasis supplied in Davis). The Supreme Court in Davis summarized these cases by stating that:

> [t]he Court has never held that the mere defamation of an individual, whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process absent an accompanying loss of Government employment.

424 U.S. at 706 (emphasis supplied).

The point need not be repeated further. Contrary to the position of the Government here, it is clear that the opinion in Paul v. Davis supports the claim of ODDPI in this case. For, as amply detailed earlier, it is precisely the "accompanying loss of Government employment" and the "foreclosure from other employment opportunity" which is the injury resulting from the Government defamation complained of in this case. As a result, we hold that a liberty interest recognized by the Fifth Amendment is implicated in this case.

C. Sufficiency of Process Made Available to Old Dominion

Finally, the Government contends that, even if Old Dominion possessed a due process liberty right in this situation, the procedures afforded to ODDPI were sufficient to satisfy the requirements of due process. It is not disputed that Old Dominion received absolutely no notice of the charges against it before the determination was made that it lacked responsibility (due to a lack of integrity) and that contracts were denied on that basis. It is also undisputed that a number of conversations were conducted between the Government and Old Dominion between the time the determination was made and the contracts lost. The Government contends, however, that the suspension proceedings initiated after the series of events in question provided Old Dominion with ample due process protection.

In support of this position, the Government points to Horne Brothers, Inc. v. Laird, 463 F.2d 1268 (D.C. Cir. 1972). In that case, this court held that before the Government may suspend a Government contractor from all bidding, "fundamental fairness" requires that the bidder be given specific notice of the charges against him and, in the usual case, an opportunity to respond to those charges. 463 F.2d at 1271. The court added, however, that "we may accept a temporary suspension for a short period, not to exceed one month, without any provision for according such opportunity to the contractor." Id. at 1270. Similarly, in Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964), this court noted that "conceivably a summary debarment, in the nature of a temporary suspension, might be warranted for a reasonable period pending investigation"; otherwise "considerations of basic fairness require administrative regulations

establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made." 334 F.2d at 578-579.

It is plain that Horne Brothers and Gonzalez do not validate the Government conduct in this case. First of all, both of those cases dealt with formal Government action, and allowed a short period of delay for the imposition of procedures otherwise required. In Horne Brothers, the contractor had been formally suspended; in Gonzalez, the contractor had been formally debarred. In the present case no comparable decisive Government action was taken, although contracts were denied. Such denials could have continued indefinitely with absolutely no recourse for the contractor. In such a case, the Government cannot invoke suspension procedures after-the-fact and claim that those procedures are adequate. The injury complained of in this case is the loss of contracts before Old Dominion was ever suspended, not the loss of contracts after suspension but before suspension procedures were able to be implemented.

In addition, it is clear that in the present case subsequent procedures were inadequate to satisfy the requirements of due process. The suspension regulations do not provide for specific notice of the charges against the contractor. A hearing may or may not occur. In the present case, the record contains no information concerning the notice ultimately given to Old Dominion. It is clear, however, that a hearing has never been given, despite the fact that over one year has passed since Old Dominion was formally suspended. (Addenda to appellant's brief, item 4.) The suspension proceedings, whether adequate or not in their own right, clearly provided no relief for the deprivations in this case.

We need not consider whether due process is satisfied in the situation where it is impossible for some reason for the Government to give notice to the contractor before adverse action is taken on a determination that the contractor lacks integrity, and subsequent notice with an opportunity to respond is in fact promptly given to the contractor. That is clearly not this case. Accordingly, we hold that subsequent procedures did not satisfy the requirements of due process in this case, and that a liberty right of Old Dominion was therefore violated.

IV.

We turn finally to the question of what process is due. It is by now axiomatic that a determination that a due process liberty or property right has been violated does not determine the amount or type of process that is constitutionally required. As stated in Morrissey v. Brewer, 408 U.S. 471, 481 (1972), "it has been said so often by

this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." More precisely, to identify the specific dictates of due process, three distinct factors must be considered: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

It is not necessary to repeat again the importance of the interest at stake in this case. As previously recognized by this court in Horne Brothers, supra, and Gonzalez, supra, the very economic life of the contractor may be in jeopardy. See 463 F.2d at 1271; 334 F.2d at 574. The likely extensive and adverse effect of the Government action in this case on Old Dominion has been documented throughout this opinion.

At the same time, however, this court recognizes the need of agencies to be free to conduct Government business effectively and efficiently; we also recognize the potentially crippling effect that might result from the imposition of stringent due process requirements with respect to all agency actions adverse to unsuccessful bidders on Government contracts. If every governmental decision required a full blown hearing involving all parties affected, the conduct of Government business would be greatly impaired.

Perhaps recognizing the potentially overwhelming burden that would be placed upon the Government if stringent due process requirements were imposed in this case, appellant has never requested or claimed the right to a formal hearing. In its reply brief, Old Dominion merely asserts the right "to be notified of the allegations against its integrity, to present immediately in whatever time was available, facts and arguments to persuade the Contracting Officer that the allegations were without merit, and thereby have the opportunity to preserve the awards which, absent the allegations, would have been made to it." Appellant's reply brief, p. 7.

We agree with appellant that due process in this case includes the right to be notified of the specific charges concerning the contractor's alleged lack of integrity, so as to afford the contractor the opportunity to respond to and attempt to persuade the contracting officer, in whatever time is available, that the allegations are without merit. This requirement to give notice will impose absolutely no burden on the Government. Since a determination that a contractor lacks integrity may not be made without reference to specific charges or allegations, it will impose no burden on the Government to notify

the contractor of those charges. In so doing, the contractor will at least have the opportunity to explain its actions before adverse action is taken. In this way, a simple misunderstanding or mistake may be clarified before significant injury is done to both the Government and the contractor.

We do not suggest that the Government was required to afford the contractor any type of a formal hearing. Government scheduling need not be delayed while the contractor puts on evidence. We simply hold that when a determination is made that a contractor lacks integrity and the Government has not acted to invoke formal suspension or disbarment procedures, notice of the charges must be given to the contractor as soon as possible so that the contractor may utilize whatever opportunities are available to present its side of the story before adverse action is taken. This minimal requirement will not burden the Government and, indeed, is in the interest of both parties.

The present case amply illustrates the insignificant burden such notice will place on the Government, as well as the potential value it may have to the parties. On March 21, a determination was made that Old Dominion lacked integrity. On that same day, that determination and accompanying reasons were wired to the contracting officer on Yokohama. There is no reason why that same report could not have been wired to Old Dominion; the effort required to do so would have been minimal. During the period between March 21 and March 26, numerous conversations were conducted between the Government and ODDPI. During those conversations Old Dominion could have presented its side of the story and perhaps reestablished its good name and integrity.

We therefore hold that Old Dominion had a right to receive notice of the charges against its integrity before the Government denied ODDPI multiple contracts on that basis. Since Old Dominion did not receive that notice and an opportunity to respond, it is entitled to relief.

V.

In a case such as the present one, it is difficult several months after the occurrence giving rise to litigation to fashion relief. Often past events cannot be reconstructed and, as a result, the injury complained of cannot be adequately corrected. Unfortunately, in this case, the injury was easier to avoid than it is to correct.

There is nothing in the record to guarantee that Old Dominion would have received the Okinawa and Yokohama contracts had it received the notice to which it was entitled. There are accordingly no grounds at this point to vacate the awards of those contracts to other contractors and grant them to ODDPI, as Old Dominion requests. However, Old Dominion did have a right to receive notice of the allegations against it, so as to have an opportunity to answer those alle-

gations before adverse action was taken. Although the Okinawa and Yokohama contracts are no longer in issue, appellant retains the right to receive that opportunity. Whether due process has ever been granted to Old Dominion is unclear.

As discussed above, the suspension proceedings that were belatedly implemented against Old Dominion were insufficient to extinguish ODDPI's constitutional rights. Nevertheless, those proceedings may by now have afforded Old Dominion the only remedy to which it is entitled at this late date. However, we are unable to reach any conclusion on this point because we are unaware of the events that have transpired since the time when the decision was rendered by the District Court. Given these circumstances, we reverse the decision of the District Court, and remand this case to that court with instructions to determine whether the suspension proceedings, or any other proceedings, have served to cure the constitutional defect and have given appellant an opportunity to clear its name and reestablish its integrity. If such cure has not yet occurred, we instruct the District Court to reconsider the case in light of this opinion and to devise an appropriate remedy.

Reversed and remanded for further proceedings consistent with this opinion.

So ordered.

GOVERNMENT CONTRACT LAW CASES

Chapter Five

STATEMENT OF WORK

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CHAPTER FIVE

STATEMENT OF WORK

Section 1. Specifications v. Drawings

FORGY CONSTRUCTION CO.

ASBCA No. 9734 (1964)

* * * * *

Appellant was the successful bidder on a contract rehabilitation and air conditioning of the Medical Food Inspection Offices, Building 5062, Lackland Air Force Base, Texas. The fixed price contract, as modified, called for payment to appellant of $11,033.46. This appeal results from a dispute about the type of solar screen required by the contract to be installed in ten windows on the Southerly side of Building 5062. The provisions of the drawings and those of the detailed specifications are in direct conflict on this point.

As the appellant correctly points out:

> . . . On sheet No. 1 of the drawings in the lower righthand corner, there is a 'Detail of new solar screen on existing window' . . . this drawing has a note reading 'New aluminum solar screens'. The arrow leading from the note to the drawing points both to the screen frame and the screen itself. . .

On the other hand, the Government relies on Paragraph 0513 of the detailed written specifications, which reads:

> 0513 LOUVERS (SOLAR SCREENS):
> Louvers over existing windows shall be woven bronze louvers, set at an angle of approximately 17 degrees, spaced approximately 17 per inch, .005 inch thick and .05 in width held in place by a bronze wire spaced vertically on 1/2 inch centers, and electrostatically nubeloncoated. Framing members shall be sections as detailed on plans, 66063-T5 extruded aluminum anodized 204-R1 finish. Install as detailed on plans.

The invitation for bids was issued June 28, 1963, and Notice to Proceed was acknowledged by appellant on October 1, 1963, but it is not clear from the file when either party to the contract became aware of the conflict between drawing and specification. So far as appears, it was brought to light during the work. On October 7, 1963 appellant submitted for approval a 10" by 12" sample of aluminum solar screen it proposed to install in accordance with the drawing. On October 16 the contracting officer replied that the solar screen appellant had submitted did "not meet specifications."

Despite extended negotiations, no agreement was reached on this matter and the appellant installed bronze screens, as required by the contracting officer. Appellant seeks reimbursement for additional costs of $294 representing the difference between $396 for bronze screens installed and $102 for aluminum screens installed.

Normally construction contracts contain a provision (Standard Form 23A, General Provision No. 2) that in case of a conflict between the drawings and specifications, the latter will govern. For reasons which do not appear, that provision was omitted from this contract.

The Continuation Sheet to the Standard Form 19 (Invitation, Bid, and Award), which was used, includes among the listed contents of the invitation: "i. Standard Form 22, INSTRUCTIONS TO BIDDERS (CONSTRUCTION CONTRACT) (Applicable only to the Invitation for Bids), with continuation sheets Pages 1-3." The quoted language is lined out in red, and another paragraph "i" relating to amendments to the invitation substituted. The parties are not agreed about the time, circumstances, or effect of this lining out. Each has a theory which is advanced as being favorable to its cause. However, the Board finds that resolution of this question would not be controlling with respect to the basic dispute.

Neither party has referred us to any authority dealing with a conflict between drawings and specifications, but each has been governed by some special provision of the contract itself. In this case we find no such provision.

It is established that: ". . . in general the United States as a contractor must be treated as other contractors under analogous situations. When problems of the interpretation of its contracts arise, the law of contracts governs. Holler-Bach v. United States, 233 U.S. 165, 171-172; United States v. Bethlehem Steel Corp., 315 U.S. 289, 298-299." United States v. Standard Rice Co., Inc., 323 U.S. 106, 111 (1944).

Under the law of contracts, as it relates to conflicting or ambiguous contract provisions, it is settled that ". . . a question of doubt in interpreting a written contract is to be construed against the party preparing it. . ." Distillers Distributing Corporation v. J. C. Millett Co., 310 F.2d 162, 164 (CCA-9) 1962. See also: Alcoa Steamship Co., Inc. v. United States, 338 U.S. 421, 424-5 (1949); Eastmount Construction Company, Et Al v. Transport Manufacturing and Equipment Company, 301 F 2d 34, 41 (CCA-8) 1962; and Harrison Sheet Steel Co. v. United States, 101 Ct Cls. 85, 53 F Supp. 717 (1944), it was held the ambiguities in a contract drawn by the Government should be construed against it. The Supreme Court affirmed in the Standard Rice Co. opinion quoted above.

While stating that the normal provision of Standard Form 23A is not a part of the contract, the Government attempts to lean on it as a precedent. This position is unsound. Exclusion of an item

normally included customarily indicates that a different result is intended. Thus, if General Provision No. 2 of Standard Form 23A has any effect in this case, it is negative--at least from the Government viewpoint. Agents of the Government drafted this contract and if they wished the benefit of that standard provision, they should have put it in the contract. Having left it out they cannot now rely on it.

In the light of the foregoing discussion this Board must sustain the appeal. The covering letter submitting respondent's answer disputed appellant's claim costs and suggested that the question of the amount of excess costs be reserved for negotiation if decision was for appellant on the merits. In response the appellant submitted cost data, which the Government has agreed "are fair and reasonable."

The appeal is sustained in the amount of $294.00.

Section 2. Ambiguous Specifications

BLAKE CONSTRUCTION CO., INC.

GBSCA No. 1610 (1966)

Contract No. GS-03B-14060 for the construction of two buildings, Federal Office Building No. 7 and the United States Court of Claims, Court of Customs and Patent Appeals Building, was awarded to appellant on January 24, 1964. The dispute on appeal concerns the application of a protective covering for membrane waterproofing for certain foundation walls of the United States Court of Claims, Court of Customs and Patent Appeals Building.

Following up earlier correspondence, by letter of February 26, 1965, appellant stated in pertinent part as follows:

> **Although not required by the Specifications, the Drawings indicate that 'WATER-PROOF MEMBRANE' is to be provided for walls of first and second basement, as shown thereon.**

Appellant disputed that the contract anywhere required providing protection to the water-proof membrane called for by the drawings, and requested additional compensation under the standard Changes clause in the event such protection was desired.

The Contracting Officer issued a final decision on May 7, 1965, stating that it was considered to be a contract requirement that membrane protection be installed on all exterior basement walls shown to receive membrane waterproofing. From this decision Appellant made a timely appeal.

The following specification provisions figure in the dispute:

> 70-01 GENERAL
> * * * *
>
> d. MEMBRANE WATERPROOFING SHALL BE APPLIED to the top of roofs of all first basement areas not covered by first floor construction and TO THE EXTERIOR OF ALL FOUNDATION WALLS BELOW THE GROUND FLOOR SLAB, except where close proximity of adjacent existing construction renders installation of membrane waterproofing impossible. (Such wall areas are to receive interior metallic waterproofing.) Waterproofing on roofs of basement areas shall be 5-ply. WATERPROOFING ON FOUNDATION WALLS SHALL BE 3-PLY. Waterproofing under toilet room floor shall be 5-ply. All other membrane waterproofing shall be 5-ply." (Emphasis supplied, and includes language added by Amendment No. 4.)

70-06 PROTECTIVE COVERING
* * * *

b. Over 3-ply membrane waterproofing on exterior of foundation walls below the ground floor slab apply Fiberboard (ASTIM C-208, Class C) one inch thick by mopping with coal tar pitch (Fed. Spec. R-P 381) or asphalt (ASTIM D-312). Fiberboard shall completely cover membrane waterproofing.

104-27 STANDARD DETAILS
* * * *

b. Where 'Basement', 'Basement Floor', or 'Ground Floor' is referred to in the specification, it shall be understood to mean the lowest floor of the building.

Drawings No. 3-1 and 3-2 show the requirements for the two basements. A "NOTE" on Drawing 3-2 (First Basement Plan) states as follows:

SEE 2nd BAS'MT, PLANT, SH. 3-1, FOR TYPE AND EXTENT OF WATERPROOFING AT EXTERIOR WALLS OF 1ST & 2ND BAS'MTS.

Sections 5, 7, 8 and 9 on Drawing No. 5-10 also show waterproof membrane on the walls of the first and second basements, extending upwards to the ground or surface elevations shown on the drawings.

Appellant contends in essence that specification section 70-06 is inapplicable, because it refers to foundation walls below the ground floor slab, and the words "Ground Floor", per specification section 104-27, mean the lowest level of the building. According to appellant, there is no floor identified as the ground floor of the Courts building, and hence, because of the aforesaid definition, there is no specification requirement for protective covering of membrane waterproofing for the walls in question, there being no foundation walls below the ground floor slab. (While appellant had advanced the same argument respecting specification section 70-01 relating to the membrane waterproofing itself, it acknowledged, as noted above, that same was required by the contract drawings.)

The Government argues that the plain intendment of the contract requirements taken in their entirety dictate affirmance of the Contracting Officer's decision. In addition to specification section 70-06, it points to section 1 of Contract Drawing 7-22, which shows "Membrane Protection" and includes the following language:

Membrane Waterproofing TYPICAL all accessible exterior basement walls; at inaccessible walls, provide metallic waterproofing in inner surface of wall. See specifications.

The Government contends that since the work so shown is typical, the requirements are the same in other locations where the same membrane waterproofing is required, it being illogical to protect a portion only.

We do not agree with the Government as to the total effect of the protection reference shown on Contract Drawing 7-22. However, we find difficulty with appellant's reliance solely on the definition set out in specification section 104-27, and certain contract drawings only, for these reasons:

(a) Having concluded that the drawings required the furnishing of membrane waterproofing for the walls in question, appellant at least should have entertained some question concerning the applicability of specification section 70-06, which called for protective covering in the same areas. The specification language beyond question is clear on the point of furnishing such protection, and clause 2 of the General Provisions provides that in case of difference between drawings and specifications, the specifications shall govern.

(b) Specification section 115, "LIGHTING FIXTURES", includes a schedule of fixtures for the first and second basements, the ground floor, and the other floors. The schedule relating to the ground floor refers to Contract Drawing No. 9-E-16. This is entitled "First Floor Plan Lighting" and includes a detail for "Ground Floor Plan Lighting." It would thus appear that appellant should have observed that the terms "ground floor" and "first floor" were being used interchangeably. The time to have raised any question, therefore, concerning this variance in terminology was during the pre-bidding period. The duty of inquiry was plain, if an ambiguity was believed to exist.

Our view is that the contract requirements, as a whole, were reasonably interpreted by the Contracting Officer. Appellant was given sufficient notice of the problem, which ripened into the dispute, by the bidding documents. Since it failed to make due inquiry concerning what is obviously considered a discrepancy of significance, it cannot prevail now by reliance on the principle that ambiguities in contracts written by the Government are held against the drafter. See Blake Construction Co., Inc., GSBCA-1438, 65-2 BCA ¶5187, decided October 26, 1965; Warrior Constructors, Inc, GSBCA-1404, 65-2 BCA ¶5139, decided September 28, 1965; and Beacon Construction Company v. United States, 314 F.2d 501.

In presenting its case, appellant made various references to the contract documents pertaining to Federal Office Building No. 7, which is also being constructed under the contract on appeal. We considered these points, but find them irrelevant, since the decision in this case properly could be and has been made on the basis of the contract documents which set out the terms for the construction of the Courts Building.

DECISION

The appeal is denied.

WPC ENTERPRISES, INC. v. U.S.

163 Ct. Cl. 1 (1963)

DAVIS, Judge, delivered the opinion of the Court:

This is a study in the toils of ambiguity. The parties put their names to a contract which, on the point crucial to this lawsuit, could reasonably be read in two conflicting fashions. Each signatory seized in its own mind upon a different one of these contradictory versions. Compounding that confusion, they discussed the issue with each other in such a way that each thought, but this time without good reason, it had obtained the other's acquiescence in its chosen reading. The impasse became unmistakably plain when it was too late. Our task is to determine on whom shall fall the risk of such mutually reinforced obscurity.

The Government set out to procure, through bids, a large number of complex generator sets--called the MD-3 set--used to calibrate the electronic systems of the B-47 and other aircraft and to start the engines when an electric starter is required. Beech Aircraft Corporation, which had previously made these elaborate devices for the Air Force on a negotiated basis, had prepared specifications and drawings of various of the component parts which the Government acquired and incorporated in the bid invitations. Plaintiff was the low bidder, lower than Beech and another company which had also provided the sets under a negotiated contract. After a period of consideration and some discussion, the award was made to plaintiff and it performed the contract as required by the Government.

The only dispute now before us is whether five components of these generator sets had to be manufactured by (or with the authorization of) certain companies, as the Government urges, or whether plaintiff was entitled under the contract to furnish identical components made by other firms (presumably at lower prices). After the award, defendant insisted that the products of the specified companies had to be furnished. Plaintiff complied but, claiming that this directive constituted a contractual change, sought review by the Board of Contract Appeals under the Changes and Disputes articles. The Board turned down the appeal on the ground that plaintiff had been told before the award of the defendant's position and had acquiesced.

For the five components now involved, the textual provisions of the specifications (borrowed from Beech) gave general descriptions, without naming any manufacturer; however, the drawings (also from Beech) listed the part numbers given to the item by a particular firm and declared that that manufacturer was the "approved source", or that the component "may be purchased" from that company, or indicated "make from" a part furnished by a particular company, or simply said that

the component was a certain part number of a specific firm. There are also other, slighter, indications of contractual meaning on which the parties rely; the details are set forth in the findings.

Each side urges that its position is sustained by the invitation as a whole--without any need to go beyond the bounds of the contractual instruments. The defendant stresses the references to specific part numbers, designated by particular fabricators, as necessarily showing that only parts made under the aegis of the manufacturer would be acceptable; this use of exact part numbers is said to be equivalent to a mandatory direction to incorporate only those very items. Defendant also points out: (i) the drawings and specifications for the five components were not adequate for a new manufacturer to make those articles in the relatively short time alloted for completion of the procurement; (ii) the defendant was satisfied with components made from parts supplied by the named manufacturers (because they had been fully tested in the past), but would be required before acceptance to test components made by others; and (iii) this burdensome and time-consuming testing would not be practicable within the scheduled period of delivery. It should have been clear, defendant concludes, that the contract called for items supplied by or through the specific companies named in the drawings. (Defendant's witnesses testified to this effect before the Board and at the trial in this court.)

The plaintiff, on the other hand, emphasizes the lack of express mandatory language in the references to particular manufacturers for the five disputed components in contrast to certain other components which the specifications very plainly declared "shall be" or "shall consist of" an identified part made by a named manufacturer. A command to use only materials or elements made by a specific firm is not frequent in government procurement; it can be expected to be phrased explicitly and not left to inference. Moreover, the references to particular part numbers are not read as mandatory because of a specification provision (labeled "Identification of Parts") which stated:

> Beech and vendor part numbers will be shown on all items except those items supplied by other than Beech Aircraft Corporation or vendors to Beech. On items supplied by other than present sources Beech part numbers will be used with a suffix to indicate a different supplier.

To plaintiff, this clause implicitly authorized the use of identical components made by other companies than those named in the Beech drawings. It thought that it could obtain such qualified substitutes by combining the knowledge gained from three sources; the drawings and specifications (insufficient though they might be); a careful breakdown of the sample models supplied plaintiff by the defendant; and general enginering competence. Plaintiff was satisfied that the proper components could be produced in this way within the time allowed. (The contractor's position was likewise supported by evidence before the Board of Contract Appeals.)

This summary of the opposing contentions is enough to show that no sure guide to the solution of the problem can be found within the four corners of the contractual documents. As with so many other agreements, there is something for each party and no ready answer can be drawn from the texts alone. Both plaintiff's and defendant's interpretations lie within the zone of reasonableness; neither appears to rest on an obvious error in drafting, a gross discrepancy, or an inadvertent but glaring gap; the arguments, rather, are quite closely in balance. It is precisely to this type of contract that this court has applied the rule that if some substantive provision of a government-drawn agreement is fairly susceptible of a certain construction and the contractor actually and reasonably so construes it, in the course of bidding or performance, that is the interpretation which will be adopted--unless the parties' intention is otherwise affirmatively revealed. Peter Kiewit Sons' Co. v. United States, 109 Ct. Cl. 390, 418 (1947); First-Citizens Bank and Trust Co. v. United States, 110 Ct. Cl. 280, 310; 76 F. Supp. 250, 266 (1948); Western Contracting Corp. v. United States, 144 Ct. Cl. 318, 326 (1958); W. H. Edwards Engr. Corp. v. United States, Ct. Cl. No. 218-59, decided April 5, 1963, slip. op., pp. 9-10; Freeman v. United States, Ct. Cl. No. 124-59, decided July 12, 1963, slip. op., p. 10, 320 F. 2d 359, 365. This rule is fair both to the drafters and to those who are required to accept or reject the contract as proffered, without haggling. Although the potential contractor may have some duty to inquire about a major patent discrepancy, or obvious omission, or a drastic conflict in provisions (See Consolidated Eng'r Co. v. United States, 98 Ct. Cl. 256, 280 (1943); Ring Constr. Corp. v. United States, 142 Ct. Cl. 731, 734, 162 F. Supp. 190, 192 (1958); Jefferson Constr. Co. v. United States, 151 Ct. Cl. 75, 89-91 (1960), he is not normally required (absent a clear warning in the contract) to seek clarification of any and all ambiguities, doubts, or possible differences in interpretation. The Government, as the author, has to shoulder the major task of seeing that within the zone of reasonableness the words of the agreement communicate the proper notions--as well as the main risk of a failure to carry that responsibility. If the defendant chafes under the continued application of this check, it can obtain a looser rein by a more meticulous writing of its contracts and (to some extent) by inserting provisions in the contract clearly calling upon a possible contractor, aware of a problem-in-interpretation, to seek an explanation before bidding. See Beacon Constr. Co. v. United States, Ct. Cl. No. 44-58, decided March 6, 1963, slip. op., pp. 4-6, 314 F. 2d 501, 504; Guyler v. United States, Ct. Cl. No. 19-60, decided March 6, 1963, slip. op., p. 9, 314 F. 2d 506, 510-511 (concurring opinion).

If there were nothing more, the case would end here with a ruling for the plaintiff. But the defendant argues, and the Board of Contract Appeals found, that before the award was made or the contract signed the plaintiff learned the Government's view of the disputed point and accepted that position. The Board rested its decision on two meetings between the parties, after the bid, but prior to the award. At the first (on December 19, 1956), the contractor's only

representative was Cecil Sugarman, its sales manager who had had no part in the preparation of the bid and had no actual authority to commit the plaintiff; on the basis of the evidence of the Government representatives (Sugarman did not testify at that stage) the Board found it had been made clear to the contractor that only components (including the five in question) from the named manufacturers would be acceptable and that the contractors so understood and agreed. The Board also relied somewhat on a later conference (January 3, 1957) at plaintiff's plant at which defendant's people met with Mr. Rohr, the vice-president concerned with this procurement, and a few others from plaintiff's side. If the Board's determination that plaintiff was told of (and acquiesced in) defendant's position is binding on or accepted by us, the tables would be turned. The initial ambiguity in the specifications would have been authoritatively resolved before the contract was made; plaintiff would have voluntarily agreed, at a time when it could have (in effect) withdrawn its bid, to the Government's reading of the terms of the transaction.

* * * * *

***We agree with the Trial Commissioner that (i) both parties became aware of the other's interpretation; (ii) neither acquiesced knowingly in the other's interpretation; (iii) both thought, however, that the other had acquiesced; (iv) without either having reasonable grounds for so thinking; and finally that (v) neither took the proper steps to clarify the pertinent terms of the transaction until after the award was made. On both sides ambiguous utterance was piled on unwarranted assumption and laced together by unspoken premise. In the end, the Government officials thought they made it quite clear that the named manufacturers would have to be used for all components, while the plaintiff's people felt that they had successfully stood their ground at least as to these five components. Both were wholly wrong in their understanding of the other's understanding. The discussions had been one prolonged minuet of cross-purposes.

In these circumstances, should the onus of the original ambiguity in the specifications still rest on the defendant? We can see no other conclusion. As the author of the defect in the drafting which led plaintiff to the reasonable supposition that it could obtain the five components elsewhere than from the named companies, the Government was under the affirmative obligation (if it wished its own view to prevail) to clarify the meaning of the contract in definitive fashion before the plaintiff was bound. It did make such an attempt, and it did reveal its own view. But when the plaintiff demurred, the Government did not adequately indicate that it stood steadfast by its announced opinion. There was a fatal insufficiency in the defendant's effort to communicate to plaintiff that the contract was to be interpreted as the Government understood it. Largely because of this lapse, the plaintiff was left with the mistaken impression that the defendant, rather than insisting, would accept plaintiff's rendering of the contract. The Government, in a word, was very lax in seeing the matter through. Since the burden of clarification was the

defendant's, it must bear the risk of an insufficient attempt; even though the plaintiff's obtuseness likewise contributed to the continuance of the misunderstanding. If there had been no communication by defendant to plaintiff between the receipt of the bid and the making of the award, the defendant would have had to suffer the consequences of its poorly drafted specifications. The ineffective attempt to put things right does not place the defendant in a better position. Only an adequate effort to reach the plaintiff's mind could have that result.

Two objections may be made to our taking this ground. The inconclusive discussions between the parties show, it may be said, that there was no "meeting of the minds" on the issue which concerns us, and therefore no valid contract. There was no subjective coming-together, it is true, but an enforceable agreement came into being nevertheless. The design of the contract can be picked from the terms and words of the invitation, objectively read with the aid of rules of contract construction (which are distillates of the common experience and the common sense of justice). It is a normal characteristic of the class of cases in which the courts have held ambiguities against the drafter that the parties' minds have failed to meet on the specific point in dispute. That gap has not been permitted to swallow the whole contract except perhaps where the gulf is far closer to the bounds of the entire consensual perimeter than here. For a contract to exist there does not have to be, and rarely is, a subjective "meeting of the minds" all along the line. See Corbin, Contracts, §§ 95, 106, 340, 559.

The other objection is that the plaintiff is bound by the opposing view of the contract because it twice extended the defendant's time to make the award (on February 8, and 18, 1957) after the Air Force's representatives had told plaintiff of their attitude. This contention must be rejected for the reason given above. Although it had the burden, the defendant simply did not make it clear enough that it stood by its position despite the plaintiff's disagreement. When the latter extended the time for the award it did not comprehend that the Government was insisting on its own construction. This state of affairs was attributable, in substantial measure, to defects in the defendant's course of communication to plaintiff on the subject of the source of the five components. Plaintiff was also at fault, but the risk of a failure to clarify lay largely upon the Government and could have been averted only by a more sufficient effort than was made.

We hold, therefore, that the defendant was wrong in demanding that only products of (or authorized by) the named manufacturers could be used for the five components. The contract did not so require. * * *

The plaintiff is entitled to recover and judgment is entered to that effect. * * *

JOHNSON ELECTRONICS, INC.

ASBCA No. 9366 (1964)

Infra, p. 5-48

Section 3. Latent Defects

GERANCO MANUFACTURING CORPORATION

ASBCA No. 12376 (1968)

This is a timely appeal from a decision of the contracting officer that steam cleaners accepted by the Government were later found to contain latent defects and that as a result appellant is liable to the Government in the amount of $29,060.

* * * * *

All 456 cleaners were to be contractor-designed to meet the requirements of Specifications MIL-C-4035D. Both contracts contained the standard Inspection article on Standard Form 32, which provides in part that "Except as otherwise provided in this contract, acceptance shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud."

* * * * *

The principal problem presented is as to whether the defects were latent.

After filing its appeal, appellant in effect "stood mute." It has filed no complaint, offered no evidence, submitted on the record, and filed no brief.

The contracting officer's findings with respect to the defects were as follows:

> * * * It is the determination of the Contracting Officer that the Steam Cleaners supplied by you to the Government contained latent defects which under normal inspection, to be performed by the Government under the terms of the contracts, would not be disclosed. These latent defects consisted of:

a. The end item being a Steam Cleaner, it was known to you that water and hot steam would be run through it. You selected a pump for the Steam Cleaners suitable for pumping oil or gasoline, but not water, because its parts were not made of corrosion resistant materials. These pumps, as a result of being the wrong type of pump, in a very short time corroded and seized, rendering them completely useless. Normal inspection required by the terms of the contracts did not require the dismantling of the Steam Cleaner and a teardown of the pump to determine the material content of its parts. The use of a pump suitable for pumping oil or gasoline instead of using a corrosion resistant pump, (for example, one of brass construction in the areas where corrosion would result from pumping water) constitutes a latent defect within the terms of the contracts.

b. The firepot insulation cracked, flaked, and deteriorized after a very short period of use. This was due apparently to improper material being used in its construction required by the contracts, did not require the teardown of the Steam Cleaner and a physical analysis of the insulation material. This defect therefore constitutes a latent defect within the terms of the contracts.

c. The heating coil support failed because of improper design and location within the combustion chamber of the Steam Cleaner. This defect also constitutes a latent defect within the terms of the contract because normal inspection did not require a teardown of the Steam Cleaner to examine the support that failed. * * *"

In support of the above findings the Government has presented affidavits by the Government engineers.

While the record does show that the defects were not discovered by the Government prior to acceptance, it does not show how the Government inspected the cleaners and it does not show how inspection of such cleaners would normally be conducted. Nor does it show why a reasonable inspection would not disclose the defects.

The contracting officer states that normal inspection does not require the dismantling or teardown of the cleaner and an analysis of the materials used. This would seem to be true if one were buying one, or a small quantity of, "off the shelf" cleaners. But we are here concerned with contracts for 456 cleaners, at a total price of $347,268.89, to be designed and produced to conform to Government specifications. The specifications contain requirements to be met by materials and components. When the Government specifies that materials and components are to have certain properties and meet certain requirements it presumably has some way of inspecting or testing to see if the specifications are met.

Moreover, under the contracts the Government expressly had the right to inspect at all times and places, including inspections during manufacture, and including inspections of components before they were installed. Thus, there was no need to wait until the cleaners were completed before inspecting the components.

DECISION

This is an affirmative claim by the Government against appellant. In such cases the Government has the burden of proof, The Heil Co., ASBCA No. 10047, June 22, 1965, 65-2 BCA, par. 4924, and this is true where, after acceptance, the Government alleges that accepted items contained a latent defect. Polan Industries, Inc., ASBCA Nos. 3996, et al, October 28, 1958, 58-2 BCA, par. 1982, on page 8175.

At common law, under the Uniform Sales Act, and under the Uniform Commercial Code, inspection and acceptance of supplies is not conclusive and does not bar the buyer from making a subsequent claim for defects if he acts promptly, but the buyer under such circumstances has a heavy burden of proof. Resolute Paper Products Corp., ASBCA Nos. 3961 and 4053, March 27, 1958, 58-1, BCA, par. 1679.

Under the Inspection article in the contract it is provided that "acceptance shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud." Therefore, the Government has a heavy burden of proof in this case.

A latent defect is usually defined as one that is hidden from the knowledge as well as from the sight and which could not be discovered by ordinary and reasonable care or by a reasonable inspection. Polan Industries, Inc., supra.

In this case the evidence presented is not sufficient to prove the correctness of the Government's allegation that the defects were latent as it does not show what a normal or reasonable inspection is on the items concerned and why it would not have disclosed the defects.

The appeal is sustained.

Section 4. Impossibility

A. Literal Impossibility

HOL-GAR MANUFACTURING CORPORATION v. THE UNITED STATES

360 F. 2d 634 (1966)

ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

WHITAKER, Senior Judge, delivered the opinion of the court:

This case is before the court on defendant's motion and plaintiff's cross-motion for summary judgment. Plaintiff seeks reimbursement for additional costs incurred in trying to perform its contract with defendant under specifications which, prior to amendment, it contends were defective, in that the desired performance could not be attained by following them. After the Contracting Officer had denied its claim, plaintiff took an appeal to the head of the Department, as required by the "Disputes" clause of the contract. The Armed Services Board of Contract Appeals, acting for the head of the Department, also denied plaintiff's claim. For reasons hereinafter set out, we hold that the Board was in error and that the plaintiff is entitled to recover for costs which it incurred in trying to perform under defective specifications.

On December 13, 1956, the Air Materiel Command of the Department of the Air Force issued a Request for Proposals for the manufacture and delivery of 107 electric generator sets, in accordance with Exhibit RADC-2491, which was an elaborate set of specifications drafted by the Air Force Research and Development Command. The specifications provided specific size and weight limitations for the generator unit and set out various environmental conditions under which the unit was to be operable. It also provided that the unit be capable of operating 23 hours a day for six months (4,000 hours), with only normal maintenance.

With regard to the diesel engine, which is of particular concern in this case, RADC-2491 called for an air-cooled, multi-cylinder, full stroke type which "shall have demonstrated, through prior test by independent or government laboratory, sufficient durability of the basic engine to meet the requirements of this specification." It then went on to provide for the amount of cubic inch displacement; the direction of rotation and operating speed of the engine; the type of fuel to be used; the components of the fuel system, including the type of fuel tank, fuel transfer pump, fuel replenishment system and fuel piping; the type of air induction, exhaust and cooling systems; the

type of lubrication system, including the kind of oil filters and lubricating oils to be used; the type of pistons, valves, crankshaft, main bearings, camshaft, flywheel, cylinder block, cylinder head, crankcase and connecting rods; the components of the starting system, including the type of cranking motor, battery charging system and storage battery assembly; and the type of engine speed governing system.

The Technical Proposal, among other things, was to give detailed analysis of the proposed method or methods of compliance with each portion of the governing specifications; to outline basic difficulties or problems, if any, in meeting the specifications; and to provide a complete and detailed statement clearly defining the bidder's recommended solution of any problems outlined.

On January 31, 1957, after a bidders' conference at which contractual details were discussed and technical details of the specifications were reviewed, plaintiff submitted its Technical Proposal. In accordance with the Request for Proposals, this Technical Proposal set forth the components and materials which plaintiff proposed to use and the methods it proposed to employ in complying with the specifications. With regard to the diesel engine, plaintiff submitted that the general requirements of the specifications limited consideration to three models of engines--the American MARC Hallet AC2, the Onan DPR, and the International Fremont FA98. It then explained why it thought the latter two models would not meet, in several important details, the more specific requirements of the specifications. It then outlined the American MARC Hallet AC2 engine (hereinafter MARC) which, with only slight modification, it thought would meet the design requirements and would probably also meet the performance requirements of the specifications, since it had successfully passed tests by the Marine Corps. Plaintiff accordingly proposed the use of a slightly modified MARC engine, as one of the components of the generator set.

On the basis of this Technical Proposal, plaintiff and defendant on March 25, 1957, entered into a negotiated fixed-price supply type contract for the manufacture and delivery of the 107 generator sets for a total contract price of $467,717.60.

The first item in the contract schedule called for the delivery of design data within 70 days after receipt of the contract, showing specifically and in detail how plaintiff meant to comply with the specifications, Exhibit RADC-2491, supra. The second item in the schedule called for the manufacture of three preproduction samples, designated in the contract as First Articles. One of these was to be delivered within 50 days after approval of the design data, for testing and approval by defendant. The other two were to be subjected to tests by plaintiff to determine whether they complied with the specifications. The results of these latter tests were to be submitted to the defendant within 170 days after approval of the design data. The remainder of the generator sets were to be manufactured and delivered at monthly intervals after approval of the test results.

In a provision of the contract entitled, "Approval of Design, First Article Testing and Approval", it was provided:

> (f) In the event testing of the First Articles [preproduction samples] * * * reveals deficiencies in the First Articles the Contractor shall, without additional cost to the Government, promptly make such corrections in the First Articles to conform to the contract specifications and repeat any testing necessary to demonstrate compliance with the contract specifications.
>
> * * * * *
>
> (h) If, as a result of testing of the First Articles, changes in the contract specifications are required, such changes shall be processed in accordance with Clause 2, "Changes" of the Contract General Provisions.

Plaintiff submitted the design data and received approval thereof on September 26, 1957. Thereafter it fabricated and commenced testing the preproduction samples to ascertain if they complied with the specifications. One of the provisions of the specifications required that the generator sets be "capable of operating 23 hours per day for a period of 6 months (4,000 operating hours) with only normal maintenance and without major overhaul." To ascertain compliance with the requirement, the specifications provided that the preproduction samples were to be tested in an endurance run of 2,000 hours with no more than normal maintenance. The test results were then to be projected to ascertain if the engine could run the required 4,000 hours.

After approximately 37 hours of the endurance run, the engine began to leak oil through the oil filler tube. The test was stopped and an examination made to determine the cause of the failure. Some changes were made and a second endurance test was started. After about 700 hours of operation, it was noted that temperatures of certain components of the engine were exceeding limits set forth in the specifications. This test was then stopped.

Meetings were held between representatives of plaintiff and defendant in an attempt to resolve the difficulties. At these meetings plaintiff's representatives stated that they did not believe that an engine of the design specified could meet the performance requirements, and that they believed the only solution was to change the specifications to permit the substitution of another engine. Plaintiff submitted several engineering change proposals which would allow the replacement of the MARC with a different engine. Defendant became convinced that plaintiff was right and accordingly, on September 23, 1960, the parties executed Supplemental Agreement No. 8 which amended the contract by relaxing the size and weight limitations of the specifications in such a way as to allow use of an Onan engine.

Plaintiff, in accepting the change, agreed that no claim would be made for any additional costs resulting from the substitution of the Onan engine, but it did reserve the right to submit a claim for costs incurred in attempting to meet the original specifications.

Thereafter, plaintiff completed the contract as amended and was paid the contract price.

Plaintiff then submitted its claim to the Contracting Officer for costs incurred in trying to perform within the requirements of the original specifications. Its claim was denied by the Contracting Officer and the denial was affirmed, after a full hearing, by the Armed Services Board of Contract Appeals.

As was pointed out above, the parties had agreed at the time of the execution of the contract that if, as a result of testing the preproduction samples, changes in the specifications were required, then such changes were to be processed in accordance with the "Changes" article of the contract. That portion of the "Changes" article relevant in the present case provided:

> The Contracting Officer may at any time, by a written order * * * make changes, within the general scope of this contract, in * * * (i) drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith * * *. If any such change causes an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. * * *

That changes in the specifications were required is clear from the fact that after numerous negotiation sessions, during which time the plaintiff was attempting unsuccessfully to comply with the specifications, they were changed by the execution of Supplemental Agreement No. 8. We are of opinion that this "change cause[d] an increase * * * in the cost of * * * performance of this contract," because the change in specifications made useless some of the expenditures plaintiff had made up to that point, but plaintiff was nevertheless out of pocket this money and it must be included in its cost of performance. Since the necessity for the change was not due to plaintiff's fault, but to faulty specifications, an equitable adjustment requires that plaintiff be paid the increase in its cost over what they would have been had no change been required.

The Armed Services Board of Contract Appeals has recognized the correctness of the allowance of costs incident to an attempt to comply with defective specifications. See, e.g., J. W. Hurst & Son Awnings, Inc., 59-1 BCA, ¶ 2095 at 8965 (1959), where the Board stated:

> * * * Where, as here, the change is necessitated by defective specifications and drawings, the equitable adjustment to which a contract is entitled must, if it is to be equitable, i.e., fair and just, include the costs which it incurred in attempting to perform in accordance with the defective specifications and drawings. Under these circumstances the equitable adjustment may not be limited to costs incurred subsequent to the issuance of the change orders. [Citations omitted.]

We hold that the plaintiff is entitled to an equitable adjustment which will compensate it for the costs which it incurred in trying to perform in accordance with the original specifications that turned out to be defective.

But whether or not costs incurred prior to the change come within the "Changes" article, plaintiff is nevertheless entitled to recover damages for breach of warranty. When the Government contracts for supplies to be manufactured in accordance with Government specifications, there is an implied warranty that if the specifications are followed, a satisfactory product will result. United States v. Spearin, 248 U.S. 132 (1918); Helene Curtis Industries, Inc. v. United States, 160 Ct. Cl. 437, 312 F. 2d 774 (1963); R. M. Hollingshead Corp. v. United States, 124 Ct. Cl. 681, 111 F. Supp. 285 (1953). If the warranty is breached, i. e., the specifications are defective, the plaintiff is entitled to damages equal to the amount expended in trying to comply with the defective specifications.

As was pointed out above, the defendant drafted the specifications for the generator sets and thereafter entered into a contract with the plaintiff to manufacture the sets in accordance with those specifications; but it was only after the original specifications were changed by Supplemental Agreement No. 8 that it was able to comply with the specifications.

Defendant contends that our decision in Austin Co. v. United States, 161 Ct. Cl. 76, 314 F. 2d 518, cert. denied, 375 U.S. 830 (1963), is contrary to the foregoing. In the Austin Co. case, the parties entered into a contract to manufacture a Digital Data Recording and Transcribing System. Prior to the execution of the contract the Austin Co. reviewed the Government specifications and determined that the desired product would not result from following those specifications. It thereupon submitted a proposed substitute for the Government specifications, which it said would produce the desired product. When the specifications proposed by plaintiff turned out to be defective, we held that since it was the Austin Co. which had drafted the specifications, it was not entitled to recover.

It is readily apparent that Austin Co. v. United States, supra, is distinguishable from the present case. Here the governing specifications were entirely drafted by the defendant. Prior to execution of the contract, no changes in the specifications were suggested by the

plaintiff and none were in fact made. The contract itself provided that to the extent of any inconsistency between the Government specifications and the plaintiff's Technical Proposal, the Government specifications were to control. The defendant was completely responsible for the governing specifications.

Defendant has asserted two counterclaims against plaintiff. The first alleges that defendant was damaged by plaintiff's failure to deliver the generator sets in the time originally scheduled. This counterclaim is dismissed on the merits since the plaintiff cannot be held for a failure to comply with impossible specifications. The second counterclaim alleges that the engine mountings on the generator set were defective and broke off on use of the engine. We are of the opinion that this counterclaim is barred by the "Inspection" clause of the contract which precludes suit for non-latent defects after acceptance of the items. It is also dismissed.

For the above reasons, defendant's motion for summary judgment is denied. Plaintiff is entitled to recover the amount necessary to constitute an equitable adjustment or for damages in attempting to comply with defective specifications. Judgment is so entered, the amount to be determined under Rule 47(c)(2).

Davis, Judge, concurring:

On the plaintiff's claim, I rest my concurrence in the judgment on subsection (h), quoted and discussed in the court's opinion, ante. As I evaluate this record, neither party warranted the specifications, so that neither could claim a breach of contract because of misrepresentations or defective specifications, defendant could not terminate for default if plaintiff failed to produce because of a failure of design, etc. But subsection (h) did provide, specially, for an equitable price adjustment if the specifications turned out to be defective or impossible, resulting in a change in specifications. This provision seems to me applicable here to permit recovery of the costs of attempting to meet the original specifications. Subsection (f) placed the risk of deficiencies in the first articles, due to manufacturing defects, on the contractor, but subsection (h) shows that the risk of defects in the specifications themselves was not to be borne by the contractor if a change was ordered. To construe subsection (h) more narrowly, as defendant does, would leave it very little scope and merge it into the Changes clause, although the parties went out of their way to make it a separate provision. If there is ambiguity to its reach, the defendant, which drafted it, should pay the toll. That the specifications were in fact impossible, under a proper understanding of that term, is clear. See Johnson Electronics, Inc., 65-1 BCA ¶ 4628. On the counterclaims, I join the court's opinion.

KINN ELECTRONICS CORPORATION

ASBCA No. 13,526 (1969)

OPINION BY MR. SOBERNHEIM

This is an appeal from the default termination of appellant's contract. Appellant has admitted its default but has asserted that the contract was technically incapable of performance and has asked that the default termination be converted into one for the convenience of the Government. Its appeal now stands ready for decision.

STATEMENT OF FACTS

1. The Contract (First Step)

a. The Request for Technical Proposals

On November 10, 1965, the Air Force Missile Development Center at Holloman Air Force Base (AFB) issued a letter request for technical proposals (RFTP) for one (1) sledborne magnetic tape recording and reproducing system in accordance with specifications attached to the letter request and set December 14, 1965 as the date for submission of technical proposals (TP).

The instrument to be procured, more simply referred to as a tape recorder, was to be mounted on the front part of a sled, riding at extremely high speeds of 1,000 miles per hour and more, to monitor the testing of inertial guidance systems. This intended application was not detailed in the specification which stated generally that the recording/reproducing system had to operate under the severe environment encountered on high performance rocket sleds. The performance requirements and the limits of the physical configuration of the instrument, set out in the specification, and as relevant here, can be summarized as follows:

a. The instrument was to occupy no more than 3,000 cubic inches, weigh no more than 60 pounds and fit into an 18 inch diameter circle for mounting.

b. It was to operate on no more than 6 amps power with a maximum surge current of 10 amps for 100 milli-seconds.

c. Among various environmental conditions its recorder playback system had to operate under hard-mount conditions subject to specified vibration and during and after 50 g's acceleration through any one axis and 15 g's through all three major axes.

d. The recorder had to be operable at 7 tape speeds up to 120 ips, load a minimum of 3,000 feet 1 mil thick tape but be capable of using tape as thick as 2.2 mils.

e. The tape transport was to attain desired speed or be able to stop within 3 seconds.

f. The tape recorder was to have 14 direct amplifiers capable of recording frequency responses of 300 kilocycles (kc) to 1.5 megacycles (mc) and 14 FM amplifiers with a narrower range of frequency responses.

g. It also was required to have 14 playback amplifiers having the same frequency response range as the direct amplifiers.

h. It was to have met the IRIG standard.

In addition to the foregoing, all to be installed in a configuration meeting the stated size, weight and power limits, the tape recorder was to be provided with additional features, all to be internal to the instrument itself:

(i) Erasing capability in the transport for full tape width erasure in forward and reverse direction.

(ii) Calibration and control features.

(iii) Tape loading through standard NAB hubs.

(iv) A reference oscillator.

(v) Lifetime lubrication of all bearings.

b. The Technical Proposals

Two technical proposals were received, one from appellant and the other from Genisco Technology Corporation. Appellant's proposal accepted all specification requirements without exception. It was accompanied by a covering letter which stated:

> Kinn Electronics has proprietary design licenses from PAR, Ltd. as well as the services of Mr. Robert O. Morrow, developer of the techniques. Currently patents are applied for in the U.S. Patent Office for the electronics, the magnetic system, and the tape transport design.

> It must be recognized that although Kinn Electronics is a small firm, it has an enviable record for delivering a product on time and within specifications.

The TP itself, in commenting on the "scope" paragraph of the specification, further stated:

> The magnetic tape recording/reproducing system shall be capable of recording analog signals, DC to 1.5 MC through the use of proprietary wide band FM and direct recording techniques. The system known as the Kinn High Density Magnetic Recording System can easily exceed the bandwidth and signal to noise requirements of the proposed Sledborne Magnetic Tape Recording and Reproducing system (see enclosed Appendix A). The proprietary transport and associated electronics will operate under the most severe environment encountered due to the special tape carrier system on the transport and module designed solid state printed circuitry on the electronics.

2. From Contact Award to Reprocurement

a. Award

After the determination late in January 1966 that both appellant and Genisco had submitted acceptable technical proposals an Invitation for Bid (IFB) was issued on February 4, 1966 with a bid opening date of February 25. Both appellant and Genisco submitted bids, appellant's being $74,500 and Genisco's about $20,000 higher. Accordingly, after performance of the pre-award survey previously recommended by Government technical personnel, the contract was awarded to appellant under date of May 12, 1966. The contract required appellant to deliver the tape recorder, defined in the specification already summarized, within 120 days of the award or about September 9, 1966 at the latest. It contained the standard General Provisions for supply contracts regarding default and convenience terminations and disputes.

b. Appellant's Performance

Appellant thereafter commenced to perform the contract but the September delivery date came and went without delivery of a tape recorder to the Government. On September 15, 1966 the administrative contracting officer (ACO) asked appellant for an explanation of its default. On September 26, 1966 appellant replied that the contract specified a tape recorder the performance of which was "well beyond any item available on the market" and that it had met with substantial postponements of deliveries by major component suppliers. In addition, personnel difficulties of a serious nature had been encountered.

In conclusion it held out the hope that the specified tape recorder could be built and asked for an extension of time. Difficulties with the procurement of parts continued and were followed by further extension requests. The Government's technical personnel were, however, willing to allow appellant time to July 1, 1967 to deliver the tape recorder though it was their view that, if delivery was not made by that date, appellant was not likely to make delivery and the recorder should be obtained elsewhere. Under date of April 27, 1967, in accordance with information furnished by appellant in mid-March 1967.

Appellant under date of June 11, 1967 advised the contracting officer that it could not meet the extended delivery date. At that point appellant had apparently tested some kind of a unit or assemblage and found difficulties in the areas of wow and flutter and FM record amplifiers. On July 3, 1967 the ACO again sent appellant a preliminary default notice to which appellant responded promptly by setting out major problems, pointing out that the procurement was "basically a major development of a tape recorder never previously accomplished" and a "major step in recorder performance" and requested permission to complete the contract which would provide respondent with a tape recorder "beyond the present state-of-the-art".

By August 1967 appellant had obtained all parts from its supplier and in assembling them into the tape recording unit had become aware of the difficulties which the limitations of size, weight and power supply were imposing on the attainment of the specified performance. Appellant thereupon sought Government assistance and a conference between appellant's president and the Government's technical representative (the Instrumentation Support Branch Chief) was held on August 17, 1967. The discussions at the conference led to a proposal by appellant to reduce specification requirements by increasing the lower frequency reception limit from 300 to 800 kc, eliminating FM record and playback amplifiers at least for the time being, making the power converter a separate unit outside the size and weight limits and omitting the calibration system internal to the unit. The subject matter of these proposals and other technical aspects of the recorder had been discussed at the August 17 conference and appellant's president considered that his suggestions had been favorably received. Appellant's president also testified, however, that his interlocutor advised him that he had no authority to change the contract and we find on the entire record, including appelant's submission of its suggestions, that no commitment was made at the August 17 conference to modify the contract and that respondent's subsequent rejection of their suggestions after lengthy consideration did not breach any agreement reached thereat. Upon receipt of the proposals respondent's technical representatives apparently came to the conclusion that appellant lacked a full understanding of the problems of designing a tape recorder for a rocket test sled, that the unit was about twice as large as specified and that appellant's proposed use of a solid state 60 cycle inverter was undesirable because of Holloman's "less than spectacular" experience with inverters of this nature. They con-

sidered further that appellant's new delivery date of January 31 would not be met and suggested procurement of the unit from another source. On November 1, 1967 the ACO rejected appellant's proposals as "not acceptable" and requested it to furnish a new delivery date. In response, appellant proposed a March 15, 1968 delivery date and added that it could only "assure" the Government of its "every effort * * * to satisfy the requirement", including the evolving of a solution of its then current reel motor drive problems. Appellant's president added:

> I can assure you that we have full intent to complete the project which, I am sure you realize, is a major technical problem within the space limitations and environmental conditions specified.

While the ACO did not consider the foregoing as an assurance of appellant that it could produce the tape recorder, the Government, nevertheless, on December 26, 1967 executed a contract modification extending the delivery date to March 15, 1968, as requested by appellant. Nothing was done by the contracting officer in regard to any of the foregoing (nor thereafter up to the time of delivery) which in any way was a change--specifically ordered or constructive--in the terms of appellant's contract.

c. Delivery and Termination

Three weeks late, appellant on April 9, 1968 delivered its tape recorder to respondent which respondent, waiving late delivery, tested and found not in conformity with contract requirements. Among major deficiencies was an excessive power use (10 amps instead of 6 and 13 amps of surge current for 1-1/2 seconds instead of 10 amps for 1/10 second) and excessive weight (100.5 lbs. compared to a specified 60 lbs.). Because of space and power limitations on the test sled these were concededly important deficiencies. Tape loading was found inconvenient since the tape had to be rewound from the manufacturer's reel. Nor did the 3 second start and stop speed function properly at 60 and 120 ips and its use required excessive power flow so that holes were burned into the metallic strips on the tape. Some of the command functions, required to be automatic, in fact had to be handled manually in appellant's tape recorder, an impossibility in rocket sled test operations. The instrument lacked calibrate circuitry and automatic calibration steps as well as a calibrator and its amplifiers did not meet specified performance because of excessive noise in or distortion of the recorded responses. Specified FM amplifiers were not provided. Other but perhaps less significant defects were noted by the testers. Because of all of these deficiencies, the environmental tests were not attempted and it is not known, in particular, whether appellant's instrument would have functioned during and after acceleration until the sled reached the end of the 7-mile test track at the specified pressure of 50 g's through one axis and 15 g's through all three major axes.

Appellant, while not agreeing with each and every one of these findings, has conceded on the record that the instrument which it furnished did not meet material specification requirements. As will be further discussed below, it contends that the requirements were unattainable.

After rejection of the instrument, proceedings looking toward contract termination for appellant's default were instituted by the Government. On May 14, 1968 appellant explained its failure to meet contract requirements by arguing that "performance and packaging requirements" of the contract specification were for a tape recorder "not available from industry at time of procurement" and even two years later (in 1968) beyond the "state-of-the-art" without major development. This allegation was supported by a chart showing the performance characteristics of numerous, though by no means all, tape recorders then on the market. Moreover, according to appellant, other military specifications did not require such features as auto-matic calibration, the erase function, wideband frequency response, internal reference oscillator, and operation during rather than only after acceleration. In consequence, building a tape recorder to the specifications was not recognized by appellant as a development task which it was willing to undertake on a CPFF basis after convenience termination of the instant contract.

Further discussions and exchanges of correspondence did not lead to any solution which would have satisfied the desires of both parties. In a final presentation under date of June 28, 1968 appellant enumerated three areas where performance was deemed to exceed the state-of-the-art: (i) size and weight; (ii) limited power; (iii) frequency response from 300 kc to 1.5 mc while undergoing acceleration and vibration. Appellant concluded that for these reasons it felt "that performance of this contract is impossible". Since respondent's personnel continued to consider performance within the state-of-the-art, contract termination became inevitable and on July 14, 1968 the contract was terminated for appellant's unexcused default.

d. Reprocurement

On August 22, 1968 respondent reprocured from Astro-Science Corporation a Mars model 1014 tape recorder at a price of $58,724.45. The performance characteristics of this unit will be discussed in a different context below. Since it was cheaper than the price of the unit to be furnished by appellant, excess costs were not incurred and the reprocurement action as such is not in issue.

3. The State-of-the-Art

To support their opposing views as to whether the tape recorder was or was not beyond the state-of-the-art and could or could not be built, both sides adduced the evidence of expert witnesses qualified to express an opinion on this point. Furthermore, they adduced a great deal of evidence as to what was commercially available by way of tape recorders both in 1965 and thereafter, as represented by manufacturers' sales promotion literature. In addition, the Instrumentation Support Branch Chief, who was an active participant in the preparation of the contract specification testified as to that matter.

Appellant's expert witness, a consulting engineer to many firms prominent in tape recorder manufacture and conversant over many years with the development of and the technical problems encountered in tape recorder manufacturing, testified in substance that, though in practice each of the performance requirements or other features of the specification was attainable, even if difficult, it was impossible to have all of them in a single instrument subject to the weight and size limits of the specification and to operate such a unit on a maximum power supply of only 6 amps and surge current of only 10 amps for no more than 100 milliseconds. * * *

In sum, while most, if not all, specification requirements were within reach of a competent manufacturer, it was unrealistic to specify all of them in a light weight unit of small size and power and not to provide for the practical trade-offs between capabilities, weight, size, and power which would result in a feasible unit of maximum capability. Even today in the witness' view, it would be impossible to build the unit exactly as specified.

Respondent's approach to the problem of showing feasibility of the contract specification was very different from that selected by appellant and was intended to show that instruments were on the market which embodied specification requirements or could be modified to attain this end. Both of the Government's engineering witnesses agreed, however, that neither in 1965 nor at any time thereafter had an instrument been built that met all specification requirements. One of these witnesses, a former project engineer of Genisco, also testified that in 1965 Genisco in its technical proposal was unwilling to offer an instrument meeting all specification requirements.

Part of the Government testimony was presented to prove that it was feasible to furnish an instrument operating during and after 50 g's acceleration. While this matter is not primarily the one on which appellant contests feasibility of the specification, the evidence adduced by the Government throws considerable doubt on its attainability in this particular respect. Not only had respondent operated the test track generally at speeds producing seven or eight g's acceleration.

but neither the literature on the Genisco models nor on the reprocured Mars model advertised the ability to operate during 50 g's acceleration (Mars' 15 g's shock for 11 milliseconds, acceleration not stated but was said to have operated during 12 g's acceleration; Genisco 10-110: 50 g's after acceleration; Genisco 10-126: 25 g's for 3 min. after acceleration. According to the testimony of the Genisco engineer the 10-110 and 10-126 models withstood successfully a high degree of shock in various drop tests but he did not mention any sled test where these instruments were operated during and after 50 g's acceleration. The cited instruments clearly failed, however, to incorporate other specification features, precisely those which appellant considered a drain on limited power and a drag on limited weight and hence not feasible in the specified unit.

Thus the Genisco model 10-126 had only 6 tape speeds and 2400 feet of tape, lacked internal erase capability and could be operated on hand mounts only in reduced environmental conditions. Internal calibration seems likewise absent. The Genisco model 10-110 had only 1200 feet of tape and, on paper at least, met other important specification requirements. The data on hand do not show FM playback, erase and calibration capabilities internal to the instrument and presumably, in the light of Genisco's attitude in its technical proposal, did not possess it. The Mars Model 1400 shows only 6 tape speeds, an external power converter such as respondent rejected here, no FM playback and lack of internal erase and calibration capability. None of the models discussed reached the required upper frequency response level of 1.5 mc. Tape start and stop speed also seem to have exceeded the required 3 second maximum.

Based on his knowledge of the Genisco units and other tape recorders in his laboratory, both large units used in the laboratory and small units used for outside tests, respondent's instrumentation engineer put together the instant specification in the fall of 1965, keeping in mind the testers' desire for ever higher frequency responses. He considered the specified unit as not beyond the state-of-the-art and interpreted Genisco's exceptions merely as an indication that Genisco did not have the specified unit ready and did not want to furnish it. He considered that modification of a Genisco model 10-126 with new heads and electronics would have achieved the frequency response required but he could not modify the one in the Government laboratory because it was in use. Appellant's difficulties with heads constitute at least a challenge to the face value of this assertion. He considered getting heads recording a 1.5 mc frequency response as the one major problem in meeting the specification.

DECISION

The legal principles applicable to the resolution of the issue in this appeal are not controverted by the parties and can be stated in summary form as follows: If the Government asks a contractor to perform a task which is technically impossible, the contractor is entitled to an equitable adjustment in contract price for its costs in vainly attempting to meet the specification requirements or to a convenience termination settlement if the contractor defaults and the contract is terminated by the Government for that reason. Hol-Gar Manufacturing Corporation v. United States, 175 Ct. Cl. 518 (1966); E. L. Cournand & Company, Inc., ASBCA No. 2955, 60-2 BCA ¶ 2840; Johnson Electronics, Inc., ASBCA No. 9366, 65-1 BCA ¶ 4628. For a recent discussion of the Government's "warranty" of its specification, see Dynalectron Corporation - Pacific Division, ASBCA Nos. 11766, 12271, 69-1 BCA ¶ 7595. The fact that the contract was entered into as a "two-step" procurement in which the contractor's technical proposal becomes part of the contract does not alter these rules. Hol-Gar Manufacturing Corporation v. Unites States, supra, at pp. 520-521.

These rules, however, subject to the important restriction that the contractor must not have assumed the risk of the impossibility of performance. If the contractor knew that the specifications were defective or impossible of performance and, nevertheless, entered into the contract he cannot obtain the equitable adjustment otherwise recoverable. Wunderlich Contracting Company v. United States, 173 Ct. Cl. 189 (1965); Electro-Nuclear Laboratories, Inc., ASBCA No. 9863, 65-1 BCA ¶ 4682. Nor can the contractor recover where he reviewed and modified the Government specifications to insure terms which it considered feasible and thus assumed the risk of impossibility. The Austin Company v. United States, 161 Ct. Cl. 76 (1963); cert. denied 375 U.S. 380 (1963); Dynalectron-Corporation, supra. The Government, likewise, must prevail where the contractor by its assurances that it possesses novel and "revolutionary" technical processes induces award of contract. Having held himself out as capable beyond ordinary measure, he cannot shield himself behind technical impossibility of performance when he fails. Electro-Nuclear Laboratories, Inc., supra; J. A. Maurer, Inc., ASBCA No. 12071, 69-2 BCA ¶ 7884; U.S. v. Wegematic Corporation, 360 F. 2d 674 (2d Cir. 1966). Valveaire, Aircraft Division Abbotwares, ASBCA No. 8322, 1964 BCA ¶ 4177, relied on by respondent, does not involve technical impossibility of performance and is not applicable here.

Applying the rules stated to the fact at hand, appellant prevails. As to the issue of technical impossibility of performance, the testimony of appellant's expert witness is persuasive that the specified instrument could not be built unless either weight, size and power supply were increased or the instrument's performance characteristics relaxed where least needed for the missions at hand or readily foreseen. While appellant had difficulties in procuring appropriate heads and found the PAR, Ltd. ideas less helpful than expected in getting proper frequency response, its real problem was not in that area, but

in the area of packaging on which respondent was unyielding. An instrument having all required capabilities could not be built within the size, weight and power limitations. Such impossibility was not, as the record shows without doubt, personal to appellant; no one else could have performed either. Consolidated International Equipment and Supply Company, ASBCA No. 12459, 69-2, BCA ¶ 7900. Not only was there no instrument, including the Genisco models, which ever met or even approached all contract requirements but none has been built since. What happened to the instrument being developed by Leach which had stated that it would have a complying unit in 1966 is not shown. But respondent surely would have brought out that it had been successfully built if that were the fact.

In addition, the record leaves gravest doubt that a unit operable during and after 50 g's acceleration could have been built. Contrary to the testimony of respondent's instrumentation engineer the record, when carefully examined and the distinction between shock impact and acceleration kept in mind, leads to the conclusion that such performance was not feasible. But since appellant's failure to perform the impossible did not turn on this particular quality of the instrument (which was never tested for it) we need not resolve this issue. Nor need we consider issues of economic or practical impossibility or of Government failure to disclose superior manufacturing knowledge to appellant. Moreover, appellant was at no time asked to do nor at any time did, anything which exceeded its contractual obligations, nor was the performance of an express or constructive change in the contract. Such cost figures and prices as the record contains fail to support the first point and our attention has not been directed to any technical aspect of the required performance which was not equally knowable by either party. It suffices for resolution of the parties' dispute that we find in the first place that performance was technically impossible within the legal meaning of the term.

Hence, appellant must prevail, unless it assumed the risk of impossibility of performance. Here appellant entered into a short-term supply contract, let to it in the second step of the contracting process as the low bidder, and without any indication that the manufacture of the instrument was beyond the state of the art as exemplified by the facts disclosed on the record before us. In such a procurement one would not readily imply an assumption of risk on appellant's part. See E. L. Cournand & Company, Inc., supra; cf. Electro-Nuclear Laboratories, Inc., supra. Nor does this case fall into the groove cut by Austin, Dynalectron and Maurer, all supra, in that appellant came forward with its own specification or by Electro-Nuclear, supra, in that appellant was pushing its own novel processes, and persuaded the Government to award it the contract on the chance that these contractor-suggested processes or specifications would work and that the contractor would underwrite the loss if they failed. See United States v. Wegematic Corporation, supra. Absent such conduct by the prospective contractor we cannot find an assumption of risk by appellant. See Hol-Gar Manufacturing Corporation v. United States, supra. Nor is it shown that appellant knew or should have known that the specifications could not be met by anyone.

The most that can be argued for the Government's position is appellant's reference to the PAR, Ltd. ideas or process. These failed to help appellant here because the PAR, Ltd. technique--adequate to have a single channel wideband tape recorder with required high frequency responses--was found to be inapplicable when applied to a 14-channel band. If appellant's effort had run aground on this shoal, the Government's position might have merit. But even to the extent that it had resolved the frequency problem notwithstanding the failure of the PAR, Ltd. ideas, appellant failed because of the size, weight and power limitations. This latter failure was entirely independent of the uselessness of the PAR, Ltd. processes or the services of their co-inventor. Appellant's expressed expectation of their usefulness in its technical proposal does not amount to an assumption of risk of technical impossibility and does not bar it from the relief it seeks.

The appeal is accordingly allowed. The determination of the amount of the convenience termination settlement to which we find appellant entitled is remanded to the contracting officer. If appellant fails to reach agreement with him or is dissatisfied with his final decision, it may appeal to this Board if it so desires.

J. A. MAURER, INC. v. THE UNITED STATES

202 CT. CL. 813 (1973)

ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

Nichols, Judge, delivered the opinion of the court:

The decisive issue in this review of a decision of the Armed Services Board of Contract Appeals (ASBCA), Appeal of J. A. Maurer, Inc., 69-2 BCA ¶ 7884, under the standards of the Wunderlich Act, 41 U.S.C. § 321-22, turns chiefly on the question of impossibility of performance of an Air Force contract terminated in 1966 for default in performance. Of secondary importance (to us, but not so relegated in plaintiff's view) are plaintiff's other contentions based on its interpretation of the contract requirements.

Fact recitals herein are based on ASBCA findings, except as indicated. In the desert at the Air Force Missile Development Center (AFMDC) Holloman Air Force Base, 9 miles west of Alamogordo, New Mexico, the Air Force has a high speed test track, on which special sleds are propelled at great velocity while data is recorded and digested by elaborate equipment for research purposes. The track, which was extended in 1956-57 to its present length of some 35,000 feet (about 7 miles) consists of two rails embedded in a concrete girder foundation. The parallel rails run north and south, are 7 feet apart. and are seamlessly welded where the sections join. A "fiducial line" runs parallel to and 9 inches outside of the western rail. The fiducial line serves as an essential reference for alignment of the track rails, which must be flat and straight to an extreme degree of accuracy to mimimize destructive vibrations that are accentuated by sled speed and track irregularity. At each of 352 locations spaced 99'8" apart along the length of the fiducial line there is inserted a bench mark by reference to which at that point the lateral and vertical positions of the rails can be compared and periodically adjusted as they get out of sinc through use, or through deformations in expansion and contraction during temperature extremes, or because of foundation settlement. Vertical movements of the rails exceed lateral movements. Sometime ago the Coast and Geodetic Survey established the fiducial line bench marks to an accuracy of approximately 1 arc second by use of a conventional theodolite.

This degree of accuracy did not satisfy the Air Force, as indicated by its Technical Exhibit A dated November 20, 1964, which was later incorporated into the procurement from which this action derives. Technical Exhibit A, which proposed a study and report on lineal sur-

vey methods for the test track, and a determination of its linear coefficients of expansion, for the purpose of improving the accuracy of existing techniques and facilities, was attached to the Government's Request for Proposal (RFP) issued on December 8, 1964, to seven companies, including the plaintiff at its request. In its initial form the RFP covered the features outlined in Technical Exhibit A, and was to be essentially a study program.

The plaintiff's Technical Proposal submitted in response to the RFP and dated January 17, 1965, compared several potential survey methods and of them recommended as a means interferometric and diffraction alignment techniques as opposed to electronic techniques. It particularly advocated using the Van Heel alignment apparatus to determine the lineal integrity of the fiducial line to reference the track alignment, which apparatus offered alignment accuracy reputed to be within a few tenths of an arc second. Another method, using the Axicon apparatus, was also described. Plaintiff's proposal quoted a price of $60,782.90.

It was the only one submitted to the Government from the seven firms receiving the RFP. On February 18, 1965, Dr. Woodson, the head of plaintiff's newly formed Optics Division and a highly respected authority in the field of interferometry (said to be second only to Dr. Van Heel of Holland), gave an oral presentation concerning plaintiff's Technical Proposal to a group of Air Force technical representatives at AFMDC, at which he rendered a convincing explanation of the Van Heel technique which plaintiff planned to use in measuring the lineal integrity of the test track and in setting up an improved system for its continuous monitoring. He described the proposed equipment, the achievable accuracy he foresaw as possible, and the environmental problems to be solved. Because of budgetary restrictions the Government on March 2, 1965, issued Amendment No. 1 to its Technical Exhibit A, which deleted the original requirement to measure the "coefficient of expansion" of the track (i.e., its exact length under temperature fluctuations), enlarged the lineal integrity requirement by applying it to the entire length of the track instead of merely a portion thereof, and provided that the Government should retain the survey equipment employed.

The parties then negotiated a price of $31,943 reflecting the foregoing amendments to the Government's Technical Exhibit A, and on May 17, 1965, consummated the contract in suit which called for items 1 and 3 only. Item 1 was divided into two phases: engineering services to investigate techniques to improve lineal surveys (Phase I), and an actual survey throughout the 7-mile track (Phase II). Item 3 required plaintiff to provide the Government with "Improved Lineal Survey Equipment (ILSE), such as the Van Heel Alignment Apparatus; the Light Source (Laser) and Collimating Lens-fringes." The plaintiff's proposal culminating in the contract included an estimated allowance of $4,000 for the Van Heel equipment. The contract intentionally omitted Phase III work of item 1 contained in the Government's original Technical Exhibit A involving the measurement of the track length, although plaintiff had submitted a separate figure for Phase III work should the Air Force find the wherewithal.

There followed months of effort to perform the contract, time extensions, validation of the intrinsic accuracy of the interferometric procedure, but ultimate failure because of inability to develop a convection barrier which would provide sufficient shelter to laser beams traveling through it in an outdoor environment so as to duplicate the accuracy in measurements that it attained under controlled laboratory conditions indoors. In the end, when the contract was terminated for default, it appeared that accomplishment of the contract objective might be technically possible given sufficient funds and time, but practically impossible to accomplish within the monetary and time limits allowed by the fixed price contract. See, however, discussion below of ASBCA findings on this topic.

A factor of fundamental impact in the case is that alignment measurements in excess of 1 arc second of accuracy had not been theretofore achieved with the new generation of interferometric and diffractometer apparatus and techniques outside of controlled laboratory conditions. The prime aim of the contract - to better the existing 1 arc second of accuracy of the test track which had been obtained by use of a standard theodolite - had never been done before in an uncontrolled, outdoor environment such as that at the Holloman test track, and in retrospect proved to be beyond the state of the art, particularly within the short period (4 months) and contract price ($31,943) allowed for performance in this instance. That the plaintiff was fully aware of the difficulties and of the risk of failure involved is shown not only by its knowledge of paragraph 3 of the Government's Technical Exhibit A which described the physical environment of the track, but also by plaintiff's Technical Proposal of January 17, 1965, which recognized the atmospheric turbulence and the temperature gradients at Holloman to be a major problem but proposed to overcome it by means of using interferometric equipment involving the projection of a laser beam through a light tube superimposed on the "convection barrier" to shield the laser beam passing through it from the atmospheric effects of its desert surrounding, namely, wind, sun, temperature fluctuations, "ground boil," "grazing rays," etc., which had a drastic effect on the supersensitive measurement apparatus which plaintiff intended to use. In effect, the convection barrier was aimed at duplicating laboratory conditions in an outdoor environment.

Despite Dr. Woodson's congenital optimism over his ability to counter the atmospheric hazards in order to apply a hitherto laboratory technique in an outdoor ambience, the plaintiff's other officials had their mental reservations and suspected the undertaking to be on the research frontier, but deferred to Dr. Woodson's superior expertise. The contract was to become a proving ground of his theoretical calculations and scientific judgment, and in the end he conceded that the amount of research involved exceeded his expectations.

Basic to Dr. Woodson's plan were the availability of suitable interferometric equipment and the devising of a convection barrier consisting of connected tubes which would shield the sensitive light source. The Van Heel apparatus was selected as preferred equipment, but when in June 1965 Dr. Woodson visited Dr. Van Heel in Holland to arrange for the equipment and to discuss prospective problems, he found that the apparatus could not be delivered for three months, at best, not soon enough to meet the 4 months' time available for contract performance. Dr. Woodson then decided to use another apparatus recently designed by Mr. Saunders of the Bureau of Standards for alignment measurement purposes. The Saunders apparatus was an interferometer, while the unavailable Van Heel apparatus was based on interference and diffraction and was accordingly termed a diffractometer, but both of them were embraced in the field of interferometry and were designed to make accurate optical measurements in a controlled laboratory environment free of atmospheric disturbances, under which conditions they were capable of .1 arc second of accuracy or better. Dr. Woodson considered that both of the apparatuses in question performed the same function in somewhat different ways, and thought the Saunders device to be the more sensitive of the two. The Saunders equipment had never been used outdoors not did its inventor think it could be, as Dr. Woodson understood prior to contract award. The Van Heel apparatus had been used with disappointing results in an outdoor test in Holland, yielding over a short distance an accuracy of only 1 to 1/2 arc second. The Government was unaware that plaintiff had decided to use the Saunders equipment instead of the Van Heel until so advised by plaintiff's first monthly progress report for the period ending July 12, 1965. The contracting officer in acknowledging the advice stated that the Saunders apparatus "may even be superior to the Van Heel for long sighting lines." As late as December 16, 1965, the plaintiff considered that the Saunders equipment, as it was being modified by plaintiff, was "even superior to the original one contemplated [i.e., the Van Heel]", so the unavailability of the Van Heel apparatus was not then considered by plaintiff to be the reason for its ultimate failure to achieve the desired result. The ASBCA findings imply that the substitution had no causal connection with the failure.

The dissimilarities in the Van Heel and Saunders techniques were not significant, in the ASBCA's eyes, for both were usable in making optical measurements to an extraordinary degree of refinement in a controlled laboratory environment, while as it came to pass neither was within the state of existing art to make measurements of comparable accuracy in an uncontrolled natural environment. This proved to be the obstacle plaintiff was unable to overcome. Finally, Dr. Woodson, who was eventually dismissed by plaintiff for his inability to solve the problem which led to default termination of the contract, testified as the Government's witness that the Saunders equipment would constitute equipment "such as" the Van Heel in the science of interferometry. He should know.

Reverting to the convenction barrier problem plaintiff contemplated using connected 20' lengths of tubing 7' in diameter so that the laser beams could travel in a straight line and be isolated from atmospheric disturbances. The tubing was to be mounted on the test track at night for the making of measurements in 4,000 segments at a time. Turbulence was less at night than during the day, and moreover this schedule would not interfere with the Air Force use of the test track during the day. (The plaintiff's contention that unavailability of the test track interferred with its contract performance is without substance, as the Board also found.) At first, the plaintiff thought of using polyethylene tubing, but because of its greater rigidity elected to use aluminized waterproof cardboard tubing which was purchased and delivered about October 1965. It was intended to mount the connected tubing in some fashion 7" above the test track in assemblies of 4,000' at a time. The 7" suspension above the track was to insulate the convection barrier from distorted readings which might result from contact with the track because of a thermogradient imbalance between the temperature on one side of the track and that on the other side caused by night breeze in the desert blowing against one side and not the other. It was calculated that it would take about 4 hours to set up each of the 4,000 assembled segments of convection barrier, and about 3 hours to disassemble it, with the actual shooting of measurements being done rather quickly once the setup was ready. If 4,000 segments were set up and measurements taken on consecutive nights, plaintiff expected to be able to survey the entire 35,000' track in nine nights when the equipment was perfected.

This did not transpire, because plaintiff was never able to develop a convection barrier that would insulate the atmosphere sufficiently to make accurate measurements outdoors. It abandoned its original plan to conduct a pilot test in Long Island during the fall of 1965 because its modifications of the Saunders apparatus were not ready in time.

After substantial delays, and time extension to March 1, 1966, in January 1966 the plaintiff set up a 55' experimental test track inside of a structure at Holloman which provided conditions which were of less than laboratory quality but considerably better than in the open. With this experimental setup an encouraging accuracy of .072 arc seconds was obtained, which converts to an unprecedented one-fourth of a thousandth of a second in a distance of 55'. This accomplishment, which vindicated Dr. Woodson's faith in the inherent accuracy of the modified Saunders apparatus, was superior to the 1 arc second of accuracy obtained previously with a theodolite at the test track. But unfortunately it could not be duplicated outdoors, despite several efforts on track lengths from 75' to as much as 3,200'.

By this time it was clear that the Saunders equipment was suitable but no means had been found to use it outdoors with an acceptable degree of accuracy. At the time that plaintiff virtually ceased further performance under the contract, which was about March 1966,

Dr. Woodson felt that, with an investment of another $10,000 or $20,000, and further time, a solution could be found. However, by now the plaintiff had spent a claimed $61,000 in its efforts to perform in contrast to a contract price of $31,943 and actual contract payments of $22,290 and regarded the contract to be for practical purposes impossible of performance. So it discharged Dr. Woodson in April 1966, and thereafter until default termination of the contract on November 1, 1966, engaged in fruitless negotiations with the Air Force to either terminate the contract for convenience and reimburse the plaintiff for its losses, or convert the contract to a cost-reimbursable basis, in which case it was willing to waive its claim for losses. There was little reason for the plaintiff by that time to have had much confidence remaining in Dr. Woodson's belief that a successful end was in sight with a modest additional expenditure, for already the performance period had far exceeded the original 4 months and plaintiff's costs had far exceeded the contract price. In terminating the contract for default the contracting officer also demanded reimbursement of the $22,290 paid the plaintiff in progress payments. The plaintiff appealed the termination to the ASBCA on November 21, 1966, and on September 10, 1969, the appeal was denied, leading to the present review proceeding.

The ASBCA decision, with much thoughtful discussion, states the conclusion as follows: "***The excuses of practical impossibility and 'commercial senselessness' are not available under the circumstances.", terms which the ASBCA rightly considered to be synonymous. It restricted the proper application of practical impossibility to the cases where "specifications [are] furnished by the Government or otherwise warranted by it, even though impliedly", there being no such warranty found in the present case. Nor did the Government have a superior knowledge of the technology and withhold it, as in Helene Curtis Industries, Inc. v. United States, 160 Ct. Cl. 437, 312 F. 2d 774 (1963). (There is nothing to suggest any Government representative concerned in the procurement had knowledge of the technology in any way equal to Dr. Woodson's).

The trial judge upheld the plaintiff on the "impossibility" issue, differing with the ASBCA. He apparently agreed with the ASBCA on other issues, which he did not address in any detail, deeming plaintiff's contentions to lack substance. Since we agree with the ASBCA and differ with the trial judge as to impossibility, we find it necessary to give plaintiff's other contentions more notice. We take them up first, leaving impossibility to the end.

Plaintiff's main point is that under the requirement in Item 3 for "Improved Lineal Survey Equipment (ILSE) such as the Van Heel Alignment Apparatus ***", (emphasis supplied) the Saunders equipment is too unlike to be "such as". Therefore, when plaintiff switched to the Saunders device, it was a cardinal change. "The contract as written was impossible to perform because the Van Heel Alignment Apparatus was not available. A new contract came into existence, and the language should have been changed if defendant wanted to preserve its

privilege of declaring a default." The ASBCA analyzes the record in detail to show that plaintiff always had the option to make the switch. We agree with what it says, but a shorter answer is that in adopting the Saunders device without notice to defendant, plaintiff interpreted the contract in a sense clearly contrary to what it now urges. It did not even allow defendant the option to retain the Van Heel device at the cost of some delay, possibly less than defendant ultimately granted in time extensions anyway. A party cannot, after a controversy has arisen, arbitrarily abandon the contract interpretations it acted on to the other's knowledge when their relations were harmonious. Gresham & Co., Inc. v. United States, 200 Ct. Cl. 97, 470 F. 2d 542 (1972). It should be noted, of course, that this argument through using the word "impossible" does not concern the issue of commercial or technological impossibility dealt with infra.

Plaintiff also urges that standards of performance were not given and therefore the contract was effectively unenforceable. We think, as did the ASBCA, that plaintiff knew what it was trying to do when it was trying to do it, and cannot now urge that the level of satisfactory performance was imprecise.

We also agree with the ASBCA that neither the short time originally allowed for performance, nor the modest contract price, establish that it did not call for research and development, when its own terms show that it did.

Turning, then, to the main legal issue, we note that the ASBCA had several things to say about the impossibility issue, mostly unfavorable to plaintiff, but in the end did not attempt to determine whether the contract was impossible to perform, in the legal as opposed to the scientific sense. A careful reading of the Decision part of its opinion that could have been labeled, Conclusions of Law, shows that its position was that the excuse of legal impossibility is only available where "under Government specifications, failure to perform is due to the circumstance that no way is known in industry how to manufacture the supplies in question according to the specified design or performance characteristics. ***[T]he Government [therefore] is held to an implied warranty." This is not such a case, because here the plaintiff was to supply methodnlogy and design. In these circumstances, the parties did not intend "limitations with reference to the state of the art." Plaintiff "knew the work tasks to be performed had not been done before." In these circumstances, no implied warranty could be imputed to the Government. Therefore the conceptual underpinning for the impossibility defense as here involved was missing.

The reasoning is in general in accord with our decisions and strongly supported by them. In Austin Co. v. United States, 161 Ct. Cl. 76, 314 F. 2d 518, cert. denied, 375 U.S. 830 (1963), we assumed that plaintiff's failure to perform was solely due to the fact that it was impossible to do so under the specifications. However, the latter were proposed by the plaintiff after it had reviewed defendant's spe-

cifications and found them unworkable. We held that plaintiff, having promised to perform under its own substituted specifications fully assumed the risk of impossibility of performance. As the Government was responsible for losses due to its own specifications if they were defective, the converse should apply to the plaintiff.

In Bethlehem Corp. v. United States, 199 Ct. Cl. 247, 462 F. 2d 1400 (1972), we followed Austin. The Bethlehem Corp. was recognized to have superior expertise. Its technical proposal was made part of the contract and defendant modified the specification, pursuant to its advice. The contract, for an environmental test chamber, was impossible to perform within the then known state of the art. Defendant's officers who prepared the specifications, did not know this, but there were experts on the National Bureau of Standards who would have. We did not impute their knowledge to the contracting agency. (NOTE: The Bureau of Standards people were only aware of the difficulties, not of possible solutions, as has been incorrectly suggested in an effort to distinguish the case.) We held that Bethlehem had assumed the risk of nonperformance notwithstanding impossibility.

In Bethlehem we cited and quoted from the leading decision of Judge Friendly in United States v. Wegematic Corp., 360 F. 2d 674 (2d Cir. 1966). There in response to an invitation for proposals for computers, Wegematic submitted a detailed proposal for a machine it characterized as "a truly revolutionary system utilizing all of the latest technical advances." It proved impossible to deliver because of "basic engineering difficulties." Judge Friendly dryly says, at p. 676:

> ***We see no basis for thinking that when an electronics system is promoted by its manufacturer as a revolutionary breakthrough, the risk of the revolution's occurrence falls on the purchaser: the reasonable supposition is that it has already occurred or, at least that the manufacturer is assuring the purchaser that it will be found to have when the machine is assembled.***

In Hol-Gar Mfg. Corp. v. United States, 175 Ct. Cl. 518, 360 F. 2d 634 (1966), we enforced the implied warranty that if Government specifications are followed, a satisfactory product will result. We distinguished the Austin case, supra, on the ground that Austin had drafted substitute specifications which it had said would produce the result.

Hol-Gar thus falls in the line of cases dealing with impossibility of performing under an assertedly defective Government specification. Others are, e.g., Natus Corp. v. United States, 178 Ct. Cl. 1, 371 D. 2d 450 (1967); Tecon Corp. v. United States, 188 Ct. Cl. 436, 411 F. 2d 1271 (1969; Tombigbee Constructors v. United States, 190 Ct. Cl. 615, 420 F. 2d 1037 (1970). In these cases the question has had to be answered; assuming absolute or utter impossibility is not the

test, how impracticable, or unfeasible or commercially senseless must performance be, to excuse its not being rendered! It is in this context that Judge Collins in Natus, supra, delivered his much-quoted observation that "impossibility in its modern context has become a coat of many colors" -at p. 9, 371 F. 2d at 456. It may be that the word "impossibility" is somewhat of a semantic trap, but we do not have to fall into it here. As Judge Wright points out in Transatlantic Financing Corp. v. United States, 363 F. 2d 312, 315 (D.C. Cir 1966), before getting into the question you first have to determine whether risk of the contingency has been allocated either by agreement or by custom. The cases say it has been, here, and therefore the ASBCA was entirely right in not deciding whether it was impossible to perform or not, in a legal sense.

It has recently been stated the Government warranty of its own specifications does not apply to "performance oriented" as distinguished from "design oriented" specifications. Patten, The Implied Warranty that Attaches to Government Furnished Design Specifications, 31 Fed. B. J. 291, 299 (1973). The rule applicable here we believe is, if the contractor, from a stance of superior expertise, asks for and obtains leave to perform according to methods defined and stated by him, he impliedly warrants that he is able to overcome the technical difficulties inherent in the project, whatever they are. As viewed in Austin, the rule is the logical and natural converse of the one respecting Government drafted specifications, the more usual case. Thus it makes no difference whether performance here was actually and literally impossible or so only in the qualified sense sanctioned in our decisions.

The "implied warranty" concept appears frequently in our cases, yet may be objected to as somewhat of a fiction; a semantic step towards a predetermined result. We may, with Judge Wright in Transatlantic Financing Corp., supra, prefer to think in terms of the reasonable expectations of the commercial community, when they have written no express provision for the contingency, and none is derivable from commercial custom. It is needless to theorize here, when the cases dictate the outcome so clearly.

The trial judge saw some conflict between Austin and Natus both supra. He fails to mention, however, the favorable citation of the former in the Wegematic and Bethlehem cases, the latter more recent than Natus, and the explanation and differentiation of Austin in Hol-Gar, phrased in a way to raise no doubt upon its correctness. If we held for plaintiff here, we would have to overrule both Austin and Bethlehem. The trial judge's basic error is, we think, his failure to accept the court's position plainly stated in Austin, that even if the impossibility of performance were absolute it was no excuse for Austin's failure to produce under specifications written by itself.

If the parties, with equal expertise, mutually agree on an impossible method of performance, the loss sometimes may be shared on a mutural mistake theory. National Presto Ind. v. United States, 167 Ct. Cl. 749, 338 F. 2d 99 (1964) cert. denied, 380 U.S. 962 (1965), (citing and distinguishing Austin). The plight of the contractor here, a small business invites sympathy, though it escapes without any liquidated damages or reprocurement charges. Nevertheless, the mistaken business and technical judgment of Dr. Woodson emerges clearly from the ASBCA's findings as the prime cause of the fiasco, and no comparable errors are imputable to defendant's officers, with their inferior expertise admitted. We think the commercial community would expect the loss herein to lie where it fell, even assuming, arguendo, they would have gagged at any kind of penalty assessment. It makes a difference, as Judge Friendly remarks in Wegematic, supra, who is suing whom for what. In that case liquidated damages and excess reprocurement were awarded, making the decision far more hardhearted than Austin, or ours herein. Our decision, contrary to the trial judge, will deter the making of only R & D contracts wherein the contractor also promises production. On the other hand, his conclusion would deter Government officials from ever relying on the superior expertise of a contractor.

The ASBCA decision is supported by substantial evidence, is not arbitrary or capricious, and embodies no error of law, therefore, by Wunderlich Act standards, it is binding here. Plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is allowed. The petition is dismissed. Since defendant recovered the progress payment of $22,900 and interest thereon by withholding and setting off payments under another contract, no action with respect to such progress payment is here required.

SANDERS ASSOCIATES, INC.

ASBCA NO. 17,550 (1974)

Decision

Here we have a Contract (633) arrived at by one-on-one negotiation with respondent soliciting no other sources. The appellant is a large defense contractor seemingly experienced in the field of oscillators.

Respondent's specifications are performance type requirements written around appellant's product.

Neither party anticipated any problems. After award, appellant claims its product cannot meet the specifications. A conference convinced respondent that appellant's product could not meet the specifications as awarded. Instead of terminating the contract, respondent agreed to relax the specifications so as to accept appellant's product. However, respondent realized that in order to use appellant's oscillator for its intended purpose, an isolator must be employed in some manner in the ultimate system, so as to allow harmonious functioning of all parts of the system. Either party was in a position to furnish the isolator. Appellant also makes isolators as a usual part of its business, and it is more feasible for appellant to furnish the isolator. Therefore the parties mutually determined that appellant would furnish the isolator as well as the oscillator. Rather than issue a change order, respondent and appellant executed a supplemental agreement relaxing the specifications in order to allow appellant to use its oscillator, and expanded the scope of the contract to incorporate a new item, an isolator.

As with the oscillator, the specifications for the isolator merely state a performance level to be met without detailing design or the manufacturing processes to be followed. Both parties have dealt with each other openly and neither has held back information. Neither expects the contract to require large expenditures of effort or money in research and development.

The modification contemplated production within a short delivery period even though the mismatch problem was not viewed as an easy one to solve.

Appellant is unable to perform Contract 633 as modified, and, within a month, appellant knew the isolator is the problem stymieing performance. Another month passes and appellant is aware that the problem is significant for its intensive engineering efforts have been unrewarded and there is no light at the end of the tunnel.

Nevertheless, appellant enters into one-on-one negotiation for 150 more oscillators having the same requirement for the isolator plus new specifications covering additional requirements not found in Contract

633; once again no other sources are solicited. By the time appellant executes Contract 449, the problems of Contract 633 are still unresolved and appellant is in a severe loss position on Contract 633. Contract 449's specifications leave the design and manufacturing processes to the judgment and discretion of the appellant. The contract, as written, envisions production and performance within a short period without expenditures of great sums for research and development.

Appellant's attempts at performance are varied. Despite its problems with its transistor vendors, appellant struggled over several years time to deliver the oscillators. Although faced with numerous rejections, appellant was able to deliver units in erratic spurts only after the expenditure of large sums of time, material and money. The specifications of both contracts call for an effort beyond the state of the art when consideration is given to the dimensional limits placed on the combined unit, the temperature levels for operation, and the mismatch requirement.

Appellant calls on respondent to stand back of the specifications, and claims recovery is due where the specifications are defective or lead to unreasonable or extreme difficulty and expense. We are told that appellant was the victim of commercial impossibility. We so find. Numerous citations of cases are offered on this point. Most of the cases involved formally-advertised or competitively-negotiated contracts incorporating detailed or design specifications.

Modification P002 of Contract 633 and Contract 449 is not of this lineage. Appellant acknowledges that its specifications are performance type and points to this Board's decisions in Johnson Electronics, Inc., ASBCA 9366, 65-1, BCA ¶4628; Kinn Electronics Corp., ASBCA 13526, 69-2 BCA ¶8061; and Ryan Aeronautical Corp., ASBCA 13366, 70-1 BCA ¶8287 as instances where the Board has found in favor of the contractor despite the presence of performance specifications.

Appellant disavows any assumption of the risk of impossibility.

We have found impossibility as a fact. Respondent, faced with such a finding, contends appellant assumed this risk. Respondent relies upon The Austin Company v. United States, 161 Ct. Cl. 76, 314 F. 2d 518 (1963)' Bethlehem Steel Corp. v. United States, 199 Ct. Cl. 247, 462 F. 2d 1400 (1972); United States v. Wegematic Corp., 360 F. 2d 674 (2d Cir., 1966); and J. A. Maurer inc. v. United States, 202 Ct. Cl. 813, 485 F. 2d 588 (1973).

Respondent also points to R. E. D. M. Corp. v. United States, 192 Ct. Cl. 891, 428 V. 2d 1304 (1970), and Dittmore-Freimuth Corp. v. United States, 182 Ct. Cl. 507, 390 F. 2d 664 (1968), for the proposition that appellant cannot recover on Contract 449 when its complaint is based upon the same problem experienced in the first contract.

Most recently, the Board has noted that the Ryan Aeronautical decision was premised upon the Government's failure to disclose its superior knowledge concerning requirements of the revised specification. Air-A-Plane Corporation, ASBCA 15716, 74-1 BCA ¶. Similarly,

the Court of Claims views our decision in Johnson Electronics, Inc., supra, as bottomed upon the non-disclosure of superior knowledge Bethlehem Corporation, supra. The Board has treated Johnson as a case involving non-disclosure of important information Lear-Siegler, Inc. ASBCA 16079, 73-1 BCA ¶10004. The evidence in this case does not indicate a non-disclosure of superior knowledge. Mr. Eckstein's opinion is merely his opinion. Nothing in the record suggests this view-point is based on empirical data known to respondent and hidden from appellant. Nor is there a claim that Mr. Eckstein's talents exceeded those of appellant's engineers assigned to the problem.

As for the Kinn decision, the salient features of that case are without parallel here. There the Government solicited seven firms and the contract was awarded to a small business firm after formal advertising. Here appellant was the only source involved and participated in drafting the specifications both as to the oscillator and isolator. Over a month's time elapsed between appellant's offer to produce the isolator and the incorporation into Contract 633 of the requirement. There is no evidence in the record as to how appellant's isolator team viewed the mismatch problem other than the specification, as stated, was a high mismatch and therefore disclosed a situation not redressable by the usual techniques.

Although neither party cites the case, we find some striking similarities between the present situation and Sperry Rand Corporation v. United States, 201 Ct. Cl. 169, 475 F. 2d 1168 (1973). In Sperry Rand, a fixed price supply contract, to all appearances a production contract, was negotiated under sole source circumstances with an experienced Government contractor who contributed to the specifications. The item involved was a later version of a navigational computer developed by the contractor. Aside from the stated dimensional limits, the specifications for the later computer were largely of the performance type. Neither party anticipated any great research and development effort. The contract in concept was not novel nor a joint enterprise; the Government cared little as to how the contractor achieved performance. In performing, the contractor expended great sums to overcome problems of research and development. The contractor asked the court to reform the contract on the ground that the contract as written did not allocate the risk of mistake to either party. The court declined to do so and concluded that the dealings of the parties as a whole, including the contract and the enterprise embodied therein, pointed to the contractor's assumption of all the uncovered risks in its promised performance.

In the case at bar, appellant, an experienced Government contractor, negotiated as sole source to produce an oscillator developed under its auspices together with an isolator of its own design. The specifications for the combined unit were partly the effort of the contractor and were of the performance type. The effort as conceived was not as a novel project or a joint enterprise; neither party anticipated any great research and development effort even though the mismatch requirement was viewed as a difficulty. Subsequently the

contractor incurred great expense in struggling with a situation which we have found to be impossible. Should the result be different from Sperry Rand? We think not.

Admittedly in Sperry Rand the fact of impossibility was not established, but the Court of Claims has not found the establishment of any variety of impossibility the escape hatch to allow the contractor recovery. In J. A. Maurer, Inc. v. United States, supra, the Court indicates the criterion to be employed:

> It has recently been stated the Government warranty of its own specifications does not apply to 'performance oriented' as distinguished from 'design oriented' specifications. Pattern, The Implied Warranty That Attaches To Government Furnished Design Specifications, 31 Fed. B. J. 291, 299 (1973). The rule applicable here we believe is, if the contractor, from a stance of superior expertise, asks for and obtains leave to perform according to methods defined and stated by him, he impliedly warrants that he is able to overcome the technical difficulties inherent in the project, whatever they are . . .. Thus it makes no difference whether performance here was actually and literally impossible or so only in the qualified sense sanctioned in our decisions.

As we view the stance of the parties, appellant in this instance had the superior expertise since it had developed the DG511A and it produced isolators as part of its usual business effort. Respondent left the methodology of compliance with the specifications up to the appellant to mate its two designed products to function at the performance level clearly stated in Modification P002 and Contract 449. On the facts of this case, we find appellant must bear the risk of impossibility. Air-A-Plane Corporation, supra.

Appellant cites a dictum in Landsverk Electro-meter Co., ASBCA 11092, 67-2 BCA ¶6649, for the proposition that once the Government becomes aware that its specification calls for the impossible and persists in directing the contractor to further effort, such directions constitute a compensable change. Landsverk also involved a performance type specification, but, unlike the case here, the specification was solely the product of the Government. When alerted to the impossibility, the Government immediately relaxed the specification. Our case differs in that appellant participated substantially in writing the specification. Moreover, the appellant never claimed impossibility until February 1972. The record does not disclose when appellant first considered itself to be attempting the impossible. Under such circumstances, we fail to see why appellant should be permitted to reconvey to the respondent the risks inherent in the effort when impossibility is encountered.

Even if we were to favor appellant in its claim of impossibility on Contract 633, the Board would be constrained to deny any recovery for expenses incurred in performing Contract 449 for by that time the problem regarding the 3:1 mismatch certainly was looming large. REDM Corporation v. United States 192 Ct. Cl. 891, 428 F. 2d 1304 (1970).

As for appellant's attack on NAFI's testing, no specific rejection of any unit was scrutinized by any witness. Rather the testimony, as previously indicated, indulged in surmise resting upon the possibility of error, had certain events materialized. We equate such testimony with educated speculation. J. B. Williams Co. v. United States, 196 Ct. Cl. 491, 450 F. 2d 1379 (1971). Appellant's evidence does not support its burden of proof on the claim of improper rejection of units.

Appeal is denied.

B. Practical Impossibility

JOHNSON ELECTRONICS, INC.

ASBCA No. 9366 (1964)

* * * * * * * * *

DECISION

Over a period of several years the Government accumulated a very considerable store of knowledge about the power supply units for its ARC-27 and ARC-55 radios. It had an expert (who had closely observed the deficiencies of earlier units, studied and contemplated at length the source of those deficiencies) ultimately write the specification under which the units were to be procured by this contract. By design or by inadvertence, the Government figuratively threw away the knowledge it had laboriously accumulated. When it sought bids, they were on a small business set-aside, for an advertised production-type contract, to be performed in a relatively short period of time and based on a performance-type specification without any mention of the past history, experience, and extensive knowledge which the Government had about the power supply unit. Then, almost as though this were not handicap enough to the successful procurement of the units, the odds against success were further increased by disassociation from the program during its critical period of the one man who knew the most about it. The reasons why these circumstances developed are of no immediate concern. That the recounted series of happenings, fortuitous or otherwise, made understanding and performance of this contract extremely difficult, is apparent. It is in this historical setting that we must determine whether the contracting officer's termination of the contract for default was proper or whether that termination should be converted to one for the convenience of the Government.

The appellant recognized that it had to produce under a performance specification and that some developmental work might normally be expected. However, the appellant's president testified that he assumed, from the fact the procurement had been restricted to small business firms, that the supplies could be fabricated by putting together readily available components without the expenditure of SUBSTANTIAL design and engineering effort--this because small firms do not generally have extensive design capabilities or the capital to finance such. He was further confirmed in his belief, he contends, by the very fact that the supplies were being competitively procured by formal advertising, and the short performance period allowed, which he contrasted with an effort under a research and development contract. He believed that had considerable developmental work been required, such a latter contract type would have been utilized. Without any

warning to the contrary in the invitation, save the fact of a specification which was in part of a performance type, these assumptions are entirely plausible.

Appellant's brief argues that the evidence demonstrates performance of the contract was impossible within the state-of-the-art as it existed at the time of advertising, award, and performance. To support this proposition, it relies heavily on the fact that no unit meeting all of the specifications had ever been produced. This is based to a large extent on the testimony of Lieutenant Martin that no one unit he knew of met all of the specifications to which Johnson was to perform. Units by other manufacturers met the requirements of specific portions of the specifications. We think that from a fair reading of all of Lieutenant Martin's testimony it is his expert opinion that performance to the standards of Specification MDNE-PD-40 was not impossible, leastways not given, at the beginning of any contractor's performance, what he (Lieutenant Martin) knew after his several years of study.

We think it doubtful that appellant has made out a case of literal impossibility of performance, i.e., has shown that no one could in any circumstance have performed to this contract's specification. There may, however, be legal impossibility without literal impossibility. Restatement, Contracts, § 454 (1932) states that "impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." The first comment to that section of the Restatement limits the situation by explaining that "Mere unanticipated difficulty, however, not amounting to impracticability is not within the scope of the definition . . .." It has been suggested that a workable definition of practical impossibility would be to say that it "means NOT POSSIBLE WITHIN THE BASIC OBJECTIVES CONTEMPLATED BY THE PARTIES--as evidenced by the contract itself and the surrounding circumstances." Pettit, Impossibility of Performance, Government Contractor Briefing Papers (March 1963). See also Uniform Commercial Code (1958 Text), § 2-615.

Viewed in the light of what the Invitation for Bids represented both affirmatively and tacitly, we think it fair to conclude that the parties assumed that the contract could be performed by a small business concern which would have a staff qualified to manufacture electronic equipment, but which would not necessarily have the technical or financial capability of carrying on an extended design program. It is significant that the time originally allowed for the design and manufacture of first articles was 90 days, which would not permit an extended research and design period. Production, and not design, was the basic commodity called for by this contract. See E. L. Cournand & Company, Inc., ASBCA No. 2955, September 29, 1960, 60-2 BCA ¶ 2840. Production clearly was not to detailed Government specifications, which would call for the application of other well-established legal principles than those here being considered. But the statement of performance required must itself be considered in the

context of all the surrounding circumstances. We can find no notice in this contract that it was intended to call for a major design effort, virtually if not actually a break-through in the existing state-of-the-art. Especially does an advertised production contract form, set aside as it was, serve no such notice. We can find no fault in the technical competence of appellant's forces, the approaches it made to solution of its design problems, or its canvassing of sources for assistance. Its efforts to perform the contract were far in excess of what it might reasonably have expected from all the circumstances existing and made evident to it at the time of bidding for this contract. We think that appellant has made out a case of practical, legal impossibility of performance of this contract.

We further think that the Government's failure to highlight to prospective bidders any of its extensive efforts to develop the transistorized power supply or to warn them in clear terms that extensive research and development efforts would be required before any production of the unit could be undertaken, but rather its advertising of this procurement on a fixed-price, production contract, set-aside basis, constituted a failure to disclose the superior knowledge it had concerning reasonably-expected performance of the contract and misled the bidder into a task, the proportions of which it could not reasonably have anticipated. Helene Curtis Industries, Inc. v. United States, Ct.Cls. No. 251-256, February 6, 1963, Midvale-Heppenstall Company, ASBCA No. 7525, December 31, 1964, 65-1 BCA ¶ 4628.

Having so found, we find further that appellant's failure to perform the contract was for causes beyond its control and without its fault or negligence and was caused by acts of the Government. This is one of the enumerated grounds of excusability stated in the contract's Default provision. Accordingly, the contracting officer's termination of the contract for default was not proper and the default should be deemed effected for the convenience of the Government. In view of the affirmative but improper termination of the contract, we have no need to consider the significance of the appellant's possible abandonment of the contract in May 1963.

The appeal is SUSTAINED and the matter remanded to the contracting officer for further action in accordance with the contract's General Provision 23, Termination for the Convenience of the Government.

DISSENTING OPINION BY LT COL YEOMAN

I believe the contractor assumes the risk of impossibility when the specifications are of the performance type. I dissent.

Section 5. Inspection

A. Finality

SOLID STATE ELECTRONICS CORPORATION

ASBCA No. 23041 (1980)

This appeal is from a contracting officer's final decision dated 24 May 1978, reversing final acceptance of 1,038 integrated circuit logic gates supplied by appellant and demanding replacement of the devices within fifteen days or return of $39,703.50 which was the Government's total payment under the contract. The basis of the rejection is that the devices contained one circuit rather than three circuits which the Government claimed was specified by the contract. The Government contends the devices contain latent defects. Also in this appeal, appellant requests $2,725, which are its costs, overhead, general and administrative expenses and profit attributable to assisting in evaluating the devices after the malfunction was discovered. Only entitlement is at issue.

* * * * *

DECISION

The issues presented by this appeal are: (1) whether the Government may, after final inspection, acceptance and payment, reject all the devices appellant supplied under the Contract because these items contain one rather than three circuits; and (2) whether appellant is entitled to additional compensation for its assistance in reinspection of the devices.

The Contract provides that Government's final acceptance can be revoked only upon a showing that the devices contain latent defects, or that acceptance was obtained by fraud or such gross mistakes as to amount to fraud (finding 2). Respondent contends the first exception applies to this appeal.

When the Government seeks to repudiate its final acceptance on the basis that the procured items contain latent defects, it must establish that defects existed at the time of final acceptance, and that such defects could not have been discovered by the exercise of reasonable care. Triple "A" Machine Shop, Inc, ASBCA No. 16844, 73-1 BCA ¶ 9826 at 45,924 and cases cited. Defects which would be revealed by a reasonable examination are not latent, Jung Ah Industrial Company, Ltd., ASBCA No. 22632, 79-1 BCA ¶ 13,643 at 66,928; and failure to make the necessary tests or to examine the items does not make the defects latent. Triple "A" Machine Shop, Inc., supra. Representatives for both parties agree that it was "very easy" to determine during final inspection whether the devices had one or three

circuits by performing either of two tests (use of an ohmmeter or energizing each circuit separately) in the presence of an inspector who knew that the Government intended to purchase a device with three circuits (findings 13, 30). The fact that the Government inspector did not know the purpose the devices were to fulfill does not excuse respondent because the Government is responsible for sending inspectors knowledgeable with respect to the production requirements of the contract. Hydro Fitting Manufacturing Corporation, ASBCA No. 16394, 73-2 BCA ¶ 10,081 at 47,368. Thus, there was no latent defect within the meaning of subsection (d) of the Inspection clause.

Respondent argues that the Responsibility for Inspection clause limits the Government's inspection responsibility, citing Kaminar v. United States [19 CCF ¶ 82,736], 203 Ct. Cl. 182, 488 F. 2d 980 (1973). In Kaminer the Court of Claims interpreted inspection clauses similar to those in the Contract (finding 2). In that dispute the Government repudiated its final acceptance when a portion of the structure appellant built collapsed due to the fact that sixteen of the 11,967 bolts used were 1-1/4 rather than 1-3/8 inches in size. In holding that the Government could reject the construction based on a claim of latent defects the Court stated:

> The right to inspect does not imply a duty to inspect. What [the inspection clause] did was to outline the Government's right to conduct reasonable inspections at its own expense at various times and places in the construction cycle. It did not place any duty on the Government to conduct such tests at the risk of assuming responsibility for any deficiencies which it might have discovered.
>
> * * *
>
> Reason dictates that it was simply impossible for the Government inspector to check every bolt or oversee the work of each of plaintiff's 60 employees.
>
> * * *
>
> Only the failure of the Government to discover an obvious error in construction would have relieved plaintiff of its responsibility to insure that the tower and derricks were properly constructed. As we have already noted, the deficiency regarding 16 bolts in the 11,967-bolt structure was hardly an obvious discrepancy.

In the present appeal the Government overlooked "an obvious error" in the devices. Failure to discover that not one device would fulfill its fundamental function, i.e., to turn on three separate lights from three separate electrical impulses, is significantly different from failure to discover that sixteen of 11,967 bolts were

1-1/4 rather than 1-3/8 inches in size. The Court's holding in Kaminer does not relieve the Government of its final acceptance in this appeal.

The Government contends that a visual inspection is all that is required to prevail on its latent defect claim. We answered this assertion in Herley Industries, Inc., ASBCA No. 13727, 71-1 BCA ¶ 8888 where we stated at 41,309-10:

> Unquestionably, ascertainment of the nature of the materials used in the isolators could not be verified by any visual examination or even by those tests applied during contract performance. The determinative factor in ascertaining latency is whether or not the defect could be discovered by ordinary and reasonable care. The fact that it may be hidden from sight or even unavailable through the application of tests established during performance, does not preclude obtaining knowledge thereof by tests which should have been considered or applied under the circumstances.

Also, respondent argues that the devices passed every test specified by the Contract. In pursuing this point, respondent states at page 21: "The test conditions, though identical for each circuit, were applicable to each of three circuits in every lamp driver assembly." The arguments are inconsistent. If, as respondent states, the Contract required that the specified tests be performed for each circuit, the devices did not pass the required tests because it is undisputed that these tests were run for only one circuit in each device, the interpretation which appellant and the Government inspection placed upon the Contract.

Respondent contends that despite its failure to conduct reasonable tests, the defect was latent, and attempts to support the position in part by the facts that appellant did not include an ohmmeter test and appellant represented to the Government inspector that the devices conformed to the specifications. The position is illogical. Since the Contract did not clearly reflect that the Government wished to procure a three circuit device, appellant, based upon a reasonable interpretation, built a one circuit device. In manufacturing the devices appellant followed Figure 2 of the schematic (findings 3, 8). All parties agree that the manner in which the pins are designated on Figure 2 indicate there is a common connection, whether internally or externally, among the three inputs and outputs. Also, David Keetley, who was responsible for procuring the devices for the Government, stated that when several circuits are required, it is accepted practice for the schematic to state: "Typical--one of three circuits" or "Typical--one of three" rather than remain completely silent as with Figure 2.

Appellant saw no conflict between the one circuit shown on Figure 2 and the requirement that the devices perform the function of three independent lamp drivers, because appellant did not know the intended

to be answered; assuming absolute or utter impossibility is not the

function for the devices. Appellant's reasonableness in dismissing this conflict was affirmed by Herman Spivack, an expert in the field of engineering and physics, who assumed three of the one circuit devices would be used in the system utilizing the devices. Additionally, three Government inspectors, all of whom saw the schematic Figure 2 and had the opportunity to review the remainder of the Drawing if Figure 2 appeared ambiguous, interpreted the Contract as did appellant and approved the one circuit device during no less than four inspections or reinspections.

Thus, appellant, confident that it had met the specifications, might have included an ohmmeter test to determine if there were any short circuits in its one circuit devices, but certainly not to test if there were one or three circuits. Also, since the three Government inspectors interpreted the Drawing as calling for only one circuit, had appellant in their presence performed the ohmmeter test or specifically stated that the device contained only one circuit, there is no indication in the record that the inspectors would have done other than accept the one circuit devices as constructed by appellant.

Respondent contends that if the Drawing were ambiguous, the ambiguity is patent, thus appellant was obligated to inquire prior to bid. This argument might have merit if appellant were claiming an equitable adjustment based upon having to make corrections prior to a final acceptance. This argument, however, is not available to set aside a final acceptance where the defect is patent.

The second exception to final acceptance also fails to apply, since there is no evidence or allegation of fraud. The third of the exceptions, "gross mistake as to amount to fraud", was defined at length in Catalytic Engineering and Manufacturing Corporation, ASBCA No. 15257, 72-1 BCA ¶ 9342, and we will not repeat it. In this appeal, the requirement for some type of misrepresentation by appellant is not present, and the fact that by contract the appellant had the responsibility for the inspection does not change this result. See Jo-Bar Manufacturing Corporation, ASBCA No. 17774, 73-2 BCA ¶ 10,311. Therefore, since none of the exceptions is available, the Government cannot repudiate its final acceptance of the devices.

Further, appellant is entitled to an equitable adjustment for its assistance in the reinspection of the devices. The Government's first written notification to appellant that deficiencies were reported was more than seven months after final acceptance of the last shipment of appellant's devices. In that notification the Government requested a written report or an interim reply from appellant within seven days. Appellant's written report was to include such information as the cause of the alleged deficiency, the corrective action appellant would take, and the date the repair or replacement would take place. Additionally, in its notification, the Government advised appellant that it might obtain exhibits or samples of the allegedly defective devices by using the enclosed form or by a "letter containing equivalent information," and also stated: "No repairs involving costs to the Government are to be accomplished until authorized by the contracting

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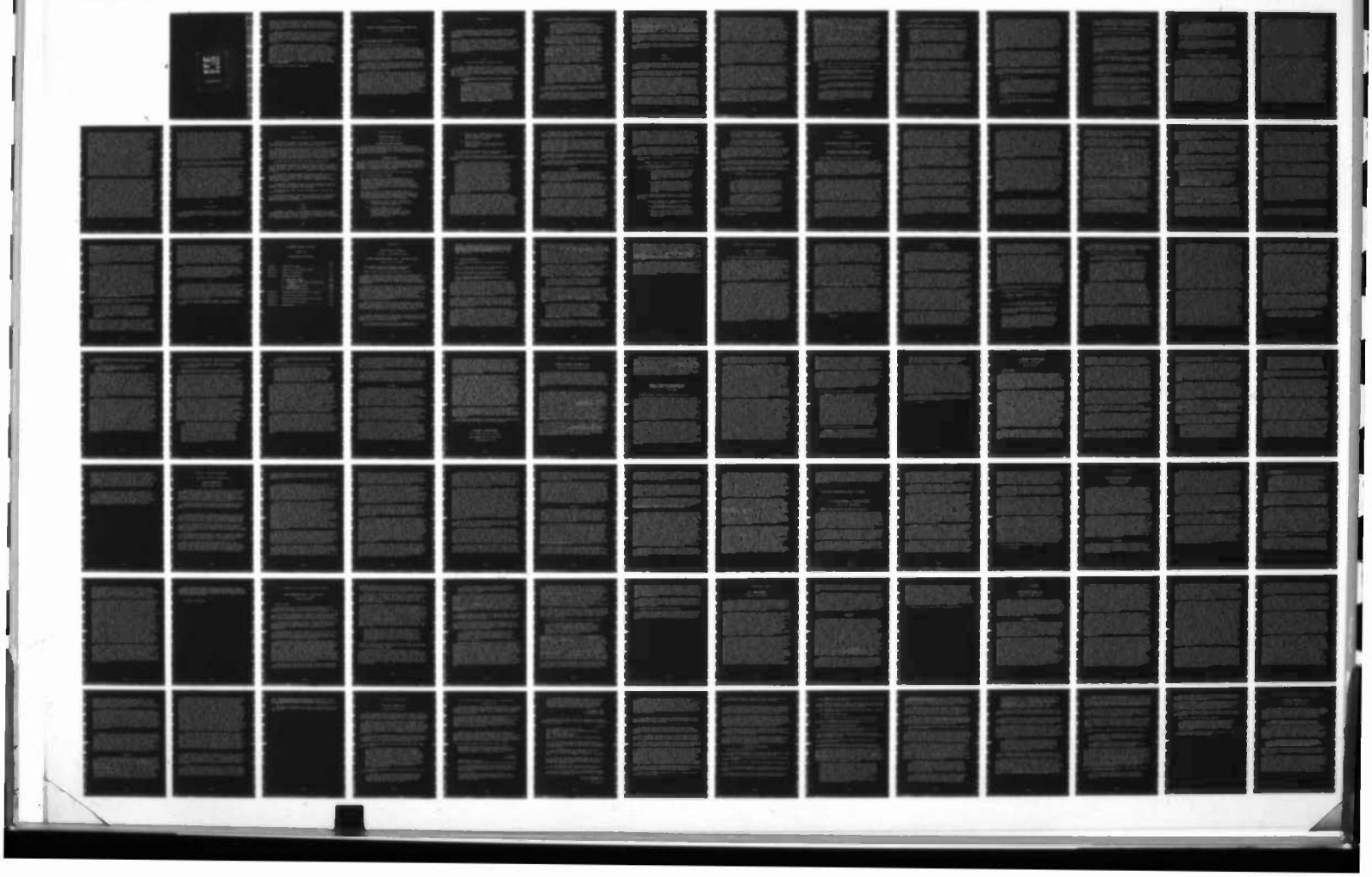

MICROCOPY RESOLUTION TEST CHART
NATIONAL BUREAU OF STANDARDS - 1963 - A

officer." Appellant responded that it would need five each of the working and non-working devices for examination and approximately thirty days' time for inspection. Appellant also stated it was unaware of the deficiencies and "without proper discovery or verification we do not feel we can undertake any further action without considering the cost involved."

Appellant ordered the devices on the printed form supplied by the Government which included the statement: "Return of the exhibit(s) is for the prime purpose of the evaluation and study at no direct cost to the Government." The reinspection was conducted during July and August of 1977 and the Government inspectors were present at appellant's plant at least twice and at each time found no defect with the devices.

The devices appellant supplied conformed to a reasonable interpretation of the Contract. The Government's notification to appellant of alleged defects could hardly be interpreted as permitting appellant to proceed with the reinspection at its option. Further, appellant was able to obtain samples of the rejected devices only upon execution of the form, or its equivalent, which released the Government from any "direct costs." We do not consider appellant acted as a volunteer. When as in this instance, a contractor is actually or constructively ordered to do work outside the requirements of the contract, it is entitled to an equitable adjustment. Chris Berg, Inc. v. United States [23 CCF ¶ 81,143], 197 Ct. Cl. 503, 525, 455 F. 2d 1037, 1050 (1972).

Accordingly, the appeal is sustained.

B. Gross Mistake

CATALYTIC ENGINEERING AND MANUFACTURING CORPORATION

ASBCA No. 15,257 (1972)

I

The Government claims $11,033.76, plus interest, paid to appellant for dehydrator cartridges.

The appeal presents two principal questions.

The first is whether the cartridges complied with contract requirements; and, more specifically, whether the contracts required end pieces made of polyvinal chloride. The end pieces were made of polystyrene. If the cartridges complied with contract requirements the second principal question is not for consideration. If they did not, the second principal question is whether the acceptance thereof was not conclusive either because of latent defects or because of such gross mistakes as amount to fraud.

For reasons set forth hereinafter, the Board's decision is that the cartridges did not comply with contract requirements, that the acceptance thereof was not conclusive because of such gross mistakes as amount to fraud, and that the Government is entitled to the $11,033.76 claimed, plus interest.

The contracts do not directly state that the end pieces are to be made of polyvinal chloride. They do require that the items be appellant's part number 3120. To decide whether the contracts require end pieces made of polyvinal chloride it is necessary to consider circumstances surrounding their execution and, more particularly, what is meant by appellant's part number 3120. This includes consideration of an unsolicited proposal, the Government's actions thereon, changes thereafter made by appellant in the drawing submitted with its unsolicited proposal, the bid on and the performance of one contract awarded and completed after the unsolicited proposal was received but before award of either of the two contracts under which the Government's claim is made, and the bids on those two contracts. It is also necessary to consider the actions of the parties after each of the two contracts under which the claim is made were awarded.

FINDINGS OF FACT

II

The item concerned is a dehydrator cartridge assigned Federal Stock Number (FSN) 4440-999-7117. Described briefly it is a tube of a particular configuration, approximately 9-1/2 inches long with approximately a 1-inch diameter, containing desiccant and other components.

It is used in the air stream behind an air compressor in several pneumatic systems in several aircraft including the B-52, F-86, and F-4C. In the B-52 it is in the pneumatic system that supplies air to the MD-9 fire control system. In the F-86 it is in the pneumatic start system used in starting the engine of the aircraft. In the F-4C it is in the pneumatic portion of the system that supplies air to the struts on the landing gear and also to the system that raises and lowers the canopies.

* * * * *

XXIX

Such Gross Mistakes as Amount to Fraud

In order to decide whether the facts in this case show "Such gross mistakes as amount to fraud" it is first necessary to decide what those words mean. Appellant has not addressed itself to this question, i.e., the meaning of the language, it its pleadings or arguments at the hearing. The Government's brief on the subject is short and is quoted below.

> D. Was acceptance induced by 'gross mistake amounting to fraud?'
>
> The 'gross mistake' provision of subparagraph (d) of the May 1958 Inspection clause afforded Respondent the right to revoke acceptance based on a showing of constructive, as distinguished from actual, fraud. Constructive fraud has been defined as an act done or omitted which amounts to positive fraud, even though the act is not done or omitted with an actual design to perpetrate positive fraud. It is rather presumed from the relation of the parties to a transaction or from the circumstances under which it takes place [Bar Ray Products, Inc., v. Unites States, 340 F.2d 343 (Ct. Cl. 1964); 37 AM. Jur. 2d, Fraud $4].

The concept is recognized in Uniform Commercial Code 2-608(1)(b) which provides in pertinent part:

> The buyer may revoke his acceptance of a . . . commercial unit whose nonconformity substantially impairs its value to him if he has accepted it without discovery of such nonconformity (and) if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances. (Emphasis ours.)

Comment No. 3, Section 2-608, of the 1962 Official Text, Uniform Commercial Code, states that 'assurances' by the seller under the quoted language can rest as well in circumstances (e.g., the acts or omissions of constructive fraud) as in explicit language used at the time of delivery.

The courts have recognized that assurances sufficient to support revocation of acceptance can be innocently made [Lanner v. Whitney, 247 Or. 223, 428, P.2d 398, 402 (1967)], that they can result from the vendor's superior position of knowledge about the subject of the sale [cf, Lawner v. Engelback, 433 Pa. 311, 249 A.2d 295, 298 (1969], and have even been found in a third party's listing of a race horse as a 'colt' on an official race program (from whence it could be implied that the animal was a stallion) when in fact the horse was a gelding [Grandi v. LeSage, 74 N.M. 799, 399 P.2d 285, 292 (1965)].

Appellant controlled the design of its part number 3120 dehydrator cartridge even though the initial design had been approved by Warner-Robins Air Materiel Area. Appellant thus had superior knowledge about its dehydrator cartridge and because Respondent was its sole customer for its part number 3120 dehydrator cartridge, was under a positive duty to inform Respondent of the change in configuration of the end piece. Breach of that duty by Appellant (which it has admitted) constituted an act of constructive fraud just as submission of design drawings to Respondent's inspector was an assurance that the changes noted therein had been approved.

In its brief the Government also contends that the substitution of polystyrene end pieces for polyvinal chloride end pieces caused a substantial defect in the cartridges.

The words "such gross mistakes as amount to fraud" have appeared in standard Government contract inspection articles at least since 10 June 1927 and may have appeared therein prior to that date. These words in the inspection article have apparently not been the subject of any extensive prior Court or Board consideration.

This Board has found only three prior cases in which a Court or Board, with the inspection article containing such language before it for consideration, has considered whether an acceptance was not conclusive because of "such gross mistakes as amount to fraud", viz: Perfect Packed Products Company, Inc., ASBCA No. 629, 25 September 1951; Bar-Ray Products, Inc., ASBCA No. 4834, 13 April 1959, 59-1 BCA p/ 2181, reviewed with the same result reached in Bar-Ray Products, Inc., v. United States, 167 Ct. Cl. 839 (1964); and Kaminer Construction Corporation, ENG BCA No. 2833, 17 October 1968, 68-2 BCA p 7321.

None of the four decisions cited in the preceding paragraph contains any extensive analysis or discussion of what is meant by "such gross mistakes as amount to fraud." The Court did find that the acceptance was not conclusive because of such gross mistakes as amount to fraud.

The three prior cases cited above in this section provide little guidance as to what is meant by the words "such gross mistakes as amount to fraud."

* * * * *

XXXIII

Conclusions

The Board has previously found (***) that the sentence under consideration manifests the intent that "fraud" and "such gross mistakes as amount to fraud" do not mean one and the same thing but mean two different things.

The Board now concludes that the important distinction between "fraud" and "such gross mistakes as amount to fraud" as manifested by the sentence is in the area of knowledge and intent.

The Board concludes that reasonably intelligent contractors reading the sentence in the context of the inspection article would understand "fraud" to mean the making of a statement knowing that it was untrue, or the deliberate taking of some improper action, with the intent to deceive the buyer and thus induce the buyer, to his detriment, to take an action (either acceptance of, or payment for, supplies not conforming to contract requirements) that it otherwise would not have taken. The Board concludes that, to reasonably intelligent contractors reading the sentence in context, "fraud" has the connotation of a deliberate untrue statement or dishonest action made or taken to deceive the buyer to its detriment.

The Board concludes that reasonably intelligent contractors reading the sentence in the context of the inspection article would understand the words "such gross mistakes as amount to fraud" to mean that there must first be a major or great or serious mistake made and that this mistake must have occasioned the acceptance of the supplies

that did not conform to contract requirements. However, unlike "fraud" which has the connotation of deliberate misstatement or improper action with an intent to deceive, "mistake" has a diametrically opposed connotation. "Mistake" connotes an unintentional misstatement or action which produces an unintended and undesirable result. "Gross mistake" connotes a mistake so serious or uncalled for as not to be reasonably expected, or justifiable, in the case of a responsible contractor for the items concerned. Finally the Board concludes that a gross mistake would be understood to amount to fraud when the misleading statement or action is made by mistake and without an intent to deceive but induces the acceptance of supplies not conforming to contract requirements to the buyer's detriment. The Board concludes it would be so understood because the resulting damage to the buyer is the same as it would have been if the statement had been made, or action taken, with the intent to deceive.

One of the elements of fraud in the definitions used above is a false representation of, or a misrepresentation of, a material fact. This requires consideration as to whether in order for gross mistakes to amount to fraud such gross mistakes must also include a false representation or misrepresentation of a material fact. The Board concludes that reasonably intelligent contractors would understand that in order for gross mistakes to amount to fraud there must be a false representation or misrepresentation of a material fact (as opposed to a matter of law or matter of opinion) but that such a false representation or misrepresentation could be by words or conduct or by false or misleading allegations or by the concealment of, i.e., failure to disclose, facts that should have been disclosed in the circumstances.

The above conclusions, while perhaps reached by a different analysis, are consistent with the statement of the Court of Claims in Bar-Ray, supra, that it would appear that the purpose of the sentence was to obviate the need for proof of intent to deceive. The Board's conclusions are not, however, based in any way on the purpose of the drafter of the sentence but are instead based upon how it would reasonably be understood by the other party. The above conclusions are also consistent with the result reached in Bar-Ray, supra, in which the Court found that the acceptance of the units was induced by such gross mistake as amounted to fraud but did not make a finding as to whether or not there was an intent to deceive. The Board observes, with respect to the statement of the Court, that since the sentence obviates the need for proof of intent to deceive it also obviates the need to find intent to deceive.

The above conclusions are also consistent with the provisions of the Uniform Commercial Code. In prior cases when, unlike here, the question being decided was not governed by specific contract language, this Board, in the absence of other Federal law, has used the Uniform Commercial Code as a source of Federal common law, Reeves Soundcraft Corporation, ASBCA No. 9030, 30 June 1964, 1964 BCA par. 4317; Council Manufacturing Company, ASBCA No. 14232, 22 February 171, 71-1

BCA par. 8731, and Federal courts have also done so, see United States v. Wegematic, 360 F. 2d 674, CA2, (1966); and Everett Plywood Door Corp. v. United States, 190 Ct. Cl. 80 (1969). In the instant case the Board's decision is governed by specific contract language and not by the Uniform Commercial Code since the Code does not override specific contract provisions; Republic Aviation Corporation, ASBCA No. 9934, 31 March 1966, 66-1 BCA par. 5432; Krimm and Companyu, Inc., ASBCA No. 14533, 30 April 1970, 70-1 BCA par. 8275. However, in the instant case the Code is of assistance, and properly for consideration, in determining the meaning of the specific contract language, particularly insofar as intent (i.e. good faith versus bad faith) is concerned in determining what "amounts to fraud." The Board notes that in Harry Thuresson, Inc., v. United States, Ct. Cl. No. 198-70, Slip Opinion dated 21 January 1972, the Court was concerned with the interpretation of certain "boiler plate" articles used in surplus sales contracts and found support in the Uniform Commercial Code for the Court's view of the meaning of the contract articles.

The Board understands (see Uniform Laws Annotated, Uniform Commercial Code, West Publishing Co., 1968, Volume I, pages III, X, XVI, and XXIII) that while the main objective of the drafters of the Code was to insure uniformity, the drafts were examined by financial and trade groups whose suggestions were considered, that it was felt that earlier uniform acts needed revision to keep them in step with modern commercial practices, and that the code is intended to be a workable set of laws taking into consideration current business practices.

Section 2-608 of the Uniform Commercial Code provides as follows:

¶2-608. Revocation of Acceptance in Whole or in Part.

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it;

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

With respect to Section 2-608 under the heading "Purpose of changes:" it is stated in pertinent part as follows:

2. Revocation of acceptance is possible only where the non-conformity substantially impairs the value of the goods to the buyer. For this purpose the test is not what the seller had reason to know at the time of contracting; the question is whether the non-conformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstance.

3. 'Assurances' by the seller under paragraph (b) of sub-section (1) can rest as well in the circumstances or in the contract as in explicit language used at the time of delivery. The reason for recognizing such assurances is that they induce the buyer to delay discovery. These are the only assurances involved in paragraph (b). Explicit assurances may be made either in good faith or bad faith. In either case any remedy accorded by this Article is available to the buyer under the section on remedies for fraud.

Section 1-201 paragraph (19) of the Code defines "Good Faith" as "honesty in fact in the conduct or transaction concerned" and section 2-103 paragraph (1)(b) states that "Good Faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

The Board concludes that the Uniform Commercial Code with its stated purpose of changes supports the Board's conclusion that responsible contractors would not understand the contract language concerned to mean that in order for the acceptance not to be conclusive, and in order for the gross mistakes to amount to fraud, it would have to be shown that the seller acted in bad faith and/or with an intent to deceive, but would instead understand that a gross mistake can amount to fraud, and an acceptance accordingly be rescinded, even though the mistake was made in good faith. While the sections of the code concerned do not state that there must be a false representation or misrepresentation of a material fact but speak instead of "assurances," they are consistent with the Board's conclusion that reasonably intelligent contractors would understand that false representations or misrepresentations could be by words or conduct, or by failure to disclose what should have been disclosed in the circumstances.

The Board's conclusions with respect to the meaning of the language concerned are also consistent with modern case law relating to whether an acceptance or contract can be rescinded by the buyer in the absence of bad faith, or fraud, on the part of the seller.

In the earlier line of cases referred to above concerning the finality of decisions by inspectors and engineers under contracts which did not use the same or similar exculpatory language but where instead the Courts stated that such decisions were not final in the case of such gross mistake as would necessarily imply bad faith, etc., the Courts were much concerned with a fact finding as to whether the inspector or engineer had acted in good faith or in bad faith. While the Court decisions did not require a finding of actual bad faith (i.e., were not concerned with the inspector's or engineer's state of mind and did not require a finding that he intentionally and deliberately made a decision which he knew to be wrong) they did require the finder of fact to find explicitly whether the inspector or engineer had, or had not, acted in bad faith. In effect the Courts said that gross mistakes imply bad faith when they cannot be reconciled with good faith; and were mistakes which a person with the experience and competence concerned, acting honestly, would not reasonably be supposed to make. Unless it was found as a fact that the inspector or engineer had acted in bad faith, his decision was held to be conclusive.

As shown above, in jurisdictions where the Uniform Commercial Code is in effect, "good faith" versus "bad faith" is not the test as to whether an acceptance of supplies can be rescinded, and assurances by the seller that induce acceptance of non-conforming supplies can rest as well "in the circumstrances" as in explicit language used at the time of delivery. The Board also notes that in applying the Uniform Sales Act it has been held that rescission may be allowed where a misrepresentation is in fact false although made in good faith by the seller. Beech Aircraft Corp. v. Flexible Tubing Corp. 270 F. Supp. 548 D.C. Conn. 1967.

With respect to rescission of acceptance, good faith versus bad faith, and misrepresentation, Williston on Contracts, Third Edition, in discussing Fraud and Misrepresentation, states in pertinent part as follows:

Sec. 1487, page 323.

> It is undoubtedly true that wherever the circumstances are such as to warrant an action for deceit for inducing a person to enter into a contract, they will certainly warrant avoidance or rescission of the bargain. The converse is not, however, true. There are cases where the belief of the deceived person is not due to such a consciously fraudulent misrepresentation as would justify an action of deceit; and yet there may be every reason why rescission should be allowed.

Sec. 1487A, pages 331 and 332.

> As to nondisclosure of a material fact or dealing in 'half truth', the Supreme Court of the United States had this to say:

A statement in a business transaction which, while stating the truth so far as it goes, the maker knows or believes to be materially misleading because of his failure to state qualifying matter is a fraudulent misrepresentation.

Such a statement of a half truth is as much a misrepresentation as if the facts stated were untrue.

The underlying principle was phrased by the court in an apt opinion:

It is a general rule that a vendor not in a confidential relation to the buyer is not under a duty to make full disclosure concerning the object which he would sell. However, it is a universally recognized exception that if he undertakes to do so he is bound not only to tell the truth but he is equally obligated not to suppress or conceal facts within his knowledge which materially qualify those stated. If he speaks at all, he must make a complete and fair disclosure.

In a similar vein, it has been said:

One of the fundamental tenets of the Anglo-American law of fraud is that fraud may be committed by a suppression of the truth . . . as well as by the suggestion of falsehood . . ..

A false impression may be produced by the concealment or nondisclosure of facts which there is a duty under the circumstances to disclose. Allowing a party to proceed upon an erroneous belief contributed to by one's acts is active concealment, equivalent to misrepresentation.

Sec. 1491, page 347

The defendant buyer alleged that material representations had been made to him as to the condition of the car. From a judgment in his favor, the plaintiff vendor appealed. Affirming, the appellate court stated the rule:

A misrepresentation by a seller of a material fact, inducing the purchase, is a fraud in law although the seller may be ignorant of the truth of the statements.

Material representations of fact by seller ignorant of their truth constitutes 'fraud' in law, and seller must make his statement good. The seller may act in good faith believing the statements to be true. And the misstatement need not be in any particular words so long as the impression created by the statement relied upon by the buyer was one which reasonably could be derived from the statement made, and which the seller reasonably could have anticipated the buyer would derive from the words used.

Sec. 1500, pages 400 and 401.

It is not necessary, in order that a contract may be rescinded for fraud or misrepresentation, that the party making the misrepresentation should have known that it was false. Innocent misrepresentation is sufficient, for though the representation may have been made innocently, it would be unjust and inequitable to permit a person who had made false representations, even innocently, to retain the fruits of a bargain induced by such representations.

Sec. 1509, pages 450 and 451.

Where a plaintiff merely seeks the return of the consideration procured from him by fraud, it seems quite clear that since the action proceeds on the theory of rescission, he can maintain an action at law for this purpose although the misrepresentation is an honest one.

XXXIV

Conclusionary Findings as to Whether There Were Such Gross Mistakes as Amount to Fraud

Consistent with what has been said above the Board makes no finding as to whether appellant acted in actual good faith or bad faith, or had an actual intent to deceive the Government, in this case. The Board does note however that its hearing member who had the opportunity to observe the demeanor of appellant's witnesses and to judge their credibility, and who dissents from this Board decision, is firm in his conviction that appellant acted in good faith and had no intent whatsoever to deceive the Government. To the extent that the Board in this section of its decision speaks of bad faith or fraud it is speaking in terms of implied bad faith and implied fraud.

Appellant made a gross mistake when it used polystyrene for the end pieces instead of using polyvinal chloride. The Board does not mean that appellant intended to use, and thought it was using, polyvinal chloride and by mistake used polystyrene. Appellant deliberately used polystyrene. Polystyrene end pieces not only fail to comply with the contract requirement that the end pieces be made of polyvinal chloride but also render the cartridges unsuitable for their intended use and substantially impair their value to the Government. The mistake was gross, in part because it rendered the cartridges unsuitable for use and in part because the evidence does not show that appellant had any reasonable basis for a belief that polystyrene was suitable for use. While the evidence does not show that appellant knew specifically the use to which the cartridges would be put and what the results might be if they failed in use, it does show that appellant knew generally the use for which the cartridges were

intended (i.e., removal of moisture from the air stream in pneumatic systems) and that such use would be in military aircraft. There is no evidence to show that before using polystyrene appellant made any tests to see whether it would be suitable for use, or took any other action to determine whether it would be suitable for use. The Shell Oil Company's report on polystyrene dated 17 June 1968 clearly indicated that polystyrene was not recommended for use with some oils and clearly stated that polystyrene should be completely tested in the application and environment where it would be used prior to commercialization of the product, and the report had been in existence for some eight months prior to appellant's drawing change on 19 February 1969 which provided for the alternate use of polystyrene for the end pieces. While the Board is of the opinion that appellant believed that polystyrene was suitable for the end pieces in the cartridges and accordingly used it, the evidence clearly shows that appellant was mistaken and the Board concludes that the mistakd was out of all measure, beyond allowance, and not be excused in the case of a supplier of dehydrator cartridges for use in military aircraft who undertakes to determine the materials to be used. The gross mistake found in this paragraph is not such a gross mistake as amounts to fraud since it, standing alone, involves no statement, act, or omission that induced the acceptance of the cartridges, and involves no representation or misrepresentation to the buyer.

Appellant made a gross mistake when, before award of the two contracts here concerned, and after their award and prior to the acceptance of the items, appellant failed to advise either the contracting officer or WRAMA that it had made changes in its drawings and would use polystyrene end pieces instead of polyvinal chloride end pieces. This is so because appellant knew that by way of its unsolicited proposal to WRAMA dated 14 August 1967, and by way of its 12 January 1968 letter to the contracting officer, it had sent its 14 August 1967 drawing to those offices representing it to be the drawing of appellant's part number 3120, and that said part would have polyvinal chloride end pieces. There is no basis in this record for a reasonable belief on the part of appellant that either of those offices knew about the revised drawings dated 19 February 1969 which permitted the use of polystyrene end pieces, or for a reasonable belief on the part of appellant that it could make such a change in the drawings to be used in performing the contracts concerned without prior approval from one of those offices, or for a reasonable belief that either office, if asked, would agree to the use of polystyrene end pieces. At no time before this dispute arose did appellant tell WRAMA or the contracting officer that appellant reserved the right to make changes in its drawings without notice to the Government. Appellant's mistake in failing to advise either the contracting officer or WRAMA of the change was a gross mistake because it is not one reasonably to be expected of a responsible supplier whose only customer for the item is the Government and who had supplied to the Government initially the drawing of the item that it offered to supply. Such a mistake was out of all measure, beyond allowance, and one not to be excused in the case of such a supplier. The mistake is

one that cannot be reconciled with good faith and one which a responsible contractor acting honestly would not reasonably be supposed to make. The gross mistake found in this paragraph is such a gross mistake as amounts to fraud. By way of its unsolicited proposal, its letter of 12 January 1968, and its bids on the two contracts concerned, appellant had represented to WRAMA and to the contracting officer that its part 3120 would in fact have polyvinal chloride end pieces. This was a misrepresentation of a fact because the part when tendered for acceptance did not in fact have polyvinal chloride end pieces but in fact had polystyrene end pieces. The misrepresented fact was a material fact because polystyrene end pieces did not comply with contract requirements, and more importantly, rendered the part unsuitable for its intended use by the Government. Prior to the acceptance appellant failed to disclose to the contracting officer a fact that should under the circumstances have been disclosed. If appellant had disclosed to the contracting officer prior to the acceptance of the item, the facts with respect to the change in the drawing and the change in the material used for the end pieces, then there would have been no misrepresentation of fact existing at the time of the acceptance. The Board cannot be certain on this record as to whether or not, if such facts had been disclosed to the contracting officer she would have authorized the acceptance of the items, but because such facts were not disclosed to her she did not have an opportunity to decide whether to authorize the acceptance of the items. The Board concludes that the gross mistake amounting to fraud found in this paragrapn was one of the gross mistakes that occasioned the acceptance of the items that did not comply with the contract requirements.

Appellant made a gross mistake when, after the award of the two contracts here concerned and prior to the acceptance of the items tendered, it furnished Mr. Burk, the Government inspector, the 19 February 1969 drawings and in addition failed to advise him that the drawings which it furnished to him when he asked for drawings were drawings which it had not furnished to, and which contained changes which it had not disclosed to, either the contracting officer or to WRAMA. Under the circumstances of this case such action and nondisclosure resulted in a false representation of a material fact by appellant to Mr. Burk. Appellant did not know whether Mr. Burk knew of the unsolicited proposal to WRAMA and the 12 January 1968 letter to the contracting officer, and did not know whether Mr. Burk knew that under the prior contract polyvinal chloride end pieces and not polystyrene end pieces had been used. While the drawings furnished to Mr. Burk showed on their face that they were revisions they were dated prior to the dates the contracts concerned were entered into and thus could have been the drawings that both parties intended be used in performing the contract. Therefore the fact that the drawings showed on their face that they were revisions did not show or indicate that the revised drawings were different from the drawings that had been submitted to WRAMA and to the contracting officer prior to the award of the contracts concerned. Upon the basis of the entire record in this case the Board finds that appellant knew the drawings it furnished to Mr. Burk would be used by Mr. Burk to inspect the items tendered and that they were furnished to

Mr. Burk by appellant for that purpose. The false representation in the case of this gross mistake was made by the failure to disclose facts that should have been disclosed to Mr. Burk in the circumstances. The mistake was gross in that it was out of all measure, beyond allowance, and one not to be expected of a responsible supplier who had supplied to WRAMA and to the contracting officer a different drawing for the item it offered to furnish. The mistake is one which cannot be reconciled with good faith and one which a responsible contractor acting honestly would not reasonably be supposed to make. The gross mistake found in this paragraph is such a gross mistake as amounts to fraud even though there may have been no actual bad faith on the part of appellant and even though the misrepresentation may have been made by mistake and without an intent to deceive. The Board concludes that the gross mistake as amounts to fraud found in this paragraph was one of the gross mistakes, and was in fact the ultimate gross mistake, that occasioned the acceptance of the items that did not comply with contract requirements.

Upon the basis of the above findings the Board decides that under the terms of the Inspection article in the contracts the acceptance of the dehydrator cartridges was not conclusive.

While from the standpoint of hindsight the Government also made mistakes in this case, the Board finds that they were not gross mistakes. In retrospect the Government made a mistake when it failed to put a specific reference to the 14 August 1967 drawing into the contracts; it made a mistake when it failed to provide Mr. Burk with a copy of the 14 August 1967 drawing for his use for inspection purposes; it, by Mr. Burk, made a mistake when it obtained from appellant the drawings used for inspection purposes; and it, by Mr. Burk, made a mistake when it accepted the cartridges. Considering the surrounding circumstances these were not gross mistakes. Appellant had submitted the 14 August 1967 drawing stating it was the drawing for appellant's part number 3120 and nothing in this record shows or implies that the Government, including Mr. Burk, could or should have reasonably foreseen that appellant would make such a major change in its drawing as the change from polyvinal chloride end pieces to polystyrene end pieces without disclosing that fact to the Government. The Government's mistakes do not excuse, and did not reasonably occasion, appellant's mistakes in this case, and provide no basis for holding that the acceptance was conclusive.

XXXV

Latent Defects

Having decided that the acceptance of the items concerned was not conclusive because of "such gross mistakes as amount to fraud" it is unnecessary to decide whether it also was not conclusive because of latent defects.

XXXVI

Amount Due the Government

The Government's claim in this case is limited to the price paid, plus interest, for dehydrator cartridges which it can return to appellant and has offered to return at appellant's expense.

The Board has found that under the terms of the contract the acceptance of such cartridge was not conclusive. The Board finds further that the Government revoked the acceptance of such cartridges within a reasonable time after it discovered, or should have discovered the basis for the revocation, and that it is entitled to the return of the amount paid for the 5,861 cartridges concerned plus interest thereon at 6% per annum in accordance with the Interest article in the contracts.

The amount paid for the 5,861 cartridges was $11,033.76.

The Government demanded repayment on 5,251 cartridges, for which it paid $9,976.93 on 27 April 1970. Through 28 August 1970 the interest due on this amount is $201.72 ($9,976.93 at 6% per annum is $598.62 per annum or $1.64 per day.) Interest is computed for 123 days for a total of $201.72.

The Government demanded repayment on 516 cartridges, for which it had paid $893.97, on 23 June 1970. Through 28 August 1970 the interest due on this amount is $9.90 ($893.97 at 6% per annum is $53.64 per annum or $.15 per day.) Interest is computed for 66 days for a total of $9.90.

The Government demanded repayment on 94 cartridges, for which it had paid $162.86, on 28 August 1970. Starting on 29 August 1970 the interest is due on this amount at 6% per annum.

Through 28 August 1970 the total interest due is $211.62 (i.e., $201.72 + $9.90).

On and after 29 August 1970 interest accrues on the $11,033.76 at the rate of $1.81 per day except to the extent that it is reduced by partial payments or full payment. ($11,033.76 at 6% per annum is $662.03 per annum or $1.81 per day.)

XXVII

Summary

The appeal is denied. As of 29 August 1970 appellant is liable to the Government in the amount of $11,245.38 consisting of $11,033.76 principal and $211.62 interest. On and after 29 August 1970 interest on the $11,033.76 accrues at the rate of $1.81 per day except to the extent it is reduced by partial or full payment.

Section 6. Risk of Loss

KIRINN AND COMPANY, INC.

ASBCA No. 14533 (1970)

OPINION BY COLONEL THORNILEY

Forty-three desks manufactured by appellant pursuant to this contract were totally destroyed in a fire at appellant's plant. The contracting officer denied appellant's request for payment of $8,772.00, the contract price of the desks. The sole question presented is which party shall bear the risk of loss.

FINDINGS OF FACT

This formally-advertised contract awarded 30 March 1966 required appellant to furnish not less than a designated minimum nor more than a maximum quantity of desks at a unit price of $204.00 when ordered by the Government. Delivery Order Number 2, issued 13 June 1966, called for 126 desks. As modified, this order required delivery starting on 15 July 1968 to be complete on 15 August 1968.

General Provision 6.14 of the basic contract provides:

6.14 PLACE OF DELIVERY: ORIGIN

(a) The articles to be furnished hereunder shall be delivered, free of expense to the Government and at the Government's option, (i) loaded, blocked, and braced on board carrier's equipment; (ii) at the freight station; or (iii) placed on wharf of water carrier (where material will originate within or adjacent to a port area and is adaptable to water movement).

(b) The articles to be furnished hereunder shall be delivered at or near contractor's plant at locations to be specified by the bidder in the spaces below for shipment at Government expense (normally on Government bill of lading) to the destination(s) specified in the schedule.

(1) Tottenville, Staten Island 7, New York, N.Y.
(Bidder insert city or town in which plant is located (Place of Delivery))

(2) Ellis St. Tottenville, S.I., N.Y.
S.I. Rapid Transit - Balt. Ohio
(Bidder insert exact location of private siding or nearest rail terminal from which rail shipment will be made with name of serving railroad(s))

(3) 101 Ellis St. Tottenville, S.I., N.Y.
(Bidder insert exact location from which truck shipments will be made including name of street or highway)

(4) Port of New York
(Bidder insert port, or the specific area within such port, to which supplies will be delivered)

(c) The method of shipment shall be specified by the Government when material is ready for shipment.

Armed Services Procurement Regulation 7-103.6, Responsibility for Supplies (Jan. 1958) incorporated into the contract by reference provides:

> Except as otherwise provided in this contract, (i) the Contractor shall be responsible for the supplies covered by this contract until they are delivered at the designated delivery point, regardless of the point of inspection; (ii) after delivery to the Government at the designated point and prior to acceptance by the Government or rejection and giving notice thereof by the Government, the Government shall be responsible for the loss or destruction of or damage to the supplies only if such loss, destruction, or damage results from the negligence of officers, agents, or employees of the Government acting within the scope of their employment; and (iii) the Contractor shall bear all risks as to rejected supplies after notice of rejection except that the Government shall be responsible for the loss, or destruction of, or damage to the supplies only if such loss, destruction or damage results from the gross negligence of officers, agents, or employees of the Government acting within the scope of their employment.

By written application dated 3 January 1969 the appellant requested issuance of a Government Bill of Lading (GBL) for forty-three of the desks called for by Delivery Order Number 2. Pursuant to this application a GBL was issued and received by the appellant on 10 January designating the Transportation Officer, Naval Supply Center, Norfolk, Virginia, as consignee and specifying Pilot Freight Carriers as the transportation company. On 5 February 1969 the Government Quality Assurance Representative inspected the desks in appellant's plant and accepted them as complying with contract specifications. Later that same day appellant notified the Pilot Freight Carriers' dispatcher by telephone that a shipment was ready and also informed the dispatcher of the number of cartons, the total cubic feet involved, and the weight and cubic footage of each carton in the shipment.

The desks were located, and remained until their destruction by fire, at appellant's plant, 101 Ellis Street, Staten Island, New York, in an area designated as the shipping room. They were ready for loading into the carrier's van.

A Pilot Freight Carriers' truck arrived at appellant's plant sometime on 6 February 1969. This truck was not large enough to take the forty-three cartonized desks and departed without picking up any part of the shipment. Although no witness called at the hearing spoke with or overheard the carrier's driver speaking, we accept appellant's allegation that before leaving the plant on 6 February the driver stated that a trailer would arrive the following day to transport the desks.

Sometime during the early morning hours of 7 February a fire of unknown origin destroyed appellant's plant and the forty-three desks subject to this dispute.

The contracting officer denied appellant's request for payment of the contract price of $8,772.00 claiming "lack of delivery to the Government", and this appeal ensued.

DECISION

General Provision 6.14 of the basic contract designates the place of delivery as on board the carrier's equipment at the appellant's plant. The clause entitled "Responsibility for Supplies" specifically provides that appellant shall be responsible for the supplies covered by this contract until they are delivered at the designated delivery point.

Although there is no controversy that the forty-three desks remained in appellant's shipping area until their destruction by fire and that they were never placed aboard the carrier's truck, the appellant claims that it tendered delivery of the goods to the carrier and that actual delivery was not consummated because of the actions of the Government's agent-carrier. We are urged that this tender constitutes a constructive or substituted delivery imposing upon the Government the risk of loss and entitling the appellant to payment according to the contract. We cannot agree.

The appellant must give notification of readiness for delivery. This contract sets forth no specified time after such notification within which the carrier's equipment must be made available to appellant for loading. It is too well settled to require citation that in the absence of a specified time for action, the law requires the parties act within a reasonable time. On the facts of this case we determine that a reasonable time for respondent's action included the work day of 7 February 1969. The object of the law of tender is to fix the facts that the one party to a contract is ready and willing to perform and that the other party refuses to allow him to do so. In this case there was no refusal to accept the desks but

only a statement on February 6 that the carrier would return for them on February 7. It is noted that the appellant voiced no objection to the respondent, to respondent's carrier or to the carrier's truck driver relating to delay in making equipment available for loading on 6 February. We conclude that these forty-three desks were not delivered. The "Responsibility for Supplies" clause therefore governs this dispute and under the terms of that clause responsibility for the desks remained in the appellant at the time of the loss.

Although we have determined that specific clauses in the instant contract govern resolution of the dispute and that the Uniform Commercial Code is therefore inapplicable, because of the extensive references thereto in the parties' briefs, we have compared our result with that to be arrived at under the code.

Section 2-509 of the Code, in its Sales Article, provides as follows:

> 2-509. Risk of Loss in the Absence of Breach
>
> (1) Where the contract requires or authorizes the seller to ship the goods by carrier
>
> (a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505); but
>
> (b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.
>
> (2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer
>
> (a) on his receipt of a negotiable document of title covering the goods; or
>
> (b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or
>
> (c) after his receipt of a non-negotiable document of title or other written direction to deliver, as provided in subsection (4)(b) of Section 2-503.

(3) In any case not within subsection(1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this Article on sale on approval (Section 2-327) and on effect of breach on risk of loss (Section 2-510).

The term of "merchant" is defined in Section 2-104(1) of the Code as a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction. In its bid for this contract appellant represented itself as a manufacturer of the supplies bid upon and it clearly falls within the definition of "merchant".

The parties concede and the facts clearly establish that there was no actual receipt by the Government of the goods in question. Respondent was not in breach at the time of the fire on 7 February 1966.

The official comments relating to Section 2-509, prepared by Conference of Commissioners on Uniform State Laws and the American Law Institute, are as follows:

Purposes of Change: To make it clear that

* * * * *

3. Whether the contract involves delivery at the seller's place of business or at the situs of the goods, a merchant seller cannot transfer risk of loss and it remains upon him until actual receipt by the buyer, even though full payment has been made and the buyer has been notified that the goods are at his disposal. Protection is afforded him, in the event of breach by the buyer, under the next section.

The underlying theory of this rule is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession.

The result under the Uniform Commercial Code is the same as we have reached by application of the specific contract clauses. The risk of loss was in the appellant at the time of the fire.

The appeal is denied.

Section 7.

Design Responsibility

OLSON PLUMBING & HEATING CO. v. THE UNITED STATES

Ct. C. No. 496-77 (1979)

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

SMITH, Judge, delivered the opinion of the court:

This is a contract case in which, by cross-motions for summary judgment, the court is asked to review a decision of the Armed Services Board of Contract Appeals (the board) in accordance with the standard of review of the Wunderlich Act. 41 U.S.C. §§ 321, 322 (1976). The question for decision is whether the board's determination, that the Government did not waive its right to terminate the production and design contract with plaintiff, is supported by substantial evidence and is correct as a matter of law. We hold that the contract was properly terminated and affirm the decision of the board.

I.

On October 21, 1970, plaintiff, Olson Plumbing & Heating Company (Olson), was awarded contract No. F0-5611-71-C-0025, a Small Business Set-Aside, for the installation of a high temperature hot water line encased in fiberglass reinforced plastic (FRP) at the United States Air Force Academy (Academy) near Colorado Springs, Colorado. Since the FRP conduit was a relatively new product and there were no regulations governing its use, the design specifications inserted into the contract by the Government were drawn from the design specifications of Ric-Wil, an experienced manufacturer of FRP conduit. These specifications were incomplete. The omitted design details had to be provided by the supplier of FRP conduit chosen by the contractor. In its letter confirming its bid, plaintiff informed defendant that it was going to use conduit supplied by the E. B. Kaiser Company (EBCO).

Initially, plaintiff had until June 20, 1971, 202 days after the notice to proceed was issued, to finish the line. It worked on the above-ground portion of the line while waiting for the first delivery of pipe. After receiving the first shipment of FRP conduit on March 1, 1971, plaintiff installed, backfilled, and successfully pressure-tested the portion of the line beneath the parking lot. Subsequent deliveries of pipe were discovered to have been damaged during shipping, and air pressure leaks were discovered in the installed portion of the line which had been laid with the first shipment of conduit.

On April 26 and 27, 1971, representatives of Olson, the Academy, and EBKO met and discussed the problems. The recommendation of the EBKO representative to patch and repair some of the pipe in the field under the supervision of a factory representative and to reject 18 sections of conduit was adopted. The representative of the manufacturer of the pipe, Wolf Ridge Plastics, Inc., concurred with this recommendation, and both plaintiff and the Government relied on this advice. This was not the end of plaintiff's troubles. The anchors designed by EBKO were defective and had to be redesigned. Olson had to replace two anchors located beneath the parking lot.

On July 6, 1971, the replacement conduit arrived at the site and was discovered to have also been damaged during shipment. It was rejected and returned to the manufacturer. In August 1971, the parties agreed to extend the completion date for 77 days or until September 8, 1971. Olson did not complete the contract by the due date, but defendant did not terminate the contract for default. Instead, on the delivery date, September 8, 1971, it sent plaintiff two letters stating that it was not waiving its rights by permitting plaintiff to continue performance and that liquidated damages would be assessed at the rate of $105 per day as stipulated in the contract, from September 8, 1971, until the date of completion. Another due date was not set.

On September 23, 1971, plaintiff received the same 18 sections of pipe which it had previously rejected and returned. Attempts to repair these sections had been made at the factory, but they were only partially successful. EBKO's advice to repair and use the casings which had been rejected in April was agreed to by the parties. These repairs were successful. After backfilling and pressure-testing, new leaks developed at the top of the casings and above the pipe supports. On January 12, 1972, the carrier pipe was connected and used until the reprocurement contractor had to disconnect the line.

On January 11, 1972, the parties met and agreed to test some remedies for the leaks above the pipe supports. The tests were conducted between April 24 and May 5, 1972. After the testing was completed, plaintiff refused to implement any suggested repairs unless the Government or the manufacturer would guarantee the results. Plaintiff did not propose a solution. During the summer of 1972, the line was further damaged by exposure and was torn apart in four places by a summer flood.

In a letter dated June 19, 1972, plaintiff stated that the specifications were impossible of performance without changes and that a claim for expenses would be filed. On August 4, 1972, defendant replied with a letter to Olson to show cause, listing deficiencies in the line and inviting Olson to supply reasons why the contract should not be terminated for default. Plaintiff's attorney responded with a request that the contract be terminated for convenience or converted to a cost-plus contract. This request was rejected at a meeting held on August 23, 1972.

At the final meeting held on September 15, 1972, the Government suggested as a solution that the spacing for the pipe supports be revised and that the existing pipe be replaced with FRP conduit which was at least 0.300-inch thick. Plaintiff interpreted the Government's recommendation as a directive. Instead of suggesting an alternative method of repair, on October 3, 1972, plaintiff's attorney informed the Government that its request that Olson replace the conduit and/or respace the pipe supports was beyond the scope of the contract and that Olson would not resume performance. The Government terminated the contract for default on October 17, 1972. The reprocuring contract officer requested bids for both repairing and replacement of the existing system. The bid for repair was higher than the bids for replacement. The reprocurement contract was awarded to the lowest bidder. The reprocurement contractor timely completed replacement of the underground system using Ric-Wil conduit and the Government's specifications which were, in all material respects, similar to those in plaintiff's contract.

On appeal to the ASBCA from the contracting officer's decision to terminate the contract, the board found that the Government was within its rights when it terminated plaintiff for default because plaintiff had abandoned the contract and the Government had not waived the due date. The board found that there had been a tacit agreement between the parties that work would be held in abeyance from January 12, 1973, until the joint testing project could be completed and that plaintiff should be given credit for the 10 days it should have taken to repair the damage caused by a summer flood. Accordingly, it reduced the 733 days of liquidated damages assessed against Olson to 514 days. It noted that the Comptroller General might find this to be an appropriate cause for remission of some of the liquidated damages, suggesting as reasons that the default was attributable to plaintiff's supplier, large sums of liquidated damages are heavy burdens for small business contractors, and the FRP conduit was a relatively new product. The Office of the Comptroller General reduced the liquidated damages to $17,135, representing the period between March 26, 1973, and September 5, 1973, when the reprocurement contractor had to disconnect the line in order to replace the system. This appeal followed.

II.

Plaintiff contends that the board's decision that the Government was within its rights when it terminated the contract for plaintiff's failure to perform by the due date is erroneous because it incorrectly analyzed the facts under the waiver-by-estoppel doctrine instead of the election doctrine. Plaintiff's theory of recovery is that the Government "elected" between two inconsistent choices. Thus, plaintiff argues, the Government lost its right to terminate the contract for default until a new delivery date had been set because it permitted 13 months to pass after the due date and before it terminated the

contract, encouraged plaintiff to continue to perform, and did not set a new delivery date. Under whatever theory the facts are considered, the question of whether the default termination is proper depends upon the facts and circumstances of each case.

Instead of terminating plaintiff for default for failure to deliver a conforming system on the delivery date, defendant sent plaintiff two letters stating that it was not waiving any rights under the contract and that liquidated damages would be assessed against plaintiff until the project was completed.

Where the right to terminate has been expressly reserved or when liquidated damages have been imposed by the non-breaching party, the other party has a heavier burden of proving that the right to terminate for failure to deliver on time has been waived. The reason for this policy * * * is applicable here though it supports a contrary result. "[T]he defendent cannot allow an unwary contractor to continue performance and thus incur large expenses, all of which the Government will refuse to reimburse if and when it decides to cancel the contract on ground of violation. (Emphasis added.) Plaintiff was neither unwary nor did it incur large performance expenses. Plaintiff knew that it was in breach for fail-ure to meet the due date. The Government's express reservation of its rights and the assessment of liquidated damages surely made clear to plaintiff that the Government was not excusing the breach. Liq-uidated damages compensate the non-breaching party for the harm caused by the delayed performance and are a cost of being in breach. Priebe & Sons, Inc. v. United States, 332 U.S. 407 (1947). Their imposition is evidence of the intent to hold the defaulting party liable for its delayed performance.

After January 11, 1972, plaintiff never resumed performance under the contract with the exception of minor housekeeping activities and the joint testing project which ended on May 5, 1972. In Acme, the court held it would be unfair to permit the contractor to continue incurring performance costs for which the Government would not make reimbursement. Housekeeping costs which merely attempt to preserve the status quo and are unrelated to continued performance, and which are not caused by the Government's fault or by a condition excusing the delay, are properly placed on plaintiff. In order to have the costs, incurred after the passage of the due date, considered as a factor weighing in favor of a finding of a waiver, it must be shown that the expenses contributed to performance.

In Ling-Temco-Vought, Inc. v. United-States, 201 Ct. Cl. 135, 475 F. 2d 630 (1973), the non-breaching party's failure to reserve its rights to claim an unsuspected breach was the basis for denying recovery because this omission denied the defaulting party the option of choosing "whether to terminate the contract entirely at that time * * * or to continue at the risk of having to pay greater damages and incurring additional costs." 201 Ct. Cl. at 149, 475 F. 2d at 638. Plaintiff, aware of its options, knowingly decided not to terminate

the contract and thereby accepted the risk that it would be unable to correct the breach and to recover its costs. The decision, whether a party to a contract loses its right to terminate for default by not ending the contract on the date performance is due but not tendered, depends upon a balancing of:

> * * * the advantages to the injured side of continuing performance (with or without reservation of rights) against the disadvantages to the defaulter, and requiring that due opportunity be given the latter to make use of the options then lawfully available to him. However the legal conclusion be framed, in terms of "waiver" or "election", or "estoppel", that is the core concept. [201 Ct. Cl. at 148-49, 475 F. 2d at 638 (footnote omitted).]

Though hindsight has shown that plaintiff's decision not to terminate the contract was the more costly one, the balancing of the opposing considerations present in this case weigh in favor of defendant in the absence of facts indicating that plaintiff was denied the right to make an informed decision to continue or to terminate.

Moreover, the Government cannot be said to have waived the due date or to have elected continued performance if the contractor has abandoned performance.

> The necessary elements of an election by the non-defaulting party to waive default in delivery under a contract are (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the Government's knowledge and implied or express consent. [DeVito v. United States, supra note 8, 188 Ct. Cl. at 990-91, 413 F. 2d at 1154 (emphasis added).]

The period of time in which the non-defaulting party can reserve its right to terminate for untimely delivery and encourage performance is greater when the contractor abandons performance or when the circumstances indicate that the contractor is unlikely to perform within a reasonable time. DeVito v. United States, supra note 8, 188, Ct. Cl. at 991, 413 F. 2d, at 1153-54. In Panoramic Studios, Inc. v. United States, 188 Ct. Cl. 1092, 1095, 413 F. 2d 1156, 1157 (1969), decided the same day as DeVito, the court expressly distinguished the case on its facts from Devito, in part, because the contractor did nothing substantial toward performance for a 9-month period.

Plaintiff did not uphold a duty it had to make progress toward completion of the contract. The contract placed the risk of design failure upon the supplier of the faulty design specifications. The ability of the reprocurement contractor to complete the contract using the Government-supplied specifications proved that the Government's specifications did not cause the system to leak. The fact that plaintiff delegated to its supplier, EBKO, the responsibility of designing

the parts of the system which were not specified in the contract does not shift to the Government the risk that the design would be defective. The contractor alone is responsible for the deficiencies of its suppliers and its subcontractors absent a showing of impossibility. Plaintiff's failure to produce a leak-free system was due to the deficient design of its supplier, EBKO, and of the failure of the FRP to be wrapped at the angle required by the Government specifications. None of these deficiencies are the fault of the Government.

Plaintiff, who alone bore the responsibility for the faulty design and the nonconforming angle of the wrap, had the duty to find an adequate solution. It failed to produce a solution and was unwilling to implement the suggested solutions of others unless the results were guaranteed from May 5, 1972, when the testing was completed, until the contract was terminated on October 17, 1972, a 5-month period. Olson's failure to make progress toward completion during these 5 months is not the substantial performance required to be present for the Government to be viewed as having lost its right to terminate for failure to meet the due date.

Likewise, plaintiff's contention that the decision in ITT, * * * 206 Ct. Cl. at 50, 509 F. 2d at 547-48, imposed upon the Government the duty to unilaterally or bilaterally set a reasonable time for performance, is without merit. This duty does not arise under the rule of ITT until the facts and circumstances show the due date has been waived. Since we have found the delivery date was not waived, we decline to decide whether the ITT rule should apply to construction contracts.

For the same reasons that we held plaintiff's failure to make substantial progress preserved defendant's right to terminate for failure to make timely delivery, we must also reject plaintiff's contention that it justifiably refused, under the cardinal change doctrine, to replace the system with pipe with a 0.300-inch or greater thickness and/or to place the pipe supports at less than 10-foot intervals. The failure of the pipe support designs and the failure of the wrap to conform to the specifications were plaintiff's responsibilities which, in turn, imposed upon it the duty of supplying a remedy. The board's finding, that plaintiff's refusal to implement or to propose any solution constituted an abandonment which gave the Government a right to terminate the contract independent of its right to terminate the contract for failure to meet the delivery date, is supported by substantial evidence.

III

As an alternative ground for recovery, plaintiff contends that the equivalent of a termination-for-convenience recovery should be apportioned equally between the parties. Equitable apportionment of losses are sometimes appropriate under the mutual fault doctrine of

Dynalectron Corp., and the mutual mistake doctrine of National Presto. In Dynalectron, the contractor was wrongfully terminated for default, yet it was not permitted to shift all the loss to the Government. In that case the contractor waived the defects in the system by failing to tell the Government it knew that the Government's specifications were impossible of performance. If it had been notified of the defects, the Government might have been able to correct the problems in the specifications to the advantage of both parties. Dynalectron's failure to communicate knowledge of the defects and the poor administration of the contract on the part of both parties unnecessarily increased the losses.

In contrast, in the instant case, the Government did not know that the specifications drafted by EBKO were defective, and there is no finding that the Government's poor administration of the contract contributed to the failure of the system and entitles it to have its losses split, fails to prove, as required by the decision in Dynalectron, that the parties were equally responsible for the delay in discovering the faulty specifications and/or the losses accompanying this delay. Furthermore, plaintiff's request that we find that the Government's alleged poor contract administration contributed to plaintiff's inability to complete the contract assumes there is causal connection between the alleged "fault" on the part of the Government and the losses sustained. This position is contradicted by the board's finding that the failure to perform was solely plaintiff's fault. Since this finding of the board is supported by substantial evidence contained in the administrative record, the court cannot, in the limited scope of review in Wunderlich Act cases, find that the Government's alleged "poor contract administration" hampered plaintiff's ability to perform, limited its options, or increased its costs. William F. Klingensmith, Inc. v. United States, 205 Ct. Cl. 651, 665, 505 F. 2d 1257, 1265-66 (1974).

The parties' mistaken belief that EBKO had 5 years' experience working with FRP conduit is not a mutual mistake of fact entitling plaintiff to reformation of the contract.

> * * * [A] mutual mistake as to a fact or factor, even a material one, will not support relief if the contract puts the risk of such a mistake on the party asking reformation * * * or normally if the other party, though made aware of the correct facts, would not have agreed at the outset to the change now sought * * * * * * [Flippin Materials Co. v. United States, 160 Ct. Cl. 357, 368, 312 F. 2d 408, 415 (1963).]

Neither condition is met in this instance. Plaintiff was responsible under the contract for choosing a supplier with 5 years' experience with FRP conduit, and its failure to choose one with the requisite qualifications is its own fault. Reformation on the grounds that a mutual mistake has been made is warranted only in the unusual circumstance when the terms of the contract do not reflect the intention of the parties at the time of formation; it cannot be used to impose a

condition which would not have been acceptable in the first instance. Nothing in the contract or in the course of dealings between the parties indicates that the Government would have waived the 5-year experience requirement had it known plaintiff planned to use a supplier without the necessary experience. The Government's unfamiliarity with FRP conduit and its placement of this requirement in the contract indicated it considered it important to avoid the mistakes which were more likely to be made by an inexperienced contractor than by one which had successfully performed for 5 years. The subsequent waiver of this requirement does not indicate that the Government would have dropped this requirement from the contract at the time of formation.

Plaintiff's position that the liquidated damages should be reduced because the Government caused much of the delay is without merit. Both the board and the Comptroller General reduced the original amount of liquidated damages assessed against plaintiff. These reduced damages represent the amount assessed for the period of time the line was disconnected by the reprocurement contractor. The Government cannot be said to have caused this delay.

IV.

Plaintiff, who delegated the design responsibilities allocated to it under the contract, bore the risk that its supplier's specifications would not be sufficient. The only fault, if any, of the Government in the entire course of dealings is its failure to perceive at an earlier date that plaintiff would be unable to cure the defects in the system. With the exception of the duty to mitigate damages, which is not applicable here, there is no equitable or legal remedy available for the failure of one party to relieve the other party from the consequences of its own breach.

Plaintiff's motion for summary judgment is denied; defendant's cross-motion for summary judgment is granted; and the petition is dismissed.

GOVERNMENT CONTRACT LAW CASES

Chapter Six

MODIFICATION OF CONTRACTS

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CHAPTER SIX

MODIFICATION OF CONTRACTS

Section 1. Constructive Change

BISHOP ENGINEERING COMPANY, INC. v. THE UNITED STATES

180 Ct. Cl. 411 (1967)

ON DEFENDANT'S MOTION TO DISMISS THE PETITION OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

DURFEE, Judge, delivered the opinion of the Court:

This is an action for breach of a fixed price research and development contract for the design, manufacture and furnishing of an instrumentation semi-trailer vehicle by plaintiff, a Maryland Corporation, for defendant, acting through the National Aeronautics and Space Administration (NASA) at a price, as subsequently amended, of $79,093.47.

Specifications of the contract called for a trailer approximately 39 feet long. Plaintiff alleges that it designed such a trailer but that defendant indicated it required a longer trailer and by constructive change compelled plaintiff to redesign and build a 40-foot trailer at an additional cost of $67,598.58 for the extra foot. The breach alleged is defendant's refusal to pay the latter sum, presumably as an equitable adjustment under the standard changes clause of the contract, upon acceptance of the trailer, and its refusal to accept the 39-foot design.

Under the standard disputes clause of the contract, plaintiff appealed an adverse decision of the Contracting Officer to the NASA Board of Contract Appeals, which denied the appeal. Plaintiff now alleges that the Board decision was arbitrary, capricious, contrary to the evidence and administrative record, and contrary to law.

* * * * *

Plaintiff advanced several claims before the Board which have not been pleaded to the court, and attention will be directed only to the change-in-length claim which is asserted here. As to that claim, the specifications, in pertinent part, read:

> 1.1.1 *** The van will be built with accommodations for as many standard 19-inch wide dlectronic equipment racks as

possible. Present requirements are for a total of 23 racks. The overall dimensions of the semi-trailer will be the maximum that will still allow air transportability via C-133 type aircraft and highway transportability within the legal road limits in all states except Hawaii and Alaska. [Emphasis supplied.]

* * * * *

4.2 External Dimensions

The external dimensions will meet the following criteria:

4.2.1 The semi-trailer will be air-transportable on the C-133 or C-124 type of military aircraft.

4.2.2 The semi-trailer will be within the legal road limits in all states excepting Hawaii and Alaska.

4.2.3 Semi-trailer shall be approximately 39 feet in length. [Emphasis supplied.]

At a meeting on October 23, 1963, Government representatives expressed dissatisfaction concerning the electronic rack layout and the insufficiency of available working space as shown in drawings prepared up to that time by the contractor. The latter stated that defendant's desires and requirements could be met only by extending the length of the trailer to 40 feet. Plaintiff ascertained that a 40-foot trailer would go into a C-133 type. The trailer, as heretofore stated, was then redesigned and built to be one foot longer than the 39-foot length first designed by plaintiff.

There is no dispute as to whether the 40-foot trailer met the requirements of paragraphs 4.2.1 and 4.2.2 of the specifications. Plaintiff argues, however, that the 39-foot design also met the contract requirements and that the redesign allegedly required by defendant amounted to a constructive change, as it was not formalized by a written change order.

There is no ambiguity in the specifications that should be construed against defendant which drafted them, despite plaintiff's contention. If paragraph 4.2.3 stood alone, plaintiff would have been justified in assuming that 39 feet would be sufficient. However, the specifications must be read together and, if a 39-foot trailer was not the maximum that would go into a C-133 type aircraft, as required by paragraph 1.1.1, then, plainly, its length should be extended to the maximum that would do so--in this case, 40 feet. There is nothing inconsistent or ambiguous about these paragraphs when they are read together. Plaintiff can prevail only if the words "maximum" in paragraph 1.1.1 or "approximately" in paragraph 4.2.3 are construed to

mean something entirely different, or are deleted. If plaintiff thought there was a patent ambiguity, it was its duty to inquire, but it did not do so. Blount Bros. Construction Company v. United States, 171 Ct. Cl. 478, 316 F. 2d 962 (1965); WPC Enterprises, Inc. v. United States, 163 Ct. Cl. 1, 323 F. 2d 874 (1963). The Board's opinion also pointed out that other specifications placed full responsibility, initially, upon the plaintiff-contractor to ascertain with precision the maximum length for C-133 loadability. Its failure to do so, coupled with its failure to request guidance from the Government concerning any doubts it had as to the relationship between paragraphs of the specifications, which it now says were confusing, led to its unnecessary design effort that was not approved.

Defendant made no change, constructive or otherwise. It simply stood pat on the language of the specifications agreed to by the parties. Where a contract is amenable to only one reasonable construction, in light of all pertinent provisions, it should be enforced according to its tenor as a whole without regard to possible ambiguity in only one provision. Construction Service Company v. United States, 174 Ct. Cl. 756, 357 F. 2d 973 (1966).

> Where a contract is amenable to only one reasonable construction upon its face, it would not be appropriate to strain the language of other contractual provisions to create an ambiguity. Jansen v. United States, supra, at 356, 344 F. 2d at 370.

Plaintiff's interpretation of the specifications is not within what this court has called, in other cases, the "zone of reasonableness." Any group of words can be twisted by strained construction into ambiguity, but this is not permissible for it does violence to the intention of the parties as expressed in the contract language and specifications. Hotpoint Company v. United States, 127 Ct. Cl. 402, 406, 117 F. Supp. 572, 574 (1954), cert. denied 348 U.S. 820; Duhame et al. v. United States, 127 Ct. Cl. 679, 683, 119 F. Supp. 192, 194-5 (1954).

> Also, an interpretation which gives a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, or superfluous; nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible. Hol-Gar Manufacturing Corporation v. United States, 169 Ct. Cl. 384, 395, 351 F.2d 972, 979 (1965).

Nor is a contract rendered ambiguous by the mere fact that the parties disagree as to its meaning when the disagreement is not based on reasonable uncertainty of the meaning of the language used. Carter Oil Company v. McCasland, et al., 190 F. 2d 887, 890-91 (10th Cir.

1951), cert. denied, 312 U.S. 870. The fact that an improvident interpretation placed by a contractor upon the specifications may even be considered conceivable, is not a sufficient basis alone for construction of the contract against the author of the language, if not reasonable when the contract is considered as a whole and in light of the purpose of the contract. Randolph Engineering Company v. United States, 176 Ct. Cl. 872, 367 F. 2d 425 (1966); Southern Construction Company v. United States, 176 Ct. Cl. 1339, 364 F. 2d 439 (1966); Jefferson Construction Company v. United States, 151 Ct. Cl. 75, 84 (1960).

By all the standard tests of the rules on ambiguity laid down by the cases, plaintiff has not proved a reasonable ambiguity as a necessary predicate for the alleged constructive change. Accordingly, the Board's decision interpreting the specifications, while not conclusive as a matter of law, was entirely reasonable and correct, and must be upheld. Defendant's motion to dismiss the petition or in the alternative for summary judgment is granted and the petition must, therefore, be dismissed.

Section 2. Authority to Issue Change Orders

PLUMLEY v. UNITED STATES

226 U.S. 545 (1913)

Mr. JUSTICE LAMAR delivered the opinion of the court.

In October, 1888, P. H. McLaughlin & Company contracted to build the Naval Observatory in Washington for $307,811. After most of the work had been done the contract was forfeited for failure to make satisfactory progress. 37 Ct. Cl. 150. The Government advertised for bids to complete the work. After examining the contract and documents Plumley agreed to complete the building in accordance with the McLaughlin contract, and "duly authorized changes" by June 1st, 1892, for the sum of $25,840. Having finished the work, he sued the Government for damages by delay and for extra work amounting to $12,813. The court rendered judgment in his favor for $502 insurance paid during the period he was delayed in finishing the work. All of the other items were disallowed. Both parties appealed. 43 Ct. Cl. 266 and see 45 Ct. Cl. 185.

The largest item is a claim for extra compensation for installing a ventilator system, which McLaughlin agreed to do for a given sum. The proposed change and this offer were submitted by the architect to the Bureau of Equipment with the statement that if approved McLaughlin would enter into a formal contract to do the work for the prices named. The plans and bid were approved. McLaughlin was directed to proceed, and did some work thereon. Later his contract was forfeited. Plumley (and his partner, Davis, a former member of McLaughlin & Co.) knew these facts at the time the bid was made to complete the work, but when required to build the ventilating system Plumley insisted that it was not within McLaughlin's original contract and not a "duly authorized change" because no written contract had been signed by both parties, as required by the terms of the contract. This contention was rejected by the architect and, on appeal, by the Secretary of the Navy. The Court of Claims at first sustained this position but on a rehearing held that Plumley was estopped from claiming that the change had not been duly authorized and, under his contract to complete the work, was bound to finish what McLaughlin had begun. Beyond this the contract provided that if there was any discrepancy between plans and specifications or between the contract of McLaughlin and the contract of Plumley the matter should be referred to the Secretary, Plumley agreeing "to abide by his decision in the premises." The Secretary decided against him and under the circumstances his construction is binding on the contractor.

This same provision prevents a recovery for the drain pipe included in the original contract. For some reason, not stated, it appears that McLaughlin was requested to make a bid for laying drain pipe. It was accepted and then countermanded. Plumley was likewise requested to make a bid, which was accepted and then countermanded. When required to lay the pipe he demanded extra compensation, but his appeal was overruled by the Secretary, possibly for the reason suggested in argument, that asking a bid did not relieve Plumley from the obligation to furnish labor and material actually included in the contract. What facts were submitted to the Secretary, is not in this record, but his ruling is conclusive, in view of Plumley's agreement to abide by his decision.

The other items for extra work were properly disallowed. The contract provided that changes increasing or diminishing the cost must be agreed on in writing by the contractor and the architect, with a statement of the price of the substituted material and work. Additional precautions were required if the cost exceeded $500. In every instance it was necessary that the change should be approved by the Secretary. There was a total failure to comply with these provisions, and though it may be a hard case, since the court found that the work was in fact extra and of considerable value, yet Plumley cannot recover for that which, though extra, was not ordered by the officer and in the manner required by the contract. Rev. Stat., § 3744; Hawkins v. United States, 96 U.S. 689; Ripley v. United States, 223 U.S. 695; United States v. McMullen, 222 U.S. 460.

The Government appeals from so much of the judgment as gave Plumley a judgment for damages caused by delay. The court found that Plumley was delayed by the failure to have the architect on hand promptly for decision pertaining to the work, while it also found that the Secretary extended the time for the reason that Plumley's failure to finish was on account of circumstances beyond the contractor's control. But Plumley at the time of the occurrence of the delay did not notify the Secretary of the facts nor of the extent to which the work would be delayed. The contract required that such notice should be given to the Secretary when the delay occurred, evidently for the purpose of informing the Department and enabling it, at the time, to remove the cause of the delay. It operated to prevent claims for damage and for failure to comply with this requirement of the contract (United States v. Gleason, 175 U.S. 588); the plaintiff is not entitled to recover. The judgment in that respect must be reversed, and is, otherwise,

Affirmed.

LOX EQUIPMENT CO.

ASBCA No. 8985 (1964)

Background facts pertinent to this appeal are set forth in the Board's decision rendered on September 30, 1964 in ASBCA No. 8518 involving one of six contracts for cryogenic vessels awarded to appellant on the same day pursuant to the same Invitation for Bids and performed by appellant concurrently in 1960. This appeal arises under the contract for cryogenic vessels for Beale Air Force Base, which is the only one of the six contracts which are not assigned by the Government to a missile base construction contractor. The contract, which was awarded to appellant by the District Engineer, U.S. Army Engineer District, Omaha, Nebraska, was transferred to the District Engineer, U.S. Army Engineer District, Sacramento, California, for administration.

This appeal relates to the degreasing of the exterior surface of the stainless steel inner shells of cryogenic vessels. Appellant submitted a claim in the amount of $15,553.69 covering degreasing under all six of its contracts, but this appeal covers only appellant's degreasing claim with respect to the vessels produced under the Beale contract, and the amount of the claim is not stated. The parties have stipulated that, if the Board should decide the issue of entitlement in appellant's favor, the appeal will be remanded for the parties to negotiate the amount of the price adjustment.

Appellant's position is that it was required by the Government to do cleaning of the external surface of inner shells in excess of the specification requirements and to employ degreasing methods and procedures that were more expensive than the degreasing methods and procedures permitted by the specifications and, hence, that it is entitled to an equitable adjustment in price under the "Changes" clause. The Government concedes that appellant did cleaning in excess of the specification requirements, but says that appellant acted as a volunteer in doing so, except for the small amount of work done during a five-day period. There is a dispute as to how much cleaning of the external surface was required by the specifications. The Government also raises an issue as to the authority of the Government representatives to require work in excess of the specification requirements.

Of the five types of cryogenic vessels covered by the contract, this appeal pertains to the following three types: the T-201 liquid oxygen storage tanks, the T-401 liquid oxygen subcoolers and the T-402 helium coolers. Each of these three types of vessels consisted of a stainless steel shell nested inside a carbon steel jacket. The stainless steel inner shells were fabricated by a subcontractor and delivered to appellant's manufacturing plants at Oakland and Livermore, where they were cleaned and then nested the outer jackets

as a part of the assembly of the complete vessels. This appeal relates to the cleaning work appellant was required to do on the external surface of the inner shells before the Government inspectors would imprint an approval stamp on the inner shell and permit appellant to proceed with the next production operation, which was the nesting of the inner shell inside the outer jacket.

The production procedure adopted by appellant called for grinding the external surface of the inner shell by means of a mechanical grinder to remove burrs, weld splatter and any adhering hard hydrocarbons that could not be removed by vapor degreasing, then nesting the inner shell and vapor degreasing the surface of the annular space formed by the exterior of the inner shell and the interior of the outer jacket. Appellant did vapor degrease the annular space in accordance with specification requirements and does not claim any additional compensation for such work. Appellant also admits responsibility for all the grinding it did for deburring and descaling of welds. Basically, its claim is for the extra manhours of work it was required to do before nesting to meet the Government's requirement for removal of hydrocarbons that could have been removed after nesting by vapor degreasing. Its position is that, except for such requirement, only about two manhours of cleaning work per vessel would have been necessary before nesting, but that as a result of such requirement it had to expend about eight manhours of cleaning work per vessel before nesting.

Set out below are pertinent provisions of Section 38 of the specifications on cleaning.

Paragraph 38-14 is in pertinent part as follows:

"38.14. CLEANING INSTRUCTIONS. All components shall be cleaned as follows:

* * * * *

j. LIQUID OXYGEN AND LIQUID NITROGEN TANKS and drain catch pots shall be cleaned as follows:

(1) DESCALING. All weld surfaces of steel and stainless steel tanks, both internal and external of both the inner and outer tanks, shall be descaled as per paragraph 38.06.

(2) DEGREASING. The inner tank and its connected piping shall be degreased both internal and external as per paragraph 38.07. The internal surfaces may be degreased prior to welding on the last head, provided the head is welded in place using a back-up strip. To prevent trapping of cleaning solution under the back-up strip, the strip shall be cleaned and installed after completion of tank degreasing."

Paragraph 38-06, entitled "Descaling", provides that surfaces which are scaled and all stainless steel welds which will be exposed to gas or liquid and are accessible shall be thoroughly cleaned with a grinder or other specified means to remove all scale.

Paragraph 38-07 is in pertinent part as follows:

> 38.07. DEGREASING. Degreasing may be accomplished by any one of the following: Vapor degreasing, solvent degreasing, detergent degreasing.
>
> a. VAPOR DEGREASING. Parts to be vapor degreased, shall be processed in a standard commercial degreaser, or degreasing vapors shall be blown into the component parts so that the vapor will condense on and properly clean all surfaces requiring degreasing. The cleaning solvent shall be trichlorethylene conforming to MIL-T-7003. The operation of the commercial vapor degreaser shall be in accordance with the manufacturer's recommendations. After the parts are degreased, all traces of solvent shall be removed by drying in accordance with subparagraph 38-11. If both oils and preservatives are present, trichlorethylene cleaning shall precede detergent cleaning.

Vapor degreasing is a commonly used commercial process for removing such hydrocarbons as oils and grease from metal surfaces. The process as authorized by the specifications and employed by appellant is briefly as follows: Trichlorethylene, the degreasing solvent, is vaporized by heating it to a temperature of 180° F to 188° F and blowing it into the annular space until the vapor, which is heavier than air, fills the space. When the heated vapor comes into contact with the colder metal surface, it condenses into a liquid solvent and dissolves the oil or grease on the surface of the metal, and the dissolved hydrocarbon is drained off with the condensate. The process of blowing in the vapor and draining off the fluid that condenses on the metal surfaces continues until tests of the condensate show that no hydrocarbons in excess of the specified acceptable level are coming out with the condensate.

Under the amended specifications the annular space was subject to the same cleanliness standards as the interior of the tank. Under the original specifications, the only access to the annular space for cleanliness inspection was a hole six inches in diameter, but at the same time that the cleaning requirements were changed the access way to the annular space was enlarged. As a result, there was limited access for inspectors to make the specified visual, black light and wipe tests of the annular space, but it was not feasible to make such inspections of the entire surface of the annular space. As a practical matter, freedom of the annular space from hydrocarbons had to be determined largely from tests of the condensate drained off in vapor degreasing.

For a determination of whether the excess cleaning prior to nesting was performed by appellant as a volunteer or pursuant to requirements imposed by authorized Government representatives, it is necessary to describe the inspection and contract administration set-up established by the Government for appellant's Oakland and Livermore plants. The Corps of Engineers had a resident inspector in charge of a staff of inspectors stationed at appellant's two plants who performed inspection on a three-shift seven-day week basis. The resident inspector and his inspection staff were administratively attached to, and received their instructions from, the Supply Division, U.S. Army Engineer District, San Francisco, and more specifically from Clifford D. Ryan, who was Chief of the Contract Administration Branch of the Supply Division and also Assistant Chief of the Supply Division. Throughout the production of the cryogenic vessels Mr. Ryan visited appellant's plants at least once a week, attended most of the weekly meetings at appellant's plant, and discussed problems that arose and were anticipated with a view to assisting the contractor and facilitating the contractor's production. The Government's own inspectors were supplemented by inspectors furnished to the Government by United Testing Laboratories (UTL), who were considered more expert than the Government inspectors until the Government inspectors gradually gained more experience. The UTL Senior Engineer was Kenneth S. Whitmore, and he had five UTL field engineers under him. Mr. Whitmore was stationed at appellant's Oakland plant, but he made surveillance checks at the Livermore plant two or three times a week. Mr. Whitmore made confidential daily written reports to the Government resident engineer. Eugene R. McClintock, a Government mechanical inspector, was in charge of the Government's inspection at appellant's Livermore plant.

It was recognized from the outset by both appellant and the Government representatives that appellant had very rigorous spebifications to comply with and a very tight delivery schedule to meet. The Government's inspection procedure called for Government inspection of each step of appellant's production operations, and appellant had to obtain Government approval of each operation before it could proceed with the next step. In order to avoid costly and time-consuming production delays, it was imperative that appellant perform each step of its production operations so as to meet the requirements of the specifications as interpreted by the Government inspectors. Being on a fixed-price basis, appellant had the strongest possible economic incentive not to do any more work than was necessary to meet the specifications and obtain inspection approval while at the same time doing everything necessary to obtain inspection approval and avoid production delays. Whenever there was any disagreement between appellant's production personnel and the Government inspection personnel over what was required by the specifications, the established procedure was for each side to refer the matter to successively higher echelons of supervisory authority until the disagreement was resolved. Mr. Ryan testified that, if the disagreement could not be "ironed out" at the working level, "then it, of course, could go to the next level of supervision--generally in the case of the contractor it could

go right up to Mr. Hampton (appellant's President); of course, in the case of the Government, it could come up to me." He indicated by such testimony that he had authority to act on behalf of the Government in such matters. Appellant could not by-pass the Government channel of authority and did not attempt to go over the head of Mr. Ryan to the contracting officer.

Shortly after appellant started production, there arose a serious disagreement between appellant and the Government inspectors with respect to the Government inspection procedures and criteria, as a result of which a meeting presided over by Mr. Ryan and attended by 21 persons was held at appellant's plant on May 17, 1960. Among those in attendance were two representatives of Arthur D. Little Company of Cambridge, Massachusetts, which company had had an important role in the development and design of the cryogenic vessels. It is clear from the record that appellant and its attorney who attended the meeting got the distinct impression from what Mr. Ryan said at the meeting and the minutes of the meeting signed by Mr. Ryan that Mr. Ryan had resolved an important issue in the contractor's favor. However, Mr. Ryan testified that he did not see any instance where the inspectors required anything not called for by the specifications, that he did not recall having sustained the contractor's position on any issue at the May 17 meeting, and that he did not think that the inspectors were going too far. In response to a question of the Hearing Member, he stated that he did not contend that he ruled against the contractor on every single issue that came up. His testimony shows that, whenever disagreements between appellant and the Government inspectors were brought up at meetings, his general approach was to attempt to work out an accommodation between appellant and the inspectors so as to avoid any delay in production, without himself having to make a firm and unequivocal ruling on the matter in dispute.

Throughout performance of the contract, Mr. Hampton's position was that paragraph 38-07 of the specifications gave him the right at his election to do the required degreasing by vapor degreasing after nesting and that it was in excess of the specification requirements to require him to degrease by a method other than vapor degreasing. Mr. Hampton stated his position repeatedly to the inspectors and to Mr. Ryan. How the resident inspector interpreted the specifications is indicated by the following extract from a memorandum he wrote appellant on June 13, 1960;

> All stainless steel vessels, prior to nesting, shall be completely washed with clean trichlor. No other washing is necessary prior to meeting. Shall have EXCESSIVE HYDROCARBON deposits removed. [Emphasis supplied.]

By a memorandum written to appellant on June 18, 1960, the resident inspector cancelled the above-quoted directive and substituted the following:

> The entire exterior of all stainless steel inner vessels shall be examined, prior to nesting, and any EXCESSIVE HYDROCARBON deposits shall be removed. [Emphasis supplied.]

Although the resident inspector's written direction to wash with trichlorethylene prior to nesting remained in effect for only five days, his superseding directive still required the removal of "excessive hydrocarbon deposits" prior to nesting. The specifications clearly gave the contractor the right at its option to remove excessive hydrocarbon deposits by vapor degreasing after nesting, if by "excessive hydrocarbon deposits" is meant any hydrocarbon deposits in excess of what is allowed by the specifications on final completion. Mr. Ryan testified that "excessive hydrocarbon deposits" as used in the resident inspector's June 18 memorandum "meant hydrocarbons that would not normally be removed by vapor degreasing." Since the phrase is susceptible of more than one meaning, whether the June 18 memorandum called for work in excess of specification requirements turns on how the phrase was interpreted and applied at the time the work was done.

Appellant gave evidence to the following effect: A much higher standard of pre-nesting cleanliness was applied at the Oakland plant than at the Livermore plant. At the latter plant where Mr. McClintock was in charge of inspection, appellant was not required after about June 28 to do any more pre-nesting cleaning than was required by appellant's own interpretation of the specifications. However, at the Oakland plant throughout the entire performance period appellant was required to wash the external surfaces of the inner shells with trichlorethylene prior to nesting and in addition, to do a great deal of time-consuming grinding and sandblasting to remove hydrocarbons that could have been removed by vapor degreasing after nesting; and without doing such excess cleaning work appellant could not get the Government inspection approval stamped on the shells so as to proceed with the next operation. Both Mr. Hampton and Mr. Ryan testified that Mr. Hampton brought this problem to Mr. Ryan's attention repeatedly throughout performance of the contract. Mr. Ryan himself testified to the effect that the contractor had no practical means of challenging the inspector's interpretation of the specifications except to carry the problem up to Mr. Ryan and that Mr. Hampton did present the problem to him repeatedly, but that he did not recall having resolved the problem.

On June 28, 1960, Mr. McClintock included the following statement in his report with respect to vessels inspected by him at Livermore:

> Excessive surface cleaning, grinding and polishing on as tank for vessel T-201-26. This is not required by Corps of Engineers.

Appellant does not make claim in this appeal for any extra work at Livermore after the date of Mr. McClintock's inspection report.

During the hearing both the Government and appellant examined the time cards pertaining to the work performed at Livermore on Tank No. T-201-26, the vessel on which Mr. McClintock reported excessive cleaning. Such examination shows 30.4 manhours of work on Tank No. T-201-26 which may have been expended in cleaning the external surface of the inner shell prior to nesting, although the time cards did not show whether or not all of the hours were expended on cleaning. Such examination of time cards brought to the attention of the Government and appellant's management for the first time the fact that the workmen who performed the excessive cleaning on Tank No. T-201-26 customarily worked at the Oakland plant but had been temporarily detailed to the Livermore plant. It may be inferred that in cleaning the tank at the Livermore plant they followed the cleanliness standards that they had been required to follow at the Oakland plant.

Under appellant's theory, Mr. Whitmore, the UTL senior engineer, was the villain in its excess cleaning difficulties at the Oakland plant. The Government introduced into evidence several of Mr. Whitmore's confidential daily reports to the Government resident inspector, and Mr. Whitmore was called as a Government witness and testified at the hearing. Mr. Whitmore and his UTL field engineers inspected for compliance with the specifications as interpreted by the Government without necessarily agreeing with the Government interpretation. The small fraction of Mr. Whitmore's daily reports introduced into evidence by the Government shows that he was aware of appellant's continuing complaints about the requirements of degreasing before nesting, and his own understanding of how the Government interpreted the degreasing specification is shown by the following extract from his report to the resident inspector on June 16, 1960:

> Attended meeting discussed cleaning of annular space of T-201 LOX storage tanks. It was felt by LOX Equipt. Co. that they were being required to clean the exterior of the inner vessel beyond the spec requirements before nesting into the outer vessel and before vapor degreasing could be done. On inquiry it was found that the resident C. of E. SF inspector had ordered the exterior of all stainless vessels completely cleaned with Tri Clor before nesting. The U. T. L. man's contention has and still is that only the heavy deposits of tar and paint should be spot removed where it was felt that normal vapor degreasing would not remove these contaminants.

> A meeting with the Dow Industrial Service man has been arranged for 6/17 to discuss the cleaning of the vessels of this contract.

On July 12 Mr. Whitmore reported as follows to the resident inspector:

> It was also discussed that too much time was being spent cleaning the exterior of the inner vessel on the T-201 LOX Storage Tanks before nesting. It was pointed out to Mr. Hampton and Jones that on many occasions it had been observed there men using wire brushes and grinders to remove tar and heavy encrustations of asphalt like material that seemed to smear under the heat of the tools thus causing considerable more time to remove than if it were scraped off and then wiped with a suitable solvent.

Mr. Whitmore was an engineer with special training in PLS inspection and was recognized as being well qualified in such inspection work. He testified to the following effect: In the annular space (which is vacuum pumped and not exposed to liquid or gaseous oxygen), they were not concerned with particle-size contamination, but only with hydrocarbons or organic materials. He did not consider washing the entire surface with trichlorethylene before nesting to be necessary, as he agreed with Mr. Hampton that in oils or light grease vapor degreasing "does a very good job, it is an accepted and universally used method of cleaning." So far as the external surface of inner shells was concerned, the only "point of any trouble" at the Oakland plant was "an excessive accumulation of heavy tar and macadam or asphalt-type of contamination from handling equipment." Since vapor degreasing would leave a residue of such material, it was necessary that the heavy tar and pitch be removed prior to nesting for vapor degreasing. In his opinion, a requirement that the contractor clean the entire external surface with trichlorethylene prior to nesting was in excess of the requirements of the specifications.

Mr. Hampton is an engineer with degrees in both chemical engineering and mechanical engineering and with extensive experience in the manufacture of LOX-compatible cryogenic vessels for the Government and commercial customers. He testified that, while there were some tarry substances on the exterior surfaces of the stainless steel inner shells, there would have been no possible difficulty if the inner shells had been nested and vapor degreased without removing tarry deposits, pointing out that a spillage of liquid oxygen into the annular space would have cracked the carbon steel jacket before there was a sufficient quantity to cause any other damage. However, he conceded that some spot removal of tarry deposits before vapor degreasing was proper.

There was a lengthy testimony and physical evidence on contamination of stainless steel shells by handling equipment. We find from such evidence that the shells received at the Oakland plant were no more contaminated upon receipt than those received at the Livermore plant and that the handling equipment used at Oakland did not contain any tar, pitch or asphaltic substances which could have contaminated the shells during handling.

We have not overlooked evidence by the Government which shows that the Government gave appellant much assistance in the performance of the contract; that due to excusable cause appellant was behind schedule except during the last stages of the contract; that the Government complained to appellant of dirty environmental conditions at the Oakland plant, and that appellant did excessive grinding on some surfaces other than the exteriors of the inner shells.

DECISION

The specifications gave appellant the right at its option to remove all hydrocarbons from the external surfaces of the inner shells by vapor degreasing of the annular space after the inner shell had been nested inside the outer jacket. The only cleaning of the external surface required by the specifications to be done prior to nesting was the "descaling" called for by paragraph 38-06 of the specifications. To require the contractor to wash the external surface with trichlorethylene prior to nesting was in excess of the specification requirements. It was in excess of the specification requirements to require the contractor to remove prior to nesting any hydrocarbons that could be removed by vapor degreasing.

The record shows that appellant could have met the applicable cleanliness standards by expending not more than two manhours of work per vessel in descaling and cleaning the external surface of the inner shell prior to nesting and that appellant did so at the Livermore plant. Appellant expended more than two manhours per vessel in descaling and cleaning at its Oakland plant only because of the additional work it had to do in order to obtain inspection approval so as to be authorized to proceed with the next production operation.

The Government argues that, even if appellant did perform cleaning work prior to nesting in excess of what was required by the specifications and could not obtain inspection approval without performing such excess work, nevertheless, appellant is not entitled to be compensated for performing the extra work, because the Government inspectors had no authority to change or interpret the specifications or to require work not called for by the specifications. With respect to this argument, we find from the evidence in the record, which is virtually undisputed on this point, that Mr. Ryan was the duly authorized representative of the Government responsible for resolving questions between appellant and the inspectors over what was required

by the specifications and whether the inspectors were requiring work not called for by the specifications as a condition of granting inspection approval; that appellant presented to Mr. Ryan over and over his contention that the inspectors at Oakland were improperly interpreting the specifications and requiring more cleaning prior to nesting than was called for by the specifications; that Mr. Ryan knew or was charged with knowledge of how the inspectors were requiring excess cleaning prior to nesting, but failed to take any effective action to correct the situation.

On June 13 the resident inspector directed the contractor in writing to remove hydrocarbons by washing with trichlorethylene prior to nesting, which was clearly work not called for by the specifications. On June 18 he rescinded the specific direction to wash with trichlorethylene prior to nesting, but substituted a direction to remove "any excessive hydrocarbon deposits", which, as interpreted by him and the inspectors at Oakland acting under his supervision, meant the same thing as the previous specific direction to wash with trichlorethylene prior to nesting. Appellant's actual performance experience shows conclusively that subsequent to the resident inspector's June 18 modification of his directions, as well as prior thereto, appellant could not obtain inspection approval without washing with trichlorethylene and other cleansing to remove hydrocarbons prior to nesting. Assuming, as argued by the Government, that the resident inspector had no authority to issue his 13 and 18 June directives, his directives as interpreted by him and his inspection staff were in legal effect ratified and confirmed by Mr. Ryan when he received knowledge of them and how they were being interpreted and failed to take effective action to correct the situation.

We find that appellant is entitled to an equitable adjustment in price under the Changes clause for all the work it performed in degreasing and removing hydrocarbons prior to nesting except for the small amount of work necessary to spot remove tar, pitch and asphaltic deposits that would have left an objectional amount of residue after vapor degreasing.

The appeal is sustained as to entitlement and is remanded for the parties to negotiate the amount of the price adjustment.

WILLIAMS v. UNITED STATES

127 F. Supp. 617 (Ct. Cl. 1955),

cert. denied, 349 U.S. 938 (1955)

Reprinted at p. 2-92

Section 3. Scope of the Contract

FREDERICK CONSTRUCTION COMPANY, INC.

ASBCA Nos. 12108 and 12241 (1968)

This is an appeal from a decision of the contracting officer, effectuating a unilateral partial convenience termination settlement. The contracting officer determined that the Government was entitled to a downward adjustment in contract price for deletion of an additive item of work in the amount stated therefor in the contract. Appellant contended that the price adjustment should be effectuated under the Changes article of the contract and should be based on the cost of the item to appellant. Rejection of this contention was followed by these appeals.

* * * * *

In regard to the appeal from the contracting officer's final decision, appellant contends that the deletion of additive item No. 3 should be treated as a change rather than as a partial termination for the convenience of the Government. This contention is contrary to the position most frequently held by contractors in the past, but upheld by this Board in its earlier decisions. Nolan Brothers, Incorporated, ASBCA No. 4378, 58-2 BCA ¶ 1910; see Kakos Nursery, Inc., ASBCA No. 10989, 66-2 BCA ¶ 5733. In accord: Doughboy Industries, Inc. FAACAP 67-3, 66-2 BCA ¶ 5712. For, where the Government wishes to reduce the number of units of supplies to be furnished, eliminate an item of work, or otherwise reduce the quantity of work to be performed, it proceeds properly to this end under the convenience termination article. Such an action is entirely different from a complex specification change which will not be split into a termination action as to deleted components and a new procurement as to additional components required in lieu of those deleted. Compare T. Barry Kingman Construction, ASBCA No. 4745, 60-2 BCA ¶ 2826, where this proposition was argued by appellant and implicitly rejected. Loc. Cit., supra.

Nor is the Government, prior to an agreement reached by the parties, bound by its initial action. It is free to change its course or to correct an error therein. Reiner & Company v. United States, 163 Ct. Cl. 381, 393 (1963); Nolan Brothers, Incorporated, supra. We have similarly held that a contractor may modify his position and correct an erroneous statement made in the course of negotiations, unless the Government was entitled to and did in fact rely thereon. Admiral Corporation, ASBCA No. 8634, 1964 BCA ¶ 4161.

Only where the parties have voluntarily proceeded under the Changes article so far as to have reached a binding agreement will they not be allowed to retrace and correct their steps. Fred A. Arnold, ASBCA No. 7761, 1962 BCA ¶ 3508; Seaboard Security Company, ASBCA No. 6716, 1962 BCA ¶ 3407; cf. Pacific Industries, Inc., ASBCA No. 4920, 1963 BCA ¶ 3731, M. F. recon. den., 1964 BCA ¶ 4397; J. J. Fritch, General Contractor, Inc., ASBCA No. 5253, 1962 BCA ¶ 3298. However, not only did the parties here not execute settlement agreements which were beyond reopening, as in Arnold and other decisions cited above, but they had reached a complete impasse. Hence, these decisions do not support appellant's position here.

* * * * *

GENERAL CONTRACTING AND CONSTRUCTION COMPANY, INC. v. THE UNITED STATES

84 Ct. Cl. 570 (1937)

WILLIAMS, Judge, delivered the opinion of the court:

The plaintiff and the defendant, represented by L. H. Tripp, Chief of the Construction Division of the U.S. Veterans' Bureau, entered into a contract on August 20, 1930, whereby plaintiff agreed to furnish all labor and materials, and perform all work required, for constructing and finishing complete, at U.S. Veterans' Hospital, Somerset Hills, New Jersey, certain buildings, connecting corridors, and roads, walks, grading, and drainage in connection with these buildings; also plumbing, heating, and electrical work; outside sewers, water, steam, and electric distribution systems, and to provide a new water tube boiler and mechanical stoker in the present Boiler House, Building No. 14, for the consideration of $911,376. The work was to be performed in accordance with the specifications, schedules, and drawings furnished by the defendant, all of which were made a part of the contract.

On September 18, 1930, plaintiff received a letter from the Acting Director of the Veterans' Bureau stating that upon reconsideration it had been decided to omit from the present construction program the Nurses' Quarters, Building No. 17, together with the work pertaining to that building as described in Alternate (c) under Item I of plaintiffs proposal, and advised plaintiff that a formal change order would be issued when the execution of the form of contract had been completed. On September 19 plaintiff was notified by the Chief, Construction Division, U.S. Veterans' Bureau, to proceed with the construction of the buildings and utilities contemplated by the contract of August 20, 1930, excepting Nurses' Quarters, Building No. 17. Plaintiff was also notified at the time that its surety bond had been approved and placed on file with the Bureau record of the contract.

On January 13, 1931, the contracting officer issued a formal change order under Article 3 of the contract eliminating from the contract Nurses' Quarters, Building No. 17, and by reason of such change decreased the contract price by $99,520.

Plaintiff had previously, in acknowledging receipt of the defendant's letter of September 19, 1930, directing it to proceed with the work under the contract "excepting Nurses' Quarters, Building No. 17", stated that the acknowledgement was made "without prejudice to any of the contractor's rights by reason of the change." Now, upon receipt of the formal change order omitting Building No. 17 from the contract and deducting $99,520 from the contract price by reason of such change, plaintiff, within the time in which it was permitted to do so under Article 3 of the contract, protested the deduction of $99,520 from the contract price because of the omission of Building No. 17 and filed with its protest voluminous proof tending to show that the deduction of that amount was excessive and inequitable, resulting in loss and damage to it, claim for which was made. The Director of the Veterans' Bureau in acknowledging receipt of plaintiff's protest and claim for loss and damages by it by reason of the change order stated: "Since the Bureau had issued a change order making a deduction of $99,520 which it considered an equitable adjustment of this matter as contemplated in Article 3 of the contract, any claim you desire to make in connection therewith is one properly for consideration by the General Accounting Office."

Prior to the time plaintiff received notice on September 19, 1930, to proceed with the work under the contract, "excepting Nurses' Quarters, Building No. 17", it had received from subcontractors prices for the furnishing of those items of materials necessary to the work not handled by itself. The unit prices for these materials proposed by the subcontractors were based on the amount of such materials required for the completion of the contract as a whole. Upon the elimination of Building No. 17 plaintiff took up with its subcontractors negotiations for contracts covering the materials required for the work, omitting Building No. 17, and found that its subcontractors in the main would not enter into the contracts for the materials to be furnished by them at the unit prices quoted in their proposals. Plaintiff was therefore required to enter into contracts with its subcontractors for the materials to be furnished by them at higher prices than the unit prices offered by them for the materials necessary for the completion of the contract as a whole. The Commissioner of the court, to whom the case was referred for the taking of proof and reporting of facts, heard testimony offered by plaintiff in respect to the loss and damage sustained by it because of its inability to procure from subcontractors reduction of their proposed contract prices to an amount commensurate with the sum ($99,520) deducted by the Government from plaintiff's contract because of the elimination of Building No. 17 and because of loss of profits and overhead. The Commissioner found and reported to the court that plaintiff had suffered damages to the extent of $20,773. The defendant offered no

proof in respect to the alleged loss and damage caused plaintiff by the elimination of Building No. 17, and took no exception to the report of the Commissioner fixing the amount of such damage at $20,773. We find, upon a careful review of the evidence heard by the Commissioner of the court, that plaintiff's loss as fixed by him is amply supported by the proof, and have made a finding of fact that because of the elimination of Building No. 17 from the contract plaintiff sustained loss and damage to the extent of $20,773.

The defendant does not challenge the finding that plaintiff has sustained loss and damage to the extent of $20,773 because of the elimination of Building No. 17, but rests its case entirely on the assumption that the elimination of Building No. 17 was a change in the drawings and specifications of the contract within the meaning of Article 3 of the contract, and that the decision of the Director of the Veterans' Bureau that a deduction of $99,520 from the contract price, the amount fixed by the contracting officer in the change order, was an equitable adjustment of the matter, is final and conclusive under Article 15 of the contract.

Article 3 of the contract provides:

> Changes. -- The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this Article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 15 of the contract provides:

> Disputes. -- Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty

days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

Article 3 of the contract is a standard form used by the Government in all construction contracts. Its purpose is to enable the contracting officer to make any change in drawings and specifications he may find necessary or desirable as work under the contract progresses. It has reference, we think, entirely to structural changes like the substitution of one kind of material for another, changes in architectural design, the addition to or subtraction from work required by the specifications, etc. Certainly the authority vested in the contracting officer by this article of the contract to make "changes in the drawings and (or) specifications of this contract and within the general scope thereof" did not vest him with authority to eliminate entirely from the contract Building No. 17. If he could eliminate one building from the contract under the guise of making changes in the drawings and specifications he could likewise eliminate two or any number of buildings and thus entirely change the contract. The elimination of Building No. 17 from the work to be performed under the contract without the consent of plaintiff was a plain breach of the contract by the defendant.

The defendant having breached the contract plaintiff is entitled to recover its damages arising therefrom and judgment is therefore awarded plaintiff in the sum of $20,773.

It is so ordered.

P. L. SADDLER v. UNITED STATES

152 Ct. Cl. 557 (1961)

287 F. 2d 411

Durfee, Judge.

This is a claim for contract damages based on a change order issued by defendant which the plaintiff maintains required work to be done which was outside the scope of the contract. The contract in suit, entered into on April 23, 1951, required the plaintiff to provide the materials and labor necessary for the construction of a levee embankment on the Methow River, near Twisp, Washington. As originally written, it was a unit price contract calling for the placing of estimated quantities of embankment, backfill, and stone riprap. The quantities and unit prices are set out in Finding No. 2. The total contract price was $12,575.

Plaintiff began performing the contract within a few days of its execution and June 8, 1951, was established as the contract completion date. Some of the work called for in the contract had been completed by May 13, 1951, when a severe flood inundated the worksite and forced abandonment of the work until July 11, 1951. It became apparent that a levee built to the specifications called for in plaintiff's contract would be inadequate to withstand a subsequent flood of the same magnitude. It was necessary, therefore, that the levee be redesigned to provide the bank protection intended and desired when the original contract was let. On June 21, 1951, defendant's resident engineer forwarded technical provisions and a revised drawing dated June 18, 1951, which amended the original specifications to provide for changes in length, alignment, and profile of the levee, which changes increased the quantity of earth to be placed. Plaintiff's bid proposal on the new quantities in response to the technical provisions provided for the same unit prices as did the original contract. Instead of the 5,500 cubic yards of embankment estimated in the original contract, the new specifications called for 7,950 yards. Plaintiff's letter accompanying his bid on the new quantities also requested a reasonable adjustment of the unit price for the riprap if he should be required to incur unanticipated exploration costs in locating a site to supply the amounts of stone required by the job specifications.

Plaintiff resumed work on the contract on July 21, 1951. The completion date was extended to September 12 by which date the work was actually completed. During the course of the resumed work a proposed change order, reciting the newly determined amounts of work to be done, was submitted to plaintiff but no action was taken on it by him.

On September 1, the defendant was notified that plaintiff was proceeding under protest and had been so operating for three weeks. Notwithstanding his bid proposal in response to the June 18 technical changes, the plaintiff expressed a reluctance to place any materials beyond the quantities called for in the original contract.

The proposed change order was withdrawn and reissued as change order No. 1, dated October 17, 1951. The quantities of materials and unit prices under that change order are set forth in Finding No. 9. It will be seen that 13,264.8 cubic yards of embankment were required under the change. The total contract price under the change order became $17,916.90. The unit prices were the same as in the original schedule but the quantities of materials had been changed. Basically, the change order provided for a slight change in the alignment and profile of the levee and added approximately 735 feet to its original length. The change of alignment required the abandonment of 300 feet of embankment already in place, thus effectively adding over 1,000 feet to the total length of the levee. Plaintiff signed the change order in February 1953 and accepted the final contract payment at that time.

Although the length of the levee was approximately doubled by the change order (including the section abandoned), the total cubic yardage contained in the design as changed was more than doubled. The reduction in quantity of both backfill and riprap, and the change in the total prices for these items was not substantial. However, under the original contract, riprap work accounted for approximately 60 per cent of the estimated total price while the riprap work after the change order accounted for only 40 per cent of the total.

In August 1952, plaintiff filed a claim with the Corps of Engineers contending that the change order constituted a breach of contract entitling him to additional compensation and claiming damages of over $21,000.

The contracting officer denied plaintiff's claim and he appealed that decision to the Corps of Engineers Claims and Appeals Board which determined that the contract had not been breached but that plaintiff would be entitled to an equitable adjustment with respect to the riprap if he had been put to additional expense in obtaining it. The contracting officer again declined to make any adjustment in the contract price and the Claims and Appeals Board sustained him on the ground that plaintiff had not been put to any expense in obtaining the riprap beyond that contemplated at the time the contract was originally entered into.

Plaintiff's claim for damages is premised on the following theory. His original contract was for approximately $12,575. He worked until $12,575 worth of work had been completed on a per unit basis. This occurred on or about August 10, 1951, and it is

plaintiff's position that that completed his original contract. All the costs he incurred from that date until the job was completed he claims emanated from the change order.

Article 3 of the original contract permits the contracting officer to make changes in the contract specifications provided they are within the general scope of the contract. The plaintiff's theory of damages for contract breach relies on the changed specifications being outside of the scope of the contract. Should changes in the contract which are within its scope have resulted in an increase in the amount of work required, the defendant would have been obligated to make an equitable adjustment in the contract price. However, damages, such as sought by Saddler, can only be recovered where the changes are outside of the scope of the contract and amount to a breach.

The Government insists that the change order did not alter the quality, character, nature or type of work contemplated by the contract and, moreover, it was actually designed to achieve the purpose of the contract. Yet it acknowledges that the point at which a change must be considered to be beyond the scope of the contract and inconsistent with the "Changes" article is a matter of degree varying from one contract to another. We think that a determination of the permissive degree of change can only be reached by considering the totality of the change and this requires recourse to its magnitude as well as its quality.

The number of changes is not, in and of itself, the test by which it should be determined whether or not alterations are outside of the scope of a contract. This court decided in Magoba Construction Co. v. United States, 1943, 99 Ct. Cl. 662, that the Government had not breached a construction contract in which it had made 62 separate changes. On the other hand, obviously, a single change which is beyond the scope of a contract may be serious enough to constitute an actionable breach of that contract.

In discussing the liability of the Government for ordering a change in a construction contract which eliminated a whole building from a hospital complex and which occasioned a ten per cent reduction in the contract price, this court said in General Contracting & Construction Co., Inc. v. United States, 1937, 84 Ct. Cl. 570, 579:

> **** Certainly the authority vested in the contracting officer by this article of the contract to make 'changes in the drawings and (or) specifications of this contract and within the general scope thereof' did not vest him with the authority to eliminate entirely from the contract Building No. 17. If he could eliminate one building from the contract under the guise of making changes in the drawings and specifications he could likewise eliminate two or any

number of buildings and thus entirely change the contract. The elimination of Building No. 17 amounted to a cardinal change or alteration of the contract itself, a thing that could only be consummated with the consent of both parties to the contract. The elimination of Building No. 17 from the work to be performed under the contract without the consent of the plaintiff was a plain breach of the contract by the defendant.

The plaintiff believes that the change which resulted in more than doubling the amount of earth to be placed was a cardinal change in the contract into which he had entered. We must agree with this contention.

The general purpose set forth in the contract was simply to construct a levee "on the right bank of the Methow River, below Twisp, Washington." Certainly if the change in the contract did not affect the nature of the work but required the contractor to levee the entire bank below Twisp, though it might involve miles of dikes, it would seem to be a cardinal change. By the same token the addition or correction of a few feet of embankment cannot be said to be a change which is beyond the scope of the contract. We do not attempt to set forth a mathematical definition by which any deviations in quantity from a contract must be measured. Obviously the differences between contract situations will admit of no such inflexible formula.

However, several elements of the instant fact situation are significant with respect to the seriousness of the change. This was a relatively small contract, perhaps involving a small margin. It was undertaken in order that the contractor might keep his men and equipment busy during the weeks preceding the opening of the summer construction season. Irrespective of the delay caused by the unanticipated flooding, the contract period must have been extended in some measure by the addition of the new work. Furthermore, there is evidence that the redrafted specifications required the contractor to bring back certain equipment to the jobsite, which he had believed was no longer needed, a distance of a hundred miles. Certain qualifying conditions which accompanied plaintiff's reponse bid on the new specifications apparently were disregarded by the defendant.

Plaintiff can not be said to have waived the impact of the extensive change. His bid on the proposed specification changes in June was a bid on an amount of earthwork only slightly increased over the original estimate, viz., from 5,500 to 7,950 yards. It became apparent that he had not intended to make such an offer on an amount of earthwork approaching that ultimately required in the final change order. He reiterated this reluctance to the defendant as it became clear in the beginning of September that the amount of embankment would far exceed the amount estimated in the June specification changes. In view of the contract provision requiring the contractor

to perform even if the estimates were not met or were exceeded, the situation might have been different had the variance been within reasonable limits. We think that this provision in this particular contract can not be effective where the variance is so substantial as to amount to a cardinal change. A unit price bid on 7,950 cubic yards of embankment can not be enforced where the amount, under these circumstances, is increased to over 13,000 yards nor can we find a waiver of the change since in June, when he submitted the bid, the plaintiff was given no idea of how extensive the change was to be.

* * * * *

Adding together the expenses for equipment transportation: labor, including a ten per cent payroll expense; equipment rentals; travel and engineering corts a figure of $11,170.31 is arrived at. To this must be added ten per cent which we think is reasonable for overhead; from it must be deducted the final payment of $6,181.90, accepted after the administrative claim had been filed. Accordingly, the amount of damages occasioned by the defendant's breach is $6,105.44 and the plaintiff is entitled to recover that amount.

Section 4. Equitable Adjustment

A. "Objective" Theory - Reasonable Cost

ADMIRAL CORPORATION

ASBCA No. 8634 (1964)

This appeal proceeds from a decision of the contracting officer, subsequent to failure of the parties to agree thereon, unilaterally determining what adjustment should be made in the subject contract price as a consequence of a conceded change in the contract requirement. Appellant had sought an increase of $32,618.00, whereas the contracting officer, by decision of August 27, 1962, determined that the contract price should be decreased by $3,721.56.

In August of 1960 the Army Signal Corps had requested proposals, such to be submitted within the abnormally short period of time of approximately three weeks, for the furnishing of AM/PRC-10A Radio Sets.

* * * * *

As awarded to appellant on September 21, 1960 (at a later time the "increase option" was exercised) the subject negotiated contract, effective as of said date, provided for the delivery by appellant of 4370 of such radio sets at a unit price of $404.00, commencing with 200 units by March 31, 1961 and with completion by October 30, 1961.

One of the components of these contracted for radio sets was a battery case having a specified metal thickness of .064 inches in contrast to a thickness of .051 ultimately employed pursuant to change order; a circumstance which, as we shall see, in time gave rise to the instant dispute.

In responding to the Government's request for proposals appellant reckoned upon obtaining these battery cases, as indeed it ultimately did in performing the subject contract, from a known outside source for battery cases, and not by means of its own manufacture.

Thus, in the negotiations between representatives of the Government and of appellant which preceded award of the contract to appellant, appellant's representative from its Purchasing Department disclosed to the Government that, relevant to its proposal to furnish the radio sets, it had received from Mirro Aluminum Manufacturing Company and from Metropolitan Specialties, Inc. (to which suppliers,

in their joint aspect as a source from which to obtain battery cases, we shall at times herein for brevity's sake refer as "the M companies") an aggregate price quotation of $13.92 per case for battery cases. * * *

* * * * *

It is urged by the Government, and we find it to be true, that such quotation from those two companies was an ingredient in appellant's September 7, 1960 price proposal for the radio sets; this being so notwithstanding in those same negotiations appellant's breakdown of the costs entering into purchased component parts for the radio sets shows that appellant had allocated only $12.48 per case, rather than $13.92, to the battery cases for the radio sets (it having been appellant's expectation, according to testimony given on its part, that it would through bargaining thereafter get its costs for the battery cases down to within this lower figure).

We find the above to have been true, too, notwithstanding the following circumstance which is basic to the Government's position that there is already more than sufficient provision in appellant's contract price to absorb the cost of the type of battery case ultimately furnished under the change order here involved. This circumstance is that appellant's Purchasing Department, in that solicitation of quotations for the battery cases from the aforesaid M companies, which had resulted in their aggregate quotation of $13.92, inadvertently had invited quotations for a battery case having a metal thickness of .051--the thickness eventually required to be furnished by virtue of the change order--rather than the .064 thickness at that time specified in the contract; this due to appellant's own unawareness, because of mistake or oversight in its Engineering Department, that the current version of AM/PRC-10 radio set being procured required a battery case of this latter metal thickness, and to its consequent use of ordering data applicable to the battery cases of an earlier version.

At the negotiation conference the representatives of neither of the parties noticed, when the M companies' quotations were exhibited by appellant, that the part number referenced thereon pertained to a battery case having the nonspecification metal thickness of .051. As appellant's testimony shows, it was concerned with justifying its unit price for the radio sets, rather than the prices of the hundreds of parts which would enter into that unit price, and the Signal Corps apparently found that unit price on the whole acceptable to it.

The evidence as to when appellant first became aware that the quotations from the M companies were for an .051 thickness proceeds no further than that it was not until soon after receipt of the award of the contract and prior to a postaward conference on October 18, 1960, at which the possible need of changing the .064 thickness was discussed. This circumstance regarding the quotations received from

the M companies is not shown to have been disclosed to the Government, however, until months later; that is to say, until after the Government had become persuaded that the metal thickness of the battery cases should be changed to .051 and had directed appellant to furnish cases having such thickness, and after the contracting officer had been engaged in seeking agreement with appellant as to the monetary consequence which should proceed from such change.

During these same few weeks prior to the October 18, 1960 postaward conference mentioned above in which it was becoming known to appellant that it did not have a quotation from the M companies for .064 battery cases, Taffet Electronics, Inc. of Woodside, N.Y. requested an opportunity to quote on the battery cases as required for the radio sets to be furnished by appellant under its recently awarded contract. Thereafter, under date of October 12, 1960, appellant received what we find amply shown by the evidence to have been a firm written proposal by Taffet to furnish 4370 of the battery cases such as were required under the then unchanged terms of that contract at a price of $7.52 each. f.o.b. factory.

An order for such cases was never issued to Taffet Electronics, Inc., however; for it was at about this time that appellant, in checking out the contract drawings as it was required to do, discovered and reported to the Government the probability of an incompatibility or imperfect mating between the receiver-transmitter case and the battery case if the latter was furnished with a metal thickness of .064.

As a result of the foregoing, and of the postaward conference which shortly followed, appellant submitted a Technical Action Request (TAR No. 2) to the Government on October 31, 1960. This proposed a change in metal thickness from .064 to .051, with an indicated cost increase of approximately $25,000. A follow-on letter of December 20, 1960, seeking early advice from the contracting officer as to how it should proceed with battery case procurement contained the first mention of appellant's having received a quotation of $7.62 per case from a supplier (not identified) for the .064 case; recited that appellant had, on the other hand, a quotation of $13.97 for an .051 case from a different supplier (likewise not identified); and went on to state that "as these figures demonstrate"--the asserted demonstration escapes us--"if you decide upon the .051 material, the Signal Corps must increase the contract price by an amount equal to $7.43 for a total of $32,469.10."

A conference on January 9, 1961, concerned with TAR No. 2 and a dozen other TARs resulted in a letter of January 11, 1961 from the contracting officer to appellant regarding each such TAR. Appellant was directed in respect to TAR No. 2 to furnish the thinner metal battery case, and was advised that a sum "Not to exceed $32,469,00, subject to final negotiations, is hereby obligated for the increase in cost resulting from the furnishing of the battery case of thinner material (.051" thick) for the 4370 units of Item 1."

A proposal for price increase because of the foregoing change was submitted by appellant on February 3, 1961 in the total amount of $32,618. Such total figure, including suggested percentages to cover manufacturing cost, G&A, and profit, is shown to have derived from an indicated increase cost to appellant of $29,087 for material in furnishing the .051 cases; and this matter of difference between what the procurement of .051 battery cases entailed in the way of purchase price as against .064 cases is the area in which the instant appeal is understood by us to require our decision.

When explanation for its proposal was sought from appellant (the basis on which appellant had arrived at the $29,087 for material had not been stated) it undertook by letter of May 8, 1962 to do so in terms of the difference between quotations received from the M companies in August (the combined price of $13.91) and the $7.52 quotation made by Taffet Electronics, Inc. on October 12, 1960. This difference of $6.40 per case when applied against the 4370 units and a 4% shrinkage factor added accounts for the previously indicated $29,087. Submission of the original M Companies' quotations with the May 8 letter revealed to the contracting officer the fact theretofore unknown to him that those August 1960 quotations employed in arriving at the $27,968 figure had not been for specification battery cases. A further letter from appellant of May 22, 1962 disclosed the additional fact that in January 1961, following approval of TAR No. 2 and the change to an .051 case, appellant had promptly issued purchase orders to the two M companies as the evidence shows the contracting officer had reason to expect it would do for the furnishing of the 4370 battery cases having that thickness of metal at an aggregate price of $11.63 per case.

Except for these last-mentioned purchase orders for .051 cases appellant is not shown to have placed an actual order with anyone for battery cases to be employed on the subject contract work. No orders for cases had been placed prior thereto.

According to the testimony of the comptroller of appellant's electronics division, the $11.63 price was obtained by negotiation with Mirro and Metropolitan, and became appellant's actual cost per case for not only the 4370 originally required to be furnished, but, as well, for a further 2185; these latter being subsequently required when, as contract Modification No. 1 bearing an effective date of March 21, 1961 shows, the Government exercised the "increased option" clause contained in the subject contract, and thereby increased the quantity of radio sets to be furnished by appellant from 4370 to 6555.

When, in spite of such actual cost of $11.63 incurred for the battery cases having the changed metal thickness, appellant continued to press for an increase in the contract price with respect to 4370 units (and without evident claim with respect to any more) because of such change, and did so on some basis not disclosed to us except that

it was other than, and substantially in excess of, the difference between the quotation it had received from Taffet for the .064 cases ($7.52) and this cost figure of $11.63, the contracting officer issued his final decision of August 27, 1962 regarding the 4370 cases, from which appellant timely appealed.

In that decision the contracting officer took the position as we understand it that inasmuch as the total contract price proposed by appellant and accepted by the Government was predicated, so far as concerned the battery cases, upon the assumption that appellant would expend for them the amount shown in its submission of cost data, the equitable adjustment because of the change to the .051 battery cases should be computed on the basis of the difference between what these latter actually cost, to wit, $11.63 each and what appellant had estimated it would have to pay for the .064 cases, to wit, $12.48. Since on this basis appellant had in fact paid the $0.85 per unit less for the changed battery cases than what it had estimated would be entailed in furnishing the unchanged cases, the contracting officer's determination was that the Government was owed this difference.

DECISION

Although the broad issue presented by the appeal concerns the amount of equitable adjustment to which the contract price shall be subject as a consequence of an undisputed change in the contract requirements, more narrowly the dispute which we must now decide on this appeal is over what factors shall enter into the determination of the amount which shall be either added to or deducted from the contract price on account of the elimination of the .064 battery case and the substitution of the .051 case.

We find, as concerns the 4370 radio sets which were the subject of consideration in the contracting officer's decision of August 27, 1962, no firm indication of present disagreement between the parties that the change to the thinner battery case necessitated the expenditure by appellant of $11.63 each for the cases. The contracting officer's decision, while it takes note of the purchase orders for such cases placed by appellant in January 1961 in that aggregate sum, contains no finding that such cost figure was unreasonable or that appellant did not reasonably incur it. There is no more, at best, than innuendo (regarding other possible sources) confronting the presumption that the $11.63, as an historical cost, was reasonable. See Bruce Construction Corporation et al v. United States, Ct. Cls. No. 479-60, decided November 15, 1963.

Appellant, judging from its closing argument and posthearing briefs, appears no longer to be urging that the $13.92 quotation given to it by the M Companies in August 1960 for an .051 case, notwithstanding this battery case at the time quoted on would have been extraneous to appellant's then existent need, should presently be used

as the measure of that reasonable cost of the battery cases actually furnished, against which to credit such amount as it should be determined would have been the reasonable cost to the contractor to furnish the cases originally required. If perchance, however, such concept still persists it must be rejected.

* * * * *

(Appellant now argues) that its change in position because of TAR No. 2 should entitle it to an adjustment of contract price based upon the difference between the cost per battery case actually sustained, i.e., $11.63 and the cost per case which would have been sustained for the .064 case, i.e., $7.52, namely, a difference of $4.11 for each of the 4370 units. This is the basis upon which we believe the price adjustment should be made in this case.

We find the $4.11 to be in accord with the rule that a proper equitable adjustment derives from the difference between what it would have reasonably cost the contractor to perform as originally required and the reasonable cost to it to perform the contract as changed. Bruce Construction Corporation v. United States, supra; The Ensign-Bickford Co., ASBCA No. 6214, 60-2 BCA ¶ 2817.

* * * * *

With regard to the Government's further contention that we must take into account the elements in appellant's initial bid price if we are to achieve an equitable adjustment for the subsequent change, this contention reduces, in substance, to the following position. When the Government accepted appellant's $404 per unit figure for the radio sets and awarded a contract to appellant for 4370 sets at that price, it has been induced to do so on the basis that the $404 figure contained $12.48 for a battery case having a metal thickness of .064 inches as then required under the contract terms. Its acceptance of the $404 figure rested upon a representation by appellant that this latter was so. It would not have accepted it, had it known the $12.48 was for a nonspecification component. Therefore, so the contention proceeds, in the particular circumstance of this mistaken representation to the Government that the M companies quotation pertained to a battery case having a metal thickness of .064, appellant should not now be in a position to disregard that $12.48, and to substitute the lower figure of $7.52 per case for which Taffet Electronics, Inc., as we found, would have furnished the .064 cases, as the appropriate measure of cost for the battery case eliminated by the TAR No. 2 change order when evaluating the altered position in which appellant found itself by reason of that contract modification.

There appears to us no more logic or merit in this position by the Government than in that which appellant's comptroller persisted in taking when demanding from the contracting officer a price adjustment of 32,000 odd dollars on account of the changed battery cases for the 4370 radio sets.

The Government's position rests upon the argumentative contentions of fact that on the basis of the mistakenly obtained quotation of $13.92 "the Government was induced to put $12.48 per unit into the contract for battery cases" which sum it would not otherwise have agreed to allow in the contract price; and that absent such misrepresentation as to the basis of that quotation the parties would presumably have discovered that the .064 case could have been purchased in the price range of $7.52 per unit. Both of these points are conjectural, appear to assume that at the negotiation conference the parties were negotiating to the point of agreement upon its individual elements of cost rather than upon a fixed unit price for the radio sets, and proceed on the dubious premise that, as expressed by the contracting officer in his decision, the parties reached agreement on that price "upon the assumption that Admiral would expend the amount shown in its submission of cost data for the cases."

We must agree with appellant, however, that its contractual undertaking was to furnish, at an agreed price, radio sets incorporating battery cases of an .064" metal thickness; and that, having so agreed, it was bound to do so at that price regardless of whether or not it had arrived at that price by mistakenly failing to incorporate a realistic cost for the battery costs in that price. (S. N. Nielsen Company v. United States, 141 Ct. Cls. 793; see also, The Ensign-Bickford Co., supra, where it can be seen that the cost adjustment did not proceed from the contractor's quotations obtained prior to bidding, but from substantially lower quotations subsequently obtained.) The parties did not, so far as we can find from the evidence, agree on the fixed price for the radio sets on the understanding that appellant had committed itself to, or necessarily would have to expend $12.48 for the battery cases. Comptroller General B-145104 (decided July 20, 1961) cited and quoted by the Government is distinguishable for this reason.

We do not have before us here either a case of misrepresentation of legal obligation relating to work to be performed by the contractor should it be awarded the contract, or of misrepresentation as to what work had been done by the contractor. In the instant case the component pricing information submitted by appellant at the negotiation conference, which subsequently proved to be incorrect as regards its application to .064 battery cases, was simply incidental to appellant's position taken at said time that its price for the radio sets was a fair one. We do not perceive why the present situation should be treated differently than had there been no change to a thickness of .051, and had appellant consequently performed its contract by furnishing radio sets containing .064 battery cases purchased from Taffet Electronics, Inc. at $7.52 per case, i.e., in that instance at an even greater price advantage as concerns the battery components ($12.48 - $7.52) than that which we find here should be employed to measure appellant's change in position because of the ordered change.

If $7.52 is what appellant reasonably would have paid but for the change, then fortuitously in this instance it will have done well in its $404 price for radio sets, so far as concerns the battery cases; just as would have been the reverse, had the situation been that .064 cases reasonably would have cost appellant a substantially greater amount than it had contemplated when agreeing to its $404 price for the radio sets.

* * * * *

To the extent indicated the appeal is allowed.

S. N. NIELSEN COMPANY v. THE UNITED STATES

141 Ct. Cl. 793 (1958)

MADDEN, Judge, delivered the opinion of the court:

On June 29, 1951, the plaintiff made a contract with the United States for construction work at O'Hare Field near Chicago, Illinois. The Government had invited separate bids on three items of work, and the plaintiff was the successful bidder on two of the items. One was for the construction of the so-called Readiness Building. That item is not involved in this suit. The other item was for the construction of the "outside utilities" for the Readiness Building and for the Alert Hangar. The construction of the Alert Hangar itself was awarded to another contractor. The "outside utilities" part of the plaintiff's contract is the one out of which this suit arises.

In submitting its bid of $152,000 and making its contract for the outside facilities work, the plaintiff was misled by a bid submitted to it by a subcontractor for the electrical part of the outside utilities work, which subcontractor had been misled by a bid submitted to it by a sub-subcontractor. The sub-subcontractor's mistake was that it estimated only for labor and included nothing for materials.

The plaintiff's bid and the circumstances did not indicate any mistake. The next highest bid was only $155,234. This may have been because of the same mistake by the same would-be sub-subcontractor. If so, the Government's representatives had no knowledge of it. The plaintiff says that its suit is not based upon the mistake in its bid and does not seek reformation of its contract.

One part of the plaintiff's outside utilities electrical work under its contract was the installation of electrical facilities between the Alert Hangar and manhole No. 2, a distance of about 3,500 feet. The plaintiff was to install new underground ducts for the entire distance, and place electric cables in the ducts. The value of this work, based upon what it would have cost the plaintiff to do it, plus overhead and profit, would have been $60,690.

The contract contained the usual article authorizing the contracting officer to make changes within the scope of the contract and providing for an equitable adjustment of the contract price if changes were made. It also contained the usual article prescribing the procedure to be followed in case of a dispute. * * * *

On July 6, 1951, just a few days after the contract was signed, the contracting officer advised the plaintiff on a proposed change eliminating the underground ducts in the work prescribed above, and providing that, for a part of the distance, the electrical cables would merely be buried in the ground, and for the rest of the distance they would be strung on poles above ground. Since the substituted construction would be less expensive than the underground duct construction, the contracting officer requested the plaintiff to submit a credit proposal for the labor and materials involved in the change. On July 26 the contracting officer issued a formal change order, which the plaintiff accepted by endorsement. That document stated that an equitable adjustment reducing the contract price would be determined at a later date. The plaintiff performed the work in accordance with the change order. The cost of this part of the work as changed was estimated to be $19,180, and the plaintiff does not contest the correctness of that figure. That left a difference of $41,510 between the value of the work as originally contracted for and the value of the work as changed.

In August 1951, the plaintiff proposed to credit the Government with $18,000 for the change. In its proposal it called attention to the error in the subcontractor's bid. The Government's representatives, apparently thinking that the plaintiff was asking for consideration on account of the mistake in its bid, rejected the plaintiff's proposal and said that the relief sought by the plaintiff could not be obtained from anyone short of the Comptroller General, and that if the plaintiff desired to submit the question to that office, that could be done through the contracting officer's office.

The plaintiff was then and is still of the opinion that it was not entitled to relief because of its unilateral mistake in the making of the contract. It did not, therefore, submit the question to the Comptroller General. The Government's representatives in all their discussions with the plaintiff maintained the position that the equitable adjustment should be based upon the difference in cost between the work as originally contracted for and the work as changed.

They had, before they first notified the plaintiff of the proposed change, made estimates of the two sets of costs, showing the difference of $41,510. However, they continued to negotiate with the plaintiff, in the hope that a procedure under the disputes article could be avoided. No agreement having been reached, the contracting officer, on June 20, 1952, made his formal determination of the equitable adjustment. He fixed it at $41,510, and the payment to the plaintiff for its contract work was reduced by that amount.

In October 1952, the contracting officer issued his findings. The plaintiff appealed through the proper channels, ultimately to the Secretary of the Army. The Secretary's representative, the Armed Services Board of Contract Appeals, on October 1, 1954, affirmed the decision of the contracting officer. The plaintiff says that its action was arbitrary.

The plaintiff points to its losses under the outside utilities electrical portions of its contract. However, its losses would have been the same if the change order had not been issued, since it finds no fault with the contracting officer's figures as to the costs as they would have been without the change order and the costs as they were under the change order. The plaintiff suggests that the change order was not permissible under the contract. If that were true it would be immaterial since, as appears above, the change order did not increase the plaintiff's losses. In any event, the change was "within the scope of the contract" and was accepted by the plaintiff. The only dispute was in regard to the amount of the equitable adjustment.

The plaintiff says that, of the mistakenly small amount of $34,800 which it estimated for all of the outside electrical work in making its bid, only $22,564.32 was properly applicable to the line from the Alert Hangar to manhole No. 2. It says that the $19,180 actual cost of the changed work should have been subtracted from the $22,564.32, and only the difference of $3,384.32 should have been deducted from the plaintiff's contract price. We think the $22,564.32 figure is of no significance. It is only an allocation of a proportionate part of a larger sum which was itself grossly inadequate because of the mistake in the bid. The plaintiff's attempt to use it is another way of seeking reformation of the contract on account of its unilateral mistake in making the contract. As we have seen, the plaintiff disclaims, rightly we suppose, any entitlement to a direct reformation of the contract on account of the mistake. We think it is not entitled to use its mistaken estimated figures, which have no relation to actual costs, in determining the equitable adjustment.

The plaintiff's petition will be dismissed.

It is so ordered.

B. "Subjective" Theory

THE ENSIGN-BICKFORD COMPANY

ASBCA No. 6214 (1960)
60-2 BCA 2817

[One-half of an Army Ordnance requirement for 2,016 demolition kits was awarded to the appellant for a fixed-price of $399,168. The remainder was awarded for an identical price to Industrial Metal Fabricating Company on a labor surplus set aside. After award, the contracts were transferred for administration to different ordnance districts, each of which was unaware of the contract being administered by the other. The appellant then entered into a subcontract with Industrial Metal Fabricating Company (hereafter called subcontractor) to obtain required parts. Subsequently, both parties were informed of a proposed Government change order which would accelerate the time required for performance. When the change order was issued, the subcontractor requested an additional $7.18 per unit for changes and an additional $23.26 for acceleration costs. This new price was agreed to and paid by the appellant until the contract was completed. The additional subcontract costs exceeded $30,000 and were included in an estimate given by the appellant to the Government prior to issuance of the change order.

After both contracts were completed, the Army Audit Agency audited the change and acceleration costs of the subcontractor. This audit revealed that two contracts for the same item at identical prices were being administered by separate ordnance districts. It also revealed that in the light of actual costs, the subcontractor had overcharged the appellant under the adjusted subcontract price. The subcontractor then settled the claim for an equitable adjustment of its prime contract with the Government for $16,500. Viewing this as an accurate computation of the subcontractor's actual cost, the contracting officer approved but $16,500 of the $30,905.28 claimed for subcontract costs by the appellant as part of its equitable adjustment. The appellant appealed from this determination to the Armed Services Board of Court Appeals.]

DECISION

This appeal presents the question as to the amount of the equitable adjustment to which the appellant is entitled for changes ordered by the Government. As both parties to this appeal have recognized, the request for acceleration was in this case a change which increased appellant's costs and for which appellant is entitled to an equitable adjustment.

We believe that the chief difficulty in this case has arisen from the fact that the parties have sought to make equitable adjustments at entirely different times. Appellant, proceeding upon the basis of foresight, made its adjustment with its subcontractor when the changes were ordered and thus made the adjustment upon the basis of estimated costs before historical costs were developed. The Government, on the contrary, both insofar as the New York District and Boston District were concerned, proceeded upon the basis of hindsight and made its adjustments after the changes had been completed and upon the basis of the historical costs incurred by a contractor other than the appellant. The historical costs of the two contractors are not the same. It is not surprising that with such divergent approaches the parties have arrived at different amounts and thereafter have been unable to settle their dispute by agreement.

The Board believes from the wording of the "Changes" article itself that it is contemplated by that article that equitable adjustments for changes will be arrived at by negotiations upon the basis of estimates and before the changed work is done, but the Board realizes that equitable adjustments for changes are not exclusively to be so arrived at and that on occasion they are arrived at after the changed work is done. We know that on occasion the Government uses the latter system (retroactive pricing). See Bruce Construction Corp., ASBCA No. 5932, 30 August 1960, 60-2 BCA 2797. And we would expect that contractors in their dealings with their subcontractors would likewise from time to time use both systems.

We believe that it was reasonable and appropriate in the instant case for the appellant, upon receipt of the changes, to use the forward pricing system in making its price adjustment with its subcontractor. This decision, we believe, rested within the sound discretion of the appellant. Nor are we persuaded that appellant, to protect itself, should have made the price increase redeterminable.

Since appellant did use the forward pricing system in this case and since it was reasonable and appropriate to do so we believe that the question to be decided in this case is whether or not the adjustment appellant made with its subcontractor was reasonable when viewed from the standpoint of 10 to 15 September 1958 (the period when the change was ordered and the adjustment made) rather than from the standpoint of December 1958 and thereafter (the period when the subcontractor's costs had become historical). We speak of the adjustment which appellant made with its subcontractor because we are principally concerned with the increase in appellant's costs and not in the increase in someone else's costs.

In Modern Foods, Inc., ASBCA No. 2090, 26 March 1957, 57-1 BCA 1229, the Board said:

> This Board has held that a proper equitable adjustment is the difference between what it would have reasonably cost to perform the work as originally required and what it reasonably cost to perform the work as changed. S. N. Nielsen Company, ASBCA No. 1990 (1954). In computing the cost of the work required by a change order, the costs that will be reasonably experienced by the contractor should be used and not necessarily those of the most efficient producer. Dibs Production & Engineering Company, ASBCA No. 1438 (1954).

We have selected the above case for quotation because of the reference in the second sentence to the costs reasonably to be experienced by the contractor as opposed to the costs that were, or might have been, experienced by someone else. The rule stated in the first sentence can be found in many prior decisions. See, for example, Air-A-Plane Corporation, ASBCA No. 3842, February 29, 1960, 60-1 BCA 2547; and Bruce Construction Corp., ASBCA No. 5932, August 30, 1960, 60-2 BCA 2797.

In the instant case it should be borne in mind that the only item in dispute is subcontract cost. The parties are in agreement upon other costs and upon profit. It should also be borne in mind that in this case the increased price which appellant has already paid to its subcontractor is increased cost to the appellant. Thus in arriving at the equitable adjustment between the Government and the appellant we are primarily concerned with appellant's increased cost and not with the subcontractor's increased cost. The contractor's cost but for the change would have been the original subcontract prices, the contractor's cost was the adjusted subcontract prices, and the difference was due to the changes since they occasioned the adjustment in the subcontract prices. The problem in the case is as to whether that difference was or was not reasonable. And, as we have said, the problem must be viewed from the standpoint of 10 to 15 September 1958 and not from the standpoint of December 1958 and thereafter.

Upon the basis of the record in this case we conclude that the difference was reasonable.

We note in this connection that when in July of 1958 appellant was asked to give an estimate of acceleration costs it gave an estimate of about $42,000. This apparently did not shock the Government at that time. The record discloses no protest that $42,000 seemed unreasonably high, no indication that Government estimates were considerably lower, no request for a justification of the estimate, and no request that it be refigured. And we note that when on 29 August

1958 the Government ordered acceleration of the Industrial Metal Fabricating Company it did so with a proviso that costs would not exceed $42,500. It would appear that in July and August of 1958 the Government did not consider $42,000 exorbitant. And we note that when on 10 September 1958 the Government ordered the acceleration of appellant's contract it did not express any belief that the prior $42,000 estimate was unrealistic or should be materially lowered.

When on 10 September 1958 appellant was ordered to accelerate it seems reasonable that appellant would go to its existing subcontractor to arrange for acceleration. Alternate sources of supply might have been found but we believe that the ordered acceleration would most reasonably be expected to be achieved by accelerating the existing subcontractor rather than by trying to put a new subcontractor into production. In going to the subcontractor to arrange for acceleration it seems reasonable that appellant would ask for a price on the acceleration so that the subcontract could be adjusted as to delivery an price. Appellant did ask for and did receive a price. This brings us to what we think is the crucial question in this case. Was the price received such that reasonably prudent contractors would have demanded breakdowns and justifications of the increase or would have rejected it as unreasonably high and have undertaken to secure a better price or a redeterminable price? On the record before us we think not. We think that reasonably prudent contractors would have considered it a fair price for the acceleration and other changes. We note in this connection that the Government itself did not question this increase, an increase accomplished on 15 September 1958, until sometime after 5 March 1959 (the date of the Army Audit Agency's audit report) at the earliest and actually would not appear to have questioned it, insofar as the Boston District was concerned, until sometime in April 1959 when a retroactive agreement based upon the historical costs of another prime contractor was reached by the New York District. In fact, as late as 14 April 1959 contracting personnel of the Boston District affirmatively considered it reasonable for they included it in the $41,651.63 proposal made to the appellant.

While the Industrial Metal Fabricating Company did agree, on 28 April 1959, to an adjustment of $16,500 and while we accept for the purposes of this opinion the Government position that said $16,500 covered the increased costs of that company, it does not follow that appellant's subcontract costs were increased by only $16,500 for obviously they were not. They were increased by $30,905.28. Nor does it follow that appellant's subcontract costs should have been increased by only $16,500 and that the balance of the increase was due to some dereliction upon the part of appellant who should therefore bear that cost instead of the Government. We find the record to show to the contrary.

Having found that changes ordered by the Government increased appellant's subcontract costs by $30,905.28 and that the increase was reasonable, we do not consider an adjustment that includes but $16,500 of the $30,905.28 equitable. We believe that equity requires that the entire $30,905.28 be included.

* * * * *

The appeal is sustained.

C. "Contractor's Cost Unless Unreasonable" Theory

BRUCE CONSTRUCTION CORP. v. UNITED STATES

163 Ct. Cl. 97 (1963)
324 F. 2d 516

Durfee, Judge.

This case involves a claim for equitable adjustment for the alleged "additional value" of building block that was used in construction of buildings on the Air Force Base at Homestead, Florida.

The principal issue before us is whether plaintiffs have suffered damages as a result of defendant's rejection of a building block and the consequent requirement that plaintiffs substitute a different block, where the price paid for the two different blocks was the same.

Plaintiffs entered into a contract, DA 08-123-ENG-1595, with the Corps of Engineers on September 15, 1954. The contract involved construction of 18 airmen's dormitories, five mess halls and three bachelor officers' quarters. The total contract price was $4,867,605.30.

The buildings were to be constructed of concrete building block with exposed surfaces "of a fine texture generally produced in the Florida area which is suitable for painting as distinguished from 'coarse textured block' produced for the purpose of receiving stucco or plaster * * *." (Paragraph 5-02(c) Materials.)

Plaintiffs placed an order for suitable block with a supplier. Subsequently, on or about January of 1955 the contracting officer rejected the concrete block submitted by plaintiffs, and required the use of a "sand block." Plaintiffs then requested additional compensation in the amount of $312,016.60 to defray alleged additional costs. The matter was processed and Modifications Nos. 45 and 46, dated May 13, 1957, and April 4, 1958, respectively, were issued. These Modifications allowed plaintiffs $125,624.39 to compensate them for the cost of additional labor required in handling and placing the block, and for handling and hauling the rejected block. Plaintiffs' claim of $42,415.98 for the alleged additional value of the originally specified block was denied by the contracting officer and, ultimately, by the Armed Services Board of Contract Appeals.

Though the price which plaintiffs actually paid for the "sand block" was the same as they would have paid for the original block selected, they contend that the fair market value of the sand block

was greater than the purchase price. Essentially then, plaintiffs argue that defendant should not benefit from the bargain price plaintiffs secured from their supplier, but should pay for the actual value of the sand block received by defendant, not merely its actual cost.

Though there is substantial controversy as to the market value of the sand block as of the time of the transaction between plaintiffs and their supplier, for purposes of defendant's motion for partial summary judgment, we are called upon only to decide the narrow question whether "cost," or "fair market value" controls in the award of an equitable adjustment.

Equitable adjustments in this context are simply corrective measures utilized to keep a contractor whole when the Government modifies a contract. Since the purpose underlying such adjustments is to safeguard the contractor against increased costs engendered by the modification, it appears patent that the measure of damages cannot be the value received by the Government, but must be more closely related to and contingent upon the altered position in which the contractor finds himself by reason of the modification. We held this view in the early case of McFerran v. United States, 39 Ct. Cl. 441 (1904). The contract there involved construction of structures at Fort Ethan Allen. The specifications called for the use of cut stone. The quartermaster in charge required that claimant furnish marble. Judge Weldon, speaking for the court in disallowing the claim, stated (39 Ct. Cl. p. 451):

> * * * The contract was performed in the country of the marble quarries, and as a result of that situation marble becomes a common material in the trimmings of houses. The findings on that point say that it is not shown that the cost of the marble used by the claimant by the direction of the quartermaster was in excess of the cost of good sound stone of best quality and even color. No allowance is made for this item.

Clearly, in that case the holding of the court was based on cost and not on fair market value. The instant case falls squarely under, and is controlled by, McFerran, supra.

The Armed Services Board of Contract Appeals, in its consideration of plaintiff's case, assumed plaintiffs' statement of law, but held against them on a finding of fact that the price plaintiffs had paid for the stone was actually its fair market value. But fair market value is not the measure of damages in this case. This is not to say that in all cases, historical cost is to be the gauge. The more proper measure would seem to be a "reasonable cost." The concept of "reasonable cost" is not new. Indeed, it has been defined in the following manner:

> A cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by an ordinary prudent person in the conduct of competitive business. (A.S.P.R. 15-201.3 (1960))

Use of the "reasonable cost" measure does not constitute "an objective and universal procedure, involving the determination of the reasonable value (or reasonable cost of any contractor similarly situated) of the work involved"; but determination of reasonable cost required, in and of itself, an objective test. The particular situation in which a contractor found himself at the time the cost was incurred, Appeal of Wyman-Gordon Co. ASBCA 5100 (1959) and the exercise of the contractor's business judgment, Appeal of Walsh Construction Co., ASBCA No. 4014 (1957), are but two of the elements that may be examined before ascertaining whether or not a cost was "reasonable."

But the standard of reasonable cost "must be viewed in the light of a particular contractor's costs * * *" [emphasis added]. and not the universal, objective determination of what the cost would have been to other contractors at large.

To say that "reasonable cost" rather than "historical cost" should be the measure does not depart from the test applied in the past, for the two terms are often synonymous. And where there is an alleged disparity between "historical" and "reasonable" costs, the historical costs are presumed reasonable.

> Since the presumption is that a contractor's claimed cost is reasonable, the Government must carry the very heavy burden of showing that the claimed cost was of such a nature that it should not have been expanded, or that the contractors' costs were more than were justified in the particular circumstance.

Applying the "reasonable cost" test to plaintiffs' hypothetical situation of a contractor purchasing blocks in New York State and paying haulage to Florida, would probably result in a disallowance of the haulage costs since the Government could probably overcome the presumption of reasonableness. Conversely, where a claimant contractor actually paid a price and then sought to recover on the grounds that the price actually paid did not constitute a reasonable cost, the burden would then be upon claimant to overcome the presumption of reasonableness. This is essentially the position plaintiffs found themselves in both here and before the ASBCA. Plaintiffs did not introduce sufficient or substantial evidence to overcome the presumption that the price paid by them did reflect a reasonable cost of the materials. Indeed, the only evidence introduced was offered to prove the fair market value, and not to prove the reasonableness of the cost.

Though considerable uncertainty seems to exist as to what test has been applied in the past, we think that this court and other courts dealing with the question have applied the reasonable cost test either implicitly or explicitly. For example, the Supreme Court, in United States v. Callahan Walker Const. Co., 317 U.S. 56 p. 61, 63 S. Ct. 113, 115, 87 L. Ed. 49 (1942), a case involving an equitable adjustment for additional work performed, pointed out that, "An 'equitable adjustment' * * * involved merely the ascertainment of the cost of digging, moving, and placing earth, and the addition to that cost of a reasonable and customary allowance for profit * * *." Though the Supreme Court was dealing only with the question of administrative remedies provided in the contract, there is no question of a "reasonable cost" test in determining damages.

No doubt some of the uncertainty in this area is due to the fact that in some cases historical or actual cost, reasonable cost and fair market value are the same, while in others, reasonable cost may be the same as either fair market value or historical or actual cost, and in still others, reasonable cost may be neither fair market value nor historical or actual cost.

As plaintiffs themselves point out at p. 6 of their brief:

> * * * the test of either a downward or upward equitable adjustment should not be actual costs or actual bids, but what the reasonable cost would be in each instance. In the ordinary case, this frequently accords with actual cost. But where it does not, this court has refused to accept actual cost to the contract as determinative. [Emphasis supplied.]

To support this statement, plaintiffs cite F. H. McGraw and Co. v. United States, 130 F. Supp. 394, 131 Ct. Cl. 501 (1955), and Oliver-Finnie Co. v. United States, 150 Ct. Cl. 189, 279 F. 2d 498 (1960). From this statement, however, plaintiffs jump to the assumption that reasonable cost is in identity with fair market value. But here plaintiffs err. The two terms are not synonymous. Indeed, in the very cases cited by plaintiffs above, the court held that the determination of damages using a basis of actual cost was necessary "* * * where there is nothing in the record to show that plaintiff's bid was too low, and where it has not been proved that plaintiff's costs were unreasonable, or that plaintiff was itself responsible for any increased costs * * *." Oliver-Finnie Co., supra, 150 Ct. Cl. at 200, 279 F. 2d at 506. [Emphasis supplied.] As we said above, there is a presumption that actual costs paid are reasonable. That presumption must be overcome by whichever party alleges its unreasonableness.

Plaintiffs here have not been able to overcome the presumption that their actual costs were reasonable, hence they may not recover. From the record, it is clear that the only evidence plaintiffs introduced tended to prove the fair market value of the blocks some

eighteen months after the transaction. We are here not required to say that evidence of fair market value subsequent to a transaction is sufficient to prove fair market value at the time of transaction. We do say, however, that evidence of the fair market value of an item some eighteen months after a transaction involving the item does not rebut the presumption that the cost of the item was reasonable at the time of the transaction.

Defendant's motion for partial summary judgment is granted, and plaintiff's cross motion is denied. That portion of the petition involving plaintiffs' claim for $42,415.98 for "additional value" of building block, as set forth in the First Count of the petition is, accordingly, dismissed.

Laramore, Judge (concurring in the result).

I concur for the reason that the only evidence of value at the time was the invoice showing the price plaintiff paid for the blocks. In the absence of any other evidence of value at the time of the purchase, I would adopt the invoice price as the proper measure of value.

D. No Change Order Issued

B. W. HORN COMPANY

ASBCA No. 11517 (1967)

This is a timely appeal from the contracting officer's decision disallowing a contract price adjustment in the aggregate amount of $20,629.79 for overhead costs and compensation for the preparation of price proposals submitted at respondent's request for contemplated change orders which never materialized as a part of the contract. By agreement of the parties this appeal is restricted to the issue of entitlement, and this decision is so limited.

The captioned contract entered into on May 14, 1962, in the lump-sum amount of $917,600 provided for the construction of an addition to the station hospital at the United States Marine Corps Base, Twenty-Nine Palms, California, with a completion date of September 14, 1963. Due to contract changes, "A" through "X", this date was extended a total of 447 calendar days to April 30, 1965 with an adjusted contract price in the total sum of $1,007,640. On June 28, 1965, appellant presented a series of claims to the contracting officer in the aggregate amount of $38,371.49. A number of these claims were resolved by negotiation and the resultant settlement incorporated in change "Y" with an additive in the amount of $17,741.70. This was in full settlement of all of appellant's claims except for two items which remained in dispute and by virtue of a timely appeal are before us for present consideration.

Appellant seeks to be compensated for overhead costs attributable to the extension of the contract performance period by changes "A" through "X" and contended at the hearing of this appeal that it was not permitted, by unidentified members of the contracting officer's staff, to include during the negotiation of these changes the costs of job supervision, job site temporary facilities such as cost of field office, telephone, gas and oil, miscellaneous tools and equipment, power and water. The parties have stipulated, however, that appellant's reimbursement pursuant to these modifications contained a fixed percentage for overhead but appellant contends that this amount did not provide adequate compensation for the direct job site overhead costs which it now claims. Appellant's Secretary-Treasurer testified that these costs were not considered in arriving at an equitable adjustment of the various changes because the contracting officer's staff would not agree to their inclusion as a component of the equitable adjustment. Although appellant claims to have registered a verbal exception to this position it nevertheless formally accepted

without reservation each of the numerous modifications during performance of the contract. The contracting officer denied this claim on the basis that each modification constituted an accord and satisfaction.

Appellant also claims compensation for increased overhead costs due to the respondent initiating requests for breakdown estimates of cost with respect to changes which were contemplated but never required or implemented as a part of the contract. Although appellant has maintained no actual record of its costs pertaining to this latter claim, it estimated that a total of 635 manhours were utilized in the preparation of cost estimates at a rate of $8.54 per hour and that it expended $249.60 for travel for a total claim in the sum of $5,706.66. During the hearing, appellant did not adduce testimony in support of this claim, and our consideration thereof is limited to appellant's documentation as contained in the Rule 4 file.

DECISION

Appellant belatedly seeks to reopen a long series of change orders for recomputation of equitable adjustment on the basis that it was precluded from submitting a substantial portion of its overhead costs which were attributed to the site of the work, because of the alleged refusal of certain of respondent's personnel to consider these costs. Appellant did not identify these individuals or show their authority, nor did it prove when, where, to whom, whether oral or in writing, and under what circumstances, such a position was taken. Neither is there a showing that by agreement of the parties this matter was set aside for subsequent consideration. However the matter was raised, it was then abandoned by appellant. Appellant's evidence in support of this claim amounts to mere generalization and does not provide a basis for the reopening of executed contract modifications for changed work. Each modification concerned was complete on its face and reflected appellant's unqualified acceptance and agreement with the terms thereof. This is indicative of an accord and satisfaction, as to each modification, which in the absence of fraud, collusion or mutual mistake is binding on the parties within its agreed scope, and may not be disturbed. Columbus Jack Corp., ASBCA No. 7249, 1962 BCA ¶ 3288; J. J. Fritch General Contractor, Inc., ASBCA No. 5253, 1962 BCA ¶ 3298; E. B. Bush Construction Co., Inc., ASBCA No. 8573, 1963 BCA ¶ 3657. Having so accepted the various change orders of which it now complains, appellant is bound by its bargain.

Respondent's requests for price quotations for proposed changes in connection with this contract were routine and usual occurrences in construction work and, as such, should have been reasonably foreseen by appellant prior to bidding. The requests complained of set forth that they were not to be construed as an authorization for the performance of the work under consideration and made no provision for

payment for the information desired. Price quotations are ordinarily furnished by a vendor without monetary consideration and constitute normal communication between the parties on a construction contract. This was the course of conduct followed by the parties during the period of contract performance and at no time did appellant indicate that compensation for the furnishing of pricing information was expected or desired. The cost breakdowns here are no more than price proposals, on a form provided by the respondent for basic costs, and make no requirement for special design work or engineering in connection with the anticipated work. From the record before us there is no proof to show other than that appellant's price quotations constituted a voluntary effort without anticipation of remuneration.

Accordingly, as to these claims, this appeal is denied.

E. Timely Request

ONSRUD MACHINE WORKS, INC.

ASBCA No. 14,800 (1971)

The appeal in this case is from a decision of the contracting officer refusing to consider a claim that the contract be modified to reflect certain alleged changes thereto which contributed to extra costs of performance. The basis for the contracting officer's refusal to entertain the claim was his conclusion that no notice of intent to file a claim was received by the Government prior to final payment and that the right to an equitable adjustment under the "Changes" clause has thus foreclosed. The sole issue before the Board at this time is whether the notice requirements of the "Changes" clause have been satisfied under the facts of this case.

FINDINGS OF FACT

Certain of the evidence relates to the merits of the claim rather than the timeliness of filing the claim. For purposes of background and to set the stage for the only issue presently before the Board we will refer to this evidence in our findings of fact in terms of contentions of the appellant. It is not our intention here to make findings on the merits of the claim. Any findings relating to the merits are expressly reserved for future proof and consideration if that becomes necessary after the parties have taken further action consistent with the decision in this case.

The subject contract called for two Onsrud F-460 4-Spindle Verticle Profilers at a unit price of $308,174.50 each and other specified items resulting in a total fixed price of $627,482.00. The profilers are universal milling machines intended for milling heavy metals. The effective date of this contract was 7 December 1964. It was a negotiated contract entered into under authority of 10 USC 2304 A (10) authorizing negotiation with a sole source. The contract definitized a Letter Contract effective 12 August 1964 which in turn was the result of an Onsrud proposal submitted in response to a request for proposals issued on 9 July 1964 by Headquarters, Aeronautical Systems Division of the Air Force Systems Command at Wright-Patterson Air Force Base, Ohio. The record would indicate that Air Force funds were limited, that the contract negotiated price did not contemplate a profit and that appellant was motivated by the desire to obtain the contract and gain the experience. The record would also indicate that in the performance of the contract the contractor experienced losses beyond expectation.

The gist of the appellant's contention on the merits is that it was in effect directed by the Air Force to make the profilers using an aluminum bronze part with which it had no experience and which turned out to be the major cause of serious problems in performance. If, on the merits it were to be determined that the contract, properly interpreted, required the use of the aluminum part and that the requirement constituted a defective specification a remedy would exist for a constructive change under the "Changes" clause. Alternatively, if on the merits it were to be determined that the contract did not require the use of the aluminum part but it was nevertheless insisted upon by the Government and was a more expensive way to accomplish the result than the contract required, the situation would also present the classic "constructive change" situation. Whether the proof will support either theory is another matter but for present purposes it suffices to find a contractual remedy consistent with the pleadings. Our present task is to decide only whether the appellant is precluded from pursuing that contractual remedy.

Under the terms of the contract as originally entered into, completion of delivery of the profilers was to be accomplished by 2 September 1965. The place of delivery was appellant's plant. Under item 4 of the contract appellant was also to provide technical and engineering assistance to the Government for installation and check out of the two profilers at a classified erection site for a period of 60 days beginning 10 days after receipt of notice by the contracting officer, which notice had to be given no later than 120 days after each unit was delivered. Thus, performance under the contract was contemplated as continuing for some six months after delivery of the profilers. The specified delivery date was later extended by Supplemental Agreement to the contract until 30 June 1966 at a total decrease in contract price of $700 resulting in a total contract price of $626,782.00.

The profilers in fact were not delivered until 17 December 1966. However work was not completed by the appellant on one of the profilers until May 1970. As to the other profiler it was in final stages of completion at the time of the trial of this case. At the time the two profilers were accepted by the Air Force in December 1966 the DD Forms 250, Material Inspection and Receiving Reports were signed by the Government inspector without exception. On their face therefore these forms indicated acceptance of the units as conforming to the contract requirements. That the units did not conform and that the appellant understood the acceptances as conditional acceptances is shown by appellant's testimony and its internal concurrent memorandums so signifying and listing the defects needing correction. The defects were not latent defects. The fact that work continued beyond the period specified in the contract and beyond the time in February 1967 when appellant received its last payment from the Government is consistent with the appellant's view that it considered the acceptances conditional. The fact that the items were considered very high priority by the Air Force is also consistent with this view.

The last payment made under the contract was made by sub-voucher No. 0182-12 dated 21 February 1967. This was the eleventh sub-voucher and the amount paid with this sub-voucher when totaled with the previous ten sub-vouchers adds up to $626,782.00, the total price specified in the contract as amended. It is respondent's position that no claim was asserted by appellant prior to this sub-voucher and that this last payment is "final payment" in this case for purposes of the "Changes" clause. It is appellant's position that a claim was in fact asserted prior to this payment and that in any event it was not a "final payment" under the "Changes" clause.

Part of appellant's case for maintaining that it asserted a claim is based upon the alleged knowledge of the principal technical representative of the Air Force, a Mr. Hill, deceased at the time of the trial of this case, that appellant had such intentions. Appellant's proof consists of the testimony of a third person present at a conversation between the then president of appellant, Mr. Onsrud, and Mr. Hill in the summer of 1966. Apparently no record or memorandum of the conversation was made by either party at the time. In view of the death of Mr. Hill in October 1967, before the issue was raised, the respondent could not reconstruct the event and appellant elected not to call Mr. Onsrud as a witness at the hearing. The testimony does not convince us that Mr. Onsrud did anything more than alert Mr. Hill to his concerns about the mounting costs of performance, discuss the problems connected with the use of the aluminum bronze parts and receive assurances of proper assistance should he decide to institute claim action. It is in fact more consistent with the entire record to conclude that it was the intention of Mr. Onsrud not to institute claim action under the contract at that time. Mr. Thorsness, the General Counsel and Chief Executive Officer for Onsrud during this period testified that he could not prevail upon Mr. Onsrud to institute action seeking a contract change. What Mr. Thorsness did prevail upon company management to do was to seek advice from the Air Force officials as to how to obtain financial relief on this contract as well as other Onsrud contracts on which losses were suffered. That action along these latter lines was instituted prior to the last payment under the contract is not contested. That the circumstances were sufficient to constitute or preserve a claim under the "Changes" clause is contested.

On or about 2 November 1966, prior to delivery of the units, Onsrud personnel including Mr. Thorsness visited Wright-Patterson Air Force Base and met with the contracting officer. The purpose of the visit was to obtain advice on how to proceed to obtain recoupment on losses under four different contracts including the subject contract. The recollection of Mr. Thorsness and of the contracting officer regarding the details of this meeting is less than explicit. However it does permit of certain conclusions pertinent to this appeal. The company was obviously interested in its overall financial position. It was seeking overall relief in the neighborhood of $700,000 whereas the portion of its losses then attributed to the subject contract was estimated at approximately $216,000.

We find that the appellant did not purport to assert any claim upon a basis that it was covered by any provision of the contract. It did not mention the "Changes" clause as a possible vehicle of relief and as far as the record indicates it did not state facts which should reasonably have alerted the contracting officer that it considered that a claim existed under the "Changes" clause or any other clause of the contract.

The contracting officer knew or should have known that the company was having problems in performance. The contracting officer knew or should have known that the use of the aluminum bronze part was a cause of these problems. In such circumstances the contracting officer might have speculated that there could be a conceivable basis for some claim of recovery under the terms of the contract but on this record we cannot find that he was advised by appellant or is otherwise reasonably chargeable with knowledge that appellant considered it had some claim of legal right under the contract.

As an outgrowth of the first meeting, Mr. Thorsness prepared a written request for relief dated 18 November 1966. Mr. Thorsness' testimony is that the substance of this letter was based "in extreme detail" upon advice received from the contracting officer at the 2 November meeting. The contracting officer recalls seeing a draft letter at the 2 November meeting but doesn't recall giving advice on any specific approaches to relief. The testimony is that it was "not his position" to give advice and that he considered the meeting as rather a courtesy to him prior to the appellant taking the matter up with a Lt. Colonel Downer who had been Mr. Hill's supervisor and who, in November 1965, was transferred from Wright-Patterson Air Force Base to the Pentagon from which position he still was associated, at a different level of authority, with performance from a customer standpoint under all of the contracts in question.

The letter of 18 November 1966 was addressed to Lt. Colonel Downer, not at his Pentagon station but rather as Chief, Industrial Resources Branch, Wright-Patterson Air Force Base. The contracting officer admits having a copy of this letter in final form no later than 23 November 1966. Since it was addressed to Lt. Colonel Downer, the contracting officer took no action to answer the letter. Neither did Lt. Colonel Downer's successor at Wright-Patterson Air Force Base who was also present at the November meeting. Neither did Lt. Colonel Downer because Mr. Thorsness met with Lt. Colonel Downer on 21 November 1966 and again in January 1967 and Colonel Downer considered that the meeting obviated the need for a response to the letter as far as he was concerned. The tone of the meetings with Colonel Downer revolved around relief under what Colonel Downer understood to be the "hardship" clauses, or PL 85-804. Colonel Downer was sympathetic to relief but considered he had no authority to process claims. Whether he conveyed this to any representative of appellant is not revealed by the record but a reasonable contractor might conclude from the action, or rather inaction, of the contracting

officer that Colonel Downer was an appropriate official of the Government to discuss the 18 November 1966 claim letter. Colonel Downer's explanation for not referring Mr. Thorsness back to the contracting officer is that the claim grouped all four contracts and the discussion centered on all of the contracts as a group, several of "which had been previously closed out."

We conclude from the foregoing that the appellant's representatives and the contracting officer and Colonel Downer all considered that the request for relief contained in the 18 November 1966 letter was intended as a request for relief under PL 85-804 rather than under any contract provision. That the question was considered explicitly by the contracting officer at the time is indicated by the fact that within 5 days of date of the letter he sought advice from his legal office regarding the letter and was advised that it was not considered a claim under the contract but was rather a plea for extra contractual aid. It is also our conclusion that the substance of the letter does not assert a claim or a basis for a claim grounded upon legal right under the contract.

* * * * *

Appellant's claim for relief under PL 85-804 was later expanded in more formal manner, and at the time of the hearing of this case was still unacted upon, it being the understanding of appellant that final action on that claim was deferred pending the determination of the "Changes" clause claim presently before the Board. The document which precipitated the latter claim is a letter dated 19 December 1968 requesting contract modification to reflect compensable changes related to the use of the aluminum bronze parts. This is the letter referred to at the outset of this opinion, which the contracting officer determined was the first notice of "Changes" clause claim and, as such, filed too late to permit relief under that clause.

DECISION

The respondent argues that the decision in this case is governed by the holdings in Specialty Assembly and Packing Company, ASBCA No. 4523 et al., 59-2 BCA par. 2370, 156 Ct. Cl. 252, Martin Construction Co., ASBCA No. 10656, 66-2 BCA par. 5894 and Missouri Research Laboratories, Inc., ASBCA No. 12335, 69-1 BCA par. 7762. We find none of the cited cases controlling in this case. As we stated in Missouri Research Laboratories, supra, "The essence of the timeliness requirement of the "Changes" clause is that the contractor must properly assert its claim for adjustment 'within the life of the contract'" citing Martin Construction Co., supra. In the case before us we conclude that the claim was asserted during the life of the contract even though it was not "asserted", within the holdings of the above cited cases, prior to the final payments voucher of February 1967.

Before going further with the basis for our decision, we would point out that one cannot review this record without being left with an impression of a certain atmosphere of musical chairs surrounding the contractor's efforts to seek relief. We have not found the contracting officer chargeable with knowledge that appellant was asserting a claim under color of legal right and for this appellant has its own vagueness to blame. However, the contractor came seeking advice on how to proceed and the response and the advice it received was either equally vague or reasonably construed as encouraging an approach to relief under PL 85-804. Were our decision not based upon other grounds we would have to look at the record more thoroughly to consider the elements of a possible estoppel in the light of all the circumstances. Similarly, the urgency attached to delivery and the continued performance long beyond the last payment raise questions with respect to the finality of acceptance of the supplies and the "final" payment. We need not reach these questions because our decision in this case rests on the basis that "final payment" did not take place because the appellant's claim for relief under PL 85-804 was instituted prior to the last payment, claimed by respondent to be the "final payment", and was still pending at the time that appellant filed what is uncontested as a claim under the "Changes" clause.

In previous Board cases dealing with the question of whether or not a claim for relief under PL 85-804 would suffice to constitute timely notice of claim under the "Changes" clause "prior to final payment" the real issue involved related to the aspect of assertion of claim rather than the issue of whether "final payment" had taken place. If the Government knew or should have known that a claim of legal right was inherent in the request for money then this would suffice to comply with the notice requirement of the "Changes" clause regardless of the fact that this knowledge came about as a result of a request for relief under the discretionary authority of PL 85-804.

* * * * *

In holding that a contractual remedy is still viable in the circumstances of this case, we need not speculate upon the availability of a remedy in the United States Court of Claims upon theories of "cardinal" change, breach of contract or of innocent misrepresentation. We note only that appellant has elected to pursue whatever remedy it has under the contract and our decision addresses itself solely to that remedy.

In deciding that the notice provisions of the "Changes" clause were here complied with we do not mean to infer, nor does the record warrant a finding, that the appellant's delay in filing its "Changes" claims was without prejudice to the Government and in such a situation the burdens of persuasion to establish the merits of its case rests more heavily upon appellant who seeks to establish it as a matter of

fact. Acme Missiles and Construction Corp., ASBCA 13531, 71-1 BCA ¶ 8741, B-W Construction Co. v. United States, 100 Ct. Cl. 227, 236, Kaiser Aluminum & Chemical Corporation v. United States, 181 Ct. Cl. 902, 906.

The appeal is sustained and the case is remanded to the parties for further action pursuant to the "Changes" clause consistent with this decision.

F. Accord and Satisfaction

KURZ & ROOT COMPANY, INC.

ASBCA No. 17146 (1974)

This is an appeal from a final decision of 9 February 1972 of a successor contracting officer denying appellant's claims in the amount of $1,062,728 which had been submitted pursuant to the Government Furnished Property clause and the Changes clause of the subject contract.

Appellant's initial claim was submitted on 8 September 1969 in the amount of $950,727, supplemented by letter of 8 December 1970 increasing it by $83,599, for a total claim of $1,034,326. Using the $1,034,326 claim as a base, the Marine Corps' then contracting officer and appellant negotiated an oral settlement of $623,500, as the amount of appellant's entitlement. The oral agreement was not thereafter reduced to writing in the form of a supplemental agreement signed by the parties.

A claim dated 10 September 1971, in the amount of $1,062,728, is a resubmission of the initial claim which resulted from the reopening of negotiations. It is an increase of $28,402 resulting from minor adjustments in costs claimed plus additional interest costs.

The appellant stated in the claim of 10 September 1971, inter alia, as follows:

> This claim was originally submitted on September 8, 1969, in the amount of $950,727. After audit and negotiation, the Contracting Officer agreed to a settlement of $623,500. That settlement is held in abeyance pending submission of further substantiating data from the Marine Corps to the Chief of Naval Materiel. This submission is intended to amplify the file for the successor Contracting Officer and is made without prejudice to Kurz & Root Co.'s position that the Marine Corps is indebted to Kurz & Root Co. in the amount of at least $623,500 based upon agreement reached with the Contracting Officer, and the Marine Corps Procurement Review Board.

The appellant requested and a hearing was held limited to the following question:

> Was there a binding and enforceable agreement between the appellant and the Marine Corps' contracting officer to pay the appellant $623,500 as a result of defective GFE (namely, the governor and engine flywheel housing) subsequent to Modification 8 of the contract?

This opinion is therefore limited solely to that question.

Findings of Fact

The parties entered into a firm fixed price contract, as a result of formal advertising, for the manufacture and delivery of production quantities of 30 and 60 KW Generator Sets, together with related provisioning data, on 14 March 1966. The initial contract price was increased to $1,414,841.

The contract provided that the Government would furnish two different types of Detroit Diesel Engines to the appellant as Government-Furnished Equipment (GFE). The Government was to provide the actuator portion of the engine (Electronic) governor while appellant was to provide the loan sensing portion of the governor system. All deliveries of the finished generator sets were to be completed on or before 19 May 1967.

* * * * *

Modification 17, dated 20 December 1968, was signed by the contracting officer on 20 December 1968 but was not signed by appellant's representative until 23 December 1968. This modification revised the delivery schedule for First Article testing to January 1969 and revised the delivery of production units to March through May 1969. This modification contained the following language:

"The above change results in no change to contract price.

The contracting officer, Mr. Doral A. Hupp, prepared a Memorandum for File pertaining to Modification No. 17 on the date that he signed it, 20 December 1968. The Memorandum (Government Exhibit 5) is set forth as follows:

"CSG-5Aa
"20 Dec 1968

MEMORANDUM FOR THE RECORD
Subj: Change in Schedule-Modification P017-Contract NOm-73511

1. On 12-13 November 1968, Kurz and Root Company personnel met with Captain NAILOR and Mr. Doral A. Hupp for the purpose of discussing the delinquency of contract NOm-73511 and reasons therefor.

2. It was determined that the delay in deliveries was attributed primarily to the GFE Woodward Governor furnished to the Kurz and Root Company as a component part of the Detroit Diesel engine.

3. The Woodward Governor personnel corrected the deficiencies at no cost to the Kurz and Root Company, and it was determined by the contracting officer that an extension would be granted under the authority of the GFP clause. Therefore, a change in delivery schedule was granted as reflected in Modification P017 of this contract.

"/s/ Doral A. Hupp
"/t/ DORAL A. HUPP
"Contracting Officer"

* * * * *

By letter dated 5 February 1971, Mr. Underwood forwarded the request for funds to the Navy. The letter signed by Mr. Underwood is set forth as follows:

5 FEB 1971

From: Commandant of the Marine Corps
To: Commander, Naval Air Systems Command (Air-53413D), Washington, D.C. 20360
Subj: Requisition No. 19-65-5122
Ref: (a) Contract NOm 73511
Encl: (1) Justification for Contract Adjustment, Contract NOm 73511

1. Kurz and Root submitted under reference (a), a claim for contract adjustment in the amount of $1,034,326.00 for increased costs arising from deficiencies in Government Furnished Engines.

2. This Headquarters has negotiated a settlement in the amount of $623,500.00 under reference (a). Justification for this settlement is contained in enclosure (1).

3. Mr. P. R. Brauning, (NAVAIR 53441E), was advised of the Kurz and Root claim during meetings held (at) this Headquarters concerning generator procurement requirements for the Navy and Marine Corps.

4. An important factor in negotiation for the settlement was prompt/expeditious payment by the Government.

5. In view of the above, it is requested that subject requisition be increased by $623,500.00 to allow for payment of claims under reference (a).

"/s/ W.H. Underwood, Jr.
"/t/ W.H. UNDERWOOD, JR.

"By direction"

* * * * *

Subsequently funds were received by the contracting officer and he advised Mr. Ross on 3 March 1971 that he would have the Supplemental Agreement ready for signature on 5 March 1971. At Mr. Ross's request, Mr. Elmore invited both Mr. Ross and Mr. Brownell to be present in Mr. Elmore's office on 5 March. Mr. Ross advised Mr. Brownell and Mr. Brownell said that he would fly in on the 5th and sign the Supplemental Agreement and take a copy back with him so that he could receive funds from DCASR, Chicago so he would be able to satisfy his creditors.

* * * * *

At the time that Mr. Ross and Mr. Elmore negotiated the settlement of $623,500 neither of them was aware that settlements of over $600,000 had to be cleared by CNM.

* * * * *

Mr. Hupp served as contracting officer on the Kurz & Root contract from the time of issuance of Modification No. 8, which he signed but did not negotiate, through the issuance of Modification No. 18.

Mr. J. W. McLain, who was Director of Marine Corps Procurement before Mr. Underwood, directed Mr. Hupp to get all generator contracts back on schedule; not just Kurz & Root but all the other contracts.

Mr. Byron Whipple, Vice President of Kurz & Root had indicated to Mr. Hupp orally and in various letters that there would be additional costs because of slippage of the schedule due to deficient GFE.

At the hearing, Mr. Hupp testified that (1) he did not feel that the Government was at fault at all; (2) the delays were strictly those of Kurz & Root; (3) modification No. 17 was an extension of the delivery schedule in lieu of termination for default pursuant to ASPR 8-602.4(i); (4) the contractor wanted to "wipe the slate clean" by signing Modification No. 17 and the contractor gave up any claims it might have had on the entire contract prior to the execution of Modification No. 17; and (5) the document admitted as Government Exhibit 5 was just a Memorandum for Record as justification to support a changed schedule. It was prepared by both Mr. Hupp and Mr. Neuman.

Mr. Hupp, in effect, renounced the Memorandum for Record which he signed and at the hearing contended that Modification No. 17 was an "accord and satisfaction" of all claims under the contract.

There is no statement in Modification No. 17 that the contractor "waives all prior claims".

Admittedly Mr. Hupp was aware of several letters wherein the contractor made reference to additional costs and claims.

* * * * *

Nearly two months after signing Modification No. 17, appellant by letter of 23 January 1969 mentioned continued GFE Governor problems and other GFE problems and spoke of the necessity to establish a new delivery schedule and advised that increased costs as the result of added work and delays would be submitted in the near future.

Even on 5 March 1971, Mr. Underwood thought the settlement was a good deal until two things happened on 5 March 1971, to wit: (1) he received information, through the Deputy Quartermaster General of the Marine Corps, from the Staff investigators of The House Armed Services Sub-committee which raised serious questions in his mind as to the integrity of the negotiations; and (2) he learned of the NPD's requirement for clearance of which he had not been aware.

The information received by Mr. Underwood that might involve the integrity of this contractor, of this contract, and the parties involved in the negotiated settlement was not revealed to the Board by Mr. Underwood or any other witness.

The evidence of record does not substantiate any allegation of lack of integrity pertaining to this contractor, this contract, or to the parties involved in negotiating the particular settlement of $623,500. We find that the negotiators on each side ably protected the interests of the respective parties.

Contentions of the Parties

The Government contends that:

1. The contracting officer did not have actual authority to bind the Government to an agreement in the amount of $623,500.

2. The appellant is bound to the limitation on the contracting officer's authority.

3. The parties did not intend that the alleged oral agreement be binding.

4. The alleged oral agreement is unenforceable in that it is in violation of the Uniform Commercial Code and the Virginia Statute of Frauds.

5. Modification No. 17 was an accord and satisfaction as to all elements of appellant's claim up to the date of that modification.

6. Appellant is precluded from saying that approval of the Chief of Naval Material was not required.

7. Appellant waived any rights it may have had by virtue of such agreement by its President's acquiescing in the Marine Corps' seeking business clearance from the Chief of Naval Material.

8. Agreement is not binding on the Government because it was not an arms' length agreement.

The appellant contends that:

1. Modification No. 17 was not an accord and satisfaction.

2. The agreement of the parties to settle all claims for $623,500 is a binding accord and satisfaction.

Further Findings of Fact and Decision

The contentions of both parties may be reduced to two basic issues, to be resolved by this Board, as follows:

1. Was Modification No. 17 an accord and satisfaction with respect to appellant's claims for costs incurred up to the date of the signing of the Modification?

2. Was the oral settlement binding on the parties, both Government and appellant?

We determine that Modification No. 17 was not an accord and satisfaction as to costs incurred as a result of the defective GFE.

This Board has consistently held that language similar to "The above change results in no change to contract price" does not have the legal effect of an accord and satisfaction with respect to matters which the parties have excluded from their negotiations. Pan American World Airways, Inc., ASBCA No. 3627, 57-1 BCA p. 1240 contained a change notice with the following language: "There shall be no change in the contract price as a result of this change." In our decision in that appeal, we stated, inter alia, as follows:

> The Government's sole defense to the claim is that the contractor, by accepting the revision and extension of the delivery schedule, waived all claims of every character growing out of delays by the Government * * *. The uncontradicted evidence of the appellant is that it was never intended by the execution and acceptance of the new delivery program to waive any additional costs which had accrued prior thereto - which those in issue are - but only those which came about from the revision and extension itself. Certainly the quoted language in the change notification of 26 August (CCN 12) does not constitute a waiver or settlement of existing monetary claims.

Pan American World Airways was later followed by the Board in Polyphase Contracting Corporation, ASBCA No. 11787, 68-1 BCA p. 6759, wherein we held that a modification extending a delivery schedule at no change in contract price did not bar claims for equitable adjustment in contract price. In that decision we stated:

"If Modification No. 1 had been intended to compromise such claims, such intent should have been recited in that Modification or should otherwise be apparent from the course of the negotiations." As we have stated in our findings of fact there is no waiver or no recitation of the compromise of any claims in Modification No. 17.

The Board reaffirmed the basic principles of no accord and satisfaction under such conditions in General Maintenance and Engineering Co., Inc., ASBCA No. 14643, 70-1 BCA p. 8243. In that appeal we held that the modification barred only those claims for price adjustment which arose because of the signing of the modification.

The appellant denies that Mr. Whipple made any such agreement as an accord and satisfaction.

Based on (1) an analysis of all the evidence; (2) consideration of the frustrating period the contractor was going through with delays and increased costs due to defective GFE; (3) the fact that Government Exhibit No. 5, and other evidence, clearly establish that the GFE was defective; and (4) the fact that Modification No. 17 contains no waiver of the claims in question, we determine that Modification No. 17 was not an accord and satisfaction as contended by the Government.

In addition we have determined that Mr. Elmore was aware of the terms of Modification No. 17 during negotiations of the $623,500 settlement and gave full consideration to the question of whether it was an accord and satisfaction. Mr. Elmore agreed to settle all claims. In so doing, he determined that the modification was not an accord and satisfaction and his determination is binding on the Government. This Board in Electrospace Corporation, ASBCA No. 14520, 72-1 BCA p. 9455, established the legal effect of such a determination. In that decision, the Board rejected the Government's argument of accord and satisfaction and stated:

> The contracting officer's actions in this case before us, in approving negotiations following the audit and evaluation for a $93,000 settlement, are inconsistent with the view that the statements in the TAR were final and conclusive. These actions effectively negated whatever rights the Government might have had to change without price adjustment or to a reduction in price.
>
> In other cases concerning finality of agreement we have examined the subsequent behavior of the parties to determine the effect accorded the purported agreement by the parties. The Court of Claims has, as have we, held that a release from all claims signed by the parties has been abrogated by

the subsequent actions of the Government showing the release to be conditioned as, for example, entertaining further negotiations on the claim. See Winn-Senter Construction Co. v. United States [4 CCF p. 60,454], 110 Ct. Cl. 34 (1948); Collins Radio Co., ASBCA No. 4487, 59-2 BCA p. 2313; National U.S. Radiator Corp., ASBCA No. 3506, 61-2 BCA p. 3192; Mecon Co., ASBCA No. 13620, 69-2 BCA p. 7786.

In the case at hand, Mr. Elmore's subsequent settlement of the claims abrogated any accord and satisfaction which the parties might otherwise be held to have effected by the execution of Modification No. 17.

To resolve the second issue, the question the Board must answer is whether the decision and oral agreement by the contracting officer and appellant is "final and binding" on the Government and therefore not subject to revocation by a successor contracting officer.

We conclude that the oral agreement of 14 December 1970 to settle the claims for $623,500 was clearly intended to put to rest a matter which had been under discussion between the parties for a period of approximately two years. It was a "final and binding" agreement. The parties definitely intended the agreement to be final. We discussed, at length in our findings, the fact that Mr. Ross considered it final. In his justification for the settlement, the contracting officer stated in writing that:

> Negotiations with the contractor were conducted by the Contracting Officer, and the $623,500.00 adjustment agreed upon is conditioned on the release by the contractor of all further claims, including that portion of the $1,034,326.00 claim which applies to costs sustained because of the railroad hump test failure which the contractor attributes to the engine flywheel housing."

Mr. Underwood, the Director of Marine Corps Procurement, considered it a binding agreement and a good deal as can be seen by the letter of 5 February 1971 (ibid.) requesting the funds from the Navy.

The oral settlement negotiated between Mr. Elmore and Mr. Ross is a valid, legal, and binding agreement despite the fact that it was oral and not written. There is no requirement that a contract or settlement agreement be in writing. The Courts and Boards of Contract Appeals have repeatedly held that a binding oral contract or agreement is formed when the Government accepts an offer notwithstanding the fact that both parties intend to sign a formal contract or agreement at a later time. Electrospace Corporation, op cit. supra, and cases cited therein; United States v. Purcell Envelope Company, 249 U.S. 313 (1919).

In Penn-Ohio Steel Corp. v. United States [11 CCF p. 80,189], 173 Ct. Cl. 1064, 354 F. 2d 254 (1965) the Court of Claims held that oral acceptance of a modification to a Government contract by the Secretary of the Navy was binding even though the modification was never signed. See also Sperry Gyroscope Company, Division of Sperry Rand Corp. ASBCA No. 9700, 1964 BCA p. 4514 and Vitro Corporation of America, ASBCA No. 14448, 72-1 BCA p. 9287.

In this regard, we also conclude that the above-cited cases are dispositive of the Government's argument that the agreement is unenforceable because it is in violation of the Virginia Statute of Frauds. We hold that the Virginia Statute of Frauds is inapplicable and would not preclude this agreement in any event.

The Navy Procurement Directives do not render the oral agreement void and unforceable. The requirement for business clearance by the CNM is a procedural and internal operating instruction. It fixed at $600,000 an amount that a contract could be amended pursuant to a Changes or Government-Furnished Property clause without CNM business clearance.

The Government's argument that ASPR 1-403, which provides as follows:

> No contract shall be entered into unless all applicable requirements of law and this Regulation, and all other applicable procedures, including business clearance and approval, have been met.
>
> Confers the force and effect of law on the NPD's requirement for business clearance of an amendment in excess of $600,000 is ingenious but we are not persuaded.

The ASPR provision is published in the Federal Register and does have the force and effect of law. The Navy Procurement Directives are not published in the Federal Register. Had they been there is no question but that we would have to conclude that any limitation on the contracting officer's authority would have been binding on appellant. In this regard, see Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). The failure of the Navy to publish the NPD's in the Federal Register deprives the NPDs of any legal effect againstone who is without actual knowledge. See Braude and Lane, Insights on Validity of Procurement Regulations, 31 Fed. Bar Journal (1972) and Davis, Administrative Law Treatise. p. 6.12 (1958) at 406.

In Electrospace Corporation, ASBCA No. 14520, supra, the Board stated at page 43, 926, as follows:

> An internal instruction does not have the effect of a statute of a regulation published in the Federal Register and is not binding on appellant absent his knowledge of its existence.

Not only did the appellant not know of the over $600,000 business clearance requirement, neither did the contracting officer nor the Director of Marine Corps Procurement.

We have considered all of the Government's arguments and as we stated in our findings, we conclude that the appellant did not waive any rights by filing a new submission of appellant's claim on 10 September 1971. We further conclude that the agreement is binding on the Government and it was made at arm's length.

Although the hearing was held on the limited issue only, this is a very complete record and it appears that this was a good settlement on the merits.

Based on the above, the following question:

> Was there a binding and enforceable agreement between the appellant and the Marine Corps Contracting Officer to pay the appellant $623,500 as a result of defective GFE (namely, the governor and engine flywheel housing) subsequent to Modification 8 of the Contract?" is answered in the affirmative.

For the foregoing reasons the appeal is sustained in the amount of $623,500.00, and is otherwise denied.

Section 5. Proceeding with the Contract as Changed

ELECTRONIC INDUSTRIES, INC.

ASBCA No. 10881 (1967)

This is an appeal from a default termination based on a finding that the uncured failure of the contractor to make progress endangered contract performance. The contract contained the customary "Default" article as set forth in Standard Form 32, June 1964 Edition. The contract also contained the last sentence of which we deem of controlling significance in this case. Such sentence reads as follows:

> However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

This contract was awarded on February 19, 1965 and called for delivery of 123 units of Item 1 (an installation kit) and 115 units of Item 2 (another type of installation kit) for a total price of $6,622.05 on a staggered basis from March through June 1965. Originally this procurement was under cognizance of Frankford Arsenal, Philadelphia, Pennsylvania. On April 5, 1965, the Arsenal sent the contractor a change order (by telegram) but included the following sentences:

> * * * THE CHANGES ARE TO BE PHASED INTO PRODUCTION WITHOUT INTERFERING WITH DELIVERIES COSTS ARE TO BE NEGOTIATED BY YOUR DISTRICT PRIOR TO IMPLEMENTATION COMPLETE E. O. PACKAGE WILL BE FORWARDED UNDER SEPARATE COVER* * *."

Just what connotation should be placed on the aforequoted language is perhaps uncertain. The contractor interpreted this as a stop work order. The matter is of no operative significance because of subsequent events.

On April 16, 1965, cognizance of this procurement was transferred to the Army St. Louis Procurement District and the contractor was so notified in writing. There was some interchange of correspondence and telephone communications concerning costing. Apparently the contractor was not happy with the changes. In a letter to the contracting officer dated April 20, 1965, the contractor for the first time indicated to the St. Louis District that the contractor regarded Frankford's telegram of April 5, 1965 as a stop work order. The contract administrator called the contractor on April 22, 1965, and advised the contractor it was in error when it regarded the April 5,

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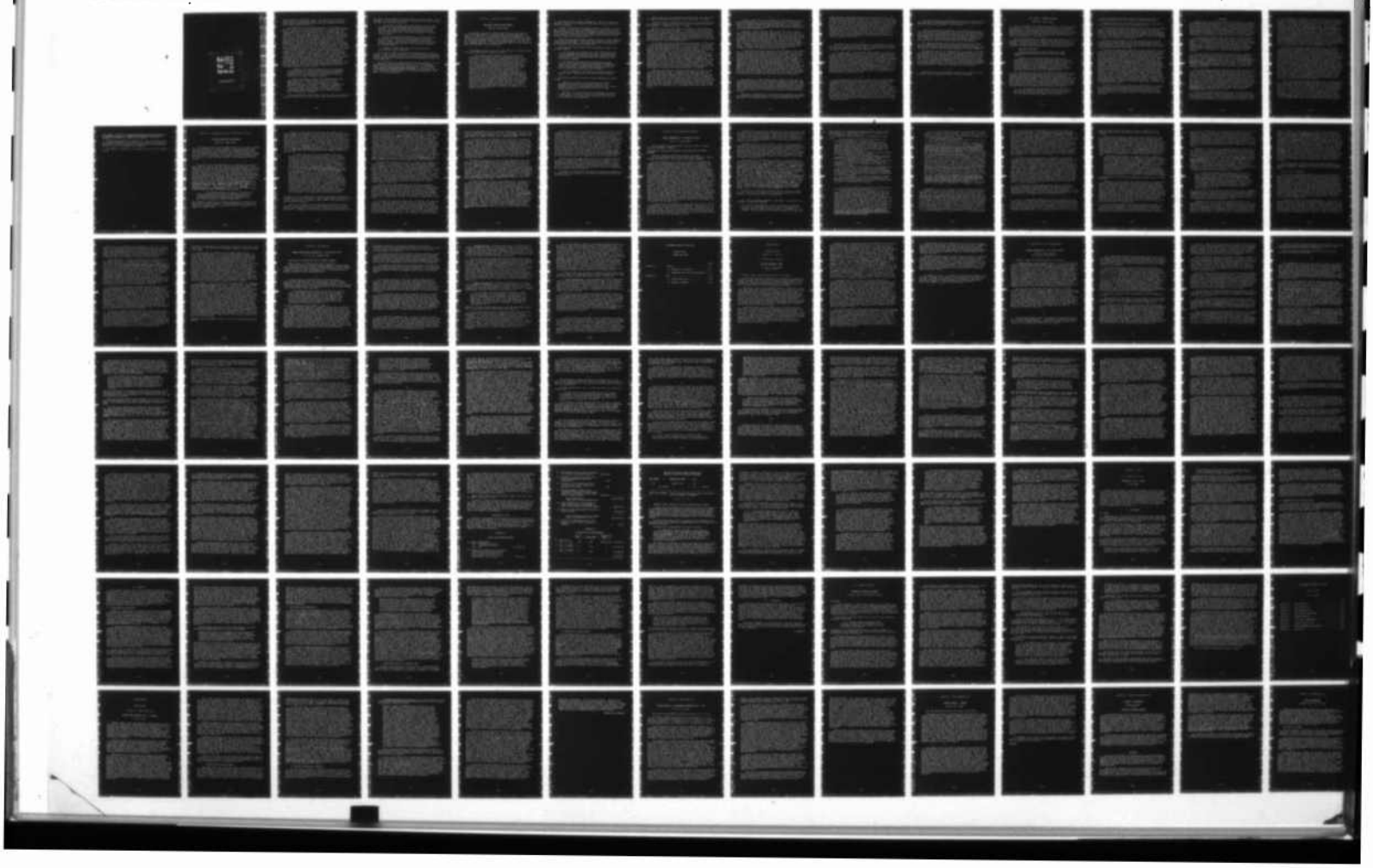

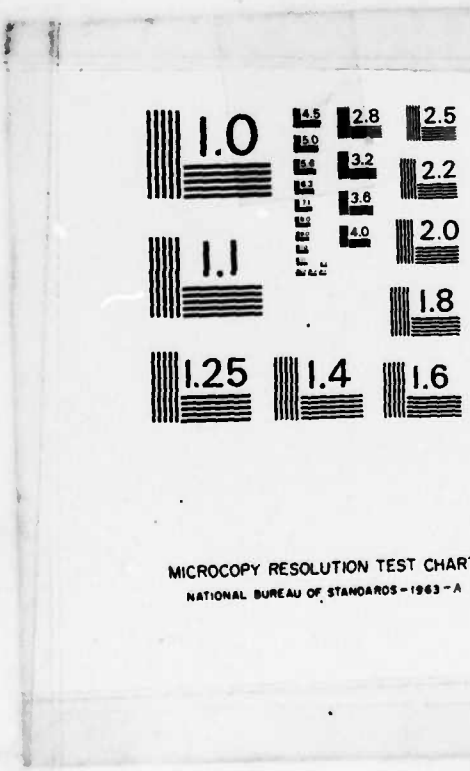

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1965 telegram as a stop work order. The contractor was informed it would receive a change order shortly and that it should continue working and incorporate the changes which were mandatory and that costs would be adjusted later.

The contractor received Modification No. 1 to the contract on April 27, 1965. This was a complete technical change order signed by the St. Louis District contracting officer. The contractor had stopped work when it had received the April 5, 1965 telegram for Frankford. On April 30, 1965, the St. Louis District which now had cognizance of the procurement telephoned the contractor and required why it was not working on the contract. The contractor apparently took the position that it had negotiated the contract with the Frankford Arsenal from which it had a telegram telling it not to proceed until change order costs were agreed upon. The contractor's attention was called to the mandatory unequivocal Change Order (Mod. 1) it had received from the St. Louis contracting officer. On May 2, 1965, by telegram the contractor said, without giving cost data, that it was doubling the price of Item 1 and tripling the price of Item 2. In view of the contractor's insistence that its performance was stopped by the Frankford Arsenal on April 5, 1965, the contracting officer sent a telegram to the contractor on May 6, 1965 stating clearly that the April 5, 1965 telegram was not a stop order. At a conference in the contractor's office on May 11, 1965, the contractor confirmed that it had performed no work since the April 5, 1965 telegram and that it would do nothing until that telegram was rescinded and the costs of Modification No. 1 were agreed upon. By letter of May 12, 1965, the contractor reiterated its position as to the significance of the April 5, 1965 telegram and we find the following paragraphs in such letter:

> Inasmuch as the changes requested which are mandatory involve additional costs, until these costs are negotiated and agreed upon and authorization is furnished Electronic Industries, Inc., they cannot be implemented into any production on the above referenced contract.
>
> Further reference is made to SLPD telegram dated May 7, 1965 wherein your command states the effectivity of Modification No. 1. All of the units prior to these specified have been produced and shipped and, therefore, an automatic stop work is in effect. Electronic Industries, Inc. is not bound contractually to continue production implementing these changes without this negotiation, and since these changes are mandatory, we can go no further until this matter is resolved.

There was apparently some urgency related to this procurement and on May 19, 1965 a ten day "cure" letter under the "Default" article

was sent to the contractor citing its failure to make progress in performance (in this case actual refusal to perform). By letter of May 28, 1965, the contractor replied:

> We therefore ask that the power you have vested in you be used to its best advantage and some action be taken immediately. Our legal personnel have informed me that under the terms and conditions of the contract and the present status of your paper work, we are not obligated to continue on the contract.
>
> We must have either an approval of the new unit prices as set forth or authorization to proceed on a time and materials basis. You are the fourth person with whom we have had contact concerning this contract of your office and do hope and pray that you will be able to get this matter off of dead center.
>
> Request is hereby made that you notify the writer within 10 days of your approval.

As of June 11, 1965, the contractor had delivered 11 units of Item No. 1 and 12 units of Item No. 2. On that date the contracting officer issued a default termination notice citing overdue deliveries and the fact that the contractor had quit work and made no effort to resume operations.

We are not clear as to what delivery schedule extension, if any, was reasonably required by Modification No. 1. Even though an appropriate extension would place the contractor in a non-default status insofar as deliveries were concerned, the refusal of the contractor to continue performance furnished the contracting officer with a completely adequate basis for the default termination. The appeal is accordingly denied.

NORTHEAST CONSTRUCTION COMPANY

ASBCA No. 11049 (1967)

This appeal presents a claim by appellant that rock which it encountered and removed in excavating was a changed condition for which it is entitled to an equitable adjustment of $56,450.63. The contracting officer denied the claim finding that appellant's notice of the alleged changed condition was untimely and that the Government was thereby prejudiced. He has not decided whether or not the rock was a changed condition. Appellant contends the notice was timely and that the Government was not prejudiced.

* * * * *

The Changed Conditions article in the contract (on Standard Form 23-A, April 1961 Edition) reads as follows:

> The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (a) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (b) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the Contractor's cost of, or the time required for performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; or unless the Contracting Officer grants a further period of time before the date of final payment under the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 of these General Provisions.

II

The contract was awarded on December 31, 1962, in the amount of $635,000, and was to be completed within 380 days after receipt of notice to proceed.

The work concerned in this appeal started in late April or early May of 1963. It consisted of the grading of an area which was an existing parking lot, partially blacktopped but mostly surfaced with gravel, on which there were two buildings and some existing structures to be removed. The area was to be lowered approximately five feet. The work was done by a subcontractor.

Soon after the subcontractor started to grade it struck layers of large stones and boulders. These would be struck after the second or third pass of the scraper. The stones and boulders could not be easily removed with earth moving machinery.

Appellant sent the following letter dated May 9, 1963 to the resident engineer:

> In the course of construction of the referenced project we have frequently encountered rock layers and boulders of size and hardness that preclude cutting or removal by power-driven tools. Such occasions create serious delays in our construction progress.
>
> We respectfully request that we be given your permission to use dynamite charges of minimum size necessary to remove rock obstructions that impede progress in construction of the project. Maximum care and precaution will be used in handling and activating these charges.
>
> We will appreciate receiving your considered reply at an early date. Thank you for your attention and cooperation.

The resident engineer replied by letter dated May 20, 1963 as follows:

> Reference is made to your Contract No. DA-23-028-ENG-6033 for construction of the 5th Increment, 1st Regimental Area, Ft. Leonard Wood, Missouri, and your letter of May 9, 1963 requesting permission to blast in your construction area.
>
> Inclosed is a copy of the blasting procedure to be used for your area. All blasting shall be coordinated with Mr. L. Bennington of our office, and extreme care shall be used in all aspects of this operation.

Neither appellant nor the subcontractor blasted. The subcontractor removed the stones and boulders using rippers and end loaders.

The record does not show when the last of the stones and boulders were removed. It does show that all of the work under the contract was accepted as complete as of April 2, 1964.

Appellant's first claim letter with respect to the stones and boulders was dated August 20, 1964. It referred to the 9 and 20 May 1963 letters; stated that thereafter great amounts of hard stone and rock were encountered within and without areas bordered by building foundations; that this impeded construction of underground footings, foundations, conduit systems, water lines, sewers, vehicle lifts, and gasoline system; that approximately 3500 cubic yards of rock and stone were removed; and claimed $61,985 therefor.

The resident engineer was advised by the contracting office that a claim had been made by appellant for rock excavation. He was asked if rock had been encountered; and, if so, where it was encountered, how much was encountered, and how it had been removed. The resident engineer and the inspectors on the site had not kept any records with respect to rock removed. The resident engineer conveyed the contracting officer's request to an inspector who was familiar with the excavation done. That inspector, upon the basis of his memory as to what had happened, replied by memorandum dated November 16, 1964, that (1) boulder type rock had been encountered in grading the southeast area of the project, that it amounted to approximately 1670 cubic yards, and that it was removed by rippers and dozers, (2) that approximately two cubic yards of rock were encountered in building excavations at the bottom of piers for three buildings, and (3) that approximately 78 cubic yards of rocky material was encountered in the storm sewer line and was removed by jack hammer and backhoe.

Appellant discussed the claim with the contracting officer and others on February 3, 1965. Thereafter, on August 30, 1965, the contracting officer denied the claim finding that appellant's first notice of the claimed changed condition was its letter of August 20, 1964, that the lack of notice seriously prejudiced the Government in that its opportunity to investigate the actual conditions and compare them with those indicated in the contract was no longer available, and that there was now no way to determine accurately the portion of the total excavation that was rock. He stated specifically that he made no decision as to whether or not a changed condition had been encountered.

III

The Board finds that prior to August 20, 1964, appellant did not advise the Government, in writing or otherwise, that it had encountered or allegedly encountered changed conditions. And the Board finds that prior to August 20, 1964 the Government had no constructive notice or knowledge that a changed condition or possible changed condition had been encountered.

Appellant's letter of May 9, 1963 did not constitute a notice that a changed condition had been encountered. It is true that no particular form and no particular wording is required in a notice that a changed condition has been encountered. The notice need not cite or paraphrase the changed conditions article. But it must in some way be sufficient to convey the thought that what has been encountered is materially different than indicated in the contract, or was unknown and is unusual, or will be the subject of a claim for time or money or both. The May 9, 1963 letter was not sufficient to do any of these things. It merely reports that rock has been encountered and is delaying progress, and requests permission to blast.

In this connection the record shows that the soil at Fort Leonard Wood was known to the resident engineer, to the inspectors, and to other contractors to be rocky and to contain boulders. Several other contractors had encountered boulders on the Fort. Most contractors who have done excavation work on the Fort have encountered rock. Requests for permission to blast, and blasting, are not uncommon and the Fort has an established blasting procedure set up. Therefore appellant's report that rock had been encountered and its request for permission to blast did not alert the Government to the fact that appellant might consider the rock to be a changed condition within the meaning of that clause. And there is no reason why it should have done so. The May 9, 1963 letter does not say where on the site the rock had been encountered or at what elevation and the contract showed by way of test pit information that rock did exist some 5 to 10 feet below where the four motor vehicle shops were to be constructed.

* * * * *

Upon the basis of conflicting evidence the Board finds that the contracting officer did not, on February 3, 1965 or at any other time, acknowledge that, prior to the receipt of appellant's August 20, 1964 letter, he had received a timely, proper, and adequate notice that the rock encountered constituted a possible changed condition. The Board finds further that if the contracting officer had so acknowledged he would clearly have been, on the basis of the record before the Board, in error.

Appellant also argues that the Government had adequate and timely notice because of conversations at the site and because the Government knew that a considerable quantity of stone and boulders was being

encountered and removed and knew where this was taking place. The evidence does not show that anyone orally claimed that a changed condition had been encountered or indicated in any way that a claim might be made. Both the resident engineer and the inspector deny that there was any such conversation. The evidence does show that the inspector, and to some extent the resident engineer, knew that a considerable amount of stones and boulders were being encountered and removed and knew generally where this was taking place. The evidence does not show that they had any reason to believe that this constituted a changed condition or that appellant would later claim that it did. To the contrary the evidence shows that they reasonably viewed the presence of the stones and boulders as being nothing different than might be expected on the site.

IV

The Board finds that the Government was prejudiced by the fact that it did not receive notice, written or otherwise, prior to August 20, 1964 that appellant considered that a changed condition had been encountered and would make a claim therefore.

It is clear that if the Government had received a timely notice of the alleged changed condition (i.e., shortly after the stones and boulders were encountered and before any substantial amount of them had been removed) it could have and would have investigated the actual conditions that existed and more importantly could have and presumably would have kept records as to where the stones and boulders were encountered or as to the quantity removed, and as to other facts relevant to the amount of the equitable adjustment, if any, to which appellant would be entitled. Because the Government did not consider the stones and boulders to be a changed condition and because appellant failed to give a timely notice that it so considered them, the Government did not keep such records and is thus prejudiced in defending against appellant's claim.

V

Because appellant did not give a timely notice of the alleged changed condition and because the Government was prejudiced thereby the appeal could be denied at this point. The Board believes, however, that the evidence in this case shows that the prejudice extends only to the question of amount, and does not extend to the question as to whether the stones and boulders constituted a changed condition. The Government does know that stones and boulders were encountered in the southeast area of the site, and it has a sufficient basis upon which to estimate that 1670 cubic yards were removed. If, as appellant contends, the contract indicated that no rock would be encountered in excavating the southeast area of the site and if 1670 cubic yards were encountered and removed then appellant did encounter a changed condition.

VI

The stones and boulders encountered and removed by appellant were not subsurface or latent physical conditions at the site differing materially from those indicated in the contract.

* * * * *

The Board finds that the locations of the test pits were such that they did not indicate whether rock would or would not be encountered in excavating the southeast portion of the site where the stone and boulders were encountered. The contract does not otherwise indicate whether rock would or would not be encountered in such excavation. Therefore, the stones and boulders encountered were not a condition that differed from those indicated in the contract.

The stones and boulders that were encountered were not unknown physical conditions at the site of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract.

The character of the work concerned was the grading or excavation of a portion of a job site to a depth of some two to five feet. The work was done at Fort Leonard Wood. The evidence shows that stones and boulders are not conditions of an unusual nature at the Fort and that they are ordinarily encountered when such work is done at the Fort. Thus, what was encountered did not differ materially from what is ordinarily encountered. And there is no evidence that the quantity encountered differed materially from the quantity that would be ordinarily encountered. Instead the evidence is to the contrary.

VII

Upon the basis of the foregoing findings (i.e., lack of notice, prejudice, and no changed condition) the appeal is denied.

* * * * *

LEE R. SMITH - CONTRACT BUILDER

ASBCA NO. 11135 (1966)

This is an appeal from the contracting officer's decision denying the contractor's claim in the amount of $2,452.50 for an overage in the quantity of re-roofing the contractor was required to perform. While conceding that the quantity was substantially in excess of the quantity stated in the invitation for bids, the Government denied the claim on the ground that the contract called for re-roofing of the specified buildings at a lump sum price.

The contract dated May 11, 1965 was placed by formal advertising and awarded to appellant as low bidder in the lump sum amount of $11,964. It was in the form of a construction contract with the provisions of Standard Forms Nos. 23 and 23A. The invitation for bids (Standard Form 20) contained the following "Description of Work":

> Description of work
>
> Maintenance Reroofing 20 Miscellaneous Buildings (approximately 610 Squares) Shaw Air Force Base, North Carolina.
>
> Bidders should carefully examine the drawings and specifications, visit the site of the work and fully inform themselves as to all conditions and matters which can in any way affect the work or the cost thereof. Should a bidder find discrepancies in, or omissions from the drawings, specifications, or other documents, or should be in doubt as to their meanings, notify the Contracting Officer at once and obtain clarification prior to submitting a bid.

The invitation for bids also incorporated a contract drawing and technical specifications describing the work to be performed. The technical specifications described the work as consisting of re-roofing 20 buildings at Shaw Air Force Base, South Carolina, that were identified by building number. The contract drawing consisted of a map of Shaw Air Force Base on which the 20 buildings to be re-roofed were clearly identified. The technical specifications did not show any quantities or dimensions. Paragraph 1.05 of the specifications, entitled "Materials", contained the following subparagraph b:

> b. All quantities and dimensions are to be verified at the site by prospective bidders before placing their bids and they shall satisfy themselves as to the total amount of work to be accomplished and submit bids accordingly.

The invitation for bids and contract contained the standard Changes and Changed Conditions clauses of Standard Form 23A.

Appellant bid on the job without making any prebid site inspection. His bid was $36 less than the second low bid.

After appellant started performance of the work he found that the actual quantity of re-roofing was substantially in excess of 610 squares. Appellant contends that the actual quantity was 735 squares, which is about 20% in excess of the quantity stated in the invitation for bids. When appellant's bid price is divided by 610, this produces a unit price of $19.62 per square, and appellant's claim is for $19.62 per square on an overrun of 125 squares.

Appellant did not appear at the hearing which was held at the time and place requested by him, and the Government gave uncontroverted evidence to the effect that a fair and reasonable unit price of the re-roofing was $17.83 per square and that the actual quantity of re-roofing performed was 691 squares.

The contract drawing and specifications were prepared by the Base Civil Engineering Office (BCE) without any indication therein of the quantity of work to be performed. BCE prepared for purely budgetary purposes an estimate showing 610 squares as the quantity of re-roofing, basing such estimate on real estate records with 12% added to the square footage to take care of roof overhangs and slopes. When Base Procurement received the drawing and specifications with the accompanying estimate for budgetary purposes, it prepared the above-quoted "Description of work" showing 610 squares as the approximate quantity. After appellant started work, he complained of the excess quantity; whereupon BCE computed the quantity of re-roofing by having two men make measurements from the ground, and, after making allowances for overhangs and slopes, they computed the quantity as 691 squares. It took them about six manhours to make these measurements from the ground. Their computation of the number of squares of re-roofing is subject to the imprecision that is inherent in the method they used, as it involved visual examination from the ground of the roof slopes and overhangs and estimating the amount to be added to the ground measurements to allow for overhangs and slopes. However, it represents the best evidence of the actual quantity of re-roofing that is afforded by the record.

The record indicates that appellant's computation of 735 squares as the actual quantity is based on the quantity of materials used. The Government gave uncontroverted evidence that the quantity of material used is not a reliable measure of the quantity of roofing installed, because of the need to allow for ridges, starting strips and waste.

DECISION

Appellant does not contend that the work included in the contract and intended to be covered by the lump sum price was the performance of only 610 squares of re-roofing. It is mutually agreed by the parties that the contract called for the re-roofing of the 20 buildings identified in the specifications regardless of whether the quantity of work proved to be more or less than 610 squares. The statement of "approximately 610 squares" in the "Description of work" was a representation as to the quantity of work set forth in the specifications rather than a limitation on the quantity of work to be performed.

The Government indicated in the IFB and contract that the quantity of re-roofing was approximately 610 squares. The dictionary meaning of "approximately" is "very near, near to correctness, nearly exact." It is derived from the Latin word "proximus", meaning, "the nearest, next." The use of the term "approximately 610 squares" suggested that the quantity was rounded to the nearest ten squares. The Government concedes that the actual quantity was at least 691 squares, which is substantially in excess of approximately 610 squares.

The Court of Claims and this Board have held that an underestimate by the Government in the amount of work to be done under the contract is a changed condition under GP-4, the standard Changed Conditions clause. Chernus v. U.S., 110 Ct. Cl. 517; Murray-Sanders & Associates et al., ASBCA Nos. 6123 and 6217, 61-2 BCA ¶ 3145; Gil Wyner Co., Inc., ASBCA No. 6114, 61-1 BCA ¶ 2994. See also 4 McBride & Wachtel, Government Contracts, Section 29.70(6). An approximate quantity is a stronger and more precise representation than is an estimated quantity.

It is clear that the actual quantity of work differed materially from the quantity represented by the Government in the invitation for bids. This constitutes a changed condition cognizable under the Changed Conditions clause, unless the contractor could have discovered the error in the Government's quantity representation by an examination of the plans and specifications or from a prebid examination on the site; as it has been held that a contractor cannot recover under the Changed Conditions for a misrepresentation by the Government that the contractor could have discovered from an examination of the plans and specifications or from an examination of the site. R. M. Duval Construction Co., Inc., ASBCA No. 8629, 1963 BCA ¶ 3722; Allied Contractors, Inc., ASBCA No. 2905, 56-2 BCA ¶ 1089; Blauner Construction Co. v. U.S., 94 Ct. Cl. 503.

There is no contention that appellant could have detected the error in the Government's statement of quantity in any way except by a site examination. The fact that appellant made no prebid site inspection makes no difference, as he is chargeable with knowledge of what he could have discovered by a reasonable prebid site inspection, but

is not chargeable with knowledge of what would not have been disclosed by such an inspection. The crucial issue in this appeal is whether appellant could have discovered the error in the Government's quantity statement by a proper site inspection, and this calls for a determination of the scope and extent of the site inspection he was chargeable with making. In Bailey-Lewis-Williams of Georgia, Inc., ASBCA No. 4997, 59-1 BCA ¶ 2225, we said: "Appellant is charged with such knowledge of the physical conditions at the site as could be gained by a reasonable site investigation." We are not aware of any case where the Changed Conditions clause has been interpreted as charging a contractor with knowledge of conditions at the site that could not be discovered by a visual examination of the site. In R. M. Duval Construction Co., Inc., supra, we used the phrase "discovered by visual examination of the site". We are not aware of any case where the site examination the contractor is chargeable with making has been held to require the making of on-site measurement to verify the accuracy of Government figures in the invitation for bids.

Although the Government argues that appellant could have discovered the error in the Government's quantity representation by measuring each building prior to bidding in the imprecise manner followed by the Government itself after appellant complained about the excess quantity, we find this to be beyond what was called for by a reasonable prebid site examination. The Government itself did not go to the time and expense of measuring the areas to be re-roofed in preparing the plans and specifications and making its prebid cost estimate. There is no substantial evidence that any bidder made any prebid measurements to verify the Government's quantity representation or that it is customary for bidders to make such measurements. The principle of full and free competition by formal advertising pursuant to 10 U.S.C. Section 2304 dictates that the expense of bidding not be disproportionate to the dollar amount of the procurement. When it is considered that numerous bids are received under one invitation and that bidders are called on to prepare several times as many bids as they receive awards, it is unreasonable to expect a bidder to incur the time and expense of making prebid on-site measurements of 20 buildings to verify the Government's quantity representation when bidding on a contract for less than $12,000.

Finally, the Government argues that appellant's entitlement to a price adjustment under the Changed Conditions clause is precluded by the above-quoted subparagraph 1.05b of the specifications providing that all quantities are to be verified at the site by bidders before bidding. A simple answer to this argument is that the courts have consistently held that such disclaimer, caveatory, and exculpatory provisions in specifications will not be construed to restrict a contractor's rights under the standard Changed Conditions clause. Fehlhaber Corp. v. U.S., 138 Ct. Cl. 571 (1957), cert. den. 355 U.S. 877; Peter Kiewit Sons' Co. v. U.S., supra; Loftis v. U.S., 110 Ct. Cl. 551; Calvada, Inc., ASBCA No. 2062, 56-2 BCA ¶ 1033; Gil Wyner

Co., supra. See Gaskins, Changed Conditions and Misrepresentation of Subsurface Materials as Related to Government Construction Contract, 24 Fordham L. R. 588, 1 Y.P.A. 191.

We find that appellant is entitled to a price adjustment under the Changed Conditions clause of $17.83 per square for 81 squares of re-roofing in excess of the quantity represented by the Government, making a total price adjustment of $1,444.23.

The appeal is sustained in the amount of $1,444.23 and otherwise denied.

Section 7. Suspension, Delay or Interruption of Work

FULLERTON CONSTRUCTION COMPANY

ASBCA No. 11500 (1967)

This appeal by the prime contractor arises out of Larsen's claims for costs incurred as a result of delays resulting from two change orders, and a refusal of the Government to inspect unchanged work until the changed work was completed. By stipulation of the parties, the issue before the Board is the liability of the Government, and the types of cost to be included in the amount awarded to the appellant. If liability is found, the exact amount is to be negotiated by the parties.

* * * * *

Appellant claims the commencement of a suspension on January 31, 1965, the date that the job was originally to be completed. It is appellant's contention that the contract specifications were defective with respect to the ceiling supporting frame members (which was cured by Modification No. 9) and with respect to the air conditioning system. Appellant claims that, but for these defects, the job would have been completed by January 31, 1965 and that these defects delayed the job beyond that period keeping Larsen involved in the project beyond that date. This, appellant contends, constitutes a suspension of work under the "Price Adjustment for Suspension, Delay, or Interruption of the Work" clause, citing S. Patti Construction Co., Massman Construction Co. & MacDonald Construction Co., Joint Venturers, ASBCA No. 8423, 1964 BCA ¶ 4225, April 30, 1964, and the cases cited therein. Specifically referred to is Laburnum Construction Corp. v. United States, 163 Ct. Cls. 339 (1963, reconsideration denied 1964) in which the Court stated:

> . . .The defendant cannot, by errors in the specifications, cause delay in plaintiff's completion of the work and then compensate plaintiff merely by extending its performance time and by payment of any added direct cost occasioned by changes to correct those errors.

The language in these cases is broad and appellant, in effect, contends that it means any defect in the specifications is a breach of contract; or where there is a suspension clause, a suspension. We cannot so read the cases.

The cases relied upon by the appellant are extreme cases. In Patti, supra, the Government failed to have the plans and specifications checked before sending them out and there were numerous defects which had to be corrected. The Board found that the Government deliberately or negligently issued defective plans and specifications with the result that appellant's work was delayed before corrective changes were placed in effect. In Laburnum, supra, the defects were also extremely broad and significant. That the Court of Claims considers the rule in Laburnum, supra, only applicable where the extent of the defects is unreasonable or abnormal is evident from its decision in Wunderlich Contracting Company, et al. v. United States, 173 Ct. Cls. 180 (1965, reh. and new trial denied, 1966). There, the Court said:

> Precedent indicates that the Government implicitly warrants in a construction contract that if the contractor complies with the specifications furnished he will be able to complete the project within the contemplated period; and if the specifications are so faulty as to prevent or unreasonably delay completion of the contract performance, the contractor may recover his actual damages for breach of the implied warranty. United States v. Spearin, 248 U.S. 132 (1918); Warren Bros. Roads Co. v. United States, 123 Ct. Cl. 48, 105 F. Supp. 826 (1952); Laburnum Construction Corp. v. United States, 163 Ct. Cl. 339, 325 F. 2d 451 (1963). But, in the case at bar, the evidence does not support plaintiffs' contention that the Government-supplied documents were so substantially deficient or unworkable as to constitute a breach of the contract. Defendant engaged an experienced and qualified architectural firm to prepare the necessary designs and subsequently invited prospective bidders to offer their comments, with a view toward eliminating as many discrepancies as possible. Although the plans and specifications, as modified and refined, did in fact contain a large number of errors which eventually had to be corrected, it cannot be said that the cumulative effect or extent of these errors was either unreasonable or abnormal for a project of such encompassing scope and complexity . . . .

This decision is also applicable in determining whether there was a suspension, since, as indicated in Patti, supra, the suspension clause in this context makes a suspension out of what otherwise would have been a breach of contract.

There is no evidence that the Government deliberately issued defective specifications or that the Government was in any way negligent in the issuance of specifications. The defects complained of were minor. The defect in the air conditioning system was merely that

it did not perform as the Government wished, not that it could not be built to specifications. It is doubtful whether this is even the type of defect referred to in Laburnum, supra, which seems to concern itself with defects that make it impossible to perform. This defect as well as the defect in the ceiling supporting frame members each involved a dollar amount of less than one percent of the contract price. They are typical of the defects which ordinarily trigger the "Changes" clause, and their correction is a conventional application of that standard clause. The ceiling defect did not even involve the subcontractor on whose behalf this claim is made and it would appear that the acceptance of Modification No. 9 by appellant waived any claim arising out of this defect. The referenced December 17, 1964 letter referred to added costs, but did not claim or reserve them. These are the only defects even cited. We decline to find a suspension of work by reason of defects in the specifications. The facts of this case do not fall within the holdings of Laburnum, supra, and Patti, supra. The case is far more analogous to Wunderlich, supra, in which no Government liability was found by the Court of Claims.

Appellant contends that the failure to inspect when requested in and of itself is a suspension of work. Appellant did not request final suspension until February 9, 1965 and the Government cannot be held responsible for the failure to provide a complete punch list before that time. The fact that the Government supplied some partial punch lists before then does not change the fact that appellant cannot claim a suspension for the failure to make a final punch list available to it when such a punch list was not requested. Larsen did request appellant to have the Government make such a punch list but there is no evidence that the appellant passed this request on to the Government. The Government was dealing with appellant, and not Larsen, and there can be no suspension on the basis of Larsen's request made to appellant.

Assuming for the moment appellant was entitled to complete inspection and punch list after requesting it, the Government had a reasonable time to complete this action and there is no evidence what such a reasonable time would be. We are not prepared to hold that February 19, 1965, a date which becomes critical for other reasons, was an unreasonable date. This was only one day after the scheduled completion of the job and ten days after the notice was given. We cannot find a suspension by reason of a failure to inspect before that date.

On February 19, 1965, the change order was issued. This had the effect of delaying completion of the job until the change could be performed. When looked at in context with the refusal to complete inspection and issue a final punch list covering other work until the entire job was complete, the change entailed a change in the sequence of work and must be considered an order to demobilize and remobilize later to complete the punch list. This aspect of the change, that is the effect on the unchanged work of the refusal to issue final punch

list on the unchanged work, was reserved in Modification No. 15, and entitles appellant to an adjustment under the "Changes" clause for the added costs occasioned thereby, e.g., I.K. Construction Enterprises, Inc., ASBCA No. 10987, 67-1 BCA ¶ 6271, March 31, 1967.

In accordance with the stipulation of the parties, we need not decide the exact amount due appellant under the terms of this item of allowance. However, under the terms of the stipulation, we must consider the costs includable in the amount to be negotiated by the parties. The added direct labor costs incurred by appellant by reason of this aspect of the change are includable in the amount payable. This includes salary and expenses of Mr. Rogers between February 19 and March 1, 1965, to the extent that the amount allowed does not include amounts recompensed under Modification No. 15 or amounts which were saved because the work did not have to be done after April 15, 1965. It would also include any other added direct labor costs which appellant can show.

The amount due appellant clearly includes equipment costs other than the cost of equipment held over for performance or used to perform the changed work which has been reimbursed under Modification No. 15. Appellant suggests using certain figures which it uses for its own internal operations. We see no basis for this approach and do not accept it. The amount due for equipment costs should be computed by taking the acquisition cost of each piece of equipment involved and applying the formula set forth in the A.G.C. Ownership Expense Manual reduced by 50 per cent for idle time during the period of the suspension. L. L. Hall Construction Co. v. United States, Ct. Cls. 269-61, decided December 16, 1966; J. D. Shotwell Co., ASBCA No. 8961, 65-2 BCA ¶ 5243, November 30, 1965.

The most controversial item of the allowance due to appellant is the home office overhead claimed on behalf of Larsen. Appellant correctly contends that application of a fixed percentage of direct cost is not necessarily a good basis for determining the amount of overhead allocable to a job during a period of work stoppage. By nature, overhead expenses continue while the direct costs against which the percentage is usually applied, drop. Appellant, therefore, suggests that the Board apply the formula set forth in Eichleay Corp., ASBCA No. 5183, 60-2 BCA ¶ 2688, July 29, 1960, to ascertain overhead costs. This formula has the effect of applying the overhead rate incurred under the contract throughout the year to the period of the work stoppage. This may be appropriate in some cases when the job is continuing, is stopped in the middle, and the overhead costs reasonably allocable to the job continue to run throughout the period of the suspension. However, it is not always an appropriate formula. Golden Gate Construction, ASBCA No. 11727, 67-1 BCA ¶ 6192, March 6, 1967.

In this case, the job was substantially completed at the time the stoppage occurred and it is difficult to see how Larsen's home office overhead allocable to this contract could continue to run at the same rate which was applicable when the contract was being performed. Appellant refers to such things as administrative work, the process of soliciting quotations on the February 19 change order, the preparation of proposals, the making of submittals, the expediting of materials, the usual correspondence between Larsen and appellant, and the resolution of certain questions raised by the Corps of Engineers. In part, these items refer to the work on the air conditioning system itself and presumably have been paid for under Modification No. 15. In any event, these items are extremely vague and the $86.79 rate per day claimed by appellant using the formula employed in Eichleay, supra, is not justified here. The record indicates no basis for applying any overhead mark-up and the Board declines to find appellant entitled to any more than that mark-up in compensation for its overhead costs.

Demobilization and remobilization costs not related to the work paid for as elements of Modification No. 15 are includable in the adjustment due appellant. This might include the payment of travel expenses both ways for anyone who came back to the job to do punch list work but was not involved in the work paid for by Modification No. 15. Finally, the normal profit and prime contractor overhead percentage mark-ups should be applied.

The appeal is sustained to the extent indicated and remanded to the parties for the negotiation of the amount due appellant consistent with this opinion.

Section 8. Value Engineering Changes

DRAVO CORPORATION v. THE UNITED STATES

202 Ct. Cl. 500 (1973)

Before Cowen, Chief Judge, Davis, Skelton, Nichols, Kashiwa, Kunzig, and Bennett, Judges.

ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

Nichols, Judge, delivered the opinion of the court:

This case is before the court in plaintiff's motion for summary judgment and defendant's cross motion for summary judgment.

Plaintiff entered into a fixed price contract (No. DACW01-68-C-0088) with the Department of the Army on April 17, 1968, for the construction of the Jones Bluff Lock and Dam on the Alabama River in Alabama. Article 50 of the general provisions of the contract entitled "Value Engineering Incentive" provided that the contractor and the Government would share in savings in the cost of performance of the contract which resulted from changes proposed by the contractor. On May 22, 1968, plaintiff submitted a proposal for a change in the design and construction of the cofferdam required by the contract along with a suggested adjustment in the contract price, not including any decrease in profit on the work originally included in the contract, which would now be deleted as the result of plaintiff's proposal. On September 25, 1968, the contracting officer informed plaintiff that its proposal was acceptable but that the decrease in the contract price must also include a decrease in plaintiff's anticipated profits. Plaintiff proceeded to do the work as changed, under protest. On May 9, 1969, the contracting officer rendered his final decision that a reduced profit must be reflected in the contract cost reduction. Plaintiff appealed this decision to the Corps of Engineers Board of Contract Appeals (The Board) on May 27, 1969. In a decision, Eng. BCA No. 3046, dated August 17, 1971, the Board Upheld the decision of the contracting officer, stating that the decrease in costs under Article 50 was to be calculated as an equitable adjustment and thus elimination of some profits must be added to the eliminated cost to determine the adjusted price.

The parties are in agreement as to the facts of the case and the figures used in arriving at the cost reduction. They disagree only as to whether Article 50 calls for the calculation of profit as part of the cost savings. Thus, the controversy in this case centers around the varying interpretations of Article 50 of the contract, and therefore the court is faced with a pure question of law. We hold that the plaintiff is right, and the Board in error.

Plaintiff tells us that the language of Article 50 indicates that the amount of cost reduction must be calculated from the point of view of cost savings to the contractor. Therefore, profit should not be included in arriving at the amount saved. The court's attention is invited to the pertinent regulations involved, and to the administrative history of those regulations, all of which the plaintiff says supports its position.

Defendant tells us, to the contrary, that the only reasonable meaning that can be given Article 50 is to read its provisions from the point of view of savings to the Government. Defendant argues that the pertinent regulations and their administrative history as they relate to fixed price contracts support its position. Finally, the defendant avers that the court should not depart from the usual method of calculating equitable adjustment under the circumstances of this case, and we are reminded that normally the calculation of equitable adjustment includes profit.

The objective in interpreting a contract is to determine the intention of the parties. The language of the contract must be given the meaning that would be understood by a reasonably intelligent person acquainted with the contemporary circumstances. Firestone Tire & Rubber Co. v. United States, 195 Ct. Cl. 444 F. 2d 547 (1971). All provisions of the contract should be read together and so as to make none inoperative, and specific provisions should be given precedence over general ones. Morrison-Knudsen Co. v. United States, 184 Ct. Cl. 661, 397 F. 2d 826 (1968). If the contract is unambiguous its language should be implemented. Keco Industries v. United States, 176 Ct. Cl. 983, 364 F. 2d 838 (1966), cert. denied, 386 U.S. 958 (1967). As an aid to interpretation of the contract the pertinent ASPR should be inspected and the policy behind the promulgation of these regulations should be looked into. Firestone, Tire & Rubber, supra. Such regulations are law, binding on the contract parties, where applicable. Newport News Shipbuilding & Dry Dock Co. v. United States, 179 Ct. Cl. 97, 374 F. 2d 516 (1967); Chris Berg, Inc. v. United States, 192 Ct. Cl. 176, 426 F. 2d 314 (1970).

That portion of the contract which is at the center of controversy in this case is Article 50 of the General Provisions of the contract. That Article reads in pertinent part:

* * * * *

50. VALUE ENGINEERING INCENTIVE (JUNE 1967) (Applicable to all contracts in excess of $100,000)

(a) (1) This clause applies to those cost reduction proposals initiated and developed by the Contractor for changing the drawings, designs, specifications or other requirements of this contract. This clause does not, however, apply to any such pro-

posal unless it is identified by the Contractor, at the time of its submission to the Contracting Officer, as a proposal submitted pursuant to this clause. * * *

(2) The cost reduction proposals contemplated are those that:

(i) would require, in order to be applied to this contract, a change to this contract; and

(ii) would result in savings to the Government by providing a decrease in the cost of performance of this contract, without impairing any of the items' essential functions and characteristics such as service life, reliability, economy of operation, ease of maintenance, and necessary standardized features.

(b) As a minimum, the following information shall be submitted by the Contractor with each proposal:

(i) a description of the difference between the existing contract requirement and the proposed change, and the comparative advantages and disadvantages of each;

(ii) an itemization of the requirements of the contract which must be changed if the proposal is adopted, and a recommendation as to how to make each such change (e.g., a suggested revision);

(iii) an estimate of the reduction in performance cost, if any, that will result from adoption of the proposal, taking into account the costs of development and implementation by the Contractor (including any amount attributable to subcontracts in accordance with paragraph (e) below) and the basis for estimate;

(iv) a prediction of any effects the proposed change would have on collateral costs to the Government such as Government-furnished property costs, costs of related items, and costs of maintenance and operation;

* * * * *

(c) (1) Cost reduction proposals shall be submitted to the Procuring Contracting Officer (PCO). * * *

(2) The Contracting Officer may accept, in whole or in part, either before or within a reasonable time after performance has been completed under this contract, any cost reduction proposal submitted pursuant to this clause by giving the Contractor written notice thereof reciting acceptance under this clause. Where performance under this contract has not yet been completed, this written notice may be given by issuance of a change order to this contract. Unless and until a change order applies a value engineering change proposal to this contract, the Contractor shall remain obligated to perform in accordance with the terms of the existing contract. <u>If a proposal is accepted after performance under this contract has been completed, the adjustment required shall be effected by contract modification in accordance with this clause.</u>

(3) If a cost reduction proposal submitted pursuant to this clause is accepted by the Government, the Contractor is entitled to share in instant contract savings, collateral savings, and future acquisition savings not as alternatives, but rather to the full extent provided for in this clause.

(4) Contract modifications made as a result of this clause will state that they are made pursuant to it.

(d) If a cost reduction proposal submitted pursuant to this clause is accepted and applied to this contract, an equitable adjustment in the contract price and in any other affected provisions of this contract shall be made in accordance with this clause and the "Termination for Convenience", "Changes", or other applicable clause of this contract. The equitable adjustment shall be established by determining the effect of the proposal on the Contractor's cost of performance, taking into account the Contractor's cost of developing the proposal, insofar as such is properly a direct charge not otherwise reimbursed under this contract, and the Contractor's cost of implementing the change (including any amount attributable to subcontracts in accordance with paragraph (e) below). When the cost of performance of this contract is decreased as a result of change, the contract price shall be reduced by the following amount: the total estimated decrease in the Contractor's cost of performance less fifty percent (50%) of the difference between the amount of such total estimated decrease and any net increase in ascertainable collateral costs to the Government which must reasonably be incurred as a result of application of the cost reduction proposal to this contract. When the cost of performance of this contract is increased as a result of the change, the equitable adjustment increasing the contract price shall be in accordance with the "Changes" clause rather than under this clause, but the resulting contract modification shall state that it is made pursuant to this clause. (JUNE 1967) * * * (Emphasis supplied.)

* * * * *

Paragraphs (c) (2), (3), and (d) indicate that the Article is to be a mechanism by which the adjustment in price is to be implemented. Paragraph (d) clearly states that "An equitable adjustment in the contract price and in any other affected provisions of this contract shall be made in accordance with this clause and the "Termination for Convenience', 'Changes', or other applicable clause of this contract." If the paragraph stated that the adjustment should be made exclusively in accordance with the "Termination for Convenience" or the "Changes" clause, then the rules which would apply to an equitable adjustment under those clauses would doubtless apply. However, here we are told that the adjustment shall be made in accordance with this clause as well as with the others, indicating that this adjustment in price is to be distinguished and different from one under those clauses. How it is to be distinguished is spelled out later in the same paragraph

where it is stated that the adjustment be calculated as half "the total estimated decrease in the Contractor's cost of performance". This specific instruction how to calculate the adjustment preempts the usual general rules for computing equitable adjustments. It runs counter to an adjustment under other clauses of the contract which are based on the decrease in the Government's cost in getting the job done and thus clearly include a decrease in the contractor's profit. Paragraph (d) ends by setting out the procedure to be followed when there is an increase in the cost of performance as the result of the Article 50 change. In such circumstances "the equitable adjustment increasing the contract price shall be in accordance with the 'Changes' clause rather than under this clause." Of course, a 50-50 cost sharing is not prescribed in case of a cost increase. However, the language used in stating this further reflects that the method used in computing a downward price adjustment is an animal peculiar unto itself.

As stated above, when possible all language of the contract should be given an operative meaning and specific language should take precedence over general language. To apply only the "Changes" or "Termination for Convenience" procedures for adjustment would be to read out contract language of specific application to the question at issue, in favor of language of general application. Such an order of preference would be contrary to the rules of construction followed by this court. The defendant invites the court's attention to the fact that "contractor's cost" is a phrase which also appears in the standard Changes and Changed Conditions Clauses yet those clauses trigger the usual rules for calculating equitable adjustment. It is clear, however, from those clauses that a change in the contractor's cost is only a condition precedent to their operation and not, as here, the stated basis of calculating what the adjustment should be. The comparison on the basis of the appearance of the phrase "contractor's cost" is simply inapposite.

The conclusion that the language of the Article in question spells out a method for adjustment which may differ from the usual equitable adjustment under the "Changes" or "Termination for Convenience" clauses of the contract and that this adjustment is to be based upon the contractor's cost of performance and therefore will not include profit, is supported by the relevant regulations.

* * * * *

The * * * regulations demonstrate an intent on the part of the authors that the contractors be encouraged to come forward with proposals which would lead to cost savings. The adjustment in the contract price under Article 50 was to be an inducement to the contractor. By § 1.1702-1(a) the Changes clause is rejected as a criterion to measure the price adjustment, and by § 1.1703(b) maximum incentives are the paramount consideration. It is consistent with this intent and policy

that the contractor not be forced to accept a reduction in his expected profit partly offsetting his gain from sharing the cost saving.

Of particular interest in respect to these regulations is that the authors of them were made aware of the fact that they could be construed to allow a contractor to retain all his expected profit. Prior to the enactment of the regulations they were submitted in draft form to various agencies for comment. The office of the Comptroller General in its comment stated that it appeared that under the regulations a contractor would be able to retain his expected profit on work that no longer would be done. It was recommended that further consideration be given to this point. The subcommittee which drafted the final language of the regulation considered this comment and explicitly stated in its memorandum to the ASPR Committee of February 13, 1967:

> Subcommittee Conclusion: In light of the basic intent of DOD's program to stimulate more aggressive value engineering-type efforts on defense contracts, this proposal of the C.G.--which, in effect, takes away part of one contractor payment (i.e., profit or fee) while at the same time making another (i.e., share in savings)-appears to be self-defeating. In addition, the C.G.'s characterization of the increased rate of fee or profit as "retention of profits unearned" is considered to be erroneous. The original profit agreed upon is a dollar figure designed to stimulate efficient contract performance: the contractor should not be penalized when he, in fact, demonstrates such efficiency by developing successful V.E. proposals. Recommendation rejected.

The subcommittee's conclusion was thereafter adopted by the full ASPR Committee.

Defendant is quick to point but, correctly, that the Comptroller General's comment was directed to the Value Engineering Incentive Clause associated with Fixed-Price Incentive (Firm Target) Contracts and not the clause to be used in a Firm Fixed-Price Contract of the sort here at issue. However, it must be noted that the Comptroller General's comment as to the retention of profits was pertinent to both forms of contracts. It is therefore clear that at the least the subcommittee was made aware by the Comptroller General's comment that the language criticized, which with variations was in the provisions proposed for several types of contract, could be construed to allow retention of profit on work not done, and that it decided that it would be most consistent with the policy of the clause to reject the Comptroller General's recommendation.

It is, of course, obvious when one thinks about it, that it is inimical to the achievement of contractor economy and efficiency to allow the idea to dominate, that his profit must be in some fixed ratio to his cost, whether the latter be great or small. We are dealing with a contract clause which on its face indicates that profit

should not be reduced because the contractor discovers how to make the job less costly. The policy which underlies the regulations promulgated in connection with the clause demonstrates an intent to induce the cooperation of the contractor by making such cooperation economically attractive. And we are shown that the authors of these regulations were aware that contractors might retain expected profit under the regulations and specifically accepted such practice. By all approaches to contract interpretation it would appear that the plaintiff is in a strong position on the question of retention of expected profits.

Defendant, in support of the opposite conclusion, asserts that the clause calls for an equitable adjustment made in accordance with the clause itself and the "Changes" or "Termination for Convenience" articles and that "equitable adjustment" is a term of art which contemplates the inclusion of profit. The court's attention is invited to the discussion of equitable adjustment in General Builders Supply Co. v. United States, 187 Ct. Cl. 477, 409 F. 2d 246 (1969). In General Builders, the court was faced with the provision of equitable adjustment in what was then a new default clause. Under the new clause, if the Government wrongfully terminated a contract the contractor could receive an equitable adjustment. The contractor in that case claimed the right to recover anticipated profits upon having a supply contract wrongfully terminated. In rejecting the contractor's claim the court stated in part at p. 482:

> * * * "equitable adjustment" has become a term of art (in federal contracts) with a commonly understood meaning in the aspect involved in this case (compare Ambrose-Augusterfer Corp. v. United States, 184 Ct. Cl. 18, 33, 394F. 2d 536, 545, (1968)), and that accepted content should be followed unless there are very strong counterbalancing reasons. Such a counterweight might be a marked alteration in context, but if the change is not significant and drastic it should not be sufficient to alter the established meaning of this specialized term. * * *

It is significant that in rejecting the contractor's claim in General Builders the court allowed for the possibility that under certain circumstances equitable adjustment might be given a different meaning. In the case at bar we have one of those circumstances, an alteration in context with a specific procedure telling how to determine the price adjustment based on the contractor's cost.

Defendant says that an equitable adjustment must be a fair adjustment and it is not fair for a contractor to retain a profit on work he does not do. As a matter of contract interpretation, we have shown that the general principles of calculating an equitable adjustment are preempted here by the special provision stating how the computation is to be made. If defendant wants us to distort the plain meaning to effectuate our sense of fairness, or revised the contract

because we deem it unconscionable, the answer is we cannot do these things to a contract legal when made; it is outside the judicial power. United States v. Bethlehem Steel Corp., 315 U.S. 289 (1942). That case is of special interest as it involves a "bonus for savings" in some ways similar to the clause here under review. Largely in response to this Bethlehem case, the Congress created the legislation to remedy the problem of excessive profits in defense contracting, now the Renegotiation Act of 1951, 50 U.S.C. App § 1211 and ff. It could do so for this contract if so minded. Moreover, if it is in the eyes of some unfair to allow a profit on work not done, it may be replied that this sense of fairness leads to the calamitous cost plus a percentage of cost method of contracting, extensively discussed in the Bethlehem case. In the eyes of others, it is fair that the rare contractor who discovers a way to do the job in a less expensive way is entitled to as much profit, maybe more, as the contractor who runs up the cost beyond all reason. In the instant case, the sharing of the cost saving, under a fixed price contract, results in a profit increase for diminished work, no matter how the instant dispute is decided.

Accordingly, the plaintiff's motion for summary judgment is allowed, and judgment is entered for the plaintiff in the stipulated amount of $5,696.00. Defendant's cross motion for summary judgment is denied.

Davis, Judge, dissenting.

As the court acknowledges at the end of its opinion, there is no question in this case of the plaintiff's being left with less gain than if it had performed the contract without the value engineering incentive change. It is bound (if its costs run according to plan) to have a greater profit, with respect to the deleted items, than if there had been no modification. The sole issue here is the amount of that additional gain--over and above the sum the contractor expected to receive as profit on the omitted work--which the contractor may properly retain. Under both of the competing interpretations of the Value Engineering Incentive clause, plaintiff will be allowed to keep as profit a sum considerably greater than the amount of gain allocated to the deleted items; the controversy is over how much more profit plaintiff should have as a result of the cost-saving. The dispute, then, is simply between a greater and a somewhat smaller amount of a very considerable added profit.

I stress this factor for two connected reasons. The first is that the decision of the case cannot comfortably be turned on the comparative "equity" or "fairness", from the monetary standpoint, of the contractor's or the Government's reading of the Engineering Incentive article. Under both, the contractor does very well, ending up with a much enlarged profit--and the increased expense to the Government from the contractor's interpretation is likely to be marginal at most. The second reason for emphasizing that, under both views, the contractor

is left with a very substantial increased gain is that, as I see it, there is little ground for picking one interpretation over the other in order to encourage contractors to submit cost-reduction proposals; there seems an adequate profit spur whichever position is taken. Rather, the question before us should be answered primarily in terms of the wording of the clause, its general purpose, context, and history, as well as the impact of the relevant regulations.

Unlike the court, I do not find paragraph (d) of the article to be a clear directive. It commences with a square reference to "equitable adjustment", with that term's traditional exclusion of profit on work not done (General Builders Supply Co. v. United States, 187 Ct. Cl. 477, 482-83, 409 F. 2d 246, 249-50 (1969)). The paragraph also refers to the convenience-termination, changes, and other relief-granting clauses which use "equitable adjustment" in the same conventional sense the court now rejects. Like the changes and changed conditions articles, the second sentence of paragraph (d) links the "equitable adjustment" directly to the "Contractor's cost of performance", suggesting the comparability of the "equitable adjustment" under this clause with that authorized by the older provisions. This stress on "equitable adjustment" and the references to the other like clauses, in the first portion of paragraph (d), appear to me distinctly to braid this clause to the normal "equitable adjustment," and thus to favor the defendant's reading.

The only part of paragraph (d) supporting the contractor is the third sentence on which the court relies so heavily; without using "equitable adjustment", that sentence says that the price shall be reduced, in effect, by 50 percent of the "total estimated decrease in the Contractor's cost of performance." Granting that there is a tension between that phraseology (reading it strictly and literally) and the rest of paragraph (d), I do not see that the third sentence is so specific and so unequivocal, in and of itself, that, without more, it must be understood as necessarily overriding the remainder of the paragraph. It is quite possible that this particular phrasing is merely an accident of draftsmanship, without special substantive significance. Further guidance must be sought from other sources outside of paragraph (d), which show the general purpose of the clause and the spirit in which it should be applied.

This was a fixed-price contract, let after formal advertising, and the dominant objective of the Value Engineering Incentive article in such an agreement is revealed by its paragraph (a)(2)(ii) which says that the cost reduction proposals contemplated are those that "would result in savings to the Government by providing a decrease in the cost of performance of this contract * * *." The emphasis is on the "savings to the Government" which can, of course, be accomplished only by a decrease in the initial fixed price. It is noteworthy, too, that the related reference is to the "cost of performance of this contract", which can mean the cost to the Government of the

contractor's performance, not merely the contractor's own costs in the strict sense. The saving to the defendant appears to be the fundamental element.

The same note is sounded in the pertinent Armed Services Procurement Regulations. 32 C.F.R. § 1.1702-1(1972) ("Incentives") says that to be acceptable a value engineering change proposal must invoke some modification with "consequent reduction in the contract cost", and even when the contract cost may be increased by a value engineering change the mechanism becomes operative if there are "overall savings" resulting from significant net reductions in collateral costs of Government-furnished property, etc. And § 1.1703-1, in discussing the types of savings to be shared with the contractor, declares that a contractor must be assured of a fair proportion "of any savings realized by the Government as a result of his change proposal", and also that the Defense Department policy reflects the premise that "the Government will benefit from any value engineering savings." The aim is to maximize the savings to the Government without dulling the contractor's incentive. That end is, I believe, reached by accepting the defendant's interpretation which leaves the contractor with plenty of incentive (as pointed out above) and at the same time gives the Government a greater over-all savings.

* * * * * * * * *

In the end I remain with and apply the standard we set in General Builders Supply Co., supra, 187 Ct. Cl. at 482-83, 409 F. 2d at 250: that "equitable adjustment" has become a term of art in federal contracts, with a commonly understood meaning with respect to profits, and "that accepted content should be followed unless there are very strong counterbalancing reasons." The only substantial "counterbalancing reason" I see here is the literal wording of the third sentence of paragraph (d) of the Value Engineering Incentive clause, and to my mind the impact of that phraseology is much diminished by the factors of, first, the wording of the rest of paragraph (d), second, the controlling purpose of the Value Engineering Incentive article to produce savings to the Government, and, third, the absence of any solid evidence that the drafters intended to depart from the normal understanding of "equitable adjustment." My conclusion is that the third sentence is not a "strong counterbalancing reason" but, rather, an accident of draftsmanship which is best understood by reading "the total estimated decrease in the Contractor's cost of performance" in slightly expanded form as "the total estimated decrease in the cost to the Government of performance by the Contractor." That is not a difficult transposition and it seems to me to fit better than the strict and literal construction.

SKELTON, Judge, and BENNETT, Judge, join in the foregoing dissenting opinion.

Section 9. Acceleration

NORAIR ENGINEERING CORPORATION v. THE UNITED STATES

Ct. Cl. No. 259-806 (1981)

ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

SMITH, Judge, delivered the opinion of the court:

Plaintiff's motion for partial summary judgment invokes review under the Wunderlich Act of General Services Board of Contract Appeals (board) Decision No. 2975, denying plaintiff the greater part of the relief it requested under the changes clause in its contract with defendant General Services Administration.

A.

Plaintiff was the prime contractor for the Smithsonian Institution's Museum of History and Technology (now the National Museum of American History). The construction contract is dated September 1, 1959, and plaintiff was expected to complete the building within 900 calendar days. The contract contained the standard changes clause which read, in pertinent part:

> The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. * * *

Plaintiff commenced work on October 7, 1959.

The work was to proceed in an orderly fashion, with the construction trades following each other sequentially from east to west on each floor, beginning with the basement and moving to the fifth floor and penthouse. Plaintiff had begun the process of erecting the structural steel frame and the concrete slabs which serve as flooring when, in May 1960, it noticed that certain of the columns were misaligned. While this was being corrected, construction of the concrete slabs on the second floor and above was suspended. On October 19, 1960, the contracting officer issued Change Order No. 36, which significantly changed the structure of the concrete floor slabs on floors 2 to 5 to make room for all of the conduits that had to be placed in them. The Government's original plans had failed to take adequate account of the conduits in designing the structural slabs and the change was

necessary to protect the structural integrity of the floors. Plaintiff claims that the new plans for the floor slabs of the second to fifth floors caused delays and inefficiencies by ruining the planned sequence of production.

After the change order and (plaintiff asserts) the delays caused thereby, defendant issued several letters which plaintiff contends were constructive orders to accelerate. Plaintiff claims that the orders to accelerate, combined with the delays caused by the destruction of the orderly construction sequence by the change order, caused plaintiff to incur additional costs in the amount of $1,653,868.13.

The museum was substantially completed on August 30, 1963, 524 days after the original contract date. Subsequently, the contracting officer granted an extension as excusable delay for all of those days because of several strikes, bad weather, and a total of 158 change orders.

B.

The original petition in this court alleged three causes of action: review of the board's decision under the Wunderlich Act, breach of contract for cardinal change, and breach of contract for defective plans and specifications. Only the Wunderlich review is raised on this single motion for summary judgment, so, in view of our decision here, the breach of contract counts remain with the trial judge, to be addressed along with those aspects of this motion which we remand.

In its motion for partial summary judgment, plaintiff requests review of the board's decision on issues of fact and of law. The board ruled that as a matter of law certain letters concerning the project's progress from defendant to plaintiff could not constitute acceleration orders, because a contract that was 524 days late (even though the delays were found excusable) could not be said to have been accelerated, and because the letters were not acceleration orders in the sense of being mandatory. The board also found, as a matter of fact, that in any case the cause of any extra delays and costs were attributable to plaintiff. To those three issues we now turn.

C.

It is generally recognized that, in order to recover for the increased costs of acceleration under a changes clause, plaintiff must establish three things: (1) that any delays giving rise to the order were excusable, (2) that the contractor was ordered to accelerate, and (3) that the contractor in fact accelerated performance and incurred extra costs. These correspond to the three legal and factual issues raised by the board: the 524-day delay, the directive content of the letters, and the actual cause of the delays and costs.

1. Excusable delay. Contrary to the board's finding, there is nothing "incongruous" about an acceleration order on a contract that is 524 days late, as long as those additional days were excusable. As a logical proposition, the board's statement will not stand. It may be that the excusable causes for delay (including Change Order No. 36) in fact justified a 700-day extension. In that case, lateness of 500 days would necessarily have involved acceleration.

In this case, the Government admitted that the delay was excusable because it granted an extension for every day that the contract was late. We may not assume that the post hoc extension was some sort of gratuity; Norair presumably was granted it because it deserved it and the effect is that Norair completed the project within the contract time. Thus, there is no incongruity in its claiming that it had to accelerate performance in order to meet that contractual date. While the normal constructive acceleration scenario is that the contractor experiences delays but is required to complete by the original date, it is clear that completion on time is not required for the claim to stand. We reverse the board on this point: a contractor who finishes the project within the contract time plus excusable delays is not disqualified as a matter of law from claiming acceleration costs.

2. Order to accelerate. An order to accelerate, to be effective, need not be couched in terms of a specific command. A request to accelerate, or even an expression of concern about lagging progress, may have the same effect as an order. We stated in Tombigee Constructors, quoting with approval a board decision:

> We are unable to see any difference between a request and an order under the circumstances. The initiative came from the Government for the Government's convenience. It makes no difference whether appellant complied willingly or unwillingly, or whether or not it also benefited from the compliance. This was work done in a manner different from that required by the contract. Appellant is entitled to reimbursement for it.

With this in mind, a brief examination of the letters cited by plaintiff and the board reveals that such an order was made.

We cite only the most obvious examples of these orders, but we emphasize that the requirement to speed up progress is evident throughout. In a letter of July 8, 1960, the resident engineer said, "I request that you take positive action to expedite the work by supplying the job with all materials necessary to accelerate progress." This letter orders both acceleration and greater expenditures to meet it. GSA confirmed the engineer's request in a letter of July 27, 1960. GSA on later occasions insisted on increases in work force and materials to speed up work. There was also considerable pressure applied to open the building as quickly as possible.

The pressure applied, even if it were merely implicit (which it was not), is particularly strong where liquidated damages hover in the background. Where the Government refuses (for whatever reason) to tell the contractor until the end of the project just what delay is excusable and what is not, the contractor is under considerable additional pressure to accede to a request because it does not know whether it will be found liable for liquidated damages. In a letter to plaintiff on October 3, 1961, the Government specifically cited the contract's liquidated damages provisions as part of a warning that the original contract completion date was only 6 months away. The Government dmphasized the original date (implying that delays might not be granted) in another letter. In short, while the Government recognized that some delays were validly excusable, it did not say which, and left it very clear that it disagreed with plaintiff as to the amount; therefore, plaintiff could have been required to accelerate work beyond what it thought was the proper rate (allowing for excusable delays) to avoid the risk of liquidated damages.

In light of the clear law that an acceleration order need not be couched in explicitly mandatory terms, we must disagree with the board that these letters cannot constitute an order to accelerate.

3. Actual acceleration. Having decided that these letters were orders, we are left with the question whether they in fact required acceleration beyond the contractual progress (that is, the progress specified by the original dates plus any excusable delays, in this case, at least 524 days). The record in this case is voluminous and these causation questions complex. Accordingly, we remand these questions to the trial judge for a recommendation, along with the two breach of contract claims.

Essentially, the trial judge must determine whether plaintiff actually accelerated and whether it incurred extra costs in doing so. To find whether there was acceleration in this sense, the trial judge must determine what the proper rate of progress was, that is, whether Change Order No. 36 caused any delays which are not accounted for in the 524-day extension. The board found that the causes of the extra delay--that which required the speeding up--were mistakes of plaintiff; the trial judge must determine whether that conclusion is supported by substantial evidence. He must also decide whether plaintiff actually did speed up its work over this rate and whether it incurred extra cost in doing so.

D.

In sum, we reverse the findings of law of the board as to what may constitute an acceleration order, and we remand to the trial judge to review the board's factual findings, to which the legal principles may be applied. In addition, the trial judge should consider the breach of contract claims originally raised in plaintiff's petition.

Accordingly, after a thorough consideration of all submissions of the parties, and without oral argument, plaintiff's motion for partial summary judgment is granted in part, and this action is referred to the trial division for further proceedings consistent with the above opinion.

Chapter Seven

PATENTS AND DATA

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CHAPTER SEVEN

PATENTS & DATA

Section 1. Patents

a. Reduction to Practice

EASTERN ROTORCRAFT CORP.

181 Ct. Cl. 299 (1967)
384 F. 2d 429

DURFEE, Judge, delivered the opinion of the court:

The Eastern Rotorcraft Corporation, a Pennsylvania Corporation owning the patent involved in this litigation, sues, under 28 U.S.C. ¶ 1498, to recover the "reasonable and entire compensation" for the Government's allegedly unauthorized use of its patented invention. Only the question of liability is now before the court.

The patent in suit is the Campbell Patent N. 2,705,461 entitled "Cargo Net Fabricated From Flexible Cable." It discloses a cargo net that, when spread out, extends in a zigzag fashion and produces diamond-shaped parallelogram meshes throughout the body of the net. Ring or hook fittings are attached along the slides and ends of the nets and at the exterior corners of the peripheral parallelograms. A net made in this manner has a high degree of flexibility and is readily adaptable to retain different shaped cargo. When not in use, the net may be collapsed by stretching it horizontally and returning the zigzag runs of cable to a parallel relationship and it may be rolled into a bundle for easy storage.

In December 1950, plaintiff entered into a contract with the Department of the Air Force for the production of six airplane cargo nets. The contract stipulated that plaintiff would grant the Government a non-exclusive, royalty-free license to any invention that was "first reduced to practice" either during the performance of the contract or "upon the understanding that a contract would be awarded." Since the invention was not reduced to practice "upon the understanding that a contract would be awarded", the Government is only entitled to a license if the reduction to practice was not completed prior to the contract.

Reduction to practice occurs when the workability of an invention can be demonstrated. Workability means that a physical form of the invention has been constructed which functions. Nash and Lasken, "Patent Rights Under Government Contracts" in Patents and Technical Data (Gov't Contracts Monograph #10) 42-52. And this requires testing the invention. The amount of testing necessary is based upon the needs of the particular art. Sinko Tool and Mfg. Co. v. Automatic Devices Corp., 157 F. 2d 974 (2d Cir. 1946). Some devices are so simple and their purpose and efficacy so obvious that their complete construction is sufficient to demonstrate their workability. Mason v. Hepburn, 13 App. D.D. 86 (1898); Buchanan v. Lademann, 54 F. 2d 425 (C.C.P.A. 1932). Other devices required laboratory testing; others, service testing in their intended environment, e.g., Elmore v. Schmitt, 278 F. 2d 510 (C.C.P.A. 1960); Paivinen v. Sands, 339 F. 2d 217 (C.C.P.A. 1964). In all these situations, the inquiry is not what kind of test was conducted, but whether the test conducted showed that the invention would work as intended in its contemplated use. Elmore v. Schmitt, supra; Gaiser v. Linder, 253 F. 2d 433 (C.C.P.A. 1958). Proof of the invention's utility for its intended purpose does not require proof of its flawlessness; it is only necessary to show that the invention is able to perform its intended purpose beyond a probability of failure. Taylor v. Swingle, 136 F. 2d 914 (C.C.P.A. 1943).

In November, 1949, the inventor, during a conference at Wright-Patterson AFB, on cargo tie-down equipment for airplanes, was informed that the Air Force, having experienced difficulty holding down miscellaneous loads inside airplanes during the Berlin airlift, was considering the use of a new type of cargo net. The nets under consideration used square mesh cable nets made from transversely intersecting cable members. They did not have the flexibility to adapt to mixed loads. Nor could they be collapsed and stored in a bundle. Soon thereafter the inventor thought of the net which is now the patent in suit. He requisitioned the necessary components and constructed a sample net. On April 16, 1950, he successfully placed the net over a load of miscellaneous items placed on a pallet. After seeing that the net adapted to the contour of the items, he removed the net, collapsed it, and placed it rolled up inside his briefcase. The following week he took the cable net to interested Air Force personnel at Wright-Patterson AFB. Application for a patent was not filed until June 19, 1951.

The cargo net patent has two primary purposes. One is to provide flexible nets that can cover and hold a large number of varied objects during transit. Campbell Specification at Col. 1, ls. 15-18. The other is "to provide a net construction which may be readily folded for storage purposes" so that it "may be conveniently stored in a rack or rolled into a compact coil." Id at col. 1, ls. 35-40. The tests performed by the inventor on April 16, 1950, sufficiently demonstrated the workability of the net for the purposes stated in the patent specification. The invention was thus reduced to practice prior to the Government contract; therefore, the Government does not have a license to the patent.

Several months after the inventor gave the Air Force the sample nets, plaintiff was awarded a contract for six cable nets. During the performance of the contract, the inventor improved the structural pattern of the nets so that they could be more easily manufactured. Plaintiff filed a patent application for the improved structure and in January, 1952, granted an express license to the Government on the improved invention.

Defendant contends that this express license gives it an implied license to the original patent in suit. Since the patent in suit is the dominant patent, it claims that its license is without value unless it has an implied license. Factually, this contention is not true because when the patent in suit expires, defendant will be able to freely make nets using both patents. And contractually, it is not sound inasmuch as the contract states that the Government will not obtain a license either "directly or by implication" to inventions made outside the contract.

* * * * *

In summary we find: (1) defendant and third-party defendants do not have a license to the patent, (2) the patent is valid, and (3) it has been infringed by structures made for defendant. Plaintiff is entitled to recover for the unauthorized use by defendant of its patent and judgment is entered to that effect. * * *

* * * * *

b. Reasonable & Entire Compensation

LEESONA CORPORATION v. THE UNITED STATES

599 F. 2d 958 (1979)
cert. denied - 48 USLW 3387

NICHOLS, Judge, delivered the opinion of the court:

In Leesona Corp. v. United States, 208 Ct. Cl. 871, 530 F.2d 896 (1976), this court held that certain claims of three patents owned by plaintiff Leesona were valid and infringed by the defendant United States. The issue in this case is the determination of "reasonable and entire" compensation due plaintiff for that infringement under 28 U.S.C. § 1498, i.e., what is called in these cases the "accounting phase." Trial Judge Browne, to whom this phase was assigned under our Rule 131(c), determined that Leesona was entitled to judgment in the amount of $3,534,753.52, which included attorneys' fees of $100,000 and delay compensation for the period of November 6, 1969, up to and including December 31, 1977. He also ordered additional delay compensation at the rate of $470.51 per day from January 1, 1978, until payment on the judgment. The Government has excepted to the trial judge's determination of what items constitute "reasonable and entire" compensation, and to much of the accounting used in the opinion.

Our conclusion is that the trial judge's award is largely excessive because of his erroneous assumption that he was adjudicating a tort claim for patent infringement under various provisions of Title 35 of the Code. We do not adopt the opinion of the trial judge, although we do adopt the trial judge's findings of fact except as stated. These findings are not printed herein, as the facts necessary to our ultimate determination are incorporated in the opinion. We have made our own determination in the amounts that will appear below. We state by separate order what findings we reject without replacement, and what findings we adopt as corrected by us. Any fact statements not having counterpart in the findings may be taken as additional findings of the court.

I

A

The infringed patents relate to mechanically rechargeable metal-air batteries termed BB-626/U's. Each BB-626/U consists of a battery box, a cover, attendant hardware, twenty-two cathode envelope structures, and a can containing twenty-two zinc anodes.

* * * * *

I

D

Trial Judge Browne awarded Leesona damages based on his view of the scope of 28 U.S.C. § 1498. That statute provides that the exclusive remedy for patent infringement by the Government is an action in the United States Court of Claims, and in such an action, the owner of a valid claim is entitled to recover "reasonable and entire" compensation for infringement.

The theory for recovery against the Government for patent infringment is not analogous to that in litigation between private parties. When the Government has infringed, it is deemed to have "taken" the patent license under an eminent domain theory, and compensation is the just compensation required by the fifth amendment. Title 28 U.S.C. § 1498 contains no directions or limitations as to the grant of damages other than its mandate of "reasonableness" and "entirety." The trial judge's definition of that mandate colors his determination of allowable damages for Leesona. In his opinion, he contends that 28 U.S.C. § 1498 was and is designed as a complete replacement for remedies for private infringement found in 35 U.S.C. §§ 284 et seq. Therefore, he concludes that, at least in such extraordinary cases as this one, parties injured by the Government can, under § 1498, obtain treble damages and attorneys' fees, such as private parties may obtain under 35 U.S.C. §§ 284 and 285.

Given this position, Trial Judge Browne determined damages as follows:

He concluded that Title 35 U.S.C. § 284 requires, as a minimum, a reasonable royalty for use made of Leesona's patent. This is to be but one element of the "reasonable and entire" compensation.

To determine this royalty, the trial judge used the contract awarded to Eagle Picher, and the options exercised by the Government under that contract, as a compensation base. The value of the initial contract to Eagle Picher was estimated to be $2,667,122.81. This includes the anode kits, cathode cells, and covers requested in the original contract as well as the batteries. Trial Judge Browne did lower the value of the covers from $90.14 to $30 per unit as he considered the high-priced covers unessential for the patented item, although some covers were needed. To this $2.6 million figure he added the additional procurement of anode kits and cathode cells under the contract option. This was valued at $921,708.03. Total government procurement under the contract was thus $3,588,830.84.

The trial judge chose 10 percent as a reasonable royalty level, justifying that figure because of plaintiff's research and development outlays, and its steady protection of its exclusive right to manufacture (as opposed to the right to sell) the batteries in the United States, a right lost when the Government authorized Eagle Picher to commence manufacturing the batteries. That royalty level applied to the compensation base results in a royalty of $358,883.

Trial Judge Browne argued that reasonable and entire compensation involves more than the "reasonable royalty"; it allows an injured party the same remedies against the Government that would be afforded a claimant against a private party, with the exception of the injunctive remedy. Therefore, since up to treble damages are allowed against a private party, Trial Judge Browne doubled the reasonable royalty figure, due to what he termed the Government's "willful and deliberate infringement and bad faith", pointing to the procurement procedure discussed above.

He also allowed inclusion of estimated savings to the Government --$768,719.10. Leesona's bid was higher, and it was and would be more expensive than the contract with Eagle Picher, he argued, precisely because Leesona's costs included development expenses easily ignored by Eagle Picher, who utilized Leesona's expertise. The savings to the Government are the difference between the $4,401,572.42 which Leesona would have received had it been supplier and the $3,632,853.32 Eagle Picher did receive. These savings are savings on all components, including the anode kits and cathode cells in the original contract and those ordered under the Government's option contract.

Lost profits in the amount of $660,235.84 were allowed. Trial Judge Browne allowed a 15 percent profit on the project, applying that percentage to the total dollar procurement of Leesona's anticipated contract, $4,401,572.42.

The trial judge ruled that contract preparation costs and the recovery of investment in the contract were not recoverable, citing General Dynamics Corp. v. United States, 202 Ct. Cl. 347 (1973). But he said that Leesona's expenditure of large sums in reliance on the letter contract, and the Government's bungled procurement procedure were good cause for the multiplication of the reasonable royalty, as above.

Thus total compensation equalled $2,146,720.95. The trial judge then computed delay compensation from November 6, 1969. He accepted plaintiff's theory that the injury began when the contract was awarded, not, as defendant contended, as each shipment of batteries was made. Utilizing the approach taken in Pitcairn v. United States, 212 Ct. Cl. 168, 193-97, 547 F.2d 1106, 1120-24 (1976), cert. denied, 434 U.S. 1051 (1978), the interest rate for delay compensation was determined on the basis of the yield of long-run AAA corporate bonds.

Finally, the trial judge determined that this case was an exceptional one warranting the award of $100,000 in attorney's fees, approximately one-third the cost to plaintiff.

The trial judge's total award in tabular form is printed following the opinion as Appendix A.

II

A

The fundamental error of the trial judge is that he has taken 28 U.S.C. § 1498, which is essentially an Act to authorize the eminent domain taking of a patent license, and to provide just compensation for the patentee, and he has converted it to a consent to suit on a tort theory, and the treatment of the United States as a tort-feasor. The trial judge brands the conduct of the United States as "despicable", for doing what it had a legal right to do, says it acted in bad faith, and assesses damages under rarely used punitive provisions for the mulcting of private parties who infringe patent rights in entire bad faith.

Before the 1910 enactment, 36 Stat. 851, the ancestor of the present § 1498, the holder of a patent infringed by the Government sometimes could recover in this court on an implied theory if he could show he had offered the invention to the Government, expecting to be paid, and the Government used it, expecting to be called on to pay, e.g., Berdan Fire-Arms Mfg. Co. v. United States, 25 Ct. Cl. 355, 26 Ct. Cl. 48 (1890), aff'd, 156 U.S. 552 (1895). Some other patent infringement cases came to this court on Congressional reference, for advisory opinions, but, otherwise, generally the way was hard. In James v. Campbell, 104 U.S. 356, 357 (1882), an injunction suit, the Court stated in dictum that the owner of a patent infringed by the Government had a fifth amendment right to just compensation, but the avenues to enforce it were dubious. Possibly officers of the United States could not be enjoined because the United States itself was an indispensable party who had not consented to be sued. The holding there was that the patent was invalid.

The Tucker Act of March 3, 1887, 24 Stat. 505, now 28 U.S.C. § 1491, added a new category to Court of Claims jurisdiction: "claims founded upon the Constitution." In Schillinger v. United States, 155 U.S. 163 (1894), aff'g 24 Ct. Cl. 278 (1889), the majority held that a patent infringement claim sounded in tort pure and simple, where the implied contract theory was not applicable, and, therefore, was excluded from Court of Claims jurisdiction by the tort exclusion. Mr. Justice Harlan, the elder, dissenting, urged that by authority of James v. Campbell, supra, the Schillinger claim was "founded upon the Constitution", and thus was added to Court of Claims jurisdiction by the new Tucker Act language.

The Congress in 1910 thus could have adopted either of two conflicting theories as to the legal nature of a patent infringement by the Government where the implied contract theory of relief was inapplicable. It could have adopted the tort theory and consented to suit as on a tort claim. Or it could have adopted the Harlan theory. Whatever ambiguity there may have been in the 1910 Act itself, the Supreme Court in Crozier v. Krupp, 224 U.S. 290, 305 (1912), clearly construed it as following the Harlan theory. Instead of consenting to suit for a tort, the Act did the following:

> * * * [T]he United States shall be considered as having ratified the act of the officer [who commited the infringement]. * * * The adoption by the United States of the wrongful act of an officer is of course an adoption of the act when and as committed, and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the Government, for which compensation is provided. * * *

The Court then refers to the power of eminent domain and says the Act exercises that power. It followed that an injunction against the infringement was no longer available, as it had been when the suit was filed, before the 1910 Act.

Thus that statute adopts the infringement as the act of the United States and makes it a rightful exercise of the power of eminent domain. The problem that led to the 1918 amendment is discussed below.

This court has traditionally searched the law of eminent domain for legal precedents and principles to apply in determining the "reasonable and entire compensation" to be granted in a valid infringement action against the Government. See, e.g., Tektronix Inc. v. United States, 213 Ct. Cl. 257, 264, 552 F.2d 343, 346-47 (1977); Calhoun v. United States, 197 Ct. Cl. 41, 51, 453 F.2d 1385, 1391 (1972).

The trial judge used the language of § 1498 to justify the award of double damages, profits, savings to the Government, and attorneys' fees in addition to a reasonable royalty he deemed due plaintiff for infringement. The 1918 amendment to the 1910 Act, the precurser of § 1498, added the words "and entire" after "reasonable" to define the compensation awarded a plaintiff whose patent was infringed by the Government. Naval Appropriation Act of July 1, 1918, ch. 114, 40 Stat. 705. The present statute retains that amended language and allows patent owners to sue in the Court of Claims for recovery of "reasonable and entire compensation for such use and manufacture" of an infringed patent. Trial Judge Browne said that that language was intended to expand government liability for patent infringement beyond the award of a reasonable royalty; indeed, an argument was made by

plaintiff that the "entire compensation" language was added to compensate for the loss of the injunctive remedy that patentees possess against private infringers. However, the trial judge made no award for loss of injunctive protection as such.

The Government argued that the addition of the word "entire" to the language of the statute was meant to underscore the exclusivity of the remedy of suit in the Court of Claims, reversing in effect the decision of Cramp & Sons Ship & Engineering Bldg. Co. v. International Curtis Marine Turbine Co., 246 U.S. 28 (1918), which allowed a patentee to sue a Government contractor and enjoin infringement of the patent. That Court held that the 1910 Act only protected infringements in the Government's own operations. The legislative history of the amendment, sparse as it is, and the amendment's subsequent interpretation by the courts does support defendant's view.

The sponsor of the 1918 amendment described the amendment as "necessary and urgent", and added that it "would expedite the manufacture of war material." The amendment, he explained, would "prevent the injunctive process from the courts being used to prevent private manufacturers doing Government work. That is the whole change made in the law and the conditions are such as to require that it should be done." 56 CONG. REC. 7961 (remarks of Rep. Padgett).

Courts interpreting this amendment agree that its primary purpose was to stimulate contractors to furnish war materials to the Government, without fear of becoming liable themselves for patent infringement. Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 343 (1928). This would bolster the Government's argument. But plaintiff takes heart from language in Richmond Screw and other cases expressing the opinion that Congress, in passing that amendment, was also accepting Government liability for the patent infringement of its contractors, and would ensure that the wronged patentee would obtain adequate compensation for the rights taken from him. Richmond Screw, supra, at 345; see also Waite v. United States, 282 U.S. 508 (1931), rev'g 69 Ct. Cl. 153 (1930). However, there is no automatic link between the Government's assumption of liability for infringement by its contracts and an intent to allow compensation to the patentee in addition to a reasonable royalty as just compensation. The Supreme Court in Richmond Screw used language emphasizing the "comprehensive nature" of relief under § 1498's predecessor because it was seeking to interpret that statute so as to avoid any doubts about its constitutionality. Thus, any remedy afforded by statute for a taking had to comport with fifth amendment standards. Richmond Screw at 345-46. The nature of the property taken by the Government in a patent infringement suit has traditionally been a compulsory compensable license in the patent, and just compensation has in most cases been defined by a calculation of a "reasonable royalty" for that license, or, when a reasonable royalty cannot be ascertained, another method of

estimating the value of the lost patent. See, e.g., Tektronix, Inc. v. United States, supra, 213 Ct. Cl. at 265, 552 F.2d at 347; Pitcairn v. United States, supra, 212 Ct. Cl. at 180, 547 F.2d at 1114; Calhoun v. United States, supra, 197 Ct. Cl. at 51, 453 F.2d at 1391. There is no clear indication that the Government intended to assume responsibility for any payment other than the just compensation required by the fifth amendment, and absent an express assumption of such a duty, no further liability other than that which is constitutionally mandated can be assumed. Schillinger v. United States, supra; United States v. Mescalero Apache Tribe, 207 Ct. Cl. 369, 379, 518 F.2d 1309, 1315 (1975), cert. denied., 425 U.S. 911 (1976). To extend the liability by inference or analogy would do violence to the doctrine of strict construction of the consent to be sued. United States v. Testan, 424 U.S. 392 (1976).

While Richmond Screw dealt with certain constitutional difficulties traceable to the impact of the 1910 and 1918 statutes on existing patent rights, it is to be noted that § 1498 was on the books in substantially its present form when all the patents involved in this case were applied for. In Richmond Screw there were troublesome retroactive changes in the incidents of a patent, much to the disadvantage of the patentee, for, as a practical matter, the loss of injunctive protection was from his point of view very much a change for the worse. There is, however, no attempt in § 1498, as we construe it, to authorize uncompensated expropriation of patents whenever issued.

The trial judge progressed from the conclusion that reasonable and entire compensation meant that the United States was assuming liability for more than the fifth amendment's mandated just compensation, to the view that reasonable and entire compensation included more than a reasonable royalty, the traditional benchmark used to measure just compensation for a taking of patent rights. He concluded that § 1498 was a substitute for Title 35, the section of the United States Code granting remedies to patentees and their assignees injured by private parties. Therefore, he concluded that the remedy of "reasonable and entire" compensation awarded under § 1498 would be defined to include most of the elements of Title 35. The injunctive relief of 35 U.S.C. § 283 could not be awarded, of course, since this court lacks the power to grant such relief.

However, as noted above, it is axiomatic that any suit against the Government requires an express waiver of the Government's immunity from suit. Incorporating all of the remedies of Title 35 into § 1498 without the explicit consent of Congress, which certainly could have provided for such incorporation had it so desired, would violate that requirement. This court has already made clear that the foundation and purpose of § 1498 are not completely analogous to those of Title 35. In Calhoun, supra, we said:

> * * * Although § 1498 resembles, in several ways, the statutory scheme dealing with the private infringer [Title 35], it is not wholly on all fours with that other pattern, and we should not disregard the different theoretical basis for the patentee's suit against the Government where that difference impinges on the particular issue. * * * [Footnotes omitted.] 197 Ct. Cl. at 51-52, 453 F.2d at 1391.

A complete congruence between § 1498 and Title 35 would grant plaintiff a recovery in excess of the just compensation required by the fifth amendment, and in excess of the reasonable and entire compensation contemplated by Congress with the passage of § 1498. The difficulties with Trial Judge Browne's incorporation of Title 35 into the definition of a § 1498 recovery can be seen in certain elements of the award he granted Leesona.

B

The trial judge's doubling of damages due to the Government's "bad faith" was an award based on the punitive aspects of Title 35. Section 284 authorizes double or triple damages, without express guidelines as to when this is to be done. Cases granting multiplied damages to victims of private infringers have a punitive ring, punishing those infringements characterized as "willful and deliberate." American Safety Table Co. v. Schreiber, 415 F.2d 373 (2d Cir. 1969), cert. denied, 396 U.S. 1038 (1970); Coleman Co. v. Holly Mfg. Co., 269 F.2d 660 (9th Cir. 1959); St. Regis Paper Co. v. Winchester Carton Co., 410 F.Supp. 1304 (D. Mass. 1976). The award granted by Trial Judge Browne punishes the U.S. Government for its mishandled procurement procedure; such a slap is meant to warn the United States to be less cavalier in the future when dealing with potential contractors and their patents. These additional damages are not based on any estimate of plaintiff's loss. The proper measure in eminent domain is what the owner has lost, not what the taker has gained. United States v. Chandler-Dunbar Co., 229 U.S. 53, 76 (1913). The lesson might be salutary, but it is not one the United States has consented to. In eminent domain it is necessary to protect the public and the compensation must be just as to it. Bauman v. Ross, 167 U.S. 548, 574 (1897). Perhaps the public must be protected against its own officials. An aggrieved party is entitled to receive only reasonable and entire compensation, not more than that. Tektronix, Inc. v. United States, supra, at 272, 552 F.2d at 351. Unlike his counterpart in a private infringement suit, he is not entitled to be the recipient of increased damages heaped on other parties as punishment or deterrence.

Even if this was a suit between private parties subject to the remedies of Title 35, we would not affirm an award of multiplied damages in this case. We are mindful of the fact that in private litigation an award of increased damages is within the discretion of the

trial judge and not to be disturbed unless there is an abuse of such discretion, American Safety Table Co., supra, E-I-M Co. v. Philadelphia Gear Works, Inc., 223 F.2d 36, 42 (5th Cir. 1955), cert. denied, 350 U.S. 933 (1956). But increased damages are awarded only for a clear showing of willful and deliberate infringement, American Safety Table Co., supra at 378; Copase Mfg. Co. v. American Photocopy Equipment Co., 298 F.2d 772 (7th Cir. 1961).

The trial judge justified a doubling of damages here due to "the despicable conduct of defendant * * * [indicating] utmost bad faith on the part of the Government." To whatever extent the trial judge may have based his conclusion of bad faith on the Government's knowing or willful infringement of the patents, the answer is, as we have noted, that the Government had the legal right to take the patents, subject to its obligation to pay just compensation for them. This bad faith activity was apparently, as we understand the trial judge, the procurement procedure whereby the Government supposedly encouraged Leesona to develop and produce the batteries, then issued and subsequently refused to ratify the letter contract, in that process thus revealing Leesona's "price" to other competitors, and finally obtained the same batteries at a lower cost from Eagle Picher. It is true that the procurement procedure utilized in this case did harm Leesona. After the time and expense it had spent developing the batteries, and negotiating a sole-source contract, other manufacturers did, by statute and regulations, obtain the right to demand an open bid procedure. It was here that Leesona agreed to assist the Government in preparing the request-for-bids, although the reason for this assistance is not stated in the record. Leesona was placed in difficult straits. Once having developed a battery marketable for military purposes, the Government was perceivably one of the few (if not only) available buyers. Leesona was probably anxious for the bidding to be completed so it could begin to recoup on its investment, and may have decided to expedite matters by helping to prepare the requests, assuming that it alone would be able to meet the required specifications.

While it seems that the procurement procedure did present aspects of unfairness for Leesona, there is no evidence, however mishandled the whole procedure may have been, that the Government's activities were a willful and deliberate attempt to violate plaintiff's legal rights and gain the use of the batteries without payment of the development cost. We could find no evidence of a deliberate Government leak of Leesona's bid price or of its known patented processes. In essence, and however clumsily, defendant was attempting to break Leesona's patent monopoly in a manner the law made permissible. The trial judge seemed to have difficulty with the idea that the law accorded the United States rights not conferred on private parties.

It is to be noted that plaintiff's petition does not and never did, and we must suppose could not, contain a count under § 1491 on the implied contract theory such as that followed in Berdan Fire-Arms, supra, or for misuse of intellectual property to benefit a bidder's competitors, as in Padbloc Co. v. United States, 161 Ct. Cl. 369 (1963). We say this, awarding defendant no accolades for its procurement procedures. See also Griffin v. United States, 215 Ct. Cl. 710 (1978), a recent case restating the implied contract rights of one submitting intellectual property for Government use.

C

We also decline to grant the award of attorneys' fees in this case, again emphasizing that this is a punitive award not necessary to provide just compensation for the taking of Leesona's patent rights by the U. S. Government.

By order dated March 4, 1977, in this very case, we informed the parties that--

> In view of this court's precedent and policy, evidence of attorneys' fees and litigation expenses is inadmissible as evidence in an accounting under 28 U.S.C. § 1498 since it is not relevant to the issue of "reasonable and entire compensation." * * * 213 Ct. Cl. 722, 725.

In that order we informed the parties that the issue of whether attorneys' fees were to be included as part of reasonable compensation had been decided by this court in Calhoun v. United States, supra, where we emphasized the eminent domain nature of a § 1498 recovery. See also Dohaney v. Rogers, 281 U.S. 362, 368 (1930), where the Supreme Court held that attorneys' fees were not part of just compensation for land taken under eminent domain.

D

We also disagree with the trial judge's award of lost profits to Leesona. Our concerns here are the authority for award of such damages, and the problem of double counting. Trial Judge Browne cited our opinion in Tektronix, Inc. v. United States, supra, as authority for the award of both items.

With regard to lost profits, he stated that Tektronix would allow award of lost profits only after strict proof that the patentee would have reaped such profits, proof that the patentee in Tektronix lacked. The focus of the Tektronix opinion, though, is whether a reasonable royalty method, acknowledged as the traditional method for determining just compensation for a § 1498 recovery, or some alternative method, such as examination of lost profits, ought to be used. In the present

case, Trial Judge Browne awarded lost profits not as an alternative to the royalty but in addition to it. This is not akin to our suggestion in Tektronix that lost profits might be used in some circumstances to measure just compensation.

Our difficulty in determining a reasonable royalty will be discussed below. But assuming such a hypothetical royalty can be estimated, and assuming Leesona had received such a royalty, Leesona's venture would have contained some element of profit. Awarding lost profits in addition to the royalty would be double-counting, and the profits, especially those based on plaintiff's own projection, are over and above the reasonable and entire compensation for plaintiff's loss.

E

Finally, we refuse the additional award made to plaintiff based on savings to the Government. The estimated savings were based on the difference between Leesona's bid and that of Eagle Picher. We do not dispute, indeed we agree, that savings to the Government may be considered in determining reasonable compensation. Its most proper use, as we will develop below, is in estimating what royalty willing buyers and sellers would agree to. It has been done infrequently in the past and generally only when the calculation of a reasonable royalty was difficult. Amerace Esna Corp. v. United States, 199 Ct. Cl. 175, 462 F.2d 1377 (1972) (dictum); Shearer v. United States, 101 Ct. Cl. 196, cert. denied, 323 U.S. 676 (1944); Olsson v. United States, 87 Ct. Cl. 642, 25 F.Supp. 495 (1938), cert. denied, 307 U.S. 621, rehearing denied, 307 U.S. 650 (1939). But we find the same difficulty with these additional damages as we do with the lost profits.

First, the trial judge ruled that savings be awarded in addition to a reasonable royalty, not as a substitute measure, as had been suggested in prior cases in this court. See, e.g., Amerace Esna Corp., supra, Olsson, supra. Like the lost profits, then, there is an element of double counting here, in excess of the reasonable compensation to which plaintiff is entitled.

Second, the trial judge awarded Leesona as but one item the total savings accruing to the Government as a result of its acceptance of Eagle Picher's bid rather than Leesona's. Even where savings to the Government are used as an acceptable measure of just compensation, no court has awarded the total savings to the infringer as just compensation, still less as but a part of just compensation. As this court said in Olsson:

> * * * [Due to the fact that the United States used plaintiff's patent to manufacture certain guns] plaintiff was relieved of the trouble, expense, and responsibility of

> manufacture and sale. In these circumstances it seems clear that plaintiff's reasonable and entire compensation paid contemporaneously with the appropriation of the use of his invention was only a percentage of the monetary value of the advantages accruing to the United States by reason of such use. The United States was entitled to claim the benefit of a large portion of the value of the savings in cost and other advantages by reason of its assumption of the care, trouble, risk, expense, and responsibility attending the incorporation of the invention in suit into an acceptable design and the manufacture of the guns. * * * 87 Ct. Cl. at 661, 25 F.Supp. at 500.

In Olsson, 25 percent of the total savings to the Government were awarded to plaintiff; in the present case, this percentage should be higher for reasons to be stated. The court in Olsson made the interesting observation, and one highly relevant to the underlying difference between us and the trial judge in this case, that the award of the entire savings from the infringement to the patentee would be more characteristic of a tort claim than of a suit for reasonable and entire compensation under the predecessor of § 1498. This was done by way of quoting at 659, 25 F.Supp. at 499 from one of this court's implied contract pre-1910 patent cases, Wood v. United States, 36 Ct. Cl. 418, 426 (1901) as follows:

> Where a man tortiously infringes, all that he makes or saves by his wrongful act belongs to the patentee. Where he sells a right to manufacture or use his patented invention and sues in contract, his damages are what the defendant expressly agreed to pay or what the license express or implied, is reasonably worth. * * *

To understand the relevancy of the quote, it is also necessary to observe that in Olsson, as often in that era, the obligation to pay just compensation, when incurred, was spoken of as an "implied agreement." Id. at 659, 25 F.Supp. at 499.

III

A

Even excluding the lost profits, double damages and savings to the Government that were included by Trial Judge Browne as compensation items to Leesona, the disparity between defendant's suggested royalty figure--$12,349.46--and the amount urged by plaintiff and the trial judge--$358,883.08--is still wide. Defendant suggests that a royalty of 1½ percent be imposed on a compensation base consisting of the amount the Marine Corps agreed to pay for the batteries ordered

after Eagle Picher's successful bid. Defendant excludes from the compensation base unpatented anodes, cathodes and blower covers that were part of the initial procurement from Eagle Picher of November 6, 1969, as well as the anodes and cathodes ordered from Eagle Picher by the Government's exercise of contract options for additional procurement.

Plaintiff's compensation base, not unexpectedly, includes all of the initial procurement from Eagle Picher as well as the anodes and cathodes ordered by the Government from Eagle Picher under the option agreement that was part of the contract. Plaintiff's base is $3,588,830.84, and its suggested 10 percent royalty gives plaintiff an award of $358,883.08. These awards exclude delay damages, which will be discussed later in the opinion.

Fortunately for this reviewing court, we are not required to accept as dogma one of the parties' figures or the other, but can use them as perimeters for our ultimate determination. The Conqueror, 166 U.S. 110, 131 (1897); United States v. Northern Paiute Nation, 183 Ct. Cl. 321, 346, 393 F.2d 786, 800 (1968). The task of determining a figure that renders just compensation is made even more difficult because plaintiff's theory of the case determined its collection and presentation of the evidence during the accounting phase of the trial. Plaintiff's presentation emphasized that when the Government infringed the patents, Leesona Moos Labs found itself in the position of having spent a great deal of money to acquire technical and manufacturing capabilities for the production of its special batteries, but having little chance to enter the battery market in the future. Plaintiff's evidence placed scant emphasis on the actual value of the infringed patents to Leesona, which is what we must determine under § 1498, and more on the total loss suffered by the entire corporation as a consequence of losing both the exclusive domestic manufacturing rights and the procurement contract which was to usher Leesona into the battery manufacturing field. Just compensation in eminent domain does not recompense such injury. United States v. General Motors Corp., 323 U.S. 373 (1945). Some elements of business injury might be weighed in determining what the owner might have sold for, if willing to sell, as is developed in the same case. Plaintiff's injury here far exceeded even its own estimate of a reasonable royalty, and as pointed out above, the tort theory under which such injury might be compensable was not applicable in a § 1498 taken case. There is a difference between evaluating the value of the property taken in light of plaintiff's business needs, and granting compensation for loss of business due to the taking, or for any incidental losses. The former is proper, the latter is not. Gulf Refining Co. v. United States, 58 Ct. Cl. 559, 577 (1923). That case neatly illustrates the proposition. The property taken was tank steamers; plaintiff was an oil company; business injury to plaintiff was not for consideration, but the fact that plaintiff as an oil company could put the tankers to more profitable use than other conceivable owners, was.

Past decisions have utilized a number of methods for determining just compensation in patent cases: a comparision of royalties charged others by the injured party for rights in the same or similar patents, Calhoun, supra, at 55-56, 45[illegible] F.2d at 1393; a determination of a royalty by postulating hypothetical negotiations between a "willing buyer" and "willing seller," Georgia-Pacific Corp. v. United States Plywood-Champion Papers, Inc., 446 F.2d 295 (2d Cir.), cert. denied, 404 U.S. 870 (1971); Tektronix, Inc., supra; basing the award on lost profits, Imperial Machine & Foundry Corp. v. United States, 69 Ct. Cl. 667 (1930); or savings to the Government, Olsson, supra.

The comparative royalty technique is the preferred method of determining just compensation, Carley Life Float Co. v. United States, 74 Ct. Cl. 682 (1921). This is the method best suited to our needs and the facts available to us, although it is not perfect, and its flaws will be illustrated by our apparent difficulties in applying it to the facts of this case. However, one way to monitor the reasonableness and fairness of our determination of just compensation is to compute the award by estimating a reasonable royalty on a proper compensation base, and then test this award by an examination of other available measures--savings to the Government, lost profits, etc. Cf. United States v. Northern Paiute Nation, supra. In a sense, we are taking a leaf from our practice under the Renegotiation Act, 50 U.S.C. app. § 1213, where we are required by statute to take certain factors such as risk and efficiency, into account when determining the reasonableness of profits. Tool Products Co. v. United States, Nos. 32-72, 445-73, and 281-74 (Ct. Cl. Dec. 13, 1978), Major Coat Co. v. United States, 211 Ct. Cl. 1, 543 F. 2d 97 (1976). After a tentative determination, in renegotiation cases called a "starting point", we test it with factors such as savings and profits, as guidelines--none totally controlling but all testing our determination of the reasonable royalty and compensation base.

B

There are two questions to be answered in determining the compensation base to which the royalty should be applied: (1) ought the original equipment anodes, cathodes, and "blower covers" be included in the base; and (2) should the extra anodes and cathodes supplied to the Government by its exercise of an option for additional procurement be included? The issue is whether these items should be included as part of the base even if independently they do not infringe plaintiff's patents.

The Government argues that all these additional items are "spare parts" that fall with the confines of "permissible repair" as expounded by the Supreme Court in Aro Mfg. Co. v. Convertible Top Replacement Co., 365 U.S. 336 (1961) (Aro I). Plaintiff maintains that since the contested items derive their utility and value from the

patented invention (the battery), and since they are necessary for the battery's operation, they are includable in the compensation base under the "entire market value rule", to be discussed below.

The Government bases its argument on the distinction made between repair and reconstruction. The rationale for the doctrine of permissible repair is that one who has bought a patented item can repair and maintain it with nonpatented staple items because the protection and financial rewards of the patent laws would be overextended if they embraced fungible component parts which are independent of the patent. Only when a patented item is "reconstructed" is it infringed. In Heyer v. Duplicator Mfg. Co., 263 U.S. 100, 101-02 (1923), the Supreme Court said:

> * * * The owner when he bought one of these machines had a right to suppose that he was free to maintain it in use, without the further consent of the seller, for more than the sixty days in which the present gelatine might be used up. * * * The machine is costly, the bands are a cheap and common article of commerce. * * *

See also El Dorado Foundry, Machine & Supply Co. v. Fluid Packed Pump Co., 81 F.2d 782 (8th Cir.), cert. denied, 299 U.S. 560 (1936).

The Supreme Court in Aro I, supra, held that a licensee as well as a purchaser had the right to repair a patent item. And in Calhoun v. United States, 197 Ct. Cl. at 51-52, 453 F.2d at 1391, this court made it clear that when the United States takes a compulsory compensable license in a patent by eminent domain, the United States is to be treated as a licensee entitled under Aro I to benefit from the doctrine of permissible repair.

Trial Judge Browne relied on the entire market value rule to justify inclusion of the anodes, cathodes, and blower covers in the compensation base. He analogized those items to the "plug-ins" in Tektronix. In Tektronix, this court included the plug-ins in the compensation base because even though they were separate and unpatented items, they were financially dependent on the market created by plaintiff's patent (for oscilloscopes); thus, plaintiff's patent substantially created the value of the plug-ins.

The Government in the present case disagrees with this court's analysis, and especially with its reliance on Marconi Wireless Telegraph Co. v. United States, 99 Ct. Cl. 1 (1942), modified on other grounds, 320 U.S. 1 (1943). In Marconi, the patent dealt with tuning apparatus. The issue was whether component parts of the electrical apparatus (transmitters, detectors, and amplifiers) could be included in the compensation base, even though they were not directly responsible for the tuning. Marconi allowed their inclusion, but did not allow inclusion of "replacement parts for such things as experience had shown might be destroyed during normal use of the set." 99 Ct. Cl. at 55.

We do not think that the discussion of "replacement parts" in Marconi alters the meaning of the entire market value rule; indeed, replacement parts as such are distinguised from components which derive their existence and value from the patent. We think the application of the entire market value rule in Tektronix was correct, and that it is especially germane to this present case. In Tektronix, the plaintiff had patents to components of superior oscilloscopes which were purchased by the Government in substantial numbers. To obtain alternative sources of supply (and at a better price), the Government invited other manufacturers to bid on a contract to manufacture such scopes, and tailored its specifications virtually to require opposing manufacturers to infringe plaintiff's patents. An opposing manufacturer underbid Tektronix, and the Government accrued substantial savings, not only on the oscilloscopes, but also on the unpatented plug-ins used with the scopes.

Under the entire market value rule, it is not the physical joinder or separation of the contested items that determines their inclusion in or exclusion from the compensation base, so much as their financial and marketing dependence on the patented item under standard marketing procedures for the goods in question. In Tektronix, we emphasized that "[n]ormally the patentee (or its licensee) can anticipate sale of such unpatented components as well as of the patented scopes." 213 Ct. Cl. at 272, 552 F.2d at 351. We cited American Safety Table Co. v. Schreiber, 415 F.2d 373 (2d Cir. 1969), cert. denied, 396 U.S. 1038 (1970), a private patent infringement and accounting case. There, "tables", frames for a collar-pressing machine not covered by the patented die assembly which rested, unattached, to the frames, were included in the compensation base for the calculation of lost profits, even though some tables could be and were sold separately from the infringed die assemblies. The district court noted that the defendant had sold tables to those who had previously bought the die assemblies, and that defendant's infringing sales had created the market for those tables, so that the situation became analogous to that where tables were sold as part of a complete machine.

American Safety Table depended in turn on the Supreme Court case of Hurlbut v. Schillinger, 130 U.S. 456 (1889), where the patent involved was the technique for laying concrete pavement in detached blocks so that repaving or removal of one section would not affect others. The Supreme Court allowed plaintiff to recover the entire profit earned by defendant by the latter's laying of the concrete pavement, since "the pavement itself was a complete combination in itself, differing from every other pavement, and the profit made by the defendant was a single profit derived from the construction of the pavement as an entirety." Allowance of this profit was based on the fact that "it clearly appears that the defendant's concrete flagging derived its entire value from the use of the plaintiff's invention, and that if it had not been laid in that way it would not have been laid at all." 130 U.S. at 472.

We think that a situation similar to that in American Safety Table and Hurlbut exists in the present case; indeed, as in Tektronix, the entire market rule applies even more strongly because of the Government's procurement practice, and because of the nature of the invention. Here it was standard Government practice to order the anodes, cathodes, and covers with the batteries as part of one procurement "package." It is not unlikely that plaintiff anticipated additional income from such parts when it estimated the value of the patents. These parts, while not patentable, were designed to operate in conjunction with this special battery; Trial Judge Browne found that they were not staple items (Finding 20) indeed, they had to conform to the specifications in the contract.

It is true that the design of the battery anticipates that many anodes will be necessary to keep the battery in operation. To operate on a normal "life cycle", it was anticipated that the 22 anodes for each battery would each be replaced 50 times. But the battery's very uniqueness lies in the fact that it uses a device like replacing anodes to be recharged, instead of relying on a cumbersome recharging device. In fact, the separability of the anodes is the key to the battery's value. In addition, the fragile nature of this special battery made it imperative that there be extra cathodes and covers to avoid a situation where damage would occur in the field, and the battery become useless because no cathodes or covers were available.

We recognize that Leesona could not prevent Eagle Picher from manufacturing and selling anodes, cathodes, and covers for a metal-air battery. But the point is that the Marine Corps wanted a mechanically rechargeable air battery and established specifications for such a battery. The Government was not merely buying a battery. It was buying a mechanically rechargeable battery, and to be so rechargeable the anodes were needed. It was buying a battery designed to be useful in ground combat, and additional cathodes and covers might be considered necessary in the first procurement. Thus, the initial procurement was a "package" of 2,138 batteries and the additional parts necessary to make the batteries useful for military combat. It is not unlikely that the Government would be buying the batteries and the additional components as one unit--they could be packaged and shipped together, as Eagle Picher's were, and one manufacturer would be responsible to the Government for the battery's operation. Most importantly, however, Leesona's patents were needed to manufacture the battery cell, and without this battery no anodes, cathodes, or covers would be required. Therefore, it is likely that if Eagle Picher desired to manufacture the batteries for the Government and obtained a license from Leesona for that purpose, the license fee would be quite stiff because the right to manufacture the battery brings with it a market for and likelihood of obtaining the right to supply the initial set of anodes, cathodes, and covers. See Paper Converting Machine Co. v. FMC Corp., 432 F.Supp. 907 (E.D. Wisc. 1977).

This does not mean that we will disregard the doctrine of permissible repair, and allow the patentee to postulate the right to supply anodes, cathodes, and covers ad infinitum to the Government. Our problem is to define when the Government is procuring the necessary parts for the battery to operate initially, and when the Government is procuring additional parts. This determination is difficult since we are dealing with a new and relatively unused product which, to be initially operable and militarily useful, depends on a number of parts. The Government itself was uncertain as to what constitutes a fully workable battery, and as to how many anodes, cathodes, and covers were needed to get an acceptable "lifetime's" worth out of the original 2,138 batteries. Therefore, we will use the original procurement as a reasonable estimate as to what parts were vital to the operation of the 2,138 batteries, and assume that the option contract was activated to procure "spare parts" which cannot be part of the compensation base.

Including in the compensation base the parts, including replacement parts, obtained with the original procurement, but excluding the additional parts obtained later under option clauses, the compensation base is $2,667,122.81.

C

Having defined the compensation base, it is now necessary to determine a reasonable royalty. Given the facts available for our use, we will establish a royalty rate by comparing other rates charged by Leesona for use of its patents, with adjustment for the special circumstances of this case. In doing so, we agree with Trial Judge Browne in both his methodology and with his ultimate conclusion as to the reasonable royalty due Leesona in this case.

The Government suggests a 1½ percent royalty as reasonable. It bases this figure on two factors, RCA's 1½ percent licensing rate on its magnesium perchlorate battery patent, and on plaintiff's own licenses, which show royalties ranging from 1½ to 5 percent.

We agree with the trial judge that none of the licenses discussed in the record are based on a situation directly comparable to the case at hand. First, we cannot compare plaintiff's licensing policies with those of RCA. RCA is a corporate giant, and no part of its present or future business depended directly on battery production. Compare Leesona, which had intended to use the Leesona Moos Labs and its patents as a springboard for entry into the battery manufacturing business. Therefore, the worth of Leesona's patents to Leesona is much greater than that of RCA's to RCA. See Tektronix, Inc., supra, 213 Ct. Cl. at 266, 552 F.2d at 348.

Defendant also points to plaintiff's licensing agreements with others. Again, the situations are not comparable. Until Leesona had lost its exclusive right to manufacture batteries in the United States because of the Government's infringement, it never granted any party the right to manufacture metal-air batteries domestically, although some licenses did allow sale within the United States of batteries manufactured abroad. Defendant argues that the 5 percent fee charged for foreign licenses includes more patents than the three in this suit, and that therefore the 5 percent is too high. But the number of patents involved in a licensing agreement is not the material factor in determining the license's worth; it is the value of the rights embodied in those patents. Leesona did not wish to give up its right to exclusive domestic manufacturing; it would have charged a high fee for a license that in effect would surrender its manufacturing exclusivity. Though we make an assumption contrary to fact in casting Leesona hypothetically in the role of a willing seller, we still assume the seller is Leesona, with Leesona's congeries of special interests.

Our focus on the special value to Leesona of the patents taken by the Government is justified under the law of eminent domain. The just compensation to which an owner is entitled when his property is taken by eminent domain is regarded in law from the point of view of the owner of the right and not from that of the taker. United States v. Chandler-Dunbar Co., supra; Monongahela Navigation Co. v. United States, 148 U.S. 312, 344 (1893); 3 NICHOLS, EMINENT DOMAIN § 8.61 (3d ed. 1977).

Gulf Refining Co. v. United States, supra, illustrates how the special value to the owner may influence an award above the going market rate. Monongahela Navigation Co. had, besides the tangible property the Government took, a franchise it did not take and did not want, which added to the profitability of its land. Held, the profitability of the land due to the franchise was an element that had to be considered. In Old South Ass'n v. Boston, 212 Mass. 299, 99 N.E. 235 (1912), land taken was while in plaintiff's hands tax exempt, but not while in anyone else's. Held, $25,000 added to award for value attributable to the tax exemption.

So it is with these batteries. The special value of the exclusive manufacturing rights, their importance to the diversification plans of Leesona, made their worth much greater and thus the hypothetical royalty charged by Leesona would have been much higher.

Therefore, in light of the unique value of plaintiff's patents to its business, we agree with Trial Judge Browne that a royalty of 10 percent is justified in this case. We recognize that this is not a perfect approximation; rather it is a type of "jury verdict," which we must estimate as best we can in the absence of hard proof warranting use of more precise criteria. Tektronix, supra, 213 Ct. Cl. at 271, 552 F.2d at 351.

As noted earlier, we can attempt to test the reasonableness of our 10 percent royalty by comparing it with other available tests. Note that a 10 percent royalty on a compensation base of $2,667,122.81 gives plaintiff an award of $266,712.28.

Compare this $266,712 figure to the alleged savings to the defendant on the initial procurement. One can estimate the total savings the Government achieved by obtaining the difference between what it paid Eagle Picher and what Leesona bid on the battery contract. On the initial procurement, the Government agreed to pay Eagle Picher $823,397.25 for the batteries, $1,779,550.20 for the anodes, $42,215.36 for the cathodes, and $65,982.48 for the covers. Trial Judge Browne reduced this final figure when estimating the compensation base, as he argued that standard covers were only worth $30/cover instead of the $90.14 Eagle Picher charged. But we kept the $90 figure for our estimate of savings to the Government, as this is the amount the Government did pay Eagle Picher. This totalled $2,711,145.29.

Leesona bid $3,301,179.32 on the contract. Granted, there could have been some cost adjustments in Leesona's contract as there were in Eagle Picher's, but for our purposes we will assume none would have occurred. The difference between Leesona's bid and Eagle Picher's contract is $590,034.03. This can be said to represent the total savings to the Government as a result of using Eagle Picher rather than Leesona.

The record is barren of specific evidence that defendant in evaluating the bids gave any consideration to the fact that Leesona owned the patents and Eagle Picher did not. However, the point could not have been overlooked. We must assume defendant was aware that an award to Leesona would avert litigation while an award to Eagle Picher would assure it. The conclusion is irresistible that defendant as a hypothetical willing buyer of a license to make and use the patented invention would not have paid over $590,034.03 applicable to this procurement. Such a license, at that cost, would have made the award to Eagle Picher exactly as expensive overall to the taxpayer as an award to Leesona. As defendant decided that the award to Eagle Picher was the most advantageous, the conclusion is inevitable that it would have valued the license at under $590,034.03, and therefore, its liability in the inevitable lawsuit at a lower figure also. Thus the figure is a ceiling on the awardable royalty, but not a floor.

In Olsson v. United States, supra, one-fourth of the savings to the Government were awarded plaintiff. That was a case where the inventor could not have manufactured the articles and defendant had to undertake doing so, with all the risks and expenses incident. In this case, research and development costs were required not only for the battery patent, but for a battery patent tailored to the specifications of the United States Marine Corps. Therefore, it would not be

unfair to estimate that about one-half of the savings to the government in this case were due to the fact that Eagle Picher had no research costs and Leesona bore them all. One-half of $590,034.03 is $285,017.01--close to the compensation base of $266,712 we obtained by use of a reasonable royalty method. This is half what a tort theory award based on savings might be, and twice the portion given in the less appealing circumstances of the Olsson case.

A floor on the royalty would be provided by the expense incurred by Leesona in developing its invention, less any compensation received from defendant in its pre-1969 development contracts. The figure, with a reasonable profit, could be amortized by the royalty attributable to the Eagle Picher procurement in the proportion such procurement bore to the anticipated sales of the invention during the patent life. In 1971 plaintiff estimated its "battery development costs" as $1,700,000 in 1968 and $1,870,000 in 1969. This included development of manufacturing technique and facilities, not strictly research and development on the invention only. However, as we have said, plaintiff valued the patents largely for their capability to channel the flow of manufacturing orders to Leesona, so it is not reasonable to suppose that as a willing seller of patent licenses, Leesona would have ignored any part of its "battery development costs." The award of a royalty here must allow amortization of a reasonable portion of "battery development cost." But Leesona as late as September 1971 projected a sale of battery units to the military only starting at 3,800 in 1971 and rising gradually to 30,000 in 1980. A willing seller of a license covering the Eagle Picher procurement of 2,138 units would not have expected to amortize the whole or a major part of the "battery development cost" out of the royalty on that one procurement. We are unable to say that a 10 percent royalty is not adequate in view of the above circumstances. The loss of the greater part of the "battery development costs" with other losses, might possibly be recoverable as business injury on a tort theory (though we do not so hold), but it is manifestly not recoverable on the eminent domain theory under which the present claim is prosecuted.

If awarded the sole source contract originally proposed, plaintiff would have had to submit cost data to defendant which would have shown the amount allocated to amortization of battery development and would be priceless evidence here. They were prepared to show a total figure of $3,700,000, according to testimony. There is no evidence how much of this was estimated allocable to the contract. When required to compete, plaintiff cut its bid to reflect no more than the prices at which it would be able to sell when it was through the learning curve and in full volume production. In other words, it would have realized a loss on this initial procurement alone. The original sole source prices as proposed presumably reflected high start-up costs and perhaps a more liberal amortization of development cost. But we have no breakdown, no detail. In Tektronix, supra, it was possible to estimate the infringer's costs and profits though

partly by the loose mode of attributing to it the plaintiff's known costs. Here, no computation of that kind is made possible by the record before us.

The award of a 10 percent royalty on a royalty base of $2,667,122.81 results in a figure, before delay damages of $266,712. This may quite possibly be less than plaintiff could be shown to be entitled to. Unhappily, the lengthy record in this accounting phase of the case is dominated by plaintiff's and the trial judge's pursuit of a large award, attempting to make good the injury to business on a tort theory, wholly inadmissible in eminent domain. To award plaintiff even as much as we do, it has been necessary to search the record for evidentiary clues as to the fair market value of the license taken, which have found their way there without much help from the plaintiff. Any amount properly awardable, with the missing facts fully developed, would be but a small fraction of what is claimed. Here, as in our renegotiation cases, the party having the burden of proof must suffer if a scantiness of record fails to support a fully informed and reasoned determination.

IV

Finally, plaintiff is entitled to damages for defendant's delay in payment of a reasonable royalty for use of its invention. See Waite v. United States, 282 U.S. 508 (1931).

We do not calculate the delay damages from the date that the Eagle Picher contract was executed, as did Trial Judge Browne. No taking of plaintiff's contract rights occurred on the day of contract execution, unless a tenable argument could be made that the Government used Leesona's patents in inducing infringement on that day. However, this court in Pitcairn stated that unauthorized use of a patented item by the Government did not constitute a taking of plaintiff's invention for once and for all; rather, "[t]he takings occurred whenever the Government procured or used a device covered by any of plaintiff's patents without a license." Pitcairn, supra, 212 Ct. Cl. at 181, 547 F.2d at 1115. And Tektronix explicitly rejected the use of the contract execution date as the date the Government "procured" an infringing device. The contract execution date was rejected because first, the scope of the interest appropriated by the Government at that time might be uncertain, and, second, the use of the execution date as a "date of taking" might present problems if the infringement went undetected until later manufacture or use, since the statute of limitations would run, see Irving Air Chute Co. v. United States, 117 Ct. Cl. 799, 93 F.Supp. 633 (1950). Finally, it is unreasonable to assume that the infringing items were manufactured or used before the contract was executed. Tektronix, Inc. v. United States, 216 Ct. Cl. _____, _____, 575 F.2d 832, 836-37 (1978), cert. denied, Dec. 11, 1978.

Plaintiff argues that this is a special case, because the taking was a taking of plaintiff's exclusive right to domestic manufacture of the air batteries, and that such exclusivity was lost on the date Eagle Picher was authorized to manufacture the batteries, and thus infringe plaintiff's patents. But the problem is that § 1498 does not provide compensation for the loss of exclusivity, only for the manufacture or use of an item by or for the Government. Although we can and do heavily stress the importance of exclusivity when determining the applicable royalty rate, we cannot say that § 1498 provides compensation for its loss independently of the statutorily defined bases for compensation. Also, assuming that the Government had been licensed to use the patent, it normally would have paid royalties on or after the delivery of the batteries.

Eagle Picher's deliveries to defendant began on April 14, 1970, and ended on February 1, 1971.

We choose a weighted average delivery date of July 30, 1970. At this time, a little over one-half of the value of the deliveries had been made to the Government. With proper compensation estimated at $266,712.28, we calculate the delay damages as indicated by Appendix B. They total $171,239.95 for July 30, 1970 through December 31, 1978, with additional compensation at $58.46 per day from January 1, 1979, until payment on the judgment.

CONCLUSION OF LAW

Therefore, we determine that Leesona Corporation is entitled to $266,712.18 as compensation for the taking of its patent rights in the metal-air batteries BB-626/U's. It is also entitled to delay damages of $171,239.95 from the average delivery date of July 30, 1970, through December 31, 1978, with additional compensation of $58.46 per day from January 1, 1979, to the day of payment of the judgment. Judgment is entered accordingly.

APPENDIX A

Trial Judge Browne's Award

(a)	Basic Compensation Base: $3,588,830.84 (after allowable deductions) Rate: 10%	$358,883.00
(b)	Recapture of Research and Development Costs (Difference between amount Leesona would have received if it were awarded contract and actual Eagle Picher, Inc. receipts.)	768,719.10

(c)	Lost Profits (15% of Total procurement if Leesona were awarded contract)	660,235.85	
(d)	Recapture of Capital Investment and Contract Preparation Costs (Not Recoverable)	0.00	
(e)	Savings to the Defendant Resulting from Efficiency, etc. (Taken into account in (a) above.)	0.00	
(f)	Multiple Damages - Willful and Deliberate Infringement and Bad Faith (Additional Sum Equal to Basic Compensation = Double Damages)	358,883.00	
	Total Compensation (Exclusive of Delay Compensation)		$2,146,720.95
(g)	Delay Compensation (From November 6, 1969, date of taking, to December 31, 1977, at applicable quinquennial rates.)		1,288,032.57
(h)	Attorney Fees (approximatey one-third of amount claimed)		100,000.00
	Total Reasonable and Entire Compensation (to December 31, 1977)		$3,534,753.52
(i)	Daily Delay Compensation Rate (from January 1, 1978 to Date of Payment of Judgment.)		$ 470.51

APPENDIX B

Calculation of Delay Damages

	No. of Years	x	Percentage	x	Compensation Base		
A - July 30 to Dec. 31, 1970	.416		.065		$266,712.28	=	$7,211.90
B - Jan. 1, 1970 to Dec. 31, 1975	5.0		.075		"	=	100,017.10
C - Jan. 1, 1976 to Dec. 31, 1978	3.0		.080		"	=	64,010.95
							$171,239.95

Calculation of Daily Delay Damages from
January 1, 1979, to Payment of Judgment

Percentage	x	Compensation Base	÷	Days		
(.08		$266,712.28)	÷	365		
	$21,336.98		÷	365	=	$58.46

TOTAL DELAY DAMAGES: $171,239.95 plus $58.46 per day from January 1, 1979, to payment on judgment.

KASHIWA, Judge, concurring in part and dissenting in part:

I concur with the majority in its reversal of the trial judge on the underlying theory of plaintiff's relief under 28 U.S.C. § 1498 (1976). The grounds for reversal by the majority are well stated in subparagraphs A, B, C, D, and E of part II of the majority opinion. I also agree with the majority views with relation to plaintiff's recovery due to delay in payment expressed in part IV of the majority opinion.

I respectfully dissent from the majority view of damages to be awarded in this case expressed in subparagraphs B and C of part III of the majority opinion.

The majority in subparagraph A of part III states:

> The comparative royalty technique is the preferred method of determining just compensation, Carley Life Float Co. v. United States, 74 Ct. Cl. 682 (1932). This is the method best suited to our needs and the facts available to us, although it is not perfect, and its flaws will be illustrated by our apparent difficulties in applying it to the facts of this case. * * *

The reason it is difficult to apply the comparative royalty technique to the facts of this case is that during the accounting trial plaintiff did not contend it was entitled to a reasonable royalty. Rather, it presented the solitary and novel theory that because it did not receive the procurement contract, the loss of funds that would have been paid to it under such contract caused it to decide to close the Leesona-Moos Division which, in turn, caused the loss of its

investment in metal-air batteries. This novel theory was completely rejected by even the trial judge, and the trial judge decided the case on his own grounds. But the trial judge's own grounds were thoroughly rejected by the majority in subparagraphs A, B, C, D, and E of part II of the majority opinion, as above mentioned. Plaintiff simply did not submit proper proof of damages to prove its case.

Defendant, on the other hand, argued for the award of a reasonable royalty and proved that in four licenses involving the patents in suit, or their foreign counterparts, plaintiff received a 5 percent royalty. It was shown that these licenses also included know-how and additional patents. Furthermore, defendant also proved that in a tripartite license involving two of the patents in suit, plaintiff received only a 1½ percent royalty. This latter license concerned a joint effort to develop technology relating to fuel cells. In addition, defendant presented evidence that RCA had negotiated a commercial license for a patent on magnesium perchlorate batteries used to power military radios for a 1½ percent royalty rate.

The majority has attempted to rescue plaintiff's case in subparagraphs B and C of part III by awarding plaintiff $266,712 on an entire market theory. I cannot see how such a theory can be adopted in the present case in that the trial judge found:

> 5. The packaged anodes, per se, prior to installation in the batteries, come within the scope of the claims of plaintiff's United States Patent 3,531,327 under which defendant has a royalty-free, nonexclusive license. When put to use in the batteries, the packaged anodes constitute indispensable elements of the infringed claims of the patents in suit.

This court found that such a license from plaintiff to defendant existed in the first Leesona case, 208 Ct. Cl. 871, 894, 530 F. 2d 896, 910 (1976). Plaintiff has not objected to the above finding. I believe the finding that the licensed patent aforementioned is indispensable to the metal-air batteries dispute herein makes the entire market theory inapplicable in this case. Assuming the figure $266,712 is correct for the purpose of this argument, however, should not Patent 3,531,327 above mentioned have some percentage of that amount credited to it? If so, what should the percentage be--50 percent or 90 percent? Plaintiff has the burden of proof; it has failed in its proof. Plaintiff and the majority may argue that such proof is impossible. The impossibility makes the use of the entire market theory unavailable to plaintiff. Plaintiff cannot claim any damages under a patent which this court decided was licensed by plaintiff to defendant. A license is a complete defense.

My final objection to the majority's finding of $266,712 damages, which the majority derives using a 10 percent royalty rate, is that the valuation methodology used by the majority is contrary to the

holding in United States v. Miller, 317 U.S. 369 (1943). Miller is fundamental in the law of Federal eminent domain. In Miller the Court held that under the facts of that case, a "single project multitaking case" authorized by Congress in August 1937 with a total of $19,400,000 appropriated, the date of valuation of all properties taken under the project was August 1937, the date of authorization, and not any subsequent date. The filing date of the condemnation suit in the case before the Court was December 14, 1938, so plaintiff argued the valuation date should be December 14, 1938, because property values rose as a result of the Government project in early 1938. The Court held that the date of authorization of the project, August 1937, controlled. The pertinent parts of the decision are as follows [at pages 375-377]:

> There is, however, another possible element of market value, which is the bone of contention here. Should the owner have the benefit of any increment of value added to the property taken by the action of the public authority in previously condemning adjacent lands? If so, were the lands in question so situate as to entitle respondents to the benefit of this increment?
>
> * * * * *
>
> If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.
>
> The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities.

> In which category do the lands in question fall? The project, from the date of its final and definite authorization in August 1937, included the relocation of the railroad right-of-way, and one probable route was marked out over the respondents' lands. This being so, it was proper to tell the jury that the respondents were entitled to no increase in value arising after August 1937 because of the likelihood of the taking of their property. If their lands were probably to be taken for public use, in order to complete the project in its entirety, any increase in value due to that fact could only arise from speculation by them, or by possible purchasers from them, as to what the Government would be compelled to pay as compensation.

In other words, the rule prevents the owner from bootstrapping. In most cases the Government's taking tends to increase values of the properties in the project. Owners are prohibited from taking advantage of such increases in value under the Miller rule.

In the present case the Marine Corps, after testing the metal-air batteries at Camp Pendleton and in Vietnam, decided, as the trial judge found in fact finding 14, as follows:

> 14. The Marine Corps requested authority in April 1969 to issue a negotiated Letter Contract to Leesona for procurement of 2,500 BB-626( )/U batteries, 753,456 anode-electrolyte composites, 3,000 cathodes (bi-cells), and 575 "blower" covers. Since detailed cost data was not available at the time, it was contemplated that a Defense Contract Auditing Agency audit would be conducted after submission of the cost data being prepared by Leesona. Consequently, a limit of $3,700,000 was placed on the proposed procurement, subject to reduction in light of the results of the DCAA audit.

Therefore, April 1969 was the date of authorization of the purchase of the 2,500 batteries, together with the above-mentioned accessories. Under the Miller rule, April 1969 is the cut-off date to determine fair market value of the patent rights taken by defendant via the defendant's eminent domain powers. It was one project, as in Miller, and the date of the decision to purchase was April 1969. Therefore, the majority's computation of damages in subparagraphs B and C of part III is unsound. All the figures used by the majority came after April 1969 and the figures included added values to the metal-air batteries by reason of defendant's procurement of the 2,500 batteries. Defendant is not liable under Miller for these added values because of the very procurement in issue in this case. Plaintiff is clearly not entitled to such bootstrap values.

I admit that in eminent domain just compensation must be determined from the view of what the owner lost, as the majority argues. This is elementary. But it is also elementary that the owner is only entitled to fair market value of what the owner lost. United States v. Miller, supra. The Federal eminent domain law regarding fair market value when there is a "single project multitaking case" is clearly spelled out in Miller and fair market value must be determined as the Court determined therein.

As stated in part IV of the majority opinion, the signing of the procurement contract with Eagle Picher was not the taking; but the procurement of each battery and manufacture of the batteries for defendant by Eagle Picher constituted the taking. However, the valuation of the patent rights taken is determined as of April 1969 for eminent domain purposes because this case is typically a "single project multitaking case" as in Miller. All the evidence considered by the majority to conclude plaintiff was damaged in the sum of $266,712 was after April 1969, and such evidence cannot be used to determine damages in eminent domain proceedings. Miller clearly prohibits bootstrapping in such cases.

Therefore, returning to the only relevant evidence--the 1½ and 5 percent licenses plaintiff voluntarily granted--this court has before it upon which to determine a reasonable royalty, I find the 10 percent royalty rate the majority uses completely unfounded. I am of the opinion the 5 percent rate is the appropriate, reasonable royalty rate. That is the rate at which plaintiff voluntarily licensed a foreign competitor. And although both parties object to this rate, but on different grounds (plaintiff because it was a foreign license rather than a domestic license and defendant because the foreign license included additional patents), that is the most credible royalty rate in the evidence before this court. The compensation plaintiff is entitled to receive is $41,169.86, plus interest on this amount for delayed compensation at the rate and for the period of time set forth in part IV of the majority opinion.

Section 2. Data

a. Trade Secrets Act

MEGAPULSE, INC. v. LEWIS

CA DC (1982)

WILKEY, Circuit Judge: Appellant challenges the district court's refusal to issue a preliminary injunction against the United States Coast Guard enjoining the release of certain technical data without restrictions protecting Megapulse's claimed proprietary commercial rights in that data. The district court denied appellant's motion for preliminary injunction and granted the Government's motion for summary judgment on the ground that it had no subject matter jurisdiction in this case. For reasons outlined in detail below, we hold that the district court erred in this conclusion. We reverse and remand for further proceedings on the merits.

I. BACKGROUND

A. Facts

Megapulse, Inc. is a corporation founded by Dr. Paul Johannessen for the development, manufacture, and sale of long-range (Loran) navigation transmitter equipment embodying a pulsing circuit system known as a megatron, developed by Dr. Johannessen.

Feeling that his development in transmission circuitry might have valuable military as well as commercial application, Johannessen invited the Coast Guard in May 1970 to witness a demonstration of a Loran-C type transmitter utilizing the megatron. As a result of this demonstration, Megapulse and the Coast Guard entered into a series of agreements, beginning in August 1970, for the demonstration and development of megatron transmitter technology for Government-use power levels.

The first contract required Megapulse to construct and test a demonstration model Loran-C transmitter and submit a report with test results and recommendations. Two provisions of this contract related to technical data. One listed several patents and patent applications on which the demonstration model was based and stated that

> [w]hile the U.S. Coast Guard will be granted rights to data relating to the demonstration model transmitter to be constructed under the proposed contract the use of the same

will be subject to the above patent rights under which no license is hereby granted at this time other than freely to use the demonstration model transmitter.

A second provision granted the Government the right to "duplicate, use and disclose in any manner and for any purpose whatsoever, and have others so do, all or any part of the technical data delivered by the Contractor to the Government under this contract."

Additional contracts were entered into in January and September 1971 containing similar provisions relating to rights in data. The final contract, dated 5 December 1975, required the delivery of a pre-production prototype and provided that all data first produced in performance of the contract would become the property of the Government. Data not first produced in performance of the contract was to remain property of the contractor; the Government was to acquire the right to use them and to authorize others to use them unless the data were entitled to limit rights protection at the time they were delivered to the Government. A portion of the engineering drawings and specifications submitted by Megapulse under the contract in November 1977 was marked with a legend, "limited rights data."

In the Spring of 1978 the parties entered negotiations on the form of the license agreement to be issued by Megapulse to prospective bidders on a contract to supply Loran-C transmitters to the Coast Guard. The appellant claimed limited rights protection for a comprehensive list of data at that time, apparently without opposition from the Coast Guard. In August 1978 the Coast Guard announced a procurement of Loran-C transmitters which included notification that those wishing to bid would be required to execute licenses before receiving the data package. The required licenses preserved Megapulse's commercial rights in those portions of the data package in which it claimed a valid proprietary interest.

After several bidders objected to the terms of the licenses, the Coast Guard informally reviewed the proprietary status of the "limited rights" data and determined that it was unlikely that significant portions of the processes described in that data were developed entirely at Megapulse's expense. As a result of this determination, the Coast Guard advised Megapulse in May 1979 that it would remove all restrictions against commercial use of its proprietary data in the bid solicitation. Megapulse protested this decision to the General Accounting Office (GAO) on 29 May 1979, and filed suit in the United States District Court for the District of Columbia to enjoin the Coast Guard's release of the proprietary data pending the GAO decision. Following a preliminary hearing, the Government agreed not to issue the solicitation without protecting the data pending resolution of the GAO protest; Megapulse withdrew its motion before the district court.

On 15 January 1980 the GAO issued an opinion denying appellant's protest on the ground that Megapulse had failed to meet its burden of showing no reasonable basis for the agency's determination that the

data were not entitled to limited rights treatment. Following a 28 May 1980 GAO denial of Megapulse's request for reconsideration, Megapulse once again filed an action for injunctive relief in the district court, founding subject matter jurisdiction on, inter alia, 28 U.S.C. § 1331 and 5 U.S.C. § 702. Notice by the Coast Guard on 2 October 1980 of its intention to proceed with the solicitation by about 1 December 1980 precipitated Megapulse's motion for preliminary injunction.

In connection with its motion for preliminary injunction, Megapulse identified, out of approximately 4,000 documents delivered to the Coast Guard, six specific drawings in the solicitation data package, restriction on release of which would at least minimally protect its commercial interests in the methods and techniques for manufacturing the megatron. It argued that unrestricted release of this data violates the Trade Secrets Act and deprives Megapulse of its property without due process of law.

B. Disposition by the District Court

The district court indicated at oral argument on appellant's motion for preliminary injunction that Megapulse had set out a case for injunctive relief if the court had power to address the merits of the case. The key issue, however, was whether the court had subject matter jurisdiction over plaintiff's claim.

The court noted that the Supreme Court's decision in Chrysler Corp. v. Brown, 441 U.S. 281 (1979) held that a district court has jurisdiction to enjoin an alleged violation of the Trade Secrets Act. It also noted, however, the "well-established rule [under the Tucker Act] that jurisdiction over Government contract disputes lies exclusively in the Court of Claims, which cannot issue an injunction." Faced with the question of whether a Government contractor can step outside the Tucker Act and seek an injunction in the district court to prevent an alleged violation of the Trade Secrets Act when the data involved were originally provided to the Government pursuant to the terms of various contracts, the district court described it as a "close and difficult question whether the logic in Chrysler should be extended to allow this court to find jurisdiction in the present case." In the end, the court found room to distinguish Chrysler, and felt compelled to follow this court's position in International Engineering Co., Division of A-T-O, Inc. v. Richardson, which found under facts similar to those of the instant case that the district court had no jurisdiction to enjoin agency disclosure of information. Appellant challenges the district court's conclusion and the propriety of its adherence to International Engineering.

II. ANALYSIS

The ultimate issue in this case was clearly described by the district court: "whether a party to a Government contract can seek an injunction in [district] court to prevent an alleged violation of the Trade Secrets Act when the disputed data was divulged to the Government in order to fulfill the terms of various contracts." As simply as it is stated, this single issue actually combines two separate inquiries: (1) Does the district court have subject matter jurisdiction over Megapulse's request for injunctive relief? (2) If so, is the district court's jurisdiction limited in any way by sovereign immunity? We address each in turn.

A. Subject Matter Jurisdiction

Megapulse, relying upon the Supreme Court's opinion in Chrysler, argues that the district court has subject matter jurisdiction under 28 U.S.C. § 1331(a) (Federal question jurisdiction). The Government counters with an argument that Chrysler does not apply under the facts of this case and that the district court was correct in adhering to this court's holding in International Engineering. As a first step, therefore, we are faced with determining if the relevant part of International Engineering has in fact survived Chrysler in a form helpful to our analysis in this case.

In International Engineering a Government contractor (IEC) brought an action to prevent the Air Force from disclosing to third parties data from technical reports related to IEC's work on Loran C/D bomb/missile guidance systems and delivered to the Air Force pursuant to contract. IEC claimed proprietary interest in the data contained in some of the reports and had marked affected material with a notice of "limited rights", restricting the Air Force's distribution rights in the data. IEC argued that the unit upon which the reports were based had been developed and built solely at contractor expense and had "been made available for this effort on a no charge loan basis." The Air Force questioned the propriety of the restrictive legend and the contracting officer notified IEC of the Air Force's intentions to utilize the data with unlimited rights.

In its suit of 10 May 1973 for declaratory and injunctive relief, IEC sought judicial review of the contracting officer's decision to strike the proprietary notice, characterizing it as agency action reviewable under Section 10 of the Administrative Procedure Act (APA).

The district court determined that it had jurisdiction in the matter and ultimately entered a preliminary injunction. This court reversed on appeal and remanded the case with instructions to vacate the injunction and dismiss the case for lack of subject matter jurisdiction. The holding that the district court had no jurisdiction to grant the relief sought was based upon the conclusions of three "converging avenues of analysis": (1) the gravamen of IEC's complaint

was for breach of contract; the matter was thus within the jurisdiction of the Court of Claims which could grant no injunctive relief; (2) the decision by the agency officer to strike the limited rights designation did not constitute "agency action" reviewable under the APA; (3) monetary damages were sufficient relief in this case, and since the APA itself states that judicial review under the APA is inappropriate where there exists "other adequate remedy in a court", there was no need to grant APA review. We are convinced that Chrysler effectively counters that portion of the International Engineering opinion which found no district court jurisdiction to review the agency's disclosure decision under the APA (avenue 2), and impacts significantly upon the other two "avenues."

In Chrysler a Government contractor plaintiff sought to enjoin Government disclosure of certain data supplied pursuant to regulation to the Defense Department's Defense Logistics Agency. After rejecting propositions that Chrysler had a cause of action under the Freedom of Information Act or an implied right of action under the Trade Secrets Act, the Supreme Court held that a decision to disclose is an "agency action" under Section 10 of the APA and that a disclosure which would arguably violate the Trade Secrets Act is reviewable as an action "not authorized by law." A private cause of action thus exists, under the APA, for the supplier of data--a person "adversely affected or aggrieved."

The Government would have us distinguish Chrysler from both International Engineering and this case, arguing that

> agency action exists in the Chrysler situation because the rights with regard to the information is [sic] defined by statute in the FOIA and the Trade Secrets Act. In contrast, information submitted pursuant to a contract [as in the instant case] is releasable according to the terms of that contract; not the terms of a statute.

We understand the distinction the Government is trying to make but we find no merit in it. First of all, the distinction presumes a fact as yet unestablished on the merits--that the information which Megapulse is trying to protect actually falls within the scope of the contract. Appellant claims that the information involved "was not developed under the contract at all . . . [but] was submitted to the Coast Guard only to comply with performance requirements for non-commercial application and thus was not governed by the contract at all." We are disinclined to accept the Government's prejudgment of the ultimate (and as yet untried) merits of the action as a basis for a jurisdictional ruling at this stage.

Secondly, the Government's suggestion that "agency action" may be involved when an agency official decides to disclose information provided by a Government contractor pursuant to regulation, but that no "agency action" exists when data subject to the disclosure were

supplied to the agency pursuant to contract, is unacceptable. In this case, as in Chrysler, the "agency action" exists in the official decision to disclose "protected" data. In both cases the supplier of the information claims that insofar as disclosure would violate the Trade Secrets Act the agency was "not authorized by law" under the APA. Chrysler was clear in holding that the Trade Secrets Act was applicable to agency disclosure and that the data supplier alleging violation of that Act was an "aggrieved party" with a cause of action under the APA. To the extent that this court's position in International Engineering was based on a conclusion to the contrary, it is therefore limited by Chrysler.

B. Limitations on Jurisdiction

While we recognize that Chrysler opened an avenue for private causes of action under the APA which this court considered closed at the time of International Engineering, we disagree with appellant's argument that Chrysler alone is dispositive of the matter at hand. It simply did not address all necessary issues. The Supreme Court identified a technical basis for injunctive relief against agency violation of the Trade Secrets Act, but it was not necessary under the facts in Chrysler to consider the possible conflict between jurisdiction over APA-based claims and the restricted role of the Federal courts in contract actions under the Tucker Act. By contrast, because these Tucker Act-related concerns dominated International Engineering, they are central to our discussion of the present case.

It is apparent from a careful reading of International Engineering that the "avenues of analysis" described in that opinion converge at a single point of concern--that to allow suit against the United States under the APA in actions actually based on contract would create such inroads into the restrictions of the Tucker Act that it would ultimately result in the demise of the Court of Claims. The fear finds root in the perceived conflict between the APA's broad waiver of sovereign immunity and the limited waiver afforded by the Tucker Act in actions based on Government contracts.

As indicated in International Engineering, the Tucker Act may be read to include more than a jurisdictional scheme. For contract actions at least, the Act also grants a limited waiver of sovereign immunity, allowing suit but limiting the Court of Claims to monetary relief only. The Court of Claims "may neither grant declaratory . . . nor injunctive relief." We continue to believe that this is a fair reading of the Act, and we agree that a plaintiff whose claims against the United States are essentially contractual should not be allowed to avoid the jurisdictional (and hence remedial) restrictions of the Tucker Act by casting its pleadings in terms that would enable a district court to exercise jurisdiction under a separate statute and enlarged waivers of sovereign immunity, as under the APA.

This concern for preserving the integrity of the Tucker Act is not unique to this court or to contract actions in particular. Courts have not hesitated to look beyond the pleadings of a case brought in district court to determine if it involves a claim over which the Court of Claims has exclusive jurisdiction. Thus, in Graham v. Henegar the Fifth Circuit observed,

> Because adjudication in a Federal district court of a lawsuit that falls within the exclusive jurisdiction of the Court of Claims would seriously undermine the purposes of the Tucker Act, courts confronting the issue have consistently held that the Court of Claims is the sole forum for the adjudication of such a claim, even though the claim would otherwise fall within the coverage of some other statute conferring jurisdiction on the district court.

We reemphasize the position of this court, stated in International Engineering, that an action against the United States which is at its essence a contract claim lies within the Tucker Act and that a district court has no power to grant injunctive relief in such a case. We disagree, however, with the district court's reading of International Engineering to suggest that any case requiring some reference to or incorporation of a contract is necessarily on the contract and therefore directly within the Tucker Act. We do not believe that such a broad test was intended in International Engineering, and we refuse to adopt it here.

The classification of a particular action as one which is or is not "at its essence" a contract action depends both on the source of the rights upon which the plaintiff bases its claims, and upon the type of relief sought (or appropriate). Where there is only one possible basis for jurisdiction, as was assumed in International Engineering, the classification need not be a narrow one. But where there is a possible alternative basis for jurisdiction independent of the Tucker Act, such as is arguably the case before us, we must be more deliberate in our examination. Although it is important on the one hand to preserve the Tucker Act's limited and conditioned waiver of sovereign immunity in contract actions, we must not do so in terms so broad as to deny a court jurisdiction to consider a claim that is validly based on grounds other than a contractual relationship with the Government. The broad language of International Engineering, while appropriate there, is little help to our present analysis, which turns now to a closer look at the "competing" bases of jurisdiction in this case and to determine if the claim so clearly presents a disguised contract action that jurisdiction over the matter is properly limited to the Court of Claims.

1. Proprietary right vs. contract right

Contract issues may arise in various types of cases where the action itself is not founded on a contract. A license, for example, may be raised as a defense in an action for trespass, or a purchase

contract may be raised to counter an action for conversion. But the mere fact that a court may have to rule on a contract issue does not, by triggering some mystical metamorphosis, automatically transform an action based on trespass or conversion into one on the contract and deprive the court of jurisdiction it might otherwise have. As this court observed in de Magno v. United States,

> It is not at all unusual for a court to find it necessary in the course of deciding a dispute over which it does not have jurisdiction to decide an issue which would be outside its jurisdiction if raised directly. For example, in deciding a conversion action, a court may have to determine title to property in another state, a question which it would have no competence to decide directly. Or in a contract action in state court, the court may find it necessary to decide the merits of the defendant's position that the contract was in violation of the Federal antitrust laws, an issue which is within the exclusive jurisdiction of the Federal courts if raised directly. While a court's lack of jurisdiction to decide an issue directly may affect the collateral estoppel effect of the particular factual determination, . . . it does not limit the court's power to decide the question to the extent it is relevant to the dispute over which it does have jurisdiction.

Even though the Court of Claims is accepted as having exclusive jurisdiction over all contract disputes over $10,000, it certainly has no corner on the power to consider contract-related issues arising in other actions. The Supreme Court many years ago recognized a private party's cause of action outside the Tucker Act to challenge the statutory authority of Federal officials to claim ownership rights in property allegedly transferred during the course of a contract. In Land v. Dollar stockholders in a private company transferred shares of corporate stock to the Federal Maritime Commission in exchange for a release by the Commission from certain obligations, the grant of an operating subsidy, and the extension of a loan. Following repayment of the loan, a dispute ensued as to whether the stock had been sold to the Commission or merely pledged. The shareholders sued in the District Court for the District of Columbia for recovery of the stock. The Supreme Court affirmed this court's ruling that the District Court had jurisdiction to consider the claim since a determination that the suit involved property of the United States, as to which sovereign immunity existed, prejudged the ultimate merits of the action. In language of particular relevance here, the Court explained,

> [P]ublic officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, [the aggrieved party] is not relegated to the Court of Claims to recover a money judgment.

Subsequent court rulings have made clear that the jurisdictional bar of sovereign immunity in property disputes arising from contractual relationships does not necessarily apply where the Government defendants are charged with having acted beyond the scope of their statutory authority.

We are convinced that Megapulse's claims against the Government are not "disguised" contract claims. Megapulse has gone to great lengths to demonstrate that it is not relying on the contract at all. It does not claim a breach of contract, it has limited its request for relief to only six documents "reflecting the essence of the proprietary technology developed . . . prior to the parties' first contract", it seeks no monetary damages against the United States, and its claim is not properly characterized as one for specific performance. Appellant's position is ultimately based, not on breach of contract, but on an alleged Governmental infringement of property rights and violation of the Trade Secrets Act. It is actually the Government, and not Megapulse, which is relying on the contract, attempting to show that the Coast Guard lawfully came into possession of the property and is empowered by the contract to put the entrusted information out for commercial use. As indicated above, we do not accept the Government's argument that the mere existence of such contract-related issues must convert this action to one based on the contract. This court retains the power to make rational distinctions between actions sounding genuinely in contract and those based on truly independent legal grounds. This is not a case "falling squarely under the Tucker Act", as the district court assumed.

2. Adequacy of a legal remedy

The Government argues that, even if the district court may technically have jurisdiction under § 1331 because of the Federal questions involved in determining whether the Coast Guard's actions violate the Trade Secrets Act, the APA itself, in § 704, states that judicial review is inappropriate where there exists some "other adequate remedy in a court." The Government then turns to International Engineering to support its contention that the availability of money damages in the Court of Claims in this type of action is an "adequate remedy." We do not read from the APA the per se rule the Government seems to suggest. The question of adequacy may be resolved only against the facts of each case. While we acknowlege the court's conclusion in International Engineering that monetary relief was possible and adequate in that case, we do not believe that a similar conclusion is required here.

The technical data which Megapulse seeks to protect in this case relate to the "detailed manufacturing processes and techniques followed in constructing the megatron, [which] could not be built without knowing these methods." Unlike the data in International Engineering, which the Government characterized as "useless except for

what not to do," the megatron is allegedly a valuable and working circuit system of enormous commercial value to Megapulse and of particular usefulness in the private sector when utilized at lower power ranges. As appellant maintains, "[T]he trade secrets here at issue represent the very economic life blood of Megapulse." Assuming an adequate preliminary support of these allegations, there is no basis in the Government's reliance on APA § 704 as denying jurisdiction to the district court to grant preliminary relief and to make an ultimate determination on the merits.

Finally, the Government argues that the relief sought by Megapulse is tantamount to a request for specific performance of a Government contract and that such relief may not be granted under the APA. First, it posits that the Tucker Act implicitly forbids specific performance by granting no equitable jurisdiction to the Court of Claims. It then points to language in § 702 stating that nothing in the section entitling parties to judicial review of agency action and waiving sovereign immunity

> (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

It concludes that the district court has no power to grant injunctive relief in this case. We are not willing to follow this line of logic.

It is one thing to rely on the generally recognized rule that a plaintiff cannot maintain a contract action in either the district court or the Court of Claims seeking specific performance of a contract. It is quite another to claim, as the Government does in this case, that an agency action may not be enjoined, even if in clear violation of a specific statute, simply because that same action might also amount to a breach of contract. Government's counsel admitted at oral argument that by the logical inference of its position the Government could avoid injunctions against activities violative of a statutory duty simply by <u>contracting</u> not to engage in those activities. Because Government involvement in any such activities would thereby also constitute a breach of a contract term, any injunction would be equivalent to an award of specific performance, which, as a matter of public policy, is not available against the Government. We cannot accept such an interpretation of the law for many of the same reasons we refuse automatically to classify claims raising contract issues as "contract actions."

It is clear to us that so long as an action brought against the United States or an agency thereof is not one that should be classified from the outset as a "contract action" for Tucker Act

purposes, its remedies are also not contract-related, and the mere fact that an injunction would require the same Governmental restraint that specific (non)performance might require in a contract setting is an insufficient basis to deny a district court the jurisdiction otherwise available and the remedial powers otherwise appropriate. We find no limits, imposed by sovereign immunity, on the district court's jurisdiction to consider and grant (if appropriate) Megapulse's request for injunctive relief.

III. CONCLUSION

The district court described as the "key issue" in this case the question of whether it had subject matter jurisdiction over Megapulse's Trade Secrets Act claims. It concluded that it did not and for that reason declined to rule on the merits. We find that the district court erred in this conclusion, based as it was on a determination that appellant's action fell within the Tucker Act. It is clear to us that Megapulse has not brought a contract action or an otherwise disguised claim for monetary relief against the United States. This action was properly brought under the APA, and injunctive relief, preliminary or permanent, is available in the district court.

The summary judgment for the Government is therefore reversed and the case is remanded; the district court is free to proceed on the merits of appellant's claim and to grant such non-monetary relief as it finds appropriate.

So ordered.

b. Computer Programs

McDONNELL AUTOMATION COMPANY

49 Comp. Gen. 124 [B-167020] (1969)

Gentlemen:

Further reference is made to your letter of May 20, 1969, with enclosures, protesting the use of your programs and related software in connection with Invitation for Bids No. F05602-69-B-0011 issued on February 26, 1969, by the U.S. Air Force Accounting and Finance Center, Denver, Colorado, to provide the Air Force with complete computer services for producing the program entitled, "Legal Information Through Electronics" (LITE).

The subject invitation under Part I, entitled "LITE Technical Statement," provided:

> c. Current software and other unique programs currently used for operation will be provided as necessary for Benchmark and eventual contract performance.

The objective of the Benchmark test was to require bidders to demonstrate to the Government that they could process LITE searches through the system satisfactorily.

Nine bids were received and opened on April 3, 1969. The low bidder, Computer Management and Services Corporation, was furnished the necessary programs and related software as provided in Part I of the invitation for the performance of Benchmark tests. Following successful completion of the Benchmark tests, and rejection by the Air Force of your protest dated May 7, 1969, which was on completely different grounds the contract was awarded to the low bidder on May 8, 1969.

By letter of May 20, 1969, you stated that the Government improperly supplied the low bidder with certain programs and related software for the performance of the Benchmark tests. You contend that these programs and related software, which had been furnished to the Government by you under a prior contract, were not subject to the Rights in Data clause of your contract because they did not constitute data specified to be delivered, and had been submitted to the Government for use by the Government only. Lastly, you protest the inclusion of Part I, supra, in the subject invitation and cite two of our decisions, B-143711 and B-150369 (43 Comp. Gen. 193) to support your position that the award was illegal and should be cancelled.

The history of development of the emulation programs and related software in dispute, appears from the record to be as follows:

Contract No. FO5602-67-C-0025 for Computer Search Services and New Data base Creation and updating services for existing bases, was awarded to McDonnell Automation Company (McDonnell) on March 23, 1967, and expired on June 30, 1969. It is reported that, initially, McDonnell could not make the LITE IBM 1410 emulation programs work on its RCA Spectra 70/45 System. The months of May, June, July and part of August, 1967 were spent developing emulation programs compatible with RCA Spectra 70/45, through the joint efforts of McDonnell, RCA and the Air Force. The manpower invested by the respective parties was unknown. However, the Air Force did not insist upon full production performance by McDonnell during these months and continued to pay the contract price of $17,750 per month for computer services, even though such services were not operational.

Meanwhile, the Air Force was concerned with obtaining computer program source decks and documentation for all McDonnell programs which would enable the agency to operate elsewhere on an identical RCA Spectra 70/45 System, since without such emulation programs and related software, the agency was completely dependent on McDonnell to run the LITE program. A memorandum, dated July 31, 1968, stated that the Air Force must have access to all programs required for operating the LITE System and concluded Clause 37, Rights in Data, entitled the agency to the current versions of all programs at the end of this contract performance.

The Air Force files show that in June 1968 the Air Force requested source decks and documentation for all McDonnell provided programs and tape and instructions for a complete System Generation for LITE and standard 70/45 software, for storage by the Air Force. In reply, by letter of July 16, 1968, you expressed willingness to make available object decks for storage by Air Force LITE against emergency and catastrophic events that would enable McDonnell to perform contract services at its Denver facility, but stated that "the source decks for the specific emulation programs which McDonnell developed at their cost to meet contract specifications will be stored by McDonnell at a separate facility for emergency backup."

This was determined by Air Force to be unacceptable, and a further request was made by letter of July 24, 1968, which requested delivery of source decks, documentation, and tape currently being used to operate the LITE system, consisting of ten specifically enumerated items, including Emulator Master Tape (Modified LITE version); also updated versions thereof and/or additional materials provided periodically and as requested by Air Force LITE. A memorandum to the file dated August 7, 1968, reports advice by telephone that McDonnell had submitted the question of its rights to emulator programs to its general counsel. A further memorandum dated August 15 states that Mr. Fullerton, McDonnell's president, called Colonel Kelley on August 13

and requested withdrawal of his letter of August 12 concerning the rights to computer program. The letter referred to does not appear in the file.

So far as appears from the record, the matter was closed by the delivery by McDonnell to the Air Force on August 21, 1968, of all the requested material then in use.

Thereafter, the Air Force decided to formally advertise for continuation of the LITE system services, and the subject invitation for bids was issued on February 26, 1969. On April 7, 1969, the Air Force requested from McDonnell copies of currently updated versions of software used for the performance of contract FO5602-67-C-0025. By letter dated April 8, 1969, McDonnell forwarded the requested software, but referred to it as material developed by McDonnell wholly at its expense, and stated the following reservation:

> This software is supplied for the sole use of the United States Government and access is not to be given to anyone outside the Government.

Since the Air Force maintained that McDonnell was required under the contract to furnish the software involved, the restriction was disregarded and the Computer Management and Services Corporation was permitted to use the items to qualify under the Benchmark tests.

The question for our resolution is whether under the terms of the 1967 contract the Air Force had title to or the right to deliver or disclose to others the programs and related software obtained by the Air Force from McDonnell, including those furnished with the letter of April 8, 1969.

The McDonnell contract contained a "Rights in Data" clause, added as section 37 to the General Provision, which included the following stipulations:

> (b) All Subject Data first produced in the performance of this contract shall be the sole property of the Government. The Contractor agrees not to assert any rights at common law or equity and not to establish any claim to statutory copyright in such Data. The Contractor shall not publish or reproduce such Data in whole or in part or in any manner or form, nor authorize others to do so, without the written consent of the Government until such time as the Government may have released such Data to the public.
>
> (c) The Contractor agrees to grant and does hereby grant to the Government and to its officers, agents and employees acting within the scope of their official duties, a royalty-free nonexclusive, and irrevocable license

throughout the world (i) to publish, translate, reproduce, deliver, perform, use, and dispose of, in any manner, and any and all Data not first produced or composed in the performance of this contract but which is incorporated in the work furnished under this contract; and (ii) to authorize others so to do.

In addition, this contract provided under Item 1 of the Technical Statement, "EDPS" that:

> * * * Program changes necessary to provide computer capability for loading and searching data basis * * * will be accomplished by the contractor from Air Force documentation and program decks. If the vendor's equipment cannot emulate or translate present programs, the vendor may reprogram or provide alternative programs or subsystems at no expense to the Government.

The only ground stated by you in support of your claimed right to restrict use of the software is that at least some material part was developed by you at your own expense. The provisions of the Rights in Data clause do not appear to recognize this as a basis for excepting any of the material otherwise covered by the terms of the clause, and to the extent that the material was developed pursuant to the provisions of Item 1 of the Technical Statement quoted above, it was required to be at your expense. In any event, it appears from the administrative report that the Government paid for a substantial part of the computer time used in developing the material. Where there is a mixture of private and Government funds, the developed data cannot be said to have been developed at private expense. The rights will not be allocated on an investment percentage basis and the Government will get unlimited rights to such data. See Hinrichs, Proprietary Data and Trade Secrets under Department of Defense Contracts, 36 Military Law Review, 61, 76.

Regardless of the relative investment of the three parties involved, it is clear that these programs and related software were developed solely for the purpose of operating the LITE System. In this regard, the Rights in Data clause incorporated in the subject contract states that all subject data first produced in the performance of this contract shall be the sole property of the Government.

Your letter cites the following decisions of our Office as supporting your position: B-143711, dated December 22, 1960, and B-150369, dated August 22, 1963.

In B-143711, the Government had received unsolicited technical data from the contractor under conditions which clearly indicated that the Government had agreed not to use the data without consent.

Therefore, our office held in that decision that the Government could not proceed with an Invitation for Bids in which such data would have been disclosed. Your protest is distinguished from B-143711, in that there is no agreement that the Government would consider the programs and related software as your proprietary data; on the contrary, the Air Force insisted throughout the performance of your contract, that it had a right to all programs required for operating the LITE System and that the Rights in Data clause entitled the Government thereto.

In B-150369, the Government used proprietary data in an invitation for bids which had been obtained under a prior contract on the basis of assurances from contracting officials that the data would be held confidential and used only for a prescribed purpose. In the instant case, there is no evidence that the Government ever in any way indicated that the programs and the related software developed under your contract would be considered as proprietary to you.

On the basis of the facts as disclosed by the record before us, it is our view that the Air Force acquired unlimited rights, under the Rights in Data clause, in all programs and related software developed in the performance of your contract, and that the use of such data in the formally advertised procurement under Invitation for Bids No. FO5602-69-B-0011 was not in violation of any rights vested in you. See 38 Comp. Gen. 667. Furthermore, we note that while the invitation was issued on February 26, 1969, and you raised questions as to the relative merits of your bid and that of Computer Management and Services Corporation by a protest dated May 6, prior to award, you did not then or at any time before the award note any objection to the terms of the IFB which announced the availability to the successful bidder of all current software. The courts have taken the position that a party to maintain his proprietary rights in information must take reasonable action to prevent or suppress its unauthorized use. See Ferroline Corporation v. General Aniline and Film Corporation, 207 F. 2d 912; Globe Ticket Company v. International Ticket Company, 104 A 92. While we have in several cases directed cancellation of a procurement where it appeared that it involved disclosure of proprietary data which the Government had no right to disclose, we have never done so after a contract had been awarded. See 46 Comp. Gen. 885. In our view such action would not be justified in this instance.

For the foregoing reasons your protest is denied.

GOVERNMENT CONTRACT LAW CASES

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CHAPTER EIGHT

LABOR CLAUSES

Section 1. Walsh-Healey Act

FEDERAL FOOD SERVICE, INC. v. DONOVAN

CA DC (1981)

NICHOLS, Judge. The issue presented in this appeal is whether the district court erred in upholding the Secretary of Labor's decision that appellants were in violation of Federal law by underpaying certain employees and that there were no "unusual circumstances" present that justified removal of appellants' names from the list of those ineligible to bid on Government contracts. Although we agree that the Secretary's finding of the existence of violations is supported by a preponderance of the evidence, we disagree on his application of the "unusual circumstances" standard and therefore reverse.

This is an appeal from two orders of Judge Penn. On August 1, 1979, Federal Food Service and its president, Harold E. Gelber (appellants) brought this action for preliminary injunction and declaratory judgment against the Secretary of Labor and the Comptroller General (appellees). On December 11, 1979, Judge Penn denied appellants' Motion for Preliminary Injunction. On December 18, 1979, he sua sponte granted summary judgment for appellees. Appellants seek review of these two decisions.

Appellants are in the business of furnishing mess attendant services and this case involves contracts awarded to appellants to provide such services at various and widely scattered military installations from July 1, 1973, through June 30, 1975. These contracts were subject to the Service Contract Act of 1965 (Act), as amended, 41 U.S.C. §§ 351 et seq. Early in 1974, appellee conducted an investigation into the performance of appellants' contract at a facility in Charleston, South Carolina. As a result, appellants paid back wages of $418 to seven employees for hours worked but not recompensed. Additional investigations thereupon were launched into other contracts of appellants and additional violations of the Act were discovered. An administrative complaint was filed in November 1976 charging appellants with violations of the minimum wage and fringe benefit requirements of the Act. Appellants denied the charges and also asserted the presence of "unusual circumstances" if violations were found.

After formal hearings, the Administrative Law Judge (ALJ) filed his decision on November 22, 1977, and found that appellants had failed to pay proper amounts of holiday pay at five locations, had failed to pay vacation pay at three locations, and owed back pay at one location. Out of a total alleged deficiency of $8,095.10, the ALJ found appellants responsible for $3,128.33. These underpayments of employees violated the Act, and under § 354 violators are ineligible for award of Government contracts for a 3-year period unless the Secretary of Labor recommends otherwise because of the presence of unusual circumstances. There is no provision for any milder sanction. It is the executioner's ax or nothing. The ALJ recommended against unusual circumstances because he found that appellants' past history reflected violations of the Act during several years, and that there were culpable violations which proper management would have precluded.

Appellants appealed to the Administrator of the Wage and Hour Division who affirmed the ALJ and who recommended to the Secretary that appellants be debarred from receiving Government contracts under § 354. Appellants filed an application for relief from debarment pursuant to 29 C.F.R. § 612, but the Secretary concurred with the ALJ's decision, and appellants were debarred. The debarment is now in effect and in view of the nature of appellants' business, must have a catastrophic impact upon it.

Appellants thereupon filed their suit for a preliminary injunction and declaratory judgment. After determining that the Secretary's decision was not precluded from judicial review, the district court denied appellants' motions, holding that the Secretary's determination that appellants' names should not be removed from the list of ineligible bidders was not arbitrary nor an abuse of discretion. Appellants bring this appeal requesting a reversal of the district court. The appellees argue that a debarment determination by the Secretary is precluded from judicial review, but if the decision is reviewable, then it was not arbitrary or capricious and was otherwise in accordance with law.

The two issues before this court are whether judicial review is foreclosed, and if there is review, whether the Secretary's decision was arbitrary, capricious, not based on a preponderance of the evidence or otherwise not in accordance with law.

1. Judicial Review not Precluded

Appellees argue that this court cannot review the decision of the Secretary because it "is committed to agency discretion by law" and thus not subject to judicial review. See 5 U.S.C. § 701(a)(1), (2). We, however, agree with the district court that the Secretary's decision is reviewable. Whether judicial review is foreclosed requires an analysis of two factors, i.e., whether there is clear and convincing evidence of a legislative intent to restrict access to review, Abbott

Laboratories v. Gardner, 387 U.S. 136, 141 (1967), or whether the statutory authority is drawn in such broad terms that in the given case there is no law to apply. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

In this case there is no indication that Congress sought to prohibit judicial review. Section 5 of the 1965 act provided for distribution by the Comptroller General of a list of Act violators, and no contract could be awarded to a person or firm on the list unless the Secretary otherwise recommended. The provision now under analysis, § 354, amended that section, and, according to the legislative history, this new provision "limits the Secretary's discretion to relieve violators of the Service Contract Act from the debarment provisions of Section 5(a) to cases where unusual circumstances exist." S. REP. NO. 92-1131, 92d Cong., 2d Sess. 3-4 (1972). Although the amendment limited the Secretary's discretion by restricting its exercise to unusual cases, appellees' citation to the above quote does not present clear and convincing evidence of a legislative intent to restrict access to judicial review. To the contrary, Congress provided that in case of judicial review, the evidentiary standard should be preponderance of the evidence. 41 U.S.C. §§ 39, 353(a). This of course would not extend judicial review to cases where it would otherwise be unavailable, but it does reflect an intent by Congress to leave availability to general law and judicial precedents.

Also, the statute is not drawn in such broad terms that there is no law to apply in this case. The "no law to apply" exception is a very narrow one which the legislative history of the Administrative Procedures Act, 5 U.S.C. § 701 and following indicates is to be applied only in rare instances. S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945); See Berger, Administrative Arbitrariness and Judicial Review, 65 COLUM. L. REV. 55 (1963). The Secretary does not undertake to show that in case of a proven or admitted violation, the question whether or not to debar is confined to his mere whim. He himself has concluded that there is law to apply, and has stated what it is, as we shall presently quote. Our holding that judicial review of the Secretary's decision to debar a contractor under § 354 is not precluded is in accord with the recent decision of the Tenth Circuit. Midwest Maintenance & Construction Co. v. Vela, 621 F. 2d 1046, 1051 (1980)(reversing same v. Jones, 84 CCH Labor Cases ¶ 33,658 (W.D. Okla. 1978, not reported in F. Supp.))

2. Review of Secretary's Decision

The next issue is whether the decision to debar was arbitrary, capricious, or otherwise not in accordance with law. 5 U.A.C. § 706. Section 5 of the Walsh-Healy Act, 41 U.S.C. § 39, incorporated by Section 4(a) of the Service Contract Act, 41 U.S.C. § 353(a), provides that the Secretary's findings of fact must be supported by a preponderance of the evidence.

In Washington Moving and Storage Co., No. SCA-168, March 12, 1974 the Secretary established the following guidelines by which "unusual circumstances" should be judged:

> Whether "unusual circumstances" are present in a case within the meaning of the Act must be determined on the basis of the facts and circumstances of the particular case. Some of the principal factors which must be considered in making this determination are whether there is a history of repeated violations of the Act; the nature, extent, and seriousness of past or present violations; whether the violations were willful, or the circumstances show there was culpable neglect to ascertain whether certain practices were in compliance, or culpable disregard of whether they were or not, or other culpable conduct (such as deliberate falsification of records); whether the respondent's liability turned on bona fide legal issues of doubtful certainty; whether the respondent has demonstrated good faith, cooperation in the resolution of issues, and a desire and intention to comply with the requirements of the Act; and the promptness with which employees were paid the sums determined to be due them. It is clear that the mere payment of sums found due employees after an administrative proceeding, coupled with an assurance of future compliance, is not in itself sufficient to constitute "unusual circumstances" warranting relief from the ineligible list sanction. It is also clear that a history of recurrent violations of identical nature, such as repeated violations of identical minimum wage or recordkeeping provisions, does not permit a finding of "unusual circumstances." * * *

These guidelines provide a rational and lawful approach to a determination of whether "unusual circumstances" exist. The "law to apply" presents the issue whether he has applied his own guidelines correctly in this instance.

In the instant case, after finding appellants were responsible for a deficiency of $3,328.35--an amount less than one-fifth of 1 percent of the contract values and in a labor-intensive business, no doubt almost as low a ratio compared to total payrolls--the ALJ ostensibly applied the Washington Moving guidelines. The ALJ found that there was no evidence the violations were willful or deliberate and that appellants cooperated with the extensive and complex investigation of the case except for one unexplained instance at the Norfolk location. Payments were made fully and promptly even though substantial amounts had to be estimated through no fault of appellants. Previous violations in the past were not substantial and did not result in debarment because of unusual circumstances.

The vital finding which most influenced the ALJ and the district court was that "proper management would have precluded the continuing occurrence of these widespread underpayments." This is an important finding in view of the small ratio of violations to value of contracts (and to total payrolls, presumably) and the absence of consideration--admitted at oral argument--of offsetting overpayments. Large underpayments might be res ipsa loquitur of improper management. There are no facts in the record to refute the judicial belief that no rational precautions could reduce violations to absolute zero. In the instant case there was no showing in the record to support the ALJ's findings of what proper management would have accomplished in these premises and it was bald assumption. The ALJ cited to no testimony of management experts or of prevalent business practices to establish what practices appellants should have followed and did not. Certainly, contractors could hire an army of bookkeepers, accountants, and supervisors to insure no underpayments would occur, and perhaps most needful to all, lawyers at each location. Such a practice, however, would elevate the cost of operation to a level to endanger the future of appellants' type of business as a source of employment.

We desire to avoid dictum and therefore do not speculate about cases other than the one before us. To state the limits of the rule we rely on is a necessary part of our decision. We hold that where, as here, the ALJ has made an inference of improper management solely on the basis of virtually de minimus underpayments, the Secretary must consider the particular circumstances of the business under review--for example, the actual problems it has faced, the precautions normally taken by well-managed companies in the field, the likelihood that it could have avoided its violations with proper management--before implementing the severe debarment provision. If as here he relies on a history of previous violations to support debarment, he must apply the standards of reasonable management to them as well. Of course, if the ALJ has made these findings on the record, the Secretary need not make an independent investigation. The very absence of any sanction other than the catastrophic one of three years debarment supports the legislative history that use of debarment against innocent and petty violations was not intended. It would be interesting to know what percentage of Federal income tax returns are found on audit to be wholly free of error and in what percentage of those not so free are negligence or fraud penalties assessed.

In reviewing debarments under § 354, we do not suggest that a "pure heart" and a lack of willfulness are sufficient to show unusual circumstances. The Secretary was accorded broad discretion by Congress. However, when findings are made they must respect the guidelines by which the Secretary exercises his discretion. In this case there were several factors favorable to the appellants, and absent evidentiary support for the finding of negligence in use of improper management techniques, appellants' debarment is arbitrary because it did not result from a reasonable application of the

Secretary's guidelines. 41 U.S.C. §§ 39, 353(a). Therefore, the decision of the district court denying appellants' motions for an injunction and declaratory relief is reversed. The cause is remanded to the district court with directions to vacate the debarment. Leave may be granted to the Secretary, however, to reinstate appellants' names on the list of debarred bidders upon reopening the record and making satisfactory findings consistent with this opinion.

REVERSED AND REMANDED.

Section 2. Davis-Bacon Act

UNITED STATES v. BINGHAMTON CONSTRUCTION CO., INC.

347 U.S. 171 (1954)

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case is before us on writ of certiorari to the Court of Claims. The question presented is whether the schedule of minimum wage rates included in a Government construction contract, as required by the Davis-Bacon Act, is a representation or warranty as to the prevailing wage rates in the contract area. We hold that it is not.

The Davis-Bacon Act requires that the wages of workmen on a Government construction project shall be "not less" than the "minimum wages" specified in a schedule furnished by the Secretary of Labor. The schedule "shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing" for corresponding work on similar projects in the area. The Act also provides for penalties, including termination of the contract, if it is found that the contractor is paying less than the schedule rate.

The respondent, a construction company, was the successful bidder for a Government flood control project on the Chemung River at Elmira, New York. On January 31, 1941, at the request of the Corps of Engineers, the Secretary of Labor submitted a schedule of minimum wages for the project. This schedule set the minimum hourly wage rate at $1.00 for carpenters and $.50 for laborers. On March 29, 1941, the Corps of Engineers issued an invitation for bids. Pursuant to the Davis-Bacon Act, supra, the Secretary's wage schedule was included in the contract specifications furnished to respondent, prior to the computation of its bid. On May 14, 1941, respondent's bid of $232,669.30 was accepted and a written contract was executed, incorporating the specifications and subject only to formal approval by the Government. The contract provided that respondent was to pay wages "not less than those stated in the specifications . . ."; for breach of this provision, the Government was authorized to terminate the contract. On June 5, 1941, the contract was formally approved; and on June 5, 1941, respondent received notice to proceed with the work.

On October 22, 1940, the local carpenters' union had notified the contracting officer that the hourly wage scale for carpenters would be increased from $1.00 to $1.125 as of January 1, 1941. On March 4, 1941, some three weeks prior to the invitation for bids on the project involved here, the Secretary of Labor had furnished another Government agency, the Federal Works Agency, a schedule of minimum wages for inclusion in the specifications for a Federal housing project in

Elmira. This schedule set the minimum hourly wage rate at $1.125 for carpenters and $.55 for laborers. On April 1, 1941, the union hourly rate for laborers was increased from $.55 to $.625.

In the performance of the contract, respondent paid the union rates then in effect--$1.125 for carpenters and $.625 for laborers. On June 16, 1941, respondent protested to the contracting officer that it was unable to obtain workmen at the rates specified in the contract schedule and demanded an adjustment of compensation, on the theory that the schedule was an affirmative representation as to the prevailing wage rates in the area and that respondent was entitled to rely on this representation in the computation of its bid. The contracting officer denied relief and the Chief of Engineers dismissed respondent's appeal.

Respondent thereupon brought this action in the Court of Claims, seeking damages for the alleged misrepresentation as well as other relief. The court specifically found that an investigation by respondent would have revealed that the prevailing rates were higher than the rates specified in the schedule. Nevertheless, it allowed respondent a recovery of $7,363.22, consisting of the difference between the rates specified in the contract schedule ($1.00 for carpenters and $.50 for laborers) and the rates specified in the Secretary of Labor's determination for the Federal Works Agency ($1.125 for carpenters and $.55 for laborers). The court held that the contract schedule misrepresented--although inadvertently--the prevailing wage rate in the Elmira area, since, prior to the invitation to bid, the Secretary of Labor had made a higher determination and the contracting officer could have ascertained that fact. Respondent, the court held, was entitled to rely on the schedule "as the Secretary's latest determination--as a representation of the wages it would have to pay when the work was to be done." We granted review because of the obvious importance of the decision in the administration of the Davis-Bacon Act.

The Act itself confers no litigable rights on a bidder for a Government construction contract. The language of the Act and its legislative history plainly show that it was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects. Congress sought to accomplish this result by directing the Secretary of Labor to determine, on the basis of prevailing rates in the locality, the appropriate minimum wages for each project. The correctness of the Secretary's determination is not open to attack on judicial review.

The Court of Claims nevertheless awarded respondent damages on the ground that the Government, through the Corps of Engineers, had falsely represented the prevailing rates in the Elmira area. The short answer to this is that the Government made no such representation. Neither the contract nor the specifications refers to

"prevailing" rates. The contract speaks only of "wage rates not less than those stated in the specifications." The specifications in turn speak only of "minimum wage rates applicable in the locality." The only reference to "prevailing" rates appears in the statute itself, which provides that the minimum wage rates are to be "based upon * * * the wages * * * determined by the Secretary of Labor to be prevailing." But this provision in the Act cannot convert the contractor's obligation to pay not less than the minimum into a Government representation that the contractor will not have to pay more. On its face, the Act is a minimum wage law designed for the benefit of construction workers. The Act does not authorize or contemplate any assurance to a successful bidder that the specified minima will in fact be the prevailing rates. Indeed, its requirement that the contractor pay "not less" than the specified minima presupposes the possibility that the contractor may have to pay higher rates. Under these circumstances, even assuming a representation by the Government as to the prevailing rate, respondent's reliance on the representation in computing its bid cannot be said to have been justified.

The Government further contends that the Secretary of Labor was justified in fixing different minimum rates for the housing and flood control projects according to the degree of skill required by each project, and that respondent is estopped to claim misrepresentation because of its failure to make an investigation of labor costs before submitting its bid. Because of our disposition of the case, we find it unneccessary to reach these issues. The portion of the judgment on which the Government sought review is Reversed.

Section 3. Anti-Kickback Acts

UNITED STATES v. LAUDANI

320 U.S. 543 (1944)

MR. JUSTICE BLACK delivered the opinion of the Court.

Indictments returned in a United States District Court in New Jersey charged that the respondent Laudani, while acting as a company foreman with authority to employ and discharge workers on a public works project financed in part by the United States, had contrary to § 1 of an Act of June 13, 1934 [commonly known as the "Kickback Act"] forced certain of his subordinates to give him part of their wages in order to keep their jobs. Laudani moved to quash, assigning as one ground that the indictments failed to charge conduct prohibited by this Act since they did not contain allegations that he was the employer of the coerced men or that he had acted as agent of the employer in forcing the payments. The gist of his contention was that the prohibition of the Act extends only to employers and persons who act in concert with them. The District Court concluded that the Act applied to a foreman such as Laudani, overruled his motion, and a jury convicted him. The Circuit Court of Appeals accepted Laudani's contention, reversed the judgment, and directed that the indictments be quashed. 134 F. 2d 847. The public importance of the question presented prompted us to grant certiorari.

* * * * *

The purpose of the Act under consideration is to extend protection not merely to the legal form of employment contracts but to the substantive rights of workers actually to receive the benefit of the wage schedules which Congress had provided for them. The evil aimed at was the wrongful deprivation of full work payments. The Act was adopted near the bottom of a great business depression as one part of a broad Congressional program the goal of which was to strengthen the domestic economy by increasing the purchasing power of the nation's consumers. To this end, Congress enacted legislation designed to relieve widespread unemployment and enable working people to earn just and reasonable wages. A large program for Federal financing of public works was established, and legislation was passed requiring Government contracts to pay certain minimum wage rates. It was the purpose of the Kickback Act to assure that the Federal funds thus provided for workers should actually be received by them for their own use except where diverted under authority of law or a worker's voluntary agreement.

In view of this background, we cannot hold that Congress intended to exclude from the Act's proscription a foreman with the authority Laudani is alleged to have possessed. Foremen vested with full power to employ and discharge subordinates could frustrate the objective of the Act just as effectively as could their employers, and foreman not given such broad powers might nevertheless be able to use their authority to accomplish the same result. That foremen not only could but might do this very thing was testified at Senate hearings when the problem of "kickbacks" was under study. And the members of the Senate Committee on the Judiciary reporting the bill used language broad enought to include foremen among others when they said that hearings had revealed, "that large sums of money have been extracted from the pockets of American labor, to enrich contractors, subcontractors, and their officials."

To hold that a company foreman vested with sufficient power substantially to affect his subordinates' contracts of employment is within the Act's proscription is not to hold that the Act applies to every extortioner, blackmailer, or other person who extracts money from one who has previously received it for labor on a federally financed project. We need not, at this time, attempt to delineate the outside scope of the Act's application. But the purpose of the legislation, no less than its language, shows that the power to employ and discharge brings an employing company's foreman within its prohibition.

The judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to that court for consideration and disposition of other questions not here involved.

Reversed.

ALBERT C. RONDINELLI

ASBCA No. 10405
(1967)

OPINION BY COLONEL PETKOFF

In connection with a prior hearing of the captioned appeal the parties, with the concurrence of the Board, agreed that the dispute concerning labor standards violations be severed and heard separately as it was considered unrelated to appellant's excess costs appeal which was then before the Board. Our present decision concludes this appeal. Previously, the contracting officer had assessed the appellant $1,150.00 as liquidated damages for 115 alleged violations of the Work Hours Act of 1962 and withheld the sum of $1,803.18 for underpayment of contract wage rates and $640.75 for unpaid overtime due employees. This aspect of the appeal concerns the propriety of the liquidated damages assessment and the accuracy of the amounts withheld.

At the hearing the parties stipulated that underpayments pursuant to the Davis-Bacon Act due appellant's employees were in the aggregate sum of $1,352.85 and overtime due them under the Work Hours Act of 1962 amounted to $450.38 for a total withholding of $1,803.23. It was also established by stipulation of the parties that appellant was responsible for 70 violations of the Work Hours Act of 1962 and that an assessment of $10 for each violation be levied thereon.

* * * * *

DECISION

The Board has reviewed the determination of liquidated damages assessed against appellant and affirms such assessment in the reduced amount of $700.00. We also find that the sum of $1,803.23 is due appellant's former employees for underpaid wages pursuant to the labor standards provisions of appellant's contract and that such sum may properly be withheld by the contracting officer for the benefit of these employees.

Appellant has admitted to 70 violations pursuant to the Work Hours Act of 1962. He stated that he was not aware of their seriousness and that in the future such violations will not recur. He also admitted to some experience with the administration of Government contracts as an inspector prior to becoming an contractor and there is

evidence of his failure to cooperate with investigators during investigation of employee complaints of underpayment. In view of the excessive number of violations incurred by appellant on a relatively small construction contract with a contract price of $119,884.50, together with other evidence before us, we are unable to find that these violations of appellant's contractual reponsibilities to employees were inadvertent within the purview of Section 104c of the Work Hours Act of 1962, P.L. 87-581, August 13, 1962, 76 Stat. 359. This conclusion goes to the imposition of liquidated damages. From the record, however, we do note that the procuring activity has agreed nevertheless to recommend to the Secretary of Labor that appellant not be debarred as a contractor.

The record indicates the possibility of rival rights to contract payment proceeds on the part of the surety on appellant's bond. This is a matter beyond the Board's function and authority and should be resolved at the procuring activity level. Under the present appeal we have but determined the rights of the parties before us, pursuant to their contract. Meco, Inc., ASBCA No. 9849, 66-2 BCA par. 5801. Under the circumstances, we cannot be concerned here with who may become the ultimate beneficiary of any award that we might make. Frances Van Wagner, Successor to American Construction and Supply Co., Inc. and Conrad Hanson and Co., Inc., a Joint Venture, ASBCA No. 11880, 67-1 BCA par. 6286.

Accordingly, this appeal is sustained as to all amounts withheld by the contracting officer in excess of $700 as liquidated damages and in excess of $1,803.23 for wages. Otherwise the appeal is denied.

Section 5. Buy-American Act

AMPEX CORPORATION

B-203021 (1982) 82-1 CPD 163

Ampex Corporation protests against the proposed award of a contract by the National Aeronautics and Space Adminstration (NASA) Sony Corporation of America (Sony) for two video tape recorder/reproducer systems under invitation for bids (IFB) No. 10-0042-1. The protester contends that NASA erroneously determined that Sony offered only domestic-source end products and, therefore, failed to apply the 6-percent differential required by regulations implementing the Buy American Act, 41 U.S.C. §§ 10a-d (1976), in evaluating Sony's bid and concludes that proper bid evaluation would result in award to Ampex.

We agree with Ampex.

The IFB includes a schedule of 15 line items, solicits prices for items Nos. 1 through 13 and a trade-in allowance for the exchange of items Nos. 14 and 15 and provides that bid evaluation and award will be based on the lowest overall cost to the Government.

Sony submitted the low evaluated bid of $173,219.76, excluded certain end products from its Buy American certificate and stated that approximately 39 percent of its proposed contract price represented foreign content or effort. The Ampex evaluated bid price of $177,2[illegible] (2 percent higher than Sony) was second low. NASA derived the evaluated bid prices by deducting trade-in allowances and, in Sony's case, a 1-percent prompt-payment discount from the total price bid items 1 through 13.

Ampex contends that, viewing the end product of the procurement as the recorder/reproducer system, the components of the system are those articles, materials and supplies directly incorporated in the system. In order to be a domestic-source end product, Sony's system must be manufactured in the United States and the cost of its domestic components must exceed 50 percent of the cost of all its components. NASA Procurement Regulation § 6.101(d) (1977 ed.). Ampex argues that bid items Nos. 1 (except standard features Nos. 1.1 and 1.2), 6 through 8, 11 and 13 are manufactured by Sony in Japan, shipped to the United States and directly incorporated into the system without further processing. Based on Sony's Federal Supply Schedule (FSS) catalog prices and published price lists, Ampex calculates the total price of Sony's foreign components at $135,382 and that of its

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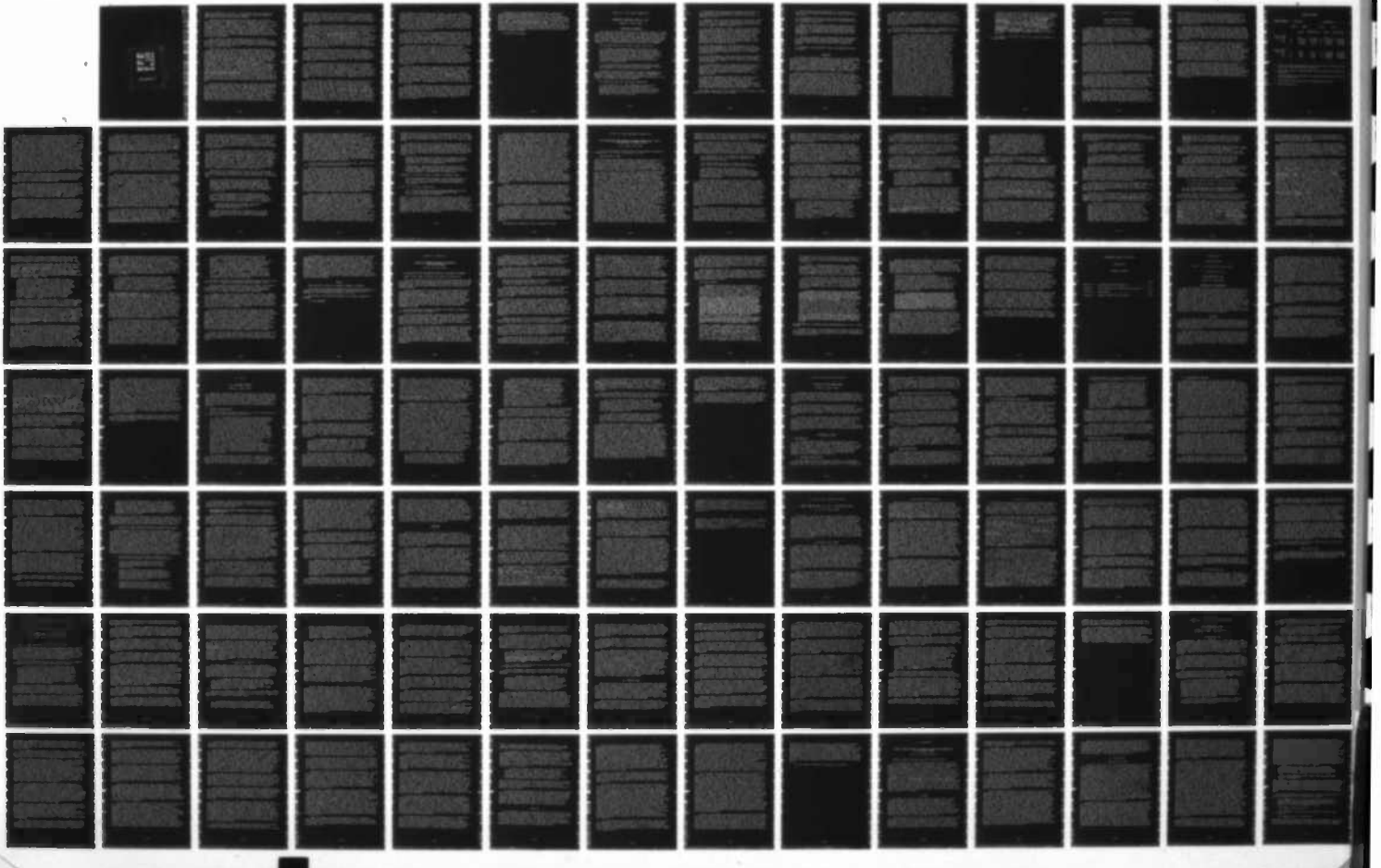

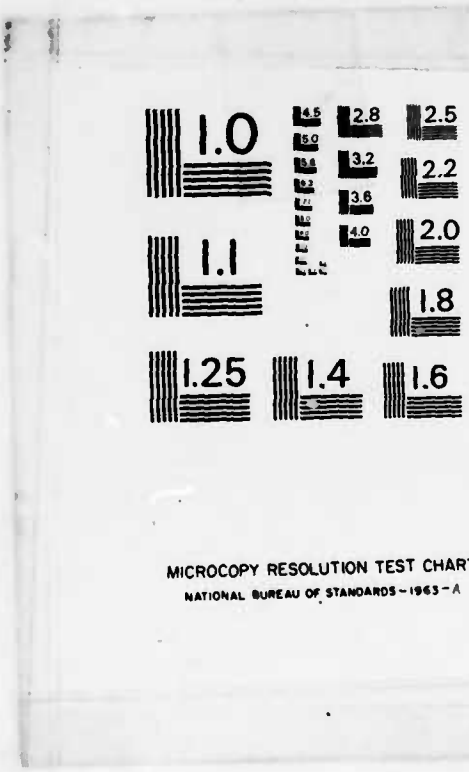

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domestic components at $72,130. The protester therefore concludes that less than 50 percent of Sony's component costs are domestic, making Sony's system a foreign end product.

NASA takes the position that the "end products" are the two systems and that the components of each system are the IFB line items Nos. 1 through 13. These items are: 1) the NTSC video tape recorder/reproducer, which includes eight enumerated items of standard equipment, 2) overhead monitoring bridge, 3) monitor cable kit, 4) NTSC color monitor, 5) vectorscope, 6) time code generator with control, 7) time code reader, 8) video time code processor, 9) time code editing system, 10) editor remote control panel, 11) service kit, 12) dual monitors and 13) set of operation/maintenance manuals for the above list of equipment.

Sony offered its model BVH-1100A Code 44 for line item 1 (including all eight items of standard equipment), stated that item 2 was part of the BVH-1100A Code 44, quoted a price of $80,105.80 each for item 1 and stated that the price of items 2 through 8 was included in the price bid for item 1.

NASA insists that, although the Sony model BVH-1100A Code 44 listed on Sony's FSS contract is manufactured in Japan, this piece of equipment alone does not meet the requirements for IFB item 1. The contracting agency explains that, in order to meet the standard equipment features specified for that item, Sony must modify its base unit by incorporating these standard equipment features. The BVH-1100A Code 44 base unit, assembled in Japan, is shipped to Sony's Compton, California, plant where it is disassembled into five basic subassemblies. Four of the required standard equipment items are already part of the base unit; three more are added to it in addition to bid items Nos. 5 through 7. NASA asserts that integrating these items into the base unit is a true manufacturing process which takes several weeks and requires proper testing and calibration, citing Hamilton Watch Company, Incorporated, B-179939, June 6, 1974, 74-1 CPD 306. NASA therefore determined that item 1 is manufactured in the United States and that, because the price of that item is more than 50 percent of the cost of the system, the system is a domestic-source end product and the Buy American Act differential does not apply to Sony's bid.

While essentially concurring in NASA's position, Sony also argues that, assuming its system is foreign, compliance with the Buy American Act should be waived pursuant to the Trade Agreements Act of 1979, 19 U.S.C. §§ 2511, et seq. (Supp. III, 1979), and Executive Order No. 12260, 3 C.F.R. 311 (1981), 46 Fed. Reg. 1653 (1981). The regulation, implementing the act and the order, provides that the Buy American Act has been waived for eligible products originating in designated countries when the total price paid for a product equals or exceeds $196,000. NASA Procurement Notice 81-2, February 2, 1981. Sony claims that it is entitled to waiver of the Buy American Act require-

ments because its video tape recorder/reproducer is eligible under several product categories, Japan is one of the designated countries and its bid has a total value in excess of the $196,000 threshold. Sony insists that the threshold value of its $204,262.39 bid should be determined without regard to the trade-in allowance, citing 53 Comp. Gen. 225 (1973).

NASA asserts that the Trade Agreements Act of 1979 does not apply to the procurement because the IFB did not include any provisions implementing the act and these provisions cannot be included by operation of law because the "Christian Doctrine" applies to contracts, not to solicitations. See G. L. Christian and Associates v. United States, 312 F.2d 418, rehearing denied, 320 F.2d 345 (Ct. Cl. 1963), cert. denied, 375 U.S. 954 (1963), rehearing denied, 376 U.S. 929, 377 U.S. 1010 (1964). The contracting agency explains that, although provisions implementing the act were inadvertently omitted from the IFB, the act does not apply to the procurement because the bid prices offered have values less than $196,000. NASA is of the opinion that the omission was neither prejudicial to the bidders nor a "compelling" reason to cancel the IFB.

Because Sony furnished information concerning the "domestic" nature of its products to NASA after the bid opening, the question of whether NASA properly evaluated its bid in light of the information received is appropriate for our consideration, notwithstanding Sony's Buy American certification that it would furnish domestic-source end products. Bell Helicopter Textron, 59 Comp. Gen. 158, 161 (1979), 79-2 CPD 431.

While we agree with NASA and Sony that the recorder/reproducer system is manufactured at Sony's California facility, we find that it is a foreign-source end product. Manufacture in the United States, alone, does not suffice to make the system domestic. In addition, the cost of the domestic articles, materials and supplies directly incorporated into the system, the "components," must constitute 50 percent or more of the cost of all such items so incorporated in order for the system to be a domestic-source end product. See 46 Comp. Gen. 784 (1967).

We cannot concur in NASA's characterization of the system's components as the IFB line items. Although we have recognized that a contractor can separately manufacture both components and end products, 45 Comp. Gen. 658 (1966), we do not think that Sony manufactures the item 1 BVH-1100A Code 44 recorder/reproducer, in addition to the recorder/reproducer system. Cincinnati Electronics Corporation, et al., 55 Comp. Gen. 1479, 1495 (1976), 76-2 CPD 286. Neither Sony's manufacturing process nor its bid pricing is consistent with the contention that the firm is engaged in separate component and end-product manufacturing operations. 48 Comp. Gen. 727 (1969). Sony's manufacturing process does not result in the assembly or manufacture of the item 1 recorder/reproducer, but includes the integration of other line

items necessary to manufacture the "system." That Sony's manufacturing process is one of end-product (system) manufacture is further indicated by the price grouping of items on Sony's bid. As mentioned above, Sony's bid states that the overhead monitoring bridge (item 2) is part of the video tape recorder/reproducer (item 1), the price bid for the latter item expressly includes the price of items 2 through 8--contrary to NASA's assertion that those items are components of the "system" rather than integral parts of item 1. In addition, the bid states that the editor remote control panel (item 10) is part of the time code editing system (item 9).

In our opinion, because the Japanese-manufactured BVH-1100A Code 44 base unit is directly incorporated into the system during Sony's manufacturing process, it is a component of the system. The fact that the base unit is disassembled and reassembled in the process of manufacturing the recorder/reproducer system does not change the fact that it is manufactured in Japan. The base unit is, therefore, a foreign-manufactured component of the system. Bell Helicopter Textron, supra.

NASA states that the FSS contract price of Sony's Japanese-manufactured BVH-1100A Code 44 base unit is $76,994 per unit. Following NASA's analysis, it makes no difference whether we consider the cost of the base unit in comparison with either Sony's total ($102,131.20) or evaluated ($88,609.88) bid price per system. The cost of the foreign base unit still constitutes more than 50 percent of the system price, rendering the Sony system a foreign end product and requiring application of the 6-percent differential in evaluating Sony's bid price. Application of the differential, of course, would affect the relative standing of the bidders, making Ampex the low evaluated bid.

NASA's analysis, however, focuses upon the cost of foreign components as a percentage of the proposed contract price. We have held that analysis on this basis does not establish whether the system being purchased is a domestic-source end product. Proper analysis requires a comparison of domestic and total component costs. Where, as here, the record does not show that the contracting agency has sufficient evidence to establish these costs, we have recommended that a more precise comparison of the cost of domestic versus foreign components be performed. TFI Corporation, 59 Comp. Gen. 405, 409 (1980), 80-1 CPD 287.

Although Sony contends that the Buy American Act should be waived for this procurement, we consider Sony's allegation in the nature of a counterprotest against an apparent solicitation deficiency which was not timely raised prior to the bid opening. Because Sony elected to compete under the terms of the IFB and failed to raise any objection until its competitive position was threatened by Ampex's protest, we find no reason to consider it at this late date. 4 C.F.R. § 21.2(b)(1) (1981).

Accordingly, we recommend that NASA perform a comparison of Sony's domestic and foreign component costs. The cost of the operation/maintenance manuals should not be used in the comparison, since the manuals are merely tools used to provide instruction rather than a result or product which can be directly incorporated into the end product. See Bell Helicopter Textron, supra. In the event that NASA finds that the cost of the foreign articles, materials, and supplies directly incorporated in the system exceeds by more than 50 percent the cost of all such items so incorporated, the 6-percent differential must be applied in evaluating Sony's bid and the contract should be awarded to Ampex.

We sustain the protest.

KLEEN-RITE JANITORIAL SERVICE, INC.

ASBCA No. 12411 (1967)

ON MOTION TO DISMISS

The record in this case consists of a notice of appeal, a letter from the contracting officer to the Board, including a copy of a prior letter to appellant, and the pleadings. No copy of the contract or other Rule 4 papers have been filed and appellant has not been asked if it desires a hearing. However, under the circumstances outlined below, neither further documentation nor a hearing are considered necessary to the disposition presently being made of the appeal.

The contracting officer's letter states, inter alia:

> 3. The matter being appealed by the Contractor evolves about denial by AFLC of his request for contractual adjustment under Public Law 85-804. This claim did not involve material of contractual nature under the Disputes clause of the contract; but involved a request by the Contractor for relief resulting from enactment of Public Law 89-601 increasing the minimum wage from $1.25 to $1.40 per hour effective 1 February 1967.
>
> 4. No final decision of the Contracting Officer has been issued pursuant to the Disputes clause of the basic contract as no question of contractual nature was involved.

Attached to the contracting officer's letter is a copy of a letter from the Government to appellant, Subject: MEMORANDUM OF DECISION - Request of Kleen-Rite Janitorial Service, Inc. for Contractual Adjustment under Public Law 85-804 - Contract AF 38 (601) - 3614. The request for relief was denied.

The complaint makes the following allegations:

> 1. On or about July 1, 1966, appellant entered into a contract with the United States of America by its contracting officer, Virgil V. Carlsen, pursuant to which appellant agreed to perform custodial services at Shaw Air Force Base, South Carolina for a period of one year at a total contract price of $72,228.00.

2. The agreed contract price was premised upon payment by the appellant to its employees in accordance with the Federal Minimum Wage Law setting a rate at the time of the contract of $1.25.

3. Appellant fully and ably performed its obligations under that contract for a period of seven months, and during that period of time its expenses in performing the contract were equal to payments received pursuant to it.

4. On or about February 1, 1967, a raise from the Federal Minimum Wage Law went into effect requiring payment by the appellant to its employees of the minimum wage of $1.40 per hour, constituting an increase of 15¢ per hour for each employee. This legislation was not anticipated by the appellant or respondent at the time of the making of the contract, and has resulted and will further result in the sustaining by the appellant of substantial losses in the performance of the subject contract.

5. On or about January 12, 1967 and February 17, 1967, appellant corresponded with the Procurement Office of Shaw Air Force Base requesting an increase in the contract price of $634.23 per month based upon the raise in the Federal Minimum Wage Law.

6. On or about March 7, 1967, appellant received correspondence from the Procurement Office of Shaw Air Force Base indicating that the request for an increase in the contract price was denied.

7. On or about March 7, 1967, appellant received from the Department of the Air Force, Wright-Patterson Air Force Base, Ohio, a copy of the decision by the respondent, W. C. Jarmuth, affirming the denial of the request of the appellant for the increase in the contract price. This appeal followed.

8. Appellant respectfully submits that it has and is suffering a loss (not merely a diminution of anticipated profits) as a direct result of action taken by the Government of the United States increasing the cost of performance of the subject contract. Considerations of fairness and fundamental equity require that appellant's request for adjustment of the contract price be granted.

The answer admits all of the allegations of the complaint except numbers 2 and 8. The answer also states:

2. The Respondent denies paragraph 2 of the Appellant's Complaint. The subject contract did not contain any escalation clause.

3. The Respondent denies that such loss as Appellant may have suffered is as a result of action by the Government in its contractual capacity.

4. Appellant's petitions for increase in contract price of 12 January 1967 and 17 February 1967 were based on Public Law 85-804. That statute and the departmental regulation implementing it contemplate that the determinations of the designee of the Secretary of the Air Force shall be final and binding.

5. Since the contractor is not appealing from a decision of the contracting officer within the meaning of the Disputes clause, the Government respectfully suggests that this Honorable Board is without jurisdiction to consider the matter.

6. Therefore, the Respondent submits the appeal should be dismissed.

DECISION

Our reading of appellant's complaint is that it is asking this Board to overrule a decision previously made under Public Law 85-804 and Section XVII of the Armed Services Procurement Regulation. Paragraph 8 of the complaint uses language similar to that found in ASPR 17-204.2(b), Amendments Without Consideration, quoted in the letter to appellant advising of the denial of its request. Based on that understanding we must dismiss the appeal. This Board has not been delegated any authority to decide cases under P.L. 85-804.

We note, however, that in denying allegation No. 2 of the complaint, the Government went on to allege: "The subject contract did not contain any escalation clause." We do not read allegation No. 2 as stating that there was any such clause in the contract. We assume appellant is alleging no more than the fact that it or both parties based the contract price upon an expectation that the employees would be paid in accordance with the old minimum wage rate. If appellant is alleging that the contract price was arrived at as the result of a mistaken belief that the old wage rate would continue and contends that the particular set of facts warrants relief for such a mistake, then that type of relief is also beyond our jurisdiction. That, too, would be a matter for decision by officials authorized to act under P.L. 85-804 or by the Comptroller General or the Courts.

But if appellant is contending that there was a contract provision that expressly or impliedly did provide for an adjustment in price on account of a minimum wage increase, then we make no decision on that issue. If there is such an issue, or if appellant considers that, on any other ground, relief can be granted pursuant to the terms of the contract, then to that extent the appeal is remanded to the parties for further consideration and, if needed, for a decision under the Disputes clause.

We think it appropriate, however, to call to appellant's attention our decision in L. J. Whitfield Co. and Alarida Construction Co., Inc., ASBCA No. 8156, 1962 BCA ¶ 3570, as follows:

> In ASBCA No. 8156 appellant simply seeks the additional amount of wages, alleged to be $6,079.84, which appellant had to pay with respect to all labor classifications within the coverage of the Fair Labor Standards Act for labor performed in September, October and November 1961 (a period subsequent to the period covered by the claim in ASBCA No. 8136), after the amendment effective 3 September 1961 of the Fair Labor Standards Act increasing the minimum wage rate fixed by the Act. The contract did not prescribe any wage rate for custodial labor. There is no contention or evidence that payment of the increased wages was caused or directed by the contracting officer or any other representative of the Government acting in a contractual capacity, under the 'changes' clause or otherwise, or was due to any Governmental action other than a public and general Act of Congress increasing the statutory minimum wage rate. The contract contains no express provision for increasing the contract price on account of the statutory increase in the statutory minimum wage rate [or] for otherwise shifting the burden of that increase to the Government, under the circumstances present. Appellant contends that subparagraph (c) of the default clause in the general provisions has that effect but the contention is without merit. Subparagraph (c) merely provides that where the contractor's failure to perform is due to causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, among other things, acts of the Government in either its sovereign or contractual capacity, the contractor will then not be obligated to pay the Government the excess costs incurred by the Government in procuring the services elsewhere as authorized by subparagraph (b) of the default clause. Subparagraph (c) contains no express or implied undertaking by the Government to increase the contract price or otherwise make payment on account of costs incurred by the contractor for any reason. In short, the record discloses no contractual commitment in behalf of the Government

to assume in any form the claimed increased costs of performance attributable to the general and public Act of Congress increasing the statutory minimum wage rate after the present contract had been entered into. See HALLMAN BROTHERS v. UNITED STATES, 107 Ct. Cls. 555 (1946); THE CLEMMER CONSTRUCTION CO., INC. v. UNITED STATES, 108 Ct. Cls. 718 (1947); FRANCIS J. KIRCHOF ET AL. v. UNITED STATES, 121 Ct. Cls. 476 (1952); CF. A. J. PARETTA CONTRACTING CO., INC. v. UNITED STATES, 109 Ct. Cls. 324 (1947); THE SUNSWICK CORPORATION v. UNITED STATES, 109 Ct. Cls. 772 (1948); GEHRHARDT F. MEYNE COMPANY v. UNITED STATES, 110 Ct. Cls. 527 (1948). Accordingly, the appeal in ASBCA No. 8156 is denied.

The appeal is dismissed in part and otherwise remanded, as indicated above.

Section 7. Service Contract Act

JOULE TECHNICAL CORPORATION

B-192125 (1979) 79-1 CPD 364

Joule Technical Corporation (Joule) protests the award of contract No. N00421-78-C-0051 to Dynalectron, Inc. (Dynalectron), by the Naval Air Station, Patuxent River, Maryland. Joule, the incumbent contractor, contends the award is unlawful because of substantial irregularities in the procurement process including a "nonresponsive" best and final offer by Dynalectron, a defective wage determination incorporated into the request for proposals (RFP), arbitrary evaluations of proposals and a possible conflict of interest by a member of the evaluation team.

The RFP (No. 421-78-R-0003) called for proposals to provide engineering and technical support services on a cost-plus-fixed-fee basis for one year with an option for one additional year. The RFP stated that in the evaluation of proposals, technical capability would be rated at least twice as important as cost, but cautioned offerors that cost (which would be evaluated on basis of cost realism) should not be ignored as the degree of its importance would increase with the degree of equality of the technical proposals. The RFP further provided that award would be made to the offeror whose proposal offered the greatest value in terms of technical approach and price. Final cost evaluation took into account base year estimated costs plus those for both the option year and an alternative option year, and on this basis Dynalectron's offer was found to be $103,178 less than Joule's and was the lowest received. The actual difference between the two offers based on the combination of the base year and the alternative option for the second year was $79,474.

Joule's claim of "nonresponsiveness" in the Dynalectron proposal, as well as its assertion of an arbitrary evaluation by the Navy, are grounded upon what Joule perceives as the personnel supervisory requirements of the RFP, the Dynalectron proposal in this respect, and Dynalectron's asserted misclassification of the employees under a Department of Labor (DOL) wage rate determination. In this regard, Joule claims Dynalectron is guilty of "wage busting" in that it hired Joule's employees at lower wage rates than those paid by Joule.

On January 26, 1978, proposals were received from seven companies, including Joule and Dynalectron, both of which were found to be within the competitive range. Additional information and revised proposals were received on April 24, 1978, and evaluations were completed on May 3, 1978. Because the Navy had been advised by DOL that the Service Contract Act of 1965 (SCA), as amended, 41 U.S.C. 351 et. seq. (1976), applied, the Navy amended the RFP to include a DOL

wage determination and a call for best and final offers by May 25, 1978. After further evaluations, the Navy concluded that the technical proposals of Joule, Dynalectron (scored 92.96 and 92.85 respectively), and five other offerors were essentially equal, and that award should be made on the basis of cost. Award was therefore made to Dynalectron on June 7, 1978, and Joule protested to this Office on June 8, 1978.

The Navy, contending that Joule's objections go to the validity of the wage determination, asserts that the protest is untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2(b) (1978), because it was not filed prior to closing date for receipt of best and final offers. In this respect, Joule states that when it hand delivered its best and final offer on May 25, 1978, it orally informed the Navy that the wage determination was not compatible with the solicitation and would need clarification.

While an oral protest is permissible under Defense Acquisition Regulation (DAR) § 2-407.8 (1976 ed.), it must be stated in such a fashion that the intent to lodge a protest is clear. Automated Processes Incorporated, B-181262, September 4, 1974, 74-2 CPD 143. In our opinion, an intent to protest is not evident merely by a statement that a wage determination is incompatible with a solicitation and will need clarification. Thus, questions relating to the DOL wage rate determination per se which were apparent from the solicitation are untimely and will not be considered on the merits. However, portions of the protest arise from information available to Joule only after contract award; these portions are timely and will be considered.

The RFP classified various technical personnel required for the contract performance, principally in terms of education and experience. Four technician levels were specified. DOL categories, however, were based on job descriptions and were broken down into three classifications. It was the offeror's responsibility to conform the RFP labor categories to the DOL classifications for the purpose of conforming to the appropriate DOL specified minimum wage rates. A tabulation of the pertinent RFP requirements and the proposal results is as follows:

PROPOSAL SUMMARY

LABOR CATEGORY	ITEM 0001			ITEM 0004		
	L.O.E.[1]	Rate		L.O.E.[1]	Rate	
		Joule	Dynalectron		Joule	Dynalectron
Elect. Tech.						
Level IV[5]	2	$8.00	$7.78(A)	2	$8.40(5%)[3]	$8.17(5%)
III	8	7.78(A)[2]	6.27(B)	10	8.17(5%)	6.52(4%)
II	0	6.27(B)	5.50(C)	5	6.58(5%)	5.50(0%)
I	0	5.50(C)	3.75	3	5.78(5%)	3.75(0%)
Mech. Tech.[4]						
Level IV	0	8.00	7.30	1	8.40(5%)	7.30(0%)
III	2	7.07	6.28	2	7.42(5%)	6.69(5%)
II	0	6.00	4.95	3	6.30(5%)	4.95(0%)
I	0	5.10	3.75	1	5.36(5%)	3.75(0%)

1. Level of effort as specified in RFP in man years at 2000 hours per man year. Item 0003 same as Item 0001.

2. Upper case letters in parentheses are DOL wage classifications for base year.

3. Percent figures in parentheses are proposed escalation for second year's performance.

4. No DOL wage rates specified for Mechanical Technicians.

5. RFP classification.

The basis for the difference between the two cost proposals is clear from the tabulation -- Dynalectron and Joule did not conform the RFP labor categories to the DOL wage classifications in the same manner. Obviously Joule conformed the RFP electronic technician labor categories to the DOL classifications one step higher than did Dynalectron, and where no wage rate existed Joule proposed rates that were consistently higher than those proposed by Dynalectron. In addition, other variations are apparent. For example, for the most part, where particular classes of labor were required during the initial contract period, Dynalectron proposed a 5 percent wage increase for each employee after one year's service purportedly based on "current projected living costs," but provided no increase for employees not utilized during the initial contract period. Joule projected 5 percent higher wage rates across the board for the second performance year, without regard to first year utilization. Thus, if we consider only items 0001 and 0004, Dynalectron's projections include no wage increase for 26,000 labor hours used in evaluation and are premised on a significantly lower wage rate for the total 112,000 labor hours specified by the RFP as the level of effort for these items. These differences alone well exceed the $79,474 difference in proposed costs between the two lowest offers for these items.

The difference in job classifications utilized by the two firms is in part explained by the administrative duties assigned by Joule to its lead (Level IV) technicians because the DOL wage determination excluded from its coverage those [among others] technicians with administrative or supervisory responsibility.

The wage rate determination also provided that any class of service employee required in the performance of the contract but not listed in the wage determination was to be classified by the contractor so as to provide a reasonable relationship between such class and those listed in the wage determination with employees to be paid as determined by agreement of the contracting agency, the contractor and the employees. In the absence of such agreement, the question of proper rate was to be submitted to DOL for final determination.

Although the Navy states all offerors but Joule classified the required personnel as did Dynalectron, Joule contends that Dynalectron misclassified the personnel because its two former lead technicians with supervisory duties have been hired at lower wages by Dynalectron for the same duties they performed for Joule. Joule contends that this is a violation of fundamental national labor policy and of the service contract procurement policy as reflected in Policy Letter 78-2, entitled "Preventing 'Wage Busting' for Professionals: Procedures for Evaluating Contractor Proposals for Service Contracts", issued by the Office of Federal Procurement Policy (OFPP), Office of Management and Budget, on March 29, 1978. 43 Fed. Reg. 18805 (May 2, 1978).

"Wage busting" is the practice of lowering employee wages and fringe benefits by a successor contractor as a result of the contractor's effort to be a low bidder or offeror on a Government service contract when the employees continue to perform the same jobs on the successor contract. A successor contractor is not guilty of wage busting when employees are reclassified by the successor contractor to lower paying jobs with different duties and responsibilities. REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES, SPECIAL PROCUREMENT PROCEDURES HELPED PREVENT WAGE BUSTING UNDER FEDERAL SERVICE CONTRACTS IN THE CAPE CANAVERAL AREA, HRD-78-49, February 28, 1978.

In this respect, Dynalectron contends its classifications were based on the duties reflected by the solicitations and not upon the practices followed by Joule in its performance of the previous contract. Dynalectron states that while Joule's lead technicians may have been performing supervisory duties, the duties of the Electronic Technician, Level IV specified in the solicitation do not include any supervisory duties, and that it was not its intention that they do so. It further states, and the Navy concurs, that it was the offeror's responsibility to conform the personnel proposed to appropriate wage classes in the wage determination and that Dynalectron reasonably did so.

DOL has excluded from the coverage of the SCA "bona fide executive, administrative or professional personnel", 29 C.F.R. 4.113(a)(2) (1978), although the Act does extend to employees such as a "foreman or supervisor in a position having trade, craft or laboring experience as the paramount requirement." 29 C.F.R. 4.113(b). Complex definitions of "bona fide executive, administrative or professional personnel" promulgated by the Secretary of Labor are contained in 29 C.F.R. 541. As we understand it, it is Joule's position that the Level IV technicians required by the solicitation perform administrative functions which would exclude those persons from the coverage of the Act (apparently this was the basis for Joule's determination that the Level IV technicians did not conform to DOL's Class A classification); that by hiring Joule's employees to perform the same duties as performed for Joule, Dynalectron was bound to conform to the DOL determination in the same manner as Joule, and that by failing to do so, Dynalectron was in violation of the SCA and thus guilty of "wage busting." Joule also asserts that the contracting officer could not have adequately determined the cost realism of Dynalectron's proposal without considering the implications of the SCA violations.

In its original form the SCA permitted DOL to find "prevailing wage rates" which were lower than those being paid by an incumbent contractor under a collective bargaining agreement. As a consequence, competitors were often able to propose lower wages than were being paid by an incumbent so long as they were consistent with the DOL wage rate determinations. National Labor Relations Board v. Burns International Security Services, Inc., 406 U.S. 272 (1972). Subsequent amendments to the SCA prohibited successor contractors from

paying "less than the wages and fringe benefits * * * provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract * * *." 41 U.S.C. 353(c) (1976). However, no such collective bargaining agreement exists in this case, and hence neither DOL nor Dynalectron was bound by the wages previously paid by Joule to its employees under the predecessor contract.

The Office of Federal Procurement Policy (OFPP) has sought to preclude wage busting for professional employees, a class of people not normally covered by union agreements, by providing for agencies to consider lowered professional employee compensation as indicating a lack of sound management. 43 Fed. Reg. 18805, May 2, 1978. The OFPP procedures are clearly inapplicable to this case, however, because their effective date (April 1, 1978) is subsequent to the December 1977 date the RFP was issued. As a consequence, there is no impediment either in the SCA, in the regulations, or in anything else to prevent a reduction in wages for incumbent employees in this case, even if a reduction can be categorized as "wage busting."

Nonetheless, we do question the efficacy of the contracting officer's cost realism determination. While Dynalectron claimed it had its own employees available for contract performance, it asserted that:

> "[I]t is our intention to utilize, to the maximum extent possible, currently assigned [incumbent] employees. This approach recognizes the performance improvement curve of incumbent personnel, a management tool the Government has relied upon for many years to forecast cost. The retention of incumbent personnel will result in maximum performance at the lowest cost.
>
> " * * * we have projected the price, wages and pay as realistically as possible. It is Dynalectron's policy to pay * * * wages consistent with the work schedule and the responsibilities assigned to each employee. * * * The labor rates for the contract period are based on the following:
>
> -'Current wage rates for incumbent personnel
> -Wage Determination #75-639, Rev. #2
> -Projected Cost Increases * * *.'
>
> "We assume that the overall cost evaluation will include accurate, current and realistic estimating practices and that this cost realism will be a part of the Government's evaluation."

There is no evidence on the record to suggest that, except for the Level IV technicians, the incumbent's employees were to be reclassified to perform different duties for Dynalectron. Indeed, for Dynalectron to have done so would be inconsistent with the premise in its proposal which recognized "the performance improvement curve of incumbent personnel" and that "retention of incumbent personnel will result in maximum performance at lowest total cost." The familiarity of the incumbent's personnel with the work required as well as the impact on costs resulting from their retention presumably were considered in the proposal evaluation process. Thus, while Dynalectron was not legally obligated to pay the wages paid by its predecessor, we believe that in view of the express language of its proposal the contracting officer's consideration of its proposed costs should have taken into account the wages previously paid to these personnel, not merely the minimum wages specified in the DOL wage rate determination and the offeror claimed conformance thereto.

In this respect, we have reviewed the DCAA audit reports of the cost proposals of both Dynalectron and Joule.

When comparing Joule's proposed labor rates for item 0001 (the base year of the contract) to the most current payroll records at the time of the examination, DCAA found no basis for questioning those costs. DCAA also found that the labor rates proposed for Items 0003 and 0004 (the option period) were based on "current labor rates" plus an escalation. DCAA questioned only the extent of the proposed escalation for the option year, not the base rates themselves. Since the DCAA audit of Joule's proposal was based on actual payroll data, and presumably to some extent the prevailing wage rate for similar personnel in the area, particularly with respect to those jobs not required for the base year (where no actual payroll data existed), we think it was incumbent on the contracting officer to verify through negotiations Dynalectron'a proposed labor costs vis-a-vis the statements contained in its proposal. See 47 Comp. Gen. 336 (1967).

There is no evidence to suggest that the contracting officer questioned the potential disparity between actual payroll data and Dynalectron's proposed labor costs or the significant difference in wage rates it proposed where no payroll data existed. For example, Dynalectron proposed wages at $3.75 per hour for Level I Electronic Technicians, who by the terms of the solicitation were required to have a "minimum of one year's general electronic experience and one year specialized experience on radar and/or test equipment or related systems," with education either in technical school or in the military. These wage rates showed no escalation for the option year ostensibly because no such personnel were required during the initial year's contract performance. Yet DCAA verified that Joule has experienced an average of 7.2 percent annual wage increase for personnel on its payroll at the job site, a rate which appears to be in keeping with general inflationary trends currently experienced in the United States. In addition, the DOL determination listed applicable

minimum rates for the base year for other personnel such as typists (Class A) at $4.10 per hour, Class B at $3.87 per hour, file clerks, Class A at $4.31 per hour and Class B at $3.97 per hour, all at higher hourly rates than proposed by Dynalectron for Level I technical personnel.

We believe that where, as here, the award of a contract is ultimately based strictly on costs proposed, a determination of cost realism requires more than the acceptance of proposed costs as submitted. DCAA's audits were admittedly limited in scope and were not considered in conjunction with any technical evaluation. More importantly, however, the DCAA audit report did contain a significant caveat, i.e.,:

> Although the cost and pricing data are not adequate in all respects (see paragraph 2, 'Special Circumstances Affecting the Examination') the proposal may be considered to be acceptable as a basis for negotiation.
>
> [Translation: There were missing items of support for the costs proposed, but based on the data in hand, there was nothing to indicate the proposed costs were not in line with the data examined. Consider this in negotiation].

Paragraph 2 referred to above, includes a statement that:

> Although we reviewed the proposal to the extent possible in the circumstances, we were unable to reach a definitive conclusion on the quantitative and qualitative aspects of the proposal * * *.

Also, the DCAA report stated that:

> The evaluation disclosed no questioned unsupported or unresolved items which woud preclude acceptance of the [Dynalectron] proposal as submitted.

However, in view of the qualifications noted above, we question the extent to which the contracting officer could reasonably rely on the Dynalectron proposal "as submitted", particularly when he was faced with a comparative audit report based on "current labor rates" at substantial variance to those proposed by Dynalectron. Ultimately the contracting officer is responsible for the exercise of the requisite judgments and solely responsible for the pricing decisions. Audit reports are advisory only and at most form the basis for these pricing decisions. DAR 3-801.2(d)(1) (1976 ed.).

The award of cost reimbursement contracts requires the exercise of informed judgments as to whether proposed costs are realistic and it is improper to award such a contract on the basis that such costs are reasonable because they are low per se on a comparative basis if the Government fails to adequately measure the realism of such low costs. See 50 Comp. Gen. 390 (1970). In this respect, the report submitted by the agency indicates to us that the contracting officer did not perform any cost realism analysis in conjunction with the technical and management proposals, but instead relied solely upon the significantly qualified DCAA audit findings. Also, the record does not show that the contracting officer questioned Dynalectron's application of the DOL wage rate determination in connection with the clearly expressed statements in its proposal that its proposed wage rates were based on current wage rates for incumbent personnel. Neither is there any indication that for those categories of labor where DOL had not issued a wage rate determination, the contracting officer considered the possibility that the wages were unrealistically low (particularly in view of the DCAA finding in its audit of Joule's proposal and the DOL wage rates for clerical type personnel) or that the lack of an inflation escalation factor for those wage rates might reflect on the credibility of the cost proposal. In our view, the contracting officer, when faced with material variances between the competing proposals, should have verified the discrepancies by requesting verification and support for the wage rates proposed by Dynalectron. We do not here suggest that Dynalectron's cost proposal would not ultimately have been found to be realistic, had an analysis been performed. However, in the apparent absence of such an analysis, we must view the contracting officer's cost realism determination as inadequate.

Finally, Joule suggests that there may have been an impropriety in the evaluation of proposals because of its claim that within one week of contract award, one member of the evaluation team was hired by Dynalectron to administer the contract. However, Dynalectron points out that it was not until after award that it learned of the retirement plans of the party in question and it was at that time that it made its offer of employment. Thus, because of the time sequence involved, Dynalectron in effect claims the employment offer could not have influenced the evaluation process. We have no reason to question the veracity of Dynalectron's statements in this respect, and Joule has offered no evidence to the contrary.

Although we find the cost analysis to have been inadequate, we need not recommend corrective action since we have been advised by the contracting officer that the Navy will not exercise the option for the second year's performance, but will extend the contract for the limited period necessary to resolicit and award on the basis of expanded requirements. We believe such agency action is reasonable under the circumstances. By separate letter of today, we are pointing out to the Secretary of the Navy our concern with regard to the cost analysis.

The protest is sustained in part and denied in part.

THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, ET AL. v. THE SECRETARY OF LABOR, ET AL.

311 F. Supp. 1002 (1970)

In the United States District Court for the Eastern District of Pennsylvania. No. 70-18. Dated March 13, 1970.

Before Weiner, Judge.

The Contractors Association of Eastern Pennsylvania consisting of a group of contractors, engaging in heavy highway and utility construction and intervening contractors have sued various Federal officials and the General State Authority of the Commonwealth of Pennsylvania in an effort to strike down a regulation issued by the Department of Labor which is entitled the "Revised Philadelphia Plan". The Plan covers six construction trades: Iron workers, plumbers and pipe fitters, steamfitters, sheet metal workers, electrical workers and elevator construction workers, and geographically applies to Bucks, Chester, Delaware, Montgomery and Philadelphia Counties in Pennsylvania. The Philadelphia Plan became effective on September 29, 1969. It was issued on June 27, 1969, in implementation of the authority of the Secretary under Executive Order 11246 of September 24, 1965 as amended, 30 F. R. 12319, 32 F. R. 14303, 34 F. R. 12986 which required that Federal contracts and federally assisted construction contracts contain specified language obligating the contractor and his subcontractors not to discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Executive Order further required the contractors and subcontractors to "take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin." Executive Order 11246,§ 202(1). Failure to comply with the required contractual commitments imposes various sanctions on the contractors which include the cancellation, suspension or termination of contracts and the debarment of a contractor from further Government contracts. However, no sanction may be imposed unless efforts at voluntary resolution have failed nor without affording the contractor an opportunity for a hearing. Thus the seeds of the Philadelphia Plan were planted. Two separate orders were issued by the Department of Labor, the first on June 27 and the second on September 23, 1969. In substance, the Plan required that with respect to construction contracts in the Philadelphia area which are subject to Executive Order 11246 and where the estimated total cost of the construction project exceeds $500,000, each bidder must, in the affirmative action submitted with his bid, "set specific goals of minority

manpower utilization which meet the definite standards included in the invitation for bids. The bidder could also meet this requirement by agreeing to participate in a multi-employer affirmative action program approved by the Office of Federal Contract Compliance.

The Department of Labor order of June 27th was based on the department's finding that although the overall minority groups representation in the construction industry in the five-county Philadelphia area was thirty (30) percent, in the six trades involved, minority representation was approximately one (1) percent. The Department of Labor concluded that the contributing factors to the small number of minority representation in these trades were due to the following:

> "(a) Contractors hire a new employee complement for each construction job on the basis of referral by the construction craft unions;
>
> "(b) The refusal of certain of these unions to admit Negroes to membership or apprenticeship programs;
>
> "(c) A preference in work referrals to union members and to persons who had work experience under union contracts. This resulted in a departmental finding that "special measures" were necessary to provide equal employment opportunity in those six trades for federally involved construction."

Predicated upon public hearings held in Philadelphia on August 26, 27 and 28, 1969, the September 23rd Order issued. This order established the ranges within which the contractor's minority group employment goals should be set. It provided that in the first year, employment "ranges" vary between four (4) and nine (9) percent; in the second year between nine (9) and fifteen (15) percent; and in the third year between fourteen (14) and twenty (20) percent; and in the fourth and last year between nineteen (19) and twenty-six (26) percent. The mathematical formula was based on findings as to the availability of minority group persons for employment and the impact of the program on the existing labor force and a determination that a contractor could commit himself to the employment goals "without adverse impact on the existing labor force" which goals may be met through the employment by the contractor of journeymen, trainees or apprentices.

Safeguards are provided by the Plan. The obligation to meet the goals is not absolute. If the contractor meets the goals he will be presumed to be in compliance with the requirements of the Executive Order. The regulation also states: "In the event of failure to meet the goals, the contractor shall be given an opportunity to demonstrate that he made every good faith effort to meet his commitment. In any proceeding in which such good faith performance is in issue, the contractor's entire compliance posture shall be reviewed and evaluated

in the process of considering the imposition of sanctions". Executive Order 11246 § 8(a). Under the Plan, for the purpose of determining whether the contractor is in compliance, it is "no excuse" that the union with which he has a collective bargaining agreement fails to refer minority employees.

Since the Philadelphia Plan went into effect, we have been advised that six contracts have been let involving a total cost of approximately $37 million, with Federal assistance totaling approximately $11 million. The present action is before us in connection with a grant from the Department of Agriculture to the Commonwealth of Pennsylvania in connection with the Brandywine water conservation project, involving a cost of approximately $4 million, of which approximately $1.1 million represents Federal assistance. Invitation for bids including the requirements of the Philadelphia Plan were issued by the General State Authority of Pennsylvania. No contracts have as yet been awarded on this project.

This law suit is bottomed upon the plaintiff's allegation that the Philadelphia Plan violates the Constitution and laws of the United States and the laws of the Commonwealth of Pennsylvania. In conjunction with its complaint the plaintiffs have filed a motion for a preliminary injunction and have moved for a summary judgment. The defendants have countered with a motion to dismiss the complaint or in the alternative, for summary judgment.

We will first consider the defendants' attack upon the standing of the plaintiffs to maintain this action. Defendants argue that the plaintiffs lack standing to attack the validity of the Philadelphia Plan. They place their reliance upon the decision of the Supreme Court in Perkins v. Lukens Steel Co., 310 U.S. 113 (190). In Perkins, the Secretary of Labor fixed minimum wages which Government contractors were required to pay their employees. The suit of the plaintiffs, iron and steel manufacturers, who bid on Government contracts, for declaratory and injunctive relief was dismissed on the ground that the plaintiffs lacked standing to challenge the validity of the Secretary's directive. We, of course, do not and cannot quarrel with the edict of the Supreme Court which settled the principle that:

> Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. . . . It was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government . . . but not private litigants . . . can complain. Perkins v. Lukens Steel Co., supra at 127.

The defendants contend that the plaintiffs are in the same class of litigants described in Perkins and therefore lack standing to attack the requirements contained in Executive Order 11246. To the contrary, the plaintiffs argue that as the impact of the Governmental action is greatest on them, access to the courts is permissible.

Our examination of the record reveals that the Contractors Association is a corporation comprised of more than eighty business organizations engaged in heavy construction. Certain of its members wished to bid on the project and four of its members did bid. The plaintiff acts as spokesman for its members concerning the relationship between its members and the Government.

Undoubtedly, the force of Executive Order 11246 is focused upon contractors who desire to bid on Federal or federally assisted construction contracts. Of necessity, the Order will require them to make significant changes in their every day business practices or they will be clearly exposed to the imposition of strong sanctions. In Abbott Laboratories v. Gardner, 387 U.S. 136, 153 (1967) a compendium of the most recent legal principles applicable to the kind of problem governing standing, the Supreme Court said:

> Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance, neither of which appears here.

It is apparent that the legal issue that the plaintiffs have presented is fit for judicial resolution. It is also evident that the Executive Order will require significant changes in the contractors' employment practices which, under certain circumstances, may subject them to serious penalties. There remains, however, the problem of determining the circumstances under which the plaintiffs may have the necessary standing to maintain this action. The answer depends, in part, upon the breadth of a group of cases which influenced and in large measure dominated the law on this subject. Hanson v. Denckla, 357 U.S. 235, 244 (1958) reaffirmed the principle that a person cannot invoke the jurisdiction of the court to vindicate the right of a third party. See: Liberty Warehouse Company v. Burley Tobacco Growers' Co-Operative Marketing Association, 276 U.S. 71 (1928); Dahnke-Walker Company v. Bondurant, 257 U.S. 282, 289 (1928). Flast v. Cohen, 392 U.S. 83, 98 (1968) is cited as authority for the principle that:

> . . . The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions'. Baker v. Carr, 369 U.S. 186, 204 (1962). 'In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justifiable'.

A financial loss is not by itself a sufficient interest to sustain a judicial challenge to Governmental action. Abbott Laboratories v. Gardner, 387 U.S. at 152, supra; Frothingham v. Mellon, 262 U.S. 447 (1923).

It is our opinion that the Contractors Association lacks standing as a proper party to request an adjudication because of its failure to establish that the association has a personal stake in the outcome of the controversy. From the averments of the complaint and supporting documents filed with us, we are compelled to recognize that the harm complained of is possible discrimination against the members of its organization. See also: Heald v. District of Columbia, 259 U.S. 114 (1922).

But we have no doubt that the contractors have sufficient standing as plaintiffs. The executive order is focused upon them; they will have to alter their previous method of hiring and a failure to exert the "good faith effort" to meet this commitment will expose them to the imposition of sanctions. This case is, therefore distinguishable from Perkins v. Lukens Steel Co., supra, and falls within the orbit of Abbott Laboratories v. Gardner, supra. The motion of the defendants for a dismissal of the cause of action instituted by the Contractors Association of Eastern Pennsylvania will be granted. The motion for dismissal as it relates to the intervening plaintiffs will be denied.

Our next inquiry concerns itself with the problem of whether or not the provisions of the Philadelphia Plan for commitment to specific goals for minority group participation is in conflict with Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) et seq. Initially, we note, that in support of their respective motions for summary judgment counsel concede that on this issue there is no genuine issue of material fact and thus, as a matter of law, the issue is ripe for judicial determination. We shall therefore consider and determine that question now. Having summarized the historical background relating to the issuance of past executive orders we will now review the conflicting issues raised by the parties. The plaintiffs contend that the Executive branch is without the power to require a

Philadelphia Plan commitment because the conduct required of a contractor under that plan would violate Title VII of the Civil Rights Act. The Act provides in relevant part that it is an unlawful practice for an employer--

> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

The plaintiffs have forcefully and ably argued that the Philadelphia Plan will require a contractor to hire and employ on the basis of and with regard to race, color and national origin. They adhere to the theory that the Plan imposes racial "quotas"; that it requires "preferential" treatment for minority persons and so creates reverse discrimination or in the ordinary context, the contractors, in order to meet his goals would necessarily have to discriminate against white persons in order to hire minority applicants.

In response the defendants deny that the Philadelphia Plan requires an employer to act in a manner which is unlawful under Title VII. They assert that the Philadelphia Plan is a lawful and appropriate implementation of the affirmative action obligation of Executive Order 11246.

The Court is of the opinion that the Plan is not in conflict with the provisions of the Civil Rights Act. We agree with the view expressed by the Court in Weiner v. Cuyahoga Community College District [14 CCF ¶ 83,244], 238 N.E. 2d 839, 844 aff'd 29 N.E. 2d 907 (1969), cert. denied. -- U.S. -- (1970) where the Court observed:

> The Court is satisfied that the Civil Rights Act of 1964, Title VII, is constitutional. The Act provides a remedy for a long-continued denial of vital rights of minorities and of every American--the right to--equality before the law--the right in every walk of life in a land whose philosophy is that 'all men are created equal,' to an equal chance of employment in keeping with his ability. To assure obedience to the law is a duty inherent in the Government. It may reasonably instruct its agencies how to proceed toward enforcement. There has, as the evidence here shows, come a time when firmness must be used against all

who do not feel able or inclined to cooperate in the equal employment effort. The statute and the Executive Order implementing it are in the Court's opinion in full keeping with the constitutional guarantees of the rights of all citizens.

If there is any one lesson that loomed above the others it is that the Civil Rights Act and the Executive Orders both have a common purpose to assure to all an equal chance of employment. Discriminatory obligations are not its intent. This is also the stated policy of the judiciary. The Supreme Court has stated that:

> [T]he Court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. Louisiana v. United States, 385 U.S. 145, 154 (1965).

The pivotal question, therefore, is whether the Plan demands that the contractors hire on the basis of and with regard to race, color and national origin. Reassertion of this basic postulate becomes necessary because a significant portion of the legal conclusions advanced by the parties are derived from their respective interpretation of the legality of the Plan as it applies to those requirements which impose on the contractors the necessity of

(a) setting specific goals for minority group hiring;

(b) every good faith effort to meet these goals;

(c) that they may not, in so doing, discriminate against any qualified applicant or employee on grounds of race, color, religion, sex, or national origin.

We are in accord with that part of the opinion of the Attorney General which reads: "If a plan such as this conflicts with Title VII of the Civil Rights Act, its validity cannot be sustained."

Despite what would appear to be areas of overlap in Title VII and Executive order 11246, we are not entirely without guidance in determining the propriety of the Order, given the overall goals of the Order and its executive history. The affirmative action requirement issued on September 24, 1965, has been tested and held to be a valid exercise of presidential authority. Farkas v. Texas Instrument Company, 375 F. 2d 629 (5th Cir.1967); Executive orders have been upheld as having the force and effect of law. Local 189 v. United States, 416 F 2d 980 (5th Cir. 1969); Farmer v. Philadelphia Electric Company (9 CCF ¶ 72,490), 329 F. 2d 3 (3rd Cir. 1964). The heartbeat of "affirmative action" is the policy of developing programs which shall provide in detail for specific steps to guarantee equal employment opportunity keyed to the problems and needs of members of minority groups, including when there are deficiencies, the develop-

ment of specific goals and timetables for the prompt achievement of full and equal employment opportunity. The Philadelphia Plan is no more or less than a means for implementation of the affirmative action obligations of Executive Order 11246.

The compelling need for implementation is clearly established. The Department of Labor found that "the most reliable data available" shows the following: in the ironworkers union, 1.4 percent of the membership consists of minority group persons; in the steamfitters union, .65 percent consists of minority group persons; in the sheetmetal workers union, 1 percent; in the electricians union, 1 percent; in the elevator construction workers union, .54 percent; and in the plumbers and pipefitters union, .51 percent.

We return to the evocative question of whether the Plan conflicts with Title VII of the Civil Rights Act. We continue our analysis against the backdrop of the established principle that an interpretation of a Presidential order issued by the official charged with administering its provisions is entitled to great, if not controlling weight. Udall v. Tallman, 380 U.S. 1 (1964). It is also well settled that the Government has the unrestricted power to fix the terms and conditions upon which it will make needed purchases, Perkins v. Lukens Steel Co., supra; unless prohibited by statute. Abbott Laboratories v. Gardner, supra. Our analysis of the plaintiffs' argument indicates to us that the genesis of their complaint is that compliance with the Plan is tantamount to a guarantee of minority employment. The Court is not persuaded that the plaintiffs' theory is sound. The Plan does not require the contractors to hire a definite percentage of a minority group. To the contrary, it merely requires that he makes every good faith effort to meet his commitment to attain certain goals. If a contractor is unable to meet the goal but has exhibited good faith, then the imposition of sanctions, in our opinion, would be improper and subject to judicial review. See: Copper Plumbing & Heating Company v. Campbell, 290 F. 2d 368 (C. A. D. C. 1964); Gonzalez v. Freeman [9 CCF ¶ 72,558], 334 F. 2d 570 (C. A. D. C. 1964). It is equally clear that if this plan is properly administered it will be a plan of inclusion rather than exclusion. This we feel is necessary as our times demand skilled craftsmen who have learned their craft and who must have an opportunity to make use of their abilities and skills. The strength of any society is determined by its ability to open doors and make its economic opportunities available to all who can qualify. It is fundamental that civil rights, without economic rights, are mere shadows. These two rights are not only equal but a must, and when realized will bring into full play that protection to which our Constitution and statutes are dedicated. In summary, it is our conclusion that the Philadelphia Plan is not inconsistent with the requirements of Title VII of the Civil Rights Act of 1964.

Attacking the geographical aspect of the Plan, the plaintiffs contend that the requirement of the Plan's commitment is an unconstitutional exercise of Executive power because it is an arbitrary and capricious classification by the Executive branch, based solely and

exclusively on artificial geographic boundaries without any other justification in fact or law and thus violated the Fifth and Fourteenth Amendment guarantees of equal protection under the laws.

It is abundantly clear that Congress has the authority to limit its attention to the geographic area where immediate action seems necessary. South Carolina v. Katzenbach, 383 U.S. 301, 328 (1964); and equal authority rests in legislative treatment by a state. McGowan v. Maryland, 366 U.S. 420, 426 (1961); Salsburg v. Maryland, 346 U.S. 545, 550 (1954). Also that the Equal Protection Clause relates to equality between persons as such rather than between areas. Salsburg v. Maryland, supra, at 551:

> The Fourteenth Amendment does not profess to secure all persons in the United States the benefit of the same laws and the same remedies. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceedings. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same state. Missouri v. Lewis, 101 U.S. 22, 31 (1879).

However, the plaintiffs submit that this is a legislative prerogative which is denied to the Executive branch. It is also suggested that a geographical selection, to be valid, must be based on some peculiarly local condition not present in other areas of the country.

While our research and that of the parties have failed to uncover any cases dealing explicitly with this doctrine, i.e. the legality of the Executive to designate a particular area, this Court, however, is of the opinion that the Executive branch of the Federal government has the right to issue an order that applies to a limited area. We are of the view that the instant order has the force of law. Cf. Farmer v. Philadelphia Electric Company, supra, and may be equated with the authority of a Congressional or legislative Act limiting legislation to a specific area.

The plaintiffs propose to the Court that the plan is arbitrary and capricious because its force is directed against the contractors, who admittedly are not responsible for the evil and not against the labor unions. It is urged that the findings of the Department of Labor, if legally acceptable, established a pattern of discriminatory membership adopted by the union. It is pointed out that the plaintiffs are not individually or collectively charged with racially discriminatory hiring practices. But, as a matter of common knowledge, as buttressed by the findings of the Department of Labor, we recognize that the contractors are compelled to rely on the construction craft unions as their prime or sole source of their labor and that most people in these classifications are referred to the jobs by the unions.

We acknowledge that the position in which the contractors find themselves is rather unfortunate and perhaps the solution may become difficult. Nevertheless, as we had previously determined, the Government, unless forbidden by law, has the unrestricted power to fix the terms, conditions and those with whom it will deal. Perkins v. Lukens Steel Company, supra; King v. Smith, 392 U.S. 309, 333 (1969). At this juncture it is appropriate to observe that the Plan requires the contractors to take minority group representation into account in their recruiting and hiring practices. This should be done. As stated in Norwalk Core v. Norwalk Redevelopment Agency, 395 F. 2d 920, 931 (2d Cir. 1968):

> What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed and to the extent it is necessary to avoid unequal treatment by race, it will be required.

See, also Offerman v. Nitkowski, 378 F. 2d 22, 24 (2d Cir. 1967); Springfield School Committee v. Barksdale, 348 F. 2d 261 (1st Cir. 1965). The plaintiffs have not persuaded us that the Executive Order is constitutionally tainted. We believe that contractual bidding is subject to the terms and conditions set forth in the Order. In light of all the circumstances, and as the Plan sets forth a reasonable method to assure equal treatment for minority groups, if the contractor makes the required good faith effort, the charge of arbitrary and capricious is negated. Our examination of the record indicates to us that the findings of the Department of Labor with respect to minority group representation in the construction industry in the five-county Philadelphia area as compared with representation in the involved trades, representation in the craft unions, and the manner of hiring are amply supported by the evidence adduced at the hearings and also by the studies conducted by the Department of Labor.

The plaintiffs' additional challenge to the validity of the Plan enters into the area of separation of constitutional powers. They call upon the Court to say that Congress is the exclusive branch of our tripartite form of government that has the constitutional authority to design an employment program. We are urged to accept the thesis that the executive is without power to order social change. This contention is fallacious. Thirty years of executive mandates have been enunciated and their validity is established. We look to the initial executive order relative to discriminatory practices first enunciated by President Franklin D. Roosevelt in 1941 and by his successors in office. We have no doubt that the authority to issue the applicable executive orders will withstand any assault. They stem from subsections (a) and (c) of § 205 of the Federal Property and Administrative Services Act of 1949. Sections (a) and (c) provide:

(a) The President may prescribe such policies and directives, not consistent with the provisions of this chapter. [Chapter 10 of Title 40] . . . chapter 4 of Title 41 . . . as he shall deem necessary to effectuate the provision of said chapters, which policies and directives shall govern the Administrator and executive agencies in carrying out their respective functions hereunder".
(c) The Administrator shall prescribe such regulations as he deems necessary to effectuate his functions under this chapter [Chapter 10 of Title 40] . . . chapter 4 of Title 41 . . . and the head of each executive agency shall cause to be issued such orders and directives as such head deems necessary to carry out such regulations.

We again state that the orders in controversy have the force and effect of law. Farmer v. Philadelphia Electric Company, supra.

Having concluded that executive orders are lawful, the question now presented to us is whether the Plan, per se, violates the Constitution or Federal statute on the ground that Congressional action alone can require a Philadelphia Plan commitment.

In support of their position the plaintiffs, initially, contend that the Executive branch is without power to require a Philadelphia Plan commitment because it violates Title VII of the Civil Rights Act. This question has been previously dealt with in this opinion and it will serve no useful purpose to review the same in detail. Suffice it to say that it is our opinion that the Plan does not conflict with Title VII and from this it follows, a fortiori, that the plaintiffs' contention falls of its own weight.

We do not subscribe to the plaintiffs' argument that the executive branch lacks power because the conduct required of a Contractor under the Plan would be contrary to the announced policy of the United States. We also reject the plaintiffs' assertion that the Plan is contrary to the express or implied will of Congress. We would say that the opposite view is an accurate portrayal of the policy of our Government. Its announced policy is to assure nondiscriminatory employment practices. The Plan complements this most desirable standard. We do not agree with the plaintiffs' argument that it is necessary that Congress delegates power to the executive before it could issue the controversial order. We believe that the prior portions of this opinion have adequately disposed of this problem.

We have given careful consideration to the plaintiffs' remaining contentions. In our view they reassert similar claims although cloaked in different legal garb. The questions presented therein are sufficiently dealt with in this opinion. We find them to be without merit.

In retrospect, it is the Court's belief that the denial of equal employment opportunity must be eliminated from our society. It is beyond question that present employment practices have fostered and perpetuated a system that has effectively maintained a segregated class. That concept, if I may use the strong language it deserves, is repugnant, unworthy, and contrary to present national policy. The Philadelphia Plan will provide an unpolluted breath of fresh air to ventilate this unpalatable situation. Justice demands an end to all artifices that prevent one, who because of color is estopped from enjoying the same opportunities that are accorded to those of different color. The destiny of minority group employment is the primary issue and the Philadelphia Plan will provide an equitable solution to this troublesome problem.

ORDER

The plaintiffs' motion for summary judgment is DENIED.

The motion of the Federal defendants to dismiss the action as it relates to The Contractors Association of Eastern Pennsylvania is GRANTED for lack of standing to maintain this suit.

The motion of the Federal defendants for summary judgment is GRANTED.

IT IS SO ORDERED.

SECURITY INSURANCE COMPANY OF HARTFORD
v. THE UNITED STATES

192 CT. CL. 754 (1970)

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Cowen, Chief Judge, delivered the opinion of the court:

This case concerns the extent to which the Government may set off taxes owed to it by a defaulting contractor against retainages claimed by a Miller Act surety who completes the contract pursuant to its performance bond. The case comes before the court on cross-motions for summary judgment.

For the purposes of this motion, the following agreed and stipulated facts are pertinent: On or about October 31, 1962, the New Amsterdam Casualty Company [hereinafter "surety"] executed and delivered payment and performance bonds on a contract entered into on October 31, 1962, by the Flagg Construction Company [hereinafter "contractor"] and the Army Corps of Engineers (Contract No. DA 08-123 Eng 4696). The contract called for the construction of an enlisted men's barracks at Fort Allen, Puerto Rico. The August 11, 1963, completion date specified in the contract was later extended to September 10, 1963.

Plaintiff Security Insurance Company is successor by merger to the New Amsterdam Casualty Company.

The surety obtained personal indemnity agreements from Norman G. Flagg and his wife, Caroline, who were officers and principal shareholders of Flagg Construction Company. From April 1962 to January 1963, the surety issued bonds to the contractor on four other construction contracts, including one with the Corps of Engineers for another project at Fort Allen, Puerto Rico.

By October 31, 1963, the contractor had not completed work on the barracks contract, or on the other project at Fort Allen. On December 10, 1963, the surety requested that the Corps of Engineers make no further payments to the contractor in view of the notices of claims the surety had received from laborers and materialmen. On December 11, 1963, the Corps of Engineers advised the surety that the work on the barracks contract was 99 percent complete as of December 1, 1963. Norman Flagg informed the surety on December 13, 1963, that liquidated damages were accruing at the rate of $60 per day on the two Fort Allen contracts.

Although the contractor's right to proceed with the barracks was never formally terminated, the surety took over completion of the barracks contract on February 1, 1964. The Corps of Engineers accepted the barracks as complete on February 7, 1964, stopping the accrual of liquidated damages, although the work was not actually completed until at least March 3, 1964.

The original contract price for the barracks of $100,162 was later reduced by change orders to $97,497.20. The Government paid the contractor $79,790.44, and charged the contractor $5,250 in liquidated damages as the result of the delay in completion. There was then due and owing by the Government under the barracks contract $12,456.76, comprised of the following items:

$8,712.36--retained percentages from 10/31/62 to 10/31/63
$2,162.08--earnings from 11/1/63 to 1/31/64
$1,582.32--earnings from 2/1/64 to 2/7/64

From the amount due under the barracks contract, the Government set off $9,764.08 for Federal taxes owed by the contractor. The contractor owed withholding, Federal Insurance Contribution Act (FICA), and Federal Unemployment Tax Act (FUTA) taxes, plus interest, in the total amount of $10,780.98 for 1962, 1963, and the first quarter of 1964.

On April 11, 1964, the contractor corporation was adjudicated bankrupt by the United States District Court for the District of New Hampshire. The Government recovered $95 on its tax claims, but the surety recovered nothing. On November 9, 1964, Caroline Flagg was adjudicated bankrupt by the same court. In the latter proceeding, the surety filed claims under the various indemnified payment and performance bonds it had issued to the contractor, including the payment and performance bonds it had issued to the contractor, including the payment and performance bonds on the barracks contract, and recovered $1,454.01.

Norman Flagg has not been adjudicated bankrupt. The record does not disclose what action, if any, the surety has taken regarding Norman Flagg's personal liability on the indemnity agreement.

In completing the work under the barracks contract and on the other Fort Allen project, the surety expended $11,970.43 for labor and materials, and $2,558.02 for attorney's services, for a total expenditure of $14,528.45. The surety also expended other sums in the settlement of the claims of laborers and materialmen arising prior to the surety's taking over the work on the barracks.

Plaintiff here sues to recover the $12,456.76 in accumulated retainages under the barracks contract, free from setoff for the contractor's indebtedness to the United States. Relying on the interpretation given United States v. Munsey Trust Co., 332 U.S. 234

(1947), by the Fifth Circuit Court of Appeals in Trinity Universal Ins. Co. v. United States, 382 F. 2d 317 (5th Cir. 1967), cert. denied, 390 U.S. 906 (1968), plaintiff asks the court to reexamine its early decision in Standard Accident Ins. Co. v. United States, 119 Ct. Cl. 749, 97 F. Supp. 829 (1951), wherein the court, on the basis of Munsey, held that the Government was entitled to set off against the retainages claimed by a performance bond surety on a Government contract, the tax debt of the contractor to the United States. Plaintifff maintains, and Trinity, supra, holds that the rule permitting set off, as enunciated by the Supreme Court in Munsey, was intended to be applied only against a payment bond surety (the Munsey facts), and not against a performance bond surety who completes the contract.

The defendant, on the other hand, contends that Standard Accident was correctly decided and that the Munsey rule should be applied to suits both by payment and performance bond sureties. Further, the defendant contends that plaintiff is not entitled to the $2,162.08 earned by, but not paid to, the contractor prior to the date plaintiff took over performance of the barracks contract. The defendant concedes, however, that plaintiff is entitled to recover its earnings in the amount of $1,582.32 under the contract after it took performance (February 1, 1964).

We have carefully reviewed the Munsey decision to determine its application to the facts in the case at bar. We have also considered the trend manifested in the cases decided and the governmental regulations promulgated since Munsey and Standard Accident were handed down. As a result, we have concluded that the Munsey rule was intended to apply and, in justice to the surety and the Government, should only be applied in an action by a payment bond surety and not in a suit by a surety who completes performances of the contract pursuant to the surety's performance bond. To the extent, therefore, that Standard Accident holds otherwise, we overrule that decision.

I

We consider first United States v. Munsey Trust Co., supra. In Munsey, the Supreme Court faced the hitherto undecided question of the rights inter sese of the Government and a payment bond surety on a Government contract to retainages withheld by the Government pursuant to the contract. The Court noted that the Government "has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him'", 332 U.S. at 239, quoting Gratiot v. United States, 15 Pet. 336, 370 (1841). Accordingly, the Court held that the Government was entitled to set off against the retained funds otherwise payable to the surety, the indebtedness of the contractor to the Government under another and unrelated contract.

The Court rejected the surety's contention that it was subrogated to the rights of the laborers and materialmen it had paid pursuant to the payment bond, since the laborers and materialmen had no enforceable rights against the United States. 332 U.S. at 241. Instead, the Court said that the surety was subrogated to the rights of the contractor, and, as subrogee of the contractor could not claim rights which the contractor did not have.

Significantly, however, from the standpoint of the instant case, the Court suggested, and we agree, that a different result would obtain in a suit by a surety on a performance bond, since in such a case, the surety, by electing to complete performance, would have conferred a benefit on the Government by relieving it of the task of completing performance itself.

The Court stated:

> Respondent [surety] argues that if the work had not been completed, and the surety chose not to complete it, the surety would be liable only for the amount necessary to complete, less the retained money. Moreover, if the surety did complete the job, it would be entitled to the retained moneys in addition to progress payments. The situation here is said to be similar. But when a job is incomplete, the Government must expend funds to get the work done, and is entitled to claim damages only in the amount of the excess which it pays for the job over what it would have paid had the contractor not defaulted. Therefore, a surety would rarely undertake to complete a job if it incurred the risk that by completing it might lose more than if it had allowed the Government to proceed. When laborers and materialmen, however, are unpaid and the work is complete, the Government suffers no damage. The work has been done at the contract price. The Government cannot suffer damage because it is under no legal obligation to pay the laborers and materialmen. In the case of the laborers' bond, the surety has promised that they will be paid, not, as in the case of the performance bond, that work will be done at a certain price. * * * [332 U.S. at 244 (Emphasis added)]

Subsequent to Munsey, in Pearlman v. Reliance Ins. Co., 371 U.S. 132 (1962), the Supreme Court held that Munsey left "undisturbed" the "established doctrine", as set forth by the Court in Prairie State Bank v. United States, 164 U.S. 227 (1896), that "a surety who completes a contract has an 'equitable right' to indemnification out of a retained fund." 371 U.S. at 138, 141. The Miller Act was also held not to have changed the law as declared in Prairie Bank. 371 U.S. at 139. Pearlman, however, was a suit to determine

the priority in right to a retained fund of the surety on a Government contract and the trustee in bankruptcy of the contractor, and is thus factually distinguishable from the instant case.

Recently, in Trinity Universal Ins. Co. v. United States, supra, the Fifth Circuit Court of Appeals, relying on Munsey, similarly distinguished suits by sureties on Miller Act payment and performance bonds. The operative facts in Trinity closely parallel those of the instant case; the determinative issue was the same. The court held:

> * * * The rights of the surety in Munsey were those of a subrogee of the contractor. Whoever, be it the contractor or his surety, pays the laborers and materialmen would be a creditor of the Government insofar as the retained funds are concerned. Pearlman at p. 141 * * *. Of course, however, the Government has a right to set off claims against its creditors.
>
> A different situation occurs when the surety completes the performance of a contract. The surety is not only a subrogee of the contractor, and therefore a creditor, but also a subrogee of the Government and entitled to any rights the Government has to the retained funds. If the contractor fails to complete the job, the Government can apply the retained funds and any remaining progress money to costs of completing the job. The surety is liable under the performance bond for any damage incurred by the Government in completing the job. On the other hand, the surety may undertake to complete the job itself. In so doing it performs a benefit for the Government, and has a right to the retained funds and remaining progress money to defray its costs. The surety who undertakes to complete the project is entitled to the funds in the hands of the Government not as a creditor and subject to setoff, but as a subrogee having the same rights to the funds as the Government. [382 F. 2d at 320]

Cf. Guarantee Co. v. Tandy & Allen Construction Co., 184 A. 2d 426 (1962).

We need only add to the reasoning of the Fifth Circuit that it would defeat the purpose of the retainages--to assure completion of the contract--to permit setoff against the claims of the completing performance bond surety.

Finally, a no-setoff rule as applied to claims against retainages by performance bond sureties finds support in the regulations governing sureties on Government contracts. The provisions of the Federal Procurement Regulations and the Armed Services Procurement Regulations are substantially identical. They provide that when the surety enters into an agreement with the contracting officer to take over completion of the work after default by the contractor, the take-over agreement shall include the following:

> Dealings with surety--take over agreements.
> * * * The agreement shall provide that the surety will undertake to complete the work required by the contract in accordance with all the terms and conditions of the contract, and that the Government will pay the surety in the manner provided by the contract, but not in excess of the surety's costs and expenses, the balance of the contract price unpaid at the time of default; subject, however, to the following conditions:
>
> (1) Any unpaid earnings of the defaulting contractor, including retained percentages and progress estimates for work accomplished prior to termination, shall be subject to claims by the Government against the contractor, except to the extent that such unpaid earnings may be required to permit payment to the completing surety of its actual costs and expenses incurred in the completion of the work, exclusive of its payments and obligations under the payment bond given in connection with the contract. [32 C.F.R. § 18.618-5 (1970) (Emphasis added); See 41 C.F.R. § 1-18.803-6 (1970)].

The clear purport of these regulations is that setoff is permissible against the retained funds claimed by a payment bond surety (the Munsey situation). However, when a performance bond surety and the Government enter into a formal take-over agreement, a setoff is not to be permitted against the retained funds claimed by the performance bond surety. In the instant case it is stipulated that the surety and the Government did not enter into a formal take-over agreement. Additionally, the pertinent ASPR provisions did not take effect until 1965, after all of the events herein at issue. Nonetheless, we believe that the regulations are helpful in that they reflect the distinction which the Supreme Court in Munsey appears to have recognized, and we believe should be drawn, between claims against retainages by payment and performance bond sureties.

Accordingly, for all of the reasons stated above, we hold that plaintiff is entitled to recover from the accumulated retainages under Contract No. DA 08-123 Eng 4696 (the barracks contract), the amount it expended in completing the contract pursuant to the performance bond, free from setoff for the indebtedness of the contractor to the United States. Plaintiff is also entitled to recover its earnings in the amount of $1,582.32 under Contract No. DA 08-123 Eng 4696 after February 1, 1964, the date it took over performance of the contract.

Plaintiff is not entitled to recover from the accumulated retainages under Contract No. DA 08-123 Eng 4696, free from setoff, the amount it expended pursuant to the payment bond on the contract. Munsey, supra. Nor is plaintiff entitled to recover, free from setoff, any amount earned by, but not paid to, the contractor prior to the date plaintiff took over performance of the contract. Since this is a suit to recover the retainages accumulated under Contract No. DA 08--123 Eng 4696, plaintiff is also not entitled to recover any amounts it may have expended pursuant to the payment of performance bonds on the contract for the other project at Fort Allen.

We believe that this result is in accord with Munsey, and is consistent with the modern trend, as manifested in recent cases and the regulations. Moreover, it avoids the anomalous result whereby the performance bond surety if setoff were permitted, would frequently be worse off for having undertaken to complete performance. As the Supreme Court noted in Munsey, "a surety would rarely undertake to complete a job if it incurred the risk that by completing it might lose more than if it had allowed the Government to proceed." 332 U.S. at 244. See Trinity, supra, 382 F. 2d at 321. We do not think that in enacting the Miller Act, the Congress intended such a result.

The case is remanded to the trial commissioner for the determination, in accordance with this opinion, of the amounts to which the plaintiff is entitled. Plaintiff's cross-motion for summary judgment is granted, and the defendant's motion for summary judgment is denied.

GOVERNMENT CONTRACT LAW CASES

Chapter Nine

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CHAPTER NINE

CONTRACT CLAUSES

Section 1. Government Furnished Property

a. Suitability for Use.

KECO INDUSTRIES, INC.

ASBCA No. 11468 (1966)

OPINION BY MR. SOBERNHEIM

Appellant sought to obtain an increase in the contract price in the amount of $55,004.70 as an equitable adjustment under the changes clause of its contract on the ground that it had provided sound suppression devices to reduce the noise level of air conditioners furnished by it to the Government. The contracting officer denied the claim on the ground that what appellant had done was within its contractual obligation. The parties agreed that the Board should only determine the issue of liability and further stipulated at the hearing of the appeal that, if appellant prevailed in its entire claim it was entitled to at least $49,453.45. The balance of $5,551.25, involving overhead items, was contested by the the Government auditors. Accordingly, if appellant prevails the matter will be returned to the parties for resolution of the auditors' objections to these items and determination of the correct amount due appellant.

DECISION

The facts and the expert opinion testimony, spread on the record primarily by appellant or based on information furnished by appellant to respondent, lead inevitably to the conclusion that the reason why appellant's first article air conditioner exceeded the specified noise levels, when measured at 25 feet distance from the unit, is found in the engine-created noise.

Other possible sources of excessive noise were tested by the parties long before the hearing and found by them not to be the cause of the high noise level. No causes other than engine noise are seriously advanced here. The suggestion that the air conditioners to be furnished under this contract were noisier than the units furnished under appellant's first contract by virtue of design changes in the later units is clearly refuted by the record. No such changes are shown to have been made.

The same record leads to the further conclusion that, if the engines here furnished by respondent to appellant as GFP were noisier than those furnished under the earlier contract, this was due to the fact that they were used and overhauled engines, and not, as under the earlier contract, new ones. This is brought out convincingly by the noise level testing of the sample unit: although this unit was accepted as meeting the noise level of the first contract, and as a matter of extrapolation from the noise level test data under that contract would have met the noise levels specified here, it was found not to meet the noise level of the instant contract after substantial use by the Government. We can only conclude from the data that extended use increases the noise of air conditioners when in operation. The testimony of the expert witnesses supports this conclusion, which conforms moreover to common experience with used and overhauled or rebuilt machinery. In all repects its quality is less than that of the new article.

This conclusion is supported here by the actual data on the deficiencies found in the 112 engines furnished to appellant. They conflict with the idealized view of the MOAMA operation taken by respondent here and together with other data on defects in overhauled engines preclude any finding that the overhauled engines furnished appellant here were of the same quality as the new engines furnished appellant under the first contract. (No dispute arose under the third contract. Appellant inquired and was told that overhauled engines would be furnished and provided in its bid for the cost of sound suppression devices.)

Having found in appellant's favor on the factual issues as to the cause of its failure to meet the specified noise levels in its first article without the addition of sound suppression devices at a substantial additional cost, we reach the issue whether appellant is entitled to an equitable adjustment in the contract price on the basis of these findings.

Appellant has argued that we should hold in its favor on the ground that the contract, interpreted in the light of relevant contract history, required respondent to furnish new engines. There is, however, nothing in the contract terms to so obligate the Government and there appears to have been no precontract inquiry or discussion which could lead to the conclusion that this was the intent of the parties. The accidental fact that the Government furnished new engines under the first contract is not enough to establish an obligation to do so under this contract. The "New Materials" clause, on which appellant rests part of its argument, applies only to CFP. It does not obligate the Government to furnish new engines.

On the other hand, the GFP clause of the contract, expressly made applicable to the Government-furnished engines, required respondent to furnish engines suitable for use. A long line of court and Board decisions, involving a wide variety of GFP, has held that this obligation includes not only the duty to furnish the specified articles and to pay for necessary repairs, such as here the replacement of missing thermo switches, broken elbows and the like, but to furnish articles "suitable for use", i.e. the use of which permits performance of the contract without "unnecessary roadblocks" to performance in the form of extra work and cost. Gillsam Manufacturing Co., ASBCA No. 4461, 58-2 BCA par. 1924 (involving Government-furnished cloth). See also Topkis Brothers Company v. U.S., 155 Ct. Cls. 648 (1961), aff'd on motion for recon. 155 Ct. Cls. 680 (1962) (cloth); Chicago Garment Co., Inc., ASBCA No. 4657, 601 BCA ¶ 2581 (cloth); Stylecraft Clothes, Inc., ASBCA No. 7932, 1963 BCA ¶ 3879 (cloth); Cornelia Garment Company, ASBCA No. 1673 (1954) (cloth); Globe Crayon Corp., ASBCA No. 1496 (1954) (chemical); Franklin Research Corp., ASBCA No. 6797, 61-2 BCA ¶ 3127 (cable reels); International Aircraft Services, Inc., ASBCA No. 8389, 65-1 BCA ¶ 4793 (repair kits); National Roofing and Painting Corp., ASBCA No. 10425, 66-1 BCA ¶ 5409 (paint).

In all these cases the Court of Claims, or far more frequently this Board, has permitted equitable adjustments in the contract price. Thus in Stylecraft, Gillsam, Cornelia, and Chicago Garment, supra, the Government-furnished cloth, for instance, could not be sewn at normal speed without damaging the cloth and the sewing equipment. Accordingly, price adjustments were made to cover the extra cost of sewing more slowly in order to do the work.

Our decision in Franklin Research, supra, is particularly in point. Appellant there agreed to manufacture cable assemblies which required the attaching of 250' lengths of cable to connectors and then to wind the cables on Government-furnished reels. These reels were of a new design and had certain hooks placed inside the traverse of the periphery which made it necessary to wind the cable by hand rather than mechanically. Since the invitation for bids did not disclose anything about this or that something other than a mechanical winding job was required, the reels were found not suitable for the intended use and appellant allowed to recover its additional costs.

Similarly, here the invitation for bid indicated that appellant was not required to do more than furnish additional air conditioners to a specification, drawings, and bill of material which it had previously successfully furnished. While the noise level permitted for the new units was lower, the previously furnished equipment had in fact already met this requirement. Hence, appellant should be allowed to recover the extra cost of the added sound suppression devices.

There is - apart from the determination of the exact amount due - one limitation on appellant's recovery. As indicated earlier, it had claimed the cost of an additional 40 hours of direct labor with attendant charges as to 31 "completed units" which required rework (App. Ex. A-10A, A-11). The contract, though permitting fabrication of component parts of the end item at all times, "expressly prohibited" appellant from assembling any of said component parts into an end item or delivering any of the components fabricated until such time as written approval of the First Article(s) test report was received (Part II(b), Sched. p. 12). The record contains little detail as to exactly what happened. However, the claim for additional work on completed units indicates that appellant violated its obligation under Part II(b) of the contract and to the extent that the costs claimed here flow from this violation of its contract their recovery is barred. On the basis of the claim letter (App. Ex. A-10A) the amount to be disallowed would be $3,921.50. Since overhead charges are to some extent disputed, the exact amount by which appellant's claim must be reduced beyond the cost of 40 hours of direct labor for each of 31 units cannot be determined. Its ascertainment is, therefore, left to agreement of the parties.

The appeal is allowed except for the claim for additional direct labor costs and attendant charges incurred for rework of 31 units beyond the direct labor cost and attendant charge incurred in regard to the remaining 81 units.

* * *

b. As-Is.

G. W. GALLOWAY COMPANY

ASBCA No. 16656 (1973)

Appellant's contract, as modified, called for the production of 46 Armored-Vehicle-Launched (AVL), Scissoring type, Class 60, Bridges. The bridges were eventually delivered but appellant experienced considerable difficulty in producing them. Appellant seeks an equitable adjustment to reimburse certain excess costs alleged to be attributable to various actions and fault on the part of the Government; among them being the furnishing of defective Government-owned special tooling.

A. Special Tooling Claim

Counsel for the Government touches the nub of the controversy in his Reply Brief when he states (pp. 9-10):

> "16. To contend that the procuring agency assumed that the special tooling offered to prospective contractors would not be useful or that the procuring activity did not offer the tooling with the hope of obtaining a lower contract price, would be to attribute to the procuring agency the intention of performing a senseless act. Clearly, this was not the intention of the procuring activity. The intention of the then Contracting Officer, Mr. Greg O'Neill, as well as the ASPR policy (as expressed in ASPR Sec. 13-304, dated 1 January 1969) was to offer the special tooling in the hope of obtaining a lower contract price for the end items. How much of a price reduction, especially in light of the relatively low acquisition value of the special tooling ($46,000), would be, as expressed by Mr. O'Neill, '. . . in the mind of how a person looks on the value of this material.' To say however, that the procuring agency did not do a senseless act does not thereby mean either that the procuring activity assumed that all the special tooling would be useful, or that the procuring agency indicated an intention that, or directed the Appellant to, utilize the special tooling.

This argument, we think, misses the point. There can be no question but that the procuring activity fully intended to receive a lower contract price by offering the tooling. It is the manner in which the tooling was offered that created the controversy and underlies the basis for attaching liability to the Government. If, as

asserted, the procuring agency did not assume that all of the special tooling would be useful it made no attempt to advise bidders of the assumption. In view of the difficulty inherent in inspecting the tooling bidders had no way of ascertaining this fact. Indeed, the one bidder who did inspect the tooling assumed that all of it would be useful. Neither has any adequate reason been given for the procuring activity's failure to advise bidders that 76 necessary tooling items were not available. Neither has it been explained why obsolete tools were included on Attachment B.

Paragraph (b) of ASPR 13-304, cited by counsel, states in part that "* * * the contract under which special tooling is furnished shall contain a description thereof, and the terms and conditions applicable to its shipment to the plant of the contractor and to the cost of adapting and installing it." The nature and extent of the "description" required by this provision is not further defined in ASPR but, at the very least, we do not think that the provision countenances, as was done here, the omission of vitally important information in the possession of the procurement activity. A portion of appellant's claim is predicated upon the failure of the Government to furnish tooling drawings with the special tools. However, the Government did not possess such drawings and did not represent that they were available. The Government cannot be held responsible for appellant's erroneous assumption that tooling drawings would be furnished.

Counsel's assertion regarding the lack of intention or direction on the part of the procurement agency that appellant utilize the special tooling ignores certain provisions of MIL-B-52088C(MO). The riveting provisions of that specification (Paragraph 3.9.5, quoted supra) states that "Components shall be bolted in position before riveting" and that "Jigs or frames shall be used to maintain alinement and tolerance." Paragraph 3.9.7 of the specification is even more to the point:

> "3.9.7 Jigs and fixtures. Shop-fabricated components (except minor parts) shall be assembled in steel jigs or frames and joined while held in position. Jigs or frames shall be designed to minimize distortion. Steel jigs or templates shall be used for drilling or boring all field-connected pin or boltholes. The length of the cylinder connecter cables shall be measured in a jig."

While these specification requirements do not specifically reference the special tooling listed on Attachment B they, nevertheless, require that some kind of tooling be used. The solicitation offered bidders rent-free use of Government-owned tooling specifically fabricated for manufacturing the AVL Bridge. However, contrary to the provisions of ASPR 13-308(b)(v) and 13-502.1, the solicitation did not contain a price evaluation factor to eliminate any competitive advantage accruing to bidders electing to use the special tooling. This

means, in effect, that a bidder who may have wished to use his own production resources rather than rely on unwarranted Government-owned special tooling would be placed at a competitive disadvantage if he elected to purchase or produce the tooling himself and include the costs thereof in his bid. In other words, the solicitation provided a built-in incentive to use the free Government-owned tooling. In the light of these circumstances, we think it allowed recovery of overhead and engineering costs incurred to resolve discrepancies between contract drawings and defective Government-owned tooling furnished "as is". More to the point is the Board's decision in Boland Machine & Manufacturing Company, Inc., ASBCA No. 13664, 70-2 BCA par. 8556, wherein recovery was allowed on one of three claims under factual circumstances similar to those present in the instant case.

In Boland the appellant undertook to complete the construction of a small surveying ship after the original contractor had defaulted. After the default, but before appellant's contract was let, the uncompleted hull was damaged by a hurricane. In order to prevent complete deterioration of the hull, a separate contract was let for the cleaning and reconditioning of flooded areas and all equipment. The procuring agency (Navy), however, was strapped for time and money and, as a consequence, the clean up work was not performed as thoroughly as it might have been. A full examination by the Navy of piping systems for removal of mud, sand, and other foreign matter was foregone to save time. As a result of the limited inspection of the clean up contractor's work the Navy did not learn that all mud had not been removed from the piping systems. Appellant, however, was not apprised of the limited Navy inspection and the invitation to bid and contract contained no reference to that fact. The hull of the ship was furnished to appellant for completion on a "where is-as is" basis with a specific disclaimer of warranty as to suitability for use in performance of the contract. Prior to submission of its bid appellant's project superintendent inspected the hull. He conceded that he could have discovered certain defective welding, and lack of check valves, both of which were attributable to the defaulted contractor, but in light of the IFB as read by him he was not looking for such defects. The project superintendent also admitted that he could have examined the piping, but did not do so for the same reason. The Board denied the appellant's claims for repairing defective welding and for furnishing the missing check valves on the basis of the disclaimer of warranty. However, the claim for cleaning the piping system was allowed. As to that claim the Board stated:

> On the other hand, respondent, as shown by the testimony of its project engineer, had been short of money and time and had not inspected the vessel thoroughly after completion of the Buck Kreihs [Clean up] contract and did not know to what extent Buck Kreihs had performed its task in all areas of work or how thoroughly it had done so.

> In the circumstances, shown on the record and heretofore summarized, respondent was under a duty to disclose its knowlege of the possible incompleteness of the work performed by Buck Kreihs. Helene Curtis Industry, Inc. v. United States * * * 160 Ct. Cl. 437, 443 et seq. (1963). The duty of disclosure is not limited to technical matters but extends to other relevant facts. Bateson-Stolte, Inc. v. United States * * * 145 Ct. Cl. 387 (1959). Here the facts to be disclosed to bidders were the limits of the final inspection which it had conducted under the Buck Kreihs contract to ascertain that all work contracted for was actually done by that company. Had it done so, appellant would have been in a position to guard against the cost incurred to accomplish what Buck Kreihs should have done in completely performing its contract. Hence, the piping clean-up claim should be allowed.

The present appeal presents an even stronger case for relief than Boland. The facts of record speak eloquently in behalf of appellant's position. Offering rent-free use of the defective Attachment B special tooling of this procurement can be characterized, without much exaggeration, as the tendering of poisoned carrots to unwary rabbits.

Some of the special tools, including the three major assembly fixtures, contained latent defects and, thus, were not discoverable by visual inspection. Most of the tools could not be verified for accuracy during the prebid period. This was due in large part to the inordinate time and effort required. To demonstrate this, we need only to recall Mr. Rau's estimate that it would take 1,200 manhours to review, check out and calibrate the tools. This translates into 150 days for one man working an 8-hour day. A period of 150 man days to determine whether special tooling is suitable for use is certainly beyond the reasonable limits of feasible inspection. In addition, certain of the holding fixtures simply could not be verified for accuracy without parts or components to place in them, i.e., without actually using them.

Seventy-six tools used by Allison on prior contracts were worn out and deleted from Attachment B as scrap. Appellant assumed, reasonably we believe, that the gaps appearing on Attachment B represented tools which had become obsolete because of revisions to the contract drawings. It had no reason to suspect that the Attachment B tooling was only a partial list of the tooling needed for the job. The procurement activity was aware of this and also knew the reason for deleting the 76 scrapped items, but revealed neither item or information. On the other hand, also unknown to appellant, tools that were actually obsolete were included on Attachment B. Allison knew this. If the inspection and screening by the DCAS-Phoenix property personnel had been as thorough as Mr. Rau claimed it was, then the Government also knew it, or should have known it.

None of the foregoing important information was disclosed to appellant prior to bid opening, but under the rulings in Boland, Helene Curtis and Bateson-Stolte it should have been. Failure to do so imposes liability on the Government for the excess costs incurred by appellant on account of the defective tools. The "as is" disclaimer of warranty is not a defense under the circumstances of this appeal.

There is yet another reason why the "as is" disclaimer of warranty provisions should not be given effect under the facts of this case. Section 2-302 of the Uniform Commercial Code provides:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Probably the main purpose for including an "as is" disclaimer of warranty provision in a contract is to enable the owner of property, in either selling or loaning it, to avoid liability for defects therein which are unknown to him. See the Boland case, supra. That is not the situation in the present appeal. The special tooling, as previously noted, had been inspected and screened by DCAS-Phoenix personnel and its physical, outward condition, at least, was known to the Government. However, the main reason why the contracting officer offered the tooling "as is" was not because of its unknown condition, either latent or discernible, but because of what he considered to be the "nature" of the special tooling, i.e., because he believed that, for the most part, it would only be compatible with capital equipment comparable to that used by Allison and might not be usable by another contractor possessing different capital equipment. His understanding, as we have seen, was wrong. The "as is" disclaimer provisions should not have been used for the purpose stated without adequate warning that the widely-accepted definition of special tooling in ASPR did not apply to the Attachment B tooling and that something else was meant. In any event, the reason given for utilizing the "as is" disclaimer in this case was not warranted in either fact or law.

Considering all the circumstances, especially the failure to disclose vital information concerning missing tools; inclusion of superfluous tools; inadequate and improper marking (identification) of tools; and the serious consequences to appellant in attempting to use tools not suitable for use, enforcement of the "as is" disclaimer of warranty provisions, would, in our opinion, be unconscionable. Compare REDM Corporation, ASBCA No. 17378, decided 27 June 1973, and authority cited therein.

Accordingly, the claim for defective tooling is allowed except (1) for that portion, as to which appellant offered no proof, relating to additional material costs resulting from the alleged necessity to resort to an unscheduled and short-run manner of procuring outside materials, supplies and services and (2) for that portion grounded in the failure to provide tool drawings with the special tools.

c. Risk of Loss-Willful Misconduct

FAIRCHILD HILLER CORPORATION

ASBCA No. 14387 (1971)

Respondent sought to impose liability upon appellant for fire damage to C-130 aircraft No. 62-1831 pursuant to paragraphs (d)(i) and (vi) of the Ground and Flight Risk Clause (ASPR 10-404 (April 1968)) of appellant's contract. At the hearing respondent agreed that its claim should be considered solely under paragraph (d)(i) of the cited clause.

Under date of 18 January 1971, prior to the hearing of the appeal, the contracting officer amended the final decision by withdrawing the assessment of liquidated damages for 536 days of delay resulting from the fire damage of aircraft No. 63-1831 in the amount of $246,560 and such assessment is no longer an issue before the Board.

On 8 April 1971, shortly before the hearing, appellant filed a motion to dismiss the appeal on the ground that respondent had suffered no loss from the fire. This assertion, countered by the Government, is premised on a calculation that the value of the salvaged spare parts was greater than the depreciated value of the plane and salvage costs incurred by the Government. For reasons which hereafter become apparent there is no need to consider this motion on its merits.

STATEMENT OF FACTS

1. The Contract

On 3 October 1968 respondent, represented by the contracting officer at Warner Robins Air Materiel Area (WRAMA), awarded to appellant, Contract No. F09603-69-0873, for the inspection and repair as necessary (IRAN) of C-130 aircraft. The contract was to be performed at appellant's facility, located at Pinellas International Airport in St. Petersburg, Florida, and to be administered by Detachment 26 of Headquarters, Oklahoma City Air Materiel Area (OCAMA), stationed at appellant's facility.

a. The Work Specification

The Work Specification, designed as Appendix A, as amended by Modification P007 prior to the occurrence of the accident which brought about this appeal, provided in Section I, 1, f that appellant

should "maintain a safety program to protect Government material, equipment and personnel . . . on his premises" and further provided in Section IV, 1, for mandatory compliance with technical orders, directives and other publications which prescribe Air Force policies, use of material, procedures for overhaul, disassembly and reassembly (App. A, Sec. IV, 1, A(3)). Among the publications listed in Section IV, 2, h are AFM 127-101 and its 1966 supplement, the Accident Prevention Handbook.

b. Specifications for Washing and Cleaning of Aircraft

One of the phases of IRAN work on C-130 airplanes is the stripping, washing and cleaning of the aircraft when received by appellant. As to this process Addendum No. 1 to Appendix A required that an aircraft which was not, or did not need to be, camouflage painted, be washed and cleaned in accordance with Technical Order (T.O.) 1-1-1, using the cleaning compound, defined in specification MIL-C-25769E and often in the record referred to as "soap," in an approved mix ratio before accomplishing other specified work.

T.O. 1-1-1 is a technical manual for cleaning aerospace equipment. Proper cleaning is intended to prolong the useful life of the equipment and, in particular, to control corrosion and its effects (T.O. 1-1-1, Sec. 1-3). The T.O. notes that scrubbing with a soap solution is no longer the only suitable cleaning technique and that only authorized methods and materials shall be used. One forbidden method is the spraying of cleaning agents on areas of the aircraft where they may be entrapped.

Section 3 of T.O. 1-1-1 specifies in detail procedures for cleaning and the use of cleaning compound MIL-C-25769E. It also permits the use of stronger, petroleum-based solvents in cleaning stubborn or exceptionally oily areas and specifies the solvent described in federal specification P-D-680, Type II "in limited quantities before application of Specification MIL-C-25769 mixture" (T.O. 1-1-1, Sec. 3-16), using a wiping cloth or sponge to apply it to the surface to be cleaned (id., Sec. 3-18a). Spraying of solvent is permitted only in specific situations, not applicable to the fire in question. A warning note states that P-D-680 solvent is flammable and has a flash point of 140°.

c. Safety Provisions

The basic safety provisions which appellant has agreed to observe are found in chapter 6, entitled "Fire Prevention Practices" and chapter 8, entitled "Aircraft and Flightline Safety Practices", of AFM 127-101 (Resp. Ex. B-9; see especially ¶ 0601.8; ¶ 0607.4; ¶ 0802.7 and ¶ .11). In compliance with its contractual obligation to maintain a program appellant also instituted safety procedures embodied in its Safety and Accident Prevention Manual of 3 September 1968. The preparation of this manual was the direct result of strictures as to

appellant's safety program at the time of the preaward survey (PAS) for the instant contract. The manual refers for detailed information on subjects covered to AFM 127-101 and other Government publications not relevant here. It contains a chapter on fire prevention in respect of flammable liquids, emphasising the fire danger from ignition of their vapors, and follows in general outline the corresponding chapter of AFM 127-101. In addition, appellant used a procedures manual which contained operational procedures of various dates and subject matters, including a procedure for storage and control of combustible solvents which was put into effect after the accident with which this appeal is concerned.

d. The Ground and Flight Risk Clause

Apart from the disputes clause the Ground and Flight Risk Clause is the only part of the General Provisions of the contract specifically applicable to the appeal (Contr. Sched., Gen. Prov. C, "Alterations in Contract", pp. 9, 14). By this elaborate clause, set forth in full in ASPR 10-404(a), the Government in essence "assumes the risk of damage to, or loss or destruction of, aircraft 'in the open', during 'operation', and in 'flight', as these terms are defined" in the clause, and "agrees that the Contractor shall not be liable to the Government for any such damage, loss, or destruction, the risk of which is so assumed by the Government." Conversely, appellant assumed the risk for the first $1,000 of damage to aircraft "in the open" or during "operation" (but not in "flight") except for reasonable wear and tear or negligence of Government personnel (cf. par. (e)).

The phrase "in the open," used in the initial, operative clause (ASPR 10-404(a), Cl., par. (a)) is defined as referring to a location wholly outside of buildings (Cl., par. (b)(ii)) and concededly was the location in which aircraft No. 62-1831 was at the time of the accident in question.

Paragraph (c) of the clause requires appellant to take corrective action if the administrative contracting officer (ACO) finds that the aircraft is kept in the open under unreasonable conditions, grants appellant an equitable adjustment in contract price if the ACO's order is later determined not to have been justified, and authorizes the ACO to terminate the Government's assumption of risk under paragraph (a) of the clause if appellant failed to act promptly or to correct such conditions within a reasonable time. If after termination of the assumption of risk the criticized condition is corrected, the Government may elect to reinstate the assumption of risk.

The Government has, however, limited its assumption of risk in six specified situations. Of these, that set forth in subparagraph (i) is the basis of respondent's claim that appellant be held responsible under the contract for the damage flowing from the aircraft fire. This exception reads as follows:

"(d) The Government's assumption of risk shall not extend to damage to, or loss or destruction of, such aircraft:

"(i) resulting from failure of the Contractor, due to willful misconduct or lack of good faith of any of the Contractor's managerial personnel, to maintain and administer a program for the protection and preservation of aircraft in the open, and during operation, in accordance with sound industrial practice (the term 'Contractor's managerial personnel' means the Contractor's directors, officers, and any of his managers, superintendents, or other equivalent representatives, who has supervision or direction of all or substantially all of the Contractor's business, or all or substantially all of the Contractor's operations at any one plant or separate location at which this contract is performed, or a separate and complete major industrial operation in connection with the performance of this contract);

Respondent originally also relied on exception (d)(vi) which relieves respondent of its assumption of risk in regard to aircraft damage "sustained while the aircraft is being worked upon and directly resulting therefrom" unless such damage would have been covered by insurance customarily maintained by appellant but for respondent's assumption of risk. The cost of such insurance on Government aircraft is warranted not to have been included in the contract price.

Appellant's rights to an equitable adjustment in contract price as well as the Government's rights in the event of aircraft damage, the risk of which respondent has assumed, are set forth in paragraphs (i) and (j) of the clause but need not be set out in detail since appellant here seeks solely a determination that the imposition of liability upon it for the damage to aircraft No. 62-1831 was in error and should be reversed.

2. The Burning of Aircraft No. 62-1831

The accident as a result of which C-130 aircraft No. 62-1831, delivered to appellant for necessary inspection and repair under Contract No. -0873, was burned, occurred on 15 February 1969 between 7:30 and 7:45PM. As a result Headquarters, WRALC appointed an Accident Investigating Board (AIB) pursuant to AFR 127-4 to determine the causes of the accident and to recommend measures to prevent recurrence (AIB Rept., pp. 4,527). In addition, Headquarters, OCALC appointed a Collateral Board (CB) pursuant to AFR 110-14 to investigate and determine facts and circumstances relating to damage sustained on 15 February 1969 by aircraft No. 62-1831 for use in administrative, disciplinary or court proceedings and with "particular attention . . . to the subject or possible contractor (Fairchild Hiller) liability."

a. The Report of the AIB

According to the report, the aircraft was positioned on appellant's outdoor wash rack for cleaning prior to IRAN. On the morning of 15 February 1969 two drums of soap (MIL-C-25769E compound) and water were prepared, but inclement weather prevented any work during daytime hours and work started only with the night shift which used the contents of the two drums to wash the aircraft. At the time of the accident one of appellant's employees, recently hired, was "shotting" the left wheel well with soap and water and them steaming it. He found it difficult to strip the tar from the surface. He then obtained a total of ten (10) gallons of another liquid (which at the time of the AIB investigation he uncertainly believed to have been P-D-680) and "shot" the liquid into the wheel well. He then took a break and returned to his station on top of the tire of the extended left wheel to continue cleaning with soap and water. He took with him a quartz-iodine floor light (also referred to as a "widelite" by its trade name) which he plugged into a junction box on the ramp near his station, in order to see better, and a bucket with soap and water. As he was continuing his work, he heard the sound ("poof") of an explosion and saw a flash coming from the lower back part of the wheel well. The employee, protected by rubber clothing, left his station and ran around the aircraft to warn others of the fire.

The employee who was washing the left wheel well did not know how the accident occurred. His unsworn statement, dated 14 March 1969, disclosed that he had used about 10 gallons of a liquid, other than that drawn from the soap and water drums, to clean the wheel well, which he thought was P-D-680 (See also Stat. of Night Lead Man on use of P-D-680; AIB Rept., p. 36). He also noted that before the fire there were two drums and drum pumps near the aircraft but after the area was cleared up after the fire they were gone.

A sample from the water and soap drums showed an admixture of methylethyl-ketone (MEK), a highly flammable cleaning fluid, in the soap and water solution. How MEK got into the solution is not clear, but the laboratory reports of Government and private laboratories established its presence therein to the AIB's satisfaction and testimony received by it shows that MEK was available and used in the cleaning process, though it was not used in stripping the aircraft. Perhaps the drums used had once contained MEK and the MEK detected in the laboratory tests was a remnant of prior use. Another sample of liquid found in the nacelle of the No. 2 engine also indicated the presence of MEK. The testimony received by us reinforces the AIB conclusions as to the possibility that the drums once contained MEK.

The immediate cause of the fire was a short circuit in the widelite lamp, as the AIB found. It considered that the lens of the lamp became overheated, that the wheel well contained volatile vapors from MEK or P-D-680 and that in this situation the arc of the spark which

had ignited in the lamp cord caused a short circuit. The testimony of the AIB's technical adviser, an accident prevention engineer in the AF Deputy Inspector General's office, before this Board tends to confirm these AIB conclusions.

The AIB, in order to formulate recommendations, also considered the safety practices prevailing at the wash rack. It sharply criticized the claimed ignorance of the night manager regarding the use of solvents which the AIB considered established by the evidence summarized above (AIB Rept., p. 18; for the night manager's statement to the AID, id., 450 et seq); considered that there was lack of real control over the use of solvents at the wash rack and found that the use of MEK and excessive use of P-D-680 as well as spray application thereof violated T.O. 1-1-1, the specification governing aircraft cleaning under the contract.

The Board recommended closer controls over the storage and issuance of flammables; a continuing training program to assure that personnel working with flammable solvents understands the dangers of handling such solvents and the proper handling procedures; controls over the use of portable lights in areas where flammable vapors were present; and revision and clarification of T.O. 1-1-1.

In conclusion, it recommended termination of appellant's contract if violations of its safety provisions continued, but it did not recommend that the Government exercise its right under paragraph (c) of the Ground and Flight Risk Clause to terminate the Government's assumption of risk on the ground that aircraft was kept in the open "under unreasonable conditions" (ASPR 10-404(a). Cl. par. (c)(1)).

b. The CB Report

On evidence similar to, if not always actually the same as, that considered by the AIB, the CB also found that the use of an unauthorized type of light which was neither explosion nor vapor proof (i.e., the widelite referred to in the AIB report, supra) in the hazardous environment created by the improper use of P-D-680 or MEK or both were the immediate and direct causes of the fire. In arriving at this conclusion the CB also received and relied on the testimony of appellant's employee who was washing the left wheel well at the time of the fire.

In regard to appellant's liability under the Ground and Flight Risk Clause the Board heard the testimony of the Air Force safety monitor. The safety monitor testified that the use of lights which were not explosion proof and the improper use of flammable solvent containers were recurrent problems and that appellant lacked care in controlling the use of these dangerous items. He added that after the incident new controls had been introduced but that previous thereto controls over the use of P-D-680 and MEK had been inadequate. He attributed the lack of control, notwithstanding action at the top, to

the insufficiencies of first line supervision. Though appellant in his view never gave enough emphasis to aircraft protection and safety, he was unwilling to consider appellant's safety efforts a failure, although appellant had not gone as far as it should have, and saw no basis for charging appellant with lack of good faith. While appellant had mostly taken the easy route of "palliatives" by taking corrective action in response to specific complaint, it had not failed to keep its promises and its managerial personnel had been generally, though not always, responsive to safety demands.

The ACO who also testified before the CB concurred in the view that appellant willingly made corrections but found the flaw in its conduct to be its failure to follow either its own or contractually-imposed safety procedures before any untoward incident or violation had occurred. He adverted to a February 1968 incident in which a fuel tank booster pump had exploded due to ignition of fuel vapors in the tank. His letter of 5 December 1968 to appellant had found appellant's conduct negligent but not willful within the meaning of paragraph (d)(i) of the Ground and Flight Risk Clause and did not hold appellant liable for the damage. After making specific suggestions for improvement he had advised appellant in this letter that any future accident, resulting in aircraft damage deemed avoidable by full compliance with and application of all directions contained in contract documents, would be considered evidence of willful misconduct and lack of good faith on the part of appellant's managerial personnel and lead to non-assumption of risk by the Government. On the basis of his past position the ACO testified before the CB that in his view appellant had not maintained a proper safety program and that he would view further avoidable accidents as evidencing appellant's lack of good faith in safety matters.

The Commander of Detachment 26, appearing as a witness before the CB, confirmed the picture developed by the preceding witness. He let himself be led, however, to take the position that appellant's unwillingness to go to the root causes of its safety troubles, while leaving the policing for safety to the Air Force and merely correcting deficiencies of which it was advised, amounted to "bad faith". He added, however, that appellant's safety manager was very cooperative in ground safety matters, if the Air Force showed him how, but again complained that this attitude put the burden on the Government. He attributed this attitude to pressure on the General Manager to meet tight schedules which he did without due regard, in the witness' view, to safety.

Based on this testimony and evidence as to a further accident on 15 January 1969 as well as QADR's reporting safety deficiencies, the CB found:

> "* * * clearly a pattern wherein management adequately answers safety deficiencies in writing but in fact makes

little or no lasting implementation. In other words, management says it will comply with a particular contract provision or correct a safety deficiency but really does little or nothing about it. In summary the preponderance of evidence substantiates a view that there has long been and continues to be a chasm between management assurances and management actions in performance under this and other contracts at this facility."

The report did not, however, make either a specific recommendation for action under paragraph (c) of the Ground and Flight Risk Clause or for contract termination for past or future safety violations, nor did it recommend either for or against relieving appellant of liability for damage caused to aircraft No. 62-1831 by the 15 February 1969 fire.

C. The ACO's Action under the Ground and Flight Risk Clause.

Simultaneously with the issuance of the foregoing reports appellant requested to be relieved of liability for damage to aircraft No. 62-1831, as it had been relieved of liability for other accidents in the past. On 13 June 1969 the contracting officer of Detachment 26 rendered his final decision denying the request. He found therein that the accident occurred because of appellant's noncompliance with the contract terms relating to washing and cleaning of aircraft, as evidenced by the indiscriminate use of P-D-680, the use of a soap solution with an admixture of MEK, and the utilization of a portable light not authorized for use in an explosive and vapor-laden environment. He further found that appellant's managerial personnel had shown a lack of good faith and willful misconduct in regard to the maintenace and administration of a protection program for aircraft in the open and cited the following matters in support of his conclusion:

a. The warning given by the cited 5 December 1968 letter after a "similar" accident in February 1968;

b. Failure of appellant's managerial personnel to establish and maintain proper training and supervision of employees and lack of a proper safety program.

c. Failure of appellant's managerial personnel to comply with instructions of authorized Government representatives regarding adequate procedures for control, use and storage of hazardous solvents and cleaning agents as well as failure to train the work force in their safe use.

d. A management pattern of answering safety deficiency reports in writing while failing to act in the implementation of an effective program to insure protection of aircraft and other Government property.

On the basis of these findings the contracting officer held appellant liable for material loss in respect of aircraft No. 62-1831 in the amount of $472,702.50 pursuant to paragraph (d)(i) on the Ground Risk and Flight Clause.

3. The Conduct of Appellant's Managerial Personnel in Respect of Aircraft Safety.

In this appeal the record includes not only, of course, the testimony and other data accumulated by the Air Force investigating boards but also a mass of other documents and the testimony of witnesses which the two Boards did not hear. On the whole we find no discrepancies between the facts developed by the Air Force Boards and the picture presented to us in testimony and documentary material.

The documents and testimony before us of the Detachment 26 staff members establish clearly that appellant had a program adequate at least on paper but that reliance on the Air Force and lack of aggressive supervision in regard to safety deprived appellant's safety program of much of its effectiveness. As a result there were numerous safety violations, often minor, as represented in the numerous QADR's before the Board. The situation was due partly to the pressure of tight delivery schedules with which appellant was willing to comply even at some cost to safety, though the Air Force representatives on the spot did not consider the schedules so short as to prevent proper safety practice. Partly the situation was due to human failings which prevented perfection in safety observance as appellant saw the situation, and partly perhaps due to appellant's unwillingness to incur the cost of extensive classroom safety training which it deemed uneconomical and excessive. There is little evidence in the record to tie appellant's managerial personnel (Within the meaning of paragraph (d)(i)) directly to safety violations and there is some evidence that even the Air Force safety monitors were not unmindful of the "practicalities" of the safety situation.

As to the specific area of appellant's facility here involved (the wash rack) there was little evidence of prior lack of safety in its operation. It had been greatly improved under the guidance of appellant's general manager. Only one or two QADR's at most dealt with matters affecting the conduct of activities at the wash rack. Complaints resulting from appellant's own safety inspections were very minor, involving such things as a loose board and overall the safety program in the wash rack area functioned rather well.

To establish the conduct of appellant's managerial personnel, both parties called appellant's general manager at the time of the incident and for four years prior thereto as a witness. His testimony as well as that of appellant's safety manager establish in great detail the facility's safety organization, operating through safety and safety policy committees which were staffed by seemingly competent

personnel, including individuals drawn from the ranks of upper management. The committee members and appellant's St. Petersburg top management as well promulgated safety manuals, caused training session to be conducted by the Florida State Industrial Commission, conducted regular and frequent safety inspections, received the deficiency reports of the Air Force monitors, and acted to correct the deficiencies uncovered by the Air Force or appellant's own inspections. The large volume of memoranda and letters relating in particular to the QADR's shows no failure of appellant to respond positively in correcting the deficiencies or unsafe practices uncovered. Only rarely was there controversy about corrective action and in nearly all instances appellant and the Air Force reached accord. Help was offered by the Air Force and accepted by appellant in the preparation of manuals and other safety matters. While appellant raised some questions as to the applicability of the Accident Prevention Manual (AFM 127-101), respondent has not pointed to any provision of AFM 127-101, relevant to dispute or note, which appellant rejected as inapplicable.

The record shows that respondent has not always looked with such a jaundiced eye upon appellant's safety record as it has in the present controversy. It has not in the past found incidents resulting in losses to the Government due to aircraft damage to be due to other than ordinary negligence covered by the Government's assumption of risk under the Ground and Flight Risk Clause.

It found numerous defects, relating to safety matters, in the PAS conducted in the Spring of 1968 for the instant contract but was so satisfied with appellant's actions that a ground safety officer of WRALC testified, without contradiction, at the hearing that he and an OCALC ground safety officer were in August of 1968 of the "opinion that the ground safety problem had been satisfactorily resolved". Two months later, on 8 October 1968, the Commander of Detachment 26 wrote appellant after the annual safety survey as follows:

> "3. NOTEWORTHY ITEMS - The contractor is commended for the exceptional progress made, the sincere cooperation rendered and the aggressive pursuit and safety consciousness reflected in the past few months. It is most gratifying to know that this facility is making daily progress in becoming a safer place to work and to see that Government equipment is afforded the required protection. We anticipate the contractor's continued cooperation and positive actions in the safety area."

Respondent has raised one further issue bearing on appellant's safety practices: Whether they meet the requirement of paragraph (d)(i) of the Ground and Flight Risk Clause that they should be "in accordance with sound industrial practice." The record includes

several handbooks on safety prepared by national organizations interested in fire protection. Respondent has, however, failed to point to any specific provision of these documents which imposed higher standards than those adopted by appellant in its manual and referenced Air Force Documents or which appellant has rejected. Nor has it adduced evidence to show industrial safety practices adopted by other enterprises engaged in aircraft overhaul. Appellant, although asserting that its practices met the "sound industrial practice" standard, has also not adduced any evidence which would allow us to ascertain the correctness of its position. On the basis of the record we can only find that any allegation of failure to meet such standard remains unproven. Whatever indications of sound industrial practice the record contains certainly do not support it.

DECISION

I

Appellant argues in its reply brief that the exception of paragraph (d)(i) from the Government's assumption of risk under the Ground and Flight Risk Clause does not apply to the damage to aircraft No. 62-1831 because it was being worked upon in the open at the time of the fire and the damage resulted directly from the work being performed. The argument is without merit under paragraph (d) as written and unreasonable from the viewpoint of the policy consideration which paragraph (d)(i) expresses.

Of the six exceptions to the Government's assumption of the risk of aircraft damage, three apply in limited situations: flight ((d)(i)), transportation ((d)(iii)), work on the aircraft ((d)(vi)). The other exceptions do not state situational limitations. They apply, as more closely defined in the particular paragraphs, to damage covered by insurance ((d)(iv)), damage from wear and tear and deterioration ((d)(v)), and damage resulting from lack of an effective safety program due to willful misconduct or lack of good faith of paragraph (d) to indicate that they do not apply when, for instance, paragraph (d)(ii) or paragraph (d)(vi) applies. When the drafters of the Ground and Flight Risk Clause sought to limit the application of one of the exceptions, if others were also applicable, they so stated expressly, as in paragraph (d)(v). Since they did not state such limitation in paragraph (d)(i), it can only be inferred that no such limitation was intended.

Moreover, the limitation placed by appellant on the scope of paragraph (d)(i), far from implementing the Government's assumption of risk policy, is destructive thereof. It is clear from the clause as a whole, and indeed not argued otherwise, that the Government assumed the risk of aircraft damage resulting not only from accidents of unknown or undetermined origin but also from accidents resulting from appellant's negligence. It was, however, clearly anxious not to

encourage disregard of safety practices at the top managerial level or to assume the risk of damage flowing from the willful misconduct or lack of good faith in safety matters by managerial personnel, as defined in paragraph (d)(i). There is no policy reason why the fact that aircraft was being worked upon should free the contractor from liability for its management's willful misconduct or lack of good faith in safety matters and that appellant should be responsible therefor only if the aircraft was not being worked upon at the time of the damage. Nor is there, as we have already pointed out, language which compels such result. Hence, we reject appellant's contention that paragraph (d)(i) is inapplicable.

II

There is little question that the record before us would sustain, if it would not compel, a finding that the burning of aircraft No. 62-1831 was due to the negligence of appellant's employees at work on the aircraft on the day when the accident occurred. There is also sufficient evidence in the record to sustain a finding, if it were necessary or needful, that appellant's administration of its safety program at the working level was less consistent, careful and effective than was necessary to insure an operation free of major accidents or of the risk that such accidents might occur. To the extent that the lack of enforcement or observation of safety rules contributed to the effective cause of the burning of aircraft No. 62-1831, appellant's managerial personnel must bear a share of the responsibility for the accident. Its negligence in strictly enforcing safety rules and procedures cannot on the record made here be denied.

But even if such findings were made respondent would not be helped. For it must show that the criticized failure of appellant's managerial personnel in regard to maintenance and administration of a program for the protection and preservation of aircraft in the open, as aircraft No. 62-1831 was here, or during operation, in accordance with sound industrial practice, amounted to willful misconduct or lack of good faith: (ASPR 10-404(a), Cl., par. (d)(i)).

The authorities are unanimous in holding that proof of negligence does not establish willful misconduct or lack of good faith. See Acker v. Schultz, 74 F. Supp. 683 (S.D. N.Y., 1947); Berry Bros. Buick, Inc. v. General Motors Corp., 257 F. Supp. 542 (E.D. Pa., 1966). Mere indifference to duty also is not enough. Ibid. What amounts to willful misconduct or lack of good faith is to be "recreant" to one's duty (Tyler v. Grange Assurance Association, 3 Wash. App. 167, 473 P 2d 193), to refuse deliberately to perform a plain, well-understood contractual or statutory obligation without just cause or excuse (Brandoline v. Lindsay, 269 Cal. App. 2d 319; NLRB v. Knoxville Publishing Co., 124 F 2d 825 (6th Cir., 1942)). Willful misconduct has also been described as the conscious failure to

use the necessary means to avoid peril and indifference to its consequences. Holman v. Brady, 241 Ala. 487, 3 So. 2d 30; Ridge v. Boulder Creek etc. School District, 60 Cal. App. 2d 453, 140 P 2d 990; see also Meadows v. Vaughn, 81 Ga. App. 45, 57 SE 2d 689; Goepp v. American Overseas Airlines, 281 App. Div. 105, 117 NYS 2d 276. When faced with this problem the NASA Board has reached the same result. McDonnell-Douglas Corporation, No. 865-28, 68-1 BCA par. 7021. Under contracts involving a similar managerial responsibility clause our predecessor, the War Department Board of Contract Appeals, has adopted a comparable approach. Cf. Sweet Briar, Inc. BCA Nos. 986, 987 (1945).

We thus reach the final question: did the conduct of appellant's managerial personnel evince a refusal to perform its duty, a conscious failure to use appropriate means to avoid industrial accidents and indifference to their consequences so that its performance of its job can be characterized as permeated with misconduct in safety matters and with that suggestion of duplicity or dishonesty which the law calls bad faith. See Fenner v. American Insurance Co. of N.Y.. 97 SW 2d 741 (Tex. Civ. App.). We believe that on the record made here this question must clearly be answered in the negative.

Appellant's general manager and his deputy might be criticized for inadequate enforcement of their own or contractually-required safety programs at the working level. But at the higher management level they had instituted a program and a safety management which was clearly adequate compliance with appellant's obligations and they had, even if often at Air Force suggestion or prodding, greatly improved the safety of appellant's facility. Nothing in the record proves that they took their responsibility for aircraft safety lightly, that they were unmindful of it, or failed to give it substantial personal attention. Conflicting considerations of scheduling and performance may have at times counterbalanced their consideration of aircraft safety. But there is no evidence that they subordinated their responsibility for safety to other goals to such an extent that one could find willful misconduct or lack of good faith in regard to safety concerns. Certainly up to the date of the fire involving aircraft No. 62-1831 wash rack operation had been safe and free of accidents involving the use or misuse of P-D-680 or MEK. Hence we are compelled to adopt the same position that the War Department Board took in the Sweet Briar plant fire: willful misconduct or lack of good faith of top management are not proven. It follows that the contracting officer's contrary finding cannot be upheld.

III

Under paragraph (e) of the Ground and Flight Risk Clause the Government's assumption of risk of aircraft damage does not extend to the first $1,000 of damage, except where damage occurs to aircraft in "flight." This latter exception is, of course, inapplicable here. With regard to these first $1,000 appellant under paragraph (e)

"assumes the risk" and accepts responsibility therefor. But for the exceptions set forth in paragraph (e) and which are inapplicable here, appellant's liability is absolute. Since the Government after the damage to aircraft No. 62-1831 "in the open" did not elect to repair or replace it, appellant became obligated to credit the contract price with, or to pay to the Government, the sum of $1,000, as provided in paragraph (e).

IV

Accordingly, the appeal must be and hereby is allowed in all respects except for the sum of $1,000 due the Government. As to that sum the appeal is denied. In view of the disposition of the appeal appellant's motion to dismiss is moot and dismissed. The matter is remanded to the contracting officer for appropriate action in accordance with the Board's decision.

d. Risk of Loss - High Risk Clause

FRAASS SURGICAL MFG. CO., INC. v. THE UNITED STATES

Ct. Cl. No. 343-73(1978)

PER CURIUM: This case comes before the court on defendant's motion, filed November 10, 1977, under Rule 141(b), moving that the court adopt, as the basis for its judgment in this case, the recommended decision of Trial Judge David Schwartz, filed September 30, 1977, pursuant to Rule 134(h), plaintiff having failed to file a notice of intention to except or exceptions thereto and the time for so filing pursuant to the Rules of the court having expired. Upon consideration thereof, without oral argument, since the court agrees with the trial judge's recommended decision, as hereinafter set forth, it hereby grants defendant's motion and adopts the said decision as the basis for its judgment in this case. Therefore, it is concluded as a matter of law that plaintiff is not entitled to recover and the petition is dismissed.

OPINION OF TRIAL JUDGE

Schwartz, Trial Judge: This is an action for reformation of a contract in which plaintiff, a manufacturer of medical and surgical equipment, agreed to produce airmen's survival kits for the Air Force. Government furnished material (GFM) valued at $126,220 was present on the plaintiff's premises when the plant was destroyed by fire, without fault of the plaintiff. A clause in the contract imposed on the contractor strict liability for losses of GFM by fire. With a reservation of rights, plaintiff paid the Government $75,000 received as insurance proceeds, and the Government withheld the remaining $51,220 from payments due under the contract. Plaintiff sues for refund of the $126,220, praying that the court reform the contract to replace the strict liability clause with another clause under which the contractor would be liable for the fire loss only in case of fault or wrongdoing.

The case has previously been considered by the court on the Government's motion for summary judgment. Fraass Surgical Mfg. Co. v. United States, 205 Ct. Cl. 585, 505 F.2d 707 (1974). The court dismissed portions of the petition and remanded the case for trial of a disputed question of fact determinative of the time of accrual of the cause of action and thus of the defense of limitations; and if the action were not barred by limitations, for trial of the claim of mutual mistake said to warrant reformation. Plaintiff has since amended its petition to allege that the challenged clause is unconscionable and therefore unenforceable.

I The Statute of Limitations

Plaintiff instituted suit on September 21, 1973; the suit is therefore barred under the 6-year statute if the cause of action accrued before September 21, 1967. 28 U.S.C. § 2501 (1970). The standard for determination of the date of accrual was determined by the court in the earlier opinion. "The claim first accrues on a claim for nonpayment of money," the court held, "on the date when payment becomes due and is wrongfully withheld in breach of the contract." Fraass Surgical Mfg. Co. v. United States, supra, 205 Ct. Cl. at 591, 505 F. 2d at 710, quoting from Oceanic S.S. Co. v. United States, 165 Ct. Cl. 217, 225 (1964).

The fire which destroyed the property in question occurred on January 9, 1967. Following meetings with Government officers during January and February of that year, plaintiff resumed its performance of the contract in June. On August 24, the Government received plaintiff's invoice number 5854, apparently the first invoice since the fire. The Government claims that on September 15 it mailed an Advice of Payment form to plaintiff, notifying it that payment of $12,382.02, due on that invoice, was being withheld. The Government argues that receipt of this notice, which it is implied occurred before September 21, 1967, was the last event necessary to permit the plaintiff to bring suit as for a wrongful withholding. Accordingly, the court is asked to hold that the period of limitations began to run before September 21, 1967 and had expired when the suit was brought on September 21, 1973. The contention fails, for lack of notice to plaintiff of a firm withholding. The withholding pursuant to the Advice of Payment was tentative only. The Advice stated that the deduction was being made pursuant to a letter from the contracting officer of July 10, 1967, "authorizing tentative withholding." The evidence is that money withheld pursuant to such authority is placed in an escrow account pending a final determination of the amount to be withheld.

Receipt of the Advice, therefore, was not a notice of an accomplished offset as a withholding from contract payments which were due the plaintiff, such as would require it to bring suit. Plaintiff was entitled to regard the action taken as non-final--merely a temporary postponement of payment. A final statement by the Government of the amount of its loss was dated September 8 and was agreed to by plaintiff on September 21. On October 10, 1967, the plaintiff with a reservation of rights turned over to the Government its insurance company's check for $75,000, reducing the balance due the Government to $51,220.38. On October 19, 1967, the remaining amount of the Government's claim was set off against payments due to the plaintiff on invoices for goods delivered, and payment was made to plaintiff of the balance due on the invoices. No payment by plaintiff or offset against sums due to plaintiff is therefore shown to have taken place earlier than October 10, 1967. Thus limitations had not expired when suit was brought on September 21, 1973.

II Reformation

Reformation is sought to rectify the alleged mistaken inclusion in the contract of clause 60.1-3a(g), allotting to the contractor the risk of loss by fire of Government furnished material. Plaintiff urges that the parties intended to include a different clause, under which plaintiff would be liable only for loss by reason of fault or wrongdoing by its officers. Were the contract so reformed, plaintiff would prevail, for the fire took place wholly without its fault.

This court will normally grant reformation when there has been a mutual mistake of fact which causes the terms of a written contract to depart from the actual intention of the parties. Fraass Surgical Mfg. Co. v. United States, supra, 205 Ct. Cl. at 596, 505 F.2d at 713; Space Corp. v United States, 200 Ct. Cl. 1, 8-9, 470 F.2d 536, 540 (1972); Bromion Inc. v. United States, 188 Ct. Cl. 31, 35, 411 F.2d 1020, 1022 (1969). The plaintiff in such a case must show, of course, that the Government would have agreed to the contract if worded in accordance with the plaintiff's intention. Ling-Temco-Vought, Inc. v. United States, 201 Ct. Cl. 135, 150-51, 475 F.2d 630, 639 (1973); McNamara Constr. Ltd. v. United States, 206 Ct. Cl. 1, 9-10, 509 F.2d 1166, 1170 (1975). A claim may also be stated by allegations of the occurrence of a mistake of which the Government knew or should have known and that the Government should be required to share in the loss as a matter of equity. Burnett Electronics Lab., Inc. v. United States, 202 Ct. Cl. 463, 472, 479 F.2d 1329, 1333 (1973)(collecting the cases); Ruggiero v. United States, 190 Ct. Cl. 327, 339-40, 420 F.2d 709, 715-16 (1970).

Here a different kind of mistake by each of the parties is alleged. The Government, presumed to have intended to include in the contract the clause which the regulations bound it to use (Chris Berg, Inc. v. United States, 192 Ct. Cl. 176, 426 F.2d 314 (1970)), is said to have chosen wrongly between the two clauses--strict-liability and liability-for-fault-only--specified in the Armed Services Procurement Regulation for two different types of contracts. Plaintiff's mistake, of a very different sort, is alleged to have occurred when plaintiff's president, relying on his recollection of past contracts with the Government, did not read the contract before he signed it, and thus did not notice that the wrong risk-of-loss clause had been included. Failure to read a contract before signing it does not necessarily foreclose reformation, since the gravamen of the reformation inquiry is whether the document reflects the agreement actually reached by the parties. Chicago & N.W. Ry. Co. v. United States, 68 Ct. Cl. 524, 538 (1929). On the other hand, a contractor who does not read the contract furnished him by the Government must still show a mistake by the Government before he can obtain reformation, since otherwise the mistake is not mutual. See, for example, National Electronic Lab. Inc. v. United States, 148 Ct. Cl. 308, 180 F.Supp. 337 (1960); Schoeffel v. United States, 193 Ct. Cl. 923 (1971); Dale Ingram, Inc. v. United States, 201 Ct. Cl. 56, 475 F.2d 1177 (1973).

Both clauses involved in the claim for reformation--the clause present in the contract and the clause plaintiff says should have been there--have their source in the version of ASPR § 13-702 in force at the time the contract was made. 32 C.F.R. § 13-702 (1966).

Subdivision (a) of ASPR § 13-702 directed the inclusion in fixed-price contracts of the clause actually in the instant contract, 60.1-3a(g), with an exception stated in subdivision (b). Subdivision (b) provided that the less strict clause--making the contractor liable only for fault--should be included in "fixed price contracts under which the contractor is required to submit [the] certified cost or pricing data" provided for in ASPR § 3-807.3, ASPR § 13-702, 32 C.F.R. § 13-702 (1966). In turn ASPR § 3-807.3, essentially a restatement of the Truth-in-Negotiations Act, 10 U.S.C. § 2306(f) (1970), provided that cost and pricing data should not be required where a negotiated contract is based on adequate price competition. 32 C.F.R. § 3-807.3 (1966).

The contract with the plaintiff was a fixed-price contract, presumptively subject to the direction of subdivision (a) of ASPR § 13-702 for the use of the clause actually used. Plaintiff's case is that the exception in subdivision (b) was nevertheless applicable because the contract was negotiated on inadequate price competition. Cost and pricing data, plaintiff contends, were therefore required to be furnished and were furnished by the plaintiff in the course of a pre-award survey. According to the Government, its officers intended to use the strict clause and were justified in doing so on the basis of a discretionary and correct judgment that there was adequate price competition such as exempted the contractor from the furnishing of cost and pricing data and thus from the application of subdivision (b) of ASPR § 13-702. Moreover, the Government denies that a pre-award survey was ordered or conducted and denies that plaintiff submitted certified cost and pricing data.

All these issues are determined against the plaintiff. The conclusion that the Government used the right clause and made no mistake makes it unnecessary to evaluate the cause of action, to pass on plaintiff's claim of its own mistake, or to discuss such questions as the effect of the Government's non-compliance with any of the regulations involved.

On the first issue--that of adequate price competition--it appears that the item involved had been the subject of two prior procurements. The bidders list for the item showed 15 firms. On the distribution of the Request For Proposals to these firms, six responded with bids. The range of bids per unit was $11.97 (the plaintiff's bid), $12.20, $19.25, $23.89, $25 and $39.50. Two of the bidders, plaintiff and the firm which bid $23.89, were the former suppliers. On these facts, the assistant contracting officer and contracting officer determined that there was price competition sufficiently adequate to treat the procurement as exempt from the need to furnish certified cost and pricing data.

"Adequate price competition," is in ASPR § 3-807 defined as present if responsible bidders submit two or more responsive bids which can satisfy the Government's needs. The decision is expressly described as a matter of judgment for the contracting officer. The contracting officer's decision on this point must be regarded as within his discretion, not to be overturned unless it is shown to be arbitrary, capricious, or an abuse of discretion. Sperry Flight Systems, Inc. v. United States, 212 Ct. Cl. 329, 339-348, 548 F.2d 915, 921 (1977). Plaintiff does not seriously challenge the decision of the contracting officer. No evidence is shown of a lack of price competition; the range of bid prices is of course not such evidence. On the other hand, the number and the range of bids and the presence of bids by two former suppliers are more than ample support for the discretionary conclusion of the officers in charge that there was adequate price competition, thus no occasion to demand certified cost or pricing data and thus no reason to use the less strict risk-of-loss clause.

Plaintiff's additional, supporting claims are likewise rejected, on the facts. Plaintiff's president testified at trial that a pre-award survey had been conducted and in a pretrial deposition that he could not remember whether there had been a pre-award survey. His testimony that he gave a rough and sketchy cost data sheet to two Government officers in the course of a pre-award survey is outweighed by the direct testimony of the contracting officer and his assistant that they did not request such data and that no pre-award survey was conducted in connection with this contract. The data allegedly furnished by plaintiff was obviously not the detailed and certified cost or pricing data contemplated by the regulation. Too, the regulation provides that the certified data shall be solicited by the contracting officer. ASPR § 3-807.3. It is found as a fact that no pre-award survey was conducted, and that certified cost or pricing data was not solicited and not furnished.

All of the arguments for the applicability of subdivision (b) of ASPR § 13-702 fail, and it therefore appears that the clause in the contract on the subject of liability for GFM was the correct clause. There was no mistake by the Government and thus no mutual mistake and no case for reformation.

III Unconscionability

Plaintiff's final contention is that the strict risk of loss clause is unenforceable because it is unconscionable. According to an early definition, an unconscionable contract clause is one "which no man in his senses, not under a delusion, would make, on the one hand, and which no fair and honest man would accept on the other." Hume v. United States, 21 Ct. Cl. 328, 330 (1886), aff'd 132 U.S. 406 (1889). The grant of discretion to deny enforcement to an unconscionable clause in the modern Uniform Commercial Code's Section 2-302 is not

intended to permit courts to redistribute risks allocated by differences in bargaining power, but rather to prevent oppression and unfair surprise. U.C.C. § 2-302, Official Comment 1.

There was here no surprise. Clause 3a(g) is there to be read, in print of the same size as the rest of the contract. Its language is quite clear, as contract clauses go--much clearer, for instance, than that of the less-than-strict liability clause plaintiff argues for. The testimony of plaintiff's president that he did not read the contract in 1966, because contracts that he had signed in 1963 and 1960 had contained the other clause, is irrelevant and unacceptable. He is an experienced businessman and should know better. Richardson Camera Co. v. United States, 199 Ct. Cl. 657, 467 F.2d 491 (1972).

Nor was the clause oppressive. It required only that plaintiff insure the goods. Plaintiff's failure to insure the goods for their full value--actually he reduced his insurance shortly before the fire --was no fault of the Government. Plaintiff says that the Government delayed shipping GFM and then shipped a very large amount, unfortunately in the plant at the time of the fire. It is not said why this was a legal wrong. Finally, a contention of unconstitutional discrimination against small contractors is frivolous. Contractors large and small can take out insurance when the premiums are defrayed by the Government's contract payments.

None of the attacks on the risk of loss clause are meritorious and the petition must be dismissed.

CONCLUSION OF LAW

Upon the foregoing opinion, the findings of fact and intermediate conclusions of fact and law, which the court adopts and which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and the petition is dismissed.

SECTION 2. Price Reduction for Defective Pricing Data

a. Set-off - Vendor Quotes as Pricing Data

CUTLER-HAMMER, INC. v. THE UNITED STATES

189 Ct. Cl. 76 (1969) 416 F. 2d 1306

DURFEE, Judge, delivered the opinion of the court:

Plaintiff contracted with the United States Air Force to design, develop and manufacture an electronic reconnaissance system to be carried in aircraft. The contract was a Fixed-Price-Incentive-Fee (FPIF) type, with a negotiated target cost of $22,389,523.00. A 10% target fee was added, making the target price $24,628,475.00. Cost savings below the target cost or expenditures about it were to be shared by the Air Force and plaintiff on an 80%-20% basis.

General provision 52 of the contract is entitled "Price Reduction For Defective Cost or Pricing Data," and reads as follows:

> (a) If the Contracting Officer determines that any price, including profit or fee, negotiated in connection with this contract was increased by any significant sums because the Contractor, or any subcontractor in connection with a subcontract covered by (c) below, furnished incomplete or inaccurate cost or pricing data or data not current as certified in the Contractor's Certificate of Current Cost or Pricing Data, then such price shall be reduced accordingly and the contract shall be modified in writing to reflect such adjustment.

Because the time allowed for submitting price proposals was short, and because a large number of personnel familiar with the system contracted for could not be spared without impairing progress on the whole program, plaintiff assembled a group of qualified people from various sections of its facility to formulate the proposal.

There are a number of different methods of formulating proposals. One is the "family tree" method, which is a block diagram depicting the approximately 140-line replaceable units (LRUs) which make up a single system. Each block indicates the type of LRU involved and the number per system. Below each block the various kinds of sub-assemblies are set out, as well as the number of each subassembly in

the entire system. The final bill of materials is arrived at by multiplying the type and quantity of each subassembly per system by the number of systems.

The "family tree" method is standard in the industry, but it has several variations. In one variation, the quantities of subassemblies indicate the number per LRU instead of the number per system. Thus, when this method is employed, the number in the subassembly block must first be multiplied by the number of LRUs in the system, and then by the number of systems.

Since some of the members of the group were accustomed to the latter method, they incorrectly multiplied the subassembly number, which represented the number per system, by the number of LRUs, before again multiplying the product by the number of systems. The number of subassemblies was thereby overstated by about 50%. These duplications led to an overstatement in price, for which the Government is seeking a reduction.

Plaintiff alleges, however, that even if it overstated this particular cost, it is entitled to offset this amount with understatements of the cost of purchased parts and components which resulted from other calculating errors. Thus, one legal issue which faces this court is whether the provision governing defective pricing allows such a set-off.

In addition to the Government's first claim, it is seeking to further reduce the target price by invoking the current cost and pricing data portion of the Defective Pricing Clause as to the antenna equipment. Each of the nine systems contracted for utilized two each of six different types of antenna. Plaintiff chose to use the Luneberg lens, whose availability was restricted in terms of sources of supply. Prior to the contract at issue, the only company that had produced the lens for the applicable purpose was Aero-Geo-Astro (AGA). On December 10, 1963, plaintiff issued a Request for Quotations from five different companies. Only AGA submitted a proposal, in the amount of $406,455.00, and this sum was included in plaintiff's price proposal submitted on January 13, 1964.

During January 1964, Transco Products Co. learned about plaintiff's Request for Quotations, and asked for one. On February 10, 1964, plaintiff received a price proposal from Transco in the amount of $91,260.00 and on February 24 it received Transco's technical proposal.

From January 13 to February 13, 1964, the Government was conducting its audit and price analysis of plaintiff's proposal. From February 13 to February 19, 1964, the parties negotiated a reduction in plaintiff's original proposal in the amount of $1,858,805.00. The respective prices of all major vendors were discussed, including those

of AGA, but no mention was made by plaintiff of Transco's lower proposal. Plaintiff contends that Transco's proposal was so low that it could not have been considered a valid proposal, and mention of it would just have confused negotiations. The Government, however, asserts that had Transco's proposal been mentioned, execution of the contract would have been delayed until Transco's competency could be ascertained, or in the alternative, the Luneberg lens costs would have been excluded from the contract negotiations and discussed separately.

Plaintiff is presently seeking Wunderlich Act review (41 U.S.C. §§ 321, 322) of the decision of the Armed Services Board of Contract Appeals (hereinafter referred to as the Board or the ASBCA) in Cutler-Hammer, Inc., ASBCA No. 10900, 67-2 BCA ¶ 6432, p. 29,822 (decided June 28, 1967). The Board held that the Government was entitled to reduce the price of the contract under the "Price Reduction For Defective Cost or Pricing Data" clause. This case was remanded to the contracting officer so that the parties could negotiate the reduction in price. Instead of entering into the negotiations, plaintiff commenced the instant suit. Both sides are moving for summary judgment.

I--Duplication Issue

The basic question presented in this aspect of the case is whether the Defective Pricing Clause requires consideration only of errors which overstate the price, or whether it allows consideration of errors which understate the price. In other words, even if there are duplications which raise the price, can the omissions which lowered the price be set off against the overstatements? The Board held that only overstated costs could be considered, stating:

> * * * Although reasonable men may certainly differ on this interpretation, it is our conclusion that the Defective Pricing Statute (PL 87-653, 10 Sept. 1962; 76 Stat. 528) was intended solely as a vehicle for recoupment by the Government of overpricing resulting from any of the causes enumerated therein. * * * Id. at p. 29,826.

The statute providing for reduction in contract price where there has been defective pricing is found at 10 U.S.C. § 2306(f) (Supp. IV, 1965-1968). It states in pertinent part:

* * * * *

> Any prime contract or change or modification thereto under which such certificate is required shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by

which it may be determined by the head of the agency that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which, as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the negotiated price as is practicable), was inaccurate, incomplete or noncurrent: * * *.

The bill which was enacted into P.L. 87-653, 10 U.S.C. § 2306(f) was H.R. 5532, and it aimed at "truth in negotiating." In an incentive type contract, costs of production are estimated and a normal profit (a percentage of costs) is added on to arrive at the target price. When "actual" costs prove to be less than "estimated" costs, the contractor receives not only the "estimated normal profit," but an "incentive profit" as well, which is determined by the cost-sharing formula contracted for (usually 20% of "estimated" costs minus "actual" costs). It was found that in almost all cases, actual costs proved to be less than estimated costs, and it was assumed by Congress that this resulted from inflated cost estimates. The statute was therefore aimed at reducing the contract price when it was found that cost items had been overstated, so that a contractor would share in savings only when these savings resulted from actual efficiencies.

It is clear that when only overstatements are included in estimates, the Government has the right to reduce the contract price. In such a situation, a downward revision of the price is mandated. Whether offsets in favor of the contractor are to be allowed presents a more difficult question, the answer to which is not so readily apparent. The legislative history of the act does indicate that efforts were made to have the language of P.L. 87-653 cover situations where errors in favor of the Government would cancel out errors in favor of contractors, but these efforts were to no avail.

* * * * *

As has already been explained, in an FPIF contract, if a contractor's actual costs are less than estimated costs, then both the contractor and the Government share in the savings. This shared saving constitutes "additional profit" for the contractor. Thus, to the extent that an inflated estimated cost is due to overstatements, the contractor should not derive any gain from artificial savings. There is no clear statement in the legislative history, however, which mandates that there be a downward revision in price in excess of overstatements which are not washed out in the final price by understatements. When Senator Symington stated that "what we are talking about has to do with negotiations downward, not negotiations upward", Id. at 102, he may merely have been saying that it was not the intent of Congress to allow understatements greater than overstatements to both cancel out the latter and increase the contract price at the same time.

Plaintiff contends that the literal language of the statute allows set-offs; defendant argues that the language of the statute and the legislative history dictate against allowing understatements to be set off against overstatements. In our view, neither the statute nor the legislative history is clear-cut. In the absence of concise guidelines, we must resort to finding the legislative intent.

* * * * *

Public Law 87-653 was intended to apply to situations where the data supplied was incomplete, inaccurate, or non-current. It was aimed at cases where costs were known, but information about them was withheld. The statute (and the contract clause which is utilized pursuant to the statute) speaks in terms of "Defective Pricing". If a cost is known when the contract price is being negotiated, it must be furnished accurately, completely, and on a current-price basis. If the contractor purchases components from a subcontractor, these costs are also subject to the Defective Pricing Clause.

Congress realized the potential value of incentive contracts, but, in the words of Congressman Vinson, the provision was intended to "* * * put the incentive profit where it belongs; that is, on demonstrated performance of the work and not by deception in negotiations." It would behoove the contractor to be as efficient as possible in order to reduce his production expenses--he may thus try to change his assembly-line set-up so as to speed up production and thereby cut down on overhead. In this fashion, he would lower costs, and share in this profit through "demonstrated performance of the work."

A much different situation obtains where inaccurate cost data for components is supplied, however. When a cost for a component is furnished, and in fact, the component costs less, then the saving was merely due to the inaccurate data, and not to any efforts on the part of the contractor to save money. Were it not for P.L. 87-653, there would be no incentive to pare down costs, but rather to inflate cost estimates.

With the foregoing in mind, there would seem to be no reason not to allow offsets. An overstatement would clearly have the effect of creating "unearned" savings. An understatement would cut down on these savings. When offset against each other, at least to the extent of the overstatements, the only savings that can be produced are those brought about through "demonstrated performance of the work."

It is argued that since the statute talks in terms of "reducing" the contract price, and the contract clause speaks in terms of "excluding" defective prices, there can only be a downward revision of price. With this we agree, but we interpret those words to mean that where overstatements exceed understatements, the excess reduces the price; conversely, where understatements exceed overstatements, the

price is not raised. To this extent, at least, the Defective Pricing statute does act as a "spur" to the contractor to make sure his estimates are complete, accurate and current, and does provide for a "one-way street."

We are mindful of the fact that Congressman Hebert introduced a bill in the 88th Congress which would have explicitly allowed offsets. Had this bill been voted on and defeated, it would be a clear indication that Congress did not intend to allow such offset. However, the bill was never brought to a vote, and it is quite difficult to derive any Congressional intent from a lack of action, especially when the reasons for not voting on a proposed bill are multitudinous. As the standard work on statutory construction states:

> * * * Generally the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment. However, such rejection may occur because the bill in substance already includes those provisions. [Emphasis supplied.] 2 Sutherland, Statutory Construction, § 5015, p. 506. (Horack 3rd ed. 1943.)

Here, of course, there was never even any rejection of the Hebert bill, but merely inaction on it.

Finally, defendant argues that allowing offsets would permit "buying-in" on Government contracts. This practice is defined as follows:

> * * * attempting to obtain a contract award by knowingly offering a price or cost estimate less than anticipated costs with the expectation of either (1) increasing the contract price or estimated cost during the period of performance through change orders or other means, or (2) receiving future "follow-on" contracts at prices high enough to recover any losses on the original "buy-in" contract. * * * 32 CFR § 1.311 (January 1969 rev.) ASPR 1-311.

It is clear from the foregoing definition why a prohibition against an upward adjustment of contract price would work against "buying in". If a contractor could knowingly understate certain costs in order to lower his price and obtain the contract, and thereafter show the true costs of the items and get an upward adjustment, this would work an injustice against the Government and the other bidders. In our case, however, there were both overstatements and understatements, and to the extent that the dollar amount of overstatements matched the dollar amount of understatements, the contract price was

not reduced to effect "buying-in". Since, in our opinion, offsets should be allowed to the extent of overstatements only, and no more, the contractor cannot lower his costs and thereafter attempt to recoup any of his understatements in excess of overstatements. By virtue of this limitation, there is nothing to be gained by a contractor underestimating his costs, since he can never get an upward revision in price later on.

As far as "buying-in" at a loss in order to get a profitable follow-up contract later on, this evil would be present whether there were underestimates only, or whether there were both underestimates and overestimates. In fact, if a contractor overestimates as well as underestimates, he hinders any possible efforts he may be making to "buy-in".

There is some controversy between the parties regarding the amount of the understatement. The Board found the overstatement to be $504,483.00, and that the net overstatement was $18,155.00. Plaintiff contends that a correct calculation of the duplications and omissions would yield a net understatement of $13,824.00. Defendant agrees that the Board's determination of a net overstatement is incorrect, but argues that the net understatement was only $8,396.00. In light of our determination that overstatements are offset by understatements only to the extent of the overstatements, we need not concern ourselves with the net amount of understatements. Since understatements exceed overstatements (by admission of both parties) there is no reason to revise the estimated cost of the contract downward; moreover, since there can never be an upward revision of cost (and certainly not under the facts of this case) the estimated cost and target cost of the contract remain unchanged.

II--Luneberg Lens

The Board held as to this claim that the Government was entitled to reduce the contract price because of the failure of Cutler-Hammer, Inc. to disclose Transco's lower bid on the antenna. In reviewing this holding, we are faced with two questions: (1) Was Transco's bid "cost and pricing data" within the meaning of the statute and the contract clause implementing it? (2) Would the disclosure of the Transco bid have affected the negotiations between the parties? The answers to both these questions are in the affirmative, and we therefore uphold this part of the Board's determination.

The statute requires the furnishing of a certificate by the contractor, in which he attests to the fact that (1) complete cost and pricing data, current as of the date of the original proposal, have been submitted; (2) all significant changes in the above data which have occurred since the aforementioned date through the date of

agreement on the negotiated price or fee have been similarly submitted, and no more recent significant change in such data was known to the contractor at the time of executing the certificate; and (3) all the data submitted are correct.

In our case, AGA's quote did not change from January 13, 1964 (the date plaintiff submitted its proposal), to February 19, 1964, when the contract price was agreed upon; indeed, it did not change even after the execution of the certificate on February 26, 1964. However, lurking in the background was Transco's quotation.

It is true, as plaintiff submits, that Transco's quotation was much lower than AGA's. Therefore, plaintiff argues, the proposal could not be taken seriously, and hence it was not "cost and pricing data." This argument, although somewhat persuasive standing alone, is unpersuasive when viewed in the light of what was transpiring between the parties.

Plaintiff did not receive Transco's price proposal until February 10, 1964. Although an audit and price analysis was at that very time being conducted by the Government of plaintiff's proposal, which included AGA's quotation, plaintiff was nonetheless interested enough in Transco as a possible subcontractor to ask Transco on the very next day for a technical proposal. This technical proposal was received on February 24, 1964, two days before the certificate was furnished.

When a contractor issues a Request for Quotations, he is not required to divulge to the Government every proposal he receives. All the Government desires to know is the cost of each component which will be included in the final product. These costs together make up the estimated cost, and actual costs are thereafter matched against the estimated costs in order to arrive at any savings or losses.

If the AGA proposal included in plaintiff's proposal had been inflated, there is no doubt that the Government would be entitled to a downward revision of price. Similarly, if AGA had learned, after January 13, but before negotiations were completed and the certificate filed, that it could possibly produce the antenna by a new and cheaper method, and had informed Cutler-Hammer of this fact, it would appear that this would be "current cost and pricing data" which plaintiff would have been required to divulge.

From the facts in this case, Transco was not just another bidder on a component, whose bid had been considered by plaintiff and disregarded. Plaintiff was interested enough in Transco's bid, even at a late date, to follow it up with a request for a technical proposal. Since Cutler-Hammer saw Transco as a possible supplier, it should have informed the Government that a lower price on the antenna may have been obtainable.

Although no firm agreement had been reached with Transco until after the certificate was filed, the fact that its proposal was being considered during this time indicates that the cost and pricing data submitted by plaintiff were less than complete or current. To allow a contractor to submit data, arrive at a negotiated price, file a certificate, and then use a lower component cost, when that lower cost was a definite possibility during the negotiating stage, but was not then disclosed, would defeat the purpose of the statute and the contract clause.

Our decision as to this facet of the case should not be construed as indicating that Cutler-Hammer had planned to include the higher AGA quotation in its proposal only until the certificate was filed, and then intended to use Transco because of the latter's lower bid. All we are saying is that when a contractor goes beyond merely receiving a quotation, and considers using a lower bidder, that possibility should be reported to the Government. Otherwise, the "cost and pricing data" are not current or complete.

A review of the contractual arrangements in an FPIF contract indicates the necessity for such circumspect action by a contractor. In an FPIF contract, the contractor is reimbursed for his costs, and gets a profit or fee based on those costs. Moreover, savings based on the same costs are shared by the Government and the contractor. Thus, all fees and profits are directly related in some fashion to costs; any inaccuracy in the latter will affect the former. If a quotation which is incomplete or noncurrent is included in a proposal, and this cost is higher than the complete or current cost, the fee is increased, and the possibility for "unearned savings" arises. And, as has already been indicated, P.L. 87-653 was directly aimed at wiping out these "unearned savings."

There may, of course, be situations where only one cost is considered by the contractor, and after negotiations are completed and the certificate is filed, a lower cost is obtainable. The language of the statute and the contract clause seems to say that no downward revision is mandated, since costs were accurate, complete and current as of the filing of the certificate. Such a situation is not the one facing us here, however; Transco's lower cost was well within the contemplation of the contractor. In our view, P.L. 87-653 could lose much of its effectiveness if contractors could argue that they did not disclose a quotation because they did not consider it "cost or pricing data", although they later took advantage of it to the detriment of the Government.

Plaintiff attempts to escape from the fact that it was actively considering Transco's quotation by defining "cost and pricing data" as data upon which a reasonable business man would rely in negotiating a contract. This definition begs the question; "cost and pricing data" is made up of costs which may or will make up part of the total cost of a contract, and which should therefore be divulged in negotiating a contract.

The fact that Transco's quotation was "cost and pricing data" does not mean that it was so only because of hindsight, as plaintiff argues. We are not deciding whether a lower cost unbeknownst to the contractor when he files the certificate would lead to a downward revision in price if it is used instead. Here, the scenario, as it developed, demonstrated that Transco's quotation was being considered by Cutler-Hammer--it should therefore have been divulged to the Government for the latter's consideration.

Our interpretation of what constitutes "cost and pricing data" is reinforced by an ASPR definition which was not in effect at the time of this contract. Both sides contend that this definition supports their arguments; we read it as buttressing the Government's case. The regulation reads in pertinent part:

> "Cost or pricing data" as used in this subpart refers to that portion of the contractor's submission which is factual. The requirement for "cost or pricing data" subject to certification is satisfied when all facts reasonably available to the contractor up to the time of agreement on price and which might reasonably be expected to affect the price negotiations are accurately disclosed to the contracting officer or his representative. * * * In short, cost or pricing data consist of all facts which can reasonably be expected to contribute to sound estimates of future costs as well as to the validity of costs already incurred. * * * [Emphasis supplied.] 32 CFR 3.807-3(e) (1969 rev.), ASPR 3-807.3(e).

The facts as to Transco's quotation were available to the contractor. Moreover, as the Board found, and as we affirm, this quotation "would reasonably be expected to affect price negotiations."

Since the finding of the Board as to the effect of Transco's quotation on price negotiations is not arbitrary, capricious, and is supported by substantial evidence, it too is entitled to finality. The difference between the AGA quotation and the Transco quotation was not a de minimis amount; rather, it was substantial. Furthermore, the Government negotiator, Mr. Herron, testified that had he known of the Transco quote, he could have recommended two possible courses of action: (1) delaying final negotiations pending an investigation of the technical and price impact of the Transco quote, or (2) deleting the proposed cost for Luneberg lenses and negotiating the Luneberg lens contract at a later date.

These were possible courses of action, and based upon the obvious need for work to proceed rapidly on the project (as evidenced by plaintiff having to prepare a proposal within a short period of time)

it was reasonable for the board, based on Mr. Herron's testimony, to conclude that the Luneberg lens negotiations would have been conducted separately.

Plaintiff makes much of the language used by Mr. Herron, that he said "could have" instead of "would have" suggested the two alternatives, and that therefore there is no guarantee that the Government would have done either. Such subtle nuances of language when used under fire of questioning is too slim a reed upon which to support an argument, and we therefore reject it.

Finally, plaintiff argues that Mr. Herron later commented, in response to a hypothetical question posed by a Board member, that he would have chosen alternative (1), whereas the Board found that the Government would have pursued alternative (2). From this, plaintiff concludes that the Board had no evidence upon which to base its finding. We disagree, not only because Mr. Herron's testimony as to what he would have done is irrelevant, since he was not the Contracting Officer at the time the decision had to be made, but also because plaintiff's own attorney attacked Mr. Herron's ability to answer this question in the abstract, without "hindsight", while he is now seeking to use the very same statement to support his argument. The Board, however, was not using hindsight, but only decided what the Government, with the pressures which existed at that time, might reasonably have done.

Having decided that the Luneberg lens part of the contract would have been deleted for separate negotiations, the Board deducted the AGA quotation from the contract price. The Transco quotation would then be added to arrive at a new contract price. However, the Board felt that due to Transco's unreliability, a contingency factor could have been added to the quotation by Cutler-Hammer, and remanded the issue to the Contracting Officer so that the parties could negotiate the Luneberg lens cost. Plaintiff appealed the Board decision before negotiations could take place, however.

Defendant now argues that the Board had no evidence upon which to conclude that Cutler-Hammer would be entitled to add a contingency factor. We find this bare assertion unpersuasive in light of the Board's statement that plaintiff had to supply substantial and unusual technical assistance to Transco in helping the latter in developing the Luneberg lens, and the fact that prior to this contract only AGA had produced the lens for the applicable purpose.

III--CONCLUSION

In accordance with our opinion, the contract price in this case is not to be reduced, since overstatements do not exceed understatements, and are offset to the extent of the understatements. Moreover,

proceedings on the amount to be added to the target cost for the Transco quotation are suspended, pending negotiations between the Contracting Officer and the contractor.

For the foregoing reasons, plaintiff's motion for summary judgment on the "Duplication" issue is granted, thereby reversing the Board, and plaintiff's motion for summary judgment on the "Luneberg lens" issue is denied, thereby affirming the Board, Defendant's cross-motion for summary judgment is therefore denied as to the "Duplication" issue, and granted as to the "Luneberg lens" issue. Judgment is therefore entered for plaintiff on the "Duplication" issue, with proceedings suspended pursuant to Rule 167 for a period of 90 days. The petition is dismissed as to the "Luneberg lens" issue.

b. Vendor Quotes - Causation - Burden of Proof

CHU ASSOCIATES, INC.

ASBCA No. 15004. February 6, 1973

Findings of Fact

The Contract. Appellant submitted its initial proposal on 18 January 1966 in response to the Government's solicitation of 5 January 1966 concerning the manufacture of 38 antenna, AS-1356 ()/URC. The price quoted by appellant for this procurement was $389,525, which was supported by a statement of cost elements on DD Form 633 and a certificate in prescribed form that the cost or pricing data were accurate, complete and current as of 18 January 1966, the date of the proposal.

Following submission of appellant's proposal, a three-month period of negotiations ensued, during which time the Government made a thorough analysis of appellant's proposal, as described in more detail below. The resulting contract had an effective date of 4 May 1966, which marked the completion of the contract negotiations. For reasons not explained in the record, the contract was not signed until 8 July 1966. As finally executed, the contract had a contract price of $371,525.

The clause under which the Government makes its claim in this appeal is General Provision 49 of the contract, entitled "PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (Sep. 1964)." The first two paragraphs of this provision read as follows:

> (a) If the Contracting Officer determines that any price, including profit or fee, negotiated in connection with this contract was increased by any significant sums because the Contractor, or any subcontractor in connection with a subcontract covered by (c) below, furnished incomplete or inaccurate cost or pricing data or data not current as certified in the Contractor's Certificate of Current Cost or Pricing Data, then such price shall be reduced accordingly and the contract shall be modified in writing to reflect such adjustment.
>
> (b) Failure to agree on a reduction shall be a dispute concerning a question of fact within the meaning of the 'Disputes' clause of this contract."

At the completion of the price negotiations, appellant submitted a second Certificate of Current Cost or Pricing Data which was dated 5 May 1966. This certificate reads as follows:

> This is to certify that, to the best of my knowlege and belief, cost or pricing data submitted to the Contracting Officer or his representative in support of RFP ES-5-ESN-50587 are accurate, complete and current as of the date of execution of this certificate.

This certificate, which is quoted in full, was typed on a paper bearing the letterhead of appellant, and was signed by its vice-president. There are no footnotes or other explanatory matter on the certificate.

Description of the AS-1356 Antenna. The antenna procured under this contract is identical in form, fit and function to the "Green Pine System" antenna made by appellant under subcontract with Western Electric Company in 1963. The antenna is approximately 28 feet tall and is mounted in a 25 foot fiber glass cylinder which is about 14 inches in diameter. The antenna was designed to be placed unattended and unguyed on a tower approximately 65 feet high, in an upper arctic environment. In this environment, the unguyed antenna had to withstand winds up to 135 mph when coated with four inches of ice, with less than 1½ degrees deflection at the top.

In order to meet the design requirements for the antenna, appellant mounted it inside a fiber glass enclosure which became its main structural element. In view of the need for a high degree of rigidity and strength in the antenna enclosure, far in excess of that normally required in fiber glass radomes, appellant specified that the 28 foot cylinder mast in which the antenna was enclosed be filament-wound. As explained by appellant's vice-president, filament winding is done by machines which wind filaments of glass through resin in random directions to give added strength, instead of laying up glass cloth in resin, which would suffice for usual radome applications. (Ibid.)

In 1963, when appellant entered into its subcontract with Western Electric for the Green Pine antenna, very few concerns did filament winding. Appellant selected Columbia Products as having the best reputation for radome enclosures. Tests of the antenna in the arctic simulation chambers at the Rome Air Development Center indicated the critical nature of the cylindrical mast in which the antenna was enclosed and the need for obtaining a tight fit of all parts within the enclosure so as to avoid resonant vibration. The Green Pine antennas were delivered to Western Electric and duly installed in the upper arctic region, where they performed well. In elaborating on the need for reliability of the cylinder mast and interior spacers which

were used in installing the antenna therein, appellant's vice-president described the time consuming, trial and error method of hand work that was required. Its efforts were so successful that in 9 years of operation, the Green Pine antennas performed in the arctic without failure.

In the absence of evidence to the contrary, we find that the 28 foot fiber glass cylinder mast was a critical item of manufacture, and that the correct fit and functioning of all parts of the radome assembly were essential to the reliable performance of the antennas.

Events Leading to the Award of the Contract. We have observed that the initial proposal submitted by appellant was dated 18 January 1966. From that time until 4 May 1966, the effective date of the contract, the Government conducted a vigorous examination of appellant's proposal. Beginning in late January and continuing into February 1966, a Government audit was performed which was the subject of an audit report dated 2 March 1966. In performing this audit, the auditor obtained a document from appellant which indicated to him that appellant intended to buy raw materials for the radome base, top flange and top cover, and to manufacture them in-house. The auditor also testified that he was not told at that time of an overload in appellant's plastic shop nor of appellant's plans to subcontract the base, top flange and top cover of the radome.

At about the same time, the Government sent an industrial specialist to appellant's plant to analyze the hours appellant had incurred in manufacturing the Green Pine antennas in order to determine the reasonableness of the hours and costs proposed for the contract here. The analysis is contained in a report dated 7 February 1966. The reason given for testing the reasonableness of the proposal by comparing it with the Green Pine historical data was that appellant had announced its intention to follow the same method of manufacture for this contract as it had employed in the Green Pine subcontract, in view of the good results that had been obtained there and the short delivery time specified in the contract here.

The third visit to appellant's plant by a representative of the Government occurred in early March 1966, when a price analyst investigated costs questioned by the auditor and met with appellant's controller and senior engineer. His report, entitled Price Determination--Bid Proposal and referencing the proposal under consideration, was made on 15 March 1966. He testified at the hearing to the effect that during this visit he was told that the only subcontracted item was the cylinder mast of the radome, and his report so indicated.

Also in March 1966, a contract price analyst reviewed the audit, the report of the industrial specialist, and the price determination referred to above, in order to establish a pricing objective for the forthcoming negotiation of appellant's price proposal. His report,

which was dated 31 March 1966, proposed a negotiating objective of $372,833, as compared with the price of $389,525 proposed by appellant. The analysis assumed that the cylinder mast was the only subcontracted item.

The actual negotiation of the contract price took place in late April and early May 1966, at which time the Government considered the revised quotation of 28 April 1966 furnished by appellant. The Government's contract negotiator testified that he had visited appellant's plant during March and April and had familiarized himself with the several reports on appellant's proposal to which we have referred. He also testified to his understanding that the cylinder mast was the only subcontracted item, according to these reports.

The Geonautics Quote. We have observed that during the three-month period of negotiations leading to the agreement on price of 4 May 1966 and the execution of the Certificate of Current Cost or Pricing Data on the following day, the representatives of the Government were under the impression that appellant intended to subcontract only the cylinder mast. One reason contributing to this understanding was appellant's representation that it planned to perform the work under this contract in the same manner it had followed in the successful Green Pine antenna subcontract with Western Electric.

Nevertheless, during January of 1966, appellant sent out six requests for quotation on the entire radome assembly as well as the cylinder mast. The first three requests were dated 10 January 1966, including one addressed to Columbia Products Company, which had successfully produced the cylinder masts for the Green Pine antennas. The three additional requests were dated 27 January 1966, slightly more than a week after the submission of appellant's original proposal. One of this latter group of requests for quotation was addressed to Geonautics, Inc., whose quote of 8 February 1966 is the focal point of the issues in this appeal.

Appellant was apparently aware from the beginning that time would be of the essence in this procurement. At the hearing, its vice-president testified that in such circumstances it is "almost mandatory" to go back to the source which makes a critical item in order to insure delivery and performance. In this case, as noted, Columbia Products had made the critical item in question, the cylinder mast. The remaining parts of the radome were not critical as to their manufacture, but rather as to the machining and fitting that was required before they could be installed in the completed radome assembly. Appellant's vice-president also noted the Government's policy to have its contractors obtain comparative bids on critical items. For this reason, as well as in implementation of appellant's own policy, the six RFQ's referred to were sent out to companies which were thought to be capable of making filament-wound cylinder masts.

In its quote of 8 February 1966, Geonautics proposed to make all four parts of the radome at a total unit cost of $1,970. Columbia Products, on the other hand, quoted a price of $1,150 each for only the cylinder mast, in its telegraphic quote of 8 February 1966.

With respect to the remaining three parts of the radome, that is, the base flange, top flange, and radome cap, the evidence is unclear as to whether appellant had represented that it planned to fabricate the parts in-house or to buy them from subcontractors. It appears from the record that the conflict in the evidence on this point may be attributable to the terminology used by appellant. In submitting its DD Form 633, it listed only the cylinder mast as a subcontract item. The remaining parts of the radome were considered by appellant to be materials, whether bought or made, because they were not critical items of manufacture. Although the parties had conflicting ideas on this question, it is clear that appellant lacked the capability of performing all of the operations, such as iriditing and certain machining, that were required in the production of these parts.

At the hearing, appellant's witnesses testified that its plastic shop was suffering from an overload and was therefore unable to perform the work of producing these three additional parts in-house. The Government, on the other hand, introduced rebuttal testimony that it was unaware of this overload in appellant's plastic shop. For reasons that will be developed later, it is unnecessary for us to resolve these conflicts in the evidence in order to reach our decision.

At the beginning of the period of negotiations, appellant's vice-president testified, Government personnel knew that appellant had gone out for comparative quotes on the radome and that appellant planned to go to Columbia Products for the cylinder mast. This witness also testified that he did not, nor was he requested to, disclose to the Government representatives the comparative quotes that they had received.

From the time of its first proposal in January through 5 May 1966, the date of executing its Certificate of Current Cost or Pricing Data, appellant intended to purchase either the complete radome assembly or at least the cylinder mast from Columbia Products, the successful prior producer of the mast. The testimony to this effect is consistent with appellant's request for quotation of 10 January 1966 addressed to Columbia Products. So far as appellant's intention to subcontract with Columbia Products for the cylinder mast, there is no evidence in the record of any contrary intention, nor is there any evidence that appellant, during the period in question, ever considered using the Geonautics quote or inquired into Geonautics' capability to perform the work.

At the hearing, a Government auditor who assisted in performing the defective pricing audit testified that he discovered the 8 February 1966 Geonautics quote in early May 1969. When this witness

discussed the Geonautics quote with representatives of appellant, he was informed that the quote had been shown at the time to the Government negotiators. The witness checked this information with the people concerned, with negative results. In support of this testimony, the contract negotiator, the contracting officer, two price analysts and the auditor who had prepared the audit of 2 March 1966, all testified that they had not seen the Geonautics quote until after it had been discovered in the defective pricing audit in May 1969.

On this record, we find that by a preponderance of the evidence the Government has established that the Geonautics quote of 8 February 1966 was not disclosed to the Government before 5 May 1966, the date on which the Certificate of Current Cost or Pricing Data was executed. We also find that during the same period of time appellant evidenced no intention of using the Geonautics quote or otherwise examining into the capability of Geonautics to perform the work in question.

Appellant's Switch from Columbia Products to Geonautics. It will be recalled that the antennas manufactured under this contract were to be installed at various sites in the upper arctic. In view of the isolated location of the antenna sites, the delivery schedule was extremely critical. To enforce compliance with this schedule, the Government inserted in the contract a liquidated damages clause at the end of the negotiating session in April, 1966. The damages thus prescribed were $500 per day per antenna, based on the Government's cost of late deliveries in view of the necessity of maintaining an erection crew at each site.

Having these schedule considerations in mind, appellant's purchasing agent issued a new request for quotation to Columbia Products on 22 April 1966. The response by Columbia, in its letter of 2 May 1966, indicated that it would be unable to deliver the cylinder mast until 90 days after receipt of an order. Since the 90 days would extend deliveries into September and cause appellant to be 30 days late, the quote was unacceptable to appellant in view of the liquidated damages clause. After further discussions, Columbia agreed to meet the schedule in a new telegraphic quote, dated 12 May 1966, in which it increased the price by as much as 50% for the first 14 or 15 cylinder masts. The reason for Columbia's hesitancy was that it was in process of moving its plant to a new location and was losing some of its personnel. In its discussions, Columbia refused to accept any portion of the liquidated damages by way of guaranteeing the schedule it had quoted on.

These developments induced what appellant's vice-president described as a state of panic at appellant's plant. Appellant immediately turned to the other sources from whom it had received quotes in February. Of these, Geonautics submitted the only conforming bid, dated 14 May 1966.

On this record, the unrebutted evidence shows, and we find, that appellant made its decision to switch from Columbia Products to Geonautics after 12 May 1966, when it received information from Columbia Products that it would increase its price for the cylinder masts by a substantial amount over its previous quotes, and that it would not guarantee its deliveries.

Consequences of the Switch to Geonautics. In its revised defective pricing review, the Government discovered that although appellant's direct materials and subcontract items increased as a result of the switch from Columbia Products to Geonautics, there was a resultant substantial decrease in the direct labor hours in appellant's plastics and machine shops which more than offset the increase in direct materials and subcontract items and, together with overhead, G&A, and profit, led to a claimed net price adjustment of $54,868.

The reason for the decrease in labor hours was explained in some detail by appellant's vice-president. Briefly, he testified that there was a great deal of fitting, hand work and assembly time involved in bonding the metal parts of the antenna to plastic spacers and fitting the antenna with spacers into the mast tightly enough to avoid resonant vibration when the antenna was mounted on top of its tower in the wind. In addition, the internal parts had to be fitted in such a manner as to permit their removal from the radome for maintenance purposes, and when the antenna was fitted in the mast, the radome had to be pressurized at five pounds per square inch of dry nitrogen without discernible leakage. The fitting and hand work as described was undoubtedly time consuming. There is no evidence in the record to the contrary.

In switching from Columbia Products to Geonautics, appellant experienced a substantial and unexpected benefit. In manufacturing its filament-wound cylinder masts, Columbia Products used disposable cardboard or fiber mandrels, which, after use, were destroyed. Geonautics, on the other hand, used a more expensive, polished metal mandrel. Since the interior surface of Columbia Products' cylinders was rough, uneven, and out of round, with occasional voids and delaminations, appellant had to make the necessary repairs to the interior surface by hand work in its plastic shop. Substantially less effort was required to prepare Geonautics' cylinders to receive the carefully fitted antenna and antenna spacers.

There were other reasons cited by appellant for the underexpenditure of manhours following its switch to Geonautics. First, appellant supervised the performance of Geonautics very closely in order to insure timely deliveries and to avoid liquidated damages. One of appellant's employees was in attendance at Geonautics' plant to expedite the flow of materials. Second, appellant lent Geonautics certain tools and instruments to help it perform its subcontract.

Finally, appellant designed certain shop aids and devoted a large amount of executive overtime toward streamlining its own internal manufacturing processes in order to insure timely deliveries.

In the present record, it appears that the principal reason for the underexpenditure of labor hours was Geonautics' use of a polished metal mandrel in place of the disposable cardboard or fiber mandrel used by Columbia Products. On cross-examination, appellant's vice-president testified that the use of a polished metal mandrel did not evolve until mid-May, after it had let the subcontract with Geonautics. As he explained it, appellant had a number of discussions with Geonautics as to the process it proposed to use and how appellant could help. He continued:

> There was a meshing of know-how, and it was during that process that we decided it would be in everybody's best interest to do it that way, based on their past history, their knowledge of the state of the art, the materials available and our knowledge and tooling available. And then we worked cooperatively to develop it on those lines.

Also on cross-examination, this witness was asked whether an attempt had been made prior to mid-May to discover Geonautics' method of manufacture for the cylinder mast. In response he testified that appellant did not seriously entertain any discussion with Geonautics prior to 14 May (Ibid).

In quantifying the Government's claim, the auditor who performed the defective pricing review used the total underexpenditure of labor hours in appellant's machine shop and plastic shop on the assumption that such underexpenditure was solely attributable to the shift from Columbia Products to Geonautics and to the consequent change in the make-buy decision for the base, top flange, and top cover of the radome. For reasons discussed below, it is unnecessary for us to examine these computations in order for us to reach our decision.

Decision

The Government's claim of defective cost or pricing data in this appeal is founded on appellant's alleged failure to disclose the price quotation of 8 February 1966 for the cylinder mast of the radome which it had received from Geonautics. Corollary to this alleged non-disclosure is the alleged failure of appellant to disclose the shift in its make-buy plans with respect to the remaining three components of the fiber glass radome, which the Government contends resulted in a substantial underexpenditure of in-house labor hours.

We have found that by a preponderance of the evidence the Government has established that appellant failed to disclose the Geonautics quote of 8 February 1966 prior to 5 May 1966, when appellant's Certificate of Current Cost or Pricing Data was executed. The reasons for the non-disclosure are apparent in the record. Geonautics was a new and untried supplier. The filament-wound cylinder mast was critical to the performance of the antennas under contract. And appellant planned throughout the period of negotiations, and so represented, that it would obtain the cylinder masts from a prior producer which had successfully supplied them. For all these reasons, we have found that appellant had no intention to procure either the cylinder mast or the entire radome assembly from Geonautics, nor had it made any investigation of Geonautics' capability, prior to the date on which appellant executed its Certificate of Current Cost or Pricing Data.

Finally, we have found that appellant's decision to shift from its proven prior producer of the cylinder mast to Geonautics occurred after 12 May 1966, when it received a quotation from its planned supplier that was not only substantially higher than had been anticipated but also the delivery dates of which that prior producer would not guarantee.

This case represents a variation of the Luneberg Lens issue decided by the Court of Claims in Cutler-Hammer, Inc. v. United States [14 CCF ¶ 83,124], 189 Ct. Cl. 76 (1969). In that case the contractor failed to disclose a quotation it had received from a potential supplier. Although that contractor regarded the nondisclosed quotation as being unreasonably low, and hence not to be taken seriously, it was interested enough to follow it up with a request for a technical proposal, which it received two days before it executed its Certificate of Current Cost or Pricing Data. The Court held that such a quotation, which was under active consideration prior to the date on which the Certificate was executed, was cost or pricing data that should have been disclosed. By contrast, although appellant here received the Geonautics' quote well before the date on which it executed its Certificate of Current Cost or Pricing Data, it gave no consideration before that date to the use of Geonautics as a source of supply, nor did it make so much as a casual investigation of its capabilities of performing the work. Under such circumstances, we conclude that the cost or pricing data furnished by appellant were accurate, complete and current as of 5 May 1966 when its Certificate was executed.

Our conclusion could be expressed in other terms. That is, that the Geonautics' quote, and the shift in appellant's make-buy plans that followed its use by appellant, were not cost or pricing data which appellant was required to disclose by the Truth-in-Negotiations law or the "Price Reduction for Defective Cost or Pricing Data" clause that implemented it.

In reaching this conclusion, we recognize that appellant's cost of performing the contract was lower than it had expected, and that this result followed from appellant's use of the Geonautics' quote. However, we are satisfied that this result was not in contemplation of appellant before the critical date to which the clause is directed, that is, the date on which appellant executed its Certificate of Current Cost or Pricing Data. Any benefit which accrued to appellant after that date and which resulted from unanticipated events that first came to appellant's attention after that date are simply beyond the reach of the statute and clause. Under a firm fixed-price contract such as the one here, the entire benefit belongs to appellant, and no price adjustment is in order, because the Government has not shown that appellant "furnished incomplete or inaccurate cost or pricing data or data not current as certified in the Contractor's Certificate of Current Cost or Pricing Data", pursuant to the "Price Reduction for Defective Cost or Pricing Data" clause of the contract.

The Government has made two other contentions that require mention here. First, it argues that appellant proposed to buy raw materials and expend labor hours for the in-house manufacture of the base, top flange and top cover of the radome, just as it had done in manufacturing the Green Pine antenna. In failing to disclose its decision to subcontract for these three components of the radome, so the argument goes, appellant has given the Government defective cost or pricing data, for which the Government is entitled to recover any resulting price overstatement. We have noted above that there is a conflict in the evidence as to whether appellant did in fact fail to disclose the shift in its make-buy plans as the Government asserts. Even if we assume that there was such a failure, however, we find the Government's argument lacking in merit because the Government has not, in our view sustained its burden of proving a connection between the decrease in appellant's in-house labor hours and the shift in its make-buy plans. On the contrary, appellant has shown by persuasive evidence that the shift had little, if any, effect on its in-house labor hours, and that the primary causes of the decrease therein noted by the Government were Geonautics' use of a polished metal mandrel and the comprehensive efforts of appellant's technical and executive personnel to revise and streamline its manufacturing processes, both of which causes originated after the date on which appellant certified its cost or pricing data.

Second, the Government contends that the manufacturing processes, including the use of shop aids, instituted by appellant after the date on which it certified its cost or pricing data were within its capabilities and could easily have been planned before certification, but that no such disclosure was made by appellant. On this point, there is no showing in the record that appellant had taken any steps before certification to adopt the new shop practices or that it had planned before certification to do so. In the absence of any such evidence, we conclude that the Government's argument necessarily fails, since as

moving party it has the burden of proof. Furthermore, we consider that the very substantial liquidated damages introduced by the Government at the very end of the negotiations, coupled with the unexpected need to shift from the prior subcontractor to Geonautics, provided ample motivation for the strenuous post-certification efforts made by appellant to meet the contract's delivery schedule. The existence of this motivation tends to corroborate the position taken by appellant on this point and rebut any inference we might otherwise draw to the effect that the planning and development of the new shop practices antedated appellant's certification of its cost or pricing data.

For the reasons discussed, the appeal is sustained.

c. Exceptions

SPERRY FLIGHT SYSTEMS DIVISION OF SPERRY RAND CORPORATION v. THE UNITED STATES

Ct. Cl. No. 40-75 (1977)

Bennett, Judge, delivered the opinion of the court:

This contract case comes before the court on appeal by way of plaintiff's request for review of the opinion of Trial Judge John P. Wiese, filed on April 19, 1976, and defendant's motion to adopt that opinion with modifications. At issue is the finality, under Wunderlich Act standards, 41 U.S.C. §§ 321, 322 (1970), of a decision of the Armed Services Board of Contract Appeals (the board), which upheld the right of a contracting officer to require the submission of cost data from a contractor in support of a proposed catalog price for a commercial item being purchased by the Government on a negotiated procurement basis. Sperry Flight Sys.--Div. of Sperry Rand Corp., ASBCA No. 17375, 74-1 BCA ¶10,648. The case has been submitted to the court on the briefs and oral arguments of counsel. Upon consideration thereof the court agrees with portions of the trial judge's opinion and adopts, with minor modifications, parts I and IIB of that opinion. Part IIA of the opinion is substantially revised, for the reasons set forth in the discussion of that part, below. As explained herein, the board's decision is affirmed.

I. Facts

On October 31, 1969, plaintiff and the United States, acting through the Navy's Aviation Supply Office, entered into a 2-year contract pursuant to which plaintiff was to supply, upon order, various types of aeronautical equipment that it manufactured. This contract, more descriptively referred to by the parties as a basic ordering agreement, contemplated two types of orders, priced and unpriced. The priced order, as the name implies, was an order issued to the contractor by the Navy after price and delivery terms had been agreed upon; an unpriced order, on the other hand, meant an order issued in the absence of prior agreement on price.

The mechanics for the pricing of an unpriced order called for the contractor's submission of a proposed price for each item within 45 days after receipt of an order together with such price supporting information as the contracting officer might request. Within 60 days thereafter, the contracting officer was required to indicate whether the price quoted was acceptable to the Government or whether further

negotiations would be necessary. In the event of a failure to agree on price, the matter was then to be resolved by resort to the standard "disputes clause" procedures.

On December 15, 1971, the order which eventually gave rise to this litigation was issued. It was an unpriced order calling for delivery of 660 model ML-1 remote compass transmitters, also sometimes referred to in the trade as flux valves. This is an electrical induction sensing device which measures the earth's magnetic field and it is used primarily in aircraft as part of a directional gyrocompass system. There had been three previous unpriced orders for ML-1 transmitters processed under the instant contract and on each of these past occasions the contractor had proposed and was paid its then current catalog price for the item. However, in this instance, the then newly assigned contracting officer declined to accept the contractor's proposed price, namely, its catalog price of $351 per unit, and asked instead for substantiating cost data. This data the contractor declined to furnish.

Then, and now, the refusal to supply the requested data rested on the contention that under the relevant statute, generally referred to as the Truth In Negotiations Act, 10 U.S.C. § 2306(f) (1970), and the procurement regulations issued pursuant thereto, such data was not to be required when--as was claimed to be the case here--the item involved was a commercial item previously sold in substantial quantities to the general public and the price proposed was either (i) the established catalog price for such item, or (ii) a price "based upon" such a catalog priced item.

There followed an extensive written exchange of views as well as negotiations between the parties, all of which proved fruitless. Thereafter, the contracting officer--whose initial request for cost data had, in the interim, been specifically approved by his superior --issued a final decision, which unilaterally established a price for the ML-1 at $204, and set forth specific reasons for the rejection of the contractor's proposed price of $351. These reasons, which were repeated among the board's own later findings in the matter, were the following. First, the catalog price of the ML-1 (i.e., the proposed price) was not an acceptable pricing criterion to the Government because that unit had not been sold in substantial quantities to the general public. Second, the proposed price of the ML-1 could not be considered to be "based upon" the established catalog price of the functionally comparable "thin valve" because the latter unit, even though admittedly similar to the ML-1 and concededly sold in substantial quantities to the general public, had previously been sold to the Air Force at a price 42 percent less than its established catalog price. Third, the price at which the ML-1 unit had been sold by the company's manufacturing facility to its marketing facility (the intra-corporate selling price) was only $138.78.

Based upon these three considerations, the contracting officer considered it inappropriate to accept the proposed price of $351. Instead, using certain limited financial data then available to him, he determined that a fair and reasonable price was $204. As a consequence of this determination, and plaintiff's disagreement with it, the matter was carried on to the board for hearing and determination, and the result there, as previously noted, was in favor of the contracting officer. The case here followed next.

II. Discussion

A. Severance of Issues

Before the board plaintiff requested and was granted a severance of the issues in the case. As a result of the severance, the board hearing and decision was limited to the question of plaintiff's entitlement to payment of its proposed catalog price without having to furnish supporting cost data. Postponed to a future date were the proceedings that would determine, at defendant's behest, the price payment to which plaintiff was entitled should it have been decided, in the first board decision, that plaintiff was required to furnish the cost data in support of its proposed price upon request of the contracting officer. Plaintiff sought this severance for the highly practical reason that it would need to bring in the cost data to counter a separate challenge by defendant to the contracting officer's decision that $204 was a reasonable and fair price, and yet, in plaintiff's counsel's words, "if we are to put in cost data at this time to meet the Government's objections with regard to the contracting officer's finding as to reasonable price, we moot the appeal [on the need to furnish cost data at all]." When plaintiff received the board decision adverse to it on the catalog price issue, it came directly to this court. Accordingly, the board has never had the opportunity to hear evidence and rule on defendant's challenge to the contracting officer's price determination.

Defendant argued to the trial judge that, since the board had yet to determine a reasonable price based on the disclosure of the cost data, this appeal was interlocutory and premature, and should not be heard until after further consideration by the board. The trial judge answered that well-settled practice, not outweighed by the judicial policy against piecemeal litigation, allows the court to decide an appeal "taken on a substantively important [to the outcome of the case] and distinctly severable issue * * * that has been treated as such by the Board and that has been fully acted upon by the Board." Cf. Cutler-Hammer, Inc. v. United States, 189 Ct. Cl. 76, 81, 416 F. 2d 1306 (1969). Defendant no longer maintains this jurisdictional challenge, but now shifts its position to argue a point not explicitly raised before the trial judge. Defendant now says that if the court finds against plaintiff on all the issues presently appealed from the

board's decision, the case must return to the board for a determination of defendant's objections to the $204 price, then to be considered, of course, in light of the plaintiff's disclosed cost data. Plaintiff counters that it has a right to stand on the contracting officer's $204 price, which it expresses a willingness to do if it does not succeed in persuading the court on the catalog price issue, and accordingly opposes reopening the contracting officer's price decision. Since we resolve the issues in defendant's favor in part IIB, infra, it becomes necessary for us to address the effect of the severance of issues on defendant's entitlement to the price redetermination that it seeks.

First of all, we think it important to note what the parties are not contending. No issue is raised regarding the Government's right to question before the board its own contracting officer's decision that, even lacking the supporting cost data he previously requested of plaintiff and was refused, he had sufficient information available to him to determine that $204 was a fair and reasonable price for the ML-1. It is not contended that, by operation of law, plaintiff's recovery may not be reopened by the board and redetermined to be below that which the contracting officer allowed, nor is it argued that the Government's defense before the board and here is limited to supporting, not challenging, what the contracting officer decided. Both sides seem content to rely upon Blount Bros. v. United States, 191 Ct. Cl. 784, 801-02, 424 F. 2d 1074, 1084-085 (1970), for the rule that proceedings at the board level are de novo and, therefore, that the Government counsel may present to the board whatever arguments he deems appropriate, even if these are at odds with the contracting officer's ruling. Further, it is not urged that the contracting officer's determination that he had sufficient information in front of him to choose a price figure for the ML-1 was discretionary and not subject, short of an abuse of discretion, to second-guessing by the board. The contracting officer was not compelled to issue a ruling on price, of course, but could have declined to make any determination at all under Armed Services Procurement Regulation (ASPR) 3-807.6, 32 C.F.R. § 3.807-6 (1969), had he thought that plaintiff's refusal to yield its cost data left him too ill-informed. Finally, there is no challenge to the Government's right, assuming the applicability of our decision in Roscoe-Ajax Constr. Co. v. United States, 204 Ct. Cl. 726, 499 F. 2d 639 (1974), to question the contracting officer's determination on sufficiency of price information even though plaintiff disputes only the officer's alleged disregard of plaintiff's legal entitlement to the payment of its catalog price. Since these matters have not been briefed or argued orally by the parties, we intimate no ruling on them.

Plaintiff bases its right to stand on the contracting officer's $204 price decision solely on a stipulation that the parties supposedly entered at the outset of the board hearing. Defendant denies that any agreement was reached allowing plaintiff to end this litigation with a $204-per-unit recovery, and our review of the transcript

of the board proceedings persuades us that defendant is correct. Throughout the colloquy among counsel and the hearing examiner, there was an assumption that the Government, if it prevailed in the first hearing, would further litigate before the board--assuming a settlement was not reached in the meantime--the correctness of the $204 price, and would do so with plaintiff's ML-1 cost data in hand. Plaintiff's counsel plainly acknowledged that the "Government has also put into issue, as is their right, the other finding of the contracting officer in terms of reasonable price." He then asked for the severance of the catalog price issue from the Government's challenge to the $204 price in order to avoid bringing in the supporting cost data to defend against the Government's challenge even as he was arguing that that data need not be furnished at all, as a matter of law. The Government counsel before the board responded that he had no objection to the severance, stating:

> [T]he board could never fix a price, a reasonable price, without cost data, and Sperry says that we don't have to furnish it. I suspect that the board would first have to say, "Sperry, you have to furnish cost data."
>
> Then, if the parties cannot agree on pricing they would have to come back here.

This statement is hardly a stipulation that the litigation may end once plaintiff is informed that it may not withhold its cost data from the Government. Defendant clearly looked forward to arguing before the board, in the absence of a compromise settlement, that the cost data, perhaps together with the information that the contracting officer had in his possession, points toward a unit price other than $204.

Plaintiff makes much of the following exchange between hearing examiner Thompson and its own counsel, Mr. Cohen:

> MR. THOMPSON: * * * I take it Appellant [plaintiff here] agrees that if Appellant should lose on a catalog item issue, and so forth, the contracting officer's decision will stand as to the issue of reasonable price.
>
> MR. COHEN: Yes, Your Honor.
>
> MR. THOMPSON: It would not be necessary to render a new decision.
>
> MR. COHEN: No; no, it would not.

Plaintiff views these words as permission from the board for plaintiff to let the contracting officer's decision on price "stand." However, the Government counsel agreed to no such view, nor did the hearing

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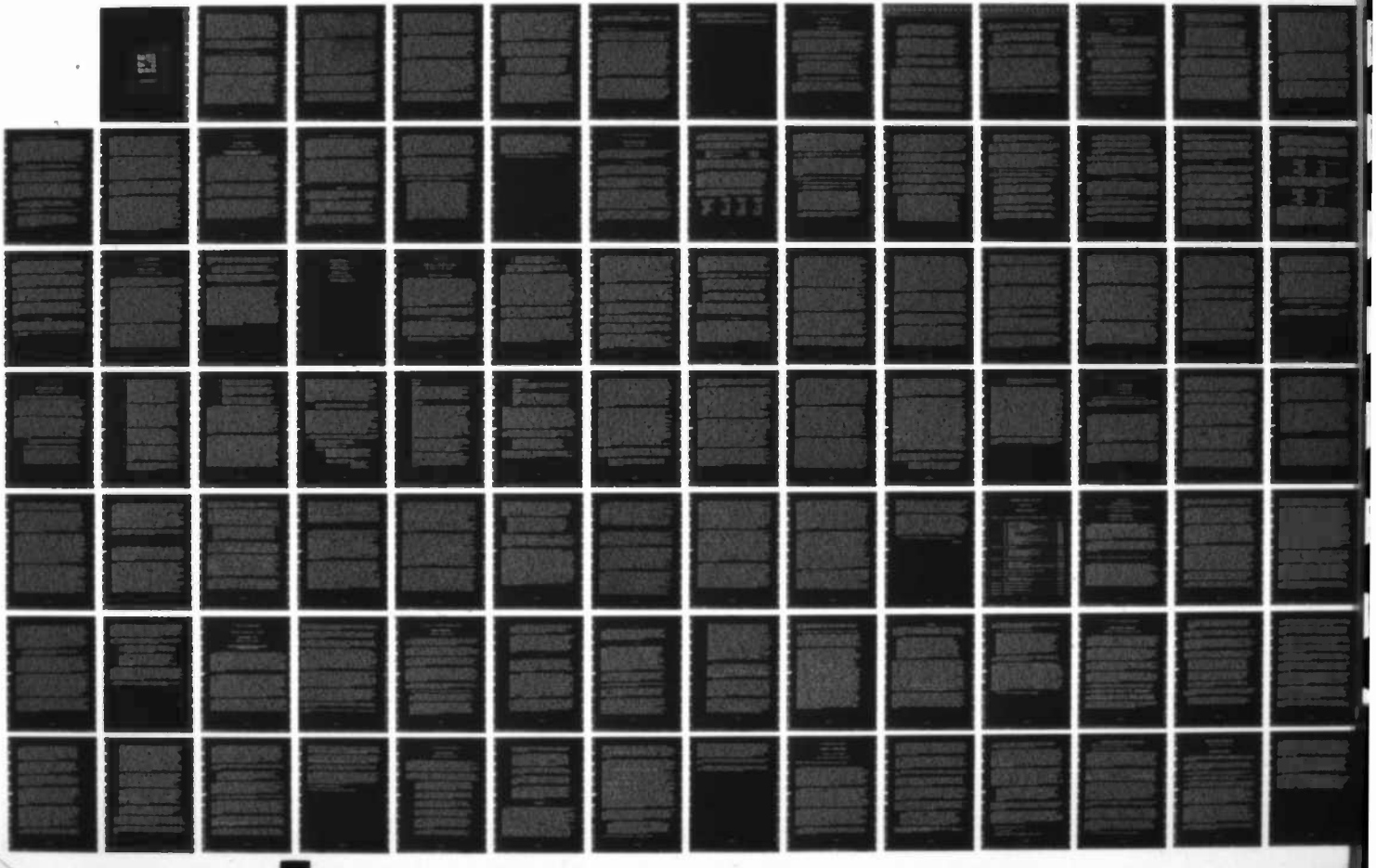

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examiner go beyond stating only that a new decision from the contracting officer would not be sought. In light of the parties' general understanding that the Government's challenge to the price determination was part of the appeal, the examiner could not have meant to say that a further decision could not be sought from the board on the Government's challenge, once the cost data were released and a settlement not reached. The examiner went on to state that "if the board did render a decision adverse to the Appellant on that [the catalog price] issue it would stand as a preliminary decision reducing the issues on the appeal and the appeal could simply stand in suspense, pending arrangements for disposing of the second problem [the Government's objection to the $204 price]." Further litigation on the price reasonableness issue, making use of the disclosed cost data was thus clearly contemplated.

Since plaintiff's contention regarding the stipulation before the board is without merit, and since we agree with defendant on the points discussed in part IIB, the case may now proceed before the board on the Government's challenge to the reasonableness of the price set by the decision of the contracting officer.

B. Catalog Price and Cost Data

As to the merits of the case, extensive reexamination of the board's decision is not called for. Two points compel a decision in the Government's favor. First, there is no legal support for the contractor's principal contention, namely, that the Government may not require cost data where it is involved in the negotiated purchase of a catalog-priced commercial item that is otherwise sold in substantial quantities to the general public. Even if the supportive facts were true, that is, that the item involved qualified as a commercial item that had previously been sold in substantial quantities to the public, still the argument would have no merit in this situation.

The statutory obligation to furnish cost and pricing data applies to every negotiated procurement where, as here, the amount involved is expected to exceed $100,000. And, to the extent that there may be exceptions to this requirement, such are wholly permissive in nature for the statute plainly says "[t]hat the requirements * * * [for submission and certification of cost and pricing data] need not be applied to contracts * * * where the price negotiated is based on * * * established catalog or market prices of commercial items sold in substantial quantities to the general public * * *." 10 U.S.C. § 2306(f) (1970). Clearly, the statutory language envisions no mandatory exemption from cost disclosure such as plaintiff claims. It is urged that legislative history counsels a different reading of the quoted language, but, like the board we see nothing in the several references which plaintiff offers in support of this proposition that demonstrates any basis whatsoever for assuming that the words "need not be applied" should actually be read to say "shall not be applied." [Emphasis in above quote supplied.]

Nor is such a mandate to be found in the pertinent procurement regulations. Indeed, just the opposite is true. ASPR 3-800 through 3-813, 32 C.F.R. §§ 3.800-3.813 (1969) (Price Negotiation Policies and Techniques), make apparent, first of all, that Government procurement, when carried out on a negotiated contract basis, depends for its success on a well-informed contracting officer, one having knowledge not only of cost and pricing techniques in general, but also knowledge in particular of the product or service in question, including its uses and technology, its costs, alternate sources of supply and prevailing market prices. To this end, the regulations contemplate that various sources of information shall be made available to the contracting officer, including not only field audits, engineering studies and technical appraisals prepared by in-house staff, but also contractor-supplied cost and pricing data.

But equally as important as the need for reliable information in the negotiation process is the need also to recognize that the decision to contract--a responsibility that rests with the contracting officer alone--is inherently a judgmental process which cannot accommodate itself to absolutes, at least not without severely impairing the quality of the judgment called for. That effective contracting demands broad discretion is plainly recognized, for the regulations observe at the outset that "[s]ound pricing depends primarily upon the exercise of sound judgment * * *." ASPR 3-801.1. Thus, in keeping with this theme, with respect to catalog-priced commercial items, the regulations undertake to set out no rigid set of standards by which to gauge price reasonableness. True, the regulations do say as to such items that "[a]s a general rule, cost or pricing data should not be requested," but the same regulation, ASPR 3-807.3(c), goes on to point out that if "despite the willingness of a number of commercial purchasers to buy an item at such a catalog or market price, the purchaser (e.g., the contracting officer) finds that that price is not reasonable and supports such finding by an enumeration of the facts upon which it is based, cost or pricing data may be requested if necessary to establish a reasonable price * * *."

In this case the contracting officer did reject the contractor's proposed price for lack of reasonableness--a consideration which brings us now to the second point for discussion. As noted earlier, among the grounds upon which the contracting officer had based his refusal to accept the contractor's proposed price was the fact that a cost-price analysis undertaken by the Government had reported the intracorporate selling price of the ML-1 unit to be $138.78. In the testimony before the board that fact was brought out again and a finding to such effect was included by the board in its opinion.

In our view, the intracorporate selling price of the ML-1 unit, $138.78, was a factor sufficient by itself to justify the action that was taken by the contracting officer in rejecting the contractor's proposed price. Given the two figures which the contracting officer had before him--or, more to the point, the disparity between the two

figures--it was altogether appropriate that he should decline to accept the proposed catalog price of $351 and insist, instead, upon substantiating cost data. Clearly, without the benefit of such data, the contracting officer would have been hard pressed to accept as reasonable a price to the Government that was fully two and one-half times greater than the seller's own indicated purchase cost. This is not to say, of course, that the price differentials might not have been entirely justifiable; there well might be appropriate justifications. We mean only to say that, given the circumstances, an explanation was clearly called for and the contracting officer was well within his rights under the regulations quoted above, in asking for the contractor's cost data.

There were also other grounds upon which the contracting officer had relied in supporting his request for cost data and these too were considered by the board. However, these additional grounds need not be examined anew, for whether the board was right or wrong with respect to the findings that it made concerning them is really beside the point. All that matters here is that the action taken by the contracting officer was authorized by law and that the action would stand as a proper exercise of his authority even if it were supported only by the single factual consideration discussed above, namely, the disparity between the proposed catalog price and the indicated purchase cost to the plaintiff. This was enough to lead one to conclude, at least initially, that the catalog price was not a reasonable price.

Nor would it matter that in procurements of the ML-1 subsequent to the one in issue, the Government consented to pay the proposed catalog price without demanding the submission of cost data. It has been pointed out that the decision as to whether or not to contract at a particular price is inherently a matter of judgment--a circumstance which can obviously yield differing results depending upon the individual administrator and the facts before him. Accordingly, the decision that was made by the contracting officer in this instance cannot be made either right or wrong by the contrast with the judgment others have chosen to follow. The only question is whether what was done by the contracting officer in this procurement was done in accordance with authority granted by the law. As to this last point, no question can seriously be raised: ASPR 3-807.3(c) expressly declares that cost data may be requested if a contracting officer finds, for reasons he has enumerated, that a proposed catalog price is not reasonable. There was a plainly sufficient reason presented in this case. In short, it is the instant contracting officer's judgment that counts; not the judgment of others who may succeed him.

There is a further argument made by plaintiff which addresses the fact that all previous Navy procurements of the ML-1 were completed without cost data submissions. Based upon this fact, plaintiff advances the contention that the Government may not now reverse course and abandon a practice upon which plaintiff has come to rely.

This argument too lacks merit. Although departure from practices previously adhered to by an agency in the administration of its contracts may, under certain circumstances, furnish the basis for an actionable claim against the United States, see L. W. Foster Sportswear Co. v. United States, 186 Ct. Cl. 499, 509, 405 F. 2d 1285, 1290-291 (1969), it is essential in such situations that this sequence of previous conduct between the parties to the agreement (i.e., their course of dealing) be such that it can be "fairly * * * regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." RESTATEMENT (SECOND) OF CONTRACTS § 249 (Tent. Drafts Nos. 1-7, 1973). In other words, a course of dealing can supply an enforceable term to a contract (or may even supplement or qualify that contract) provided that the conduct which identifies that course of dealing can reasonably be construed as indicative of the parties' intentions--a reflection of their joint or common understanding.

Such was the case, for example, in L. W. Foster Sportswear Co. v. United States, supra, where this court held that the Government could not insist upon performance in strict accordance with contract requirements when, in previous instances involving plaintiff's manufacture of the same item under essentially identical specifications, the closely related predecessor procuring activity had habitually recognized the need for, and allowed, deviations from its specified requirements. Regarding that situation, the court said:

> * * * Both the plaintiff and the Navy were aware of this past history, and necessarily relied upon it in entering into new contracts of the same type. We have no doubt that plaintiff would have a sound claim if the Navy had abruptly changed its practices under the same contract specifications. We likewise have no doubt that plaintiff would not have to indicate at the time it bid on the successor Navy contracts that it expected to obtain the same deviations. * * *. [186 Ct. Cl. at 509, 405 F. 2d at 1290-291.]

No comparable fact situation exists in this case. The reliance argument that plaintiff makes here is, at best, only a statement of its own unilateral assumptions concerning the Navy's expected future conduct. No facts are offered that would establish or even allow an inference that the Government, by having accepted plaintiff's catalog prices on past occasions, thereby intended to commit itself to continue such a practice into the future. Not only would there be no contractual purpose served by such a commitment, to the contrary, the idea abridges the flexibility that the Government must necessarily retain in order to carry out its purchases properly on a negotiated basis. In effect, what plaintiff argues for is a contract right that would undermine the authority and responsibility vested in a contracting officer to obtain for the Government the benefit of fair and reasonable prices. Even assuming such a result could lawfully be brought about, nothing has been shown here that would justify placing the Government in so irretrievable a position.

CONCLUSION

For the reasons hereinbefore stated, plaintiff's motion for summary judgment is denied, defendant's cross-motion for summary judgment is granted, and plaintiff's petition is dismissed.

Davis, Judge, concurring:

Joining in the court's opinion, I add some further considerations which, as I see it, puncture this plaintiff's claim even if one disagrees with the broader proposition that contracting officers have a general discretion to demand cost data whenever there is some preliminary reason to believe the demanded price may be excessive.

The contractor's case rests at bottom on its argument that the regulation affirmatively gave it a flat exception from the cost data requirement because the price of the flux valve (the ML-1 model) was an established catalog price of commercial items sold in substantial quantities to the general public, or at least was "based upon" the "thin valve" which did meet those characteristics. One can accept arguendo the contention that items satisfying these specific criteria are automatically exempted from the cost data requirement without holding for this plaintiff. The Armed Services Board of Contract Appeals confronted the point by finding that in any event the particular standards (on which plaintiff relies) were not satisfactorily met. First, the Board found in effect that the ML-1, though a catalog item, was not sold in substantial quantities to the general public--without doubt this determination had solid support in the record. Second, the Board found in substance that the catalog price of the ML-1 was not "based upon" the price of the "thin valve"; for this finding the tribunal largely rested, and quite properly, on the express testimony of plaintiff's marketing manager that the ML-1 price was not based on the price of the "thin valve" but on a number of factors.

Another part of the regulation secondarily invoked by plaintiff limits, in the case of substantially similar items not technically "based on" the price of a publicly vended catalog item, the requirement for cost or price data "to that pertaining to the differences between the items" (i.e. between the item in question and the "similar" item sold publicly in substantial quantities) but only "if this limitation is consistent with assuring reasonableness of pricing result." On the basis of the factors already mentioned plus the sole-source nature of the ML-1 and "the ability of the Air Force to obtain lower prices on the more complex thin unit," the board permissibly concluded, in my opinion, that the contracting officer could permissibly determine that in this instance the limitation was not

consistent with assuring reasonableness of pricing result--that unanswered questions of reasonability still remained, even though the ML-1 and the "thin" unit might be "similar."

It follows that, even under the specific parts of the regulation on which plaintiff grounds its claim, it is not entitled to recover.

d. Defective Pricing Data as False Claim

HONEYWELL, INC.

ASBCA No. 12353 (1968)

ON MOTION TO DISMISS

By letter dated 9 May 1966 the contracting officer wrote to appellant concerning certain findings by the General Accounting Office on the subject of alleged overpricing on this contract. The letter requested a refund in the amount of the alleged overpricing.

The parties did not agree and on 1 November 1966 the Assistant Secretary of the Navy (Installations and Logistics) advised appellant that it had been decided to transmit the case to the Department of Justice for appropriate action. The Department of Justice made a demand on the contractor for $155,596 by letter of Feb., 1967. On 14 February 1967 appellant requested a contracting officer's decision pursuant to the Disputes clause of the contract. The contracting officer replied on 13 March 1967 as follows:

> * * * As you and your counsel know, this matter has been referred to the Department of Justice, which has made a demand upon your company under the False Claims Act.
>
> The demand by the Navy which you rejected has now been superseded and preempted by the demand made by the Department of Justice. It is considered that the question of your liability under the False Claims Act is not justiciable under the Disputes provision of your contract with the Navy. If it should become necessary to litigate the matter, the Federal courts would present the appropriate forum.
>
> Hence, it is not considered that there is any basis for issuing a Contracting Officer's decision.

Appellant filed a notice of appeal on 17 March 1967 from the contracting officer's refusal to issue a decision. The complaint followed on 28 April and on 23 May the Government moved for dismissal. The file contains a copy of a letter of 3 May 1967 to the Navy from the Assistant Attorney General, Civil Division, pertinent portions of which follow:

As you know, we recently forwarded a complaint for filing to the United States Attorney for the Middle District of Florida. We have been informally advised that the complaint was filed on 1 May 1967. The damages alleged in the complaint were $155,596. This figure is subject to doubling plus forfeitures under the False Claims Act, 31 U.S.C. 231.

Although Honeywell's complaint in appeal is ambiguous regarding specific issues of fact, it would appear that the primary issue raised is whether the Government suffered damages under the contract. This issue, of course, is closely intertwined with Honeywell's potential liability under the False Claims Act. And the appropriate forum for a suit under the False Claims Act is a Federal Court (31 U.S.C. 232), not an administrative board. Accordingly, we recommend that a motion to dismiss Honeywell's appeal be filed at this time.

Incidentally, it should be noted that the reference to $278,500 in Honeywell's complaint is outdated. By both our demand letter of 1 February 1967, and subsequent negotiations, this Department demanded $155,596, as stated in our complaint.

The appellant asked the Board not to rule on the Government's motion to dismiss the appeal pending a ruling by the District Court on a motion by appellant to dismiss the suit. Appellant had sought dismissal of the suit on the ground that its subject matter "* * * is by contractual agreement within the original jurisdiction of the Armed Services Board of Contract Appeals, subject to judicial review as provided by statute, 41 U.S.C. 321-22" and that an appeal to the Board had duly been taken. The court denied appellant's motion by order dated 29 January 1968. We must now rule on the Government's motion to dismiss the appeal.

The clause entitled "Price Reduction for Defective Pricing Data" (ASPR 7-104.29) was not physically incorporated in the contract. Appellant contends, nevertheless, that it is a part of the contract on the ground that the contract did not become effective until after the effective date of the ASPR revision that prescribed the clause. This contention raises issues concerning the effective date of the contract and the force and applicability of the Christian case, issues that we do not decide.

It is clear from the record that the contracting officer did not purport to issue a decision pursuant to the Disputes clause. Rather, decisions were made by the Assistant Secretary of the Navy to transmit the case to the Department of Justice for appropriate action and by the Department of Justice to demand damages and then to sue under the

False Claims Act. A claim under that statute must be based on allegations of the presentation of false, fictitious or fraudulent claims or other acts specified in the statute. The relief to be sought is the forfeiture of:

> * * * $2000.00, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit. R.S. 3490, 5438. 31 U.S.C. 231 (Emphasis supplied.)

Section 231 of Title 31 spells out the liability of persons making false claims. Section 232 provides that the United States District Courts shall "* * * have full power and jurisdiction to hear, try, and determine such suit." This Board does not have such jurisdiction. It is incumbent upon the Department of Justice to decide on the pursuit of such claims and for the District Court, not this Board, to adjudicate them.

The price reduction clause provides for a determination by the contracting officer in pursuit of a contractual right to reduce the price and gives the contractor an administrative right of appeal. Such a claim "arises under the contract." The statute, on the other hand, provides for suit for forfeiture and double damages. Such a claim arises under the statute. The disputes procedure, contrary to appellant's argument, is plainly not the exclusive remedy in the instance of defective cost or pricing data. The Government's choices whether and when to pursue remedies provided by contract are to be made by officials charged with administering the contract and by the Justice Department. While there are occasions when the Board will not relinquish its jurisdiction, this is not such a case. Apart from the clear distinction between the contractual and statutory remedies, the District Court presumably will preside over the trial of some of the same issues that would be heard by the Board and may render Board decisions on them unnecessary. On that ground alone we can and do decline to exercise jurisdiction.

The appeal is dismissed, subject to reinstatement if appellant believes that disputed issues survive the District Court proceedings.

e. Adequate Price Competition - Certification

NORRIS INDUSTRIES, INC.

ASBCA No. 15,442 (1974)

DECISION

1. Threshold Questions

Appellant has presented several general arguments each of which is said to undercut all or a major portion of the claims asserted by the Government. Two of these arguments raise threshold questions which we now discuss as applicable to resolution of the entire appeal.

A. Adequate Price Competition

The clause entitled Price Reduction for Defective Cost or Pricing Data, contractually implements the provision of the Truth in Negotiations Act, P.L. 87-653, 76 Stat. 528 (1962), 10 U.S.C. Sec. 2306(f). The statute provides that contracts subject thereto should contain a provision for adjustment of the contract price:

> . . . to exclude any significant sums by which it may be determined by the head of the agency that such price was increased because the contractor or any subcontractor required to furnish such a certificate, which, as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the negotiated price as is practicable), was inaccurate, incomplete, or noncurrent . . . . (10 U.S.C. 2306(f)(4))

The statute further provides that the above requirement as to a contractual provision for price adjustment need not be applied where the contract is awarded under certain circumstance, one of which is

> where the price negotiated is based on adequate price competition. (10 U.S.C. 2306(f)(4))

The phrase "adequate price competition" is defined in ASPR Section 3-807.1(b)(1). Paragraph 'a' provides in part that

> Price competition exists if offers are solicited and (i) at least two responsible offerors (ii) who can satisfy the

purchaser's (e.g., the Government's) requirements (iii) independently contend for a contract to be awarded to the responsive and responsible offeror submitting the lowest evaluated price (iv) by submitting priced offers responsive to the expressed requirements of the solicitation.

Paragraph 'c' further provides that:

A price is 'based on' adequate price competition if it results directly from such competition or, if price analysis (not cost analysis) shows clearly that the price is reasonable in comparison with current or recent prices for the same or substantially the same items procured in comparable quantities under contracts awarded as a result of adequate price competition (e.g., (ii) an item is normally procured competitively but in a particular situation only one offer is solicited or received, and the price clearly is reasonable in comparison with recent purchases of comparable quantities for which there was adequate price competition).

ASPR Section 3-807.3(a), which sets forth the circumstances under which the contractor must be required to certify the accuracy, completeness and currency of its submitted cost or pricing data, provides an exemption where "the price negotiated is based on adequate price competition."

Appellant contends that the Government is barred from obtaining price reductions under the two contracts involved in this dispute on the ground that the contract prices, including the price for Mod 10 to contract 9763A, were based upon adequate price competition. In so contending appellant has set forth in its brief what it calls a price analysis indicating that the negotiated prices were reasonable in comparison with recent prices obtained by the Government through competition. Appellant says in effect that the prices for the three procurements involved in this appeal were "based on" adequate price competition within the meaning of ASPR Section 3-807.1(c).

In our opinion the ASPR text relied upon by appellant provides a narrow exemption, applicable where an item is normally procured competitively in similar quantities, but due to special circumstances, e.g. urgency, a particular procurement is itself noncompetitive, and the contractor's price is reasonably close to recently-obtained competitive prices. By the time contract 9763A was negotiated competition was no longer the normal means for procuring bomb bodies since the Department of Defense had embarked upon a policy of allocating its requirements among individual suppliers and negotiating with each of them subject to obtaining reasonable prices. Appellant does call to our attention its four formally-advertised contracts, and the two competitive procurements awarded to AMF and IMCO on 20 July 1965. The first of appellant's advertised contracts, calling for

100,000 units, was awarded over a year prior to the contract 9763A solicitation. Of the other contracts referred to, only one, the AFM contract calling for 140,750 units, involved a quantity comparable to the quantities respectively procured under contracts 9763A & 10350A. In comparison with contract 9763A the AMF contract price was about $15.00 per unit lower. Appellant explains that this difference is not significant when account is taken of appellant's decision to absorb deferred nonrecurring costs under contract 9763A, AMF's use of Government furnished equipment, and differences in freight charges on steel purchases. This explanation appears to have merit. But in our view the regulatory language cited by appellant in support of its position requires reliance upon several competitive procurements of comparable quantities within the same relative time frame as a basis for price comparison if the price for an individual noncompetitive procurement is to be regarded as based on adequate price competition. Even if the first formally-advertised contract awarded to appellant is considered along with the AMF contract, the basis for price comparison is too meagre for appellant to prevail on the ground that the contract 9763A price was based on adequate price competition. The same result holds as to the contract 10350A price and the Mod 10 price, with further attention of the basis for comparison in view of the longer time difference between negotiation of these prices and the competitive awards.

In considering this contention we have taken into account the fact that before making each of the three awards to appellant the Government's negotiator ascertained that the prices agreed upon were reasonably similar to prices then being offered by other suppliers. But, as found above, the negotiator did scrutinize appellant's proposed costs to the extent time and available information permitted. There is nothing inconsistent between a cost analysis and a comparison of the proposed prices with prices then being offered by other suppliers for purposes of bargaining or justifying the awarded price. Furthermore, there is no evidence that prior to taking this appeal appellant maintained that the award prices were based on adequate price competition. Although certificates of current cost and pricing data were filed belatedly, the record does not indicate that appellant had refused to execute such certificates on the ground that such certificates were not required.

We conclude that the negotiated prices for contract 9763A, Mod 10 thereto and contract 10350A were not based on adequate price competition within the meaning of ASPR 3-807.1(c). In view of our disposition of this matter on the merits we do not consider the jurisdictional questions which would arise if the adequate price competition exemption were found applicable and the Price Reduction for Defective Cost and Pricing Data Clause quoted above was therefore erroneously included in the contract. Cf. Libby Welding Company, Inc., ASBCA No. 15084, 73-1 BCA par. 9859; 46 Comp. Gen. 631 (1967); 49 Comp. Gen. 216 (1969).

B. Post-Award Filing of Certificates

As found above, appellant executed certificates of current cost and pricing data with respect to each of the three procurements involved in this appeal after the dates of the respective awards. Appellant contends that in view of this fact the certifications have no legal effect, and the Government is barred from any recovery based on those certificates. In this regard appellant relies on provisions of the Truth in Negotiations Act and implementing regulations which state in effect that the contracting officer shall require contractors to furnish such certificates "prior to the award" of any negotiated prime contract or modification thereto which in either case, is expected to exceed $100,000 in amount. 10 U.S.C. 2306(f)(1), (2), (3); ASPR Section 3-807.3(a). ASPR Section 3-807.4 further provides in part that:

> The contractor shall be required to submit the certificate as soon as practicable after agreement is reached on the contract price.

According to appellant if the Government makes an award of a contract subject to the Truth in Negotiations without first obtaining a certificate of current cost and pricing data, the award is made without assurance that the contractor will be bound by the defective pricing law and the Government assumes the risk that the data submitted by the contractor might have been defective.

It is now well established that a contractor's liability for having failed to disclose accurate, complete, and current cost or pricing data is dependent upon its execution of a certificate of current cost and pricing data. Aerojet-General Corporation, ASBCA No. 12873, 69-1 BCA par. 7585; Libby Welding Company, supra; Lockheed Shipbuilding and Construction Company, ASBCA No. 16494, 73-2 BCA par. 10157. Under the Price Reduction for Defective Cost or Pricing Data clause, the Government is entitled to a price reduction where the contractor

> . . . furnished incomplete or inaccurate cost or pricing data or data not current AS CERTIFIED IN THE CONTRACTOR'S CERTIFICATE of Current Cost or Pricing Data . . . ." (emphasis added)

The Truth in Negotiations Act similarly provides for a price adjustment where the price

> . . . was increased because the contractor . . . required to furnish such a certificate, furnished cost or pricing data which, as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the negotiated price as is practicable), was inaccurate, incomplete, or noncurrent. . . .
> (10 U.S.C. 2306(f)(4))

The quoted portion of the clause in effect implements the quoted provision of the statute. By executing a contract containing the Price Reduction for Defective Cost or Pricing Data clause, the contractor assumes the risk of having failed to furnish accurate, complete or current cost or pricing data as certified in its certificate. The contractor's liability is predicated upon the clause; and under the clause the significant date is the date to which the contractor certifies the accuracy, completeness and currency of its cost and pricing data. That date is not necessarily the same date as the date on which the contractor executes the certificate. Such is the case as to two of the three certificates involved in this appeal.

We agree with appellant that the contracting officer is obliged to obtain a certificate of cost and pricing data prior to award of the contract. However, the statutory and regulatory provisions relied upon by appellant were not incorporated into the contracts, and in view of the text of the applicable clause, we do not share appellant's opinion as to the consequences of a contracting officer's failure to carry out this obligation. In our opinion a later-executed certificate which certifies the accuracy, completeness, and currency of cost or pricing data AS OF a date bearing a reasonable relationship to the date of final agreement on the contract price, final submission of cost and pricing data, or award or execution of the contract is still binding on the contractor, and the Government may recover on the basis of a certificate so executed.

In the case of contract 9763A cost or pricing data was certified to be accurate, current and complete as of 23 November 1965. This was about six weeks after the effective date of the contract but only five days after appellant signed the contract. In our opinion appellant's certification was as of a date bearing a reasonable relationship to the date of contract execution, and appellant accordingly certified its cost and pricing data to be accurate, complete and current as of 23 November 1965.

The two other certificates were executed long after the award dates, but they purported to certify the cost and pricing data as accurate, complete and current as of dates only one or two days removed from the respective agreements on the contract price. As found above the certificates were executed and mailed to Mr. Shupe's home address only after Mr. Shupe, during the GAO investigation, discovered their absence from the contract files. Appellant contends that by furnishing these certificates Mr. White was doing Mr. Shupe merely a personal favor, and appellant did not intend to be bound thereby. Mr. White so testified, as indicated above, but that testimony is not corroborated by any contemporaneous documentation or other evidence. On the record as a whole as it relates to this matter, we find that both Mr. Shupe and Mr. White desired to correct what amounted to an administrative oversight. We are not persuaded that the certificates for contract 10350A and Mod 10 should not be accorded the legal effect which they merit on their face. Accordingly we conclude that appellant certified its cost and pricing data for contract 10350A and Mod 10 to be accurate, complete and current as of 10 November 1965 and 29 March 1966 respectively.

f. Waiver-Reliance

THE BOEING COMPANY

ASBCA No. 20875 (1981)

OPINION BY ADMINISTRATIVE JUDGE ROWE
ON MOTIONS FOR SUMMARY JUDGMENT

Under a letter contract dated 6 April 1970 for modification kits on B-52 aircraft, appellant issued a purchase order on 20 April 1970 to Resalab, Inc. for part of the work. Appellant and Resalab negotiated a fixed price for the purchase order in the amount of $969,500 the following June, at a time when some of the actual costs of performing the purchase order had been incurred. As the Board understands the record, these costs were not included in the submissions of cost and pricing data made by Resalab to appellant, or appellant to the Government prior to definitization of the letter contract. The Government made a demand in 1975 for $330,514 pursuant to the clause of the contract entitled "Price Reduction for Defective Cost or Pricing Data (1970 Jan). This was done as a result of a DCAA audit in 1973 which apparently found the submitted data defective in light of the costs incurred by Resalab in performance of the subcontract.

Based primarily on the fact that the Government had become aware, when it definitized the prime contract, of the lack of data on these actual performance costs incurred by the subcontractor, appellant moved for summary judgement, contending that there is no genuine dispute as to any material fact on the issues of respondent's reliance on the cost or pricing data submitted by Resalab, or the allegedly defective data's causation of any overstatement in the prime contract price.

The Government's response was a cross motion for summary judgment on the ground that appellant was obliged to obtain current and complete cost and pricing data from Resalab; and that, when the Government expressed its concern to appellant about the lack of actual cost data, appellant assured the Government that the data had not been asked for or obtained because Resalab's minimal work effort at the time of subcontract price negotiations was minor, and would not impact Resalab's price. Based on this assurance, says the Government, and upon the executed certificate of cost and pricing data, the contracting officer believed there had been full disclosure, and that Resalab's data were current, complete, and correct.

Appellant's Contentions

The cross motions and the many subsidiary facts relevant to the motions are much more detailed than need be outlined. On receipt of the motions the Board advised the parties that the pleadings disclosed numerous factual issues which were left unresolved by the motions and affidavits; but in an effort to narrow the issues further, a prehearing conference was held. The gist of appellant's contentions, as shown in the transcript of the prehearing conference, is that its motion should be granted because, even assuming Resalab's data submission was defective in not containing actual costs or initial performance, there are three reasons why the Board should deny the Government's claim.

The first reason is that the Resalab "data" was not before the Government since the purchase order had become one for a fixed price, and Boeing had amended its data submission to the Government to put in a firm fixed price to Resalab, which was current, accurate, and complete. The second reason is that the Government knew that actuals had not been submitted to Boeing, yet it elected to go forward and definitize the prime contract notwithstanding that fact. Therefore, even if the data submission was defective, the Government did not rely on defective data as a matter of law. The third argument is that, if the Government reimbursed Boeing more than it should have, in light of the defective data, the cause was not reliance on defective data, but the Government's election to approve the subcontract in full knowledge of a defective data submission, when it was not legally obligated to do so.

DECISION

The contention that the Government may not recover because only the fixed price of the subcontract was submitted, rather than defective data which may have led to its negotiation, is without merit. In a comparable case, Lockheed Aircraft Corporation, ASBCA No. 10453, 72-1 BCA ¶ 9370, the Board ruled:

> Therefore, in the March 1963 prime contract negotiations the data that was supposed to have been given to the Government by Lockheed included the amount of its fixed priced subcontract with Midwestern and the complete data submission that Midwestern was supposed to have made to Lockheed in the spring of 1962. [i.e., at the time of the subcontract price negotiations]

The Board's decisions in the Lockheed appeal, although reversed on an "offsets" issue, were upheld by the court on the contractor's liability for a defective cost data submission. Lockheed Aircraft Corporation, Lockheed Georgia Company Division v. United States, 193 Ct. Cl. 86, 432 F. 2d 801 (1970), 202 Ct. Cl. 787, 485 F. 2d 584 (1973).

The Board also sees no merit in appellant's other points that, because the Government elected to definitize the prime contract and approve the subcontract with knowledge of the absence of actual cost data, therefore there was no reliance on defective data, or causation of a price increase. As the Board understands the record, there was no express approval of the subcontract; rather, there was a determination, correct or incorrect, that approval, or consent, was not required. There is also no apparent dispute about the fact that appellant represented to the Government that "Resalab's costs that had been incurred and could have been available at the price negotiations covered such a short period of time that they were not considered to be meaningful".

The Board does not know whether, despite this representation, appellant would contend that there was no reliance on defective data as a matter of fact. On this motion we are concerned only with appellant's apparent position that, as a matter of law, the Government may not be held to have relied on defective data because it knew the actuals had not been submitted, but chose, nevertheless, to approve the subcontract and definitize the prime contract without the data on actual performance costs. For the Board to agree with that contention would, we belive, be tantamount to holding that the contracting officer waived the requirement for submission of that data.

However, in M-R-S Manufacturing Company v. United States, 203 Ct. Cl. 551, 492 F. 2d 835 (1974), the court ruled:

> The plaintiff makes one other argument concerning Contract 8006. It asserts that even if it was obligated to furnish accurate, complete, and current data, the Government waived the obligation. Waiver is said to be shown by the fact that the Government used only data available on March 23, 1967, as a basis for price reduction, even though the certificate for Contract 8006 was not executed until August 17, 1967. Since the Government chose to ignore any data developed between March 23 and August 17, the plaintiff says the obligation to furnish accurate, complete, and current data was waived. The most basic flaw in this argument is the assumption that the obligation to furnish proper data can be waived by a Government agent. The duty to furnish accurate, complete, and current data is a duty imposed on Government contractors by a statute, and therefore, that duty cannot be waived by a Government agent. United States v. Stewart, 311 U.S. 60, 61 S.Ct. 102, 85 L. Ed. 40 (1940); Utah Power & Light Co. v. United States, 243 U.S. 389, 37 S.Ct. 387, 61 L.Ed. 791 (1917); see Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947); Montilla v. United States, 457 F. 2d 978, 198 Ct. Cl. 48 (1972).

The record shows no agreement whether, in fact, the subcontractor's actual cost data was meaningful, i.e., whether, in the peculiar circumstances, it was the kind of data "which prudent buyers and sellers would reasonably expect to have a significant effect on price negotiations". (ASPR-DAR 3-807.1) The absence of agreement on that fact issue alone would preclude summary judgment for either party. And, if the data was in fact significant, and therefore required to be submitted under the terms of the statute and contract clauses, the contracting officer was not authorized to waive the requirement by approving or ratifying a subcontract, or definitizing the prime contract without the data.

The cross motions for summary judgment are denied.

g. "Significant Effect on Price"

ROSE, BEATON AND ROSE

PSBCA No. 459 (1980)

This appeal is from the final decision of the contracting officer reducing the initial total contract price by $10,841 and reducing other contract fees and rates based on alleged defective cost or pricing data concerning overhead costs contained in Appellant's proposal for this architect-engineer contract.

Findings of Fact

1. Under date of January 14, 1977, appellant submitted to Respondent (USPS) a proposal for a firm fixed-price architect-engineer (A-E) contract for design of a main post office facility at White Plains, NY, with options for field duties during construction and preparation of modifications to the contract for construction of the facility.

2. Appellant's proposal contained the figure of $199,894 for design services and expenses and various other amounts for the options. For the year ending December 31, 1976, it showed total overhead costs of $744,885.23 ($327,823.18 on direct labor plus $417,062.05 miscellaneous overhead items). The total overhead rate for 1976 was shown as 122.38% (AF-4).

3. The proposal was prepared by William A. Rose, Jr., one of Appellant's partners, based on figures he was given by Appellant's bookkeeping department. At the time of proposal preparation the figures for December, 1976, had not been posted to the books and, thus, were not available to Mr. Rose. Using the available figures for January-November, 1976, by extrapolation of those figures and using certain estimates, he arrived at the overhead figures shown in the proposal. As a result, some of the overhead figures contained in the proposal varied from actual figures (AF-12). In negotiations, Mr. Rose told the Contracting Officer, Mr. Harold Ours, that extrapolation had been used to arrive at the overhead figures.

4. Negotiations based on Appellant's proposal were conducted at USPS Headquarters on February 1, 1977. The principal negotiators were Mr. Ours for USPS and Mr. Rose, Jr. for Appellant. Respondent's witness, Nancy E. Robinette, a contract specialist, participated in all steps of the negotiation and wrote a memorandum of the negotiation. (AF-5).

5. USPS negotiators entered the negotiation with the position, corresponding to USPS policy, that USPS would not accept an overhead rate higher than 110 per cent. USPS feels that anything in excess of 110% reflects inefficiency on the part of the contractor.

6. During the negotiations the parties discussed several of the overhead items included by Appellant in its proposal. USPS took the position that the following four items were not properly allocable to an indirect cost pool for a USPS contract:

Indirect (overhead on direct labor)	$ 5,090.43
Bonuses	38,445.00
Taxes - Payroll and Excise	27,597.00
Sundry Expense	6,930.35

Deletion of these items from the overhead pool, as insisted on by USPS, gradually reduced the overhead rate from the 122.38% proposed by Appellant "to 120 to 116 to 112, and then finally to 110 percent", the rate finally included in the contract. Appellant took exception to the deletion but, according to Robinette, its defense of the items was "weak".

7. On February 11, after further negotiations, Appellant accepted the $140,000 total for design services which USPS had proposed during the February 1 negotiation. This included an overhead percentage of 110% and 10% profit (reduced from the 15% originally proposed by Appellant). Appellant accepted the $140,000 amount as a compromise figure which, according to William Rose, Sr., another partner, fell far short of covering actual overhead and which gave Appellant no profit but had nevertheless potential advantages to Appellant in securing more business in the northeastern states.

8. Following agreement on price, Ms. Robinette prepared a memorandum of negotiation which showed the following breakdowns of proposed (by Appellant) objective (Respondent's) and negotiated amounts for design services:

	Proposed	Objective	Negotiated
Direct Labor	$ 76,330	$ 52,409	$ 58,879
DL Overhead	93,413	52,409	64,766
Expenses			
Travel	2,898	2,856	1,836
Repro	805	1,275	1,417
Telephone	375	1,000	375
Subtotal	$173,821	$109,949	$127,273
Profit	$ 26,073	$ 10,995	$ 12,727
TOTAL	$199,894	$120,944	$140,000

9. The breakdown of the $140,000 negotiated price shown in Ms. Robinette's memorandum was arrived at by working backwards from the $140,000 compromise figure, taking off the negotiated 110% overhead and 10% profit figures. Appellant never specifically agreed during negotiations to a direct labor figure of $58,879 and was not aware that USPS had assigned that amount to direct labor until mid-1978 when it was provided for the first time with a copy of Ms. Robinette's memorandum. The $58,879 figure bore no rational relationship to Appellant's direct costs which, according to Rose, Sr., were the amount originally proposed by Appellant, i.e., $76,330.

10. In negotiating the overhead rate USPS relied on the data furnished by Appellant (A.F. 5, p. 6).

11. The contract was awarded to Appellant effective March 4, 1977. Paragraph 4.3 of the special provisions of the contract stated that the design fee ($140,000) was based on an overhead rate of 110% (AF-1). Following award, Rose, Jr. executed a Certificate of Current Cost or Pricing Data (PS Form 7470) in which he certified that cost or pricing data as defined in PCM [Postal Contracting Manual] 3-807.3(h) submitted or identified in writing in support of Appellant's fee proposal for design of the facility were accurate, complete, and current as of February 1, 1977, the date on which price negotiations were concluded.

12. The contract's general provisions included the following pertinent clause:

> 21. PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA
>
> (The following clause is applicable if the amount of the contract exceeds $100,000.)
>
> (a) If any price, including profit or fee, negotiated in connection with this contract or any cost reimbursable under this contract was increased by any significant sums because the Architect-Engineer, or any subcontractor pursuant to the clause of this contract entitled SUBCONTRACTOR COST OR PRICING DATA or any subcontract clause, therein required, furnished incomplete or inaccurate cost or pricing data or data not current as certified in the Certificate of Current Cost or Pricing Data, then such price or cost shall be reduced accordingly and the contract shall be modified in writing as may be necessary to reflect such reduction.
>
> (b) Failure to agree on a reduction shall be a dispute concerning a question of fact within the meaning of the DISPUTES clause of this contract.

13. In July, 1977, USPS audited Appellant's records to determine whether the cost or pricing data furnished by Appellant during negotiations were accurate, complete, and current. The auditor, Postal Inspector H. Schneiderman, made a report of the audit (AF-6). The actual figures for the various items included by Appellant in overhead were generally substantially greater than the estimated figures in its proposal but the auditor questioned several of the costs included in Appellant's overhead pool and by reclassification or elimination of such costs arrived at an overhead rate of 93.26% as against the 122.38% estimated by Appellant in its proposal.

14. At the conclusion of the audit, Schneiderman advised William A. Rose, Sr. of the exceptions taken to Appellant's overhead pool and of the audited overhead rate of 93.26%. Rose, Sr. signed a memorandum prepared by the auditor indicating acceptance by Appellant of the exceptions and of the 93.26% rate (RX-1).

15. Ms. Robinette testified that Respondent would not have accepted the 110% overhead rate had its negotiators known that the actual rate for 1976 was 93.26%. It would have agreed on the lower rate. There is no evidence that Appellant knew, or should have known its actual overhead rate for 1976 prior to executing the contract.

16. Based on the recommendations contained in the audit report, the Contracting Officer, on September 28, 1977, sent to Appellant a proposed contract modification reducing the contract price by $15,818 on account of defective cost or pricing data in Appellant's fee proposal, i.e., the overhead factor (AF-7, 10).

17. On October 10, 1977, Rose, Jr. wrote the Contracting Officer (AF-10) objecting to the proposed price reduction. Rose took the position that the negotiated design fee of $140,000 was a compromise figure "having nothing whatever to do with hours, overhead and profit in the final analysis." Rose went on to say:

> Simply stated, this [$140,000] was a number that you and we agreed to, but one which was substantially less than our original proposal even using USPS guidelines. We readily concede an error in listing our payroll taxes to compute overhead, which with other minor revisons reduced our overhead figure, as USPS views the subject, to 93.26%. However, since our final estimate was marginally adequate, and our overhead costs continue, the effect of the compromise was to reduce our anticipated profit to zero. Since the contract was signed, the additional time spent in developing designs acceptable both to USPS and the Urban Renewal Agency has more than offset the reduction in overhead allowed. To now ask us to execute the project at a loss we feel is grossly unfair. If the USPS insists on its position, we reserve the right to invoice fees for all time and

expense spent in assisting USPS to obtain title to the property from the Urban Renewal Agency through the latter's approval process. This assistance is not part of the contract requirements."

On a copy of the proposed modification enclosed with the letter Rose, Jr. indicated disagreement with reduction of the design fee but noted that Appellant had agreed with the "shift of bonuses from overhead to salaries resulting in an overhead rate of 93.26%". Appellant did not execute the proposed modification.

18. On December 8 the Contracting Officer sent to Appellant a unilateral modification, identified as his final decision under the Disputes clause. This modification changed the overhead rate specified in special provision para. 4.3 from 110% to 93.26% with related changes in various fees and rates and reducing the initial contract price by $10,841. The modification, according to the transmittal letter, was issued on account of defective cost or pricing data in Appellant's basic fee proposal (AF-8).

19. Appellant took a timely appeal from the final decision.

20. Ths USPS auditor's recommended reduction of the contract overhead rate to 93.26% was based on the following:

(a) Reclassification of $43,207 covering bonuses and clerical salaries for productive personnel from indirect expense to direct labor.

(b) Exclusion of $209,825 for payroll taxes from overhead on direct labor. Appellant admitted that this figure was erroneously placed in its overhead proposal. This item alone, when corrected, reduced Appellant's overhead rate to 87.9%.

(c) Reduction of depreciation costs by $2,474. This reduction was based on the auditor's contention that depreciation on automobiles should have covered only a three month period rather than the full year on which Appellant based its depreciation figure.

(d) Exclusion of $370.00 from Dues and Licenses for Chamber of Commerce and Westchester County Association dues, because of their "personal nature".

(e) Exclusion of $1,804.00 from management expense representing numerous items of hotel, restaurant, credit card, and petty cash expenditures as unallowable under PCM 15-205.11.

(f) Exclusion of $22,577, from Promotion Expense covering entertainment, country club, athletic club and foreign travel expenses as unallowable under PCM 15-205.11.

(g) Exclusion of $6,971 from Miscellaneous Expenses, representing litigation, damage costs, advertising and contributions, as unallowable costs under PCM 15, Part 2.

(h) Reclassification of clerical salaries and bonuses totalling $43,207, for productive personnel from overhead to direct labor.

21. To arrive at the recommended 93.26% overhead rate, the auditor made the foregoing adjustments against Appellant's actual 1976 costs rather than the estimated costs contained in its proposal.

22. The reason for the differences in price reduction contained in the proposed contract modification sent to Appellant on September 28 and that contained in the final decision was an error, acknowledged by Ms. Robinette in testimony, corrected in the final decision. Respondent has not shown the basis upon which it computes its $10,841 reduction or the various other rate adjustments which are contained in unilateral modification 02.

Positions of the Parties

USPS says that the facts in this case demonstrate: (1) that the Postal Service was given cost or pricing data which Appellant certified were true and accurate and supportive of the 110% overhead rate included in the contract; (2) that the Postal Service relied upon that data; (3) that the data did not support the 110% rate because they were inaccurate; and (4) that the Postal Service is entitled to all price adjustments stemming from application of the accurate overhead rate of 93.26%.

Appellant's principal arguments are:

1. The price reduction taken by Respondent is unfair because in agreeing to the $140,000 original price for design services Appellant sacrificed profit and a substantial part of overhead.

2. The provisions of the Postal Contracting Manual relating to cost principles are not applicable to Appellant and to this contract because they are not included in the contract directly or by reference.

3. Appellant admits error in placing an amount for taxes withheld from wages in the overhead costs included in its proposal. Beyond the elimination of that amount Appellant contends that any

audit changes should be limited to correcting amounts stated in the proposal for various overhead items and should not extend to total elimination of any items.

4. Appellant proffers a new set of figures for direct labor ($500,047) and what it calls "True Overhead Expenses" ($606,651), producing an overhead percentage of 121.32 and argues that since this exceeds the 110 percent specified in the contract, Respondent is not entitled to a price reduction and the appeal should be sustained.

5. Presenting what it calls a "True Accounting", Appellant advances a claim for an increase of $18,071 in the contract price. This approach is, in effect, a claim for retrospective repricing of the contract based on actual costs incurred.

Decision

The sole issue before us is whether Respondent's reduction of the contract price and alterations in various rates and fees on the basis of defective cost or pricing data were proper and in the correct amounts.

Under the "Price Reduction for Defective Cost or Pricing Data" Clause (GP 21) the Contracting Officer had the right to reduce the contract price by the amount such price was increased by any significant sums in pre-award negotiation due to incomplete, inaccurate, or non-current cost or pricing data furnished by Appellant.

Appellant has admitted that it improperly included in its proposal relating to overhead rate payroll taxes amounting to $209,825. This constituted the only clearly established inaccuracy in the data furnished by Appellant. Other exceptions taken by Respondent's auditor related mainly to items involving the exercise of judgment as to allowability and/or whether they should be placed in direct or indirect costs. As to these judgmental items Respondent has not proved inaccuracy, incompleteness or noncurrentness.

Thus the issue is narrowed to whether the erroneous inclusion of the large amount for payroll taxes increased the negotiated contract price for design services and certain rates for Architect-Engineer services (Art. 6) and preparation of modifications (Art. 7) and, if so, how much.

Respondent has established that in negotiating the contract price, it relied on all of the data in Appellant's proposal. The question then is, what was the natural and probable consequence of the erroneous overhead rate and Respondent's reliance thereon. See Sylvania Electric Products v. United States [18 CCF ¶ 82,334], 202 U.S. 16 (1973). We conclude based on the following reasoning that Respondent has not established that such consequence was an increase in the negotiated price in the amount it claims, i.e., $10,841.

In computing the price breakdown upon which it justified the contract price (and upon which it apparently computed the claimed price reduction) the Postal Service "worked backwards" from the negotiated price. This resulted in an arbitrary downward adjustment in the direct labor price which was not, in any logical way, connected to the negotiated reduction in the number of required drawings.

Eliminating from Appellant's overhead prcposal the erroneously included $209,825, the proposed overhead rate would have been 87.9%. Using this rate, its proposal for design services would have been as follows (using the breakdown shown in Respondent's Price Negotiation Memorandum (A.F. 5, p. 3)):

Direct Labor	$76,330	
DL Overhead	67,094	(87.9% of DL)
Expenses		
Travel	2,898	
Repro	805	
Telephone	375	
Subtotal	$147,502	
Profit (15%)	22,125	
Total	$169,627	

Using the 87.9% overhead figure and reducing Appellant's proposed direct labor costs by a percentage equivalent to the negotiated reduction of the number of contract drawings from 63 (proposed) to 59 (93.65%) and using negotiated amounts for travel, repro, and telephone, and 10% profit, produces the following:

Direct Labor	$71,484	
DL Overhead	62,836	(87.9%)
Expenses		
Travel	1,836	
Repro	1,417	
Telephone	375	
Subtotal	137,948	
Profit	13,795	
Total	$151,743	

Taking Appellant's proposal figures as adjusted above, and accepting Respondent's evidence that the objectives of Respondent's negotiator were an overhead rate not exceeding 110%, profit of 10%, and a design fee not exceeding 6% of estimated project cost (excluding amounts for coordination and liaison with local officials and contingency for soil conditions) all of which were achieved in the $140,000 fee for design services. Respondent has not sustained its burden of proving that Appellant's overstatement of overhead resulted in any significant increase in the price for design services. Therefore, Respondent is not entitled to the reduction it has taken in the fee for design services.

Disregarding Appellant's admitted error in inclusion of payroll taxes, the auditor's computation of an overhead rate of 93.26% based on Appellant's actual 1976 costs is not valid because the evidence shows that the contract price was negotiated on the basis of a combination of actual and estimated costs. There is no provision in the contract authorizing or requiring recomputation of the overhead rate based on actual costs for 1976 or any other period.

As for the overhead rate specified in paragraph 4.3 of the special provisions, had the parties during negotiations been aware of the erroneous inclusion of an amount for payroll taxes in its overhead proposal, or had such amount not been included in the proposal, we think it reasonable to conclude that the parties would have agreed to an overhead rate of 88%. This percentage should be substituted for the 110 in Article 4.3.

Although Appellant's complaint placed at issue the rest of the fee and rate changes contained in Respondent's unilateral modification (i.e. Articles 6.1b, 6.1b(1), 6.1b(2), 6.1b(3), 6.1b(4), 6.2, and 7.2), Respondent failed to prove the method, logic, and accuracy of such changes. Therefore, we must hold that Respondent has established no reasonable basis for such changes and that they should remain at the original contract rates.

Appellant has established no contractual basis for changes it proposes in various contract amounts and rates (Complaint, "Dollar Claims"; paragraphs 4 & 5 under Appellant's position, supra). As stated above the only issues before us in this appeal are the propriety and accuracy of the numerous changes in contract amounts and rates contained in the unilateral modification which gave rise to this dispute.

Summary

Respondent has failed to sustain its burden of proof as to the propriety of the reduction in the contract price, the validity of the 93.26% overhead rate, and the basis for the various other changes contained in the unilateral modifications. The overhead rate specified in Article 4.3 of the special provisions should be 88%.

The appeal is sustained to the extent indicated and denied in all other respects.

Section 3. SUBCONTRACTS

a. Privity of Contract

NICKEL v. POLLIA

179 F. 2d 160 (10th Cir. 1950)

Andrew A. Pollia brought suit against E. C. Nickel, the prime contractor, and the Federal Public Housing Authority (FPHA) to recover for work done and materials furnished under a subcontract. Pollia was awarded judgment by the Federal District Court, and the defendants appealed to the United States Court of Appeals.

On 14 June 1946, the United States through the FPHA entered into a CPFF contract with Nickel to move 900 housing units. The contracts provided that with the approval of the contracting officer the contractor could employ subcontractors to do part of the work. On 2 September 1946, with the approval of the United States, Nickel entered into a subcontract with Pollia for the removal and reinstallation of the plumbing and heating fixtures on 402 of the units for a total consideration of $89,244. The subcontract provided for monthly partial payments on estimates made by the subcontractor and approved by the contractor. It also incorporated the provisions of the prime contract with respect to labor, wages, and such matters. It provided that except where otherwise specifically provided, whenever the contractor and subcontractor were unable to agree on any question of fact arising under the contract, the dispute should be submitted to the contracting officer who signed the prime contract, or his duly authorized representative, whose decision should be final and conclusive upon the parties. In the interim the subcontractor was required to proceed diligently with the work as directed. The contract also provided that, if a performance bond was required by the Government, the subcontractor was to furnish the same.

On 17 October 1946, the subcontractor submitted to the project engineer for the United States an estimate for work done each in the amount of $17,846.60. The project engineer certified that "20% of the plumbing and heating work* * *has been done to this date 17 October 1946." A second estimate for a similar amount was submitted on 4 November 1946. However, these estimates were not accompanied by certified payrolls as required by the contract, and the payrolls, which were subsequently furnished, showed that wages were not being paid in accordance with terms of the base contract. The prime contractor then became doubtful of Pollia's credit standing, and on 1 November 1946, Pollia was notified that he must furnish a performance and payment bond as required by the terms of the subcontract, and that no payment would be made until such bond was furnished. An

attempt was made to raise money for Pollia, but it failed when it was discovered that items which Pollia claimed had been paid were in fact not paid. On 23 December 1946, Pollia wired the prime contractor that:

> Due to failure on your part after making numerous promises to us that are past due we have advised the regional office today by wire that we are stopping operation of work covered by our contract.

On 30 December 1946, the prime contractor advised Pollia by letter that his subcontract was terminated in accordance with paragraph three thereof because of his continued refusal to diligently prosecute the work in accordance with the terms of the subcontract.

* * * * *

[1] It must be remembered that there was no privity of contract between Pollia and the F.P.H.A. His contract was with Nickel alone, and it was to Nickel alone that he must look for payment under his subcontract. Under the base contract, the F.P.H.A. agreed to pay Nickel the full consideration for performance of the entire work. When Nickel executed a subcontract with Pollia for performance for part of the work, he alone obligated himself to pay Pollia's consideration under that contract, and the consideration Pollia was entitled to receive from Nickel bore no relationship to the payments in the base contract between F.P.H.A. and Nickel. True, the base contract was a cost plus fixed fee contract. That obligated the Government to pay Nickel a sum sufficient to discharge all of Nickel's obligations under subcontracts executed in conformity with the provisions of the base contract. But the fact that the entire cost of the project came from the Government, did not create a contractual obligation between the Government and the subcontractors under contracts to which the Government was not a party. The subcontractor perforce was required to look to the one who promised to pay him for his work and to him alone. There being no privity of contract between Pollia and the Government, he could not maintain an action against the Government for money due him from Nickel alone. [Citing cases] The motion to dismiss should have been sustained.

AEROJET-GENERAL CORP.

ASBCA No. 11739

Reprinted Infra p. 4-29

SEVERIN v. U.S.

99 Ct. Cl. 435 (1943)

Reprinted Infra p. 10-27

b. Approved Sources

PENNY CO. v. THE UNITED STATES

No. 433-73 Ct. Cl. (1975)

OPINION OF TRIAL JUDGE

WIESE, Trial Judge: This is an appeal from a decision of the Armed Services Board of Contract Appeals (hereinafter the Board) sustaining the Government's default termination of plaintiff's supply contract. The appeal, presented here in the conventional format of a motion for summary judgment, asserts that the administrative decision is not entitled to finality under the Wunderlich Act first, because it reflects alleged errors of law and second, because it includes factual findings that are said to be lacking in substantial evidentiary support. The United States denies these claimed deficiencies in the Board's decision and insists that the decision is entitled to full finality. In addition, the United States has interposed, by way of counterclaims, a demand for judgment in the amount of $58,992.94. This demand represents the aggregate of excess reprocurement costs that were incurred by the United States in consequence of its reletting of 14 separate contracts upon each of which plaintiff had been default terminated.

Upon a review of the record and notwithstanding some equities in its favor, the conclusion must be reached that plaintiff cannot prevail. The administrative decision is entitled to full finality and the United States is entitled to judgment on its counterclaims.

I. The Essential Facts

On May 8, 1969, the United States, acting through the Navy Ships Parts Control Center in Mechanicsburg, Pennsylvania, issued a small business set-aside solicitation seeking bids for the manufacture of 96 shock mounts for Terrier missile containers. The shock mounts, which were to be fabricated in accordance with the specifications contained in a 1965 drawing, included a subassembly that required the bonding of rubber blocks to metal plates. Relevant to this bonding requirement was a recitation on the drawing which stated as follows:

> The following manufacturers are approved for the bonding of the metal parts to the rubber:

1. Lord Manufacturing Company, Erie, Pa.
2. Dow-Elco Inc., Montebello, California
3. Henrite Products Corporation, Ironton, Ohio
4. Goodyear Tire and Rubber Company

Other manufacturers wishing to bond the rubber parts shall contact the Navy Bureau of Ordnance, Washington, D.C. for approval. [ASBCA Record, Appellant's Exhibit A-1, Contract Drawing, Shock Mount Sub-Assembly.]

Upon receipt of this solicitation, the contractor contacted various potential suppliers to ascertain prices and delivery time. Among the companies thus contacted was the Lord Manufacturing Company, the first of the four companies that had been listed on the contract drawing as a Navy-approved source of supply for the bonding requirement. This initial contact with the Lord Manufacturing Company was by way of a telephone call between plaintiff's president and a Lord salesman and, in the course of their telephone conversation, plaintiff was informed that the company had often done the bonding operation in the past. At the time, plaintiff asked for and was given a bonding quote of $12 per unit. However, it does not appear from the testimony that anything more than this was ascertained, that is, the question of delivery was not discussed. On this same point, the Board found "that the latter [meaning plaintiff's president] made no direct inquiry as to whether and within what time frame Lord Manufacturing Company was willing to undertake the bonding job and that he considered the salesman's willingness to quote a price as implying willingness on Lord's part to perform the work when given a definite order * * *."

Following this telephone conversation and being then otherwise satisfied that it could properly accomplish the work, the contractor submitted a bid and was awarded the contract in the latter part of June 1969. Under its terms full performance was due within 90 days from the award, or, in this instance, by September 15, 1969. The total amount of the contract was $33,600.

Approximately one month after the contract award, the contractor forwarded a purchase order to Lord Manufacturing Company asking that it undertake to do the bonding work that the contract required. Within a week thereafter, on July 30, 1969, Lord Manufacturing responded saying that it was not then tooled to produce the item and would therefore not be competitive; hence, the order was declined. Thereupon, the contractor turned to the other Navy-approved suppliers and learned through the inquiries that followed that of the three remaining listed companies, two--Henrite Products Corporation and Dow-Elco Inc.--were no longer in business, while the third, Goodyear Tire and Rubber Company, was not interested in the work because the job was too small and the delivery time too short. Other companies were then sought out but without timely success.

Because of this difficulty, the contractor found it necessary to request a time extension. On September 4, 1969, plaintiff's president addressed a letter to the Defense Contract Administrative Services Region (DCASR), Philadelphia, Pennsylvania, which asked for an extension of the contract's delivery date to December 15, 1969. This request was granted. In the letter asking for the extension, no mention was made of the bonding problem. Instead, the contractor referred to his problems as "machining difficulties." In his testimony before the Board, the contractor explained that use of the term "machining difficulties" had been suggested to him by a DCASR employee whose function it was to monitor the status of the contractor's production and who, in the pursuance of these duties, visited the contractor's plant on a weekly basis and was thus aware of the problem that had been encountered with respect to locating a subcontractor for the bonding work.

The effort to locate a satisfactory bonding source was continued. Although the Board made no finding on the point, it appears that of the numerous companies that were contacted during this extension period, those that did express an interest in doing the bonding work demanded more lead time than plaintiff felt could be allowed. At any rate, it was not until the end of November or early December that plaintiff located an acceptable bonding subcontractor. This company, the Alpha Rubber Company, advised plaintiff that it would need about 5 weeks in which to make the necessary mold and from this to produce the necessary parts.

On January 8, 1970, plaintiff again wrote DCASR to request extension of the contract's delivery date--this time until February 1, 1970. Machining difficulties were once more cited as the reason for the requested extension and again plaintiff explained that his use of this reason for extension was prompted by the suggestions made to him by the DCASR representative.

Alpha's initially projected 5-week delivery period did not materialize. That company experienced problems in the making of the mold and this, in turn, made impossible plaintiff's completed performance by the anticipated date of February 1, 1970.

Accordingly, on February 3, 1970, plaintiff forwarded a third request for extension to DCASR. In this letter, plaintiff for the first time mentioned that it was "having difficulty in obtaining delivery of the rubber bonding on parts for this contract * * *." An extension until March 1,1970, was requested.

On February 19, 1970, the Government responded to the contractor's two pending requests for additional time. (The January request had not previously been acted upon by the Government.) On this date, it issued amendment 2 to the contract extending the contract's delivery date from the then existing but obviously no longer controlling due date of December 15, 1969, to the most recently requested date that had been specified by the contractor, namely, March 1, 1970.

The contractor did not perform by the promised date of March 1, 1970. Accordingly, on March 2, 1970, the contracting officer wrote to advise plaintiff that, if delivery had not been made in accordance with the March 1, 1970 date, then the contract would be carried in a delinquent status until March 12, 1970. At the same time, the contractor was asked to present in writing, within 10 days, any reasons that might establish that the failure to perform had been due to reasons beyond the contractor's control and without his fault or negligence.

The contractor responded on March 7, 1970. The answer given the Government reads, in part, as follows:

> When we first quoted this job there were three names of companies given who were qualified to do the rubber bonding on this job. I got a price to quote from one of them on the telephone. After I received the contract I found that one of the companies named on the print was out of business and the other two felt that the job was too small to bother with.
>
> The problem is that we had difficulty finding someone who would agree to do the bonding. After we found a company to do the bonding we were held up on the molds for 12 weeks before the bonding could begin. [ASBCA Record, Rule 4 Doc. No. 5.]

The letter goes on to recite that, but for the problem with the molds, delivery would have been accomplished sometime in January and that "[a]s of now the bonding is being done and we will ship this job by the end of March." The contracting officer did not consider the contractor's response to be sufficient to preclude termination for default; by letter of March 20, 1970, the contract was so terminated.

II. Discussion

A. Plaintiff's Claim: In its decision the Board said that in order for the contractor to escape the consequences of a default termination it would have to be shown that the failure to deliver had been due to causes beyond the control and without the fault or negligence of itself or its subcontractor. In the Board's view of the case this burden had not been met. The cause of the default, as the Board saw it, was the subcontractor's delay, and as to this cause it was observed that "the record contains neither detailed explanation of its [the subcontractor's] delay nor a showing that it was due to any cause other than Alpha's technical inability to complete the work on time." Such a cause, said the Board, "is one for which both appellant and its subcontractor must take responsibility."

The Board was correct both in its view of the law as well as in its application to the facts of the case. The default clause in plaintiff's supply contract gave the Government the right to terminate the contract either in whole or in part if the contractor failed to make delivery of the supplies within the time specified in the contract or any extension thereof. The existence of "excusable" causes for delay or nondelivery would, of course, require converting a default termination into a termination for the Government's convenience (see paragraph (e) of the "Default" clause, supra note 8). However, subcontractor delays of the sort experienced here do not excuse a prime contractor's delinquencies. See Poloron Products, Inc. v. United States, 126 Ct. Cl. 816, 828, 116 F. Supp. 588, 595 (1953), and Putnam Mills Corp., ASBCA No. 5548, 60-1 BCA ¶ 2511. Indeed, plaintiff does not challenge the Board's decision on this ground. Instead, the arguments that are raised look not to excuse the contractor's delivery failure; rather, they seek to place the responsibility for the default squarely upon the Government's shoulders.

Chief among the contentions that are made in this regard is the argument that where a solicitation enumerates, as the one here involved did, the names of Government-approved manufacturing sources, then such enumeration is, in effect, a representation by the Government that the named sources are ready, willing and able to do the work contemplated by the contract and to accomplish the same within the required time frame. Thus, the argument continues, when such representations prove to be wrong, as was said to have been the case here and the Government, at the same time, fails to allow the contractor sufficient time to qualify a new source of supply, then, under these circumstances, it is the Government that stands in breach of the contract and the contractor is exonerated from any responsibilities flowing from his failure to deliver.

The argument that is made has validity--but only to a limited extent and that to a degree insufficient to carry the day for plaintiff. Where the Government issues a contract drawing upon which are listed the names of Government-approved sources of supply, one could readily accept the proposition that such a listing constitutes a representation, i.e., a warranty by the Government, that the listed suppliers have the ability to do the work contemplated by the contract. Indeed, the common sense of the situation could tolerate no less a construction of such contract statements. But it is quite another matter to say, as plaintiff also does, that in addition to guaranteeing the abilities of the listed manufacturers to perform, the Government is also warranting their willingness to do so and within the time period contemplated by the contract.

In Paccon, Inc. v. United States, 185 Ct. Cl. 24, 33, 399 F. 2d 162, 168 (1968), the court expressed the general rule that a warranty which would place upon the shoulders of the United States the burden of guaranteeing the performance of third parties without regard to any fault of its own is an unusual assumption of responsibility and

one that "should not be inferred from ambiguous, inconclusive, or general discussions." The admonition declared in Paccon fits this situation even more convincingly. The contract language used here (previously quoted herein at p.) simply does not lend itself to the interpretation that plaintiff urges nor are there any attendant circumstances detailed in the proof from which the equivalent implication might justifiably be drawn. Fairly construed, the language that was used in the contract drawing promises only that those named can do the job; not that they will. Moreover, it would be highly unusual, to say the least, to conclude that the United States, having once approved a given supplier's technical qualifications, should thereafter be considered as having placed itself in the position of guaranteeing that supplier's willingness to undertake the work whenever a demand for the service might materialize. The realities of business life absolutely negate any such assumptions. In short, it would be nothing less than arbitrary to endorse the interpretation plaintiff espouses. On this record, no breach of contract may be imputed to the United States simply because the manufacturers that it had listed as approved sources of supply declined to undertake the work for which they had been found qualified.

Given the conclusion stated it must follow that the obligation to locate a supplier remains where that sort of obligation has traditionally rested--upon the contractor. Of course, in the circumstances detailed here, where the Government has specified that the metal-to-rubber bonding work may only be done by an approved source and where all the approved sources are found to be unavailable, the contractor would be entitled to time extensions sufficient to permit the locating of a new supplier and the securing of the Government's necessary approval. And it is precisely this point--the matter of sufficient time--which is the focus of the second part of plaintiff's chief argument.

The contention is made that since Government approval of the bonding manufacturer was not only a contract requirement but also an unavoidable prerequisite in this case (because of the unavailability of all previously approved manufacturers), then the termination of the contract before the contractor was in a position to submit work for approval was plainly a breach of contract.

This contention cannot be accepted. The argument completely overlooks the fact that the contract termination, though indeed effected before approval had been accomplished, occurred after plaintiff had failed to meet the delivery date that had been promised. To ignore this critical fact is, in essence, to say that the Government's contract reservation of a right of approval carries with it the correlative duty to hold open a contract without regard to all intervening delays until such time as the contractor is in a position to tender a product for approval. Clearly, there is no such obligation. On the contrary, contractor-caused delays in timely submitting a product for approval expose the situation to the same risks of

termination as would attend the failure to make timely deliveries once approval had been given. In either case, the sufficiency of the contractor's performance is to be measured by the dates specified in the contract; where delinquencies occur which are not excusable, then termination for default is within the Government's rights.

To be sure, the rule would be otherwise if the delays resulted from circumstances with respect to which the Government bore the risk. Thus, for example, if it had been the case here that the Government had selected the subcontractor or had vouched for the competence of the one that was selected, then delays attributable to that subcontractor's technical problems (in doing the work) would remain within the Government's sphere of responsibility. However, neither of these conditions were met here. The subcontractor whose delays ultimately brought about plaintiff's default was chosen by plaintiff alone. In short, in this situation the attendant risks remain with the plaintiff.

According to the contract's terms, if the subcontractor is the source of delay, then the prime contractor may be excused only if the reasons for the delay are beyond the control and without the fault or negligence of either the contractor or its subcontractor. Manifestly, that was not shown to be the case here. The record is virtually barren of any pertinent information on this score. Nothing more appears save the fact that the subcontractor had experienced some technical problems in doing the work. There is no account either of the nature of these problems nor the reasons for them. Such being the state of the proof and given the rejection here of plaintiff's "warranty" argument, it must follow that termination before approval had been given was not erroneous.

A second argument that is raised against the correctness of the default termination is the contention that the termination was improper because it occurred at a point when plaintiff had substantially performed the contract.

Substantial performance, as that term is used here, refers to the equitable doctrine that guards against forfeiture in situations where a party's contract performance departs in minor respects from that which had been promised. Building and construction contracts offer the most frequent examples of its application though clearly the doctrine has its place in contracts for supplies as well. See, e.g., Radiation Technology, Inc. v. United States, 177 Ct. Cl. 227, 366 F. 2d 1003 (1966), and LeRoy Dyal Co. v. Allen, 161 F. 2d 152 (4th Cir. 1947).

In resisting the application of the substantial performance doctrine to the facts of this case, the Government makes the argument that that doctrine can have application in a supply contract situation only if the contractor has delivered the goods on schedule. In other words, for the Government, the matter of the substantiality of a contractor's performance is limited simply to the question of the conformity of delivered supplies.

Surely this is too narrow a view to endorse, at least for a contract of the sort here involved. It has long been the rule that, save in situations where "time is of the essence," the timeliness of a contractor's performance is as much a factor to be considered in evaluating the substantiality of that performance as are all other factors which might bear upon the adequacy of completeness of that performance. 3 A. CORBIN, CONTRACTS § 713 (1960). In an early case, Beck & Pauli Lithographing Co. v. Colorado Milling & Elevator Co., 52 F. 700, 703 (8th Cir. 1892), it was said that "in contracts for work or skill, and the materials upon which it is to be bestowed, a statement fixing the time of performance of the contract is not ordinarily of its essence, and a failure to perform within the time stipulated, followed by substantial performance after a short delay, will not justify the aggrieved party in repudiating the entire contract * * *." Essentially the same view applies today. See RESTATEMENT (SECOND) OF LAW, CONTRACTS 2d § 255, Comment c at 598-99 (Tent. Drafts Nos. 1-7, 1973).

But notwithstanding the application of a different or more liberal rule than that being urged by the Government, the conclusion must nevertheless be reached that the substantial performance doctrine is inapplicable here. It is enough to defeat plaintiff's position to point out that, as of March 2, 1970 (the date the contracting officer wrote to inquire concerning the state of performance), the contractor's then estimated time to completion involved a requirement for approximately 30 additional days. Whether this additional required time be viewed in the context of the delivery period which the Government had initially contemplated, namely 90 days, or whether it be measured against the sum of the extensions that it had thrice granted the contractor, amounting in all to about 160 days, in neither context would a further delay of 30 days be excusable in the sense that the contractor had substantially complied with the delivery schedule. Moreover, to the additional time which the contractor had projected, there would have to be added also whatever additional testing time the Government might require in order to assure itself that the product, as offered, met the contract requirements. Thus, in net result, the delays would extend even beyond the contractor's own time estimate.

Admittedly, the purpose of the substantial performance doctrine is to avoid the harshness of a forfeiture. By the same token, however, the doctrine should not be carried to the point where the non-defaulting party is compelled to accept a measure of performance fundamentally less than had been bargained for. Substantial performance "is never properly invoked unless the promisee has obtained to all intents and purposes all benefits which he reasonably anticipated receiving under the contract." In Re Kinney Aluminum Co., 78 F. Supp. 565, 568 (S.D. Cal. 1948). Given this stated restriction, it would have to be concluded that the extent of the further delay that was anticipated by the contractor goes beyond what the Government could justifiably be required to accept in the name of substantial performance.

The foregoing is not meant to suggest that every delay that might be judged to be extensive when viewed against the time requirements of the contract as a whole is, by itself, sufficient to preclude a finding of substantial performance. To the contrary, there might well be situations where performance has been brought to a point sufficient to permit the Government the satisfactory use of the product and thereafter a delay occurs with respect to a remaining minor item of work that has the effect of making 100 percent completion impossible for a period of time. Under these circumstances a delay even longer than that experienced here would not preclude a finding that substantial performance had taken place. So long as the product in its then existing condition could be put to satisfactory use by the Government, then substantial performance has been achieved. However, there is nothing in this record that would permit the conclusion that such was the state of affairs here when the contract was terminated. No more may be inferred in this situation save that performance involving substantial value had taken place. But that is not substantial performance.

There is a third argument made which is to the effect that it was error for the Board to have accepted the validity of the contract's delivery schedule because, according to plaintiff, that schedule reflected contractor-requested time extensions that had been induced by Government coercion, by threats to terminate the contract and by false representation.

There is absolutely no support for these contentions. All that the record reveals is that, with respect to the first two extensions that were sought, plaintiff relied upon the DCASR representative's advice to cite "machining difficulties" as the reason for needing more time. As to this reason, certainly a more accurate description of plaintiff's then-current problems might have been given. However, it is by no means made clear how the use of this suggested reason, in lieu of some other, operated to plaintiff's detriment in any way. The fact of the matter is that the initial two extensions that were requested by plaintiff were granted, that a later extension specifically requested because of bonding problems was likewise granted and that, with respect to all three time extensions, the amount of time that was asked for in each reflected plaintiff's own expected delivery estimations. There is not the remotest proof in this record of any Government coercion or misdealing with plaintiff sufficient to invalidate the enforceability of the contract's delivery schedule.

A final argument that is raised makes the point that, in sustaining the default termination, the Board entirely overlooked the Government's legal obligations to assist contractors participating in small business set-aside procurements. No citations of authority are offered in support of this point, though clearly the court's rules demand this. See Rule 163 (b)(3)(ii).

It is the function of the attorney and not that of the court to point out errors with specificity; this rule is the same whether the error claimed is one of fact, see Algonac Mfg. Co. v. United States, 192 Ct. Cl. 649, 661, 428 F. 2d 1241, 1248 (1970), or of law, see Ala Moana Boat Owners' Ass'n v. State, 434 P. 2d 516, 518 (Hawaii 1967). Since the proposition claimed by plaintiff is not one so generally understood as to require no supporting citation, no more need be said on the point raised save that plaintiff has not sustained its burden of showing that the Board was wrong in doing what it did.

With respect to the factual side of the case, there are a number of findings that are challenged for a claimed lack of substantial evidence. However, there is no need to take up these challenged findings individually for even if plaintiff were found to be right in some or all particulars the outcome would yet remain the same. On the few critical points in this case, the evidence is not equivocal or subject to debate: there was no warranty by the Government with respect to the availability of the suppliers that it had listed on the contract drawing; the default that occurred here was caused by a subcontractor selected by plaintiff and that default was ascertained by an assessment of performance that had been measured against a delivery schedule that had been established by plaintiff. Since none of the facts which plaintiff challenges would alter these basic points in any way, all further consideration of the challenged facts is irrelevant.

It follows from the foregoing discussions that the Board's decision must be recognized to be the final decision in the matter.

CONCLUSION

For the reasons given herein (i) plaintiff's motion for summary judgment is denied and its petition is dismissed; (ii) the Government's cross-motion for summary judgment is granted.

c. Direct Appeal by Sub

WESTINGHOUSE ELECTRIC CORP.

ASBCA No. 25,685 (1982)

OPINION BY ADMINISTRATIVE JUDGE BURG ON MOTION TO DISMISS

This is an appeal by Curtiss-Wright Corporation (Curtiss-Wright) in the name of its prime contractor, Westinghouse Electric Corporation, Plant Apparatus Division (Westinghouse) from the refusal of the contracting officer to issue a final decision. The dispute concerns the allowability of certain legal expenses included in Curtiss-Wright's General & Administrative pool under a cost-plus-incentive-fee portion of a subcontract between Curtiss-Wright and Westinghouse under two cost-plus-fixed-fee prime contracts between Westinghouse and the Navy for submarine nuclear propulsion systems.

Contracts N00024-72-C-5513, effective 5 May 1972, and N00024-74-C-5010, effective 25 July 1973, are cost-plus-fixed-fee contracts for purchase of nuclear propulsion systems between the Navy and Westinghouse. By purchase order 56-HT-15255-P, dated 28 October 1976, Westinghouse entered into a subcontract with Curtiss-Wright for the manufacture, assembly, inspection and delivery of ten steam generators and two T-shells (large forgings) for use in the construction of the nuclear propulsion system. The T-shells were a sole-source procurement from Ladish Company (Ladish). Paragraph D of Attachment O to the purchase order entitled "Terms and Conditions Applicable to T-Shell Procurement from Ladish Company" provided in part, as follows:

> D. The following clause entitled "Disputes Regarding Cost Accounting Standards Article" applies to T-Shells:
>
> DISPUTES REGARDING COST ACCOUNTING STANDARDS ARTICLE
>
> (a) If the Buyer or the Government makes a decision on any question of fact relating to Seller's or a subcontractor's compliance with an applicable Cost Accounting Standard, rule, or regulation of the Cost Accounting Standards Board said decision shall be binding on the Buyer and Seller with respect to such question under this Order, unless an appeal is successfully taken pursuant to (b) and (c) above [sic].

(b) If the Seller disagrees with any such decision of the Buyer or the Government and if the Buyer in its sole discretion elects to appeal from that decision pursuant to the terms of the "Disputes" clause in the Buyer's prime contract with the Government, Seller may, at its own expense, be associated to the extent permitted by law with the Buyer in the prosecution of said appeal, provided that such association is through and under the coordination of the Buyer. If the Buyer costs for prosecuting such an appeal are not recoverable under the prime contract, Seller shall assume any such reasonable and documented expense.

(c) Furthermore, if the buyer, in its sole discretion elects not to appeal, Seller shall, to the extent permitted by law, have the right of an appeal to the Secretary, or his duly authorized representative within thirty (30) days from the date of the Buyer's receipt of a copy of the Buyer's or the Government's decision as follows. Any such appeal by Seller shall be made only after prior written notice to the Buyer of Seller's intention to appeal, shall be made in the Buyer's name, but at Seller's expense, and shall be subject to the provisions of the "Disputes" clause in the Buyer's prime contract with the Government.

(d) The decisions of the Secretary or its duly authorized representative shall be final and conclusive and binding upon the Buyer and Seller unless determined by a Court of competent jurisdiction to have been fraudulent, capricious, arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. The expenses of any appeal to such a court shall be at the expense of the Seller.

(e) The Buyer agrees to provide to Seller a copy of any such Buyer or Government decision within ten (10) days after the Buyer receipt of such a decision. If this Buyer or Government decision is not accompanied by a statement by the Buyer [sic] that the Buyer will prosecute an appeal to the Secretary or his duly authorized representative pursuant to (b) above, Seller may proceed per (c) above.

(f) Pending final decision pursuant to the above (a) or (d), Seller shall proceed diligently with the performance of this Order in accordance with the Buyer or Government decision.

(g) This Article does not preclude consideration of questions of law in connection with the decision provided in Paragraphs (a) and (d) above.

(h) The rights and obligations of the Buyer and the Seller under this Article entitled "Disputes Regarding Cost Accounting Standards Article" shall survive completion of, and final payment, under this Order.

(i) Nothing herein shall grant to the Seller a direct right to obtain a decision of the Buyer or the Government or a direct right of appeal to the Secretary or his duly authorized representative.

Inclusion of some disputes clause had been initiated by Ladish in 1973 out of an abundance of caution because of inclusion in its purchase orders of the then new Cost Accounting Standards clause. Ladish was concerned that, in the event it should disagree with a subsequent determination that its price be reduced because of noncompliance with Cost Accounting Standards, absent such type of clause its only recourse would be against Curtiss-Wright. Ladish felt that would be wholly undesirable and "not even reasonable since the point at issue would have been raised by the Government who is not a party to the contract between us." The clause proposed by Ladish was very similar to the clause set forth above. The primary difference was that where the clause mentions "Buyer or the Government" Ladish had proposed "Contracting Officer" and where the clause in the other instances uses "Buyer" Ladish had proposed "Curtiss-Wright." It was clear that, as proposed by Ladish, the term "Seller" referred to Ladish.

At the same time that Ladish was negotiating with Curtiss-Wright it was also negotiating with Babcock and Wilcox concerning the same matter. Additionally, Curtiss-Wright was negotiating purchase orders with the Machinery Apparatus Operation of the General Electric Company for supply of steam generators for Naval nuclear propulsion systems which also involved procurement of forgings from Ladish. The latter purchase order, No. MAOB-494, was executed 28 March 1974 after extensive negotiations between Ladish, Curtiss-Wright and appropriate personnel from General Electric. (Affidavit of Albert J. Kovell filed 21 April 1982) It was during these negotiations that the General Electric representatives agreed the Disputes clause would be incorporated in Purchase Order MAOB494 with the changes in language noted above. "Contracting Officer" was changed to "Buyer or the Government" and "Buyer" in place of "Curtiss-Wright" so that any disputes concerning decisions on cost accounting standards by the Government or General Electric would be covered by the clause and appeal from such decisions could be made under the prime contract. The changes noted above made the clause consistent with the other portions of the

purchase order which denoted General Electric Machinery Apparatus Operation as the "Buyer" and Curtiss-Wright as the "Seller". Attachment 0 to Purchase Order 56-HT-15115-P involved in this appeal was patterned after the General Electric Purchase Order and included an identical Disputes clause concerning Cost Accounting Standards. Curtiss-Wright understood Westinghouse to be the "Buyer" and Curtiss-Wright the "Seller" for the entire Purchase Order including this particular clause. Article II "Abbreviations and Definitions" (at 3 of 10) of the Purchase Order identified Westinghouse Plant Apparatus Division (WPAD) as the "Buyer" and Curtiss-Wright Corporation as the "Seller." No variation was noted for Attachment 0. Article VIII.B.4 "Pricing" (at 6 of 10) of the Purchase Order provides:

> For T-Shells procured under this order, the Terms and Conditions of purchase specified in Attachment 0 apply.

Attachment 0 listed a number of clauses and used a system of footnotes and asterisks to indicate that certain clauses in Sections A, B and C applied to Curtiss-Wright only "and are not required to be passed down to Ladish Co.", applied only to Ladish, or did not apply to Ladish Company. Section D, the disputes clause involved in this appeal, contained no notation or asterisks. We conclude that reference to "Buyer" and "Seller" in Attachment 0 were to Westinghouse Plant Apparatus Division and to Curtiss-Wright, respectively. In reaching this conclusion we are cognizant of submittals by the Government that Curtiss-Wright recognized that only Ladish was covered by the clause originally proposed. However, the inference is greater that Curtiss-Wright decided to and did negotiate to cover itself as well as Ladish. Otherwise the language need not have been changed.

Prior to execution of Purchase Order 56-HT-15225-P, on 12 October 1976 Westinghouse submitted the following letter to the Government:

> Assistant Naval Sea Systems Command
> Technical Representative - Pittsburgh
> Post Office Box 1047
> Pittsburgh, Pennsylvania 15230
>
> Subject: S6G STEAM GENERATORS AND LONG LEAD MATERIAL PROCUREMENT COST PLUS INCENTIVE FEE (CPIF) TERMS AND CONDITIONS APPLICABLE TO THE PROCUREMENT OF T-SHELLS FROM LADISH COMPANY (SOLE SOURCE) CONSENT REQUEST
>
> Inquiry: WPAD-HT-RAM-15225
> Prospective Suppliers: Babcock & Wilcox Company (B&W)
> Curtiss-Wright Corporation (CWC)

Dear Sir:

PURPOSE

ANSTR consent is requested for the Cost Plus Incentive Fee (CPIF) terms and conditions as presented in Attachment 1 hereto. These terms and conditions will be applicable to the T-Shell procurement from Ladish Company (sole source) in any resultant purchase order(s) to either Babcock & Wilcox Company (B&W) or Curtiss-Wright Corporation (CWC) for the subject equipment.

DISCUSSION

In April of this year, WPAD received bids from B&W and CWC for the procurement of the subject equipment. Both bidders identified Ladish Company as the "sole source" for the procurement of T-Shell forgings in the long lead material portion of their respective proposals. Additionally, both identified that they were experiencing difficulty with Ladish, in that Ladish would not agree to the submittal of a DD-633 and Cost Data, as required by Public Law. Following diligent and prolonged discussions with Ladish management by all parties concerned, Ladish agreed to submit the required data, noting that it would only accept an order from either B&W or CWC on a "Cost Plus" basis. This being the case, WPAD initiated negotiations relative to the terms and conditions which would be applicable to the T-Shell portion of any resultant purchase order. These negotiations have been completed and this letter advises ANSTR as to the results of same.

This letter is written in advance of the procurement recommendation regarding the subject equipment in order to provide ANSTR with adequate time to review the negotiated (CPIF) terms and conditions applicable to T-Shell procurement from Ladish Company in any resultant purchase order(s) to either supplier prior to your receipt of the placement recommendation.

Attachment 1 to this letter presents the proposed "Terms and Conditions Applicable to the T-Shell Procurement From Ladish Company", which will become an attachment to any resultant purchase order with either B&W or CWC to which it applies. An explanation of these terms and conditions is presented in Attachment 2. All mandatory pass-downs have been accepted by Ladish.

RECOMMENDATION

WPAD recommends acceptance of the terms and conditions presented in Attachment 1 based on the explanations contained in Attachment 2.

SUMMARY

ANSTR consent is requested for the Cost Plus Incentive Fee (CPIF) terms and conditions as presented in Attachment 1 hereto. These terms and conditions will be applicable to the T-Shell procurement from Ladish Company (sole source) in any resultant purchase order(s) to either B&W or CWC for the subject equipment.

On page 3 of the letter under a space provided for "Contracting Officer's Action" appears in handwriting "Consent granted" and the signature of P.E. Salm dated 10-18-76. In its Answer the Government admits consenting to such terms and conditions. (Answer #46). In his affidavit filed with the Board on 16 April 1982, Mr. Salm indicated that in connection with his duties he had reviewed and consented to the terms and conditions proposed by Westinghouse in connection with procurement of T-Shells. Consent was granted because Ladish, the sole source supplier for T-Shell forgings, would not submit the required cost and pricing data unless it was granted a cost type contract which included the special disputes clause involved in this appeal. Mr. Salm intended the clause apply only to Ladish.

The purchase order, issued on 28 October 1976, contained the terms and conditions approved by Mr. Salm as attachment "0". On 10 November 1976 the Navy granted consent to the purchase order (Answer #47). The consent contained the following language:

> 2. It should be understood that no review has been made of the terms and conditions of the subcontract, and neither approval nor disapproval thereof is made inasmuch as the relative responsibilities and rights of the Government are determined by the terms of the prime contracts.

This consent to placement of the subcontract was required under the Westinghouse prime contract. Such approval by the responsible contracting officer. Mr. William Mohney, did not constitute his approval of the terms and conditions.

A major portion of Curtiss-Wright's Nuclear Facility business during the years 1969-1980 was the fabrication of large metal components for use in the construction of nuclear propulsion plants for Naval surface ships and submarines. These components were supplied under subcontracts with either Westinghouse or a second prime contractor, General Electric Company. In May 1976 Curtiss-Wright filed a law suit against General Electric Company arising out of disputes under such subcontracts, Curtiss-Wright Company v. General Electric Company, Civil No. 76-794 (D.N.J.), (New Jersey litigation), which litigation is still pending. Appellant has included legal fees connected with that litigation in the General and Administrative (G&A) expense pool of its Nuclear Facility. This is consistent with the Disclosure Statement which Curtiss-Wright was required to file under 4 C.F.R. § 351.140 (Cost Accounting Standards disclosure statement) which indicated "professional services (consultant fees)" were a part of that G&A expense pool.

On 28 June 1979, the Defense Contract Audit Agency issued Audit Report 6201-9A179004-273 verifying the costs Curtiss-Wright had incurred on the cost plus incentive fee (T-Shell) portion of the purchase order. That audit report questioned an amount of G & A overhead attributable to the legal expenses incurred in the New Jersey litigation, indicating such costs were not considered allowable overhead expense for 1977 and 1978. Curtiss-Wright had previously been notified that such legal fees had been included in cost proposals for other 1977 and 1978 subcontracts in non-compliance with CAS 405.5(a) (Audit Reports Nos. 6361-35-7-0115 and 6201-35-8-0233 dated 17 August 1977 and 29 August 1978, respectively.) Each of these reports was entitled "Determination of Potential CAS Noncompliance." Thereafter, on 23 July 1979, Westinghouse requested Curtiss-Wright to delete such costs from costs charged to the T-Shell subcontract. Curtiss-Wright refused, and an exchange of telegrams about this matter culminated in a formal request on 8 April 1980 that Curtiss-Wright be permitted to prosecute an appeal to this Board concerning this matter in the name of Westinghouse. When no reply was forthcoming, the request was repeated by letter dated 21 May 1980. Additional correspondence ensued, until by letter of 12 September 1980 Westinghouse refused to allow Curtiss-Wright to appeal in the name of Westinghouse.

By letter of 14 November 1980 Curtiss-Wright requested a final decision from a contracting officer with the Naval Sea Systems Command as to the allowability of the disputed legal fees. By letter dated 16 December 1980 the contracting officer responded to Curtiss-Wright's request indicating that:

> As your dispute is with Westinghouse and there exists no privity of contract between Curtiss-Wright and the Government, your request for a Government decision is inappropriate. . . .

On 23 December 1980 Curtiss-Wright, in the name of Westinghouse, filed this appeal from the contracting officer's refusal to issue a final decision. The Government moved that this Board dismiss the appeal for lack of jurisdiction.

The Government argues that Curtiss-Wright has no right to appeal against the Navy. However, as we view the appeal, Curtiss-Wright has not done so. It has appealed in the name of its prime contractor, Westinghouse. Thus, the issue which we must decide is whether we have jurisdiction to hear such appeal where the prime contractor has refused to consent to appeal of this specific dispute. We must note that the dispute is founded on a cost disallowance by the Government with apparent concurrence in result by Westinghouse. Westinghouse has been promised reimbursement of any costs it might incur in defending a suit brought against it by Curtiss-Wright in an appropriate court should we conclude we do not have jurisdiction to hear this appeal. We further conclude that the Westinghouse refusal to consent to an appeal to the Board was apparently at the insistence of the Government. In any event, the necessary permission was refused. Therefore, Curtiss-Wright used an alternative approach and appealed in its prime's name pursuant to the Disputes regarding Cost Accounting Standard clause set forth in Attachment 0 of the purchase order.

The Government argues that utilization of the clause can only be triggered by Ladish. We have set forth in detail the development of Attachment 0 and the clause involved in this appeal. While it arose from the insistence by Ladish, a sole source subcontractor for a cost reimbursement type contract, the Attachment 0, as developed, was negotiated by Curtiss-Wright and contained specific notations of provisions which applied only to Curtiss-Wright or to Ladish. No such notations appeared for the clause in question. Further, the terms "Seller" and "Buyer" were specifically defined by the contract to apply to Westinghouse and to Curtiss-Wright, respectively. The Government's argument that the heading of Attachment 0, "Terms and Conditions to T-Shell Procurement from Ladish Company" and the language of Section D that the "following clause . . . applies to T-Shells" limit the clause to Ladish do not require such conclusion. There is no limitation to direct costs of Ladish and this dispute involves indirect costs applied to the T-Shell procurement.

The parties are also in disagreement whether the Government consented to the inclusion of the provision in the contract between Westinghouse and Curtiss-Wright. This is a factual matter. The parties concluded that an oral hearing was unnecessary and elected to submit evidence to support each position on the record. We have recited relevant evidence from such submittals and conclude that under the contract involved in this appeal, the Government consented in advance that Curtiss-Wright could appeal a dispute involving cost accounting standards in the name of the prime, Westinghouse, under the contract disputes clause.

The Government admits it consented to Westinghouse placing a subcontract with special terms and conditions to apply to Ladish, by so indicating on the letter from Westinghouse dated 12 October 1976. We see no such limitation to its consent. It consented to inclusion of the clause referencing "seller or a subcontractor" as distinguished from "Buyer or the Government." The affidavit from the individual who gave such consent indicates he never intended to allow Curtiss-Wright a direct right of appeal. We have already indicated why we do not consider that matter relevant since we have the appeal in the prime's name. Even if the Government only intended to permit appeal concerning Cost Accounting Standards problems of Ladish, the intent was subjective. The contract language clearly states to the contrary. We, therefore, conclude that the Disputes clause in Attachment 0 pertains both to Curtiss-Wright and any subcontractor involved in the T-Shell procurement from Ladish.

Having concluded the clause does pertain to Curtiss-Wright, we next consider whether this appeal concerns a "question of fact relating to seller's or a subcontractor's compliance with an applicable Cost Accounting Standard, rule, or regulation of the Cost Accounting Standards Board" [emphasis added] so as to invoke that clause. The Government argues that the disallowance in the present dispute is an issue only under the Defense Acquisition Regulations (DAR) cost principles, Section XV, Part 2 and does not concern any cost accounting standard question. All cost disallowances are pursuant to DAR. Both by statute and regulations compliance with cost accounting standards is incorporated into DAR. Therefore, the Government can always disallow a cost "pursuant to DAR Section XV." However, DAR § 15-201(iii) specifically requires that costs in a contract subject to cost accounting standards must be accumulated in compliance with such standards in order to be allowable. Here, Curtiss-Wright filed its disclosure statement in 1972 indicating professional fees were included in its G&A expense pool.

Since there is no final decision of a contracting officer, Curtiss-Wright has appealed in the name of Westinghouse from failure of the contracting officer to issue a final decision. Various Government audit reports have informed Curtiss-Wright of a potential non-compliance with CAS 405 (accounting for unallowable cost) arising from the costs here disallowed. Curtiss-Wright has also alleged problems concerning compliance with CAS 401 (Consistency in estimating accumulating and reporting costs), 402 (Consistency in allocating costs incurred for the same purpose), and 410 (allocation of business unit general and administrative expenses to final cost objective) should the disallowance be sustained. The questioned cost is an allocated portion of an expense the Government considers unallowable pursuant to DAR § 15-205.31. The Government argues that we must first consider allowability before considering any allocation problem. We do not agree. A disallowance of cost would have an effect on Curtiss-Wright's allocation of such costs and, therefore, invokes the various Cost Accounting Standards. The Government, itself, admits

that the Cost Accounting Standards concern allocation (but not allowability) of costs. We, therefore, conclude that this dispute does relate to compliance with several cost accounting standards. We reach such conclusion based on the language of the clause emphasized above. While we recognize that the problem concerning compliance with various Cost Accounting Standards only occurs if we determine the cost in question unallowable we consider this "related to" the Cost Accounting Standards. The parties could have used more limiting language such as "arising under" to achieve a more limited result. They did not do so.

In the 16 April 1982 supplemental Rule 4 submittal in lieu of an oral hearing, the Government included an affidavit of Harry R. Van Cleve to support its position that this dispute is not related to a cost accounting standard. On 3 May 1982 appellant filed its objection to inclusion of such affidavit in the Rule 4 file. The Government filed its memorandum opposing the appellant's position on 13 July 1982. While a question of timeliness might be raised, the Board will receive such memorandum. In it, respondent argues that the affidavit is presented because Mr. Van Cleve, as General Counsel to the Cost Accounting Standards Board, prepared and assisted in the preparation of Cost Accounting Standards and is an expert in the field of cost accounting. Both parties were afforded an opportunity to present evidence at an oral hearing and chose not to do so. (See Memorandum of Telephone conference call dated 22 February 1982 submitted to the parties 23 February 1982.) Expert testimony of the type submitted by the Government would be more appropriate at an oral hearing so that the expert could be subject to cross examination. However, the Board does not consider this sufficient to reopen the record since we have previously indicated that it was the Cost Accounting Standard Board's responsibility to issue, modify or amend Cost Accounting Standards and this Board's responsibility to interpret the standards. See Lockheed Corp. et al, ASBCA No. 22451, mot. rec. den. 80-2 BCA ¶ 14,509; McDonnell Douglas Corp., ASBCA No. 19482, mot. recon. den. 80-2 BCA ¶ 14,508. Moreover, we consider it our responsibility not that of others to determine what constitutes a "dispute" since this is what cloaks us with jurisdiction. This pertains to a Cost Accounting Standards as well as other disputes. Nor are we persuaded as to the relevancy of such affidavit. Cf. Honeywell, Inc. v. United States, Ct. Cl. No. 443-79C, decided 9/23/81, affirming 79-1 BCA ¶ 13,652. We consider the affidavit of little probative value to the matter before us.

The other question raised concerning such right of appeal is whether a prime contractor can agree that a subcontractor can appeal in its name in advance of a dispute. The clause involved in this appeal provides in subsection (c):

> (c) Furthermore, if the Buyer, in its sole discretion elects not to appeal, Seller shall, to the extent permitted by law, have the right of an appeal to the Secretary, or his duly authorized represen-

> tative within thirty (30) days from the date of the Buyer's receipt of a copy of the Buyer's or the Government's decision . . . .

We see no reason why parties cannot agree in advance that, in the event of a specific type of potential dispute, the subcontractor could appeal in the name of its prime. We are dealing with a tailor-made provision, negotiated between the parties and consented to by the Government, that in the event a dispute arose concerning compliance with a cost accounting standard Curtiss-Wright could appeal at its own expense in the name of Westinghouse following written notification to Westinghouse. Curtiss-Wright complied with the notice requirement. The fact that a prime contractor might not consider a claim justified does not destroy a subcontractor's right to appeal in the name of its prime. We have held it is sufficient if the prime acknowledge that if the Government is liable to the contractor, he will be liable to the subcontractor. Cf. TRW, Inc., ASBCA No. 11373, 66-2 BCA ¶ 5847, recon. den. ¶ 5882. The prime contracts between Westinghouse and the Navy are cost-plus-fixed-fee contracts and there is no indication that the Government would not be ultimately responsible for amounts Westinghouse owe Curtiss-Wright. To the contrary, the Government has even agreed to reimburse any cost incurred by Westinghouse for court litigation should we conclude we do not have jurisdiction. The cost involved in this appeal resulted from disallowance of a portion of the progress payments requested by Curtiss-Wright from Westinghouse pursuant to the cost reimbursable portion of its subcontract. While in TRW, Inc., supra, the prime consented to the subcontractor bringing the suit at the time the dispute arose, we see no reason why such agreement could not be made in advance with consent of the Government. We have already indicated the basis for our conclusion that the Government did consent. Therefore, permission to appeal was neither required nor could it be withheld when the specific dispute arose.

In summary, we conclude that this Board has jurisdiction to hear and decide the dispute concerning the allowability of the costs here in question. The Government's Motion to Dismiss this appeal is denied.

Section 4. Federal, State and Local Taxes

U.S. v. NEW MEXICO

No. 80-702 (1982)

U.S. Supreme Court

JUSTICE BLACKMUN delivered the opinion of the Court.

We are presented here with a recurring problem: to what extent may a State impose taxes on contractors that conduct business with the Federal Government?

I

A

This case concerns the contractual relationships between three private entities and the United States. The three agreements involved are typical in most respects of management contracts devised by the Atomic Energy Commission (AEC), now the Department of Energy (DOE). Like many of the Government's contractual undertakings DOE management contracts generally provide the private contractor with its costs plus a fixed fee. But in several ways DOE agreements are a unique species of contract, designed to facilitate long-term private management of government-owned research and development facilities. As the parties to this case acknowledge, the complex and intricate contractual provisions make it virtually impossible to describe the contractual relationship in standard agency terms. See App. 196-197; Hiestand & Florsheim, The AEC Management Contract Concept, 29 Federal B.J. 67 (1969). While subject to the general direction of the Government, the contractors are vested with substantial autonomy in their operations and procurement practices.

The first of the contractors, Sandia Corporation, was organized in 1949 as a subsidiary of Western Electric Company, Inc. Sandia manages the government-owned Sandia Laboratories in Albuquerque, N.M., and engages exclusively in federally-sponsored research. It receives no fee under its contract, and owns no property except for $1000 in United States bonds that constitute its paid-in capital. But Sandia and Western Electric are guaranteed royalty-free, irrevocable licenses for any communications-related discoveries or inventions developed by most Sandia employees during the course of the contract, and the company receives complete reimbursements for salary outlays and other expenditures.

The Zia Company, another of the contractors, is a subsidiary of Santa Fe Industries, Inc. Since 1946, Zia has performed a variety of management, maintenance, and related functions at the Government's Los Alamos Scientific Laboratory, for which it receives its costs as well as a fixed annual fee. While Zia owns property and performs private work, virtually none of its property is used in the performance of its contract with the Government, and all of its private activities are conducted away from Los Alamos by a separate work force.

The third contractor is Los Alamos Constructors, Inc. (LACI), since 1953 a subsidiary of Zia. LACI's operations are limited to construction and repair work at the Los Alamos facility. The company owns no tangible personal property and makes no purchases; it procures needed property and equipment through its parent, Zia. And like Zia, LACI receives its costs plus a fixed annual fee from the Government.

The management contracts between the Government and the three contractors have a number of significant features in common. As in most DOE atomic facility management agreements, the contracts provide that title to all tangible personal property purchased by the contractors passes directly from the vendor to the Government. Similarly, the Government bears the risk of loss for property procured by the contractors. Zia and LACI must submit an annual voucher of expenditures for Government approval. And the agreements give the Government control over the disposition of all property purchased under the contracts, as well as over each contractor's property management procedures. Disputes under the contracts are to be resolved by a DOE contracting official.

On the other hand, the contractors place orders with third-party suppliers in their own names, and identify themselves as the buyers. Indeed, the Government acknowledged during discovery that Sandia, Zia, and LACI "may be . . . 'independent contractor[s],' rather than . . . 'servant[s] for . . . given function[s] under the contract[s] (e.g., directing the details of day-to-day . . . operations and the hiring and direct supervision of employees)," and the Government does not claim that the contractors are federal instrumentalities. See Department of Employment v. United States, 385 U.S. 355 (1966). Similarly, the United States disclaims responsibility for torts committed by the contractors' employees, and maintains that such employees have no claim against the United States for labor-related grievances. See 624 F. 2d 111, 116-117 n. 6 (CA10 1980).

Finally, and most importantly, the contracts use a so-called "advanced funding" procedure to meet contractor costs. Advanced funding, an accounting device developed shortly after the conclusion of the Manhattan Project, is designed to provide "up-to-date meaningful records of costs and controls of property," as well as to "speed up reimbursement of contractors." App. 204 (Fifth Semiannual Report of the Atomic Energy Commission (1949)). The procedure allows contractors to pay creditors and employees with drafts drawn on a special bank account in which United States Treasury funds are deposited.

To put the advanced funding mechanism in place, the United States, the contractor, and a bank establish a designated bank account, pursuant to a three-party contract. The Government dispatches a letter of credit to a Federal Reserve Bank in favor of the contractor, making Treasury funds available in the designated account. The contractor pays its expenses by drawing on the account, at which time the bank or the contractor executes a payment voucher in an amount sufficient to cover the draft. The voucher is forwarded to the Federal Reserve Bank. The United States owns the account balance. As a result of all this only federal funds are expended when the contractor makes purchases. If the Government fails to provide funding, the contractor is excused from performance of the contract, and the Government is liable for all properly incurred claims.

Prior to July 1, 1977, the Government's contracts with Sandia, Zia, and LACI did not refer to the contractors as federal "agents." On that date--some years after the commencement of this litigation--the agreements were modified to state that each contractor "acts as an agent [of the Government] . . . for certain purposes," including the disbursement of Government funds and the "purchase, lease, or other acquisition" of property. This was designed to recognize what was described as the "long-standing agency status and authority" of the contractors. Thus it was made clear that Sandia and Zia were authorized to "pledge the credit of the United States," and the Government declared that it "considers all obligations properly incurred" in accordance with the contractual provisions to be Government obligations "from their inception." At the same time, however, the United States denied any intent "formally and directly [to] designat[e] the contractors as agents," and each modification stated that it did not "create rights or obligations not otherwise provided for in the contract."

B

New Mexico imposes a gross receipts tax and a compensating use tax on those doing business within the State. With limited exceptions, "[f]or the privilege of engaging in business, an excise tax equal to four per cent [4%] of gross receipts is imposed on any person engaging in business in New Mexico." N. M. Stat. Ann. § 72-16A-4 (Supp. 1975). In effect, the gross receipts tax operates as a tax on the sale of goods and services. The State also levies a compensating use tax, equivalent in amount to the gross receipts tax, "[f]or the privilege of using property in New Mexico." § 72-16A-7. This is imposed on property acquired out-of-state in a "transaction that would have been subject to the gross receipts tax had it occurred within [New Mexico]." § 72-16A-7(A)(2). Thus the compensating use tax functions as an enforcement mechanism for the gross receipts tax by imposing a levy on the use of all property that has not already been taxed; the State collects the same percentage regardless of where the

property is purchased. Neither tax, however, is imposed on the "receipts of the United States or any agency or instrumentality thereof," or on the "use of property by the United States or any agency or instrumentality thereof." §§ 72-16A-12.1, 72-16A-12.2.

Without objection, Zia and LACI each year paid the New Mexico gross receipts tax on the fixed fees they received from the Federal Government. But the Government argued that the contractors' other expenditures and operations are constitutionally immune from state taxation. In July 1975 the United States therefore initiated this suit in the United States District Court for the District of New Mexico, seeking a declaratory judgment that advanced funds are not taxable gross receipts to the contractors; that the receipts of vendors selling tangible property to the United States through the contractors cannot be taxed by the State; and that the use of Government-owned property by the contractors is not subject to the State's compensating use tax.

The District Court granted the United States summary judgment. Relying on Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954), the court determined that the crucial inquiry is whether the contractors are "procurement agents" for the Government. The court answered that question in the affirmative, noting that the Government "maintains control over the contractors' procurement systems, property management and disposal practices, method of payment of operational costs, and other operations under the contracts." 455 F. Supp. 993, 997(NM 1978). That analysis led the court to identify an agency relationship existing even in the years prior to the 1977 contract modifications. Ibid. The court therefore held that the gross receipts tax cannot constitutionally be applied to purchases by the contractors; because the court reviewed the compensating use tax as a correlative of the receipts tax, it determined that the use tax also was invalid as applied to Sandia, Zia, and LACI. Finally, the court ruled that advanced funds do not serve as compensation to the contractors, and therefore cannot be taxed as gross receipts.

The United States Court of Appeals for the Tenth Circuit reversed. 624 F. 2d 111 (1980). In its view, this Court's decisions in the tax immunity area have been "more concerned with preserving the delicate financial balance between our co-existing sovereignties than with rigid adherence to agency law terminology." Advanced funding, the court declared, "is simply another means of reimbursement devised by accountants to eliminate major weaknesses in the government's bookkeeping practices." In meeting overhead and salaries with Government funds, the contractors were satisfying their own obligations, and they exercised dominion over the funds by issuing drafts to obligees. And insofar as the claims of third-party vendors are concerned, the court found federal "responsibility for properly incurred claims to be inherent in all cost-type contracts", any number of businesses act under letters of credit from banks and other sureties, and the Federal Government itself finances a variety of organizations --including States and local governments--in such a manner.

The other contractual provisions relied on by the District Court --federal control over procurement systems, management practices, and the like--failed to impress the Court of Appeals. It concluded that the Government-contractor relationship, viewed as a whole, did not "'so incorporate[] [the contractors] into the government structure as to [make them] instrumentalities of the United States . . . .'" quoting United States v. Boyd, 378 U.S. 39, 48 (1964). And that Sandia received no fee for its services was of little consequence, in the court's view, because "decisions on the amount of fee, if any, to be paid a government contractor are not made primarily with agency consequences in mind." 624 F. 2d, at 120. Since the 1977 contractual amendments by their terms added nothing of substance to the agreement, they did not affect the court's analysis. The District Court was directed to enter summary judgment for New Mexico.

The United States sought certiorari, and we granted the writ to consider the seemingly intractable problems posed by State taxation of federal contractors. 450 U.S. 909 (1981).

II

A

With the famous declaration that "the power to tax involves the power to destroy", M'Culloch v. Maryland, 4 Wheat. 316, 431 (1819), Chief Justice Marshall announced for the Court the doctrine of federal immunity from state taxation. In so doing he introduced the Court to what has become a "much litigated and often confused field", United States v. City of Detroit, 355 U.S. 466, 473 (1958), one that has been marked from the beginning by inconsistent decisions and excessively delicate distinctions.

M'Culloch itself relied on generalized notions of federal supremacy to invalidate a state tax on the Second Bank of the United States. The Court gave broad scope to state power: the opinion declined to "deprive the States of any resources which they originally possessed. It does not extend to . . . a tax imposed on the interest which citizens of Maryland may hold in [the bank], in common with other property of the same description throughout the State." 4 Wheat., at 436. Not long afterwards, however, Chief Justice Marshall, speaking for the Court, seemingly disregarded the M'Culloch dictum in striking down a state tax on interest income from federal bonds, explaining that such levies cannot constitutionally fall on an "operation essential to the important objects for which the government was created." Weston v. Charleston, 2 Pet. 449, 467 (1829). During the following century the Court took to heart Weston's expansive analysis of federal tax immunity, invalidating, among many others, state taxes on the income of federal employees, Dobbins v. Commissioners, 16 Pet. 435 (1842); on income derived from property

leased from the Federal Government, Gillespie v. Oklahoma, 257 U.S. 501 (1922); and on sales to the United States, Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218 (1928).

These decisions, it has been said, were increasingly divorced both from the constitutional foundations of the immunity doctrine and from "the actual workings of our federalism", Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 490 (1939) (Frankfurther, J., concurring), and in James v. Dravo Contracting Co., 302 U.S. 134 (1937), by a 5-4 vote, the Court marked a major change in course. Over the dissent's justifiable objections that it was "overrul[ing], sub silentio, a century of precedents", the Court upheld a state tax on the gross receipts of a contractor providing services to the Federal Government:

> [I]t is not necessary to cripple [the State's power to tax] by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government. Quoting Willcuts v. Bunn, 282 U.S. 216, 225 (1931).

The Court's more recent cases involving federal contractors generally have hewed to the James analysis. Alabama v. King & Boozer, 314 U.S. 1 (1941), upheld a state tax on sales to a federal contractor, overruling Panhandle Oil Co. v. Mississippi ex rel. Knox, supra. Decisions such as United States v. City of Detroit, supra, have validated state use taxes on private entities holding federal property.

Even the Court's post-James decisions, however, cannot be set in an entirely unwavering line. United States v. Allegheny County, 322 U.S. 174 (1944), invalidated a state property tax that included in the assessment the value of federal machinery held by a private party; fourteen years later that decision in large part was overruled by United States v. City of Detroit, supra. See United States v. County of Fresno, 429 U.S. 452, 462-463, n. 10 (1977). In Livingston v. United States, 364 U.S. 281 (1960), summarily aff'g 179 F. Supp. 9 (EDSC 1959), the Court, without opinion or citation, approved the invalidation of a state use tax as applied to a federal contractor. Yet United States v. Boyd, supra, upheld a virtually identical state tax, seemingly confining Livingston to its "extraordinary" facts. 378 U.S., at 45, n. 6.

Similarly, the decisions fail to speak with one voice on the relevance of traditional agency rules in determining the tax-immunity status of federal contractors. Thus, Alabama v. King & Boozer, supra, declined to find immunity in part because the contractors involved lacked the "status of agents", 314 U.S., at 13, and United States v. Township of Muskegon, 355 U.S. 484, 486 (1958), upheld a use tax on a

federal contractor with the caveat that the "case might well be different if [the contractor] . . . could properly be called a 'servant' of the United States in agency terms." See Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954). Yet James v. Dravo Contracting Co., supra, stated flatly that tax immunity is not dependent "'upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents.'" 302 U.S., at 154, quoting Railroad Co. v. Peniston, 18 Wall. 5, 36 (1876) (plurality opinion). And United States v. Boyd, supra, rejected the Government's argument that its contractors were federal agents and therefore tax immune, stating simply that the private entities were not "instrumentalities of the United States." 378 U.S., at 48.

B

We have concluded that the confusing nature of our precedents counsels a return to the underlying constitutional principle. The one constant here, of course, is simple enough to express: a State may not, consistent with the Supremacy Clause, U.S. Const., Art. VI, cl. 2, lay a tax "directly upon the United States." Mayo v. United States, 319 U.S. 441, 447 (1943). While "[o]ne could, and perhaps should, read M'Culloch . . . simply for the principle that the Constitution prohibits a State from taxing discriminatorily a federally established instrumentality." First Agricultural Bank v. State Tax Comm'n, 392 U.S. 339, 350 (1968)(dissenting opinion), the Court has never questioned the propriety of absolute federal immunity from state taxation. And after 160 years, the doctrine has gathered "a momentum of authority that reflects, if not a detailed exposition of considerations of policy demanded by our federal system, certainly a deep instinct that there are such considerations. . . ." City of Detroit v. Murray Corp., 355 U.S. 489, 503-504 (1958) (opinion of Frankfurter, J.)

But the limits on the immunity doctrine are, for present purposes, as significant as the rule itself. Thus, immunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy. That is the import of Alabama v. King & Boozer, where a sales tax was imposed on the gross receipts of a vendor selling to a cost-plus Government contractor. The Court found it constitutionally irrelevant that the United States reimbursed all the contractor's expenditures, including those going to meet the tax: the Government's right to be free from state taxation "does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity." 314 U.S., at 9. That the contractor is purchasing property for the Government is similarly irrelevant; in King & Boozer, title to goods purchased by the contractor vested in the United States immediately upon shipment by the seller.

Similarly, immunity cannot be conferred simply because the state tax falls on the earnings of a contractor providing services to the Government. James v. Dravo Contracting Co., supra. And where a use tax is involved, immunity cannot be conferred simply because the State is levying the tax on the use of federal property in private hands, United States v. City of Detroit, supra, even if the private entity is using the Government property to provide the United States with goods, United States v. Township of Muskegon, supra; City of Detroit v. Murray Corp., supra, or services, Curry v. United States, 314 U.S. 14 (1941); United States v. Boyd, supra. In such a situation the contractor's use of the property "in connection with commercial activities carried on for profit", is "a separate and distinct taxable activity." United States v. Boyd, 378 U.S. at 44. Indeed, immunity cannot be conferred simply because the tax is paid with Government funds; that was apparently the case in Boyd, where the contractor made expenditures under an advanced funding arrangement similar to the one involved here.

What the Court's cases leave room for, then, is the conclusion that tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned. This view, we believe, comports with the principal purpose of the immunity doctrine, that of forestalling "clashing sovereignty", M'Culloch v. Maryland, 4 Wheat., a. 430, by preventing the States from laying demands directly on the Federal Government. See City of Detroit v. Murray Corp., 355 U.S., at 504-505 (opinion of Frankfurter, J.). As the federal structure--along with the workings of the tax immunity doctrine--has evolved, this command has taken on essentially symbolic importance, as the visible "consequence of that [federal] supremacy which the constitution has declared." M'Culloch v. Maryland, 4 Wheat., at 436. At the same time, a narrow approach to governmental tax immunity accords with competing constitutional imperatives, by giving full range to each sovereign's taxing authority. See Graves v. New York ex rel. O'Keefe, 306 U.S., at 483.

Thus, a finding of constitutional tax immunity requires something more than the invocation of traditional agency notions: to resist the State's taxing power, a private taxpayer must actually "stand in the Government's shoes." City of Detroit v. Murray Corp., 355 U.S., at 503 (opinion of Frankfurter, J.). That conclusion is compelled by the Court's principal decisions exploring the nature of the Constitution's immunity guarantee. Chief Justice Hughes' opinion for the Court in James, which set the doctrine on its modern course, suggested that a state tax is impermissible when the taxed entity "is so intimately connected with the exercise of a power or the performance of a duty" by the Government that taxation of it would be "'a direct interference with the functions of government itself.'" 302 U.S., at 157, quoting Metcalf & Eddy v. Mitchell, 269 U.S. 514, 524 (1926). And the point

is settled by Boyd, the Court's most recent decision in the field. There, the Government argued that its contractors were tax-exempt because they were federal agents. Without any discussion of traditional agency rules the Court rejected that suggestion out-of-hand, declaring that "we cannot believe that [the contractors are] 'so assimilated by the Government as to become one of its constituent parts.'" 378 U.S., at 47, quoting United States v. Township of Muskegon, 355 U.S., at 486. And the Court continued:

> Should the [Atomic Energy] Commission intend to build or operate the plant with its own servants and employees, it is well aware that it may do so and familiar with the ways of doing it. It chose not to do so here. We cannot conclude that [the contractors], both cost-plus contractors for profit, have been so incorporated into the government structure as to become instrumentalities of the United States and thus enjoy governmental immunity. 378 U.S. at 48.

The Court's other cases describing the nature of a federal instrumentality have used similar language: "virtually . . . an arm of the Government." Department of Employment v. United States, 385 U.S. 355, 359-360 (1966); "integral parts of [a governmental department]", and "arms of the Government deemed by it essential for the performance of governmental functions", Standard Oil Co. v. Johnson, 316 U.S. 481, 485 (1942).

Granting tax immunity only to entities that have been "incorporated into the government structure" can forestall, at least to a degree, some of the manipulation and wooden formalism that occasionally have marked tax litigation--and that have no proper place in determining the allocation of power between co-existing sovereignties. In this case, for example, the Government and its contractors modified their agreements two years into the litigation in an obvious attempt to strengthen the case for nonliability. Yet the Government resists using its own employees for the tasks at hand--or, indeed, even formally designating Sandia, Zia, and LACI as agents--because it seeks to tap the expertise of industry, without subjecting its contractors to burdensome federal procurement regulations. See Hiestand & Florsheim, supra, at 81; App. 182-184. Instead, the Government earnestly argues that its contractors are entitled to tax immunity because, among other things, they draw checks directly on federal funds, instead of waiting a time for reimbursement. Brief for United States 32-25. We cannot believe that an immunity of constitutional stature rests on such technical considerations, for that approach allows "any government functionary to draw the constitutional line by changing a few words in a contract." Kern-Limerick, Inc. v. Scurlock, 347 U.S., at 126 (dissenting opinion).

If the immunity of federal contractors is to be expanded beyond its narrow constitutional limits, it is Congress that must take responsibility for the decision, by so expressly providing as respects contracts in a particular form, or contracts under particular programs. James v. Dravo Contracting Co., 302 U.S., at 161; Carson v. Roane-Anderson Co., 342 U.S., at 234. And this allocation of responsibility is wholly appropriate, for the political process is "uniquely adapted to accommodating the competing demands" in this area. Massachusetts v. United States, 435 U.S. 444, 456 (1978) (plurality opinion). See United States v. City of Detroit, 355 U.S., at 474. But absent Congressional action, we have emphasized that the States' power to tax can be denied only under "the clearest constitutional mandate." Michelin Tire Corp. v. Wages, 423 U.S. 276, 293 (1976).

III

It remains to apply these principles to the Sandia, Zia, and LACI contracts. The Government concedes that the legal incidence of the gross receipts and use taxes falls on the contractors, Brief for United States 25, and we do not disagree. See United States v. State of New Mexico, 581 F. 2d 803, 806 (CA10 1978). The issue, then, is whether the contractors can realistically be considered entities independent of the United States. If so, a tax on them cannot be viewed as a tax on the United States itself.

So far as the use tax is concerned, United States v. Boyd, supra, controls this case. The contracts at issue in Boyd were standard AEC management contracts, in all relevant respects identical to the ones here. The contractors performed maintenance and construction work at government facilities, under the general direction of the Government. They procured materials, and paid for the goods with government funds under an advanced funding arrangement; title passed directly from the vendor to the United States. The contractors owned none of the property involved, and received a fixed annual fee. Indeed, one of the contractor's purchase orders stated that it made purchases "for and on behalf of the Government." 378 U.S., at 42 n. And the Tennessee use tax did not differ in any significant way from the use tax now before us.

As noted above, the Government argued that this close contractual relationship made the contractors federal agents, and therefore tax immune. Yet the Court had no difficulty upholding the application of the Tennessee tax, concluding that "'[t]he vital thing' is that [the contractors are] 'using the property in connection with [their] own commercial activities.'" Quoting United States v. Township of Muskegon, 355 U.S., at 486. That the federal property involved was being used for the Government's benefit--something that by definition will be true in virtually every management contract--was irrelevant, for the contractors remained distinct entities pursuing "private ends", and their actions remained "commercial activities carried on for profit." 378 U.S., at 44. For that reason, the contractors had not become "instrumentalities" of the United States.

The same factors are at work here. The tax, the taxed activity, and the contractual relationships do not differ from those involved in Boyd. The contractors here are privately owned corporations; "[g]overnment officials do not run [their] day-to-day operations nor does the Government have any ownership interest." First Agricultural Bank v. State Tax Comm'n, 392 U.S., at 354 (dissenting opinion). In contrast to federal employees, then, Sandia and its fellow contractors cannot be termed "constituent parts" of the Federal Government. It is true, of course, that employees are a special type of agent, and like the contractors here employees are paid for their services. But the differences between an employee and one of these contractors are crucial. The congruence of professional interests between the contractors and the Federal Government is not complete; their relationships with the Government have been created for limited and carefully defined purposes. Allowing the States to apply use taxes to such entities does not offend the notion of federal supremacy.

For similar reasons, the New Mexico gross receipts tax must be upheld as applied to funds received by the contractors to meet salaries and internal costs. Once it is conceded that the contractors are independent taxable entities, it cannot be disputed that their gross income is taxable. This conclusion follows directly from James v. Dravo Contracting Co., supra, where the Court upheld a State tax reaching "gross amounts received from the United States." 302 U.S., at 137. In any event, incurring obligations to achieve contractual ends is not significantly different from using property for the same purposes. And despite the Government's arguments, the use of advanced funding does not change the analysis. That device is, at heart, an efficient method of reimbursing contractors--something the Government has apparently recognized in contexts other than tax litigation. See Appr. 31 (Sandia contract), 189 (Ninth Semi-annual Report of the Atomic Energy Commission (1951), 191 (same). If receipt of advanced funding is coextensive with status as a federal instrumentality, virtually every federal contractor is, or could easily become, immune from state taxation.

New Mexico's tax on sales to the contractors presents a more complex problem. So far as the use tax discussed above is concerned, the subject of the levy is the taxed entity's beneficial use of the property involved. See United States v. Boyd, 378 U.S. at 44. Unless the entity as a whole is one of the Government's "constituent parts", then, a tax on its use of property should not be seen as falling on the United States; in that situation the property is being used in furtherance of the contractor's essentially independent commercial enterprise. In the case of a sales tax, however, it is arguable that an entity serving as a federal procurement agent can be so closely associated with the Government, and so lack an independent role in the purchase, as to make the sale--in both a real and a symbolic sense--a sale to the United States, even though the purchasing agent has not otherwise been incorporated into the Government structure.

Such was the Court's conclusion in Kern-Limerick, Inc. v. Scurlock, supra, a decision on which the Government heavily relies. The contractor in that case identified itself as a federal procurement agent, and when it made purchases title passed directly to the Government; the purchase orders themselves declared that the purchase was made by the Government and that the United States was liable on the sale. Equally as important, the contractor itself was not liable for the purchase price, and it required specific Government approval for each transaction. See 347 U.S., at 120-121. And, as the Court emphasized, the statutory procurement scheme envisioned the use of federal purchasing agents. The Court concluded that a sale to the contractor was in effect a sale to the United States, and therefore not a proper subject for the Arkansas sales tax. As we have noted elsewhere, Kern-Limerick "stands only for the proposition that the State may not impose a tax the legal incidence of which falls on the Federal Government." United States v. County of Fresno, 429 U.S., at 459-460, n. 7.

We think it evident that the Kern-Limerick principle does not invalidate New Mexico's sales tax as applied to purchases made by the contractors here. Even accepting the Government's representation that it is directly liable to vendors for the purchase price, Sandia and Zia nevertheless make purchases in their own names--Sandia, in fact, is contractually obligated to do so, and presumably they are themselves liable to the vendors. Vendors are not informed that the Government is the only party with an independent interest in the purchase, as was true in Kern-Limerick, and the Government disclaims any formal intention to denominate the contractors as purchasing agents. Similarly, Sandia and Zia need not obtain advance Government approval for each purchase. These factors demonstrate that the contractors have a substantial independent role in making purchases, and that the identity of interests between the Government and the contractors is far from complete. As a result, sales to Zia and Sandia are in neither a real nor a symbolic sense sales to the "United States itself." It is true that title passes directly from the vendor to the Federal Government, but that factor alone cannot make the transaction a purchase by the United States, so long as the purchasing entity, in its role as a purchaser, is sufficiently distinct from the Government. Alabama v. King & Boozer, 314 U.S., at 13.

There is a final irony in this case. In Carson v. Roane-Anderson Co., 342 U.S. 232 (1952), the Court considered a state sales and use tax imposed on AEC management contractors. The terms of the contracts were in most relevant respects identical to the ones here, and insofar as they differed they established an even closer relationship between the Government and the contractors. The Court held that in the last sentence of § 9(b) of the Atomic Energy Act of 1946, 60 Stat. 765--which barred state or local taxation of AEC "activities"--Congress had statutorily exempted the contractors from state taxation, because the operations of management contractors were Commission activities. 342 U.S., at 234. Congress responded by repealing the last

sentence of § 9(b), Pub. L. 262, 67 Stat. 575, in an attempt to "place the Commission and its activities on the same basis, with respect to immunity from State and local taxation, as other Federal agencies." S. Rep. No. 694, 83d Cong., 1st Sess., 3 (1953). In doing so, Congress endorsed the principle that "constitutional immunity does not extend to cost-plus-fixed-fee contractors of the Federal Government, but is limited to taxes imposed directly upon the United States."

We do not suggest that the repeal of § 9(b) waives the Government's constitutional tax immunity; Congress intended AEC contractors to be shielded by constitutional immunity principles "as interpreted by the courts." S. Rep. No. 694, at 3. But it is worth remarking that DOE is asking us to establish as a constitutional rule something that it was unable to obtain statutorily from Congress. For the reasons set out above, we conclude that the contractors here are not protected by the Constitutions's guarantee of federal supremacy. If political or economic considerations suggest that a broader immunity rule is appropriate, "[s]uch complex problems are ones which Congress is best qualified to resolve." United States v. City of Detroit, 355 U. S., at 474.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

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CHAPTER TEN

REMEDIES-CONTRACTOR

Section 1. Jurisdiction of Boards of Contract Appeals

A. Completed Contracts

BURROUGHS CORPORATION

ASBCA No. 10065 (1965)

OPINION BY COLONEL BOOTH ON MOTION TO DISMISS. On the basis of a post-contract audit, the Comptroller General has asserted that by means of withholding information during negotiation of these contracts the appellant, Burroughs Corporation, overcharged the Government by $556,150. Demand for refund of that amount was made on Burroughs by the contracting officer, and this appeal ensued. The Government filed a Motion to Dismiss, which Burroughs opposes. A hearing has been held at which arguments relative to the motion were presented by both parties.

The Government concedes that for the purpose of passing on the motion, the facts stated in the complaint must be regarded as true. It appears that the contracts were awarded by the United States Army Signal Procurement Office, Fort George G. Meade, Maryland. These were negotiated fixed price contracts for the production of spare electronic parts.

* * * * *

The total amount of the three contracts was *** $1,433,788.

* * * * *

These three contracts were the subject of a report by the Comptroller General of the United States, based on an examination of Burroughs' books and records. The Comptroller General asserted that by failing to disclose certain cost experience data during negotiation of these contracts, Burroughs had contrived to overcharge the Government by $556,150. A draft of the Comptroller General's proposed report was furnished to the Department of the Army, and the matter was discussed at a meeting between Burroughs officials and the contracting officer on 8 February 1963. By letter dated 18 February 1963, the contracting officer reiterated that the Army "position is to seek reimbursement to the Government of the total claimed overpricing." Subsequent negotiations did not produce a settlement, and on 8 May 1964 the contracting officer wrote Burroughs demanding payment of

$556,150. He stated that any amount not paid in 30 days would draw interest at 6%, and threatened offset against current bills. By letter dated 25 May 1964 Burroughs appealed to the Secretary of the Army.

The Government has moved to dismiss this appeal on the grounds that the Board has no Jurisdiction: A. Over claims based on misrepresentation; B. Over claims outside the contract; C. Over breaches of contract or torts; D. To review a decision of the Comptroller General; and E. Over administrative withholding of funds. Although not listed as a ground for the action, Government counsel conclude it with a statement that: "the Secretary of the Army has already administratively concurred in the recommendation of the Comptroller General thus preempting any action by the Board."

The authority of this Board stems primarily from the Disputes clause found in Department of Defense contracts. Like other such contracts, the three here in question contain the standard Disputes clause. This clause provides for decision by "the Secretaty or his duly authorized representatives" of "any dispute concerning a question of fact arising under this contract". This Board is the designated representative of the Secretary of the Army for the stated purpose. The Government implication that the Secretary has acted in this case must, thus, be examined critically, for if his authority with respect to this appeal has been exercised, we would not be free to review it or exercise it again.

Counsel's assertion of secretarial action appears to be an allusion to a letter dated 28 September 1962, which was addressed to the Associate Director of the General Accounting Office's Defense Accounting and Auditing Division by the Deputy Assistant Secretary of the Army (I & L) (Logistics). The letter, which comments on a draft of the Comptroller General's proposed report, does state that "The Department of the Army agrees with the findings and conclusions as stated in the report." Even assuming this language states the personal opinion of the Secretary, we do not read it as being intended to withdraw from this Board any jurisdiction or authority it may have with respect to this case. At most it is believed to reflect a willingness to pursue certain corrective measures recommended by the Comptroller General. Such corrective measures have been pursued, and in fact included the demand for refund which generated this appeal.

Actually, the contracting officer's demand for refund and the failure to agree on an amount constitute the dispute which is being appealed. Thus, the dispute arose after the Comptroller General's audit report and the Assistant Secretary's letter, so that the Secretary could not have had this dispute under consideration.

Among the grounds normally asserted by the Government in support of its Motion to Dismiss, it is stated (E) that this Board has no authority over the administrative withholding of funds. Although set-

off was threatened by the contracting officer, it was agreed at the hearing that no set-off or withholding has actually taken place. This is not an appeal from an actual set-off. In this situation no useful purpose would be served by exploration of this point.

It was also asserted (D) that we have no authority to review a decision of the Comptroller General. In areas over which that official has been given exclusive, final, or superior authority, the assertion has merit. This Board had, for example, refused to review decisions dealing with matters which redate the award and govern or condition the very existence of the contract itself. Invalidation of a contract had been held to defeat jurisdiction by nullifying the Disputes clause along with the contract's other provisions. The Board has no jurisdiction in the absence of a valid contract with an operative Disputes clause. As to other areas, where the Comptroller General's authority is less precisely defined or not patently superior, this Board had not hesitated to act notwithstanding a position already taken by the General Accounting Office. In fact, this board recently rejected the two-pronged argument that an opinion of the Comptroller General has established the underlying question to be one of law beyond our cognizance, and that it has preempted the possibility of final resolution of the matter within the Department of the Army. The soundness of the Board's position rejecting such arguments, particularly as applied to cases like this, was underscored recently by Comptroller General Joseph Campbell in testimony before a Congressional committee. The Comptroller General also recognizes that they are appropriate before his office can take binding action. Moreover, as already observed, this dispute arose after the Comptroller General published his report.

Additionally, as already indicated, the Government asserts that this Board has no jurisdiction over: A. Claims based on misrepresentation; B. Claims outside the contract; or, C. Breaches of contract or torts. Burroughs answers that: 1. It has a contract right to a hearing; 2. The Board can grant the relief sought; and 3. The Board had consistently assumed jurisdiction to review a contracting officer's assessment of damages against a contractor.

Reduced to its simplest terms, we have a contracting officer's demand that a contractor return more than 38% of the total amount of compensation paid under the contract, and an appeal from that demand. Burroughs contends that the contractor is entitled to keep money paid pursuant to its provisions. It is further contended that the contracting officer's demand for return of the money and Burrough's refusal of that demand together constitute a "dispute concerning a question of fact arising under this contract" within the meaning of the contract's Disputes clause.

Counsel have cited no case precisely like this one, and our research has revealed none. However, we believe this motion may be disposed of without exhaustive discussion of the various cases which counsel have called to our attention.

By an interesting coincidence of timing, one day after the last of the final payments under these contracts, the President signed Public Law 87-653. That statute provides, inter alia, that in negotiated procurements exceeding $100,000, the contractor must, except in certain enumerated circumstances, submit cost or pricing data and certify that it is accurate, complete, and current. Implementation of that statute was accomplished by regulations and by promulgation of mandatory clauses for inclusion in appropriate Defense Department contracts. Generally, these clauses provide that if the contracting officer determines that the agreed price was increased by any significant sum because of incomplete or inaccurate pricing data, then the price should be reduced and the contract modified to reflect such adjustment. The Clause then states that:

> failure to agree on a reduction shall be a dispute concerning a question of fact within the meaning of the 'Disputes' clause of this contract.

Without suggesting that either the statute or the ASPR provision is retroactive, we do feel that they should not be ignored. The officials that have responsibility for formulating basic Defense Department procurement policy have considered, albeit in the abstract, the effect of allegations of defective pricing data. It was their determination that a contracting officer's finding that a negotiated price was substantially affected by defective pricing data followed by a failure to agree on a price adjustment constitutes a dispute concerning a question of fact within the Disputes clause.

Finding this ASPR provision persuasive, as we do, we observe that entirely apart from policy considerations which might dictate an equality of remedies, we do not view the ASPR provision as a departure from established jurisdictional rules but rather a reaffirmation of them. This Board has heretofore denied a motion to dismiss an appeal from a determination that the contractor violated warranties expressed in inducement of the contract. We are unsure whether the Government contends that the Board would not have jurisdiction if this dispute had arisen during active administration of these contracts; that is to say, before final payment. In any event, we believe we do have such authority. Further buttressing what has already been said on this point is the fact that the Board will review for correctness a contracting officer's assessment of damages against a contractor.

In the present state of the pleadings issues have not been joined, and it would be hazardous to forecast their precise course. However, it appears that Burroughs is calling into question the allegations made by the Comptroller General on which the contracting officer's demand is bottomed. These allegations may be proved or disproved upon a hearing, and, this is the opportunity we understand Burroughs seeks. The relief to be granted in such circumstances lies clearly within the ambit of our authority.

Having determined that we would have authority to hear and decide the present appeal if the dispute arose during active administration of the contract, there remains only the question whether final payment operated to defeat our authority. This Board has in the past held that a contract might be reopened several years after completion by a demand for refund made by a Contracting Officer, and that in such circumstances the Disputes clause was applicable.

This conclusion has received approval of courts. In an opinion dated 15 November 1963, the United States Court of Appeals for the First Circuit adopted this position, observing:

> The Court of Claims, which has consistently construed disputes clauses narrowly, recently reviewed its position after being reversed by the Supreme Court in the Bianchi case and concluded:
>
> We do not agree that disputed issues may not in any case legally arise after the contract has been completed.' The court went on to hold that the disputes clause was applicable to a dispute arising after performance and after payment of a contract. Bar Ray Products, Inc. v. The United States, No. 382-61, July 12, 1963.

Had the Government elected to litigate this matter in a court of competent jurisdiction and the matter were there now pending we might reach a different result. The election has been made at this stage, however, to proceed by way of a contracting officer's demand for refund of alleged overpayments. There has been an appeal from that demand. Thus, we conclude that there is no bar to our exercise of authority in accordance with the Board's rules.

The Motion to Dismiss is denied, and the Government is allowed 45 days from the date of this opinion in which to answer.

B. B.C.A. v. Claims Court

Disputes - Reformation - Filing

NOME PHARMACY, INC.

ASBCA No. 24333 (1980)

OPINION BY ADMINISTRATIVE JUDGE NORRIS
ON MOTION TO DISMISS

On 14 September 1979, the contracting officer denied appellant's request for a "deviation" from the contract's payment provisions. The original contract payment provisions had been deleted and different provisions inserted by means of a bilateral contract modification. It is from these modified payment provisions that appellant wanted the contracting officer to deviate and from which the contracting officer refused to deviate. Appellant was paid in accordance with the terms of the contract but felt that it had not been paid enough and that the contract's terms unfairly discriminated, for various reasons, against it. On 26 September 1979, appellant filed its notices of appeal from the contracting officer's final decision.

On 13 September 1979, prior to the contracting officer's final decision, appellant forwarded a petition, which was filed on 17 September 1979, to the United States Court of Claims and which is essentially identical to appellant's complaint filed with the Board. It is clear from record that appellant sought to disassociate itself from the administrative procedures specified in its contract. On 8 January 1979, appellant had filed an action, involving the same factual situation, in the United States District Court for the District of Alaska. That action was dismissed by the United States District Judge on 11 July 1979 on the ground that the District Court lacked jurisdiction to decide the matter. He also stated that the United States Court of Claims had exclusive jurisdiction over contract actions against the United States where the amount in controversy exceeded $10,000, as was the case there.

This contract was awarded in 1975 but was extended by contract modification through 30 September 1978. The period in controversy was between 1 October 1977 and 30 September 1978. As stated previously, the contracting officer issued his final decision on 14 September 1979. Appellant's claim was pending before the contracting officer on 1 March 1979, the effective date of the Contract Disputes Act of 1978. By the terms of that Act, appellant could have elected to proceed under the terms of that sta-

tute but did not do so. In the absence of such an election, this Board can only exercise the jurisdiction it has before the Contract Disputes Act of 1978 in connection with this appeal.

The Government has moved to dismiss this appeal on the basis that the Board does not have jurisdiction to consider the issues presented and further that the identical issues are presently before the United States Court of Claims.

Respondent alleges that there are no factual issues, arising under the contract, in dispute between the parties. Respondent also alleges that what appellant seeks is to have the contract voided or reformed and to have various constitutional issues resolved.

Appellant has filed its non-opposition to respondent's motion. Appellant agrees that there is no factual issue to be resolved by the Board. Appellant avers in its non-opposition that it seeks an adjudication of law rather than one of fact. It is requesting that its contract be voided or reformed based upon constitutional grounds. Appellant further avers that its position has always been that the matter should be resolved by the United States Court of Claims and that the Armed Services Board of Contract Appeals should not exercise jurisdiction over the case. Finally, appellant states that it "agrees or files this non-opposition conditioned upon a finding that Nome Pharmacy, Inc. has now fully exhausted its administrative remedies before the Armed Services Board of Contract Appeals.

The Contract Disputes Act of 1978 conferred upon boards of contract appeals the authority to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims. That authority, if exercisable, would permit this Board to void or reform the instant contract and to provide other relief which appellant seeks. But, in the absence of an election by this Pre-Contract Disputes Act, contractor to proceed under the terms of the Contract Disputes Act of 1978, our expanded authority is not exercisable. Consequently, we do not have jurisdiction to grant the relief appellant seeks.

Further, we have, in the past, dismissed appeals without prejudice to their reinstatement when an action involving the same matters was pending in the Court of Claims. In this instance, appellant's petition was filed with the Court of Claims before its notice of appeal was filed here. On that, and other bases, even if we were to determine we had jurisdiction, we would dismiss the appeal without prejudice, pending resolution of the matter before the Court of Claims.

The question of whether appellant has exhausted its administrative remedies is a matter for the Court of Claims to decide, if that question is raised there.

Respondent's motion is granted and this appeal is dismissed without prejudice.

C. B.C.A. v. Contract Adjustment Board

GENTEX CORPORATION

ASBCA No. 24040 (1979)

On 19 July 1978 appellant submitted a request under ASPR 17-204.3 (iii) for extraordinary relief in the form of a contract modification to correct the effect of an alleged mutual mistake as to a material fact. The amount of relief sought was $4,276,941.

Section 16 of the Contract Disputes Act of 1978 contains an effective date of 1 March 1979. It provides that, notwithstanding any provision in a contract made before the effective date, the contractor may elect to proceed under the Act with respect to any claim "pending then before the contracting officer or initiated thereafter."

On 7 June 1979 appellant asked the Government to review its claim in view of the new authority contained in the Contract Disputes Act. Appellant stated it was filing the claim under the Act and wanted a contracting officer's decision if the contracting officer disputed the claim.

Having received no contracting officer's decision, appellant filed its notice of appeal dated 27 June 1979. The government moved to dismiss on the ground that the substance of the appeal was neither the subject of a contracting officer's final decision nor pending before the contracting officer on the effective date of the Act. The Board denied the motion primarily on the basis that appellant could elect to proceed under the Act on a claim initiated after the effective date of the Act.

The government has moved for reconsideration on the basis of arguments not previously advanced. The following are a few excerpts from the government's lengthy contentions.

"Section 16 of the Contract Disputes Act provides in part:

> 'Notwithstanding any provision in a contract made before the effective date of this Act, the contractor may elect to proceed under this Act with respect to any claim pending then before the Contracting Officer or initiated thereafter.'
>
> The main portion of the above cited sentence of Section 16, upon which the Board found jurisdiction for this appeal is the language 'initiated thereafter.' In distinguishing E-Systems Incorporated, (70-1 BCA ¶13,806) the Board stated, "That decision does not preclude an election to proceed under the Act on a reformation claim that is 'initiated thereafter' under section 16 of the Act.

In this connection it is the Government's position that the clear language of Section 16 of the Act along with the legislative history and Board rulings on this section, preclude a finding that the subject appeal is based on a claim initiated after 1 March 1979.

The above cited section of the Act and its corresponding legislative history clearly indicates that the Act expands or clarifies the area where a contracting officer can issue a final decision, to include the issue of reformation of a contract due to a mutual mistake of fact. However, this expansion of the authority to the contracting officer was a concomitant reduction of the authority in those individuals in the executive branches of Government who previously had the authority under P.L. 85-804 to decide cases of this nature.

* * *

". . . the issue then presents itself as whether the appeal now docketed before the Board is a claim initiated after 1 March 1979. In this connection perhaps one of the best avenues to approach the subject is to view how the Appellant treated the issue. Its position was set forth in the Appellant's Opposition to Respondent's Motion to dismiss, which states as follows:

'Approximately one year ago, July 19, 1979 appellant filed claims for relief under P.L. 85-804 based on mutual mistake and breach of contract. These claims lay dormant for almost a year despite continuing efforts on the part of appellant to expedite resolution of said claims. Finally, as a result of the Disputes Act (P.L.95-563] which became effective March 1, 1979, the appellant notified respondent by letter dated June 7, 1979, that its claims were now to be considered in accordance with the CDA. Notwithstanding this letter and the fact that respondent has had the claims under consideration for almost a year, the contracting officer took no action to the letter of June 7, 1979. Accordingly, on June 27, 1979, appellant filed an appeal directly with the ASBCA . . . [emphasis added]

In addition to appellant's own admission that it initiated this claim in July 1978, reference is made to Exec. Order No. 10789, which implemented P.L. 85-804. Part 1 Paragraph 4 of the Executive Order treats any submission under said law as a claim. Thus it appears that in accordance with the provisions of section 16 of the Contract Disputes Act; this claim existed on or about July, 1978.

* * *

There is no doubt, therefore, that the Appellant commenced and started its efforts for reformation by its submission under P.L. 85-804 in July of 1978. The claim having been submitted in July 1978, the Appellant should not be permitted to assert the same claim past March 1979 to fulfill the naked requirement of being initiated thereafter.

* * *

In addition, as was stated in Monaco and Towne Realty, supra, (79-2 BCA ¶13,944) it was also the express intent of Congress not to allow switching of forums between the Board and the Court of Claims. This objective should also be applied to those claims, which prior to enactment of P.L. 95-563, had a certain route to follow, namely ASPR/DAR, Section 17 which would deny transfer to another forum of a claim that was under consideration for a year and a decision on said claim was imminent. Therefore as in E-Systems, where the claim had been pending and heard by the Board, but no decision rendered before the effective date of the Act, precluding election to proceed under the Act should serve as the rationale in the present case to preclude reinitiation of appellant's P.L. 85-804 claim.

The Contract Disputes Act did not address itself directly to the problem of switching of forums in a case of this nature, nor did it address similar types of problems that could arise. In particular, reference is made to 28 U.S.C.A. §1346(a)(2) which provides as follows:

(a) The District Courts shall have original jurisdiction concurrent with the Court of Claims.

(2) Any other civil action or claim against the United States, not exceeding $10,000.00 in amount, founded either upon . . . any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . .

This provision of Title 28 was repealed by §14(a) of the Disputes Act. However, there was no provision in the Act to cover a situation where a party, who had a breach of contract claim against the Government pending in the District Court prior to 1 March 1979, could seek a decision from the Contracting Officer on the breach claim subsequent to 1 March 1979 in order to have the case processed before the Board. In such a situation, if the Board found jurisdiction it would, in effect, be giving retroactive application of the Act. In

other words, prior to 1 March 1979 the Contracting Officer did not have authority to issue a decision on a breach of contract claim, resulting in the contractor initiating his claim in the appropriate forum, for example, the District Court. However, if he had not received a decision from the Court by 1 March 1979 and was allowed to return to the Contracting Officer and receive a decision under the Contract Disputes Act, then the Board's assumption of jurisdiction would constitute retroactive application of the Act. By analogy, the same result would follow if the Board found jurisdiction in the instant appeal. The claim for reformation was submitted and under consideration and review before the only authority that had jurisdiction to decide the claim at the time it was initially submitted. If the contractor is now allowed to resubmit or reinitiate the claim before the Contracting Officer, it would be a clear situation of giving retroactive application to the Act. On this point the Board has already decided that the Contract Disputes Act of 1978 does not have retroactive application. See Bryant International Co., ASBCA No. 21889, 9 March 1979, 79-1 BCA ¶13,747.

Finally, recent cases decided by the Board which are similar to, but clearly distinguishable from the facts of the present case, should be discussed. The specific cases being referred to are The Handy Tool & Mfg. Co., Inc, ASBCA No. 22659, February 26, 1979, 79-1 BCA ¶13,723; The Handy Tool & Mfg Co., Inc., Motion for Reconsideration; 79-1 BCA ¶13,872 and Starlite Services, Inc., ASBCA No. 22894, 9 March 1979, 79-1 BCA ¶13,742.

Both of the above cited cases involved appeals that were taken from contracting officers' decisions that were taken and docketed before the Board prior to 1 March 1979. Both of these appeals also involved, in part, mistake in bid issues. The Board dismissed the appeals as they related to a mistake in bid issue on the ground that the Board did not have jurisdiction. However, the important point of these cases is the language used by the Board in effecting the dismissals. In Handy 22659, May 8, 1979, 79-1 BCA ¶13,872 the Board stated in part as follows:

Accordingly, we find that the instant claim, having been solely before the Board prior to, on, and after the effective date of the Act cannot be considered to be, at the same time, pending before the contracting officer, and thus cannot be the subject of the Board's jurisdiction pursuant to section 16 of the Act. See E-Systems, Incorporated, ASBCA No. 21091, 79-1 BCA ¶13,806. We so hold, but without prejudice to appellant's renewal of its claim before other forums,

including the Contracting Officer if appropriate under the Act. Starlite Services, Inc., ASBCA No. 22894, 79-1 BCA ¶13,743.'

"In Starlite, supra, the pertinent language is as follows:

The appeal is denied with respect to the claims arising under the changes clause, and otherwise dismissed for want of jurisdiction, without prejudice to the appellant's renewal of its claims before a Department of Defense Contracting Officer under the provisions of the Contract Disputes Act of 1978, with a right of appeal to this Board or to the Court of Claims from the contracting officer's decision under the Act.

In both of the above cited decisions the Board has implied that under the facts of the respective cases the appellant could submit a claim to the contracting office under a mistake in bid theory and if relief were not granted it could appeal any final decision of the contracting officer under the Contract Disputes Act of 1978. Assuming that this is the applicable law on the matter, nonetheless, this holding would not apply to the present case because of a complete dissimilarity of the facts. Unlike the present case, in neither Starlite or Handy did the contractor initiate a claim for reformation based on a mistake in bid theory before the forum authorized to decide such a claim. In fact, in Handy and Starlite the mistake issues were raised ancillary to the appeals from a termination for default and denial of an equitable adjustment claim respectively. Thus these two cases stood to inform the Appellants that they had a right to submit a claim to the Government for reformation of their contracts due to a mistake in bid. Subsequent to 1 March 1979 the individual charged with the responsibility for making a decision on such claims is the Contracting Officer. Therefore, if Starlite and Handy followed the guidance given them by the Board, they would indeed be initiating a claim after 1 March 1979 which the contracting officer had the duty to decide and, if adverse, appealable by the contractors to the ASBCA or the Court of Claims. The facts of the present case do not lend themselves to a similar ruling. The appellant's claim was submitted in July 1978 and was then taken under consideration by those individuals who had the authority to consider and decide the claim. Unlike the above cited cases, the present appeal does not involve the initial submission of a mistake in bid to a Government official who has the authority to decide the same, but an attempt to resubmit its original claim and thus gain retroactive application of a law, which clearly was not intended to so apply when enacted by Congress.

Decision

The Board will not purport to rule on the jurisdiction of the district courts or contract adjustment boards. But on the subject of retroactivity, see de Rodulfa v. United States, 461 F.2d 1240 (1972), cert. denied, 409 U.S. 949 stating the rule on jurisdictional repeals as follows:

> There is hardly room for doubting that had section 211(a) been so amended before these cases had run their course in the District Court, it would have foreclosed any judgment favorable to the claimants. That the judgments antedated the amendment makes for no difference in result as to so much of the judgments as were brought here for review. Amended Section 211(a) is as much a dissolution of our jurisdiction as it was of the District Courts', and 'when a law conferring jurisdiction is repealed without any reservation as to pending cases all cases fall with the law . . . 'It is clear to us beyond peradventure that their appeals fell when Congress changed Section 211(a).

More to the point, we fail to see an analogy between a claim on which suit has been brought in a federal district court and a claim on which a request for extraordinary relief has been filed under P.L. 85-804. Relief has, no doubt, been granted under P.L. 85-804 on many breach and reformation claims of a type that could have been successfully prosecuted outside the executive departments as claims of legal right. However the decisions under P.L. 85-804 are not made as part of the judicial or quasijudicial disputes resolution process. There is no appeal from such decisions to a contract appeals board or court. On the other hand such decisions do not bar a successful suit or contract appeal on claims found by a contract appeals board or court to be within its own jurisdiction. The ultimate issue in a P.L. 85-804 case is whether a requested contract or amendment will facilitate the national defense, not whether a claimant had a judicially enforceable contract right. Commonwealth Engineering Co. of Ohio v. U.S. (7 CCF ¶71,245), 180 F.Supp 396, 148 Ct. Cl. 330 (1960) cert. denied, 81 S. Ct 55, 364 U.S. 820, 5 L.Ed 50; Embassy Moving & Storage Co. v. U.S. (14 CCF ¶83,535) 424 F 2d. 602 191 Ct. Cl. 537 (1970).

Similarly, an attempt at an analogy between claims pending before contract appeals boards and contract adjustment boards also fails. The judicial and Congressional concern about a switch of forum from an appeal board to the court of claims was patently a concern for efficiency and economy in the judicial and quasijudicial processes, either one of which could end in a virtually final resolution of a dispute. But extraordinary relief actions are part of the contract process, not litigation, and may be taken as a matter of grace rather than legal right.

The Government's own regulations show the weakness of its arguments. See the new regulatory implementation of the Act, 8 CCH Government Contracts Reporter ¶79,605:

> (d) Public Law 85-804 Requests.
>
> Requests for relief under Public Law 85-804 are not considered to be claims within the Contract Disputes Act of 1978 or the Disputes clause, and shall continue to be processed under (DAR Section XVII) (FPR Part 1-17). However certain kinds of relief formerly available within the agency only under Public Law 85-804 and not within the contracting officer's authority such as alleged legal entitlement to rescission or reformation for mutual mistake, are now within the Contracting Office's authority under the Act and the Disputes clause. In case of doubt, the contracting officer should obtain legal advice as to authority to settle or decide specific types of claims.

Clearly, appellant's request for P.L. 85-804 relief did not preclude it from initiating a claim after 1 March 1979 within the meaning of the Contract Disputes Act.

Finally we find unpersuasive the Government's attempt to distinguish the Board's decisions in the Handy Tool and Starlite Services appeals. If the appellants in those appeals could initiate their claims by renewing them after 1 March 1979, notwithstanding their having been pending before the Board previously, on the theory that they were not properly so pending, it follows all the more that a reformation claim in this case could be initiated after 1 March since it had never been pending before either the contracting officer or the Board on or before that date. Not only was appellant's request for relief not a claim within the Contract Disputes Act, but it was pending only before the officials authorized to act under P.L. 85-804. In fact, because the significant distinguishing feature in this case is that the claim was never before this Board until the docketing of the appeal of 27 June 1979, we found it unnecessary in our original decision to rely upon the decisions in the Handy Tool and Starlite Services appeals.

The motion for reconsideration is denied.

D. B.C.A. v. Comptroller General

SIERRA PACIFIC INDUSTRIES

AGBCA No. 79-200 CDA, April 11,1980

The Cooks Timber sale (contract No. 017753) was awarded on June 11, 1974 by the Forest Service to Sierra Pacific Industries (referred to as "Sierra" or "contractor"). The contract for harvest and removal of timber from the sale area on the Plumas National Forest in California included road construction for use in removal of logs. The Forest Supervisor of the Plumas National Forest was the Contracting Officer.

Sierra submitted a claim dated January 26, 1978 to the contracting officer in the amount of $13,804.00 for clearing work performed in construction of Specified Road No. 28N02. The claim was based on a theory of mutual mistake and reformation of the contract was sought to increase the amount of purchaser credit to reflect 17.9 acres of clearing instead of the 6 acres estimated by the Forest Service in calculating allowable purchaser credit limits.

Sierra requested relief from the contracting officer if possible and if not, requested that the claim be forwarded to the Claims Division, General Accounting Office (GAO). The contracting officer by letter dated March 24, 1978 notified Sierra that he would not approve the claim but would forward it to GAO.

The matter was reviewed by Forest Service officials at the Regional Forester's level and at Washington office levels. Associate Deputy Chief F. Leroy Bond in a memorandum dated June 23, 1978 to the Regional Forester stated that the Forest Service would not submit the claim to the Comptroller General but that the timber purchaser had a right to file the claim directly.

Subsequent discussions between the parties resulted in Forest Service transmittal of Sierra's claim on November 1, 1978 to GAO.

The Comptroller General denied the claim. Matter of Sierra Pacific Industries, B193399, December 5, 1978, 78-2 CPD ¶390.

The Comptroller General reversed the December 5, 1978 decision upon reconsideration requested by Sierra. Matter of Sierra Pacific Industries-Reconsideration, B-193399, April 5, 1979, 79-1 CPD ¶238.

The Forest Supervisor by letter dated July 26, 1979 to Sierra gave notice of intention to seek reversal of the April 5, 1979 Comptroller General decision and declined to pay in accordance with the Comptroller General decision which provided that:

> * * * the claim may be paid upon verification by the agency of the costs incurred by reason of the excess acreage which was cleared. However, payment should be limited to an amount which would not result in displacement of the second high bidder.

Counsel for Sierra by letter dated August 14, 1979, to the Forest Supervisor filed a claim for $13,804.00 plus interest under the Contract Disputes Act (41 USC 601-603) and requested a decision within 60 days of receipt.

The Forest Service by letter dated September 17, 1979 to the Comptroller General protested the reconsidered decision of April 5, 1979 and requested further reconsideration on the merits. It was also stated that the Forest Service was never informed by Sierra or the Comptroller General that reconsideration had been granted at the request of Sierra.

Counsel for Sierra by letter dated September 27, 1979 to the Office of the General Counsel, GAO, acknowledged receipt of a copy of the Forest Service letter requesting further reconsideration by the Comptroller General. Counsel further stated in the letter that:

> It should be noted at the outset that because a period of over four months went by with no payment to Sierra Pacific under the "Decision Upon Reconsideration of April 5, 1979", Sierra Pacific has filed a new claim with the Contracting Officer under the Contract Disputes Act. Seemingly, then, any further proceedings within G.A.O would be inappropriate.
>
> Since the thrust of the Forest Service's "Request for Reconsideration" is directed at alleged procedural deficiencies, it should be comforted in that further proceedings in this matter will proceed (if need be) under the jurisdiction of the Board of Contract Appeals and the Court of Claims.
>
> It is respectfully requested that no further ex parte contacts be made in this matter and that it proceed anew under the Contract Disputes Act.

The Forest Supervisor by letter dated October 12, 1979 to counsel for Sierra denied the claim on the basis that a request for further reconsideration was before the Comptroller General. Alternatively he stated that:

> In the event that the Comptroller General elects not to reconsider his desision issued April 5, 1979, the settlement will be limited to an amount not to exceed $8,755.00 which is the difference between the first and the second high bid.

Sierra by letter dated October 23, 1979 filed a Notice of Appeal with this Board under the Contract Disputes Act and elected to proceed under the accelerated procedure under Board Rule 12.3.

The appeal was docketed on November 1, 1979 under the Contract Disputes Act. Board jurisdiction under section 8(d) of the Act (41 USC 607 (d)) includes authority "to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims.

The office of the General Counsel, GAO, by letter dated October 25, 1979 to the Chief, Forest Service, gave notice that a conference would be scheduled. In effect, the Forest Service request for further reconsideration of the April 5, 1979 decision was granted.

The Government attorney representing the Forest Supervisor in this appeal before the Board on November 15, 1979 filed a Request for Stay of further Board proceedings until a final decision could be rendered by the Comptroller General.

The Government attorney representing the Forest Supervisor in this appeal before the Board on November 15, 1979 filed a Request for Stay of further Board proceedings until a final decision could be rendered by the Comptroller General.

The Board by letter dated November 26, 1979 denied the Government request for stay of proceedings on the ground that the Comptroller General lacked jurisdiction over such issues as were cognizable as contract dispute issues pending before the Board under the Contract Disputes Act.

The Comptroller General has recognized the dichotomy of functions which flows from S & E Contractors v. United States [17 CCF ¶81,265], 406 U.S. 1 (1972). In B-184709, September 29, 1975, 75-2 CPD ¶211, the Forest Service was given an advance decision to the effect that, absent bad faith or fraud, the Comptroller General would not review a final agency settlement or decision rendered by a Board under the Disputes clause of a contract.

In the Matter of GTE Sylvania Incorporated, B-192985, January 25, 1979, 79-1 CPD ¶53, the Comptroller General declined to consider issues directly related to a default termination which were pending before the DOT Board of Contract Appeals under the Disputes Clause. However, the issue of bid protest concerning the award of the reprocurement contract was retained for consideration as to whether applicable procurement procedures were followed.

In B-195272, January 29, 1980, 80-1 CPD ¶79, 22 G.C.¶96, the Comptroller General considered the impact of the Contract Disputes Act on GAO settlement procedures. The decision reads in pertinent part as follows:

The Contract Disputes Act of 1978 provides that all claims by a contractor against the Government relating to a contract shall be submitted to the contracting officer for decision. (Section 6(a) of the Act.) Section 2 of the Act defines the contract to which the Act applies as including 'any express or implied contract * * * entered into by an Executive agency for [the procurement of property, services or construction work on real property].'

The invoice of the Georgia Lions Eye Bank was forwarded here because of the absence of an express contract underlying the request for payment. Our Payment Branch advised the agency that claims arising from an express or implied contract entered into by an executive agency should be settled by the agency under the provisions of the Contract Disputes Act of 1978.

The threshold question, however, is whether the Georgia Lions Eye Bank has submitted a claim which must be decided by the contracting officer under the disputes provisions of the Act. We hold it has not, and that this matter should be referred to our Office for settlement under 31 U.S.C. §§ 71, 74 (1976).

The applicability of the Contract Disputes Act begins with the contractor's filing of a 'claim.' The Act does not in any way define the term 'claim.' While in its broadest sense, 'claim' could be read to include such routine matters as progress payment requests, price proposals on formal changes and even invoices, the context of the Act itself clearly indicates that 'claim' as used in the Act is intended to refer to situations where the entitlement to recovery or the amount of recovery is disputed by the Government.

The Agency does not disagree with the Georgia Lions Eye Bank that the invoice should be paid. In fact, the Army states it will pay the invoice if authorized by our Office. Since there is no dispute between the parties, either with regard to entitlement to payment or amount of payment, the disputes-resolving procedures of the Act should not be involved. That is to say, the invoice submitted is not a 'claim' under the Act for which a decision by the contracting officer is required. Rather, the invoice here is simply a request for payment. Because there is no express contract underlying this request, the agency has asked us to certify its voucher.

Where proper procurement procedures are not used, such as this case, certain steps must be taken before payments properly may be made. This is because informal commitments,

unlike express contracts which are subject to various procedural safeguards to insure compliance with appropriation and procurement requirements imposed by statute or regulation, by their very nature are not subjected to the same safeguards as express contracts. Thus, before an implied procurement contract to which the United States is a party may be legally recognized, questions must be resolved which concern not only the authority of Government officials to enter into or ratify a contractual arrangement, but also whether the purported contract is prohibited by a statute or not within the agency's statutory authorization. Also, there may be questions concerning the availability of funds to pay an invoice resulting from an informal commitment, even if it is clear that there is no legal impediment to recognizing an implied contractual relationship.

These are questions that we have traditionally decided under 31 U.S.C. §§ 71, 74. We see no conflict between the disputes-resolving procedures of the Act and our responsibility to settle and adjust demands against the Government and to render binding decisions involving the payment of appropriated funds. In response to a situation such as this, a contracting agency should refer the question regarding propriety of payment to this Office for decision.

To hold otherwise would be inconsistent with the statutory authority of our Office to pass upon the propriety of expenditures of public funds and would result, in effect, in a repeal by implication of 31 U.S.C. §§ 71, 74, a construction not favored by the law. 1A Sutherland, Statutes and Statutory Construction, 23.10 (4th Ed. C. Sands 1973). Moreover, our interpre-tation provides for a harmonious reading of different statutes, a result which is favored by the law. 2A Sutherland 51.02.

Accordingly, we are instructing the Payment Branch to consider the matter in accordance with this decision. The contracting agency is advised that requests for payment, based on informal commitments, should continue to be referred to our Office in accordance with 4 GAO 5.1.

The Board has been given to understand that the Office of the General Counsel, GAO, does not disagree with the position taken by the Board that contract disputes issues should not be further considered by the Comptroller General in view of the jurisdiction vested in the Board by the Contract Disputes Act.

The pleadings and Rule 4 appeal file were duly filed with the Board, discovery procedures were utilized and a hearing on the merits was scheduled to be held at San Francisco, California on March 25, 1980.

Counsel for appellant by letter dated March 24, 1980, filed a request for Dismissal and withdrew the appeal. Counsel notified the Board orally on March 25, 1980, that it was withdrawing the appeal with the understanding that the Board would dismiss with prejudice. Direct access to the Court of Claims is available under section 10(a) of the Act (41 USC 609(a)) to a contractor who brings a court action within 12 months from receipt of a decision of a contracting officer "in lieu of appealing * * * to an agency board". Accordingly, it appears that Sierra would be precluded, in this factual situation, from filing an action in the Court of Claims.

Government counsel delivered a motion to the Board on March 25, 1980 seeking to have the Order of Dismissal also contain the following language:

> Pursuant to appellant's request this case is hereby dismissed with prejudice. Appellant now accepts the contracting officer's decision of March 24, 1978 in this matter. The Comptroller General's decision of April 5, 1979 no longer holds any precedent value.

The decision of March 24, 1978 was a denial of the claim but was not appealable to the Board under the Disputes clause and the Secretary's charter regulations granting jurisdiction to the Board in Forest Service timber sale contract disputes (7CFR 24.4(e)). This is so because the relief sought was reformation of contract which is expressly excluded from the timber sale contract jurisdiction in §24.4(e)(3) of the Secretary's regulations.

In any event, the matter was submitted to the Comptroller General who issued the decisions as described above.

Sierra received a new decision dated October 12, 1979 wherein the contracting officer denied the claim under the Contract Disputes Act. This decision was appealed to the Board by Sierra which elected to have the Act apply to a decision rendered after March 1, 1979 relating to a contract awarded before March 1, 1979. Accordingly, the Board had jurisdiction to consider the matter which involved a request for reformation of the terms of a Forest Service timber sale contract (41 USC 607(d)).

This Board considers that Forest Service timber sale contracts are express contracts for the disposal of personal property within the meaning of section 3(a)(4) of the Act (41 USC 602 (a)(4)). Southwest Forest Industries, Pacific Northwest Division, AGBCA No. 77-180, 79-1 BCA ¶13,788; All-American Plywood Co., AGBCA No. 79-147 CDA, 80-1 BCA ¶14,189, 22 G.C. ¶55.

An argument can also be made that Forest Service timber sale contracts have elements of a service contract in them (road construction, environmental protection, insect disease control, fire control) which would warrant inclusion of such contracts within the category of

express contracts for the procurement of services within the meaning of section 3(a)(2) of the Act (41 USC 602(a)(2)). See §4.131f, 44 F.R. 77036, 77056-7, December 28, 1979, Notice of proposed rulemaking under the Service Contract Act by the Department of Labor.

It should be noted that the jurisdictional question involving Forest Service timber sale contracts under the Act is presently before the Court of Claims. See report of Trial Judge Harkins in Everett Plywood Corporation v. United States, No. 199-75, December 28, 1979, 27 CCF ¶80,059 [subject to review by the Court of Claims.]

In the case before the Board, neither party has contested the jurisdiction of the Board to consider disputes relating to Forest Service timber sale contracts under the Act.

The Government motion here seeks to nullify the ruling issued by the Comptroller General involving this timber sale contract. We have concluded that Sierra by appealing to the Board under the Act effectively gave up any right which it might have asserted under the April 5, 1979 C.G. decision. We express no opinion as to the decisions of the Comptroller General as precedents in other cases not involving Sierra's contract No. 017753.

IT IS, THEREFORE, ORDERED THAT:

The appeal is hereby dismissed with prejudice.

E. Relating To The Contract

Holly Corporation

ASBCA No. 23749 (1979)

The Defense Fuel Supply Center (the Government) has filed a Motion To Dismiss the appeal of Holly Corporation (Holly) for lack of Jurisdiction. The Motion raises a number of grounds for such dismissal each premised on the basic fact that Holly's claim, since it involves an admiralty cause of action, is within the exclusive jurisdiction of the Federal District Courts and not with this Board.

We will, solely for purposes of this motion, assume that the allegations as stated in the pleadings thus far filed with the Board, are factually correct. Based upon this assumption, the facts pertinent to a determination of this preliminary question are as follows:

1. The contract between Holly and the Government requires Holly to provide services and facilities for receiving Government owned aviation fuel from pipelines, tankers and barges, for storing the fuel in underground tanks, and for shipping it from storage.

2. Holly, in order to perform as required by the contract, maintains a number of underground petroleum storage tanks, provides a dock capable of berthing tenders, and has a fuel pipeline system.

3. On 11 March 1978 and on 4 July, 1978, two Government vessels, while in the process of docking at Holly's dock for purpose set forth in the contract, collided with dock and did damage to it.

4. As a result of the second collision, the dock, which Holly states it is not obligated to repair in the case of Government caused damage, must be repaired before it can again be utilized under the contract.

5. In July 1978, Holly, under the contract's "Disputes" clause, filed a claim with the contracting officer for repair costs necessitated by the two collisions. The contracting officer responded by stating that his office could not settle claims involving Government vessels.

6. In January 1979 Holly requested issuance of a final decision on the matter from the contracting officer, pursuant to the contract's "Disputes" clause.

The contracting officer refused to do so, claiming that he lacked authority to settle admiralty claims against the Government.

7. On 5 March 1979 Holly again requested a contracting officer's final decision regarding its claim. The contracting officer replied on 22 March, once more stating that he was without authority to render a decision in the matter. He added that ". . . a refusal by the contracting officer to render a final decision has itself been held to be an appealable issue."

8. Holly filed an appeal from the contracting officer's failure to render a final decision on 27 March 1979, and elected to proceed under the Contract Disputes Act of 1978.

9. Holly's complaint alleges that it is entitled to recovery of the damages caused by the collision under the contract's "Changes" clause or, in the alternative, because of the Government's breach of its contract with Holly.

10. The major arguments raised by the Government in support of its action to dismiss are (1) the complaint does not relate to contract No. DSA 600-01-C-7878 or any other Government contract, and (2) since it involves damages caused by vessels, Holly's claim is within the original admiralty jusisdiction of the Federal District Courts pursuant to 28 USC §1333.

DECISION

We disagree with the Government's initial contention that Holly's claim is unrelated to the subject contract or any other Government contract. Holly alleges that the two vessels were occupied in contract related business when they collided with its dock. In other words, according to Holly, but for the contract - the vessels would not have been at its dock and the events being reviewed would not have occurred. This brings the matter easily within the language of Section 6 (a) of the Contract Disputes Act of 1978 which contemplates our determination of "all claims by a contractor against the Government relating to a contract . . ." Holly's appeal has been brought under the Contract Disputes Act of 1978, and we believe correctly so, in view of its 5 March request for a final decision and the contracting officer's 22 March "final refusal" to render only Monaco Enterprises, Inc., ASBCA No. 23611, 79-1 BCA ¶_____. Thus., we believe that the facts alleged by Holly do indeed relate to the contract under appeal, and we believe that its theories of relief, either as constructive changes under the "Changes" clause, or as

breaches of contract are at least tenable. Whether or not the complaint states a cause of action is not a question of jurisdiction but is to be decided on the merits after the Board has taken jurisdiction. Ralston-Steel Corp. v. United States, 169 Ct. Cl. 119, 125, 340 F. 2d 663, 666 (1965); cert. den. 381 U.S. 950 (1965). Accordingly, we are of the view that this aspect of the Government's argument is not valid.

The Government's next major contention, that we are without jurisdiction to hear appeals involving admiralty matters, is similarly without merit. We have, in the past, accepted jurisdiction of appeals that have involved admiralty questions, and we have done so without question or criticism either from the parties or from the Courts. For instance, Northwest Marine Iron Works v. United States, 493 F.2d 652 (1974) concerned a contract for the "activation, repair and conversion" of a navy vessel, and was characterized by the Court of Claims as being "essentially maritime in nature." Because of its maritime character the Court of Claims concluded that it had no jurisdiction over this Wunderlich Act action and transferred the case to the U. S. District Court. The Court of Claims did not, however, criticize this Board's original consideration of the appeal, see Northwest Marine Iron Works, ASBCA No. 16350, 73-1 BCA ¶9902, nor did it intimate that we lacked jurisdiction over the matter. Its decision not to hear the case related only to the judicial treatment of an admiralty matter, not to its administrative determination. In United States Lines, Inc., ASBCA No. 20828, 77-1 BCA ¶12,261, our Board not only fully considered an appeal that was maritime in nature, but thoroughly analyzed a contract provision that was uniquely maritime. There was, again, no jurisdictional question raised by either party. See also, Sea Tankers, Inc., ASBCA No. 22294, 78-1 BCA ¶13,150, where the Government filed a Motion to Dismiss, but for reasons unrelated to the maritime character of the contract involved in the appeal. These cases, and others, reflect the consistent practice of this Board to fully consider cases of an admiralty nature on their merits as long as the contracts involved contained appropriate "disputes" language and otherwise provided for the relief sought.

Section 4 of the Contract Disputes Act of 1978 discusses Maritime Contracts and it states that appeals from Board decisions, under Section 8(g), and claims brought directly in Court, under Section 10, are governed by the statutes which vest jurisdiction over maritime contracts solely in the Federal District Courts. As the Committee Report on this aspect of the Act states:

> Jurisdiction over matters arising in admiralty including maritime contracts has vested exclusively with the Federal district courts since 1920 . . . Inclusion of maritime contracts within the bill would have created an exception to the district courts' otherwise exclusive admiralty jurisdiction and divided maritime contract disputes between the Court of Claims and district courts. . . .

S. Rep. No. 95-118, 95th Cong., 2d Sess. (1978).

But Section 4 and the legislative history are concerned solely with judicial determination of an admiralty matter, those that arise either as the result of an appeal from a Board decision or through "direct access" to the courts. Section 4 of the Contract Disputes Act does not disturb our authority, under Section 6, to hear appeals "relating to the contract" regardless of their subject matter, nor does it change our past practice of considering admiralty appeals if the contract language involved was otherwise appropriate.

We have considered the remaining arguments offered by the Government in support of its Motion and consider them similarly without merit.

Accordingly, the Government's Motion to Dismiss is denied, and it is directed to submit its Answer to Holly's Complaint as amended within 30 days after receipt of this decision.

F. Subcontractor Appeals

SEVERIN v. UNITED STATES

99 Ct. Cl. 435 (1943)

Cert. denied 322 U.S. 733 (1944)

MADDEN, Judge, delivered the opinion of the court:

Plaintiffs entered into a contract with the United States on August 3, 1933, to furnish all labor and materials and perform all work required for "the construction, including approaches, etc. of the Post Office at Rochester, New York, per Bid No. 4 (using sandstone for all exterior stonework except where marble and granite are required and substituting steel casement windows for the aluminum casement windows)" for a consideration of $805,923.00 in accordance with designated drawings and specifications. The work was to be completed within 540 days after receipt of the notice to proceed. Plaintiffs were notified to proceed September 2 1932, thus fixing the date of completion on or before February 24, 1934.

The defendant employed a firm of architects who were "authorized to prepare all drawings . . . criticize and approve plaster models or ornamental work as shown or noted on contract drawings." Article 46 of the specifications provided that the defendant would furnish the models indicated on the drawings. Plaintiffs proceeded with the work but they, and the subcontractor with whom they had made a contract for the cutting of the marble caps and the ornamental work, were delayed because of the failure of the defendant to furnish models for the exterior marble column caps for the porticos which were at two entrances to the building. The roofs of the porticos were supported by the columns, the caps of which were between column and frieze.

The letter from the Supervising Architect, who was the duly appointed representative of the contracting officer under Article 30 of the specifications, to plaintiffs on January 26 1934, shows that there was delay in furnishing models No. 6 and No. 7, due to the fact that the contract for the models had not been awarded because of faulty designs furnished to the Supervising Architect and the necessity for new designs. Award of the contract for models was in May instead of the early part of 1933. The models were not approved until the following June and the marble caps were not received by Plaintiffs until August 17, 1933.

The defendant does not deny that by reason of its failure to furnish the models plaintiffs and their subcontractor were delayed. A change order was issued extending the time for completion of the contract for 21 days.

No allowance was made in this change order for the actual loss sustained by plaintiffs and their subcontractor by reason of the fact that the delay caused plaintiffs to stop work to await the arrival of the models. The subcontractor had its force ready to go to work on the carving of the column caps. It was impossible for plaintiffs to complete the roofs of the porticos because the roofs were to be supported by the columns.

The actual delay caused by the subcontractor was for thirteen days. The actual damage sustained by the subcontractor due to the cost of labor and rental of equipment, which had to be kept idle awaiting the arrival of the models, and the uncertainty as to when they would arrive, amounted to $702.00. The subcontractor's overhead was $35.10, and the plaintiffs' extra overhead on account of this delay was $73.71.

Plaintiffs may have suffered other losses on their own account, as a result of the delay, but if so, they have not adequately proved them.

We have then a case in which plaintiffs are suing for damages sustained by themselves as a result of the Government's breach of contract and also for damages sustained by another person, a subcontractor. Plaintiffs may, of course, recover for their own loss, which so far as proved, was $73.71.

As to the items of $702.00 and $35.10 which represent losses of the subcontractor, we think the plaintiffs may not recover. The subcontractor could not sue the Government since it has not consented to be sued except so far as relevant to this case, for breach of contract. But the Government had no contract with the subcontractor, hence it is not liable to, nor suable by him. Herfurth v. United States, 89 Ct. Cls. 122.

If the subcontractor did have a claim against the Government, it could not transfer that claim to another person, plaintiffs, for example, since assignment of such claims is forbidden by statute. R.S. 3477; 31 U.S.C. 203. The Supreme Court said of this statute in Spofford v. Kirk, 97 U.S 484, 488, 489:

> It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes power of attorney, orders, or other authorities for receiving payment of any such claim, or any part thereof. It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the Government from creating an interest in the claim in any other than himself.

See also National Bank of Commerce v. Downie, 218 U.S. 345; Seaboard Air Line Ry v. United States, 53 Ct. Cls. 107; Packard Co. v. United States, 59 C. Cls. 354.

If, then, we regard the subcontractor as the real party in interest in this claim, we are faced with a legally forbidden attempted assignment of a nonexistent claim.

If we look at plaintiffs as the real party in interest in their own suit we encounter these facts. Plaintiffs did have a contract with the Government. That contract was breached. That breach might, if the contract had been one between private persons, have given rise to a right to win a suit, and to recover nominal damages, even if no actual damages resulted from the breach. But the futile exercise of suing merely to win a suit was not consented to by the United States when it gave its consent to be sued for its breaches of contract. Nortz v. United States, 294 U.S. 317, 327; Great Lakes Construction Co. v. United States, 95 Ct. Cl. 479, 502.

Plaintiffs therefore had the burden of proving, not that someone suffered actual damages from the defendant's breach of contract, but that they, plaintiffs, suffered actual damages. If plaintiffs had proved that they, in the performance of their contract with the Government became liable to their subcontractor for the damages which the latter suffered, that liability, though not yet satisfied by payment, might well constitute actual damages to plaintiffs, and sustain their suit. Here, however, the proof shows the opposite. The subcontract, which is in evidence, shows that plaintiffs and the subcontractor agreed with each other as follows:

> 21st. The Contractor or Subcontractor shall not in any event be held responsible for any loss, damage, detention or delay caused by the Owner or any other Subcontractor upon the building; or delays in transportation, fire, strikes, lockouts, civil or military authority, or by insurrection or riot, or by any other cause beyond the control of Contractor or Subcontractor, or in any event for consequential damages.

Thus plaintiffs, effectively so far as we are advised, protected themselves from any damage by way of liability over to the subcontractor for such breaches of contract by the Government as the one which occurred here.

Plaintiffs must, then, so far as their claim includes items of losses suffered by their subcontractor, be merely accommodating another person who was damaged, by letting that other person use, for the purposes of litigation, the name of plaintiffs, who had a contract and could properly have sued, if they had been damaged. Orderly administration of justice, as well as the statute against assignment of claims, seem to us to forbid that.

Plaintiffs may recover $73.71.

It is so ordered.

WHITAKER, Judge; and LITTLETON, Judge, concur.

DISSENTING OPINION BY CHIEF JUSTICE WHALEY

WHALEY, Chief Justice, dissenting:

I cannot agree with the majority opinion.

There is no legal or equitable assignment involved. This is an action by a contractor to recover damages suffered by himself and his subcontractor, occasioned by the delay of the defendant. It is submitted that defendant's delay caused damages to both the contractor and the subcontractor. The plaintiff failed to prove the amount of his own damages but the damages suffered by the subcontractor were estabished by clear proof. The majority opinion admits that the subcontractor was damaged in the amount of $737.10 by allowing overhead on this amount to plaintiff.

For fifty years it has been the settled doctrine of this court that a contractor could bring suit for himself and his subcontractor for losses occasioned by delay by the defendant before payment was made to the subcontractor. In innumerable cases from Stout, Hall & Bangs v. United States, 27 C. Cls. 385, to Consolidated Engineering Company, No. 43159, decided February 1, 1943 (98 Ct. Cls. 256), this doctrine has been uniformly followed and [has] never been questioned.

We must bear in mind that general contractors usually sublet specialized work like plumbing and electrical installations to subcontractors. The effect of the majority opinion would be to compel such subcontractors, and they are legion in numbers, to sue in their own names, which they could not do for lack of privity with the United States. This anomalous situation has never been recognized by this court in all its history. And the majority opinion cites no case in the Supreme Court in which subcontractors have been held to be assignors of claims against the United States, merely because they were unfortunate enough to be subcontractors.

The subcontractor of plaintiff agreed in his contract not to hold the contractor for "loss, damage, detention or delay caused by the owner."

The contractor is the plaintiff in this action. The subcontractor is not suing the contractor or the defendant. Plaintiff is suing for himself and his subcontractor for an admitted loss. The defendant was not a party to the subcontract. No consideration has been paid by the defendant for the protection given the contractor in the sub-contract and without it the defendant cannot avail itself of this defense.

In my judgment it is a travesty of justice to allow plaintiff overhead on the losses suffered by his subcontractor and to deny recovery to plaintiff for his subcontractor of the amount admittedly due him from the defendant, which any court of equity would require the contractor to pay over to his subcontractor after payment to him by the defendant.

I think plaintiff is entitled to recover $810.81.

AEROJET-GENERAL CORPORATION

ASBCA No. 11739 (1967)

ON MOTION TO DISMISS

The Government has moved to dismiss an appeal brought by Aerojet-General Corporation for and on behalf of its subcontractor, Electrac, Incorporated.

Both the prime and subcontract are cost-plus-fixed-fee type contracts. Electrac alleges it is entitled to payment of $19,097.58 arising out of the performance of the subcontract. This claim for payment raises two issues:

1. The correctness of the action by the Government auditor in suspending certain costs claimed by the subcontractor; and

2. Whether the subcontractor is barred from recovering any cost by the Limitation of Cost clause in its subcontract.

The ultimate issue, and we so find, is whether the prime contractor is entitled to be reimbursed by the Government for those costs to be incurred in connection with his performance on the prime contract.

The invoice claiming the contested costs was presented to the appellant after delivery under the subcontract was complete. Appellant rejected them on the basis of the cost limitation provision of the subcontract. An audit was performed by the Army Audit Agency. The auditors were of the opinion that payment of the requested cost should be suspended, some of them as unallowable, and some as unproved. Apparently appellant and the contracting officer agreed with the auditor and Electrac was so informed, but this was not in the form of a formal rejection of the invoice.

The contracting officer refused to consider the claim on its merits on the basis that there was no dispute between the prime contractor and the Government. The subcontract did not contain a disputes clause. The appellant and Electrac amended the subcontract to include a disputes clause in accord with ASPR 3-903.5. The appellant forwarded this change to the contracting officer and again requested a decision. The latter refused to either approve the change order to the subcontract or to issue a decision on the merits of Electrac's claim. Appellant again requested a decision, received a refusal, and brought this appeal.

The appeal letter states that it is brought in its own name, on behalf of its subcontractor, Electrac, and is signed by a vice president of the appellant corporation.

The Government has moved for dismissal on the ground that there is no dispute between the prime contractor and the Government. The contracting officer and the Board do not decide disputes between prime and subcontractors. The argument is eloquent, and is persuasive that the two contractors could not bind the Government to a subcontract disputes clause not authorized or approved by the contracting officer. It does not overcome the fact, however, that the appeal was brought by the prime contractor, in its own name, and was signed by one of its principal officers.

The only question remaining is whether the appellant has good ground to bring the appeal. An appealable interest was recently defined in TRW, Inc., ASBCA No. 11373, on Motion for Reconsideration, 66-2 ¶ 5882. Applying that definition here, the appellant has sufficient grounds for bringing this appeal. Thus established, the present appeal is identical in form to Westinghouse Electric Corp., ASBCA No. 10899, 66-1 BCA ¶ 5687, in which the Board took jurisdiction and decided the subcontractor's claim on its merit. The motion to dismiss is denied.

The complaint requests that we remand the matter to the contracting officer with instructions that he decide this claim on its merits. Mandamus is not one of the remedies readily available to the Board. However, the refusal of a contracting officer to make a decision is itself appealable, Leader Manufacturing Company, ASBCA No. 4416, 58-2 BCA ¶ 1877. If the contracting officer advises that he will now consider the claim, the Board will dismiss this appeal, without prejudice. Otherwise, the Board will consider the appeal.

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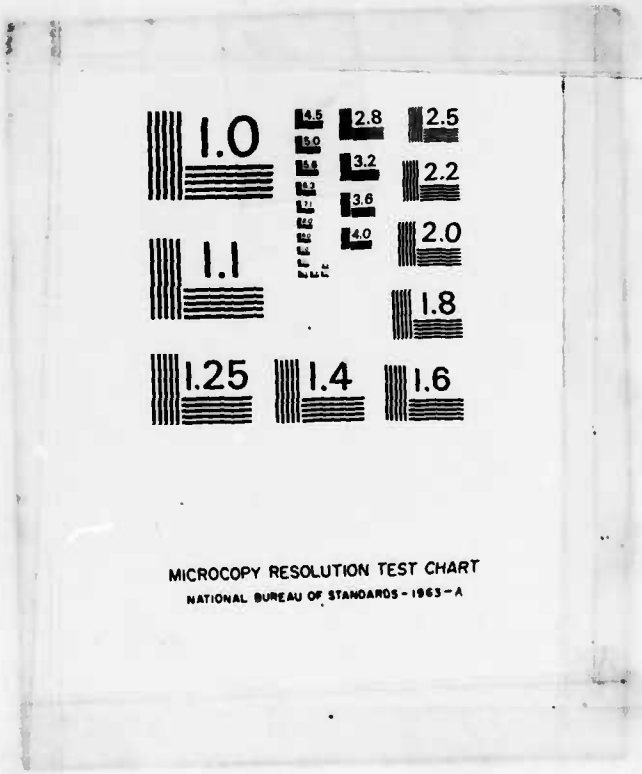
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G. Fraud

MEDICO INDUSTRIES, INC.

ASBCA No. 22141 (1980)

The Government, by motion dated 3 March 1980, urges that this appeal be dismissed on the ground that the underlying contract, including appellant's appeal rights and this Board's jurisdiction stemming from the Disputes clause thereof, have been cancelled and annulled by the contracting officer upon his determination on 25 February 1980 that the contract was tainted with violations of 18 U.S.C. §207(a).

Briefs and oral arguments have been submitted in support of the motion by the Government and in opposition thereto by appellant.

BACKGROUND

The subject contract for the manufacture and delivery of 452,400 60mm M49A3 projectiles was awarded to appellant on 31 May 1973. The quantity of projectiles to be furnished was subsequently augmented to 2,267,400 by contract modification, and the contract price was increased from $834,578.00 to $5,061,713.00.

On 25 November 1974 appellant filed a claim for an equitable adjustment, alleging that it was commercially impractical to manufacture projectiles by the prescribed method which would conform to the contract standards and that the Government was aware of the said commercial impracticability at the time of contract award. Appellant further contends that at a meeting on 1 August 1974 an understanding was reached to the effect that appellant would receive additional compensation from the Government if it continued production in spite of the immoderate costs then being incurred (Complaint, ¶¶14-16).

Appellant's claim was denied by the contracting officer on 10 June 1977 in a final decision rendered under the standard Disputes Clause of the contract, and appeal therefrom to this Board was timely taken on 23 June 1977 by appellant on behalf of its subcontractor, NEMPCO.

Appellant filed its complaint on 30 August 1977, alleging entitlement to additional costs of $2,045,780.00, which the Government opposed by answer dated 6 October 1977.

On 9 May 1979 the Government filed a Motion to Suspend the Board's Proceedings upon receipt from the Federal Bureau of Investigation of the following letter to Government counsel dated 4 May 1979:

The current investigation of Congressman Daniel J. Flood, D-Pa., has been expanded to include his association with Medico Industries of Plains Township, Pennsylvania. The Washington Field office hereby requests your office to suspend all current and future proceedings concerning the appeal of Medico Industries contract DAAA09-73-C-0259, ASBCA number 22141, pending the outcome of their criminal investigations. Washington Field Office requests your assistance in securing and obtaining evidence which may be pertinent to the investigation. Your office will be advised of the outcome of the investigation, at which time your negotiations could be continued without further interference.

Despite objection by appellant, we granted the Government's motion and suspended proceedings from 4 June 1979 to 2 August 1979.

Both before and after the said suspension of proceedings, the parties participated in extensive discovery and other prehearing activities in preparation for the hearing of the appeal which the parties and the Board anticipated, in an October 1979 conference, would begin in March or April 1980.

By letter dated 25 February 1980, the contracting officer, Eugene F. Waldo, informed appellant:

Your contract with the Department of the Army DAAA09-73-0259, is tainted with violations of the United States Code (18 U.S.C. 207(a)) on the part of Mr. Edward F. Hill. I am exercising my discretion and canceling this contract effective this date. This cancellation extinguishes all claims, rights and demands of whatsoever nature which Medico Industries, Inc., may have had against the United States under the aforementioned contract.

We are unaware of any criminal or other proceedings instituted against appellant or Mr. Edward F. Hill involving alleged violations of any criminal laws of the United States in connection with the subject contract.

From the time for the docketing of the appeal by us in June 1977 until the filing of the present motion to dismiss, the Board exercised jurisdiction over the appeal without question by either of the parties, and no question is raised even now as to the Board's having had jurisdiction from the commencement of the appeal until the contracting officer's action on 25 February 1980.

The Government's Position

Title 18, Section 207(a), of the United States Code, in effect during the contract period and at all pertinent times thereafter, provides:

Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of

Columbia, including a special Government employee after his employment has ceased, knowingly acts as agent or attorney for anyone other than the United States in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and in which he participated personally and substantially as an officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, while so employed . . . Shall be fined not more than $10,000 or imprisoned for not more than two years, or both . . . .

The Government contends that the prohibitions in the said statute are public policies of the United States and that it has the right to cancel, annul, repudiate, or disavow Government contracts tainted with violations therof; that as the Government's principal agent in the administration of its contracts, the contracting officer may exercise the Government's right to cancel its contracts; that upon his exercise of that right concerning the subject contract, a valid contract no longer exists as the basis for jurisdiction by the Board; that whether or not the cancellation by the contracting officer was proper, the matter is not subject to review by the Board; and that even if the cancellation was improper for any reason, it constitutes a breach of contract, a matter not within the jurisdiction of the Board.

Appellant's Position

Appellant argues that the contracting officer's unprecedented action of 25 February 1980 was a legal nullity because he has no authority to act as prosecutor, judge and jury in determining violations of the criminal laws of the United States: that no showing of facts was made to indicate what acts the contracting officer considered to be in violation of 18 U.S.C. §207(a); that the contracting officer denied appellant minimal due process protections in effecting a punitive and unjustifiable deprivation of appellant's contract rights; and that there is no legal justification for cancellation of a Government contract for violations of 18 U.S.C. §207(a).

DECISION

The contracting officer's determination on 25 February 1980 that the subject contract was "tainted with violations of the United States Code (18 U.S.S. 207(a)) on the part of Mr. Edward F. Hill" and his concomitant cancellation of the contract on the basis of that determination have generated several issues unresolved heretofore by us or the courts:

Does a violation of §207(a) of Title 18, United States Code, justify invalidation of a Government contract in the same manner as a violation of §208(a) thereof?

In United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961), the Supreme Court held that the extensive evidence before it, which had been adduced in the United States Court of Claims, constituted a violation of the public policy of the United States embodied in 18 U.S.C. §434 (the predecessor statute to 18 U.S.C. §208(a)) for which the Government had the right to repudiate the contract. However, the Court observed that the contract in issue before it, unlike the contract before us, "resulted from the illegal transaction", the conduct of a public official having simultaneous conflicting financial interests - i.e., serving two masters at the same time. Id. at 564; cf. United States v. Acme Process Equipment Co., 385 U.S. 138, (1966): Crocker v. United States, 240 U.S. 74, (1916); Michigan Steel Box Co., Inc. v. United States, 49 Ct. Cl. 421 (1914).

Likewise, in K & R Engineering Company, Inc. v. United States, Ct. Cl. No. 84-77, 20 February 1980, the Court of Claims, after a thorough consideration of the evidence, found that the entire contracting process was "fraught with fraud and corruption" in violation of 18 U.S.C. §208(a) and significantly stated:

> The contracts themselves were each infected by this corruption, and each was void ab initio. (Slip op. at 14)

Since 18 U.S.C. §207(a) deals with conflicting interests of officials subsequent to their employment by the Government, and not simultaneous therewith, the propriety of application of precedents dealing with violations of 18 U.S.C. 208(a) to violations of §207(a) is questionable. In any event, for reasons hereinafter set forth, resolution of this issue is not requisite to our decision on the motion before us.

2. Is cancellation of the contract by the contracting officer, whether proper or improper, subject to review by the Board?

In purporting to cancel the subject contract on 25 February 1980, the contracting officer stated that he was thereby "exercising my discretion."

While many areas of Government contracting are properly left to administrative discretion without review by the courts, contracting officials cannot be allowed to exceed the legal perimeters (sic) of their discretionary authority. Scanwell Laboratories, Inc. v. Shaffer, 42 F. 2d 859, 874 (D.C.) Cir. 1970); cf. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, (1947). Accordingly, we have consistently held that whether a discretionary right existed is a proper question for determination by the Board, although the decision whether to exercise an existing right may not be. Yankee Telecommunication Labs, ASBCA No. 13042, 69-2, BCA ¶7970; El-Tronics, ASBCA Nos. 5501, 5511, 5512, 60-2 BCA ¶2712, at 13,799; Woodside Screw Machine Co., Inc., ASBCA No. 6936, 62 BCA ¶3308. Applying this precept, we turn to the final and crucial issue presented.

3. Did the contracting officer have the discretionary right to cancel the contract upon determining that it was tainted with violation of 18 U.S.C. §207(a)?

The general scope of the authority of contracting officers within the Department of Defense is set forth in the Defense Acquisition Regulations (DAR):

> 1-402 Authority of Contracting Officers. Contracting officers at purchasing offices (see 1-201.24) are authorized to enter into contracts for supplies or services on behalf of the Government, and in the name of the United States of America, by formal advertising, by negotiation, or by coordinated or interdepartmental procurement; and when authorized by 20-703 to administer such contracts in accordance with this Regulation. This authority is subject to the requirements prescribed in 1-403 and 1-404 and any further limitations, consistent with this Regulation, imposed by the appointing authority. Contracting officers at contract administration offices (see 1-201.25) are, except as provided in 20-703.3, authorized to perform the applicable contract administration functions (see 1-406) and to perform additional procurement functions when delegated by the purchasing office.

Specific duties and responsibilities for dealing with criminal conduct in connection with procurement activities within the Department of the Army are prescribed in Part 6 of the Army Procurement Procedures, in pertinent part as follows:

> 1-650 Fraud or Criminal Conduct. Prompt reporting of allegations of fraud or criminal conduct in connection with procurement activities, and of all other irregularities which could lead to debarment or suspension of a contractor or to judicial or administrative action against military personnel or civilian employees of the Department of the Army is of extreme importance to the proper supervision of procurement activities. . . .
>
> (b) Within the Department of the Army the requirement of reporting under ASPR 1-608.1 (i), (ii), (iv), (v), and (vi) is based upon the existence of reason to suspect that one or more of the enumerated offenses or acts has been committed. This is a lesser standard than, and not necessarily related to, the standard used by the Secretary or his authorized representative under ASPR 1-605.1 [and Assistant Judge Advocate General] in determining whether to suspend. . . .
>
> (c) when a contractor has been added to the consolidated list in ASPR 1-601, or allegations of fraud or criminal conduct in connection with procurement activities are reported, the reporting agency shall make a determination as to whether a review also shall be made of contractual rela-

tionships with the contractor and its affiliates. The review, if made, shall cover a period of two years, or longer if considered necessary, to determine whether there is procurement fraud or other criminal conduct and whether the Government may have any basis for recovery of damages, or payments from the contractor in connection with such other procurement activities. Results of the review shall be reported through procurement channels to the addressee in 1-150(b) (2) [exempt report, paragraph 7-2t, AR 335-15].

1-651 Responsibilities

(a) The contracting officer is responsible for prompt initiation, complete and accurate preparation, and submission of reports. (b) The Head of Procuring Activity is responsible for supervision of the contracting officer and for administration of current contracts with contractors recommended for suspension or debarment, or with suspended or debarred contractors.

* * *

(d) The Advisor on Fraud Matters to the Assistant Secretary of the Army (Installations and Logistics) is responsible for and has delegate authority to supervise and exercise surveillance over procurement fraud, allied matters of bribery, and kickbacks and other criminal conduct in connection with procurement activities by contractors and their personnel and by military personnel or civilian employees of the Department of the Army. The Chief of the Debarment, Suspension and General Branch, Litigation Division, OTJAG, is the Advisor on Fraud Matters to the Assistant Secretary of the Army (Installations and Logistics).

1-652 Delegation of Authority by Head of Procuring Activity.

A Head of Procuring Activity may delegate authority under this Part 6 Section I to his Deputy, or a principal or deputy principal assistant for procurement, or to his legal advisor, in writing, and one copy shall be forwarded at time of issuance to the addressee in 1-150 (b)(6).

The foregoing regulations grant no responsibility or authority to a contracting officer concerning violation of the conflict of interest statutes of the United States other than to initiate a report where he has reason to suspect such a violation. Neither those regulations nor any others authorize him to make determinations and take dispositive action with regard to such violations.

In Aywon Wire & Metal Corporation, ASBCA No. 4966, 1963 BCA §3912, one of tne defenses raised by the Government was that illegal

conduct by appellant, in violation of the False Claims Act (31 U.S.C. §231 et seq.), tainted the claim. In disallowing the said defense, we said:

> Because of the nature of the statutes concerned; for the reasons set forth in HARRY LEV, ASBCA No. 2869 supra; and because of the assignments within the Department of the Army with respect to responsibility for false claims, fraud, and other criminal conduct, (Part 6, Section 1, APP); the Board concludes that it is not within its jurisdiction to find that all or a portion of appellant's claim or of the testimony or documentary evidence presented in support thereof is, in this case, false or fraudulent and to deny or forfeit the claim, in whole or in part, upon the basis of such a finding. Cf., ATLAS CAN CORP., ASBCA No. 3381, 6 June 1960, 60-1 BCA par. 2651, pages 13,165 and 13,177-8. [Emphasis inserted]

The quoted language pertaining to our jurisdiction to make findings as to criminal conduct and to deny or forfeit a claim on the basis thereof is equally applicable to the jurisdiction or right of the contracting officer to make criminal findings and cancel the contract in consequence thereof in the matter before us. 1/ Just as we had neither authority nor duty to render a decision as to an allegation of fraud, the contracting officer in this appeal had no authority or duty to render a decision concerning violations of 18 U.S.C. § 207(a).

As the Court of Claims stated in International Potato Corp. v. United States, 142 Ct. Cl. 604, 607, 161 F. Supp. 602, 604 (1958):

> The authority of a contracting officer to render decisions under contract provisions such as the one at bar is limited strictly to factual questions arising from the contract itself, Pfotzer v. United States, 111 Ct. Cl. 184 (1948), and does not extend to questions of law. Ruff v. United States, 96 Ct. Cl. 148 (1942); Plato v. United States, 86 Ct. Cl. 665 (1938).
>
> * * *
>
> The Contracting Officer . . . has power to administratively settle disputes of fact arising in the execution of a contract, not crimes in the nature of frauds of fact resulting from its execution.' United States v. United States Cartridge Co., 78 F. Supp. 81, 83-84 (E.D. Mo. 1948).

It follows that the contracting officer's action of 25 February 1980 was nugatory and of no effect upon our jurisdiction to hear the subject appeal.

The Government's Motion to Dismiss for Lack of Jurisdiction is denied.

H. Leases

ROBERT J. DI DOMENICO

GSBCA No. 5539 (1980)

The Government has moved for dismissal of this apppeal on the ground that the Board lacks jurisdiction. The Government argues first that the Board lacks jurisidiction under the Contract Disputes Act of 1978, 41 U.S.C. §§601-613, because the Act does not apply to lease agreements such as the one before us. Secondly, the Government argues that the absence of a remedy-granting clause in the contract deprives the Board of jurisdiction under the Disputes clause. We conclude that the Board does have jurisdiction under the Contract Disputes Act and therefore need not reach the Government's other argument.

This case was docketed by the Board on September 13, 1979 following receipt of a letter from appellant dated September 6, 1979, requesting that the Board take jurisdiction under Section 6(c)(5) of the Contract Disputes Act, 41 U.S.C. §605(c)(5), because of the contracting officer's failure to issue a timely final decision. A final decision was thereafter issued on October 3, 1979 in which the contractor was informed of its right to appeal to this Board and if it so elected to proceed under the Contract Disputes Act. On October 11, 1979, appellant filed its appeal from the final decision. Appellant had indicated in its September 6, 1979, letter that it desired to proceed under the Contract Disputes Act, and it reaffirmed that election by letter dated November 2, 1979. Subsequently, discovery has been taken, the Board has issued subpoenas to witnesses, and several prehearing conferences have been held. It was in this context that the Government first raised its challenge to the Board's jurisdiction by motion filed April 2, 1980. Because the Board denies the motion on its merits, there is no need to consider whether the motion is timely.

As to the merits, the Government argument rests on Section 3(a) of the Contract Disputes Act which provides:

> Unless otherwise specifically provided herein, this Act applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of Title 28, United States Code) entered into by an executive agency for --
>
> (1) the procurement of property, other than <u>real property in being</u>;
>
> (2) the procurement of services;
>
> (3) the procurement of construction, alteration, repair or maintenance of real property; or,
>
> (4) the disposal of personal property.

(Emphasis supplied.) The Government contends that a lease is the procurement of "real property in being" and that lease agreements are therefore not within the scope of the Act. We do not agree. What is procured in a lease agreement is a leasehold interest in real property, not the real property itself. In our view a leasehold interest is not real property at all and certainly not "real property in being."

At common law, a lease for a term of years, even though it is an interest in real property, constituted personal property. "At early common law a term for years was, in the strict sense, not property in land but rather a contract right against the lessor." C. Monihan, A Preliminary Study of the Law of Real Property, 30 (1940). See also H. Tiffany, C. Zollman, Real Property § 68 at 63 (1940). Although leasehold interests have over the years developed some of the incidents of real property, such interests remain personal property except where statutes have modified the common law rule.

> The interest of a tenant in a term for years was deemed at common law personal property as distinguished from real estate, however long its duration in years, as in the cases of leases which sometimes run for 99 or 999 years. Except as modified by statute, a leasehold interest or estate, although it is a chattel real, is still personal estate and is subject to all the rules governing that species of property.

49 Am. Jr. 2d Landlord and Tenant §7 at 49 (1970). See also 51C C.J.S. Landlord and Tenant §26 at 62-64 (1968).

The use of the modifying phrase "in being" in the Act bolsters the conclusion that lease agreements were not intended to be excluded from the Act's coverage. All estates in real property can be characterized as either freehold estates or estates less than freehold. Tiffany, supra, at 29. "The distinctive characteristic of freehold estates is that they endure for a period the termination of which is not fixed or ascertained by a specified limit of time." Id. A lease for a term of years is an estate less than freehold, not a freehold estate. Id. Strictly speaking, therefore, a leasehold interest, unless assigned, cannot be "in being" prior to the time of its procurement since the lease agreement creates it. In contrast the potentially infinite duration of a freehold estate, which is the very characteristic that makes it a freehold, connotes the sense of permanence, of "being" that a leasehold interest lacks. There must be a freehold estate in all real property and thus there is always a freehold "in being." The same is not true of leasehold interests.

"Not all rights in land are considered as real property. The English law subdivides rights in land according to the duration of the interest therein of their possessors. Certain of these interests therein are termed freeholds, that is, those interests that endure for the life of the holder or longer. For such interests the real actions are available. Other interests, however, those that endure for a term of years, however long, and those that endure at the will of the parties, are termed nonfreehold. Concerning these latter interests, during the formative period of the law no real action was available. The termor, or lessee as he is now commonly called, was considered to

have no real interest in the land itself but to hold only at the will of the lessor, against whom his rights in the land were therefore not real but personal." R. Brown, W. Raushenbush, The Law of Personal Property, 1.7 at 10-11 (3d ed. 1975).

Finally, the modern trend has been to consider leases as contracts rather than as conveyances of real property. Passaic Distributors, Inc. v. Sherman Company, 386 F. Supp. 647 (S.D.N.Y. 1974); Pugh v. Holmes, 405 A.2d 897 (Pa. Sup. Ct. 1977); Albert M. Greenfield & Co., Inc, v. Kolea, 475 Pa. 351, 380A 2d 758 (1977); Sommer v. Kridel, 77 N.J. 446, 378 (A.2d 767 (1977). See also 3 G. Thompson, The Modern Law of Real Property §1017 (1959 & Supp. 1979).

The Government nevertheless contends that the Contract Disputes Act must be construed so as to include leases in the meaning of "real property in being." It cites the legislative history of the identical phrase as it appears in the statute creating the Office of Federal Procurement Policy ("the OFPP Act") 41 U.S.C. §§ 401-412 (Supp. 1979). Section 6(a) of the OFPP Act, 41 U.S.C § 405(a), provides:

> The Administrator shall provide overall direction of procurement policy. To the extent he considers appropriate and with due regard to the program activities of the executive agencies, he shall prescribe policies, regulations, procedures, and forms, which shall be in accordance with applicable laws and shall be followed by executive agencies (1) in the procurement of -
>
> (A) property other than real property in being;
>
> (B) services, including research and development; and
>
> (C) construction, alteration, repair or maintenance of real property.

(Emphasis supplied.) In the section-by-section analysis of the OFPP Act in the Senate Report, S. Rep. No. 93-692, 93d Cong., 2d Sess. 18 (1974), the following appears:

> Procurement under this section covers property, services (including research and development), and construction, alteration, repair or maintenance of buildings and other forms of real property, but excludes real property in being. Accordingly, the acquisition of a fee, easements, leases or other interests in existing buildings and land would not be subject to the policies and regulations promulgated by the OFPP.

(Emphasis supplied.) The Government would have the Board (1) construe the OFPP Act in accordance with the quoted legislative history, (2) construe the Contract Disputes Act as being in pari materia with the OFPP Act and (3) conclude that the Contract Disputes Act does not apply to lease agreements. As we cannot take either of the first two steps we do not share the Government's conclusion.

First, we are reluctant to construe the OFPP Act to exclude leases of existing buildings from the jurisdiction of OFPP. It is, to begin with, not this Board's province to determine the jurisdiction of OFPP. In any event, we perceive nothing so distinctive about the lease of an existing building that it should be insulated from the policy-making authority of OFPP while a lease of a building not in existence is not exempt. Even reading the committee report as distinguishing between buildings under construction and completed buildings, we are left with the question whether a lease agreement originally entered into when a building is under construction suddenly becomes a lease of an existing building at the time the building is completed - and thereupon vanishes from OFPP jurisdiction.

We are unaware of any judicial construction of the phrase "real property in being" as it appears in the OFPP Act. As indicated, we do not purport to determine the scope of OFPP jurisdiction in this opinion. But even if we were to conclude that the committee report is correct and that in the context of the OFPP Act "real property in being" includes leases, we still would not apply that construction to the same phrase in the Contract Disputes Act because we do not accept the Government's contention that the two statutes are in pari materia.

"Statutes are considered to be in pari materia - to pertain to the same subject matter - when they relate to the same person or thing, or to the same class of persons or things or have the same purpose or object. As between characterization of the subject matter with which a statute deals and characterization of its object or purpose, the latter appears to be the more important factor in determining whether different statutes are closely enough related to justify interpreting one in the light of the other. For example, it had been held that where the same subject is treated in several acts having different objects the rule in pari materia does not apply." 2A C. Sands, Sutherland Statutory Construction 51.03 at 298 (4th ed. 1973) (footnote omitted). It is true that in a very broad sense, the two statutes have the same subject matter; Government contracting. However, any narrower classification of the acts even as to subject matter provides a clear distinction between them; the OFPP Act deals with broad issues of procurement policy, whereas the Contract Disputes Act deals with very specific issues affecting the resolution of contract disputes. Their purposes are even more obviously distinct; the OFPP Act is intended to establish an overseer of the Government's procurement activities and to create a centralized policy body within the Executive Branch where none had previously existed. In contrast, the Contract Disputes Act codifies, with significant modifications, existing practice in the resolution of Government contract disputes.

We construe the Contract Disputes Act in the light of two principles of construction that we find much more pertinent: (1) to assume that the legislature would not alter the status quo ante except by a clear enactment 73 Am. Jur. 2d Statutes §181 at 384 (1974); and (2) to construe a statute so as to effectuate its purposes. Id. at 359: C. Sands, supra, at 417.

The practice of this Board prior to the enactment of the Contract Disputes Act was to consider and decide disputes arising under lease agreements. See e.g. Edelbrock Corp.; GSBCA 4160 76-2 BCA ¶12,927 (1977); Grubb & Ellis Development Co., GSBCA 4160 76-2 BCA ¶12,189 (1976) rehearing denied, 76-2 BCA ¶12,190 (1976); Third and Pierce, Inc. GSBCA 3234, 74-1 BCA ¶10,452 (1974); D. L. Phillips Investment Builders, Inc., GSBCA 3545, 73-1 BCA ¶9794 (1972). Other boards of contract appeals have also considered and decided such disputes. Intelex Systems, Inc., PODBCA 249, 68-1 BCA ¶6925 (1968); Tennessee Corp., ASBCA 11570, 67-2 BCA ¶6622 (1967).

There is nothing in the language of the Contract Disputes Act other than the use of the phrase "real property in being" (which in its ordinary sense does not apply to lease agreements) to indicate that Congress intended to deprive the boards of contract appeals of the jurisdiction that they previously exercised over disputes concerning lease agreements. The legislative history of the Act contains no suggestion to that effect. Indeed, the Act itself provides a strong indication to the contrary; Section 8(d) 41 U.S.C §607(d) provides:

> Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relating to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the administrator had designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims.

By this provision, Congress deliberately expanded the jurisdiction of the boards beyond their former Dispute clause jurisdiction over claims "arising under the contract." This expansion of board jurisdiction was one of the primary purposes of the Act. It would distort the process of statutory construction to conclude that Congress would deliberately and patently expand the jurisdiction of the boards by the enactment of Section 8(d) and then narrow that same jurisdiction by using a phrase in Section 3(a) which a committee report of four years earlier, discussing the same phrase in a very different statute interpreted in an unusual and strained manner, contrary to general legal principles so as to exclude leases of existing buildings.

The Government has cited D. Oland Hawkins, PSBCA 796, 80-1 BCA ¶14,293 (1980) in support of its position. The opinion in that case is cursory, we do not find it persuasive, and we decline to follow it.

DECISION

For the foregoing reasons the Government's motion to dismiss for lack of jurisdiction is denied.

I. Certification As Jurisdictional

W. M. SCHLOSSER COMPANY, INC. v. THE UNITED STATES

CAFC (1983) 705 F.2d 1336

FRIEDMAN, Circuit Judge. This is a joint motion by the parties to transfer this case to the United States Claims Court and to dismiss the petition to review filed in this court. We deny this transfer, and hold that we have no jurisdiction over the appeal.

I.

This appeal challenges a decision of the General Services Administration Board of Contract Appeals (the Board) denying the appellant's claim for additional compensation under a Government contract entered into in September 1977.

In their joint submissions, the parties have set forth the pertinent facts. In February 1980, the appellant submitted an uncertified claim of $121,130 to the contracting officer. The contracting officer denied the claim on June 2, 1980, and informed the appellant that it had the option of appealing under either the disputes clause of the contract or the Contract Disputes Act, 41 U.S.C. 601 et seq (1982).

Appellant appealed the contracting officer's decision to the Board on July 24, 1980.

In a letter to the Board indicating its intent to appeal, the appellant stated that "[i]n addition, we elect to proceed with this appeal pursuant to the new contract disputes act." The appellant also included with the letter a document which retroactively certified that the claim previously submitted to and decided by the contracting officer was "made in good faith" and "to the best of my knowledge and belief" was accurate.

The Board denied the appeal on September 16, 1982, and the petition to review was filed in this court on October 25, 1982.

The motion, as augmented by submissions requested by the court, raises two issues: (1) Whether this court is without jurisdiction over the appeal from the Board decision under the Contract Disputes Act "because appellant did not submit a certified claim to the contracting officer"; and (2) whether the failure to certify the claim before the contracting officer renders the appellant's election to proceed under the Act invalid. The parties contend that the failure to certify had that effect and that this case therefore is one under the Wunderlich Act, over which the Claims Court has jurisdiction under the Tucker Act.

II.

We agree with the parties that we have no jurisdiction because the claim the appellant submitted to the contracting officer was not certified.

Since the contract was entered into prior to the effective date of the Contract Disputes Act (March 1, 1979), the appellant had the choice to proceed under either the Act or the disputes clause of the contract. See 41 U.S.C. § 601, note (Supp. IV 1980); Skelly & Loy v. United States, 685 F,2d 414 (Ct. Cl. 1982); Tuttle/White Constructors, Inc. v. United States, 656 F2d. 644, 647 (Ct. Cl. 1981). Under such disputes clauses "certification was not a jurisdictional prerequisite." Skelly & Loy, 685 F.2d at 418.

There is no question that the appellant elected to proceed under the Act. The parties have so recognized in their supplemental submissions. Moreover, the record shows that the election was "conscious and unwavering." See Tuttle/White Constructors, Inc., 656 F.2d at 647 (Ct. Cl. 1981). The contracting officer's decision informed the appellant of its choices, and the appellant's letter to the board instituting its appeal stated that it "elect(ed) to proceed" under the Act.

The appellant's attempt retroactively to certify its claim before the Board further demonstrates that the appellant made a voluntary and informed decision to proceed under the Act. It shows that the appellant knew that certification of all claims of more that $50,000 was required under the Act, and reflects a belated attempt to comply with this requirement. The circumstances of this case are similar to those in Essex Electro Engineers, Inc. v. United States, No. 26-82 (Fed. Cir. Mar. 11, 1983), where we recently held that a contractor's decision to proceed under the Act was binding. See also Tuttle/White Contractors, Inc., supra.

Since the appellant elected to proceed under the Act when it appealed to the Board, it must abide by the Act's procedural requirements of taking this particular route. Section 605(c)(1) of the Contract Disputes Act, 41 U.S.C. §605(c)(1) (1982), requires the certification of all claims in excess of $50,000. The Court of Claims repeatedly has held that a claim of more than $50,000 "cannot be considered under the statute" unless it was "properly certified" when it was submitted to the contracting officer. Paul E. Lehman, Inc. v. United States, 677 F.2d 352, 355 (Ct. Cl. 1982). See also Skelly & Loy, supra; Troup Bros. v. United States, Ct. Cl. No. 622-80C (order entered June 8, 1982); W. H. Moseley Co. v. United States, 677 F2d 850 (Ct. Cl. 1982). As the court stated in Lehman "[u]nless that [certification] requirement is met, there is simply no claim that the court may review under the Act." 673 F.2d at 355.

Although those decisions all involved cases in which direct review was sought in the Court of Claims of the decision of the contracting officer under section 608(a) of the Contract Disputes Act, 41 U.S.C. §609(a)(1) (1982), rather than, as here, of the Board's decision, we

see no reason to apply a different rule in the latter situation. As indicated in Skelly and Loy, - "the failure to certify the claim submitted to the contracting officer should taint every 'decision' that follows." 685 F.2d at 419. An uncertified claim "has not been 'properly submitted', so the contracting officer does not have the authority to issue a decision." Id.

Here as in Lehman, the fact that "a contracting officer has rendered a decision on the merits of an uncertified claim was of no consequence, since the officer "had no authority to waive a requirement that Congress had imposed." See Skelly & Loy, 685 F.2d at 419, quoting Lehman, 673 F.2d at 356. The Board likewise cannot waive the certification requirement. See Cosmic Construction Co. v. United States, No. 23-82, slip op. at 3, ___ F.2d___ (Fed. Cir. Dec. 10, 1982) (Holding that a board of appeals cannot waive the statutory 90-day limit for appeals to the board.) Unless the claim was certified when it was submitted to the contracting officer, the Board should have neither heard nor ruled on the appeal.

The policy considerations underlying the certification requirement are no less applicable to challenges to decisions of contract appeals boards than to those of contracting officers. In both situations, the certification requirement "deter[s] contractors from filing inflated claims which cost the government substantial amounts to defeat." Lehman, 673 F.2d at 355.

Although the appellant did certify the claim before the Board after the contracting officer had rendered a final decision, this retroactive certification is ineffective under the Act and does not cure the original failure to certify the claim at the proper time (i.e., when it was submitted to a contracting officer for decision). See W. H. Moseley, 677 F.2d at 852 (retroactive certification to contracting officer held ineffective).

We therefore agree with the parties that we have no jurisdiction over this case because of the failure of the appellant to certify the claim it filed with the contracting officer. To enable the appellant now to submit a certified claim to the contracting officer, if it so wishes, and to avoid any possible problem about the precedential effect of the Board's decision upholding the contracting officer, we shall vacate that decision.

III

The parties seek transfer under 28 U.S.C. §1631, added by section 301(a) of the Federal Courts Improvement Act of 1982 (the Courts Improvement Act), Pub. L. No. 97-164, 96 Stat. 25, 55, which became effective on October 1, 1982 (section 402, 96 Stat. 57). Section 1631 directs a court, upon filing of an appeal (including a petition to review) over which the court finds that "there is a want of jurisdiction", to transfer the appeal to "any other such court in which the . . . appeal could have been brought at the time it was filed or noticed. . ." if "it is in the interest of justice. . . ."

A. We deny the transfer motion because the petition for review in this case could not have been filed in the United States Claims Court at the time the appellant filed it in this court on October 25, 1982, well after the effective date of the Courts Improvement Act.

Under 28 U.S.C. § 1295(a), added by the Courts Improvement Act (96 Stat. 37-38), the Court of Appeals for the Federal Circuit has "exclusive jurisdiction ... (10) of an appeal from a final decision of an agency board of contract appeals pursuant to section 8(g)(1) of the Contract Disputes Act. . . ." Section 8(g)(1) of that Act authorized a contractor to appeal to the Court of Claims a decision of any agency board of contract appeals within a specified time. The Courts Improvement Act transferred that jurisdiction exclusively to this court.

Thus, although the United States Claims Court, which the Courts Improvement Act created, generally has the same trial jurisdiction that the Court of Claims formerly had (see 28 U.S.C. § 1491, as amended by the Courts Improvement Act, 96 Stat. 39), the Claims Court has no jurisdiction over petition to review decisions of agency boards of contract appeals rendered under the Act. Since the appellant here elected to proceed under the Act, the Board decision must be treated as one pursuant to the Act. Accordingly, this action to review the Board decision could not have been brought originally in the Claims Court. We therefore have no authority under 28 U.S.C. § 1631 to transfer the case to that court.

B. The parties, however, argue that the "appellant's failure to certify its claim also nullified its purported election to proceed under the (Act)", and that the case should be treated as one in which the contractor appealed to the Board under the disputes clause of the contract (which did not require certification of a claim). Under this theory the case could have been brought initially in the Claims Court under the Tucker Act, 28 U.S.C. § 1491(a)(1) (1981), recently reenacted in section 133(a) of the Courts Improvement Act (96 Stat. 39-40), as a suit upon a "claim against the United States founded upon . . . .(an) express . . . . contract with the United States." 96 Stat. 39-40.

We reject the parties' suggestion that the appellant's conscious and voluntary decision to proceed before the Board under the Act should be ignored because the appellant failed to follow the prescribed statutory procedure of certification and that the appellant should be allowed at this late stage to re-elect now to proceed under the contract disputes clause. In Tuttle/White Constructors, Inc., the Court of Claims faced an analogous situation where a contractor elected to proceed under a contracts disputes clause, but subsequently attempted to re-elect to proceed under the Act. As the court there indicated, where the contractor "made a conscious election to proceed under the disputes clause, . . . it is foreclosed from later electing to proceed under the Contract Disputes Act." 656 F.2d at 649.

We see no reason why the appellant's decision to proceed under the Act should be any less binding. Although the lack of certification taints all proceedings brought under the Act, as noted above, it does not nullify the appellant's election to proceed under the Act. The Act became applicable as a result of the appellant's voluntary election to proceed under it, and it is immaterial that when it made that election the appellant's claim that it sought to appeal to the Board was fatally defective for want of certification.

Once the Act is applicable, it "control[s] all avenues of appeal available to the plaintiff." Skelly & Loy, 685 F.2d at 418. Accordingly, the appellant's only recourse is to proceed properly under the Act. "The proper course of action - for a contractor [proceeding under the Act] whose case is dismissed for lack of jurisdiction - is the following: (1) properly certify the claim; (2) resubmit the claim to the contracting officer; and (3) if there is then an adverse contracting officer's decision, appeal either to the board . . . or directly to [the Claims Court] . . . ." Skelly & Loy, 685 F2d at 419. To enable the appellant to begin again on a clean slate, as Skelly & Loy contemplates, we vacate the decision of the Board. If the appellant wishes to proceed under the Act, it must follow the procedure outlined in Skelly & Loy.

The joint motion of the parties to transfer this case to the United State Claims Court is denied. The decision of the General Services Administration Board of Contract Appeals is VACATED.

J. Mistake - Reformation

GENTEX CORP

ASBCA No. 24040 (1979)

See Section 1c, this chapter.

K. Claims - FMS - Appropriated Funds - Interest

FEDERAL ELECTRIC CORPORATION

ASBCA No. 24002 (1982)

This appeal arises from a contract for the design, furnishing, and installation of a Territorial Command Network (TCN) in Spain for the use of Spanish Armed Forces. We will refer to it as the TCN contract. The TCN contract was entered into by appellant corporation, which is a subsidiary of International Telephone and Telegraph (ITT), and the U.S. Army Electronics Command at Fort Monmouth, New Jersey (ECOM) as a Foreign Military Sale (FMS) action pursuant to the authority granted in section 22(a) of the Arms Export Control Act (AECA), 22 U.S.C. 2762(a) (1976), and in accordance with the Armed Service Procurement Regulation (ASPR), now known as the Defense Acquisition Regulation (DAR).

The appeal was taken from the contracting officer's refusal to pay appellant's invoice of $13,819,622, an amount the parties had agreed in a special settlement agreement was due appellant upon completion of work under the contract.

The solicitation for and award of the contract followed negotiations and agreements between the Governments of the United States (USG) and Spain (GOS) which resulted in a Memorandum of Understanding (MOU) and a Letter of Offer and Acceptance on DD Form 1513 (LOA), both executed 5 May 1972. In FMS transactions, this task is designated Spanish Case UKJ.

Appellant has elected to proceed under the provisions of the Contract Disputes Act of 1978 (hereinafter referred to as "the Contract Disputes Act" or ("CDA"), 41 U.S.C. 601 et seq., P. Law 95-563, 92 Stat. 2383.

We are not called upon to, and will not, interpret or construe the government-to-government agreements which form the background and basis for the contract under which appellant performed as regards the mutual rights and obligations of the respective governments arising from such agreements. The review and eventual resolution of these matters belong to forums and authorities designated for this purpose by the two Governments involved. They are not within the ambit of this dispute.

The only parties to this contract and dispute are the appellant and the Department of the Army, one of the military departments of the United States Government. We are concerned with their mutual rights and obligations under the terms of the TCN contract, as analyzed and construed with reference to and guidance from judicial and other decisional pronouncements.

The proceedings before the Board included Government's Motion to Dismiss for Lack of Jurisdiction on the grounds that there was no claim or breach of contract over which the Board could exercise jurisdiction or, alternatively, that the Board lacked jurisdiction in this matter because no appropriated funds were available for the payment of any resulting award pursuant to Section 13 of the CDA. By the Board's prehearing order of 6 December 1979, ruling on the motion was deferred until the merits of the appeal were considered.

* * * *

The disputed issues which the Board will consider were stated as follows in the Board's order of 14 January 1980 (Board file):

> 1. Whether the failure of respondent to make payment to appellant of the amount(s) due pursuant to the settlement agreement of April 23, 1979 or under the terms of the contract as modified, including the return of appellant's invoice of March 13, 1979 without action by the contracting officer, constitutes a breach of the settlement or the contract cognizable under the Contract Disputes Act of 1978.
>
> 2. Without regard to whether respondent is able to obtain funding from the Government of Spain, and in view of Section 22(a) of the Arms Export Control Act (22 U.S.C §2762a (1976)) and the regulations governing foreign military sales or of any other relevant statutory or regulatory provisions, is respondent independently liable to pay appellant the amount(s) due pursuant to the settlement agreement of April 23, 1979 or under the terms of the contract as modified.

* * * *

DECISION

I. THE GOVERNMENT'S MOTION TO DISMISS

1. Contentions of the Parties

The basic jurisdictional issue regarding the Board's authority to consider appellant's claims was formulated as follows:

> Whether the failure of respondent to make payment to appellant of the amount(s) due pursuant to the settlement agreement of 23 April 1979 or under the terms of the contract as modified, including the return of

appellant's invoice of 13 March 1979 without action by the contracting officer, constitutes a breach of the settlement agreement or the contract cognizable under the Contract Disputes Act of 1978?

This issue arose from the Government's Motion to Dismiss the appeal for lack of jurisdiction in the Board on the ground that there was no dispute between the parties characterizable as a claim relating to the contract or the settlement agreement, there was no breach of the settlement agreement and hence no claim cognizable under Section 6 of the Contract Disputes Act because appellant at all times was aware of the lack or unavailability of funds, and of the prohibition against use of appropriated funds, to pay the amount set forth in the settlement agreement.

By Board's prehearing order dated 6 December 1979, consideration of and ruling on the motion were deferred until the appeal was decided on the merits (Board file).

In its posthearing briefs the Government advances two basic challenges to the Board's jurisdiction:

1. There has been no default (or breach) of Respondent's obligations under the contract or the settlement agreement of 23 April 1979 sufficient to create a cause of action cognizable before this Board; but even if there was such a breach, the appellant waived the breach as well as its 13 March 1979 claim (invoice) by entering into the settlement agreement.

2. Appellant has failed to set forth a "claim" cognizable under the Contract Disputes Act of 1978.

A basic jurisdictional issue is also presented by the Second Issue as it was formulated by the Board. This is based on respondent's position that if the Board determines that the TCN contract was not to be supported by appropriated funds, as respondent has argued, the Board has no jurisdiction to make an award to appellant pursuant to the Contract Disputes Act in view of the well established rule that the Court of Claims has no subject matter jurisdiction over a contract dispute when the contract could not obligate appropriated funds. Kyer v. United States, 177 Ct. Cl. 747 F.2d 714 (1966), cert. denied 387 U.S. 929 (1967); Novid Company, Ltd. v. United States, 210 Ct. Cl. 1, 535 F.2d 5 (1976).

This contention raises issues different from those arising in connection with the Board's general jurisdictional authority under the Contract Disputes Act. It has been briefed by the parties on that basis and hence will be discussed separately.

Appellant insists on the Board having jurisdiction to consider and decide its claim under the provisions of the Contract Disputes Act. It argues that the Government's failure to pay the 13 March 1979

invoice constituted a breach of its contractual obligations and that the payment of the agreed on settlement amount was not conditional on the availability of funds; that there was no waiver or release of its claim to the payment; that the invoice of 13 March 1979 is a claim within the meaning of the Contract Disputes Act and the OFPP (Office of Federal Procurement Policy) regulations; and that the contracting officer's failure to issue a final decision on the invoice and return of the invoice constituted an appealable decision under Section 6(c)(5) of the Act.

2. Parameters of the Board's Jurisdiction Under the Contract Disputes Act of 1978

The Contract Disputes Act grants the boards of contract appeals jurisdiction over "any appeal from a decision of a contracting officer(1) relative to a contract made by its agency . . . " (sec.8(d).)

The contracting officer's decision on a claim relating to a contract is the "linchpin" and a necessary prerequisite for appealing claims under the Act. Paragon Energy Corporation v. United States, 227 Ct. Cl._____, 645 F.2d 966 (1981); White Plains Iron Works, Inc. v. United States, Ct. Cl. No. 232-81C, order of 24 November 1981, 29 CCF ¶82,054; R. G. Robbins Co., Inc., ASBCA No. 26521, 82-1 BCA ¶15,643; Allied Materials & Equipment Company, Inc., ASBCA No. 24373, 80-1 BCA ¶14,340.

If a communication from the contracting officer is not formally designated a final decision and does not include the required notice of the contractor's appeal rights, we still have entertained appeals on that basis if it is clear that the contracting officer had considered and denied the claim submitted by the contractor and no useful purpose would be served by returning the matter to the contracting officer. Habitech, Inc. ASBCA Nos. 26388, 26403, 26406, 82-1 ¶_____ (decided 7 May 1982) and cases cited there; Clarke Enterprise, ASBCA No. 24306, 80-2 BCA ¶14,548.

Equated with a decision denying a claim, pursuant to section 6(c)(5) of the Act, is a failure by the contracting officer to issue "a decision on a contract claim within the period required". SCM Corporation v. United States, Ct. Cl. No., 576-79C, order of 10 October 1980, 28 CCF ¶80-789 cf. Westclox Military Products, ASBCA No. 25592, 81-2 BCA ¶15,270.

Claims in excess of $50,000 must be certified before the duty is imposed upon the contracting officer to issue a decision (sec.6(c)(1) and an appeal or suit commenced. Allied Materials & Equipment Company Inc., supra; Paul E. Lehman, Inc. v. United States,673 F.2d 352 (Ct. Cl. 1982); W. H. Mosely Company, Inc v. United States, Ct.Cl.No. 56-81 21 April 1982, 29 CCF ¶82,340: White Plains Iron Works, Inc. v. United States, supra; John R. Hundley, Inc., ASBCA No. 26689, 82-1 BCA ¶ _____ (12 March 1982).

The Act applies to all contracts entered into after the 1 March 1979 effective date (sec. 16). Monroe M. Tapper & Associates v. United States, 222 Ct. Cl._____, 611 F.2d 354 (1979).

With respect to contracts entered into prior to 1 March 1979, sec. 16 of the Act provides that "the contractor may elect to proceed under this Act with respect to any claim pending then before the contracting officer or initiated thereafter." Appellant made such an election in the letter demand of 13 March 1979 and in its notice of appeal. See Tuttle/White Constructors Inc., v. United States, ASBCA No. 24007, 79-2 BCA ¶14,090.

The pendency of a claim before a contracting officer has been the subject of numerous court and board decisions. As a rule, a claim has not been considered "Pending" when there has been a final contracting officer's decision on the claims or the parties had executed a contract modification settling the claim. S. J. Groves & Sons Company v. United States Ct. Cl. No., 480-80C order of 22 May 1981, 28 CCF ¶81,411; Monroe M. Tapper & Associates v. United States, supra; Troup Brothers, Inc v. United States Ct. Cl. No. 64-79, order of 24 August 1979, 26 CCF ¶83,634; Monaco Enterprises, Inc. and Town Realty Inc., ASBCA No. 23611, 23676, 79-2 BCA ¶13,944: Palmer and Sicard, Inc., ASBCA No. 23485, Gentex Corporation, ASBCA No. 24040 81-1 BCA ¶15,029; Kyle Engineering Company, ASBCA No. 25168 81-1 BCA ¶14,990; Jets Waescherei GabH ASBCA No. 23874, 80-1 BCA ¶14,316 Cincinnati Electronics Corporation, ASBCA No. 23742, 79-2 BCA ¶ 14,415; Gentex Corporation, ASBCA No. 24040,79-2 BCA ¶ 14,007, motion for recon. 79-2 BCA ¶ 14,139; Starlite Services, Inc., ASBCA No. 22894, 79-2 BCA ¶ 13,743; Wiggins Electric Company, ASBCA No. 23796, 79-1 BCA ¶ 13,906.

However, it has been specifically held that an informal or oral settlement does not remove a claim from the "pending" status. In Brookfield Construction Co. Inc. and Baylor Construction Corp. v. United States, 661 F. 2d. 159. 167 (Ct. Cl. 1981), the Court stated in this regard:

> When a claim has been settled and a written settlement agreement or contract modification embodying that settlement has been issued as a final contracting officer's decision, the claim is no longer pending before the contracting officer. See Monroe M. Tapper & Assoc. v. United States, supra. 222 Ct. Cl.____,____, 611 F.2d 354, 357-59 (1979); Troup Bros. v. United States. Ct. Cl. No. 64-79 (order of Aug. 24, 1979). But that is not the situation here. The critical distinction is the lack of a pre-Act final written decision implementing the oral agreements. Before he has issued such a formal decision, the contracting officer has not taken all the steps required of him in order to complete his function in the dispute process, see section 6(a) 41 U.S.C. §605(a) and the standard disputes clause, and the claim is therefore still pending before him until he does so.
>
> In this case that did not occur until after the effective date of the Act and therefore the orally settled claims were still "pending" before the contracting officer for purposes of section 16 on March 1. That official could have

issued a written decision at the time of settlement but chose not to do so as a matter of the Government's convenience. The Government cannot take such an action for its own benefit and then later seek to ignore its consequences. We think, moreover, that it accords better with the Disputes Act's aim to establish a definite date for eligibility-to-elect-to-proceed under that Act to construe the phrase in section 16, supra--"claim pending then before the contracting officer as calling for a definitive written determination by the contracting officer before a claim can be said to be no longer "pending." Otherwise, the trigger of section 16 could be subject to troublesome disputes over whether a complete oral settlement of a claim had or had not been previously reached.

There is no disagreement that the Contract Disputes Act broadened the Board's jurisdiction by subjecting to the contracting officer's decision making process breach of contract claims which are not remediable under any of the contract provisions, Gentex Corporation, ASBCA No. 24040, 79-2 BCA ¶14007 quoted with approval in Paragon Energy Corporation v. United States, supra, 645 F.2d at 975 and where the court stated (ibid):

> Congress could not have expressed itself more clearly to the effect that all contractor claims based upon a valid contractual theory fall within the procuring agencies' jurisdiction under the Contract Disputes Act. This was essential to Congress' design that all contract disputes be resolved according to the same set of procedures, beginning with the contracting officer.

See also H.R. Rep. No. 95-1556, 95th Cong., 2d Sess. 17-18 (1978): S. Rep. No. 95-1118, 95th Cong., 2d Sess. (1978), reprinted in (1978) U.S. CODE CONG. AND AD. NEWS 5235; Johnson & Son Erectors, ASBCA No. 24564 on motion for recon. 81-1 BCA ¶15,082.

As any other claim, breach of contract assertions must be submitted in writing to the contracting officer for decision pursuant to section 6(a) of the Act.

3. Definition of "Claim"

The Contract Disputes Act has made the "claim" the centerpiece of the disputes process by providing in Section 6(a) that "(a)ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for decision", but has not further defined a claim. This void has been filled by implementing regulations. The first attempt at defining the claim was made in the OFPP interim final regulations pertaining to the Contract Disputes Act, dated 7 March 1979:

'Claim' means:

(1) a written request submitted to the Contracting Officer;

(2) for payment of money, adjustment of contract terms or other relief;

(3) which is in dispute or remains unresolved after a reasonable time for its review and disposition by the Government; and

(4) for which a contracting officer's final decision is demanded.

44 Fed. Reg. 12,519 7 March 1979; retained as interim regulations by notice published at 44 Fed. Reg. 34,228 14 June 1979.

The final regulations issued as OFPP Policy Letter 80-3 dated 30 April 1980 revised and broadened this definition as follows (45 Fed Reg. 31,035-37, 9 May 1980):

(a) As used herein 'claim' means a written demand by one of the contract parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or related to the contract.

(ii) A voucher, invoice, or request for payment that is not in dispute when submitted is not a claim for the purpose of the Act. However, where such submission is subsequently not acted upon in a reasonable time, or disputed either as to liability or amount, it may be converted to a claim under section 6(a) of the Act as provided in Section 3, below.

The definition of "claim" in amended Section 1-314 of the DAR (Defense Acquisition Regulation) follows that of the OFPP Policy Letter 80-3 7/ and provides that contractor claims shall be made in writing and submitted to the contracting officer for decision and that a written demand seeking payment of money in excess of $50,000 is not a claim unless or until certified pursuant to the requirements of the Act:

(b) Definition.

(1) As used herein, "claim" means a written demand on one of the contracting parties seeking, as a matter of right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or related to the contract. However, a written demand by the contractor seeking the payment of money in excess of $50,000 is not a claim unless or until certified as required by (L) below.

(2) A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim for the purposes of the Act. However, where such submission is subsequently disputed either as to liability or amount or not acted upon in a reasonable time, it may be converted to a claim under section 6(a) of the Act as provided in (h) below.

* * *

(h) Initiation of a Claim. Contractor claims shall be made in writing and submitted to the contracting officer for a decision. Claims by the Government against a contractor shall be the subject of a contracting officer decision.

(Defense Acquisition Circular No. 76-24, 28 August 1980)

The above DAR definition of "claim" has been approvingly cited by the Court of Claims and this Board. Paragon Energy Corporation v. United States, supra, 645 F.2d. at 976; General Dynamics Corporation, ASBCA No. 25919, 82-1 BCA ¶ 15,615; B. D. Click Company, Inc., ASBCA No. 25609, 81-2 BCA ¶ 15,394.

4. Invoice as a Claim

It is well established that a precondition to a contracting officer's decision and thus for the Board's jurisdiction is filing of a claim pursuant to section 6(a) of the Contract Disputes Act:

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for decision.

Paragon Energy Corporation v. United States, supra; Tilbury, Inc., ASBCA No. 25972 82-1 BCA 15,644; Modular Devices, Inc., ASBCA No. 24198, 82-1 BCA ¶15,536.

Respondent argues that submission of an invoice in undisputed amount, seeking merely the payment of money, is not a "claim" creating Board's jurisdiction under the CDA. It recognizes that an invoice may become a claim under the OFPP regulations which went into effect as of 1 June 1980, but argues these were not applicable to appellant's invoice of 13 March 1979.

At that time the effective regulations were the OFPP interim regulations (see supra at ¶ I, 3) which defined the claim as a written request "for payment of money" which is in dispute or remains unresolved after a reasonable time for its review and disposition by the Government and for which a contracting officer's final decision is demanded.

In respondent's view the amount of the invoice was not in dispute or unresolved because the invoice amount had been agreed on by the parties and appellant was not seeking a decision upon a disputed amount.

Respondent also relies on a Comptroller General decision which held that an invoice submitted for an undisputed charge for an eye cornea, for which there was no underlying express contract, was not a claim within the meaning of the Contract Disputes Act, but "simply a request for payment, because neither the entitlement to recovery or the amount of recovery was disputed by the Government." Contract Disputes Act of 1978, B-195272, 80-1 CPD ¶79.

Appellant's position is that even if the invoice is not considered a claim under the Interim Regulations, it still is a claim within the meaning of the Contract Disputes Act:

> It is, after all, the Act and not the regulations that are dispositive. The interim regulations were simply OFPP's earliest attempt to ascertain Congressional intent as to what constitutes a claim for Disputes Act purposes. The final regulations published on May 9, 1980, were, for the most part, a refinement of the earlier interim regulations. Thus, at least, to the extent that the final regulations are not inconsistent with the earlier interim regulations, the final regulations should be used as an aid in understanding and applying the interim regulations.

Appellant also calls upon GSBCA decision in Dawson Construction Company, GSBCA No. 5777, 80-2 BCA 14,817 which relied on the "claim" definition in the OFPP final regulations although these were not applicable to the contract involved in the dispute. Appellant further relies on Dawson for the proposition that a delay in payment gives rise to a Contract Disputes Act "claim" and that this is the situation here because FEC has not yet received the "delayed" payment due it. (APP's posthearing br. at 51-53)

In this context we do not need to address respondent's contention that the Dawson case was "poorly" decided because it is clearly distinguishable on its facts and rationale from the instant situation. It suffices to note that Dawson was decided on a basis which has been described as a "pure delay in payment of an equitable adjustment claim." (Patock Construction Company, ASBCA No. 25345, 81-1 BCA ¶14,493, motion for recon. 81-2 BCA 15,184). It did not involve submission of an invoice for payment and, at least impliedly, determined that payment had become due when the parties reached an oral agreement on the settlement of an equitable adjustment for the changed work performed by appellant. This was recorded in a Government memorandum of the negotiation meeting and its date was then used as the starting point from which delay in payment was measured.

A better view may be to consider such claims still pending until the issuance of the change order or contract modification, as suggested by the court in Brookfield Construction Co., Inc. v. United States, supra.

In the Brookfield case, the court held that a claim on which the parties had reached an agreement as to the amount was still "pending" as disputed for the purposes of Sections 12 (interest) and 16 (applicability of the Act) until "a written settlement agreement or contract modification embodying that settlement has been issued as a final contracting officer's decision" (661 F.2d. at 167). Only when the contracting officer has issued such a decision can he be considered having completed

> (H)is function in the disputes process, see section 6(a) 41 U.S.C. 605(a) and the standard disputes clause, and the claim is therefore still pending before him until he does so.

Ibid.

We believe the same reasoning and rule should be used for purposes of defining a claim under section 6(a), as the court has already indicated by reference to that section. See Monroe M. Tapper & Associates v. United States, supra, 611 F. 2d at 359.

There is no question that the 13 March 1979 invoice was a written request or demand for payment of money which requested a contracting officer's decision. We agree with appellant that it also presented claims which were either disputed or had remained unresolved for a lengthy period of time, but for different reasons.

Our analysis of the 13 March 1979 invoice and demand letter must start with the recognition that this submission does not constitute one "monolithic" claim. The amount demanded, $13,819,335, represented the sum of three different categories of "claims". First, $5,081,700 is the unpaid portion of the contract price as adjusted by previously executed contract modifications (at ceiling price) for which appellant had previously submitted invoices. This is the difference between the adjusted contract price and payment made on contractor's invoices.

The second element of $1,912,635 represents the value of claims the parties had settled prior to the 22 November 1978 negotiation session but for which no contract modification had been issued.

The third category, in the amount of $6,825,000, represents the value of all previously unsettled claims and counterclaims the parties had agreed to settle in the 24 November 1978 memorandum and which were ultimately included in the Settlement Agreement.

It does not appear from the record that the settlements totalling $1,912,635 were anything but oral. Thus on 13 March 1979 the claims covered by these settlements were in no different status than the orally settled claims in Brookfield. There also is no reason to treat

any differently the claims the parties settled on 24 November 1978 despite the signing of a Memorandum for Record by the contracting officer. The memorandum stated that "(t)his settlement will be reflected . . . in a comprehensive TCN settlement Agreement which will cover all other remaining TCN open issues as well as appropriate release provisions", and thus contemplated subsequent execution of a definitive document (which ultimately was executed on 23 April 1979). The Memorandum for Record does not represent a "final written decision" of the contracting officer that would terminate the "pending" status of the claims covered by the settlement.

Hence, the claims included in the above discussed settlements were not "created" by the 13 March 1979 letter and invoice. They were pending at that time and remained pending as disputed matters and claims within the meaning of section 6(a) of the Contract Disputes Act. We reject respondent's argument that these were undisputed amounts in this sense when the invoice was submitted.

For the amount of $5,081,700, representing the unpaid portion of the adjusted contract price, appellant had submitted invoices earlier and these had remained unpaid. These invoices had remained unresolved for a considerable time, some for more than a year. With respect to them the invoice of 13 March 1979 clearly constituted a "claim" both under the OFPP Interim and Final Regulations. See Patock Construction Company, supra; Capital Security Services Inc., GSBCA No. 5722, 81-1 BCA ¶ 14,923 at 73,842.

But even if [we] were to adopt respondent's view that such an invoice could be considered a claim only under the 1980 regulations (OFPP or DAR), the same conclusion would follow. In defining a "claim", the OFPP regulations endeavored to ascertain the intent of the Contract Disputes Act. Since we are engaged in a similar undertaking, for this purpose the effective date of the regulation is immaterial. In Paragon Energy Corporation v. United States, supra, the Court of Claims proceeded in the same manner when it applied the definition of "claim" found in DAR 1-314 (as amended by DAC 76-24 of 28 August 1980) to a purported claim dated 3 September 1979. We make use of the definition of a "claim" in the regulations in the same manner.

Treating an invoice as a claim for the purposes of the Contract Disputes Act when it has not been acted upon "in a reasonable time" is consistent with the legislative intent that breach of contract claims be included in the Act's coverage. S.REP 96-1118, supra at 5235; Gentex Corporation, ASBCA No. 24040, motion for recon. supra.

If no date for payment has been established in a contract, the payment is due within a reasonable time and a failure to make the payment by such time is a breach. Cf. The Chesapeake & Potomac Telephone Company of Virginia v. United States, _____ F.2d _____, note 9 (Ct. Cl. 1981); Paint & Pack Corporation, ASBCA No. 1341, unpubl. 30 October 1953. Thus the Government's failure to honor FEC's earlier invoices for an unreasonable time would constitute a breach.

We accordingly conclude that the invoice of 13 March 1979, having been properly certified, was a claim cognizable under the Contract Disputes Act submitted to the contracting officer for decision. Paul E. Lehman, Inc. v. United States, supra; W. H. Moseley Company, Inc. v. United States, supra; See also Patock Construction Company, supra; Tilbury, Inc., supra.

5. The Government's Payment Obligation and Breach of Contract

Respondent's obligations to make payments were set forth in the "Payments" and "Progress Payments" clauses. The "Payments" clause provided:

> The contractor shall be paid, upon the submission of proper invoices or vouchers, the prices stipulated herein for supplies delivered and accepted or services rendered and accepted, less deductions, if any, as herein provided. Unless otherwise specified, payment will be made on partial deliveries accepted by the Government when the amount due on such deliveries so warrants; or, when requested by the contractor, payment for accepted partial deliveries shall be made whenever such payment would equal or exceed either $1,000.00 or 50% of the total amount of this contract.

The contractor was also entitled to progress payments as it proceeded with the work upon proper invoices approved by the contracting officer. These were based on eighty percent of the contractor's recorded or incurred costs.

It is well established that a party's failure to make payment when due under a contract constitutes a breach. In Northern Helex Company v. United States, 197 Ct. Cl. 118, 124-25, 455 F.2d 546, 550 (1972) Judge Davis appropriately stated:

> The Government's failure to pay a large amount over an extended period of time was a conceded breach of its contractual obligation. Arrearages in monthly payments which began in December, 1968 and continued through 1969 ranged from $644,122 to $3,235,349. For deliveries from November 1, 1969 through November 30, 1970, the Government paid nothing at all. By the time suit was filed in December 1970, $8,671,632 was owing to the Plaintiff.
>
> * * *
>
> Nor was this a contract in which the Government's duty to pay was conditioned on receipt of appropriations or approval by Congress. Cf. Congress Const. Corp. v. United States, 161 Ct. Cl. 50, 314 F.2d 527, cert. denied, 375 U.S. 817, 84 S.Ct. 53,11 L.Ed.2d 52 (1963). We have, in short, not the slightest doubt that the prolonged failure to pay large amounts was a material breach of the contract. [The Government contends, however, that such delinquency without

more does not constitute a total breach warranting the contractor in ending the agreement. Perhaps mere delay in payment, for awhile, would not be a material breach but there is a clear distinction between delay of that kind and a total failure to pay, over many months. Our jurisprudence strongly suggests that the latter sort of breach by the Government is material, just as it would be in the case of a private party.]

See also Brooklyn & Queens Screen Manufacturing Co. v. United States, 97 Ct. Cl. 532 (1942); Seatrain Lines, Inc. v. United States, 99 Ct. Cl. 272 (1943); Ramsey v. United States, 121 Ct. Cl. 426, 101 F.Supp. 353 (1951), cert. denied 343 U.S. 977 (1952). Pilcher, Livingston & Wallace, Inc., ASBCA No. 13391, 70-1 BCA ¶ 8331 at 38, 765 and cases cited there.

Respondent does not deny its obligation to make payment under the terms of the contract and even conceded being "arguably in default of its [payment] obligations under the contract payments clause" prior to entering into the Settlement Agreement.

Respondent argues, however, that these obligations and appellant's right to payment were "indisputably and conclusively modified by the Settlement Agreement." In respondent's opinion, its default had been waived by appellant's release for "all past, present and future claims and defenses each party has or may have". This has been stated in respondent's posthearing brief as follows:

> Accordingly, by the plain meaning of the Settlement Agreement, it [appellant] entered into a full and final settlement of the payment issue and released Respondent with respect to all past, present and future claims Appellant might have premised upon the Payments clause of the Contract. It follows that there can be no serious argument that Respondent's alleged failure to make payment to Appellant of amounts due pursuant to the terms of the Contract constitute a breach of the Contract cognizable before this Board. Appellant had already waived any such breach.

Further in respondent's view this constituted an accord and satisfaction insofar as breach of contract terms was concerned, citing QES, Inc. ASBCA No. 22443, 78-2 BCA ¶ 13,490 and causes cited there, since appellant entered into the settlement agreement with the knowledge that funds were unavailable of [any] settled contract claims.

Respondent's contentions extend to the Settlement Agreement itself in that the agreement does not contain a provision for the payment of the settlement amount except "until funds are available", thus no breach could have incurred as long as such funds were not available and accordingly the agreement establishes only the Government's liability in the stated amount.

Furthermore, inasmuch as the Settlement Agreement was not a formal contract modification and could not be one because of the unavailability of funds to make payments, the agreement did not create an obligation to make payments pursuant to the "payments" clause of the contract.

The Settlement Agreement also extinguished all prior claims, respondent continues, and thus the 13 March 1979 invoice was waived or released as a "past" claim. It follows then, in respondent's view, that there was no claim before the contracting officer on 18 May 1979 when he returned appellant's invoice, no denial of a claim appealable to the Board and thus no Board jurisdiction.

Respondent summarizes its position in this respect as follows:

> At most it can be argued that the agreement confirms Appellant's entitlement to payment of the stipulated amount at such times as funds become available. As that eventuality has not occurred, the agreement remains unbreached.

These contentions place in issue the nature and effect of the Settlement Agreement itself and as it relates to the terms of the basic contract and modifications executed prior to the execution of the agreement.

6. The 23 April 1979 Settlement Agreement

* * * *

We accordingly conclude that the Settlement Agreement left fully intact and in effect the Government's obligation under the "Payments" clause to pay the contract price established in previously issued contract modifications.

There is no more merit to respondent's argument that if the 13 March 1979 invoice were considered a "claim" for the purposes of the Contract Disputes Act, it must be covered by the release which included "all claims".

Although "claim" is a very general term and could cover appellant's 13 March 1979 invoice (see BLACK's LAW DICTIONARY 224 (5th ed. 1979)), there is no indication on this record that the parties used the term "all claims" in such a broad sense. As already noted, we have no doubt that in this contest they referred only to "claims" which arose out of the performance of work under the TCN contract and were considered in negotiations resulting in the settlement of all unresolved claims in the amount of $6,825,000 plus the previously settled claims in the amount of $1,912,635, as well as any other claims related to its performance but not yet put forward by appellant. The 13 March 1979 invoice was not a claim as the term was employed in the release because all it asserted was a "demand for payment" of an amount that appellant believed to be due on the basis of the parties agreement on the value of their outstanding mutual claims.

This amount, $13,819,622, is the same amount the parties agreed and stipulated in the Settlement Agreement "that FEC is entitled to receive from the USA", representing the difference between the total negotiated contract value of work performed and the payments received by FEC. These provisions would be rendered completely meaningless and ineffective should we adopt respondent's suggestion and hold that the claim as represented by the invoice was released or waived in the very same agreement.

7. The Contracting Officer's Decision

Having thus established that a claim within the meaning of section 6(a) of the CDA had been submitted to the contracting officer, we note that the 13 March 1979 letter also contained a certification of the claim as required by section 6(c)(1) of the Act.

Appellant alleges there has been no contracting officer's decision on its properly submitted claim and that this is sufficient for the Board to assume jurisdiction pursuant to section 6(c)(5) of the Act. We agree. SCM Corporation v. United States, supra.

The Board's jurisdiction may also be asserted on the alternative ground that the contracting officer's 18 May 1979 letter returning appellant's invoice "without action" constituted denial of its claim, i.e. payment of the invoiced amount which appellant was "entitled to receive from the USA" as provided in the Settlement Agreement. Cf. Habitex, Inc., supra; Paragon Energy Corporation v. United States, 645 F.2d at 970-71.

II. USE OF APPROPRIATED FUNDS AS AN ISSUE

1. Contentions of the Parties

This issue was stated as follows:

> 2. Without regard to whether Respondent is able to obtain funding from the Government of Spain, and in view of Section 22(a) of the Arms Export Control Act, 22 U.S.C. § 2762a (1970) [AECA] and the regulations governing Foreign Military Sales, or of any other relevant statutory or regulatory provisions, is Respondent independently liable to pay Appellant the amount(s) due pursuant to the settlement agreement of 23 April 1979 or under the terms of the contract as modified?

This is both a jurisdictional and substantive issue. Substantive in the sense that it relates to the authority of the Department of the Army to use certain type of funds. The jurisdictional aspect arises from respondent's contention that use of appropriated funds for the purposes of this contract is precluded and therefore this Board is without authority to grant a remedy.

With respect to the use of appropriated funds, the Government has developed a three-pronged argument.

The Government argues, first, that AECA section 22(a) precludes the use of appropriated funds to satisfy claims arising under contracts awarded pursuant to the authority granted therein because it was the intent of the Congress that foreign countries bear the full cost of such foreign military sales contracts without the use of regular appropriations.

The second argument is that to allow a board award to be satisfied from the permanent indefinite appropriation pursuant to section 13(b) of the Contract Disputes Act (CDA) would amount to circumvention of the intent of Congress that appropriated funds not be used to support FMS contracts entered into pursuant to the authority granted in AECA section 22(a).

And third, that on the basis of this statutory framework the Board is prohibited from the "exercise of jurisdiction to enter a monetary judgment with regard to contract claims which are not to be satisfied out of appropriated funds" because the remedies available to the Board are the same as available in the Court of Claims and the latter does not have subject matter jurisdiction over claims which cannot be satisfied out of appropriated funds, citing Kyer v. United States, 177 Ct. Cl. 747, 369 F.2d 714 (1966), cert. denied, 387 U.S. 929 (1967) and Novid Company Ltd. v. United States, 210 Ct. Cl. 1, 535 F.2d 5 (1976) for the proposition that to be actionable in the Court of Claims the contract must be one which in the contemplation of the Congress could obligate public monies.

The essence of respondent's position on this issue is succinctly stated in its posthearing brief (at 74):

> Respondent admits its liability in the amount stated. If the Board determines that the liability may be satisfied out of appropriated funds it may enter a judgment payable out of the United States Treasury. However, if the Board determines that the contract was not to be supported by appropriated funds, it has no jurisdiction to render judgment for Appellant pursuant to 28 U.S.C. § 2517 (1970).

Appellant first takes issue with the proposition that under the Contract Disputes Act the jurisdiction of the Court of Claims as well as that of the boards of contract appeals is limited to appropriated fund contracts. Appellant contends that in the absence of an express provision in the Act to this effect there is no such limit to the Board's jurisdiction and therefore all provisions of the CDA apply to all FMS contracts.

Appellant arrives at this conclusion by analyzing the relationship of the Contract Disputes Act to 28 U.S.C. § 2517 which constitutes the statutory underpinning for the Court of Claims holdings that its

contract claims jurisdiction under the Tucker Act, 28 U.S.C. § 1491 (1976), is limited to contracts as to which claims could be satisfied from appropriated funds.

Appellant argues that changes made by the CDA in the Tucker Act and in 28 U.S.C. § 2517 removed the restriction imposed by section 2517 on the jurisdiction of the Court of Claims, as interpreted by the Court in Kyer v. United States and its progeny, limiting its jurisdiction to "appropriated funds."

Appellant specifically points to two changes brought about by the CDA. 28 U.S.C. § 2517 was changed by section 14(a) of the Act to read as follows, by adding the bracketed phrase:

> (a) [Except as provided by the Contract Disputes Act of 1978,] every final judgment rendered by the Court of Claims against the United States shall be paid out of any general appropriation therefor, on presentation to the General Accounting Office of a certification of the judgment by the clerk and chief judge of the court.

As to the Court of Claims basic jurisdiction, the Tucker Act, 28 U.S.C. § 1491, provided in pertinent part that

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States . . .

Section 14(i) of the CDA added to this section the following:

> The Court of Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with a contractor arising under the Contract Disputes Act of 1978.

Appellant then argues that the Court of Claims was given jurisdiction of Contract Disputes Act claims without regard to whether such claims are related to contracts supported by appropriated funds and that the Board's jurisdiction is of the same scope. In appellant's opinion, the CDA does not restrict the court's or Board's jurisdiction to appropriated fund contracts and that the Board has already decided in Gentex Corporation, ASBCA No. 2404C, 80-2 BCA ¶ 14,732, that under the CDA it has subject matter jurisdiction as to FMS contracts.

2. Analysis of CDA Section 13(b)

These arguments bring us to the central issue of the dispute, namely, whether this Board may enter a judgment which, at least initially, would be satisfied from appropriated funds in accordance with section 13(b) of the CDA. The pertinent provisions of section 13 are:

> (a) Any judgment against the United States on a claim under this Act shall be paid promptly in accordance with

the procedures provided by section 1302 of the Act of July 27, 1956, (70 Stat. 694, as amended; 31 U.S.C. 724a).

(b) Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) above.

(c) Payments made pursuant to subsections (a) and (b) shall be reimbursed to the fund provided by section 1302 of the Act of July 27, 1956, (70 Stat. 694, as amended; 31 U.S.C. 724a) by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes.

§ 724a of Title 31 of the United States Code reads in pertinent part:

§ 724a. Appropriations for payment of judgments and compromise settlements against United States

There are appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements, which are payable in accordance with the terms of sections 2414, 2517, 2672, or 2677 of Title 28 and decisions of boards of contract appeals . . . . [as amended by P. Law 95-563, Sec. 14(c)]

Appellant's analysis offers an appealing theory regarding the jurisdiction of the Court of Claims and the boards of contract appeals but is not necessarily persuasive.

The basic weakness of appellant's analysis is its complete disregard of the above quoted provisions of section 13 of the CDA pursuant to which monetary awards by the Board shall be paid, upon proper certification, by the Comptroller General from an indefinite permanent appropriation pursuant to 31 U.S.C. 724a, and that the agency whose appropriations were used for the contract must reimburse the fund used for payment "out of available funds or by obtaining additional appropriations for such purposes."

One of the teachings of Kyer v. United States, supra and the cases following its holding is that the words of its jurisdictional grant in the Tucker Act "must be read and must be regarded as limited by another statute [28 U.S.C. § 2517(a)] which provides that our judgments are paid only from appropriated funds." (177 Ct. Cl. at § 751, 369 F.2d at § 717)

Likewise, the provisions of the Contract Disputes Act granting the Board jurisdiction over certain types of express and implied contracts with the military departments of the United States Government (section 3; see Hi-Tech Electronics Corporation, ASBCA No.

25968, 81-2 BCA ¶ 15,360), section 6 defining the disputes process and section 8(d) providing that a board of contract appeals shall have jurisdiction to decide any appeal from a decision of a contracting officer relative to a contract made by its agency must be construed in conjunction with section 13 which sets forth the procedure and sources for payment of the board's monetary awards.

Although the language in section 13(b) differs slightly from that found in 28 U.S.C. § 2517 that a judgment "shall be paid out of any general appropriation therefore", it does not appear that the Congress in the Contract Disputes Act had abandoned the requirement that contract claims, brought to judgment or award under the Act's provisions, need not be satisfied out of appropriated funds.

Legislative history of the CDA shows that section 13 was intended to carry out recommendation No. 12 of the Procurement Commission that "all court judgments on contract claims [be paid] from agency appropriations if feasible." The Senate Committee report stated in this regard:

> In order to promote settlements and to assure the total economic cost of procurement is charged to those programs, all judgments awarded on contract claims are to be paid from defendant agency's appropriations. If the agency does not have the funds to make the payment the agency is to request additional appropriations from Congress.

S.REP. NO. 95-118, 95th Cong., 2d Sess. 1 (1978) reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5235 at 5267.

In interpreting the jurisdictional grant to the boards of contract appeals in the Disputes Act we are in basic agreement with respondent that section 13(c) of the Act has the same effect on the Board's jurisdiction as 28 U.S.C. § 2517(a) has on the jurisdiction of the Court of Claims since both the judgments of the court and awards by the boards are to be paid out of the permanent indefinite appropriation established by 31 U.S.C. § 724a.

We hold, therefore, that under the Contract Disputes Act boards of contract appeals may make monetary awards only in instances where these are payable out of appropriated funds and must refuse awards in cases where public monies could not be obligated.

The inclusion of certain enumerated non-appropriated funds within the reach of the Contract Dispute Act and thus within the Board's jurisdiction does not change the foregoing conclusion as appellant would suggest. In this respect the CDA does nothing more than repeat the provision included in the Tucker Act (28 U.S.C. § 1491). As is the case with the Court of Claims, the Board's jurisdiction under the Contract Disputes Act extends to these non-appropriated funds but to no other contracts which may be supported or satisfied out of non-appropriated monies.

In support of this jurisdictional argument appellant also refers to a number of previously decided Board cases which it claims involved foreign military sales pursuant to the authority of AECA section 22, particularly to the appeal of ITT Federal Electric Corporation, ASBCA No. 20436, 77-2 BCA ¶ 12,790 which arose under the same TCN contract involved in the instant appeal. Other cases referred to are Hughes Aircraft Company, ASBCA No. 21429, 79-1 BCA ¶ 13,641, motion for recon. 80-1 BCA ¶ 14,329; General Electric Company, ASBCA No. 20957, 80-1 BCA ¶ 14,425 and Gentex Corporation, ASBCA No. 24040, 80-2 BCA § 14,732. Of these, only the Gentex appeal was processed under the provisions of the Contract Disputes Act. The other appeals had been brought to the Board pursuant to the standard Disputes clause of the contract involved.

But we note also that except for the ITT Federal Electric Corporation case, the contracts involved were not entered into pursuant to the authority of AECA Sec. 22(a). In Gentex the dispute arose not under an FMS contract but in connection with a regular procurement for replenishment of Government stocks of helmets. Appellant there was retroactively seeking an increase in the contract price primarily on the ground the the procurement actually was for sale to foreign countries and thus appellant was entitled to higher prices under special DAR pricing provisions applicable to foreign military sales. Thus the Gentex case has no precedential value on the jurisdiction issue. The same type of non-FMS contracts and pricing issues were involved in the Hughes Aircraft Company and General Electric Company appeals.

Further, in the non-FMS contract cases the contracts were supported by appropriated funds and no jurisdictional issues similar to those raised here were present. Nor was the jurisdictional issue raised in the ITT Federal Electric appeal which was decided prior to the enactment of the Contract Disputes Act. We can therefore attach no precedential value to that case with respect to the instant appeal.

Our agreement with respondent's views regarding the limitation on the Board's authority to make awards does not mean that we accept respondent's suggestion that the outcome in the instant case is controlled by such cases as Kyer v. United States, supra and Novid v. United States, supra, even though we recognize and adopt the proposition enounced in these cases that the judgments awarded by the court are to be paid out of appropriated monies pursuant to 28 U.S.C. § 1517.

3. Court of Claims on Availability of Appropriated Funds

Although appellant does not dispute the correctness of respondent's proposition as it relates to the lack of Court of Claims jurisdiction over contracts funded by non-appropriated funds, it disagrees with the conclusion that cases such as Kyer v. United States, supra and Novid v. United States, supra are controlling in the

instant appeal. Appellant rather urges that the Board should follow the court's holdings in Hughes Aircraft Company v. United States, 209 Ct. Cl. 446, 534 F.2d 889 (1976) and DeMauro Construction Corporation v. United States, 215 Ct. Cl. 364, 568 F.2d 1322 (1978), that appropriated funds were involved in foreign military sales contracts and the court therefore had jurisdiction.

The Kyer case involved a suit against the Grape Crush Administrative Committee for recovery of a brokerage commission. The Committee was appointed by the Secretary of Agriculture pursuant to the Agricultural Marketing Act of 1937 and received its financial support from fees imposed on the industry involved. No appropriated funds were used or authorized. The Court of Claims declined to exercise jurisdiction by virtue of 28 U.S.C. § 2517 and stated:

> The jurisdiction of this court under the Tucker Act [footnote omitted] encompasses 'any claim against the United States: . . . founded upon any express or implied contract with the United States; . . . .' While the terms of this statute are broad, its words must be read in conjunction with and must be regarded as limited by another statute which provides that our judgments are paid only from appropriated funds. 28 U.S.C. § 2517 (1964).] Thus, to remain within the framework of our jurisdiction, it is essential that the contract sued on be one which could have been satisfied out of appropriated funds. It is not enough to say, as plaintiff does, that his contract was one to which the United States was a party. To be actionable in this court, that contract must be one which, in the contemplation of Congress, could obligate public monies. [Citation omitted.] If Congress has indicated that public funds shall not be involved, we cannot grant the relief requested. . . .

177 Ct. Cl. at 751-52, 369 F.2d at 717-18; emphasis in text.

In Novid, the court approvingly quoted the above statement and likewise declined jurisdiction on the ground that there the appropriated funds were "wholly insulated from liability" (210 Ct. Cl. at 7, 535 F.2d at 8).

The contract involved here was entered into by the Department of the Army, an executive agency of the Government, pursuant to an express statutory authorization in AECA section 22(a), and thus we find applicable the distinction drawn by the court between these cases and a claim for breach of contract damages in a surplus property sale by the General Services Administration in Convery v. United States, 220 Ct. Cl. 106 (1979), 597 F.2d 727, 729-30 (1979):

> The cases relied on by the defendant fall far short of the mark. In Kyer, the contract in question was not entered into with a department or agency of the Government, but with an administrative committee established by the Secretary of

Agriculture. The committee was not supported by Congressional appropriations and was not authorized to obligate appropriated funds. Its financial support came from handlers and producers of agricultural commodities.

* * *

In Novid, 210 Ct. Cl. at 6, the court expressly found that the agreement in issue "strictly limited contract payments to the Iranian Government loan account established in the Foreign Trade Bank of Iran." From this, the court concluded that appropriated funds were wholly insulated from liability.

In Convery and in two cases decided more recently, L'Enfant Plaza Properties, Inc. v. United States, 668 F.2d 1211 (Ct. Cl. 1982), 29 CCF ¶ 82,130 and Kevin McCarthy, Trustee in Bankruptcy for Builders International (Senegal) S.A. v. United States, 670 F.2d 996 (Ct. Cl. 1982), the Court of Claims has in essence held that in cases involving Federal agencies or instrumentalities it would exercise Tucker Act jurisdiction in the absence of a clearly expressed Congressional intention that the activity resulting in the claim was not to receive or be funded from appropriated funds. The rule as presently construed and applied by the court is explained in the L'Enfant Plaza case (668 F.2d at 1212-13):

> The Tucker Act, 28 U.S.C. § 1491 (1976), is a broad waiver of sovereign immunity granting jurisdiction to this court over contract claims against the Government. If the agency involved in the dispute operates as a governmental body and within its statutory authority, this court acquires jurisdiction absent a specific indication that Congress did not intend the agency to be covered. Regional Rail Reorganization Act Cases, 419 U.S. 102, 126 (1974); Breitbeck v. United States, 205 Ct. Cl. 208, 210, 500 F.2d 556, 558 (1974).
>
> Defendant does not challenge plaintiff's contentions that the Office of the Comptroller is a governmental agency (part of the Treasury Department) doing the work of the Government, and that it acted within its statutory authority in executing the lease. The Government does contend, however, that the Comptroller is a non-appropriated fund agency over which this court lacks jurisdiction.
>
> The juristictional grant under the Tucker Act is limited by the fact that judgments awarded by this court are to be paid out of appropriated monies. 28 U.S.C. § 2517 (1976). Juristiction can only be exercised, therfore, over cases in which appropriated funds can be obligated. See e.g., Kyer v. United States, 177 Ct. Cl. 747, 751, 369 F.2d 714, 718 (1966), cert. denied, 387 U.S. 929

(1967). The Comptroller is a nonappropriated fund agency, defendant argues, since it is financially self-supporting from the revenues it derives from assessments of the banks it regulates. Because of these revenues, Congress has not appropriated funds for it since 1947.

The fact that the Comptroller has been financially self-sufficient is not dispositive. There must be a clear expression by Congress that the agency was to be separated from general federal revenues. Breitbeck, 205 Ct. Cl. at 212-13, 500 F.2d at 559. See United States v. Hopkins, 427 U.S. 123, 125 (1976) (non-appropriated fund agency characterized as one denied by the Government fund use of appropriated monies). Congress must have intended that the activity resulting in the claim was not to receive or be funded from appropriated funds. Hughes Aircraft Co. v. United States, 209 Ct. Cl. 446, 476, 534 F.2d 889, 907-08 (1976). To sustain jurisdiction here, the requirement is not that appropriated funds have been used for the activity but that under the agency's authorizing legislation Congress could appropriate funds if necessary. Convery v. United States, 220 Ct. Cl. ___, ____, 597 F.2d, 727, 730 (1979); De Mauro Constr. Corp. v. United States, 215 Ct. Cl. 364, 375, 568 F.2d 1322, 1328 (1978). Jurisdiction under the Tucker Act must be exercised absent a firm indication by Congress that it intended to absolve the appropriated funds of the United States from liability for acts of the Comptroller. See Regional Rail Reorganization Act Cases, 419 U.S. at 126; Butz Eng'r Corp. v. United States, 204 Ct. Cl. 561, 569, 499 F.2d 619, 623 (1974).

This limited application of the exception to our broad jurisdiction is consistent with the underlying policy of the rule excluding non-appropriated-agencies from our jurisdiction of not wanting to impose "an unauthorized burden on the public treasury." Hughes, 209 Ct. Cl. at 483-84, 534 F.2d at 912.

The legislation governing this case does not preclude Congressional appropriation of funds to the Comptroller. In fact, appropriations had been received through 1947. The statute governing the Comptroller's Office was not amended at that time but appropriations were discontinued primarily because of the sufficiency of the funds being received from the regulated banks. Congress is not statutorily prohibited from appropriating funds to the Comptroller if a deficiency should occur. See Treasury Department Appropriations Bill for 1948: Hearings Before the House Comm. on Appropriations, 80th Cong., 1st Sess. 462 (1947)

> Neither our previous jurisprudence nor legislative history contradicts our formulation and application of the rule. Kyer v. United States, 177 Ct. Cl. 747, 369 Ff.2d 714 (1966), cert. denied, 387 U.S. 929 (1967), and its progeny, McCloskey & Co. v. United States, 208 Ct. Cl. 697, 530 F.2d 374 (1976) and Interdent Corp. v. United States, 203 Ct. Cl. 296, 488 1011 (1973), involved agencies where the statutory authority for the activities specifically limited liability or expenditures to non-appropriated funds. Kyer, 177 Ct. Cl. at 751-52, 369 F.2d at 718; McCloskey, 208 Ct. Cl. at 701-02, 530 F.2d at 377; Interdent, passim. In addition, Kyer and McCloskey did not involve contracts with a department or agency of the Government but with subsidiary bodies not authorized to commit United States treasury funds. See Convery, 220 Ct. Cl. at ___, 597 Ff.2d at 729. Villani v. United States, 211 Ct. Cl. 329 (1976), the case referred to by the defendant as dispositive, involved a claim against the Federal Reserve Bank of Cleveland, Ohio. Reserve banks are neither departments nor agencies of the Government and have no authority to receive or obligate appropriated funds.

The court reiterated these views in the McCarthy case which involved a contract between a developer of a foreign housing project and a foreign nation on the one hand and the Agency for International Development (AID) on the other hand and giving the AID control over certain of the financial and planning decisions pertaining to the project including approval of plans and specifications and of increases in the selling prices of the houses. As a part of the program the AID had entered into a separate guaranty agreement with private investors who agreed to provide permanent financing for purchasers of houses. This loan guaranty was specifically authorized by the Foreign Assistance Act of 1961 (FAA) in order to "facilitate and increase the participation of private enterprise" in the economic development of less-developed friendly countries.

A dispute between the developer and the AID was finally resolved in arbitration proceedings but the AID refused to pay the arbitration award of $495,898.45. The suit in the Court of Claims followed. The Government defended on the ground that the program was to be run without imposition of any monetary burden upon appropriated funds. Since the court does not have jurisdiction over nonappropriated funds, the Government argued that the court was without jurisdiction because claims under contracts of any activity supported by funds from other than Congressional appropriations are not included in the consent to suit given in the Tucker Act.

While the court acknowledged the nonappropriated fund exclusion of its jurisdiction, it cautioned that (slip op. at 9):

> Too sweeping conclusions cannot be drawn from this in view of the fact that our judgments, when awarded against the United States, are normally payable not from appropriations to maintain the agency that incurred the liability, but from appropriations made for the purpose of paying Court of Claims and other court judg-ments, now normally standing appropriations. 31 U.S.C. § 724a; see Temoak Band of Western Shoshone Indians v. United States. 219 Ct. Cl. 346, 593 F.2d 994, 998-99 (1979); Ellis v. United States, 228 Ct. Cl. _____, 657 F.2d 1178 (1981). Defendant unsuccessfully argued the identical jurisdictional defense urged here in the recent case of L'Enfant Plaza Properties, Inc. v. United States, Ct. Cl. No. 213-81L (slip opinion of January 13, 1982). As the court there clearly spells out, the non-appropriated funds exclusion is limited to instances when, by law, appropriated funds not only are not used to fund the agency, but could not be. . . . We have no doubt that AID has authority to use appropriated funds if and to the extent appropriated, and that is sufficient to avoid the nonappropriated funds exclusion. See 22 U.S.C. § 2182(f) (1964) now § 2183(e); G.L. Christian & Associates v. United States, 160 Ct. Cl. 1, 14, 312 F.2d 418, 425, cert. denied, 375 U.S. 954 (1963).

The court further concluded that the contract with the developer was incidental to AID contracts with private investors and indicated the AID's intent to ensure completion of the work without jeopardizing the investors' interests and thus to prevent AID from incurring any liability under the contracts of guaranty. And by helping make the guaranty program more fiscally sound, the contract with the developer furthered the professed purpose of the FAA and thus was within the statutory authority conferred by the Act. On the merits, the court found that the AID had breached the contract and entered judgment for the arbitration award.

4. Views of the Comptroller General

Respondent also refers us to various opinions of the Comptroller General in support of its general proposition that "FMS contracts under Section 22(a) are to be conducted without recourse to appropriated funds", citing Tele-Dynamics, Division of AMBAC Industries, 55 Comp. Gen. 674 (1976), 76-1 CPD ¶ 60, Keco Industries, Inc., B-184911, 58 Comp. Gen. 81, 78-2 CPD ¶ 352 and Procurements Involving Foreign Military Sales, 58 Comp. Gen. 81, 78-2 CPD ¶ 349. See also Consolidated Diesel Electric Company, B-177450, 77-1 CPD ¶ 7 and Aerosonic Corporation, B-187765, 77-1 CPD ¶ 424, where the Comptroller General declined to review bid protests involving FMS procurements pursuant to section 22 of the AECA on the ground that these involved only a temporary use of appropriated funds until reimbursement was made by the foreign country.

In Procurements Involving Foreign Military Sales, supra, however, the Comptroller General modified his earlier position of not considering FMS bid protests in recognition of the characterization of the trust funds (including those for foreign military sales) in 31 U.S.C. § 725a (1970) appropriated funds. In deference to the court's opinion in Hughes Aircraft Company v. United States, supra, the Comptroller General acknowledged that the temporary use of appropriated funds pursuant to section 22(b) of the AECA does not defeat the GAO's jurisdiction over bid protests.

While noting the intended self-sufficiency of the FMS procurements pursuant to section 22(a) of the AECA, the Comptroller General nevertheless assumed bid protest jurisdiction in view of the fact that funds received from foreign customers are normally deposited into the FMS Trust Fund established pursuant to 31 U.S.C. § 725a and thus constitute "technically appropriated funds even though they are not annually appropriated by Congress and not subject to direct Congressional control" (58 Comp. Gen. 81, 86-87).

In subsequent analyses of the liability of the United States Government under FMS contracts entered into pursuant to section 22(a) of the AECA, the Comptroller General has recognized, although somewhat reluctantly, that the United States may be held liable in case of default by the foreign customer. In his report on Financial and Legal Implications of Iran's Cancellation of Arms Purchase Agreements (B-174901, 25 July 1979, prepared in response to requests by Senators Baucus and Riegle, Jr., the Comptroller General observed that the AECA does not address the issue [of] what is to be done when a dependable undertaking fails, and then stated:

> However, the fact remains that only the United States enters into the procurement contracts with the defense contractors--not the foreign country concerned--and the United States maintains control over both the performance and the payments to those contractors. There-fore, it would appear that a court may well hold the United States liable to the contractors for their unpaid costs. If the defense contractors should decide to bring a lawsuit against the United States and [they] are ultimately successful, the resulting judgments could be paid from the general funds of the Treasury from the permanent indefinite appropriation provided for in 31 U.S.C. 724a.

See also B-196926, 26 January 1980, How Military Sales Trust Funds Operate: Saudi Arabian and Iranian Funds Compared.

Thus the Comptroller General recognizes that even if the Department involved in a FMS contract administratively could not use its appropriated funds to make payments to the contractors, the same impediment would not necessarily apply when the permanent indefinite appropriation established pursuant to 31 U.S.C. § 724a constitutes the authority for payment.

5. Appropriated Funds May Be Used On TCN Contract

In applying to the instant situation the criteria and conditions developed by the Court of Claims in a long line of cases since Kyer and as summarized in the L'Enfant Plaza and McCarthy cases, we note first that the Department of the Army, as it performed with respect to the TCN contract through its Electronics Command, operated within the statutory authority conferred by section 22 of the AECA. Respondent also acted in conformance with the terms of the Memorandum of Understanding between the Governments of the United States and Spain and pursuant to the terms of the Letter of Offer and Acceptance.

There also is no dispute that the Department of the Army has the authority to use appropriated funds and is fully authorized to bind the United States Government and obligate appropriated funds when carrying out the authorized project directly related to United States national defense", DeMauro Construction Contractor v. United States, 215 Ct. Cl. at 374, 568 F.2d at 1328.

But these facts alone would not be sufficient for a conclusion that appropriated monies could be obligated for the payment of a resulting judgment or award if there was a statutory bar for the use of appropriated funds for the activity involved, that Congress has affirmatively precluded the use of appropriated funds or there was a clear expression of Congressional intent that the activity resulting in the claim was not to receive or be funded from appropriated funds or was to be separated from general federal revenues. See cases cited in L' Enfant Plaza Properties, Inc. v. United States, supra, slip op. at 2-3.

Respondent's arguments fail when tested against these criteria. Although the Congress may have intended to establish foreign military sales as self-sufficient programs pursuant to section 22(a) of the AECA, this must be considered a policy objective rather than a prohibition against the use of appropriated funds or against future appropriation of funds for programs entered into pursuant to section 22(a) authority. It clearly is within the discretion of Congress to appropriate funds for such purpose or to permit an agency to use monies already appropriated (e.g. grant-aid funds) for payments on contracts entered into pursuant to section 22(a).

In this respect the situation is no different from that in McCarthy v. United States, supra where the court stated (slip. op. at 9):

> We have no doubt that AID has authority to use appro priated funds if and to the extent appropriated, and that is sufficient to avoid the nonappropriated funds exclusion [citations omitted].

To the extent monies are appropriated, the Department of the Army may use such funds to make payment to appellant. Section 13 of the CDA, in our opinion, has provided for such contingency by directing payment of a Board's award from the permanent indefinite appropriation

and reimbursement of the fund by the agency. If the Department of the Army does not have appropriations available to reimburse the permanent indefinite judgment fund established by 31 U.S.C. § 724a, it has to seek supplemental appropriations. Thus Congress acknowledged the possibility that the agency whose appropriated funds supported the contract in question may not have sufficient funds available to satisfy the award or judgment rendered pursuant to the CDA by providing for the agency to turn to the Congress for additional funds.

Respondent places great reliance on Gevyn Corporation v. United States, Ct. Cl. No. 158-74, order of 19 September 1980, 28 CCF ¶ 80,719 in arguing that the Department of the Army should not be placed "in the position of obligation to the permanent indefinite appropriation without any appropriation to satisfy that obligation."

The Gevyn case involved a construction contract with the Veterans Administration (VA) under which the parties, after litigation, settled various claims for $1,150,000. Subsequent to the settlement the parties learned that the agreement could not be implemented because of a special statutory provision. This provided that no appropriated funds could be used to make payment on any settlement of over $1 million on any VA construction contract which had not been independently audited as to the reasonableness and appropriateness of expenditures and where payment had not been specifically provided for in an Appropriation Act. The court vacated a trial judge's order directing the ENGBCA to render a decision encompassing the negotiated settlement and directing the VA to "secure funds by supplemental appropriation to implement the settlement which has been negotiated." On issues pertinent here the Court reasoned that the direction to the Board to render a decision that included the settlement amounted to an impermissible attempt to avoid the statutory requirement for audit and specific congressional appropriation which were found to be binding on the Court. The Court also found that the direction to the VA to secure funds by supplemental appropriation was an "unjustifiable interference with the agency's operation that this court ordinarily has no authority to require", especially in view of the steps the Government has already undertaken to obtain the necessary authority to pay the settlement amount.

We are unable to agree with respondent that a monetary award in the instant case pursuant to section 13 of the CDA, "thereby permitting appellant to proceed to the Comptroller General and the Department of the Treasury to obtain payment from the permanent indefinite appropriation" is comparable to the trial judge's direction in Gevyn which the court found improper because the Board would thus attempt "to circumvent the statutory requirement of Congress in 22 U.S.C. § 2762(a) (1970) that Foreign Military Sales contracting be conducted without recourse to United States appropriations."

As appellant has pointed out in its reply brief (at 42), in Gevyn the court was faced with a statute, 31 U.S.C. § 700d (1976), which explicitly prohibited the use of appropriated funds to pay settlements

without prior audit and specific appropriation whereas there is no explicit statutory prohibition with respect to the payment of FMS contractor claims from appropriated funds.

We deem this to be a critical distinction. Although it may be the established policy of the Congress that the FMS sales pursuant to section 22(a) of the AECA be self-sufficient and in the language of the statute the dependable undertaking of the foreign country involved should "assure the United States Government against any loss on the contract", the Congress abstained from inserting in the statute an explicit prohibition against the use of appropriated funds. If this was the Congressional intent, as respondent so earnestly contends in these proceedings, it would have been simple for the legislature to state it explicitly. Cf. Blackhawk Heating Co., Inc. v. United States, supra. Instead, the Congress even envisioned that foreign countries may be delinquent in their payments and mandated charging of interest on delinquent accounts. We have not been cited any legislative history to the effect that Congress intended the United States contractors to forego payments for goods delivered or services performed under section 22(a) FMS contracts with the United States Government simply for the reason that the foreign country receiving the services or supplies had not made the necessary funds available in a timely manner. What is lacking here is a "clear expression by Congress that the agency was to be separated from general federal revenues" with respect to its activities in the area of Procurements for foreign military sales. L'Enfant Plaza Properties, Inc. v. United States, supra.

That no prohibition against the use of appropriated monies existed is also shown by respondent's own practices in the administration of the TCN contract. Grant-aid funds in the amount of $4.5 million were appropriated and made available for the TCN project and, at first, it was contemplated to use a portion of these funds on the TCN contract. Such use was subsequently abandoned but only because the grant-aid funds were needed in their entirety for field administration costs for which they had been primarily destined and not because such use might have been inappropriate.

Moreover, under the terms of the Letter of Offer and Acceptance the Government expressly agreed to assume costs resulting from cancelling the offer in the interests of the United States. Section A.6 provides:

> 6. Under unusual and compelling circumstances when the best interests of the United States require it, [the United States Government] reserves the right to cancel all or part of this offer at any time prior to the delivery of defense articles or performance of services. It shall be responsible for all termination costs of its suppliers resulting from cancellations under this paragraph.

Obviously such action visualized use of United States' own funds.

Also, establishing the TCN contract as a "reimbursable" type of FMS and citing Army's appropriations in the contract tends to indicate respondent's understanding that appropriated monies could be used on the contract, albeit on a provisional or intermittent basis. Cf. Hughes Aircraft Co. v. United States, supra.

We conclude, therefore, that there is no statutory prohibition against Congress appropriating monies to be used for the purpose of foreign military sales contracts entered into pursuant to the authority of section 22(a) of the Arms Export Control Act or against the use of appropriated funds for payment under the terms of such contracts.

6. Conclusion

Accordingly, this Board has jurisdiction to adjudicate a dispute for a monetary award related to appellant's contract with the Government and make an award as provided in section 13(b) of the Contract Disputes Act of 1978.

* * * *

IV. THE INTEREST CLAIM

Appellant is asking for interest on the claimed amount of $13,819,622 pursuant to section 12 of the Contract Disputes Act as follows (Complaint ¶ 26 and 30);

> [D]amages in the amount of $13,819,622 plus interest thereon as follows: (1) $12,819,622 plus interest thereon from the dates the claims comprising that amount were submitted, but in any event no later than March 13, 1979, due and payable immediately; and (11) $1,000,000 plus interest thereon as set forth above due and payable upon the completion, under protest, by FEC of that certain work specified in the TCN Settlement Agreement. [emphasis supplied]

Appellant cites the decision in Dawson Construction Co., Inc., GSBCA No. 5777, 80-2 BCA ¶ 14,817 as the authority for payment of interest as damages for unreasonably delayed payment of a negotiated settlement or claim.

In Dawson, the parties negotiated an equitable adjustment for a change order on 21 November 1979. This was recorded by Government personnel in a memorandum of the meeting. A contract modification (change order) reflecting the settlement was not issued until 4 June 1980. The contractor executed the change order subject to its interest claim for delay in payment which it had asserted in earlier correspondence, both before and after the settlement. In the interval between the settlement and the issuance of the change order the contractor did not submit an invoice for the amount due but made

several requests in writing for payment of both the agreed on equitable adjustment and interest. The interest claim was denied in a contracting officer's final decision.

The GSBCA denied interest as cost of performance but considered interest recoverable for the period of unreasonable delay in payment after the parties had negotiated a settlement of the claim, relying on the legislative history of the CDA and the OFPP final regulations which became effective as of 1 June 1980 (and thus were not applicable to the contract involved). The Board found unreasonable the Government's failure "to pay the unprogressed portion of the equitable adjustment as agreed on November 21, 1979 through July 10, 1980", and also that any payment made after 18 January 1980 was unreasonably delayed. Interest was allowed from that date until payment.

Respondent denies that any interest is due on the settlement amount. It argues, first, that Dawson was "poorly" decided because of its reliance for the definition of a "claim" on the OFPP final regulations, which did not apply to the contract, and that under the applicable interim regulations an invoice was not a claim as already set forth, supra.

But even if Dawson was correctly decided, respondent contends that no interest should be due for the period before 23 April 1979 because the settlement agreement "waived and released all claims and defenses not incorporated therein", including any interest claim. Further, interest would be due only for a period of unreasonable delay and appellant has presented no evidence which would enable the Board to make such a determination. In respondent's view appellant recognized that even if the settlement agreement was signed there would be a collection problem and a substantial delay in payment and thus the agreed on amount included an allowance for interest for the expected delay in payment.

Section 12 of the CDA, under which appellant claims interest reads as follows:

> Sec. 12. Interest on amounts found due contractors on claims shall be paid to the contaractor from the date the contracting officer receives the claim pursuant to section 6(a) from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (55 Stat. 97) for the Renegotiation Board.

In deciding appellant's entitlement to recovery of interest on the amount due pursuant to this provision we do not need to determine whether or not Dawson Construction Co., Inc., was correctly decided. As pointed out in our earlier discussion, supra, this case is factually distinguishable and thus will not be a precedent.

We rather choose to follow the trail blazed into the thicket of the interest controversy by the Court of Claims in Brookfield Construction Co., Inc., v. United States, 661 F.2d 159 (Ct. Cl. 1981) and the opinions of this Board approvingly cited there.

In Brookfield, interest was claimed on seven claims which were pending before the contracting officer on 1 March 1979, the effective date of the CDA. Oral agreement had been reached on three of these claims before March 1, 1979, but no final modification, memorandum of understanding or other writing had been issued at that time due to an alleged lack of program funds to pay for the settlements. Final modifications settling all of the claims were executed in October 1979, and payment was made on 13 December of that year.

According to the court, by letter of 26 June 1979, plaintiff's counsel informed the Government that it would seek interest under the CDA on the amounts finally paid for claims pending before the contracting officer on the 1 March 1979 effective date. The contract contained no interest provision and the contracting officer denied the statutory interest claim in final decision of 28 August 1979. The contractor appealed the denial to the Court of Claims pursuant to Section 10(a)(1) of the Act, seeking interest only.

The court denied interest for the period prior to the effective date of the Act (1 March 1979), but allowed interest from that date regardless of the date when the contractor had elected to proceed under the provisions of the Act. The basis for this allowance was that the claims remained pending until the issuance of the contract modification and interest from that date until payment was expressly authorized by the Act:

> By the same token we are not persuaded that plaintiff's attempt to recover post-Act interest on its orally-settled claims is the equivalent of a suit for prohibited late-payment damages rather than one for interest on a disputed claim. Brookfield-Baylor asks here for whatever statutory interest it can have on its claims, and section 12 (after it became effective) orders payment of interest "until payment". That period must include time due to delay in payment.

661 F.2d at 168.

In so holding, the court distinguished this Board's decision in A.L.M. Contractors, Inc., ASBCA No. 23792, 79-2 BCA ¶ 14,099 on the ground there was no dispute over the amount of the underlying claim and the claim for interest was based solely on the Government's delay in making payments. We might add, that in A.L.M. Contractors the payments had been made prior to 1 March 1979 at which time there no longer was pending an underlying claim to which the interest could attach. See Monaco Enterprises Inc., ASBCA No. 24110, 80-1, BCA ¶ 14,282, Wheeler Brothers, Inc. v. United States, Ct. Cl. No. 315-80C, order of 19 December 1980, 28 CCF ¶ 80,966.

Interest is due not only on the amount found due by the Board but also on the amount found due by the contracting officer and not disputed before the Board. In Oxwell, Inc., ASBCA No. 25703, 81-2 BCA ¶ 15,392 we stated in this respect:

> The foregoing conclusion, drawn from the language of the Contract Disputes Act, is reinforced by Department of Defense regulations purporting to implement that statute. Among the various remedial policies reflected both in the Act and in pertinent regulations are the encouragement of (a) prompt contracting officer action on contractor claims and (b) resolution and settlement of claims by mutual agreement without litigation. See DAR 1-314(c). Significantly, DAR 1-314(b)(2) expands the definition of 'claim' to permit converting into a claim under Section 6(a) of the Act a routine request for payment that is either 'subsequently disputed as to liability or amount or not acted upon in a reasonable time.' The latter condition is stated in the disjunctive and operates without regard to whether the amount is in dispute. Once such payment request is converted into a 'claim', Section 6(c) of the Act established time periods within which the contracting officer must issue a decision and Section 12 provides for payment of interests on any 'amounts found due.' Where the Government fails to act within a reasonable time on a contractor's request for payment, and such request has been converted into a 'claim', the letter and spirit of DAR 1-314 would be vitiated if the Government is permitted to avoid the payment of interest on the undisputed portion of such 'claim.'

Based on the foregoing, no interest can be allowed for the period prior to the effective date of the Act, 1 March 1979. Brookfield Construction Co., Inc. v. United States, supra; United States v. Inland Services Corp., Ct. Cl. 1-80, order of 27 October 1981, 29 CCF ¶ 81,991.

For the post-Act period after 1 March 1979, the key to the allowance of interest is whether an underlying claim was in existence. Brookfield Construction Co., Inc. v. United States, supra.

With respect to the portion of appellant's invoice representing the unpaid portion of $5,081,700 of the contract price we concluded above that the 13 March 1979 letter and invoice constituted a claim which has remained pending since. Interest on this amount is accordingly recoverable from 13 March 1979, the date we found the contracting officer received the claim, until it is paid.

On claims that were pending before the contracting officer on 1 March 1979, interest is recoverable from that date regardless of when the claims were received by the contracting officer.

Hence, this would be the earliest date for interest to commence on the settlement amounts of $1,912,635 and $6,825,000 which we considered to represent the value of the then disputed or pending claims.

The fact that these claims were ultimately included in the Settlement Agreement of 23 April 1979, which we determined to be the contracting officer's final determination of these claims, does not toll or stop the running of interest. Section 12 of the Act provides payment of interest "until payment" and this event has not yet occurred. See Brookfield Construction Co. v. United States, 661 F.2d at 168.

We agree with respondent, however, that appellant should not be able to collect any interest for the period prior to or until the executing of the Settlement Agreement on 23 April 1979 on this portion of its claim.

Appellant repeatedly tried to include in the settlement agreement a provision allowing interest from a date certain, this being either the execution of the agreement or some other date. Because of the contracting officer's refusal, no such provision was included. Nor does the agreement contain a specific reservation as to interest.

In negotiations which resulted in affixing the value of outstanding claims at $6,825,000 and ratifying the earlier settlement of $1,912,635, appellant was fully aware of the Government's firm view that no interest would be separately allowed on these amounts and understood that its "cost of money" had to be taken into account in the lump-sum settlement amount.

We are persuaded by these events and statements preceding the execution of the Settlement Agreement that whatever interest claims appellant was considering in connection with its unresolved claims, these were included in the lump-sum settlement amount of $6,825,000.

But is is equally clear that this consideration of interest covered only a limited possible delay in obtaining payment on these claims, certainly not extending beyond the 23 April 1979 execution date of the settlement agreement. Neither can we find any intention to toll the running of interest by the execution of the settlement agreement nor interpret the agreement as producing such result.

Thus any estoppel to be applied against appellant with respect to its interest claim, to the extent it is based on pre-settlement agreement negotiations and matters, should not extend beyond the 23 April 1979 execution date. Interest on the settlement amounts of $6,825,000 and $1,912,635 would thus be computed from that date, except the amount of $1,000,000 the Government was entitled to withhold until satisfactory completion of the tasks set forth in the Settlement Agreement. In the absence of a showing that FEC had not

completed these obligations, or an acceptance/rejection action by the Government, we deem final acceptance having occurred upon expiration of the 45-day period after FEC's notification on 23 July 1980 pursuant to section G of the Settlement Agreement.

This period expired on 6 September 1980 and interest on $1,000,000 of the settlement amount thus shall be computed from that date.

V. SUMMARY

The Government's motion to dismiss is denied.

Appellant is entitled to receive payment of $13,819,622 and an award is made in this amount pursuant to section 13(b) of the Contract Disputes Act.

Simple interest on this award shall be computed in accordance with the applicable six month Treasury rates (Brookfield Construction Co., Inc. v. United States, supra; ACS Construction Company v. United States, Ct. Cl. No. 339-81C, order of 23 March 1982, 29 CCF ¶ 82,339) as follows:

On $5,081,987 - from 13 March 1979
On $1,912,635 - from 23 April 1979
On $5,825,000 - from 23 April 1979
On $1,000,000 - from 6 September 1980

The appeal is sustained as described above.

L. 8a Contracts

DECORAMA PAINTING, INC.

ASBCA No. 25,299 (1981)

The United States Air Force (USAF) entered into a contract with the Small Business Administration (SBA) pursuant to Section 8(a) of the Small Business Act with an effective date of 11 July 1979. On the same date the SBA entered into a contract with appellant for the performance of all the work. This latter contract states, "the parties to the prime contract hereby agree that Decorama Painting, Inc., (hereinafter called the subcontrator) shall for and in the stead of the SBA, fulfill and perform all the requirements of the prime contract."

A dispute arose with respect to a modification to the contract and appeal was taken. The Government now moves to dismiss the appeal for lack of jurisdiction for three reasons:

> 1. The ASBCA does not have jurisdiction in regard to contract No. F33630-79-C-0013 because the Contract Disputes Act does not apply to this contract because there is no contractor as defined in section 2(4) of the Act.
>
> 2. In regard to Contract No. SB5208(a)79-C-307, the ASBCA does not have jurisdiction because Mary Jean Michael, Base Contracting Officer, did not have authority to enter into that contract and, therefore, could not issue a decision thereunder.
>
> 3. If the Base Contracting Officer did have authority to issue a decision under SB-307, neither the SBA nor the administrator has designated the ASBCA to decide appeals under SBA contracts as provided in Section 8(d) of the Act.

The contract between the Air Force and SBA recited the following:

> The parties agree that Decorama Painting, Inc., 3639 Lee Rd., Shaker Heights, OH 44120, (hereinafter called the subcontractor) shall for and in the stead of the Small Business Administration, fulfill and perform all of the requirements of the prime contract for the consideration stated therein. The subcontractor acknowledges that it has read and is familiar with each and every part of the prime contract.

The reverse side of the page reads:

> 1. By subcontracting, pursuant to the provisions of Section 8(a) of the Small Business Act, as amended, the Small Administration (hereinafter called the SBA) agrees to furnish the materials and services set forth in this contract according to the specifications hereof.
>
> 2. The SBA has delegated to the U.S. Air Force (hereinafter called the USAF) the responsibility for administration of the subcontract hereunder. (See Subcontract No. SB5208(a)79-C307). This includes issuance of riders, inspection, and acceptance by USAF representatives and direct payment by the USAF.

A copy of Subcontract No. SB5208(a)79-C307 is attached hereto and made a part hereof.

SPECIAL PROVISION

> It is agreed that the provisions of the 'Termination for Convenience', 'Changes', 'Differing Site Conditions', Default-Damages for Delay-Time Extensions', 'Suspension of Work', 'Disputes', 'Price Reduction' and 'Payments to Contractor' clauses which are included in the contract between the SBA and its Contractor shall be invoked in appropriate cases when requested by the DoD Contracting Officer. If the SBA does not agree with the DoD Contracting Officer's request, the case shall be referred to the Secretary or his designee for decision.
>
> Performance Bond in an amount equal to 100% of contract price and Payment Bond in an amount equal to 50% of contract price shall be furnished by Decorama Painting, Inc.

The contract also includes, by reference to DAR (ASPR) clauses, the usual construction contract clauses including, among others, the disputes clause.

The contract between SBA and the appellant contained the following provisions:

> Small Business Administration has delegated to the United States Air Force (hereinafter called the USAF) the responsibility for administering its subcontract hereunder. This includes issuance of orders, inspection, and acceptance by USAF representatives and direct payment by the USAF.

* * *

1. The Small Business Administration (hereinafter called the SBA) has entered into contract F33630-79-C-0013 (hereinafter called the prime contract) with the United States Air Force (hereinafter called the USAF) for the performance of the work required under this subcontract.

2. The parties to the prime contract hereby agree that Decorama Painting, Inc, (hereinafter called the Subcontractor) shall for and in the stead of the SBA, fulfill and perform all the requirements of the prime contract. The Subcontractor acknowledges that he has read and is familiar with each and every part of the prime contract and that he agrees to perform all the work required under the provisions of this contract for the considerations stated herein. A copy of prime contract F33630-79-C-0013 is attached hereto and made a part hereof.

3. Payment shall be made directly to the Subcontractor by the Accounting & Finance Office, 94th TAW (ACF), Dobbins AFB, GA 30060.

4. The Subcontractor further understands and agrees that the responsibility for administering this subcontract has been delegated to the USAF.

Performance Bond in an amount equal to 100% of contract price and Payment Bond in an amount equal to 50% of contract price shall be furnished by Decorama Painting Inc.

Decorama Painting Inc., must not further subcontract any portion of this work without the authorization of the SBA Contracting Officer.

DAR (ASPR) sets out in Section 1-705.5(c)(2) the procedures for DoD agencies to follow in construction contracts with SBA under the small business program. ASPR (DAR) Section 1-705.5(c)(2)(H) required the Air Force, as the DoD contracting office, to prepare two contract sets and to include a statement in the contracts deeming the ASBCA as the "duly authorized representative" in the "Disputes" Clause:

(i) prepare appropriate contractual documents for use by the SBA with the SBA's contractor. These documents shall be completed, except for signatures and award information (see (c)(I)(i)), based on information requested or furnished by the SBA. This contract shall incorporate the mandatory general provisions and standard forms as required and also shall include the appropriate one of the following statements:

(a) For all contracts excepting civil works contracts of the Corps of Engineers-

For the Purposes of this contract, the reference to 'his duly authorized representative' in the 'Disputes' clause shall be deemed to refer to the Armed Services Board of Contract Appeals.

For reasons not shown, this latter statement was not included in these contracts although reference to other clauses was otherwise made, including a statement that contract administration functions were to be performed by the Air Force as the cognizant defense contracting officer as required by ASPR (DAR):

(ii) prepare Standard Form 19 or Standard Form 23 or other appropriate forms for execution with the SBA without incorporating any general provisions. The general provisions are not applicable to the SBA. '10 USC 2304(a)(17)' shall be cited as the authority for negotiations of this contract. This contract shall include a statement as follows:

It is agreed that the provisions of the 'Termination for Convenience', 'Changes', 'Differing Site Conditions', 'Defaultdamages for Delay-Time Extensions', 'Suspension of Work', 'Disputes', 'Price Reduction' and 'Payments to Contractor' clauses which are included in the contract between the SBA and its Contractor shall be invoked in appropriate cases when requested by the DoD Contracting Officer. If the SBA does not agree with the DoD Contracting Officer's request, the case shall be referred to the Secretary or his designee for decision.

(I) Contract administration functions will be performed by the cognizant Defense contracting office.

A later revision (DAC # 76-22, 22 Feb 80) to ASPR (DAR) 1-705.5 (c)(2)(H)(i) which post dated these contracts requires essentially the same designation but updates the clause to incorporate reference to the Contract Disputes Act of 1978:

(a) For all contracts excepting civil works contracts of the Corps of Engineers--

JURISDICTION OVER DISPUTES APPEALS (1979 MAR)

For the purposes of Section 8(d) of the Contract Disputes Act of 1978, Public Law 95-563, the agency board designated as having the jurisdiction to decide appeals from decisions of the Contracting Officer relative to disputes relating to this contract is the Armed Services Board of Contract Appeals.

This shows a continuing DoD policy that ASBCA is the agency board designated as having jurisdiction to decide these appeals.

In these contracts, it is clear that neither the Air Force nor the SBA intended that the SBA would perform the work in the schedule of the contract but rather that the work would be performed by a minority small business under Section 8(a) of the Small Business Act. In practical effect, the SBA acted as an agent to bring together the Air Force and the minority small business, Decorama, Inc., the appellant in this action. The subcontract between SBA and appellant is an indispensable part of the contract between the Air Force and SBA and was made for the mutual benefit of the Government and appellant. Appellant was obligated to carry out all terms and conditions of the contract between SBA and the Air Force. SBA delegated the responsibility for administration of its contract with the Air Force to that agency and the Base Contracting Officer performed her duties in accord with this delegation as was the clear intent of the parties. Both contracts were attached together; each was made a part of the other; each carried an effective date of 11 July 1979. Under these circumstances, the two instruments constituted a single contractual transaction involving mutual rights and obligations among the Government agencies and appellant with each of the three parties in privity with the other two. See R&R Construction Company, VACAB No. 1101, 74-2 BCA ¶ 10,857; Small Business Administration (Mills Enterprises, Inc.), AGBCA No. 76-165, 77-2 BCA ¶ 12,657. Therefore appellant is a "contractor" under section 2(4) of the Contract Disputes Act, with a right of appeal to this Board as the board which all three parties intended should hear appeals under these contracts.

Accordingly, we conclude that the reasons advanced by the Air Force as a basis for its Motion to Dismiss are incorrect; the motion is therefore denied.

M. Bid Preparation Costs

HI-TECH ELECTRONICS CORPORATION

ASBCA No. 25968 (1981)

Appellant, acting pro se, argues that having made a mistake when it omitted the price for Line Item 0007 of its bid, the Contracting Officer should have requested a verification in accordance with DAR 2-406 and that his "disregard of the DAR circumvented the Government's implied promise to give honest consideration to [appellant's] bid . . . ." Appellant claims entitlement to recover the sum of the cost of preparing the Technical Proposal, profits which he allegedly would have received if the contract was properly awarded, and cost of litigation.

The Government argues that this Board does not have jurisdiction to consider appellant's claims on their merits. It is the Government's position that the Contract Disputes Act of 1978 does not vest jurisdiction for appeals of this nature in the Board, that there is no contract within the meaning of the Act on this appeal, and that the Board's acceptance of jurisdiction on this case would be inconsistent with the design and purpose of the act.

STATEMENTS OF FACT

For the purpose of disposing of this motion the facts recited below are derived primarily from the statement of facts in Respondent's Motion to Dismiss For Lack of Jurisdiction (hereinafter Motion) and appellant's Complaint (hereinafter Complaint).

1. On or about 21 April 1980 a Request for Technical Proposals (RFTP N61339-80-R-0076) was issued by the Government under step one of a contemplated two-step formally advertised procurement. The RFTP included the design, development, field installation, and testing of two units of a Target Tracking Electronics Subsystem for the AN/MPQ-47 Track White Scan (TWX) Radar Simulator. RFTP N 61339-80-R-0076 was issued as a total small business set-aside. The only step-one technical proposal submitted in response to RFTP N61339-80-R-0076 was a proposal submitted by appellant.

2. On or about 16 June 1980, RFTP N61339-80-R-0076 was cancelled because of the receipt of only one proposal. The appellant's proposal was returned to appellant unopened. (Ibid.) A request for technical proposals covering the same items but without a small business set-aside restriction was issued as RFTP N61339-80-R-0110 dated 4 August 1980. The Government received a step-one technical proposal from both

the appellant and Metric Systems Corporation in response to RFTP N61339-80-R-0110. The technical proposals of both firms were determined to be technically acceptable.

3. Thereafter, under step two of the two-step formally advertised procurement, the Government issued Solicitation No. N61339-80-B-0006 to the aforementioned firms, seeking prices for items listed therein. Item 0007 in Solicitation NO. N61339-80-B-0006 called for a unit price/per man-day based on a quantity of 30 man-days for on-call contractor field services.

4. Both appellant and Metric Systems submitted bids on Solicitation No. N61339-80-B-0006 which were opened on 30 January 1981. Appellant did not submit a unit price or any other notation covering item 0007. The Contracting Officer, in a letter dated 10 February 1981, rejected appellant's bid on the grounds that it was non-responsive. Metric System's Corporation whose bid did reflect a price for item 0007 was considered responsive.

5. The appellant disputed the contracting officer's determination in a letter dated 23 February 1981. By letter dated 23 March 1981 the contracting officer reasserted its previous position.

6. On 23 March 1981 Metric Systems Corporation was awarded Contract No. N61339-81-C-0006.

DECISION

The Board's jurisdiction under the Contract Disputes Act of 1978, P.L. 95-563, 92 Stat. 2383, 41 U.S.C. Sec. 601 et seq (hereinafter the Act) clearly depends upon the existence of a contract. The Act applies:

> . . . to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of Title 28, United States Code) entered into by an executive agency for--
>
> (1) the procurement of property, other than real property in being;
>
> (2) the procurement of services;
>
> (3) the procurement of construction, alteration, repair or maintenance of real property; or,
>
> (4) the disposal of personal property. (Sec. 602a)

The specific issue we decide here is whether this appeal relates to a contract as defined in the aforementioned provision. Government counsel argues that no contract at all is involved. While conceding that the Government did impliedly promise to give honest and fair consideration to appellant's bid, Government counsel contends that this

promise was not contractual in nature. Relying upon Heyer Products Co., Inc. v. United States, 135 Ct. Cl. 63, 140 F. Supp. 409 (1956) to support his contention in this regard, he argues:

> Inasmuch as the Government's obligation is not based on a tacit understanding and agreement between the parties to be bound, the Respondent submits that such promise is based on and arises out of a regulatory obligation imposed by the administrative procedures for bid advertising.

A reading of Heyer Products, supra, clearly demonstrates a different conclusion. The Court in finding that the Government "breached its implied promise when it solicited bids" noted that an "implied contract [had] been broken" and pointed out that plaintiff coud maintain an action for damages for its breach" (Ibid.). See also, Keco Industries, Inc. v. United States, 192 Ct. Cl. 773, 428 F. 2d 1233 (1970); Master Mechanics, Inc. GSBCA No. 5535, 80-2 ¶ 14,584; Town Center Security Corporation, GSBCA No. 5875, 81-1 BCA ¶ 15,030; Ace Art Company, Inc., GSBCA No. 6032, 81-1 BCA ¶ 15,106; The Hecht Company, AGBCA No. 80-157-1, 81-1 BCA ¶ 15,138. Appellant's allegations that the contracting officer failed to give honest consideration to its bid lends, at least, a colorable factual situation within the purview of the implied contract found in Heyer and its progeny, supra. Our jurisdiction thus established by the existence of an implied contract, we are authorized to grant the same remedy which the Court of Claims declares to be available for its breach. Section 607(d) of the Act.

Government counsel would still argue that even if the Board "would somehow determine that the implied promises referenced in Heyer, supra," create an implied contract, such a "contract is certainly not the type of implied contract envisioned by Section 602(a) of the Contract Disputes Act. That section limits the scope of the Act to implied contracts for the procurement 'or disposal' of the items listed therein." We are not so persuaded. The legislative history of the Act indicates that one of the major intentions of the Congress was to avoid costly and time consuming fragmentation of remedies between the Boards and the Court of Claims. While the Congress preserved the right of direct access to the Court of Claims it also expanded the Boards' jurisdiction by granting "all disputes" authority for contract matters. And in exercising this jurisdiction, the Congress in Section 607(d) of the Act authorized the Boards "to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims." Thus, the Congress felt that justice could best be served by providing alternative forums for the resolution of contract disputes because the claimant should have the ability to choose the forum according to the needs of the particular case. Senate Report No. 1118, 95th Cong. 2d Sess., 12-13; [1978] U.S. Code Cong. & Ad. News, 5246-47.

We are mindful that the Congress did not intend the Act to apply to all contract matters. Indeed, while the Congress expressly excluded certain contracts such as the procurement of "real property in being" it did not mean to split fine hairs regarding the Act's applicability to the wide range of express and implied contracts, not expressly excluded, that may be encountered within the Federal procurement context. The Congress meant what it said when it chose to abolish the fragmentation of remedies. Government counsel seeks to revive such fragmentation by a narrow construction of Section 602(a). We reject that construction because it fails to take into account the nexus between the aforementioned categories defined by Section 602(a) of the Act and appellant's bid which would have no life of its own apart from the contract which succeeds it. But for the bid solicitation, here, the services contract would fail to materialize. Thus, the solicitation, the implied promise of the contracting officer to fairly and honestly consider the bids arising therefrom, and the procurement are indeed connected and together comprise the necessary steps in the procurement process ultimately leading to a contract award contemplated by Section 602(a). For us to hold that the alleged implied contract here is not within the embrace of the Contract Disputes Act would be to frustrate the clearly expressed Congressional intent to expand the Board's jurisdiction in order to avoid the confusion, delay and expense that would otherwise befall appellant in its attempt to resolve its contract dispute with the Government.

We note the Government's citation of Edwin T. Noyes III, PSBCA No. 652, 12 July 1979; James L. Jones, PSBCA No. 778, 80-1 BCA 14,292; and Dakota Titles & Records, ICBCA No. 1420-1-81, 81-1, BCA ¶ 14,958 in support of its Motion to Dismiss. We are not persuaded by these decisions which do not involve allegations of breach of the contracting officer's implied contractual promise to fairly and honestly consider a bid. Accordingly, we hold that appellant's allegations of the contracting officer's "disregard of the DAR" is a prima facie indication of such arbitrary and capricious Government action to merit our taking jurisdiction to decide whether or not the evidence overall manifests conduct which would afford a recovery of appellant's bid preparation costs pursuant to Heyer et al, supra.

The Motion is denied.

Editor's Note: This case was reversed by CAFC in Coastal Corporation et al v. United States, CAFC No. 83-706, August 3, 1983.

Section 2. Late Appeals

A. Timely Appeal As Jurisdictional

SOFARELLI ASSOCIATES, INC.

ASBCA No. 24580 (1980)

OPINION BY ADMINISTRATIVE JUDGE SPECTOR
ON RESPONDENT'S MOTION TO DISMISS PURSUANT TO RULE 12.3
FINDINGS OF FACT

1. The subject contraction contract is dated 9 May 1977.

2. The name and address of the contractor, as they appear in the contract, are as follows:

"Sofarelli Associates, Inc. and Sofarelli Associates,
Ltd., A Joint Venture
Post Office Box 5227
Albany, New York 12205"

3. By letter dated 15 August 1979 respondent issued a final decision denying appellant's claim in the amount of $23,019 for additional compensation under the contract.

4. The contract contained a standard Disputes Clause providing for a thirty days appeal period.

5. The name and address to which the final decision was directed were the same as appear in the contract.

6. The mailed final decision letter was received by Mr. Van Ness on 20 August 1979. Mr. Van Ness was an accounting employee of Sofarelli Associates, Inc. at the latter's office in Albany, New York. He gave the letter to Mr. Bunzye, the office manager at the Albany office who handled the bookkeeping duties under the subject contract.

7. Mr. Bunzey, about the first day of September 1979, mailed the final decision to Mr. Fiorillo at Sofarelli Associates, Ltd., located in the Virgin Islands. Mr. Fiorillo was the project manager for the subject contract.

8. For some unexplained reason Mr. Fiorillo did not receive a copy of the final decision in the Virgin Islands until about the second week of December 1980.

9. Mr. Fiorillo testified that mail to the Virgin Islands was "very sporadic", "not very reliable", and that sometimes mail was received six months from date of mailing.

10. On 3 January 1980 Mr. Fiorillo hand carried a notice of appeal to an attorney for the Department of Navy, Navy Facilities Engineering Command, located at Alexandria, Virginia. It was received by the Board on 4 January 1980.

11. Appellant has elected to proceed under the Contract Disputes Act of 1978 and the accelerated procedure therein provided.

12. Respondent has filed a motion to dismiss the appeal as not being timely filed.

DECISION

Section 7 of the Contract Disputes Act of 1978 provides that within ninety days of receipt of a contracting officer's decision the contractor may appeal such decision to an agency board of contract appeals.

Rule 1(a) of the Interim Rules of the Armed Services Board of Contract Appeals states:

> Notice of an appeal shall be in writing and mailed or otherwise furnished to the Board within 90 days from the date of receipt of a contracting officer's decision. A copy thereof shall be furnished to the contracting officer from whose decision the appeal is taken.

In filing its notice of appeal appellant has clearly not complied with the ninety days requirement specified in both the Contract Disputes Act of 1978 and the Rules of this Board.

However, appellant contends that neither Mr. Van Ness nor Mr. Bunzey had authority to act in negotiating a claim with respondent, that Mr. Fiorillo had that responsibility and was the only person with background and knowledge to act on the final decision, and that the contract was still "open." Appellant also cites Maney Aircraft Parts, Inc. v. United States (Ct. Cl. 1973), 479 F.2d 1350, and Rule 33 of the Interim Rules of the Board which provides for extensions of time for procedural actions where appropriate and justified.

With respect to the Maney decision, it is enough to say that it predated the Contract Disputes Act of 1978.

Section 6(b) of the Act states:

> The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this Act. . . .

We regard timely compliance with Section 7 of the Act to be jurisdictional in nature, not a mere procedural action, and not subject to the above considerations advanced by appellant.

The Department of Transportation Contract Appeals Board has recently stated (Avon C. Brown, Inc., Docket No. 1082, 18 Jan 1980):

> Now the Boards must consider the mandate of the Act which sets a limit upon the time for entertaining appeals. We believe that the Boards no longer have discretion to waive the late filing of appeals.

Even were we to treat appellant's election to proceed under the Contract Disputes Act of 1978 as a nullity, appellant has not shown good cause or justifiable excuse for failing to file its appeal within the period specified in the contract.

The appeal is dismissed.

B. Election By Contractor

TUTTLE/WHITE CONSTRUCTORS, INC. v. THE UNITED STATES

Ct. Cl. No. 205-80C (1981)

SMITH, Judge, delivered the opinion of the court:

This Government contract case, on which we have heard oral argument, is before the court on defendant's motion for summary judgment. We are unable to find, in the particular circumstances of this case, that plaintiff elected to proceed under the Contract Disputes Act of 1978. Accordingly, we grant defendant's motion.

I.

On September 28, 1977, plaintiff entered into a contract with the Department of Army Corps of Engineers for the construction of an enlisted men's barracks complex at Fort Bragg, North Carolina. The contract (No. DACA21-77-0166) specified that a substantial portion of the barracks was to be constructed with masonry units, known as CMU blocks. During construction, the parties disagreed as to whether the interior walls of the barracks should be assembled in a stack bond fashion or in a running bond pattern. Although plaintiff had interpreted the contract to call for the stack bond pattern, defendant nevertheless directed plaintiff to lay the CMU blocks in a running bond pattern. Since the use of the running bond pattern significantly increased plaintiff's costs, plaintiff submitted a claim to the contracting officer for an equitable adjustment of the contract to cover its additional costs.

Plaintiff's claim for equitable adjustment was denied by the contracting officer on May 16, 1979. In the denial letter of that date he stated:

> This is my final decision as Contracting Officer. Decisions on disputed questions of facts and on other questions that are subject to the procedures of the Disputes clause may be appealed in accordance with the provisions of that clause. If you decide to make such an appeal from this decision, written notice thereof (in triplicate) must be mailed or otherwise furnished to the Contracting Officer within 30 days from the date you receive this decision. Such notice should indicate that an appeal is intended and should reference this decision and identify the contract by numbers. * * * Please advise this office if you elect to have this dispute subject to the Contract Disputes Act of 1978. You have already been furnished a copy of this Act.

In response, plaintiff's project manager advised the contracting officer by letter dated June 4, 1979, as follows:

> Reference is made to your letter of May 16, 1979 regarding your final decision in the matter of the masonry walls in the Barracks buildings being installed in a running bond pattern.
>
> This is our notice to you that we desire to appeal from this decision.

This letter made no reference to the Contract Disputes Act.

The Armed Services Board of Contract Appeals (ASBCA) processed plaintiff's letter as an appeal to it and informed plaintiff by certified mail of the ASBCA docket number it had assigned to the appeal. At that time plaintiff was notified that its appeal would be governed by the rules of the ASBCA. Plaintiff raised no objection nor indicated any desire on its part to pursue its claim in this court under the Contract Disputes Act. Subsequently, plaintiff allegedly decided to withdraw its appeal because the parties had continued to negotiate with the contracting officer and were trying to arrive at a mutually acceptable settlement. Plaintiff requested a dismissal of the appeal. Pursuant to this request, the ASBCA dismissed plaintiff's appeal with prejudice on September 10, 1979.

On May 2, 1980, plaintiff petitioned this court, pursuant to the Contract Disputes Act, for a trial de novo on its claim. Defendant at that point refused to proceed with the scheduled negotiations. Defendant now moves for dismissal of the petition but so informs the court that it will not oppose reinstatement of this plaintiff's appeal before the ASBCA. It is defendant's position that the ASBCA appeal foreclosed plaintiff's right to proceed in this court under the Contract Disputes Act. Plaintiff, on the other hand, argues that the mere assignment of a docket number by the ASBCA cannot bar an otherwise valid election and insists that the court's recent holding in National Electric Coil compels us to allow plaintiff to proceed with its suit in this court. We do not agree with plaintiff and, based on the following, we grant defendant's motion.

II.

With the passage of the Contract Disputes Act, a new era in the resolution of Government contracts emerged. One of its most significant reforms was to present an alternative to the administrative appeal in contract disputes. Under the new law, which applies to all contracts entered into on or after March 1, 1979, a contractor either can appeal an adverse final decision to the appropriate board of contract appeals or seek relief from the contracting officer's decision directly in this court. Given the fundamental differences between the two forums, the contractor thus must make an important initial strategic decision; namely, which forum would be better suited to hear its particular claims.

With respect to pre-March 1, 1979, contracts, section 16 of the act provides that "[n]otwithstanding any provision in the contract made before the effective date of this Act, the contractor may elect to proceed under this Act with respect to any claim pending then before the contracting officer or initiated thereafter." (Emphasis supplied.) In other words, although the Contract Disputes Act does not automatically apply to such contracts, including the one here in dispute, the contractor is given the right to elect to have the act extend to such claims. In these circumstances, the contractor would have to make two distinct elections. First the contractor may decide whether to elect to proceed under the new act at all. If that election is made, the contractor would further have to choose a forum in which to pursue its claim. Absent an election to proceed under the new act, the disputes clause of the pre-March 1, 1979, contract would govern the resolution of the dispute.

That being the case, we must find that plaintiff at an appropriate point elected to have the parties' pre-March 1, 1979, contract governed by the new act. We find that plaintiff has failed to make that election. Although the contracting officer had requested that plaintiff notify his office if plaintiff intended to proceed under the act, plaintiff submitted, pursuant to the procedures set forth in the contract's disputes clause, its notice of appeal to the contracting officer without any mention of the new act. Nor did plaintiff elect to have the dispute subject to the Contract Disputes Act when it received notice of the docketing by the ASBCA.

Plaintiff vigorously argues that it elected to have the dispute subject to the Contract Disputes Act when it instituted the present suit. Having withdrawn the former appeal, plaintiff contends that it was free to elect to proceed in this court under the Contract Disputes Act. We do not agree; plaintiff originally chose to appeal the contracting officer's adverse decision to the ASBCA and now that choice must stand. Plaintiff appealed the contracting officer's final decision to the ASBCA, and once this avenue was chosen for resolution of its dispute, we hold that plaintiff could no longer elect to bring suit directly in this court under the Contract Disputes Act.

It is a fact that the Contract Disputes Act does not set forth a specific time period within which an election to proceed under that act must be made, nor does the act prescribe the manner in which such election must be made. However, it is clear that, for the comprehensive purposes of the act to be implemented, the contractor is under certain compulsions of time and choice that point to a requirement that the contractor make a positive election whether to come under the act at such time and in such manner as are consistent with the options that it has and which remain open to it from time to time. For example, in a pre-March 1, 1979, contract, where a contractor makes a conscious and unwavering election to proceed under the disputes clause of the contract, it obviously must move to implement that election within 30 days of the contracting officer's final decision. Where a contractor makes a conscious and unwavering election to proceed under the Act and before a board, it obviously must implement that election

within 90 days of the final decision. Where a contractor makes a conscious and unwavering decision to come under the act and proceed directly to this court, it obviously must implement that election by filing a petition here within 12 months of the final decision of the contracting officer. Thus, had plaintiff not responded to the contracting officer and to the board as it did, it clearly could have done nothing for almost 12 months and then could have availed itself of direct access to this court or abandoned its claim. In choosing direct access it would of necessity have had to invoke the act. Those are not the facts of this case.

In response to the contracting officer's notice that questions which are subject to the procedures of the disputes clause may be appealed by written notice to the contracting officer within 30 days, plaintiff, within such 30-day period, responded that it desired to appeal. With respect to the contracting officer's request that his office be advised if plaintiff elects to have the dispute subject to the Contract Disputes Act, plaintiff made no response. Furthermore, plaintiff took no positive action which could be described as an election under section 16 of the act until it filed a petition, 351 days after the contracting officer's decision, and 332 days after noting its intent to appeal, in which petition plaintiff invoked section 10(a)(1) of the act. Plaintiff was furnished a copy of the Contract Disputes Act, was requested specifically to indicate whether it elected to come under the act, and made no response thereto other than to file with the contracting officer a notice of intent to appeal. In light of those facts, we conclude that plaintiff was furnished sufficient information to make a straightforward and conscious election whether to invoke the act, and that its filing a notice of appeal within the 30-day period, in response to the contracting officer's letter, evidenced its decision to proceed under the disputes clause and not under the act. Our conclusions are further supported by the facts that the board's response to plaintiff's notice was consistent with an election by plaintiff to proceed under the disputes clause, particularly in view of the fact that plaintiff made no effort either to clarify its position by advising the board within 90 days that it objected to the board's treatment of its notice or that it desired to proceed under the act, but before the board. Instead, it "kept its options open", eventually withdrew its appeal to the board, and filed suit in this court. To allow this procedure would permit contractors unilaterally to establish their own rules of procedures in cases covered by the act.

Senate Report No. 95-1118 states--

> [t]he contractor may elect to proceed under this act with respect to any claims pending then before the contracting officer or initiated thereafter. It is not intended that upon the effective date of this act, a claim currently before an agency board can be switched to a court * * *. [Emphasis supplied.]

Although this comment is directed to a slightly different set of circumstances, we believe that it expresses the spirit of the act and the intent of the Congress in the circumstances before us. Plaintiff must be held to have made a conscious election to proceed under the disputes clause. Having done so, it is foreclosed from later electing to proceed under the Contract Disputes Act. Having foregone this option it may not bring its case to us without first exhausting its administrative remedies.

Our recent holding in National Electric Coil is not applicable to the facts in this case. In that case, involving a pre-March 1, 1979, contract, the contractor was not informed of its right to elect to proceed under the Contract Disputes Act until after an agency board of contract appeals had docketed the contractor's case. Given those facts, we held that the contractor could not have knowingly elected its forum for appeal since the contractor was unaware that the new act could govern the pre-March 1, 1979, contract. Plaintiff's reliance on that case is misplaced since that is not the situation in the instant case. Here plaintiff was informed by the contracting officer of its right to elect to proceed under the new act, was provided with a copy of the act, and was requested specifically to respond on that point. Plaintiff therefore made a knowing election when it appealed the contracting officer's final decision to the ASBCA.

Assuming that the ASBCA would have allowed plaintiff the right to elect to have the pending appeal governed by the new law, that fact in itself would not allow plaintiff to withdraw the appeal to bring suit in this court under section 10(a)(1) of the act. Section 10(a)(1) provides that "in lieu of appealing the decision of the contracting officer * * * to an agency board, a contractor may bring an action directly on the claim in the United States Court of Claims." (Emphasis supplied.) The language "in lieu of" clearly indicates that the contractor has a choice of forums; that does not however allow a contractor to pursue its claim before both forums. Since we find that plaintiff appealed the contracting officer's adverse decision to the ASBCA, plaintiff cannot utilize the direct access provision of the Contract Disputes Act to appeal the adverse decision to this court.

Although the ASBCA dismissed the appeal with prejudice, the record indicates that plaintiff might be permitted to renew its claim before that forum. The parties' correspondence with the administrative law judge indicates that the appeal was dismissed with prejudice in order to facilitate the action before this court and bore no relation to the merits of the claim. Consequently, the ASBCA may find it appropriate to vacate its order which dismissed the appeal.

CONCLUSION

Based on the foregoing, we grant defendant's motion for summary judgement. Plaintiff's petition is dismissed.

KUNZIG, Judge, concurring:

I concur in the result. I would hold that by docketing an appeal with the ASBCA, plaintiff made a binding election of forums under the Contract Disputes Act and is now required to litigate in its chosen arena--the Board--prior to seeking judicial review in this court. See 41 U.S.C. § 609(a)(1)(Supp. II 1978). Cf. National Electric Coil v. United States, Ct. Cl. No. 79-80C (order entered March 17, 1981) (special circumstances exception). This holding is clearcut and easily understandable, fully supported by the statutory language, and potentially lasting in its significance.

The same cannot be said of the approach taken by the court. Its analysis begins with the statement, not in itself controversial, that "the contractor must decide whether to elect to proceed under the new act at all." Ante, at 4. It is the next step in the analysis which troubles me. The court states that said election must be made "at an appropriate point." Ante, at 4. Otherwise, some sort of waiver will be deemed to have occurred. This additional requirement, the basis for the court's reasoning, finds no support whatsoever in the statutory language or legislative history. Compare 41 U.S.C. § 605 (c)(5)(Supp. II 1978); SCM Corp v. United States, Ct. Cl. No. 576-79C (order entered Oct. 10, 1980). Moreover, the test propounded by the court for determining the "appropriate point" is exceedingly vague:

> However, it is clear that, for the comprehensive purposes of the act to be implemented, the contractor is under certain compulsions of time and choice that point to a requirement that the contractor make a positive election whether to come under the act at such time and in such manner as are consistent with the options that it has and which remain open to it from time to time.

Ante, at 5. Finally, it is worth noting that the rule adopted by the court applies solely to the inherently limited class of contract claims arising out of pre-Act contracts. My proposed rule, by contrast, has no such limitation.

Nothing in the facts of this case shows that plaintiff ever affirmatively waived its statutory right to proceed under the Contract Disputes Act. Instead, when timely filing its petition in this court, plaintiff unequivocally expressed its election to proceed under the Act. The problem, as I see it, is that by earlier docketing its appeal to the Board, plaintiff had already elected its forum and was no longer authorized by the Act to initiate a direct action in this court. Only when the proceedings before the Board have been brought to a finish may this court take jurisdiction of the case. See 41 U.S.C. § 607(g)(1)(A)(Supp. II 1978).

I therefore concur in the result, although, with respect, I prefer to reach it by a different route.

C. Lost Or Consolidated Decisions

F. E. CONSTRUCTORS, J. V.

ASBCA No. 24488 (1980)

The Government moved for dismissal of this appeal on the ground that the appeal was untimely.

Contract No. DACA85-77-C-0044 contained the standard Disputes clause for construction contracts and said clause provided that the contracting officer's decision would be final and conclusive if not appealed within thirty days of the contractor's receipt thereof.

On 12 February 1979, the contracting officer issued his decision on the aluminum flexible conduit claim, which is the subject of this appeal, and it was sent to appellant by certified mail, return receipt requested. The return receipt shows that appellant received the final decision on 15 February 1979. A notice of appeal was sent to the Board, through the contracting officer, on 5 September 1979 and this was 202 days from the date appellant received the final decision.

DECISION

The sole question before us is whether appellant's appeal from the final decision was timely. If it was not timely it must be dismissed for our jurisdiction depends upon a timely appeal. Even assuming we had the discretionary authority to waive an untimely appeal for good cause, we could not find any good cause here. In truth, the absence of a timely appeal was caused by appellant's counsel losing the contracting officer's final decision in its office and then discovering it months later. That situation cannot serve as "good cause" for failing to do what the Disputes clause clearly required appellant to do.

Appellant's partial reliance upon the Fulford Doctrine is misplaced. That doctrine relates to the situation where a contractor fails to, or simply does not, file an appeal from a final decision terminating the contractor's right to proceed with contract performance but does appeal from a final decision assessing excess costs of reprocurement. The reasoning behind that doctrine is simply that the legality and propriety of the termination action is, of necessity, in issue when excess costs, based upon reprocurement following the termination, are assessed. That doctrine has no application here for no default termination action was taken and, of course, no excess costs of reprocurement are involved.

Appellant relies upon the Engineer Board decision in B. Bornstein & Son., Inc., Eng. BCA Nos. 3707 et al, 77-1 BCA ¶ 12,438. Appellant characterizes the rule as follows:

Moreover, it is well settled that where a group of claims have been consolidated for purposes of appeal, an appeal from either the first or last Contracting Officer's final decision carries with it all of the other appeals.

Appellant's reliance on the Bornstein decision is misplaced. The factual situation in that appeal is totally different from that in the instant appeal. In Bornstein the contractor submitted one consolidated claim which involved, apparently, some sixteen separate and distinct items of claim, (causes of actions), i.e., for delays and additional work encountered in performance of the contract work. For these sixteen separate and distinct items of claim the contractor sought the total amount of $232,312, a time extension through the date of substantial completion and the remission of all liquidated damages.

Meetings were held on this consolidated claim but it could not be settled. When negotiations broke down the contracting officer stated that he would issue a final decision within 2-4 weeks. Instead of adhering to that promise, the contracting officer separated the various items in the consolidated claim; in essence making sixteen separate and distinct actions out of the one consolidated action submitted to him by the contractor. He issued a series of decisions over a five-month period. After some of the decisions had been issued, appellant's counsel asked the Government why final decisions were being issued in a piecemeal fashion. He was told that it was being done so that the contracting officer could sign as many as possible before he was transferred. He was also told that none of the decisions would be forwarded for docketing until the entire claim had been disposed of. All of them were to be consolidated and sent through channels to the Board.

Appellant attempted to submit a notice of appeal for each of the final decisions but did not start soon enough for the five appeals which the Government sought to dismiss on the basis of untimeliness. There is no question but that the contractor's notices for these five appeals were not timely, i.e., not filed within the mandated 30-day appeal period.

Appellant's appeal from the last decision issued was timely. That decision denied appellant's claim for a time extension, extended overhead and remission of all liquidated damages, each of which appellant had requested in its consolidated claim. The contractor contended that the last decision encompassed all of the previous decisions which had denied the substantive basis or underlying factual issue involved in each of the other decisions. It was these factual issues upon which its overall time extensions and delay-related claim had been founded. The contractor contended that its timely appeal from the last decision was an appeal from the denial of the entire consolidated claim which the contracting officer had decided on a piecemeal basis.

The Engineer Board set forth appellant's argument as follows:

> The appellant states that the election to divide the claim into sixteen parts was done for the administrative convenience of the contracting officer and should not now be used to trap appellant in a procedural technicality. He urges the Board to deny the government's motion to dismiss in this case on the grounds that the appeal period did not begin to run until he had received final decisions covering the entire area of dispute.

The Engineer Board, relying upon its earlier case of Harbison and Mahoney, Eng. BCA Nos. 2819, 2820, 68-1 BCA ¶ 6880, held that the contractor had established a reasonable basis for sustaining its position that the obligation to appeal did not arise until the entire claim was decided. In other words, since one consolidated claim (one action containing a number of causes of action) had been submitted by appellant to the contracting officer, appellant did not have any obligation to submit a notice of appeal until the contracting officer decided the entire consolidated claim. In essence, the Engineer Board held that notwithstanding the contracting officer's categorization of his interim decisions as final decisions they were not final appealable decisions but that only the last decision was in reality an appealable final decision which triggered appellant's obligation to appeal within the mandatory time limit.

In Harbison and Mahoney, supra, the contractor submitted one claim (action), involving three separate and distinct items (causes of action) in issue between the parties. The amount sought by the appellant was $35,983.30 as a lump sum not broken down between the three disputed items. The contracting officer took it upon himself to make three claims out of what had been presented to him as one claim. He issued a final decision on one of the items on 23 August 1966 but the contractor did not appeal from that final decision. In September, on the 15th and 20th, the contracting officer issued two other final decisions. Appellant promptly appealed those decisions and in doing so filed notice of appeal from the first final decision. The Board docketed the latter two final decisions under one docket number and the first under the second docket number.

The Government then moved to dismiss the second docket number (2820) as being untimely. The Board said:

> We will deny the motion because while it is clear to us that the contracting officer intended to isolate each of the three items of claim and start the appeal period running separately for each of them, we consider appellant's (actually California Erectors') version of the matter (that it continued to consider the items in dispute as a single claim) to be plausible. In that frame of mind, it would be reasonable that it assume that the obligation to appeal would not arise until it had been given a decision or decisions covering the entire area of dispute. Appellant appealed within 30 days of that event and we consider the appeal timely.

In Pilaras Painting Company, ASBCA No. 23157, 79-1 BCA ¶ 13,692, the ASBCA relied upon the Bornstein opinion in denying the Government's motion to dismiss. In Pilaras the claim which was not timely appealed was one of 30-40 claims. In that case, the contractor had specifically asked the contracting officer to issue one consolidated final decision so that one appeal only need be filed. The contracting officer was told that all adverse decisions would be appealed. The contracting officer, however, for his own administrative convenience, issued separate final decision[s] for each of the 30-40 separate claims.

The entire decision portion of the Board's opinion was as follows:

> We think the facts of this case fall within the precedent of B. Bornstein & Son, Inc., ENG BCA Nos. 3707, et al, 77-1 BCA ¶ 12,438 in which, under similar circumstances, [BCA] found an appeal to be valid.
>
> The motion to dismiss is denied.

It is clear that in Pilaras the contractor had elected to have his numerous causes of action consolidated into one action and had requested the contracting officer to so treat them; specifically by issuing one final decision which relied upon all of the causes of action and appellant's request for relief. Again it was the contracting officer, for his own administrative convenience who chose to make, or attempted to make, numerous actions out of what had been submitted to him as one action.

The Bornstein Rule was also discussed in Pantronics, Inc., ASBCA No. 20982, 78-2 BCA ¶ 13,285 at 64,986. There the Government treated separate claims under two separate contracts as being essentially one claim. We said:

> There is precedent for considering a timely appeal from one or more of a group [of] final determinations as fulfilling the timely appeal requirements from the other final decisions in the group where it can reasonably be determined that that was the appellant's intent (citations omitted).
>
> Although in B. Bornstein & Son, Inc., supra, and Harbison and Mahoney, supra. only claims under one contract were involved, no less confusion developed where the government applied 'group' treatment to claims under various contracts. In the instant appeal, although appellant failed to file a timely appeal from the default termination in Contract No. 1364, it timely appealed from the excess reprocurement cost assessment under that contract, and by application of the principle in B. Bornstein & Son, Inc., supra, that timely appeal would serve to provide timely notice of appeal of the excess reprocurement cost assessment in Contract No. 3408.

> This Board has always been reluctant to dismiss a case on technical jurisdictional grounds unless it can clearly be shown that no reasonable basis exists for retaining jurisdiction.

In the instant case, the factual situation is very different from those found in Harbison and Mahoney, Bornstein, Pilaras and Pantronics. In all of those other cases there was a clear election to treat what could have been separate actions as one action although multiple causes of action were involved.

Here, there were eight separate claims (actions) presented to the contracting officer over a period of about ten months, i.e., from November 1977 until August 1978. Each claim was presented as a total entity with its own demands for relief including individual dollar amounts relating to the particular factual situation encompassed in that claim. Appellant's counsel submitted individual briefs for each claim. The contracting officer issued individual final decisions for each of the claims submitted to him by appellant. In each instance the contracting officer finally determined the total dispute which had been presented to him. When that final decision was issued for each action nothing remained to be decided. Appellant promptly submitted a notice of appeal for the first three final decisions but not for the one involving the aluminum flexible conduit claim.

In almost all correspondence the claims were all treated as being individual claims. No request was ever made to have the eight separate submissions considered as only individual aspects of a single consolidated claim. No request was ever made to have only one final decision rendered which would encompass all of the separate submissions. In short, eight separate and distinct claims were presented to the contracting officer for decision. Appellant made a conscious decision to present separate claims.

A recent opinion of another board of contract appeals supports our conclusion. In that opinion the board said:

> Thus, it appears to the Board that Appellant has compartmentalized and packaged its claims as it has seen fit and Respondent has responded to the claims accordingly. Respondent has not issued a separate decision on each claim or contractor proposal but it has been careful to retain the identity of the claims and careful to announce which claims it was addressing. Although it is true that all of the 'Trenching through Ballast' claims (including those still pending with Respondent) seem to embrace a common subject and could be consolidated for the purpose of analysis at the contracting officer's level and for hearing before the Board, it is Appellant, not Respondent, that has broken the subject into more than 20 parts.
>
> It is the Board's view that Appellant has not been misled or confused by Respondent either advertently or inadvertently.

> . . . Appellant cites no excuse and the Board can think of none on its own, particularly for a firm of attorneys which this Board holds to a higher standard of care than the contractor itself.

(General Railway Signal Company, ENG BCA No. 4350, 80-1 BCA ¶ 14,323, at 70,611-12)

In its Response to the Government's Supplemental Memorandum of Law, appellant seeks to distinguish the General Railway case by noting in that case:

> . . .[T]he Government did nothing to mislead, delay or confuse the contractor relating to its obligation of appealing from each of the Contracting Officer's final decisions. Moreover, the opinion is totally devoid of any facts indicating that the contractor was induced into believing that its claims had been consolidated.
>
> This is in stark contrast to the facts of the instant case, where Appellant was caused to believe that its claims had in fact been consolidated.

There is nothing in the record before this Board which leads us to the conclusion that the Government did anything, on purpose or inadvertently, which could be construed, however broadly, as having lead appellant to believe that the eight separate and distinct claims were to be consolidated for any purpose other than for hearing. The record convincingly shows that appellant fully believed that the only consolidation was for purposes of hearing and that that belief did not change until it was recognized that some excuse would have to be found for the failure to submit a timely appeal from the flexible conduit final decision. At that point in time, "consolidation" took on a much broader definition.

Appellant contends that the parties have considered the claims together during their settlement negotiations. This may be true but is of no significance in deciding the issue before us. What that amounts to is that the parties have considered eight separate and distinct claims together in an attempt to settle their entire differences. There is nothing unusual about that. Conversely, that is the normal procedure.

Appellant also argues that the appeals all have been consolidated for hearing. It is clear from the record that both parties and the Board have agreed that there should be one hearing to dispose of all of the appeals but, of course, the Board has not yet issued an order to that effect. Appellant reasons from this uniform agreement, that the appeals have been consolidated for all purposes. Appellant's reasoning is faulty.

Consolidation for hearing does not have the effect of making one action, i.e., one appeal out of several or many appeals. When appeals are consolidated for hearing it is an administrative procedure designed to further the Board's purpose of providing a speedy, inexpensive resolution of disputes. It is clearly recognized that such a consolidation is a joining together of separate and distinct appeals in order that they may be heard at one time in order to reduce expense and inconvenience to the parties and to the Board. Generally, but not always, the consolidation is ordered after appeals have been docketed and during the pretrial stage. The fact that the Board has agreed to, and will at the proper time, order consolidation of the appeals involved for hearing has no bearing on the Government's motion. The consolidation for hearing cannot make timely that which was untimely.

We conclude that the aluminum flexible conduit claim was presented by appellant to the contracting officer as a separate and distinct claim; that it was so treated by the contracting officer and was, in truth, a separate and distinct claim. We further conclude that no consolidation of actions (claims) under Contract No. DACA85-77-C-0044 was ever intended by either party or ever took place in fact or in legal contemplation. We further conclude that appellant did not file a notice of appeal from the aluminum flexible conduit final decision until 202 days after its receipt by appellant, that such notice of appeal was untimely, and, finally, that no basis exists upon which the Board could or should retain jurisdiction of an untimely appeal.

Respondent's motion is granted and this appeal is dismissed with prejudice.

D. The Fulford Doctrine

FULFORD MANUFACTURING COMPANY

ASBCA No. 2144 (1955)

OPINION BY MR. CUNEO

These appeals are from decisions of the contracting officer, in the first of which he terminated the contract for default and in the second assessed excess costs in the amount of $13,630.55 against the contractor.

The second jurisdictional question is whether the contractor may raise, in its appeal from the assessment of excess costs, the same alleged causes for delay which it had previously presented to the contracting officer and which were found by him to be nonexcusable in his decision terminating the contract for default but from which finding the contractor did not appeal.

The Government argues that the unappealed decision of nonexcusability is final and conclusive under the "Disputes" article and cannot be raised in any other appeal. This Board has had similar facts before it in De Lisser Manufacturing Corporation, ASBCA No. 1002 (1952), Southern Supply Company, ASBCA No. 1413 (1953), John Peterson, d/b/a S P K Co., Automatic Machine Products, ASBCA No. 1633 (1954 - Motion for Reconsideration pending), and Bockmier Lumber Sales Agency, Inc., ASBCA No. 1235 (1953). In a number of other decisions we have relied upon our holdings in those appeals.

In De Lisser Manufacturing Corporation, John Peterson, etc., and Bockmier Lumber Sales Agency, Inc., we held that an unappealed decision of a contracting officer to the effect that the default for which a contract was terminated was not excusable did not preclude consideration of the excusability issue in a subsequent appeal from the assessment of excess costs. Those decisions were based upon the specific language of paragraph (b) of the standard "Default" article (Armed Services Procurement Regulation, ¶7-103.11). The Government maintains, however, that the decision on this point in De Lisser Manufacturing Corporation is dictum.

In Southern Supply Company the decision of the Board was governed by a supplemental agreement executed after termination for default. There is, however, some language in the Board's opinion that might be considered to support the Government's position.

The facts in Aero-Land Supply Company, ASBCA No. 1626 (1953) and ASBCA No. 1869 (1954) are not in point with the facts of these appeals. There the contractor appealed from the default termination decision which embodied a finding on excusability. We held in the first decision that the default was not excusable and stated:

The matter of propriety as to assessment of excess costs otherwise than as herein determined, will be considered when the appeal of the assessment has been submitted to the Board for decision.

On the later appeal from the assessment of excess costs the contractor again sought a review of the excusability question. We refused such a review for the reason that we had previously adjudicated the question.

There is no doubt as to what is meant by the "Disputes" article. It provides:

"12. DISPUTES

Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall be final and conclusive: Provided, That if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. * * *

We have held that a dispute involves a controversy, discussion, or contest between the two parties. Esmond Chemical Company, Inc., etc., ASBCA No. 938 (1952). The reasonable construction of the article is that an unappealed decision by the contracting officer of a dispute involving a question of fact is final and conclusive. The question of excusability has consistently been held to be a question of fact. The finality of the "Disputes" article, however, is governed by the opening clause of that article. It is only final if no other article provides to the contrary.

The resolution of our question depends upon the construction to be given the standard "Default" article. We must consider in particular the following paragraphs of that article:

"11. DEFAULT

(a) The Government may, subject to the provisions of paragraph (b) below, by written Notice of Default to the Contractor terminate the whole or any part of this contract in any one of the following circumstances:

(1) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

* * *

(b) The Contractor shall not be liable for any excess costs if any failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes include, but are not restricted to, acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and defaults of subcontractors due to any of such causes unless the Contracting Officer shall determine that the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

* * *

(e) If, after notice of termination of this contract under the provisions of paragraph (a) of this clause, it is determined that the failure to perform this contract is due to causes beyond the control and without the fault or negligence of the Contractor pursuant to the provisions of paragraph (b) of this clause, such Notice of Default shall be deemed to have been issued pursuant to the clause of this contract entitled 'Termination for Convenience of the Government', and the rights and obligations of the parties hereto shall in such event be governed by such clause. (Except as otherwise provided in this contract, this paragraph (e) applies only if this contract is with a military department.)

In this case the specified contract delivery dates had passed prior to dispatch of the notice of termination. Under the generally accepted construction given to the wording of paragraph (a) of the article, the contracting officer has the right to terminate for default upon the passing of the contract delivery date. The only condition expressed in (a) is that the Government terminates "subject to the provisions of paragraph (b) * * *." Paragraph (b) merely provides that the contractor shall not be liable for excess costs if the default was due to excusable causes. Hence, paragraph (a) in effect states that after the contract delivery date has passed the Government may terminate, but after termination the contractor is not liable for reprocurement excess costs if his default was due to excusable causes. Paragraph (a) sets forth the rights of the parties as of the time of termination.

Paragraph (e), however, allows for a determination of excusability after the termination has been made. It specifically provides that if after the notice of termination has been given under paragraph (a) it is determined that the failure to perform was due to excusable causes pursuant to the provisions of paragraph (b), then the notice of default shall be deemed to have been issued under the "Termination for Convenience of the Government" article. A reasonable contractor reading paragraph (e) might well construe it to mean that regardless of what was said in the contracting officer's decision to terminate for default under paragraph (a), he could at a later time raise the issue of excusability.

The Board recognizes that an article, as well as a contract, must be examined in its entirety in construing any particular part. Previous standard default articles expressly conditioned the Government's right to terminate for default upon a determination that the default was not due to excusable causes. The present "Default" article, as we have seen, is not so conditioned. Instead, there is no specific time stated within which the excusability determination need be made nor is there any express provision for extending the contract delivery date to compensate for delay resulting from excusable causes.

Under paragraph (b) the excusability issue must be raised by the contractor when the contracting officer assesses excess costs, but under paragraph (e) the issue may be raised at any time after the notice of termination has been given.

The literal construction to be given to paragraph (e) probably is that the determination specified was intended to be made in connection with an appeal from the assessment of excess costs since paragraph (e) provides the excusable causes will be determined pursuant to the provisions of paragraph (b).

Other constructions might be given to the referenced paragraphs but they border on the speculative side and are of no aid in answering our question.

It may be that the draftsmen of the present standard "Default" article intended the results flowing from the literal meaning of the words they used, but under any construction an area of uncertainty surrounds the time within which the excusability issue may be raised.

Since the Government drafted and prescribed the "Default" article, its ambiguous provisions must be construed in favor of the reasonable construction given to them by the contractor.

Under the circumstances the only fair and reasonable construction to be given the quoted paragraphs of the "Default" article is that they specifically authorize the issue of excusability to be raised after the termination notice has been served. The time the contractor has to appeal from the notice of default on the issue of excusable delay is not 30 days from the receipt of such notice but 30 days from the receipt of notice of the assessment of excess costs. Under the wording of the "Default" article excusable delay only directly concerns excess costs and relates to the notice of default only under paragraph (e) once excess costs have been assessed. Therefore, the contractor has until 30 days after notice of the assessment of excess costs to appeal from both it and the notice of default. Since that is so, pursuant to the first clause of the "Disputes" article, finality would not attach to an unappealed decision of a dispute involving excusable cause that was included in the termination for default notice. This conclusion is not free from doubt but the circumstances and the law require that we decide this question in favor of the contractor.

Therefore, we conclude that the contractor may in these appeals ask us to determine the excusability issue, and we shall now do so.

Section 3. Finality Of BCA Decisions

A. Appeal Grounds

UNITED STATES v. WUNDERLICH

342 U.S. 98 (1951)

MR. JUSTICE MINTON delivered the opinion of the Court.

This Court is again called upon to determine the meaning of the "finality clause" of a standard form Government contract. Respondents agreed to build a dam for the United States under a contract containing the usual "Article 15." That Article provides that all disputes involving questions of fact shall be decided by the contracting officer, with the right of appeal to the head of the department "whose decision shall be final and conclusive upon the parties thereto." Dissatisfied with the resolution of various disputes by the department head, in this instance the Secretary of the Interior, Wunderlich brought suit in the Court of Claims. That Court reviewed their contentions, and in the one claim involved in this proceeding set aside the decision of the department head. 117 Ct. Cl. 92. Although there was some dispute below, the parties now agree that the question decided by the department head was a question of fact. We granted certiorari, 341 U.S. 924, to clarify the rule of this Court which created an exception to the conclusiveness of such administrative decision.

The same Article 15 of a Government contract was before this Court recently, and we held, after a review of the authorities, that such Article was valid. United States v. Moorman, 338 U.S. 457. Nor was the Moorman case one of first impression. Contracts, both governmental and private, have been before this Court in several cases in which provisions equivalent to Article 15 have been approved and enforced "in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment * * *." Kihlberg v. United States, 97 U.S. 398, 402; Sweeney v. United States, 109 U.S. 618, 620; Martinsburg & P. R. Co. v. March, 114 U.S. 549, 553; Chicago, S.F. & C.R. Co. v. Price, 138 U.S. 185, 195.

In Ripley v. United States, 223 U.S. 695, 704, gross mistake implying bad faith is equated to "fraud." Despite the fact that other words such as "negligence", "incompetence", "capriciousness", and "arbitrary" have been used in the course of the opinions, this Court has consistently upheld the finality of the department head's decision unless it was founded on fraud, alleged and proved. So fraud is in essence the exception. By fraud we mean conscious wrongdoing, and *intention to cheat or be dishonest.* The decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract.

If the decision of the department head under Article 15 is to be set aside for fraud, fraud should be alleged and proved, as it is never presumed. United States v. Colorado Anthracite Co., 225 U.S. 219, 226. In the case at bar, there was no allegation of fraud. There was no finding of fraud nor request for such a finding. The finding of the Court of Claims was that the decision of the department head was "arbitrary", "capricious", and "grossly erroneous." But these words are not the equivalent of fraud, the exception which this Court has heretofore laid down and to which it now adheres without qualification.

Respondents were not compelled or coerced into making the contract. It was a voluntary undertaking on their part. As competent parties, they have contracted for the settlement of disputes in an arbitral manner. This we have said in Moorman, Congress has left them free to do. United States v. Moorman, supra, at 642. The limitation upon this arbitral process is fraud, placed there by this Court. If the standard of fraud that we adhere to is too limited, that is a matter for Congress.

Since there was no pleading of fraud, and no finding of fraud, and no request for such finding, we are not disposed to remand the case for any further findings, as respondents urge. We assume that if the evidence had been sufficient to constitute fraud, the Court of Claims would have so found. In the absence of such finding, the decision of the department head must stand as conclusive, and the judgment is Reversed.

B. Role Of Court On Appeal

UNITED STATES v. CARLO BIANCHI & COMPANY, INC.

373 U.S. 709 (1963)

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case involves the interpretation and application of the "Wunderlich Act", 68 Stat. 81, 41 U.S.C. §§ 321-322, an Act designed to permit judicial review of decisions by federal departments and agencies under standard "disputes" clauses in Government contracts. The issue before us is whether in a suit governed by this statute, the Court is restricted to a review of the administrative record on issues of fact submitted to administrative determination or is free to receive new evidence on the issues.

In 1946, the respondent, Carlo Bianchi and Company, entered into a contract with the Army Corps of Engineers for the construction of a flood-control dam. Included in the work performed was the construction of a 710-foot tunnel, designed for the diversion of water, to be lined with concrete and to have permanent steel supports as protection for a 50-foot section at either end. The specifications did not call for such permanent supports throughout the remainder of the tunnel but only for "[t]emporary tunnel protection . . . where required for the safety of workmen." The contract contained a standard "changed conditions" clause authorizing the contracting officer to provide for an increase in cost if the contractor encountered subsurface conditions materially different from those indicated in the contract or to be reasonably anticipated, and also contained the standard "disputes" clause, quoted, supra.

After the tunnel had been drilled by a subcontractor, but before it was lined with concrete, the respondent took the position that unforeseen conditions creating extreme hazards for workmen, required permanent protection. The contracting officer decided that compensation would not be made, and pursuant to the "disputes" clause a timely appeal from his decision was taken to the Board of Claims and Appeals of the Corps of Engineers. While the appeal was pending, respondent installed the tunnel supports and completed work on the tunnel.

An adversary hearing was held before the Board, at which a record was made and each side offered its evidence and had an opportunity for cross-examination. In December 1948, the Board issued a decision against the contractor, resolving certain conflicts in the evidence in favor of the Government and holding in substance that there were no unanticipated or unforeseen conditions requiring the use of permanent steel protection throughout the tunnel.

Almost six years later, in December 1954, respondent brought the present action for breach of contract in the Court of Claims, seeking substantial damages and alleging that the decisions of the contracting officer and the Board were "capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or were not supported by substantial evidence." At a hearing before a Commissioner in 1956, the Government took the position that on the question whether the Board's decision was entitled to be considered final, no evidence was admissible except the record before the Board. But the Commissioner received evidence de novo, including, over Government objection, a substantial amount of evidence that had not been before the Board. He subsequently made extensive findings of fact and concluded that the respondent was entitled to recover.

In an opinion issued in January 1959, the Court of Claims accepted the Commissioner's findings and conclusions ruling that "on consideration of all evidence, the contracting officer's decision (as affirmed by the Board) cannot be said to have substantial support", and thus "does not have finality." 144 Ct. Cl. 500, 506. On the question whether it was limited in its consideration to the evidence before the Board, the court stated:

> In our opinion in Volentine and Littleton v. United States, 136 C. Cls. 638, holding that the trial in this court should not be limited to the record made before the contracting agency, but should be de novo, we recognized that there were logical weaknesses in our position. We concluded, however, that the intent of Congress in enacting the Wunderlich Act was in accord with our conclusion, and we adhere to that conclusion in this case." Ibid.

After receiving additional evidence on damages, the court entered judgment for respondent in the amount of $194,617.46 --- Ct. Cl. ---. We granted certiorari, 371 U.S. 939, to resolve a conflict among the lower courts on important question of the kind of judicial proceeding to be afforded in cases governed by the Wunderlich Act.

I.

The jurisdiction of the Court of Claims in the present case is conferred by 28 U.S.C. § 1491, since this is a suit for judgment against the United States "founded" upon an "express or implied contract with the United States." Ordinarily, when questions of fact arise in such suits, the function of the court is to receive evidence and to make appropriate findings as to the facts in dispute. But this Court long ago upheld the validity of clauses in government contracts delegating to a government employee the authority to make determinations of disputed questions of fact, and required such determination to be given conclusive effect in any subsequent suit in the

absence of fraud or gross mistake implying fraud or bad faith. See Kihlberg v. United States, 97 U.S. 398; Ripley v. United States, 223 U.S. 695. Thus the function of the Court of Claims in matters governed by "disputes" clauses was in effect to give an extremely limited review of the administrative decision, and although the scope of review was somewhat expanded by that court over the years, it was expressly restricted in United States v. Wunderlich, 342 U.S. 98, 100, to determining whether or not the departmental decision had been founded on fraud, i.e., "conscious wrongdoing, and intention to cheat or be dishonest."

The Wunderlich decision, rendered, over strong dissents, evoked considerable effort to obtain legislation expanding the scope of review beyond questions of fraud. A number of bills were introduced in the Eighty-second and Eighty-third Congress; hearings were held in the Senate and House of Representatives; and the resulting statute known as the "Wunderlich Act" was ultimately approved by both Houses in 1954. This statute, quoted in full, supra, is entitled an Act "To permit review of decisions of the heads of departments . . . involving questions arising under Government contracts", and provides in substance that a departmental decision on a question of fact rendered pursuant to a "disputes" clause shall be final and conclusive in accordance with the provisions of the contract

> unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence.

Respondent has not argued in this Court that the underlying controversy in the present suit is beyond the scope of the "disputes" clause in the contract or that it is not governed by the quoted language in the Wunderlich Act. Thus the sole issue as stated supra, is whether the Court of Claims is limited to the administrative record with respect to that controversy or is free to take new evidence. In considering this issue, we put to one side questions of fraud, which are not involved in this case, which normally require the receipt of evidence outside the administrative record for their resolution, and which could be considered in judicial proceedings even prior to the enactment of the statute.

It is our conclusion that, apart from questions of fraud, determination of the finality to be attached to a departmental decision on a question arising under a "disputes" clause must rest solely on consideration of the record before the department. This conclusion is based both on the language of the statute and on its legislative history.

1. With respect to the language used, we note that the statute is designated as an act "To permit review" and that the reviewing function is one ordinarily limited to consideration of the decision of the agency or court below and of the evidence on which it was based.

Indeed, in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no de novo proceeding may be held. Tagg Bros. & Moorhead v. United States, 280 U.S. 420; National Broadcasting Co. v. United States, 319 U.S. 190, 227. And of course, as shown by the Tagg Bros. and NBC cases themselves, the function of reviewing an administrative decision can be and frequently is performed by a court of original jurisdiction as well as by an appellate tribunal.

Moreover, the standards of review adopted in the Wunderlich Act -- "arbitrary", "capricious", and "not supported by substantial evidence" -- have frequently been used by Congress and have consistently been associated with a review limited to the administrative record. The term "substantial evidence" in particular has become a term of art to describe the basis on which an administrative record is to be judged by a reviewing court. This standard goes to the unreasonableness of what the agency did on the basis of the evidence before it, for a decision may be supported by substantial evidence even though it could be refuted by other evidence that was not presented to the decision-making body.

2. The legislative history supports our conclusion that the language used in the Act should be given its customary meaning. It is true that several witnesses representing contractors explained the purpose of the proposed legislation as restoring rights the contractors had before Wunderlich, and that it had apparently been the practice of the Court of Claims to receive evidence on matters covered by "disputes" clauses. But it seems clear in context that these witnesses meant only that the standards of review should cover more than conscious fraud, as the Court of Claims had assumed prior to Wunderlich. Indeed with respect to the procedural significance of the substantial evidence test, a leading contractor's representative stated that it would

> result in these various departments and agencies feeling that they will have to produce their witnesses at these hearings and permit the contractor to examine them, in order to have in the record some substantial evidence to support their decisions when they go up on appeal to the court.

The House Report recommending the bill ultimately enacted leaves little doubt that the review intended was one confined to the administrative record. H.R. Rep. No. 1380, 83d Cong., 2d Sess. The explicit references to the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009, and to this Court's discussion of the standards of review in Consolidated Edison Co. v. Labor Board, 305 U.S. 197,229, are only the least indications. Even more significant is the Committee's view, echoing that of the witness quoted above, that the standards proposed would remedy the practice in many departments of failing to acquaint the contractor with the evidence in support of the Government's position:

> It is believed that if the standard of substantial evidence is adopted this condition will be corrected and that the records of hearing officers will hereafter contain all of the testimony and evidence upon which they have relied in making their decisions. It would not be possible to justify the retention of the finality clauses in Government contracts unless the hearing procedures were conducted in such a way as to require each party to openly present its side of the controversy and afford an opportunity of rebuttal.

H.R. Rep. No. 1380, 83d Cong., 2d Sess. 5.

This sound and clearly expressed purpose would be frustrated if either side were free to withhold evidence at the administrative level and then to introduce it in a judicial proceeding. Moreover, the consequence of such a procedure would in many instances be a needless duplication of evidentiary hearings and a heavy additional burden in the time and expense required to bring litigation to an end. Thus in the present case judicial proceedings began in 1954, almost six years after completion of the departmental proceedings, and a final decision on the issue of liability was not rendered until 1959. This is surely delay at its worst, and we should be loath to condone any procedure under which the need for expeditious resolution would be so ill-served. Here the procedure is clearly inconsistent with the legislative directive.

It is contended that the Court of Claims has no power to remand a case such as this to the department concerned, cf. United States v. Jones, 336 U.S. 641, 670-671, and thus if the administrative record is defective or inadequate, or reveals the commission of some prejudicial error, the court can only hold an evidentiary hearing and proceed to judgment. There are, we believe, two answers to this contention. First, there would undoubtedly be situations in which the court would be warranted, on the basis of the administrative record, in granting judgment for the contractor without the need for further administrative action. Second, in situations where the court believed that the existing record did not warrant such a course, but that the departmental determination could not be sustained under the standards laid down by Congress, we see no reason why the court could not stay its own proceedings pending some further action before the agency involved. Cf. Pennsylvania R. Co. v. United States, 363 U.S. 202. Such a stay would certainly be justified where the department had failed to make adequate provision for a record that could be subjected to judicial scrutiny, for it was clearly part of the legislative purpose to achieve uniformity in this respect. And in any case in which the department failed to remedy the particular substantive or procedural defect or inadequacy, the sanction of judgment for the contractor would always be available to the court.

II.

In its argument here, the Government has urged that if judicial review is confined to the administrative record, it must be concluded that the Board's determination is supported by substantial evidence and thus is entitled to finality under the Wunderlich Act. The respondent, on the other hand, contends that there were several irregularities in the Board's procedures that precluded giving its determination conclusive effect.

Neither of these matters is properly embraced within our grant of certiorari, and we are therefore not called upon to pass on them. We hold only that in its consideration of matters within the scope of the "disputes" clause in the present case, the Court of Claims is confined to review of the administrative record under the standards in the Wunderlich Act and may not receive new evidence. We therefore vacate the judgment below and remand the case for further proceedings in conformity with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART concurs, dissenting.

The petition of the Court of Claims alleged that changed subsurface conditions required respondent to install permanent tunnel protection by the use of steel arch ribs and steel liner plates, that that work delayed completion of the project and increased its cost, for which respondent should be reimbursed, and that the decision of the Corps of Engineers in rejecting the claim was "capricious" or "arbitrary."

The Wunderlich Act, 41 U.S.C. § 321, makes "final and conclusive" any decision by a federal agency under customary disputes clauses in government contracts with several exceptions -- "unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

I think the decision was "capricious or arbitrary" because evidence was considered by the Appeals Board in making its decision which the claimant did not see and which he had no opportunity to refute. I therefore think that a de novo hearing was permissible before the Court of Claims.

The Board found that respondent at the start should have used temporary protection against fall-ins and that, had it done so, permanent tunnel protection would not have been required. In February 1948, before the hearing, a letter from the Acting District Engineer to the Chief of Engineers reported a conversation the Corps' resident

engineer for this project had had with an expert from New York's Bureau of Mines. The only inference that could be drawn from that report was that the expert believed that the tunnel was in safe condition shortly after it was bored and that its later unsafe condition was caused by the fact that the respondent "had not had the foresight to gunite the exposed tunnel roof with cement as the excavation progressed to seal it against air slacking (sic) . . . ." Somehow, in a manner not disclosed by the record, this letter came into the hands of the Appeal Board and was considered by it before a decision was rendered on the appeal.

After the decision respondent learned of this expert's alleged statements and called him as a witness at the hearing before the Court of Claims, where he testified on the basis of his inspection that permanent, not temporary, protection against fall-ins was necessary from the beginning. As respects the guniting of the tunnel one of the government's own witnesses testified at the hearing before the Court of Claims that it would have served no useful purpose.

This issue -- whether only temporary protection was needed -- was one of the main issues in the case. When the agency making the decision relies on evidence that the claimant has no chance to refute, the hearing becomes infected with a procedure that lacks that fundamental fairness the citizen expects from his government. Cf. Willner v. Committee on Character and Fitness, 373 U.S. _____; Gonzales v. United States, 348 U.S. 407; Morgan v. United States, 304 U.S. 1.

This irregularity points up what Judge Madden, writing for the Court of Claims, said in Volentine and Littleton, 136 Ct. Cl. 638, 641-642:

> . . . the so-called 'administrative record' is in many cases a mythical entity. There is no statutory provision for these administrative decisions or for any procedure in making them. The head of the department may make the decision on appeal personally or may entrust anyone else to make it for him. Whoever makes it has no power to put witnesses under oath or to compel the attendance of witnesses or the production of documents. There may or may not be a transcript of the oral testimony. The deciding officer may, and even in the departments maintaining the most formal procedures, does search out and consult other documents which, it occurs to him, would be enlightening, and without regard to the presence or absence of the claimant.

We are dealing, in other words, with subnormal administrative procedures. While the regulations governing hearings before the Corps of Engineers are published and provide many protective features (33 CFR § 210.4), they lack some of the safeguards normally accorded claimants in administrative proceedings. Thus they are specifically exempt from § 5 and from § 17 of the Administrative Procedure Act. 5 U.S.C. §§ 1004, 1006.

The exemption from § 7 is highlighted in this case. That section provides in part:

> Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

That provision, if applicable, would have made reliance by the Board on the ex parte hearsay statement of this outside expert reversible error. Lax procedural standards may at times do no harm. But where, as here, opinion evidence on the vital issue in the case was obtained ex parte and where that evidence is shown to have been false, the conclusion that the decision was "capricious" or "arbitrary" seems to me unavoidable.

A remand to the agency to determine whether the agency's decision is "capricious" or "arbitrary" seems obviously inappropriate since it is the court, not the agency, that should determine that question. Since these administrative proceedings are exempt from the protective provisions of § 7 of the Administrative Procedure Act, there is no procedure whereby a contractor can determine whether the agency's decision rested on the testimony of "faceless" or secret witnesses, as in this case. Like the case where a contractor seeks reformation of his contract (cf. Blake Constr. Co. v. United States 296 F. 2d 393), the only place he can get the hearing Congress intended him to have on whether the decision was "capricious" or "arbitrary" is in the courts.

See next page for reconsideration

CARLO BIANCHI AND COMPANY, INC.

August 20, 1973

ENG. BCA No. 3243

The appeal of Carlo Bianchi and Company, Inc., is back before this Board after the passage of many years. It is here pursuant to Private Law 91-234, January 2, 1971. That law confers on this Board jurisdiction to reconsider the company's claim for additional costs incurred because of changed conditions and delays in connection with the construction of a 710 foot long concrete lined tunnel under Contract No. W-30-180-ENG-398. We are authorized and directed to consider the evidence presented in the original proceedings before the Board, Eng C&A 14, and that presented to the Court of Claims in connection with the proceedings in Carlo Bianchi and Company, Inc. v. United States (144 Ct. Cl. 500, Ct. Cl. 432) together with any additional evidence which may be submitted to us. The parties have filed a stipulation of material facts but have presented no further evidence.

The Act requires application for reconsideration within one year of its effective date. The appellant has satisfied this requirement.

In the original proceedings before the Board of Claims and Appeals of the Corps of Engineers the appellant's claim for additional costs based on changed conditions and delays was denied. In the Court of Claims evidence in addition to that adduced before the Board was admitted, and on the expanded record the Court found a compensable changed condition and delay, Carlo Bianchi & Company, Inc. v. United States, 144 Ct. Cl. 500 (1959) and determined the amount of recoverable compensation to be $149,617.36, 157 Ct. Cl. 432 (1962).

The Supreme Court in a landmark decision, United States v. Carlo Bianchi & Co., Inc. [9 CCF 72,126], 373 U.S. 709 (1962) reversed the Court of Claims. It held that the Wunderlich Act prevents de novo consideration by a court where an administrative determination has been made on a matter covered by the standard Disputes clause. The reviewing court is limited to a determination whether there is substantial evidence based on the record developed before the Board to support the administrative conclusions. The case was remanded to the Court of Claims. The Court of Claims then held that on the record made before the Board of Claims and Appeals of the Corps of Engineers that Board's conclusions had substantial support in the record as a whole and had to be upheld. With that the petition was dismissed; Carlo Bianchi & Company, Inc. v. United States [9 CCF 72,656], 167 Ct. Cl. 364 (1964).

W^ have reviewed the subject matter in accordance with the instruction to us in Private Law 91-243 and we come to the same conclusions as those reached by the Court of Claims in its decision on this case at 144 Ct. Cl. 500 (1959).

We are convinced upon a consideration of all the evidence that the rock condition which the appellant encountered was a changed condition within the purview of the Changed Conditions clause of the contract. The rock that the appellant reasonably could have expected from the contract indication was stable unweathered rock. The rock which the appellant encountered was quite to the contrary. It was unstable weathered rock containing seams filled with mud and clay which when saturated would offer little resistance to the fall of rock once its vertical support had been removed. The surface thaw and spring rains effected just such a saturation. The rock condition which the appellant encountered differed materially from that which the contract indicated it could expect.

We are further of the opinion that the steel lining which the appellant installed throughout the tunnel was reasonably suited to meet the changed condition and was something more than the temporary protection already called for under the contract. Its purpose which it fulfilled was to make it possible to construct the concrete lining in spite of the large unexpected rock falls. It became a part of that lining. It was the kind of protection provided for under the contract as permanent protection against rock falls throughout the first fifty feet at both ends of the tunnel. We also on that account consider that it was reasonably suited to resolve the changed condition situation which the appellant encountered. There is, moreover, no convincing evidence that something less would have done the job.

We find that the appellant is entitled to recover on its Changed Conditions claim.

We are also of the opinion that the contracting officer unreasonably delayed the appellant's installation of the permanent protection by his refusal for a considerable period of time to authorize such installation. Such delay threw the work of constructing the concrete lining into the winter months with the resultant increased costs.

UNITED STATES v. UTAH CONSTRUCTION AND MINING CO.

384 U.S. 394, 16 L. Ed. 2d 642 (1966)

OPINION OF THE COURT

MR. JUSTICE WHITE delivered the opinion of the Court.

(1) The typical construction contract between the Government and private contractor provides for an equitable adjustment of the contract price or an appropriate extension of time, or both, if the government orders permitted changes in the work or if the contractor encounters changed conditions differing materially from those ordinarily anticipated. Likewise, it is provided that the contract shall not be terminated nor the contractor charged with liquidated damages if he is delayed in completing the work by unforeseeable conditions beyond his control, including acts of the Government. See Armed Services Procurement Regulations (hereinafter ASPR), 32 CFR §§ 7.602-3 to 7.602-5; Atomic Energy Commission Procurement Regulations (hereinafter AECPR), 41 CDR § 9-7005-2. Article 15 provides that "all disputes concerning questions of fact arising under this contract" shall be decided by the contracting officer subject to written appeal to the head of the department, "whose decision shall be final and conclusive upon the parties thereto." ASPR, 32 CFR § 7.602-6; AECPR, 41 CFR § 9-7.5004-3. Appeals from the decision of the contracting officer are characteristically heard by a board or committee designated by the head of the contracting department or agency. Should the contractor be dissatisfied with the administrative decision and bring a Tucker Act suit for breach of contract in the Court of Claims or the District Court, 28 U.S.C. § 1346(a)(2) (1964 ed), the finality accorded administrative fact finding by the disputes clause is limited by the provisions of the Wunderlich Act of 1954 which directs that such decisions "shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." With respect to this statutory provision we held in United States v. Carlo Bianchi & Co., 373 U.S. 709, 10 L. Ed. 2d 652, 83 S. Ct. 1409, that where the evidentiary basis for the administrative decision is challenged in a breach of contract suit, Congress did not intend a de novo determination of the facts by the Court, which must confine its review to the administrative record made at the time of the administrative appeal.

The issues in this case involve the coverage of the disputes clause and a recurring problem concerning the application of Bianchi to certain findings made during the administrative process. We granted certiorari because of the importance of these questions in the administration of government contracts. 382 U.S. 900, 15 L. Ed. 2d 155, 86 S. Ct. 234.

I.

The contractor, Utah Construction & Mining Company, executed a contract in March of 1953 to build a facility for the Atomic Energy Commission. After completing the project in January 1955, it filed with the contracting officer a "Pier Drilling" claim, which asked for an adjustment in the contract price and an extension of time under Article 4, the "changed conditions" clause. The contractor asserted it had encountered float rock in the course of excavating and drilling which, among other things, had increased its cost and delayed the work. Contrary to the decision of the contracting officer, the Advisory Board of Contract Appeals found the float rock to be a changed condition within the meaning of Article 4. But the Board nevertheless denied the request for a time extension and for delay damages. It found that the increased costs had been incurred by a subcontractor rather than the contractor and that the delay experienced by the contractor was not caused by the float rock but by a dispute over the quality of concrete aggregate furnished by the Government, a dispute not then before the Board for adjudication.

Another claim filed by the contractor, its "Shield Window" claim, asserted the existence of changed conditions calling for relief under Article 4 by reason of inadequate specifications and drawings furnished by the Government. Additional compensation and additional time were demanded. The Board found there was no changed condition within Article 4 and denied additional compensation. However, it found the delay involved to be the result of difficulties inherent in a new field of construction rather than the fault of either party, and it therefore authorized a time extension under Article 9.

In the contractor's subsequent suit for breach of contract, the Court of Claims held both the Pier Drilling claim and the Shield Window claim to be claims for delay damages alleging a breach of contract by reason of the Government's unreasonable delay. In its view, such breach of contract claims were not within the disputes clause and the administrative findings regarding the responsibility for the delays were subject to de novo determination in the Court of Claims. The disputes clause limited the authority of the Board to "'disputes concerning questions of fact arising under this contract'." That meant "a dispute over the rights of the parties given by the contract; it (did) not mean a dispute over a violation of the contract." Utah Constr. & Mining Co. v. United States, 339 F. 2d 606, 609-610 (Ct. Cl., 1964). Because the Advisory Board of Contract Appeals was clearly authorized to determine the cause of the delay in granting or denying the request for an extension of time under Article 4, the dissenting judge thought the findings were reviewable only on the administrative record and therefore objected to the de novo trial ordered by the majority. 339 F. 2d, at 715 (Davis, J.).

The meaning of the Court of Claims' distinction between disputes over rights given by the contract and disputes over a violation of the contract has been clarified in a subsequent decision holding that to the extent complete relief is available under a specific contract

the contract.

adjustment provision, such as the changes or changed conditions clauses, the controversy falls within the disputes clause and cannot be tried de novo in a suit for breach of contract. Morrison-Knudsen Co. v. United States, 345 F. 2d 833, 837 (Ct. Cl. 1965). With respect to relief available under the contract, therefore, the contractor must exhaust his administrative remedies and the findings and determination of the Board would be subject to review under the Wunderlich Act standards, as applied in Bianchi. But the Court of Claims has also ruled that when only partial relief is available under the contract -- e.g., an extension of time under Article 4 -- the remedies under the contract are not exclusive and the contractor may secure damages in breach of contract if the Government's conduct has been unreasonable. See Fuller v. United States, 108 Ct. Cl. 70, 90-102, 69 F. Supp. 409 (1947); Kehm Corp. v. United States, 119 Ct. Cl. 454, 465-473, 93 F. Supp. 620 (1950). The issue raised by the decision of the Court of Claims respecting the Pier Drilling and Shield Window claims is therefore whether factual issues that have once been properly determined administratively may be retried de novo in subsequent breach of contract actions for relief that is unavailable under the contract.

The other issue of significance in this case is raised by a third claim filed by the contractor and involves the matter referred to by the Advisory Board of Contract Appeals in disposing of the contractor's Pier Drilling claim. The contractor, as it was permitted to do under the contract, elected to purchase concrete aggregate from the Government stockpile, discovering very shortly that the aggregate was dirty and its poor quality the cause of understrength concrete. The Government suspended the work for a time, directed temporary corrective procedures and itself undertook more permanent remedial measures. After completing the contract, the contractor claimed extra compensation based on the poor condition of the aggregate, which was alleged to be a changed condition under Article 4. The contracting officer rejected the claim and the Board ruled the appeal was untimely. It remarked, however, that if the claim was one for unliquidated damages for breach of warranty or for delay, it had no jurisdiction to award monetary relief. Rejecting the Government's position that even if a claim sought only a remedy that was not available under Articles 3, 4 or 9, it nevertheless was within the scope of the disputes clause and subject to "final" administrative determination, the Court of Claims held that unless the claim sought relief for a "change" under Article 3 or "changed conditions" under Article 4 or excusable delay under Article 9 and was adjustable by the terms of those provisions, the claim was not within the disputes clause, was not subject to administrative determination and was a matter for de novo trial and decision in the proper court.

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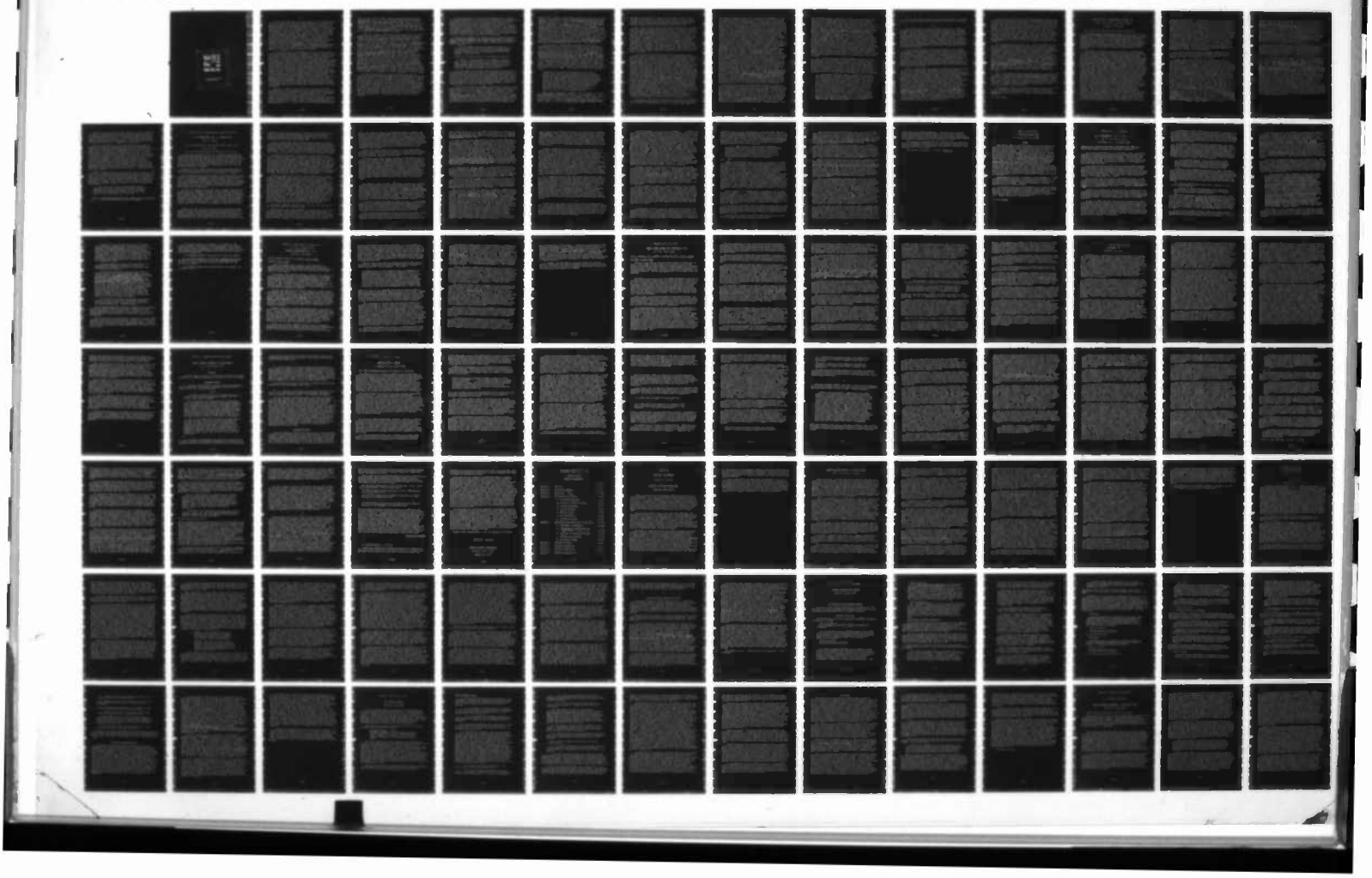

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II.

We deal first with the issue of the scope of the disputes clause which is raised by the Court of Claims' treatment of the concrete aggregate claim. The Government reasserts here its position in the Court of Claims that the disputes clause authorizes and compels administrative action in connection with all disputes arising between the parties in the course of completing the contract. In its view, the disputes clause is not limited to those disputes arising under other provisions of the contract -- Articles 3, 4 and 9 in this case -- that contemplate equitable adjustment in price and time upon the occurrence of the specified contingencies. If the Government is correct, the concrete aggregate claim was a proper subject for administrative handling even if the substandard aggregate was not a changed condition within Article 4 and even if the claim was for breach of warranty and delay damages. From this and from the Government's position in United States v. Anthony Grace & Sons, Inc. ___U.S.__ , 16 L. Ed. 2d 662, 68 S. Ct. ___, which we sustain, it would follow that the factual issues underlying this claim were not subject to a de novo trial in the Court of Claims.

(2-5) We must reject the Government position, as did all the judges in the Court of Claims. The power of the administrative tribunal to make final and conclusive findings on factual issues rests on the contract, more specifically on the disputes clause contained in Article 15. This basic proposition the United States does not challenge; and the short of the matter is that when the parties signed this contract in 1953, neither could have understood that the disputes clause extended to breach of contract claims not redressable under other clauses of the contract. Our conclusion rests on an examination of uniform, continuous, and long standing judicial and administrative construction of the disputes clause, both before and after the contract here in question was executed. Reference to decisions subsequent to 1953 is justified in many cases as a practical construction of the clause by one of the contracting parties, the Government (for it has frequently been the Government that has urged a narrow construction of the disputes clause on the various Boards of Contract Appeals), and in any event as showing the construction on which innumerable other Government contractors may have relied in not presenting breach of contract claims to the contracting officer, which claims would now be forever barred under the Government's interpretation by the contractual time limitations on the presentation of claims and appeals.

Beginning in 1937, a series of cases in the Court of Claims decided prior to the execution of this contract had established that the jurisdiction of the Boards of Contract Appeals under the disputes clause was limited to claims for equitable adjustments, time extensions, or other remedies under specific contract provisions authorizing such relief and accordingly that the contractor need not process pure breach of contract claims through the disputes machinery before filing his court action. See, e.g., Phoenix Bridge Co. v. United States, 85 Ct. Cl. 603, 629-630 (1937); Plato v. United States,

86 Ct. Cl. 665, 677-78 (1938); John A. Johnson Contracting Corp. v. United States, 119 Ct. Cl. 707, 745, 98 F. Supp. 154, 156 (1951); Continental Illinois Nat'l Bank v. United States, 126 Ct. Cl. 631, 640-641, 115 F. Supp. 892, 897 (1953). That has continued to be the view of the Court of Claims, e.g., Railroad Waterproofing Corp. v. United States, 133 Ct. Cl. 911, 915-916, 137 F. Supp. 713, 715-716 (1956); Ekco Products Co. v. United States, 312 F. 2d 768, 773 (1963); see also Hunter v. United States, 9 CCF, 72,647 (DC ED NC 1963), aff'd per curiam, 331 F. 2d 741 (CA 4th Cir. 1964).

After its creation in 1942, the War Department Board of Contract Appeals quickly accepted the principle established by the Phoenix Bridge and Plato cases, Boyer t/a Harry Boyer, Son & Co., 1 CCF 53 (1943); Kirk t/a Kirk Bldg. Co., 1 CCF 67, 70-81 (1943), and long prior to 1953 it was the settled practice of the various Boards to refuse to consider pure breach of contract claims, e.g., Asbestos Wood Mfg. Co. 2 CCF 203 (WDBCA 1944); Specer B. Lane Co. 2 CCF 500, 505 (WDBCA 1944); Rust Engr. Co. 3 CCF 1210 (NDBCA 1945). The United States, indeed, grudgingly concedes that the boards "have frequently, and perhaps usually", declined such jurisdiction. Such rulings are in fact legion, see, e.g., Dean Constr. Co. 1965-2 BCA, 4888 (GSBCA 1965); Prototype Development, Inc. 1965-2, 4993 (ASBCA 1965); Electrical Builders, Inc. 1964 BCA, 4377 (IIBCA 1964); E. & E. J. Pfotzer, 1965-2 BCA, 5144 (Eng BCA 1965), and the decisions cited therein and in the decision below, 339 F. 2d, at 616, n 2 (Davis, J., dissenting and concurring), and include decisions of the bodies appointed to administer the disputes clause on behalf of the Atomic Energy Agency, the contracting agency in this case, see Claremont Constr. Co., Dkt No. 64 (Feb. 14, 1955); Frontier Drilling Co., Dkt No. 74 (July 1, 1955); Utah Constr. Co., Dkt No. 91 (Dec. 12, 1956); J. A. Tiberti Constr. Co., Dkt No. CA-126 (May 2, 1961); but cf. Fick Foundry Co., 1965-2 BCA, 5052, at 23,786. The AEC Advisory Board of Contract Appeals reaffirmed this interpretation of the disputes clause in its discussion of respondent's concrete aggregate claim, see supra.

The United States does not dispute the fact that the past construction of the standard disputes clause has been that it does not authorize the Boards of Contract Appeals to finally determine, and to grant relief for, all claims related to the contracted work. Instead, it attacks these rulings of the Court of Claims and the Boards of Contract Appeals concerning the scope of the standard disputes clause as erroneous and premised on principles that have since been rejected in other cases. But even if, as an original matter, the language of the disputes clause might have been susceptible to the interpretation urged by the Government, the restrictive meaning of the words "arising under this contract" had long since been established when these parties used them in 1953. The question before us is what the parties intended, not whether the construction on which they relied was erroneous.

The United States, as an alternative argument, would limit the rulings described above to the question of availability of remedy, and it contends that even if it be accepted that the Boards of Contract Appeals are without jurisdiction to grant relief for breach of contract they are nevertheless authorized by the disputes clause to make binding findings of fact respecting all disputes. The argument is premised in the main on certain unique provisions in the charter of the Armed Services Board of Contract Appeals, which is the successor to the War Department Board of Contract Appeals. Special attention to the ASBCA is justified by its large caseload and its consequent importance as a model for the development of other Boards.

Originally the WDBCA took a narrow view of its jurisdiction, see Shedd, Disputes and Appeals: The Armed Services Board of Contract Appeals, 29 Law & Contempt. Probs. 39, 55 (1964), and as a result the Secretary of War issued on July 4, 1944, a memorandum directing the Board, inter alia, to

> (f)ind and administratively determine the facts out of which a claim by a contractor arises for damages against the Government for breach of contract, without expressing opinion on the question of the Government's liability for damages. 9 Fed. Reg. 9463.

Similarly, the present charter of the ASBCA provides that

> (w)hen in the consideration of an appeal it appears that a claim is involved which is not cognizable under the terms of the contract, the Board may, insofar as the evidence permits, make findings of fact with respect to such a claim without expressing an opinion on the question of liability. 32 CFR § 30.1, App. A, Part I, § 5.

It will be noted that on their face the very provisions on which the Government relies in this phase of its argument conclusively refute the broader contention that the Boards may determine and afford relief for all contract claims, for they recognize that some claims for breach of contract may not be "cognizable under the terms of the contract" and that in such cases the Boards should express no opinion on the question of liability. Nor do the provisions, in terms, provide any support for the view that the Boards may make binding, as distinguished from advisory, findings of fact.

In the first case before the WDBCA under the 1944 directive, the Board ruled that it would retain jurisdiction to hold a hearing and to make findings of fact even though it expressly recognized it could grant no relief and it was "doubtful whether any findings the Board should make . . . would be given any consideration by a court. . . ." Columbia Constructors, Inc., 2 CCF 942 (WDBCA 1944). Such willingness to make findings even though no hearing had theretofore been held was in keeping with the dual function of adjudicatory body and advisor to the Secretary then exercised by the WDBCA, which heard appeals on an advisory basis in the case of contracts that did not authorize the

designation of a board as the representation of the Secretary to hear appeals, see, generally, Smith, The War Department Board of Contract Appeals, 5 Fed. BJ 74, 77 (1943), and sometimes investigated claims for extraordinary relief under Title II of the First War Powers Act, 55 Stat. 838 (1941), see Ardmore Constr. Co., 3 CCF 255, 265 (WDBCA 1944). Subsequently the contractor's appeal in the Columbia Constructors case was dismissed when the contractor represented that he did not desire a hearing if the Board could award no relief, thus confirming the parties' understanding that the 1944 memorandum did not require presentation to the WDBCA of all contract disputes as a prerequisite to a court action. 2 CCF 1162 (WDBCA 1944). In later cases where a hearing had been held in connection with other claims the WDBCA did make special findings, but without any intimation that such findings were to have binding effect, e.g., Swords-McDougal Co., CCF 238 (WDBCA 1944); Fiske-Carter Constr. Co., 3 CCF 415 (WDBCA 1945); Hargrave t/a Hargrave Constr. Co., 3 CCF 1113, 1120 (WDBCA 1945).

The practice of the ASBCA has evidenced an even narrower understanding of the charter provision authorizing findings without expression of opinion on liability. In cases heard on the merits prior to decision of the jurisdictional question the Board has made special findings in accordance with the charter. See Specialty Assembling & Packing Co., 1959-2 BCA, 2370; J. W. Bateson Co., 1962 BCA, 3293; see also the Metrig Corp. 1963 BCA, 3658. But in Simmel-Industrie Meccaniche Societa per Azioni, 1961-1 BCA, 2917, the Board rejected the contractor's contention that "(t)he ASBCA has jurisdiction and is under a duty to make findings of fact in this appeal even if it lacked jurisdiction to make an award to appellant", id., at 15233. The Board interpreted the charter to mean that it would make special findings only in "appeals where a hearing on the merits has been completed prior to the filing of a rule to show cause or a motion to dismiss." Id., at 15235. More recently the Board has explained that

> (g)enerally, as a matter of sound policy, the Board's discretionary right to make findings of fact in instances where a claim is not cognizable under the contract is not exercised, simply because the Board has no way to afford the parties the remedy which logically would flow from the facts found. The cases wherein the Board has declined to consider an appeal because it had no method within the confines of the contract terms to afford a remedy have sometimes been described, perhaps rather inaptly, as being beyond our jurisdiction or beyond our authority to consider. Basically, the lack is not of authority to hear but of authority finally to dispose administratively.

Lenoir Wood Finishing Co., 1964 BCA, 4111, at 20,061. As Lenoir Wood Finishing Co. indicates, the ASBCA, like the WDBCA, has disclaimed any binding effect for its findings in those cases where it has made special findings solely under authority of the special charter provision. See also Simmel-Industrie Meccaniche Societa per Azioni, supra, at 15235; J. W. Bateson Co., supra, at 16985. Since

the ASBCA has declared it is not under any mandatory duty to make findings at a contractor's request in cases where it has no jurisdiction to grant relief, it would seem strange indeed to interpret the disputes clause as embodying the parties' understanding that such cases were nevertheless to be determined administratively.

(6) Since it is so clearly established that that special charter authority to make findings without expression of opinion on liability does not expand the scope of the dispute clause or empower the Board to make binding determinations of fact, one may well ask as what purpose such authority, and the findings made pursuant to it, can possibly serve. One obvious answer is that the Board's findings may facilitate a settlement of the contractor's breach of contract claim. For example, the General Accounting Office, which has a statutory authority to settle claims against the United States, Budget and Accounting Act of 1921 § 305, 31 U.S.C. § 71 (1964 ed.), provides no procedure for resolution of factual dispute, 21 Comp. Gen. 244, and thus refuses to undertake settlement where there are substantial factual disputes, Comp. Gen. Dec. B-147326, May 25, 1962; Comp. Gen. Dec. B-149795, Jan. 4, 1963. Accordingly, acceptance by the parties of the Board's findings might provide the necessary requisite for intervention of the GAO.

(7,8) Thus the settled construction of the disputes clause excludes breach of contract claims from its coverage, whether for purposes of granting relief or for purposes of making binding findings of fact that would be reviewable under Wunderlich Act standards rather than de novo. This is not to say that the Government does not have a powerful argument for construing the disputes clause to afford administrative relief for a wider spectrum of disputes arising between the contracting parties. It can be argued, as the Government persuasively does, that the same considerations which initially lead to providing an administrative remedy in those situations covered by such clauses as Article 3, 4 and 9 of the contract also support the broader reading of the disputes clause permitting and requiring administrative finding with respect to all disputes arising between the contract parties. But the coverage of the disputes clause is a matter susceptible of contractual determination, United States v. Moorman, 338 U.S. 457, 94 L. Ed. 256, 70 S. Ct. 288, subject to the limitations on finality imposed by the Wunderlich Act, and one would have expected modification of the disputes clause to encompass breach of contract disputes if the restrictive interpretation of Article 15 was thought unduly to hinder Government contracting. In fact the contracting departments have not rejected the narrower judicial reading of the disputes clause nor attempted any wholesale revision of its language to cover all factual disputes. Instead they have acted to create alternative administrative remedies for some breach of contract claims and to disestablish others by fashioning additional specific adjustment provisions contemplating relief under the contract in specified situations not reached by such provisions as Articles 3, 4 and 9.

An example of the creation of alternative administrative remedies is afforded by the provisions in effect at various times since World War II, see First War Powers Act, Title II, 55 Stat. 838 (1941); Act

of January 12, 1951, 64 Stat. 1257, authorizing extraordinary relief for certain claims of contractors. Pursuant to a delegation by the President under the statute presently in effect, Public Law 85-804, 72 Stat. 927, 50 U.S.C. § 1431 (1964 ed.), Government departments and agencies exercising functions in connection with the national defense may -- upon a finding that such action would "facilitate the national defense", enter into amendments and modifications of contracts without regard to other provisions of law respecting such amendments and modifications. As implemented by the departmental procurement regulations, see ASPR, 32 CFR § 17.000 ff.; AECPR, 41 CFR § 9-17.00 ff., the authority conferred encompasses amendments without consideration, correction of mutual mistakes, and formalization of informal commitments. This authority, which in many respects is analogous to power to settle claims, is delegated to Contract Adjustment Boards established within the departments and agencies concerned separate from the Boards of Contract Appeals. Because the regulations preclude resorting to the powers conferred by Public Law 85-804 "unless other legal authority in the department concerned is deemed to be lacking or inadequate", ASPR, 32 CFR § 17.205-1(b)(ii), the Army Contract Adjustment Board has required contractors to exhaust remedies before the ASBCA under the disputes clause, Blaw-Knox Co., ACAB Dkt. No. 1019, Nov. 2, 1960. However, in Bendix Corp., ACAB Dkt. No. 1050, Sept. 11, 1962, which involved a claim for delay damages arising out of the Government's failure to make the construction site available on time, the Board ruled that the contractor need not present its claim to the ASBCA in view of that body's lack of jurisdiction over claims that were not premised on a provision for adjustment within the contract. Further the ACAB confirmed that it was empowered to grant unliquidated damages for delay in breach of contract even though the contractor might also have a court action. Likewise, the Boards of Contract Appeals have consistently recognized that while they themselves may be without jurisdiction to grant relief for claimed breaches of contract, such claims, in appropriate cases, could be presented to the Adjustment Boards. See, e.g., Fiske-Carter Constr. Co., 3 CCF 415 (WDBCA 1945); Ardmore Constr. Co., 3 CCF 468 (WDBCA 1945); see, generally, Smith, The War Department Board of Contract Appeals, 5 Fed. B. J. 74, 82 (1943); cf. Coyle & Russell, Inc., 1965-2 BCA 4912, at 23,220 (NASA BCA). Thus it is quite evident from the administration of Public Law 85-804 and its predecessors that the limitations on the jurisdiction of the Boards of Contract Appeals are well understood by the military procurement departments and Congress.

An illustration of the disestablishment of breach of contract claims through the fashioning of additional contract adjustment provisions is provided by contractual provisions designed to deal with just such claims for delay damages as are presented here. In response to the importunings of Army contractors following this Court's ruling in United States v. Rice, 317 U.S. 61,87 L. Ed. 53, 63 S. Ct. 120, that the contractor's remedy under Article 9 was limited to an extension of time, a "Suspension of Work" clause was adopted for use in construction contracts, see T. C. Bateson Constr. Co. 60-1 BCA, 2552 (ASBCA 1960), at 12, 347-348, and has been the basis for administrative allowance of delay damages in numerous cases. A more extensive clause

for "Price Adjustment for Suspension, Delay, or Interruption of Work", ASPR, 32 CFR § 7.604-3 (1965) (rev.), was promulgated in 1960 for optional use in Department of Defense fixed-price construction contracts. Effective April 1965, the clause was made mandatory in such contracts, ASPR § 7-602.46, 3 CCH Gov't Contracts Rep. 33,755.90, and the Armed Services Procurement (Regulations) Committee has proposed its use in fixed-price supply contracts as well. See, generally, Kelly, Government Contractors' Remedies: A Regulatory Reform, 18 Admin. L. Rev. 145, 148-152 (1965). An Interagency Task Group is currently reviewing the clauses in the standard contract form, including the Changes, Changed Conditions and Suspension of Work clauses, to determine whether they should be expanded in coverage to prevent fragmentation of remedies. See 6 CCH Gov't Contracts Rep., 90,027 at 95,048. While in one respect it can be said that clauses broadening remedies under the contract have been adopted in response to restrictive interpretation of the disputes clause and express dissatisfaction with the unavailability of an administrative remedy, the fact that the response has taken this measured form has manifested the parties' reliance on the prior interpretation and has properly tended to reenforce it. As the ASBCA remarked in Simmel-Industrie, supra, "(i)t is noteworthy that when it is intended to provide an administrative remedy for Government delays, specific contract clauses have been developed and are set forth for that purpose", 1961-1 BCA, at 15234.

(9) Finally, we may note that development of provisions such as the Suspension of Work clause illustrates not only administrative acceptance of the narrow interpretation of the disputes clause; it also indicates the lack of any compelling reason for overturning that interpretation at this late stage. Inclusion of such additional clauses in the contract naturally limits the area of disputes falling outside the framework of contractual adjustment and thus outside the disputes clause, as does expansive construction of the existing adjustment clauses. As one member of the ASBCA has recently remarked:

> . . . Government procurement agencies started several years ago adding various contract clauses designed to convert what would otherwise be claims for damages for breach of contract into claims payable under such contract clauses and, hence, to be regarded as 'arising under the contract.' This trend has continued to the point where the field of claims for breach of contract that are not regarded as 'arising under the contract' is becoming very narrow indeed. Also there has been an increasing tendency for contract appeal boards to give a broad interpretation to contract clauses as vehicles for the administrative settlement of meritorious contract claims. Decisions where ASBCA dismisses an appeal for lack of jurisdiction as involving a claim for breach of contract are becoming increasingly rare. Shedd, Disputes & Appeals: The Armed Services Board of Contract Appeals, 29 Law & Contemp. Probs. 39, 74 (1964).

(2) For the reasons stated we reject the Government's contention that the disputes clause covers all disputes relating to the contract.

III.

(10) We are unable to accept, however, the Court of Claims' disposition of the Pier Drilling and Shield Window claims. Although the Board lacked authority to consider delay damages under these two claims, it did have authority to consider the requests for extensions of time under Articles 4 and 9, and these requests called for an administrative determination of the facts. Such findings, if they otherwise satisfy the standards of the Wunderlich Act, are conclusive on the parties, not only with respect to the Articles 4 and 9 claims but also in the court suit for breach of contract and delay damages. This finality is required by the language and policies underlying the disputes clause and the Wunderlich Act and by the general principles of collateral estoppel.

(11) Both the disputes clause and the Wunderlich Act categorically state that administrative findings on factual issues relevant to questions arising under the contract shall be final and conclusive on the parties. There is no room in the language of Article 15 or of the Act to consider factual findings final for some purposes but not for others. It would disregard the parties' agreement to conclude, as the Court of Claims did, that because the court suit was one for breach of contract which the administrative agency had no authority to decide, the court need not accept administrative findings which were appropriately made and obviously relevant to another claim within the jurisdiction of the board.

(12,13) The position of the Court of Claims would permit erosion of the policies behind both the Wunderlich Act and the disputes clause. Any claim, whether within or without the disputes clause, can be couched in breach of contract language. The contractual and statutory scheme would be too easily avoided if a party could compel relitigation of a matter once decided by a mere exercise of semantics. Certainly, as the Court of Claims itself has since held, where the administrative agency has made relevant factual findings in the course of refusing relief which the contract authorizes it to give, the finality of these findings, if sufficiently supported, cannot be avoided in a court action for the same relief by labeling the refusal of an equitable adjustment as a breach of contract or by asserting that the primary issue involved is a question of law, Morrison-Knudsen Co. v. United States, 345 F. 2d 833; Allied Paint & Color Works v. United States, 309 F. 2d 133. Likewise, when the Board of Contract Appeals has made findings relevant to a dispute properly before it and which the parties have agreed shall be final and conclusive, these findings cannot be disregarded and the factual issues tried de novo in the Court of Claims when the contractor sues for relief which the board was not empowered to give.

This is no more than our decision in Carlo Bianchi requires. We there held that administrative findings in the course of adjudicating claims within the disputes clause were not to be retried in the Court of Claims but were to be reviewed by that court on the administrative record. This result, which was required both by the contract of the parties and by the Wunderlich Act, avoids "a needless duplication of evidentiary findings and a heavy additional burden in the time and expense required to bring litigation to an end." 373 U.S. at 717, 10 L. Ed. 2d at 659, and it encourages the parties to make a complete disclosure at the administrative level, rather than holding evidence back for subsequent litigation. HR Rep. No. 1380, 83d Cong, 2d Sess, 5 (1954). These same reasons support the finality, in a suit for delay damages, of all valid and appropriate administrative findings already made in the course of resolving a dispute "arising under" the contract.

(4) Although the decision here rests upon the agreement of the parties as modified by the Wunderlich Act, we note that the result we reach is harmonious with general principles of collateral estoppel. Occasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputes issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose. Sunshine Coal Co. v. Adkins, 310 U.S. 381, 83 L. Ed. 1263, 60 S. Ct. 907; Hanover Bank v. United States, 285 F. 2d 455; Fairmont Aluminum Co. v. Commissioner, 222 F. 2d 622; Seatrain Lines, Inc. v. Pennsylvania R. Co., 207 F. 2d 255. See also Goldstein v. Doft, 236 F. Supp. 730, aff'd 353 F. 2d 484, cert denied, ___ U.S. ___, 16 L. Ed. 2d 302, 86 S. Ct. 1226, where collateral estoppel was applied to prevent relitigation of factual dispute resolved by an arbitrator.

(15) In the present case the Board was acting in a judicial capacity when it considered the Pier Drilling and Shield Window claims, the factual disputes resolved were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings. There is, therefore, neither need nor justification for a second evidentiary hearing on these matters already resolved as between these two parties.

Accordingly, in light of the above, we affirm the Court of Claims in its interpretation of the scope in the disputes clause and we reverse as to its failure to give finality, in the suit for delay damages and breach of contract, to factual findings properly made by the Board.

It is so ordered.

UNITED STATES v. ANTHONY GRACE & SONS, INC.

384 U.S. 424, 16 L. Ed. 2d 662 (1966)

OPINION OF THE COURT

MR. JUSTICE WHITE delivered the opinion of the Court.

In United States v. Carlo Bianchi & Co., 373 U.S. 709, 10 L. Ed. 2d 652, 83 S. Ct. 1309, we held that, aside from questions of fraud, a reviewing court is limited to the administrative record made below in determining the finality to be given departmental decisions and findings made by a Board of Contract Appeals pursuant to a standard Government disputes clause. In the present case we are called upon to decide whether the reviewing court or the Board of Contract Appeals should make the original record on an issue which the Board did not resolve because it erroneously dismissed the appeal before it as untimely.

The question is framed by the following facts. The Department of the Air Force issued an invitation for bids for the construction of military housing project at Topsham Air Force Station, Maine. The invitation included a tentative minimum wage schedule which the contractor would have to meet. It also advised that the wage schedule would be finally redetermined by the Secretary of Labor not more than 90 days prior to the commencement of construction and that the Federal Housing Commissioner would then adjust the contract price to reflect any changes made in the wage schedules. In addition, the successful bidder was required to complete certain preparatory acts in order to close the contract and to post a $25,000 deposit to ensure the closing of the contract. Respondent, Anthony Grace & Sons, Inc., was the low acceptable bidder and a letter of acceptability was sent to it. That letter reminded respondent that failure to close the contract within a specified number of days was sufficient justification to warrant the Department of the Air Force to cancel the bid and letter of acceptability, retain the deposit for liquidated damages and determine additional liability for actual damages. A dispute clause in the letter of acceptability made such decision by the Department of the Air Force final unless, within 30 days from the receipt of the decision, respondent appealed to the Armed Services Board of Contract Appeals, whose decision would be final and conclusive unless fraudulent or capricious or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. After receiving subsequent wage schedules from the Secretary of Labor, respondent concluded that certain work was being placed in higher wage categories than was provided in the specifications which accompanied the bid invitation. On the basis of this alleged deviation from the original specifications respondent asked first the Housing Commissioner and then the Department of the Air Force to raise the contract price. These requests were refused and

respondent then notified the Air Force that it would be unable to complete the closing until the matter was cleared up. In the ensuing exchange of letters, the contracting officer informed respondent that its bid and the letter of acceptability were being canceled and its deposit was being retained. Pursuant to the disputes clause, respondent appealed this decision to the Armed Services Board of Contract Appeals, which dismissed the appeal as out of time without considering the merits of the case. Respondent then sued in the Court of Claims to recover its deposit and for damages resulting from the Government's alleged wrongful cancellation. That court concluded that the appeal to the Board was timely and that the Board had erred in not reaching the merits of the case. With Judges Davis and Laramore dissenting, the court then decided to remand the case to its own trial commissioner, rather than to the Board of Contract Appeals, to make a record and consider the case on its merits. The Government asked us to grant certiorari to consider whether this was in violation of the principles announced in the Wunderlich Act and United States v. Carlo Bianchi & Co., supra. We granted certiorari 382 U.S. 901, 15 L. Ed. 2d 154, 16 S. Ct. 234, and we now reverse.

This question was anticipated in Bianchi, supra, where we considered what a reviewing court should do when the administrative record is defective, or inadequate or reveals the commission of a prejudicial error. Two suggestions were given:

"First, there would undoubtedly be situations in which the court would be warranted, on the basis of the administrative record, in granting judgment for the contractor without the need for further administrative action. Second, in situations where the court believed that the existing record did not warrant such a course, but that the departmental determination could not be sustained under the standards laid down by Congress, we see no reason why the court would not stay its own proceedings pending some further action before the agency involved. Cf. Pennsylvania R. Co. v. United States, 363 U.S. 202 (4 L. Ed. 2d 1165, 80 S. Ct. 1131). Such a stay would certainly be justified where the department had failed to make adequate provision for a record that could be subjected to judicial scrutiny, for it was clearly part of the legislative purpose to achieve uniformity in this respect." 373 U.S. 709, 717-718, 10 L. Ed. 2d 652, 659, 83 S. Ct. 1409. The policy reflected in this language, which requires utilization of the administrative procedure contractually bargained for, was clearly intended by Congress, see HR Rep. No. 1380, 83d Cong., 2d Sess. (1954); United States v. Carlo Bianchi & Co., supra, 373 U.S. at 715-718, 10 L. Ed. at 657-659, and it has been consistently reflected in a long line of decisions by this Court. See United States v. Wunderlich, 342 U.S. 98, 96 L. Ed. 113, 72 S. Ct. 154; United States v. Moorman, 338 U.S. 457, 94 L. Ed. 256, 70 S. Ct. 288; United States v. Hulpuch Co., 328 U.S. 234, 90 L. Ed. 1192, 66 S. Ct. 1000; United States v. Blair, 321 U.S. 730, 88 L. Ed. 1039, 64 S. Ct. 820; United States v. Callahan Walker Construction Co., 317 U.S. 56, 87 L. Ed. 49, 63 S. Ct. 113; Kihlberg v. United States, 97 U.S. 398, 24 L. Ed. 1106.

Preeminently, this policy is grounded on a respect for the parties' rights to contract and to provide for their own remedies. See United States v. Utah Construction & Mining Co., ___ U.S. ___, 16 L. Ed. 2d 642, 86 S. Ct. ___; United States v. Moorman, supra, 338 U.S. at 461-462, 94 L. Ed. at 259, 260. But, beyond that, there is also a belief that resort to administrative procedures is an expeditious way to settle disputes, conducive of speed and economy. United States v. Blair, supra, 321 U.S. at 735, 88 L. Ed. at 1043. Such procedures also facilitate a department's supervisory control over contracting officers and perhaps enhance the possibility of harmonious agreement. Ibid. Further, reliance upon a few expert agencies to make the records and initially to pass on the merits of the claims properly presented to them will lead to greater uniformity in the important business of fairly interpreting Government contracts.

There can be no doubt that the dispute here over the decision by the Department of the Air Force to cancel respondent's commitments under the bid and letter of acceptability and to retain the deposit is one which the parties contractually provided should be heard and decided by the administrative process. Barring some compelling policy reason to disregard this provision, the contractor should be held to its contractual agreement even at this stage in the litigation.

It is true that this Court has said on several occasions that the parties will not be required to exhaust the administrative procedure if it is shown by clear evidence that such procedure is "inadequate or unavailable." United States v. Hulpuch Co., supra, 328 U.S. at 240, 90 L. Ed. at 1195; United States v. Blair, supra, 321 U.S. at 736-737, 88 L. Ed. at 1044. It may be that the contracting officer, H. B. Zachary Co. v. United States, 344 F. 2d 352, or the Board of Contract Appeals, Southeastern Oil Florida, Inc. v. United States, 115 F. Supp. 198, so clearly reveals an unwillingness to act and to comply with the administrative procedures in the contract that the contractor or supplier is justified in concluding that those procedures have thereby become "unavailable." Similarly, there may be occasions when the lack of authority of either the contracting officer or the administrative appeals board is so apparent that the contractor or supplier may justifiably conclude that further administrative relief is "unavailable." But these circumstances are clearly the exceptions rather than the rule and the inadequacy or unavailability of administrative relief must clearly appear before a party is permitted to circumvent his own contractual agreement. When the Board fails to reach and decide an issue because it disposes of the appeal on another ground--here the untimeliness of the appeal--which the Court of Claims later rejects, there is no sound reason to presume that the Board will not promptly and fairly deal with the merits of the undecided issue if it is given the chance to do so.

The Court of Claims in this case attempted to justify bypassing the Board of Contract Appeals because it felt the dispute could be resolved more speedily if its Trial Commissioner made the record and initially passed on the merits. The dissenting judges question the factual accuracy of the premises. Even if the premises were sound, however, this argument falls substantially short of establishing that the administrative route is inadequate or unavailable.

Nor is it persuasive to say that the administrative remedy is inadequate in this case because the Board of Contract Appeals considers itself unable to review wage determinations by the Secretary of Labor or the corresponding bid adjustments by the Federal Housing Commissioner. The necessity of determining the validity of these determinations and adjustments is speculative at best. The issue involved here is whether the Department of the Air Force was justified in cancelling respondent's commitments, retaining its bid and itemizing certain damages. This raises questions concerning the propriety of respondent's failure to press forward to close the contract regardless of an outstanding wage dispute. And this, in turn, requires an analysis of the original bid invitation and accompanying specifications, the custom and usage of the trade, and the subsequent conduct of both parties to this dispute. Obviously there are factual issues to be resolved and that task is initially for the Board, not the Court.

Another argument advanced by the Court of Claims is that it lacks authority to remand the case and the Board may refuse to consider it again. At this stage of the proceedings this fear may be dismissed as a hypothetical one. There will be time enough later, if this fear ever materializes, to consider whether the reviewing court would then be authorized to make its own record. In this regard it should be noted that, in Bianchi, supra, we suggested one way of dealing with this problem:

> And in any case in which the department failed to remedy the particular substantive or procedural defect or inadequacy, the sanction of judgment for the contractor would always be available to the court. 373 U.S. 709, 718, 10 L. Ed. 2d 652, 659, 83 S. Ct. 1409.

See also Interstate Commerce Comm'n v. Atlantic Coast Line R. Co. ___U.S.___, ___, 16 L. Ed. 2d 109, ___, 86 S. Ct. 1000.

C. Role Of Justice Department And Comptroller General

S & E CONTRACTORS, INC., v. UNITED STATES

406 US 1 (1972)

On Writ of Certiorari to the United States Supreme Court

(April 24, 1972)

Mr. Justice Douglas delivered the opinion of the Court.

The question presented in this case is whether the Department of Justice may challenge the finality of a contract disputes decision made by the Atomic Energy Commission in favor of its contractor, where the contract provides that the decision of AEC shall be "final and conclusive." Section 321 of the Wunderlich Act leaves open for contest a claim that "is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

Moreover, 41 U.S.C. §322, provides that "No government contract shall contain a provision making final on a question of law the decision of any administration official, representative, or board."

But the Disputes Clause in the contract says that the decision of the AEC is "final and conclusive," unless a court determines that the award is vulnerable under §§321 or 322 of the Act. There is no federal statute which submits disputes of this character to review by one or more administrative agencies, where as here there is no charge of fraud or bad faith. Nor is there a statute which enables another federal agency to contest in court the validity of the decision of AEC, absent fraud or bad faith.

In plain lay language the question then is whether, absent fraud or bad faith, the contractor can rely on the ruling of the federal agency with which is made the contract or can be forced to go through still another tier of federal review. We hold that absent fraud or bad faith the federal agency's settlement under the disputes clause is binding on the Government, that there is not another tier of administrative review, and that, save for fraud or bad faith, the decision of AEC is "final and conclusive", it being for these purposes the Federal Government. We reverse the judgment of the Court of Claims.

I

On August 4, 1961, petitioner contracted with the Atomic Energy Commission to build a testing facility at the National Reactor Test Station in Idaho. The work was completed and accepted by various changes in contract specifications and difficulties in meeting performance schedules, petitioner submitted a series of claims to the contracting officer for resolution under the standard disputes clause

contained in the contract, asking for equitable modifications of the contract and additional compensation. On August 8 and November 8, 1962, the contracting officer approved some of the claims and disapproved others and the petitioner sought review of its adverse decisions with the Atomic Energy Commission.

Since it did not then have a contracts appeal board, the Commission referred petitioner's appeal to a hearing examiner before whom an adversary hearing was held. On June 26, 1963, the examiner decided in favor of eight of petitioner's claims and remanded the dispute to the contracting officer for negotiations to determine the exact amount due petitioner. 2 A.E.C. 631. The contracting officer then sought review of this decision by the Commission. See 10 CFR §2.760 (Jan. 1, 1963).

The Commission declined to review four of the claims, 2 A.E.C. 738, which had the effect of sustaining the examiner's decision on them. 10 CFR §2.762(a) (Jan. 1, 1963). Included within this group was the examiner's determination that amounts due petitioner could not be retained to offset claims allegedly owed by petitioner to other contractors and other agencies of government. The Commission modified the examiner's decision on three of the remaining claims and reversed him on the last, which petitioner has since abandoned. It "remanded to the contracting officer with instructions to proceed to final settlement or decision in accordance with the decisions of the hearing examiner dated June 26, 1963, and modified by (its) order or November 13, 1963, and by (that) decision." 2 A.E.C. 850, 856.

On March 6, 1964, prior to AEC's final ruling but after it had upheld the examiner's decision on the "retainage" claim, a certifying officer of the Commission requested the opinion of the General Accounting Office on whether a voucher for the retainage claim could be certified for payment. Jurisdiction for the Comptroller General's review was purportedly founded upon 31 U.S.C. §82d. After some 33 months of what amounted to a plenary review of the proceedings before the examiner, the Comptroller General concluded that the voucher could not be certified for payment. 46 Comp. Gen. 441. On March 27, 1967, AEC wrote petitioner, saying, "The Atomic Energy Commission's view is that S&E Contractors, Inc. has exhausted its administrative recourse to the Commission. The Commission will take no action, in connection with the claims, inconsistent with the views expressed by the Comptroller General. . . ." The petitioner then brought this action in the Court of Claims seeking a judgment of $1.95 million and an order remanding the case for negotiations on the time extension to which it claimed was due under the AEC's original decision.

The defense tendered raised no issue of any fraud or bad faith of the contractor against the United States.

On cross motions for summary judgment, a commissioner of the Court of Claims ruled in favor of petitioner, holding that the General Accounting Office lacked authority to review the decision of AEC and that AEC's refusal to follow its own decisions favorable to petitioner was a breach of the disputes clause of the contract. On review by the Court of Claims, however, that decision was reversed by a four-to-

three vote. While the majority acknowledged "that the Comptroller General effectively stopped payment of the claims," it did not pass upon the legality of that action. 433 F. 2d. 1373, 1375. Reasoning instead that the Wunderlich Act allowed both the Department of Justice and contractors an equal right to judicial review of administrative decisions and that the Atomic Energy Commission's refusal to abide by its earlier decision was a permissible means of obtaining this review, it remanded petitioner's claims "to the commissioner for his consideration and report on the various claims under Wunderlich Act standards." Id., at 1381.

Neither the Commissioner nor the Court of Claims based their opinions on any issue of fraud or bad faith of the contractor against the United States. The case is now here on a petition for writ of certiorari which we granted. 402 U.S. 971.

Petitioner argues that neither the text nor the legislative history of the Wunderlich Act supports the right of the United States to seek judicial review of an administrative decision on a contractual dispute, that the General Accounting Office was without statutory or contractual authority to overturn AEC's decision, and that AEC should not be allowed to abandon after some 33 months its own decision that had been made in petitioner's favor. In response, the Solicitor General contends that the Wunderlich Act does give the Department of Justice the right of judicial review of contract decisions made by federal administrative agencies and that the Department of Justice is free to assert whatever defenses it desires in the Court of Claims without regard to the earlier actions of the federal contracting agency.

II

The disputes clause included in Government contracts is intended, absent fraud or bad faith, to provide a quick and efficient administrative remedy and to avoid "vexatious and expensive and, to the contractor oftentimes, ruinous litigation." Kihlberg v. United States 97 U.S. 398, 401 (1878). The contractor has creded [sic] his right to seek immediate judicial redress for his grievances and has contractually bound himself to "proceed diligently with the performance of the contract" during the disputes process. The purpose of avoiding "vexatious litigation" would not be served, however, by substituting the action of officials acting in derogation of the contract.

The result in some cases might be sheer disaster. In the present case nearly a decade has passed since petitioner completed the performance of a contract under which the only agency empowered to act determined that it was entitled to payment. To postpone payment for such a period is to sanction precisely the sort of "vexatious litigation" which the disputes process was designed to avoid.

Here, petitioner contracted with the United States acting through the Atomic Energy Commission and it was exclusively with this Commission that the administrative resolution of disputes rested. Disputes initially were to be resolved between the contractor and the

contracting officer and, if a settlement satisfactory to the contractor could be reached at that level, no review would lie. See United States v. Mason & Hanger Co., 260 U.S. 323; United States v. Corliss Steam Engine Co., 91 U.S. 321.

By the Disputes Clause the decision of AEC is "final and conclusive" unless "a court of competent jurisdiction" decides otherwise for the enumerated reasons. Neither the Wunderlich Act nor the Disputes Clause empowers any other administrative agency to have a veto of AEC's "final" decision or authority to review it. Nor does any other Act of Congress, except where fraud or bad faith are involved, give any other branch of the Executive Department authority to submit the matter to any court for determination. In other words, we cannot infer that by some legerdemain the Disputes Clause submitted the dispute to further administrative challenge or approval, and did not mean what it says when it made AEC's decision "final and conclusive." See United States v. Mason & Hanger Co., supra, at 326. Kipps, The Right of the Government to Have Judicial Review of a Board of Contract Appeals Decision Made Under the Disputes Clause, 2 Pub. Contract L. J. 286 (1969); Schultz, Wunderlich Revisited, 29 L. & Contem. Prob. 115, 132-133 (1964).

A citizen has the right to expect fair dealing from his government, see Vitarelli v. Seaton, 259 U.S. 535, and this entails in the present context treating the government as a unit rather than as an amalgam of separate entities. Here, the AEC spoke for the United States and its decision, absent fraud or bad faith, should be honored. Cf. National Labor Relations Board v. Nash-Finch Co., 404 U.S. 138.

Since the AEC withheld payment solely because of the views of the Comptroller and since he had been given no authority to function as another tier of administrative review, there was no valid reason for AEC not to settle with petitioner according to its earlier decision. For that purpose the AEC was the United States. Cf. Small Business Administration v. McClellan 364 U.S. 446, 449.

The cases deny review by the Comptroller General of administrative disputes clause decisions as "without legal authority" absent fraud or overreaching, e.g., McShain Co. v. United States, 83 Ct. Cl. 405, 409 (1936). In James Graham Mfg. Co. v. United States, 91 F. Supp. 715 (ND Cal. 1950), for example, the contracting agency had determined that the contractor was entitled to reimbursement for certain expenditures under two cost-plus-fee contracts, but the Comptroller General refused payment. While the court noted the "extensive and broad" powers of the Comptroller, it held that absent instances of "fraud or overreaching" where the Comptroller's power was founded upon specific statutory provisions such as 41 U.S.C. § 53, he had no "authority to determine the propriety of contract payments" approved by the statutory provisions such as 41 U.S.C. § 53, he had no "authority to determine the propriety of contract payments" approved by the contracting agency. 91 F. Supp., at 716. Accordingly, summary judgment was entered by the court, which said, "Since the Navy Department has determined that plaintiff contractor is entitled to the payment sought, this Court must adjudge accordingly." [It has been

said that the Act's legislative history "has something for everyone." Kipps, supra, at 295. Suffice it to say we find the Act's history at best ambiguous. In construing laws we have been extremely wary of testimony before committee hearings and on debates on the floor of Congress save for precise analyses of statutory phrases by the sponsors of the proposed laws.] [The reason is the caveat of Mr. Justice Holmes, "We do not inquire what the legislature meant; we ask only what the statute means." The Theory of Legal Interpretation, 12 Harv. L. Rev. 417.]

Congress contemplated giving the General Accounting Office such powers and, indeed, the Senate twice passed-in the form of the McCarran bill-a provision which would have allowed the Comptroller to review disputes decisions to determine if they were "fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence." S. 24, 83d Cong., 1st Sess. (1953). "If enacted, it would (have) invest(ed) the GAO with the power-which it has never had-to upset an administrative decision which it (found) 'grossly erroneous' or 'not supported by reliable, probative, and substantial evidence.'" Schultz, Proposed Changes in Government Contract Disputes Settlement: The Legislative Battle over the Wunderlich Case, 67 Harv. L. Rev. 216, 243 (1953). The House of Representatives rejected this provision, however, and the Wunderlich Act was ultimately passed in its present form. We cannot therefore construe it to give the Comptroller General powers which Congress has plainly denied.

It is suggested, however, that the Comptroller General's power is not one of review over the AEC decision but is merely the power "to force the contractor to bring suit and thus to obtain judicial review for the Government." The disputes clause, however, sets forth the administrative means for resolving contractual disputes. Under the present contract AEC is the final administrative arbiter of such claims and nowhere is there a provision for oversight by the Comptroller General. The Comptroller General, however, conducted a 33-month de novo review of the AEC proceedings; it blocked the payment to which the AEC determined petitioner was entitled; and it placed upon petitioner the burden of going to the Court of Claims to receive that payment. That action by the Comptroller General was a form of additional administrative oversight foreclosed by the disputes clause.

III

A majority of the Court of Claims held "that the Government has the right to the same extent as the contractor to seek judicial review of an unfavorable administrative decision on a contract claim." 433 F. 2d at 1378. The Solicitor General adopts this view and sees in the Attorney General's obligation to conduct litigation on behalf of the United States, 28 U.S.C. §§ the power to overturn decisions of coordinate offices of the Executive Department.

The Attorney General has the duty to "conduct . . . litigation in which the United States, an agency, or officer thereof is a party," 28 U.S.C. §516, and to "supervise all (such) litigation," 28 U.S.C. §519. That power is pervasive but it does not appear how, under the Wunderlich Act, it gives the Department of Justice the right to appeal from a decision of the Atomic Energy Commission. Normally, where the responsibility for rendering a decision is vested in a coordinate branch of Government, the duty of the Department of Justice is to implement that decision and not to repudiate it. See 39 Op. Att'y Gen. 67, 68 (1937); 38 Op. Att'y Gen. 149, 150 (1934); 25 Op. Att'y Gen. 524, 529 (1905); 25 Op. Att'y Gen. 93, 96 (1903); 20 Op.. Att'y Gen. 711, 713 (1894); 20 Op. Att'y Gen. 270, 272 (1891); 17 Op. Att'y Gen 332, 333 (1882). Indeed, this view of the role of the Department of Justice may be traced back to William Wirt, the first of our Attorneys General to keep detailed records of his tenure in office. "Wirt it was who first recorded the proposition that the Attorney General does not decide questions of fact, that the Attorney General does not sit as an arbitrator in disputes between the government departments and private individuals nor as a reviewing officer to hear appeals from the decisions of public officers. . . ." H. Cummings & C. McFarland, Federal Justice 84 (1937) (footnotes omitted).

The power to appeal to the Court of Claims a decision of the federal agency under a disputes clause in a contract which the agency is authorized to make is not to be found in the Wunderlich Act and its underlying legislative history. That Act was designed to overturn our decision in United States v. Wunderlich, 342 U.S. 98 (1951), which had closed the courthouse doors to certain citizens aggrieved by administrative action amounting to something less than fraud. See S. Rep. No. 32, 83d Cong., 1st Sess.; H.R. Rep. No. 1380, 83d Cong., 2d Sess. It should not be construed to require a citizen to perform the Herculean task of beheading the Hydra in order to obtain justice from his Government.

We are reluctant to construe a statute enacted to free citizens from a form of administrative tyranny so as to subject them to additional bureaucratic oversight, where there is no evidence of fraud or overreaching. In this connection, it should be noted that committee reports accompanying the Wunderlich Act indicate that judicial review was provided so that contractors would not inflate their bids to take into account the uncertainties of administrative action. This objective would be ill-served if Government contractors-having won a favorable decision before the agencies with whom they contracted-had also to run the gantlet before the General Accounting Office and the Department of Justice.

IV.

A contractor's fraud is of course a wholly different genus than the case now before us. Even where the contractor has obtained a judgment and the time for review of it has expired, fraud on an administrative agency or on the court enforcing the agency action is ground for setting aside the judgment. "Setting aside the judgment to permit a new trial, altering the terms of the judgment, or restraining

the beneficiaries of the judgment from taking any benefit whatever from it," Hazel Atlas Co. v. Hartford Co., 322 U.S. 238, 245, are the usual forms of relief which have been granted. Patents obtained with unclean hands and contracts that are based on those patents are similarly tainted and will not be enforced. Precision Co. v. Automotive Co., 324 U.S. 806. Contracts with the United States--like patents--are matters concerning far more than the interest of the adverse parties; they entail the public interest:

> . . . where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public.

Id., p. 815.

Congress has made elaborate provisions for dealing with fraudulent claims of contractors. Where the Comptroller General is convinced "that any settlement was induced by fraud," he is directed to "certify . . . all the facts . . . to the Department of Justice, to the Administrator of General Services, and to the contracting agency concerned." 41 U.S.C. §116 (b). The Administrator of General Services is also given broad powers of investigation and he is directed to give the Department of Justice "any information received by him indicating any fraudulent practices, for appropriate action." 41 U.S. C. §118 (d). Moreover, whenever "any contracting agency or the Administrator of General Services believes that any settlement was induced by fraud," the facts shall be reported to the Department of Justice. 41 U.S.C. §118 (e). And the Department of Justice is given broad powers to act. Ibid. In addition, Congress has imposed severe penalties on contractors who commit fraudulent acts and it has given the federal courts power to hear and determine such cases. 41 U.S.C. 119 .

Broad, flexable civil remedies are also provided against those who "use or engage in . . . an agreement, combination, or conspiracy to use or engage in or cause to be used or engaged in, any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Federal agency in connection with the procurement, transfer, or disposition of property . . ." 40 U.S.C. §489 (b).

As to the Court of Claims, 28 U.S.C. §2514 provides that "A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.

"In such cases the Court of Claims shall specifically find such fraud or attempt and render judgment of forfeiture."

These statutory provisions show that, apart from the inherent power of courts to deal with fraud, the Department of Justice indubitably has standing to appear or intervene at any time in any appropriate court to restrain enforcement of contracts with the United States based on fraud. See, e.g., United States v. Hougham, 364 U.S. 310 (1960); Rex Trailer Co. v. United States, 350. U.S. 148 (1956); United States v. Dinerstein, 362 F. 2d 852 (CA2 1966).

So far as the Wunderlich Act is concerned, it is irrelevant whether the administrative agency deciding this dispute is the AEC or AEC's board of contract appeals. It was common in the beginning to give final authority to the reslution of disputes under a Government contract to the designated contractual officer, save for "fraud or such gross mistake as could necessarily imply bad faith, or a failure to exercise an honest judgment." Kihlbert v. United States, supra, 402. Later came the present boards of contract appeals.

Boards of contract appeals within the respective agencies today are common. They are not statutory creations but established by administrative regulations. S. Doc. No. 99, 89th Cong., 2d Sess. & Operation and Effectiveness of Government Boards of Contract Appeals, pp. 20-21. Their decisions "constitute administrative adjudication in its purest sense." Id., at 21. As noted, AEC has had a board of contract appeals since 1964. Boards of contract appeals were in effect long before the Wunderlich Act and that explains why the Act provides for review "of any decision of the head of any department or agency or his duly authorized representative or board." 41 U.S.C. 321 (emphasis added).

We held in United States v. Bianchi & Co., 373 U.S. 709, that even where the decision on review in the Court of Claims is that of a board of contract appeals, the review must be on the administrative record and that no trial de novo may be held. That decision led to proposals in Congress that in effect rulings of contract appeal boards be denied finality. S. Doc. No. 99, supra, pp. 25-26, n. 70. But Congress has not taken that step. Some have urged that where a decision of a board of contract appeals is involved, the United States should have standing to appeal to the Court of Claims. Id., at 159. But our leading authority on these problems, Professor Harold C. Petrowitz, who authored S. Doc. No. 99, supra, observed, "This has never been done, and the procedure may appear anomalous in view of the relatively close relationship between boards and the agencies they serve." Ibid. However serious the problem may be and whatever its dimensions, it is obviously one for the Congress to resolve, not for us to resolve within the limits of the Wunderlich Act.

This case does not involve the situation where an administrative agency, upon timely petition for rehearing or prompt sua sponte reconsideration, determines that its earlier decision was wrong and, for that reason, refuses to abide by it. AEC has not, to this day, repudiated the merits of its decisions in favor of petitioner. Nor, to repeat, is this a case of a fraud of a contractor against the United States. This is simply an instance where a citizen successfully resolved its disputes with the agency with which it had contracted and

to who that power had been delegated. The fruits of petitioner's labors were frustrated, however, by the intermeddling of another agency without power to act and, when petitioner sought enforcement of its rights in court, still another agency of the Government entered and sought to disavow the decision made here by the AEC.

If the General Accounting Office or the Department of Justice is to be an ombudsman reviewing each and every decision rendered by the coordinate branches of the Government, that mandate should come from Congress, not from this Court.

The judgment of the Court of Claims is Reversed.

D. Appeal By Government

U.S. v. INLAND SERVICES CORP.

Ct. Cl. App. No. 1-80 (1981)

ORDER

PER CURIAM: This is the first appeal by the Government under the Contract Settlement Disputes Act of 1978, 41 U.S.C. §§ 601, 607(g)(B) (see also 28 U.S.C. § 2510(b)(2)), from a decision of a Board of Contract Appeals. The appeal urges that the Armed Services Board of Contract Appeals erred in awarding the contractor, under the Contract Disputes Acts, interest (on most of his claims) back to October 31, 1977 when the claims were received by the contracting officer. Inland Services Corp., et al, ASBCA No. 24043, Dec. 31, 1979. We heard oral argument but postponed decision to await the court's hearing and disposition of Brookfield Construction Co., Inc., et al. v. United States, No. 555-79C, which involved the very same issue. (There is no doubt that present plaintiffs had the right to elect under section 16 of the Disputes Act, 41 U.S.C.A. § 601 (note). The contracting officer's decision was pending on March 1, 1979, and his decision was issued on June 22, 1979. The ASBCA reversed in most instances and allowed what it considered to be proper interest under the Act. The Government's appeal concerns only the retroactive award of interest by the ASBCA.)

Brookfield was decided in an opinion issued September 23, 1981, and wholly governs this case. Plaintiffs are not entitled to interest on their allowed claim for periods prior to March 1, 1979. The decision of the ASBCA is therefore reversed to he extent it awarded interest for prior periods.

We understand that the principal amount of the claim has been paid, and that only the amount of interest remains to be calculated and paid. The determination of the amount to be awarded as interest (not earlier than for the period beginning with March 1, 1979) will be made in the Trial Division under U.S.C. § 609(c), 28 U.S.C. §§1491, 2510(b)(2), and Rule 131(c).

IT IS SO ORDERED.

Section 4. Federal Courts Improvement Act of 1982.

JON C. GRIMBERG CO., INC., et al. v. U.S.

CT. CL. No. 510-82C (1982)

Affirmed C.A.F.C. 1 FPD ¶89 (1983)

MEMORANDUM AND ORDER ON PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs instituted this suit on October 4, 1982, by filing a Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction and Declaratory Judgment. Concurrently they filed a Motion for Temporary Restraining Order and a Motion for Preliminary Injunction. At 10 a.m. on October 5, 1982, argument was heard on those motions, the disposition of which is the subject of this memorandum and order.

This action is directed to two General Services Administration (GSA) contracts for the renovation of certain Government buildings. Plaintiff Grimberg was the second-low bidder on one of them (bid opening on July 8, 1982) and plaintiff Schlosser the same on the other (bid opening on September 13, 1982). In each instance the low bidder was P. W. Parker Inc. (Parker), a company with a wholly-owned subsidiary, R & P Contractors, Inc. (R & P).

The invitation for Bid on each of the above contracts included the mandatory GSA clause entitled "Listing of Subcontractors", a provision, the parties agree, designed to discourage post-award "bid shopping" by the successful prime for subcontract work. Howel-Steffen Constr. Co. v. United States, 231 Ct.Cl. ____, 684 F. 2d 843, 850 (1982).

On both of its bids Parker identified R & P as subcontractor for performance of all mechanical work required under the contracts. In the same particular, plaintiffs, on the other hand, designated various independent suppliers for performance of such areas of the mechanical work as sheet metal, insulation, temperature controls and system balancing.

On July 12, 1982, four days after the first bid opening, plaintiff Grimberg, believing that R & P lacked the functional capability to perform the items of mechanical work mentioned above, lodged a protest with the GSA contracting officer challenging the responsiveness of Parker's bid on the ground that the designation of R & P for all mechanical work violated the "Listing of Subcontractors" clause. By a letter of July 29, 1982, the contracting officer acknowledged receipt of the protest. His letter concluded: "The bids are being evaluated and you will be advised of his decision."

On September 16, 1982, following the bid opening of September 13, plaintiff Schlosser wrote the contracting officer to interpose, as to the second contract, essentially the same challenge as that made by plaintiff Grimberg to the first. The contracting officer acknowledged the protest by a letter of September 20, 1982. That letter concluded: "The bids are being evaluated and you will be advised of our decision before an award is made."

At the outset of the hearing on the pending motions the defendant, citing Section 133(a) of the Federal Courts Improvement Act of 1982, 96 Stat. 25, proferred a motion to dismiss this action, instituted October 4, 1982, for want of jurisdiction on the ground that on September 29, 1982, GSA had awarded Parker Contract GS-03B-98224 (Schlosser bid) and on September 30, 1982, had awarded the same firm Contract GS-11B-18208 (the Grimberg bid). The referenced provision amends section 1491, Title 28, United States Code, effective October 1, 1982, to read in pertinent part, as follows:

> (3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. * * *.

Defendant's motion marked the first point in this proceeding at which the fact of award became affirmatively indicated. With plaintiffs theretofore unaware of such actions, their moving papers did not treat with the question of jurisdiction. The parties were accordingly afforded one day within which to file such further papers as they desired, addressing only that issue. Both sides have exercised that opportunity and their additional submissions have been carefully considered.

Rule 12(h)(3) of the Rules of this Court (identical to Rule 12(h)(3), FRCP) commands:

> Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Among first principles is that which prescribes that the jurisdiction of the federal courts cannot be conferred by the prior action or consent of the parties. American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18 (1951). Put otherwise, the rule is that the parties cannot confer on a federal court jurisdiction that has not been vested in the court by the Constitution and Congress. The parties cannot waive lack of jurisdiction, whether by express consent, or by conduct, nor yet even by estoppel. Wright, Law of Federal Courts at 17 (3rd Ed. 1976).

It is with the foregoing tenets in mind that I must determine whether this court may grant equitable relief in respect of a contract awarded prior to the institution of suit for such relief.

If the language of 28 U.S.C. § 1491, as amended, referring to a "[c]ontract claim brought before the contract is awarded * * *" can be susceptible of ambiguity, all subsisting doubt is removed by the legislative history attending the amendatory legislation. I refer specifically to statements of uniform purport appearing in the Reports of the House and Senate Committees on the Judiciary. Housing Authority of City of Omaha, Nebraska v. United States Housing Authority, 468 F.2d 1, 7, n. 7 (8th Cir. 1972). For present purposes those statements are significant not only for the proposition that this court is without equitable jurisdiction in a post-award situation but equally so for the principle that by its legislative action Congress did not intend to void the District Court jurisdiction confirmed in Scanwell Laboratories, Inc. v. Shaffer, 424 F. 2d 859 (CA DC 1970), to redress grievances arising out of contracting activity, at least in those cases where, as here, award precedes suit for equitable relief.

In the House of Representatives the first version of H.R. 4482, 97th Cong., that contained the language found in Section 133(a) of the Act was the Bill as reported by the Judiciary Committee on November 4, 1981. Concerning that language, which represented a retrenchment from an earlier, more expansive charter conferring on the Claims Court the broad power to grant equitable relief in all controversies within its jurisdiction, the Committee's Report states (H. Rep. No. 97-312, 97th Cong. 1st Sess., pp. 43-44):

> The new section 1491(a) does give the new Claims Court the augmented power to grant declaratory judgments and give equitable relief in contract actions prior to award. This engaged authority is exclusive of the Board of Contract Appeals and not to the exclusion of the district courts. It is not the intent of the Committee to change existing case law as to the ability of parties to proceed in the district court pursuant to the provisions of the Administrative Procedure Act in instances of illegal agency action. See, e.g., Scanwell Laboratories, Inc. v. Shaffer, 424 F. 2d 859 (D.C. Cir. 1970). Nor is it the intent of the Committee to oblige lawyers, litigants, and possibly witnesses to travel to Washington D.C., whenever equitable relief is sought in a contract action prior to award. Although Claims Court judges will travel, they cannot be expected to do so at extremely short notice. Therefore, for the time being, the Committee is satisfied by clothing the Claims Court with enlarged equitable powers not to the exclusion of the district courts. The dual questions of whether these powers should be exclusive of the district courts will have to wait for a later date. (Emphasis added.)

On November 19, 1981, the Senate Judiciary Committee favorably reported S. 1700. As to the matter at hand, it contained the same language as earlier reported in the House. Regarding that language the Committee observed (S. Rep. No. 97-275, 97th Cong., 1st Sess., pp. 22-23):

> [S]ection 133 gives the new Claims Court the power to grant declaratory judgments and give equitable relief in contract actions prior to award. Since the funds which the Government utilizes to purchase goods and services are derived solely from public sources, the public possesses a strong interest in the ability of the Government to fulfill its requirements in these areas at the lowest possible cost. Accordingly, in the vast majority of circumstances, the Government must be permitted to exercise its right to conduct business with those suppliers it selects and to do so in an expeditious manner.
>
> The courts ordinarily refrain from interference with the procurement process by declining to enjoin the Government from awarding a contract to a contractor which the Government has selected.
>
> By conferring jurisdiction upon the Claims Court to award injunctive relief in the pre-award stage of the procurement process, the Committee does not intend to alter the current state of the substantive law in this area. Specifically, the Scanwell doctrine as enunciated by the D.C. Circuit Court of Appeals in 1970 is left intact. See Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Circ. 1970). Moreover, the Committee expects that the court will utilize the authority conferred upon it by this section only in circumstances where the contract, if awarded, would be the result of arbitrary or capricious action by the contracting officials, to deny qualified firms the opportunity to compete fairly for the procurement award. The Committee intends the court to take care not to delay or prevent the award of contracts for goods or services which relate to the national defense or security.
>
> Since the court is granted jurisdiction in this area, boards of contract appeals would not possess comparable authority pursuant to the last sentence of section 8(d) of the Contract Disputes Act. (Emphasis added.)

In sum, however compelling plaintiffs' suggestion that in making the subject awards GSA may very well have offended its anti-bid shopping regulation, the fact remains that in obedience to the clearly expressed will of Congress this court must stay its hand by acknowledging the dispositive impact of the pre-suit awards on its jurisdiction.

Despite the want of jurisdiction here, plaintiffs are not without a forum in which to air their grievances. Congress has affirmatively identified that forum as the United States District Court. Section 301(a) of the Act, amended Title 28, United States Code, by the addition of Section 1631 provides express authority for a transfer of this action there.

A final point remains for attention. On October 5, 1982, Parker, pursuant to Rule 24(a) of the Rules of this court, filed a Petition for Leave to Intervene in this proceeding. On October 6, 1982, Parker filed an amended petition for leave so to do. In view of the disposition that must be made of plaintiffs' motions, Parker's motions have become moot.

IT IS THEREFORE ORDERED that plaintiffs' motions are DENIED.

IT IS FURTHER ORDERED that, this court lacking subject matter jurisdiction, in the premises, the case is TRANSFERRED pursuant to 28 U.S.C. § 1631, to the United States District Court for the District of Columbia.

IT IS FINALLY ORDERED that the petitions of P.W. Parker, Inc. are DENIED as moot.

Section 5. Equal Access to Justice Act

A. B.C.A. Applicability

FIDELITY CONSTRUCTION CO. v. U.S.

CAFC No. 27-82 (1983)

before FRIEDMAN, NICHOLS, and BALDWIN, Circuit Judges.

NICHOLS, Circuit Judge.

This is an appeal from a decision of the Department of Transportation Contract Appeals Board (board) which found that appellant was not entitled to attorney fees under the Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325, 28 U.S.C. § 2412 (Supp. V. 1981) (EAJA).

We now turn to the question whether a contractor who prevails on its claim before a board of contract appeals may by it be awarded attorney fees under the EAJA. As mentioned previously, the board dismissed Fidelity's motion for attorney fees because of its belief that it did not have authority to award fees incurred prior to October 1, 1981. We need not reach the issue of the retroactivity of the EAJA in this situation, because we hold that the board of contract appeals is without jurisdiction to award fees under this Act retroactively or prospectively applied.

We begin our analysis of the board's authority to award attorney fees against the United States, * * * by stressing that the doctrine of sovereign immunity must be overcome before there can be an award of such attorney fees. To overcome this doctrine, we must therefore find specific statutory language that expressly authorizes such an award. Nibali v. United States, 634 F.2d 494, 497 (Ct. Cl. 1980), and cases cited therein. The waiver of sovereign immunity must be unequivocally expressed. Neither this court nor any agency is authorized to award attorney fees against the United States by mere implication or by "negative inference."

Fidelity argues that a broad Congressional waiver of sovereign immunity for an award of attorney fees and expenses is embodied in the EAJA. Although the EAJA lifts the bar of sovereign immunity for award of fees in suits brought by litigants qualifying under the statute, it does so only to the extent explicitly and unequivocally provided. If the EAJA empowered the board of contract appeals to award attorney fees, we would find this grant of authority in a specific statutory provision of the Act. We cannot expand by implication the list of forums which are authorized to award fees under the EAJA.

Fidelity first argues, somewhat timidly, that the proceeding before the board of contract appeals has evolved into an administrative adjudication governed by the Administrative Procedure Act (APA). Fidelity thus contends that the board derives its authority to award

attorney fees under section 203 of the EAJA. 5 U.S.C. § 504(a)(1). Section 203, however, only authorizes the award of attorney fees in those adversary adjudications, whatever they are, that are subject to 5 U.S.C. § 554. In enacting the CDA, Congress explicitly stated that a board of contract appeals proceeding is not subject to the adjudicative procedure of 5 U.S.C. § 554. See S. Rep. No. 95-1118, 95th Cong., 2d. Sess., reprinted in 1978 U.S. Code Cong. & Ad. News, 5241, 5249. We have no difficulty concluding that section 203 of the EAJA does not provide statutory authority for a board of contract appeals to award attorney fees.

Fidelity next argues that the language of section 204, 28 U.S.C. § 2412(d)(3), renders the EAJA directly applicable to proceedings before the board of contract appeals. It provides:

> In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

Under this section, the court may award fees for service before a board only when it also awards fees for service before itself. Broad Avenue Laundry and Tailoring v. United States, 693 F.2d 1387 (Fed. Cir. 1982). Fidelity contends that Congress must have intended the board to award attorney fees under the EAJA; otherwise the reference to the CDA would be meaningless, for the court would be left with nothing to review when the claimant prevailed before the board.

This interpretation misconstrues the express provision of the section and attempts to imply by negative inference a statutory authority which does not exist. Section 204 authorizes a court to award fees and expenses in reviewing CDA or specific APA proceedings. The "judicial review of an adversary adjudication" is that of the final decision of the administrative agency under the APA or, as in this case, the final decision of the board of contract appeals. There is no express language in section 204 granting the board of contract appeals the authority to award fees and expenses against the United States and no such authority will be implied. It is at least possible that Congress wrote this provision in this manner in order to deter the government from appealing board decisions adverse to it. This provision may therefore be meant to apply to CDA cases only when the contractor loses before the board but wins on court review.

We understand appellee will argue in an appropriate case, that the Claims Court does not have this authority to award fees. We do not make any assumption as to this question one way or the other.

Had Congress intended board of contract appeals to independently award attorney fees and expenses, it should have included statutory language expressly so providing to satisfy the strict construction standard. An early version of the EAJA, H. Rep. No. 6429, clearly permitted the award of attorney fees and costs in agency adjudications under both § 554 of the APA, and § 605 of the CDA. See Federal Contracts Report, No. 837, June 23, 1980, at A-16. Moreover, the only pertinent amendment to H. Rep. No. 5612, the bill which became Pub. L. No. 96-481, was that which allowed a court to award attorney fees and expenses in reviewing CDA proceedings; proposed amendments expressly allowing a board of contract appeals independently to award attorney fees were defeated. See Federal Contracts Report, No. 861, December 15, 1980, at A-8.

Finally, Fidelity suggests that the EAJA must be interpreted in a manner that furthers the legislative purpose of the CDA -- that is, to provide a prompt, efficient, and less costly remedy of contract disputes through board adjudications. To this end, Fidelity contends that the EAJA may be applied to the board through section 8(d) of the CDA, which states that "the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims." 41 U.S.C. § 607(b). Although this argument is attractive and has been, in fact, successful in some board proceedings, we are not persuaded.

The decisions Fidelity cites in support of this proposition were rendered prior to October 1, 1982, the effective date of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (FCIA). See e.g., Brand S. Roofing, 82-1 B.C.A. ¶ 15,717. We are aware of no post-FCIA decisions on this point. It seems that if a board now tried to apply the EAJA through section 8(d) of the CDA with the rationale that the present Claims Court is empowered to award attorney fees under the EAJA, our reasoning here would apply and such an application would be in error. Appellee, however, does not even concede that the Claims Court has any authority under the EAJA. Again, we do not make any assumption regarding what powers the Claims Court inherits from the Court of Claims or whether the Claims Court has the authority to award attorney fees.

Section 8(d) of the CDA was a floor amendment inserted to provide adequate authority to resolve breach of contract claims at the agency level. Nothing in the legislative history of the EAJA suggests that Congress intended this general provision of the CDA to take precedence over its specific determinations respecting the powers of boards to award fees.

As we noted previously, Congress must expressly authorize an award of fees against the United States with specific statutory language. In construing a statute waiving the sovereign immunity of the United States, great care must be taken not to expand liability beyond that which was explicitly consented to by Congress. It is an error to suppose that the ordinary canons of statutory construction

are to be applied in this context, if they would add anything to what Congress has expressly said. Where, as here, a party's argument is "hopelessly dependent on implication and negative inferences," it ultimately must fail. Nibali v. United States, 634 F.2d at 497. The thrust of the Supreme Court's most recent decision, United States v. Erika, 50 U.S.L.W. 4399 (U.S. April 20, 1982), is that broad and general language which might be construed as consenting otherwise, will not be so construed when Congress has elsewhere specified how and to what extent it consents to the specific liability to be enforced, or refuses consent.

In summary, the EAJA does not authorize boards of contract appeals to award attorney fees and expenses against the United States, and, for this reason, the board's dismissal of Fidelity's motion for attorney's fees and expenses is affirmed.

B. "Substantially Justified"

BROAD AVENUE LAUNDRY AND TAILORING v. U.S.

CA FC No. 28-81 (1982)

Before FRIEDMAN, RICH, BENNETT, MILLER, and SMITH, Circuit Judges.

FRIEDMAN, Circuit Judge.

This is an application under the Equal Access to Justice Act, 28 U.S.C. 2412 (Supp. IV 1980) (the Act), for attorney's fees and expenses incurred in the petitioner's successful appeal to the United States Court of Claims from a decision of the Armed Services Board of Contract Appeals (the Board), denying an upward price adjustment in a government contract. We deny the application for attorney's fees and expenses.

I

The dispute that gave rise to the present application grew out of a fixed price contract under which the applicant agreed to operate for one year a government-owned laundry at a military post. Labor costs were such a major item of the contract that the petitioner's cost of performance varied almost directly with the wages paid. The wage rates were set through collective bargaining and were required to equal the prevailing wage rates in the area determined by the Department of Labor under 41 U.S.C. §§351-358 (1976). When the petitioner took over the operation of the laundry, there was an existing collective bargaining agreement.

Shortly after the petitioner began to perform the contract, its employees shifted their union affiliation. Following collective bargaining between the petitioner and the new union, the parties agreed upon higher wages. They further agreed that those higher wages would not be effected unless the government agreed to incorporate them in the contract as an additional cost of performance.

The parties consulted the contracting officer, who said that if the Labor Department would issue a new prevailing wage determination reflecting the higher wages, she would incorporate them in the contract and that the petitioner then could request a contract price adjustment. She acted in reliance upon a Department of Labor regulation, 29 C.F.R. §§4.143-4.145, 4.161, which provided that the wage rates in a contract could be changed by "(a) change in the Fair Labor Standards Act minimum by operation of law." 29 C.F.R. at §4.161. The contracting officer, who was not a lawyer, assumed that a new Labor Department prevailing wage determination would constitute a change "by operation of law". She was unaware of another provision of the regulation that indicated that new prevailing wage determinations would be effective only for contracts not yet awarded, but not for contracts already in effect. Id.

The Labor Department issued a new prevailing wage determination embodying the higher wages. The contracting officer incorporated those higher wages into a modification of the contract that required the petitioner to pay the higher rate for the life of the contract. The petitioner then requested a contract price adjustment to reflect the higher wages.

Extensive discussion ensued within the government regarding the legality of the contracting officer's modification of the contract to require the higher wages. Two weeks before the expiration of the contract, a successor contracting officer disallowed the price adjustment.

The petitioner, appearing pro se, appealed to the Board, which held that the petitioner was not entitled to a price adjustment. The Board ruled that the contracting officer had no "authority to bind the Government either in promising to amend the contract if a wage revision" were issued or "in incorporating (the) Revision 10 into the contract. The contracting officer had the apparent authority to take these actions but no actual authority." The Board held that the petitioner could not invoke equitable estoppel against the government, which was the theory upon which its case primarily was based, because for that doctrine to apply "the Government representative whose acts form the basis for the estoppel must have been acting within the scope of his/her authority."

The petitioner (represented by counsel) filed an appeal from the Board to the Court of Claims. The court reversed the Board's determination that the petitioner was not entitled to recover and remanded the case to the Board to determine damages. Board Avenue Laundry and Tailoring v. United States, 681 F.2d 746 (Ct. Cl. 1982). The court held that the act of the contracting officer "though erroneous, was within the scope of her authority." Id. at 747. It ruled that the contracting officer had "actual authority to embody mistakes of law in her decisions and the government is estopped, having endowed her with the powers it has, to assert otherwise." Id. at 749.

II

The provisions of the Equal Access to Justice Act involved in this case authorize a court to "award reasonable fees and expenses of attorneys . . . to the prevailing party in any civil action brought by or against the United States . . . in any court having jurisdiction of such action." 28 U.S.C. §2412(b) (Supp. IV 1980). The Act further provides that "a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified." Id. §2412(d)(1)(A).

In this case we need decide only two questions: (1) whether "the position of the United States", the justification for which must be evaluated, is the position it took in the court litigation for which

the fees and expenses are sought, or also includes the position it took before the tribunal below (here the Board); and (2) whether the position of the United States in this case was substantially justified. We hold that the position of the United States refers to the government's position in court and not before the Board, and that the government's position here was substantially justified.

A. The Act provides for the awarding against the United States of attorney's fees "incurred by (the prevailing) party in any civil action . . . in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified." A fair and reasonable reading of those words is that the position referred to is that taken by the United States in the "Civil action" in which the attorney's fees were "incurred." The provision addresses the award of attorney's fees in a civil action in court, and it is in that particular action in which the government takes a position. See Operating Engineers Local Union No. 3 v. Bohn, 541 F. Supp. 486, 493-96 (D. Utah 1982); Alspach v. District Director of Internal Revenue, 527 F. Supp. 225, 228-29 (D. Md. 1981). Contra Citizens for Block Grant Compliance v. City of Euclid, 537 F. Supp. 422, 426 (D. Ohio 1982); Photo Data, Inc. v. Sawyer, 533 F. Supp. 348, 352 (D.D.C. 1982).

It would strain the normal meaning of language to construe the statutory words to cover the position the United States took in the administrative proceedings that led to the civil action in which the attorney's fees were incurred. The petitioner here seeks attorney's fees and expenses only for services rendered in the proceedings before the Court of Claims, and it would be inappropriate to look at the position the United States took in other forums to determine whether to award fees for those services.

The legislative history of the Act sheds no light on the issue of just which "position" is to be evaluated. The ordinary meaning of the words Congress used, however, limits our review to the justification for the position of the United States in the proceedings before the Court of Claims. If Congress had intended the words to mean something else, presumably it would have so indicated.

Another provision of the Act--28 U.S.C. 2412(d)(3)--supports this conclusion. That section provides that in awarding fees to a prevailing party in an action for judicial review in an adversary adjudication as defined in U.S.C. §504 (Supp. IV 1980), or an adversary adjudication subject to the Contract Disputes Act of 1978 (as this case was), the court shall include in that award fees and expenses unless it finds that "during such adversary adjudication the position of the United States was substantially justified." (This section does not cover this case because it applies only if the court awards fees, which we do not do here.)

In section 2412(d)(3) Congress specifically dealt with the situation where the position of the United States in the administrative proceedings was not substantially justified. This explicit reference to the position of the United States in those proceedings is

in sharp contrast to the language involved in this case, which provides for an award of attorney's fees on the basis of the position of the United States "in any civil action . . . brought by or against the United States court." Section 2412(d)(3) shows that when Congress intended the court to consider the position of the United States before the agency, it knew precisely how so to provide. The failure of Congress to include similar language in section 2414(d)(1)(A) is strong evidence that it did not intend the latter section also to cover the position of the United States before the agency.

In holding that the position to which the Act refers is the position the United States took in the court litigation, we do not suggest that the validity of the agency decision should be ignored. The justification for the government's litigating position necessarily implicates the decision of the tribunal being reviewed. The merits of the latter decision, however, are implicated only as one element of evaluating the justification for the government's judicial litigating position. In considering an application for attorney's fees under the Equal Access to Justice Act, the court is not to re-examine the administrative proceedings in an attempt to determine whether the party seeking the attorney's fees should have prevailed before that tribunal.

B. 1. The legislative history sheds some light upon the meaning of the words "substantially justified." The committee reports stated:

> The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made.

S. Rep. No. 253, 96th Cong., 2d Sess. 6 (1980); H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10, reprinted in 1980 U.S. Code Cong. & Ad. News 4984, 4989.

Whether the position the United States took in the litigation was substantially justified because it was reasonable depends upon all the pertinent facts of the case. Fixed rules cannot be established for determining this issue. Similarly, there is no occasion or need to attempt to describe the particular facts that might be relevant in a particular case or to indicate the respective weight to be given to them. Since two cases in litigation are rarely alike, the decision whether the position of the United States in a particular case was substantially justified is unlikely to be a significant precedent in determining that issue in another case.

There are two guidelines, however, that properly may be stated:

a. The mere fact that the United States lost the case does not show that its position in defending the case was not substantially justified. The committee reports make this clear. They explain that the standard of reasonableness "should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case." S. Rep. No. 253, supra at 7; H.R.

Rep. No. 1418, supra at 11, 1980 U.S. Code Cong. & Ad. News at 4990. Indeed, the committee reports show that Congress did not intend the "substantially justified" standard to "require the Government to establish that its decision to litigate was based on a substantial probability of prevailing." Id. Making the outcome of the case determinative would virtually eliminate the "substantially justified" standard from the statute.

b. A corollary of this principle is that the position of the United States is not shown to have been substantially justified merely because the government prevailed before the tribunal below and endeavored to uphold the decision in its favor. If that were the rule, attorney's fees never could be awarded in favor of an appellant against the government.

2. We find that the position of the United States before the Court of Claims in defending the decision of the Board in this case was substantially justified.

In holding that under the pertinent regulation the contracting officer had no authority to increase the contract price on the basis of a prevailing wage determination made after the contract was executed, the Board followed its prior decision in Suburban Industrial Maintenance Co., ASBCA No. 22875, 79-1 BCA 13731. The court of Claims had not decided the issue. In holding against the petitioner, the Board applied the well-settled principle that the government is not bound by the unauthorized act of its agent.

Although equitable estoppel may provide an exception to that principle, the precise scope and contours of the exception are unclear and are subject to varying judicial interpretations. On the basis of the law as it stood after the Board decision, it was far from clear that the Board's decision was erroneous or that the Court of Claims would reverse it. In those circumstances, it was reasonable for the United States to defend the Board's decision before the Court of Claims.

In reversing the Board, the Court of Claims held that although the contracting officer's action was erroneous, it was within her authority because she had "actual authority to embody mistakes of law in her decisions and the government is estopped, having endowed her with the powers it has, to assert otherwise." Perhaps that conclusion was novel, but in any event it cannot be described as foreordained on the basis of the decisions reported and regulations in force at the time the government litigated the case before the Court of Claims. Cf. Donovan v. Dillingham, 668 F.2d 1196, 1199 (11th Cir. 1982)

Considering all the circumstances, the position the United States took before the Court of Claims in defending the decision of the Board was substantially justified. It follows that the petitioner is not entitled to be awarded fees and expenses against the United States under the Equal Access to Justice Act. The application for fees and expenses is denied.

Section 6. Contract Adjustment Board

E-SYSTEMS, INC.

AFCAB No. 245 (1980)

E-Systems, Inc. ("E-Systems"), has requested that the Air Force Contract Adjustment Board ("Board") grant extraordinary contractual relief in connection with Contract F42600-79-C-0001 ("Contract 0001"). E-Systems has advanced two alternative theories for relief. First, E-Systems contends that Contract 0001 should be amended pursuant to DAR §17-204.2(b) to mitigate the effect of Government action. The action complained of is the United States Air Force ("USAF") decision to discontinue its defense-related aircraft maintenance in Taiwan. In the alternative, E-Systems contends that the failure to provide for complete amortization of certain past service costs during the negotiation of Contract 0001 was a mutual mistake justifying extraordinary contractual relief under DAR §17-204.3(iii). Respectively, relief in the amount of either $5,459,479.00 or $4,663,311.00 is requested.

E-Systems has had annual contracts with the USAF and other agencies of the United States for maintenance of aircraft deployed in the Far East since 1975. During this period of time, the actual aircraft maintenance has been performed for E-Systems by its subcontractor, Air Asia Company, Ltd. ("Air Asia"), at Air Asia's facility in Tainan, Taiwan. Air Asia is a wholly-owned subsidiary of E-Systems. Following the termination of diplomatic relations between the United States and the Republic of China (i.e., Taiwan) on December 31, 1978, E-Systems was informed of the USAF decision to discontinue defense-related aircraft maintenance in Taiwan as expeditiously as practicable. E-Systems' request for relief arises as a result of this decision.

E-Systems requests relief on behalf of both itself and Air Asia. Under its first theory for relief, E-Systems contends that the USAF decision to discontinue its aircraft maintenance in Taiwan is Government action that has caused Air Asia, and therefore E-Systems, to suffer a loss under Contract 0001. In support of this theory, E-Systems explains that the loss of USAF business represents the loss of a significant portion of Air Asia's business base. This loss of business has necessitated a corresponding reduction in Air Asia's work force which has caused Air Asia to incur unanticipated employee separation and retirement costs in the amount of approximately $5.5 million. E-Systems concludes that fairness requires the adjustment of Contract 0001 to cover these unanticipated costs.

In the alternative, E-Systems contends that negotiations relating to Contract 0001 between it and the USAF were based on an erroneous mutual assumption that E-Systems and Air Asia would continue to be eligible for the award of aircraft maintenance contracts in the Far East area. E-Systems characterizes this mistaken assumption as a mutual mistake as to a material fact. E-Systems maintains that approximately $4.7 million of certain past service costs would have been recognized during contract negotiations and reflected in the service rates established under Contract 0001 if the parties had recognized that contractors in Taiwan would become unacceptable as sources for USAF aircraft maintenance. These past service costs are unfunded employee separation and retirement benefits that accrued prior to E-Systems' purchase of Air Asia. E-Systems assumed this liability when it purchased Air Asia as a going concern in 1975. Prior to 1975, Air Asia was a part of the United States Central Intelligence Agency's proprietary operations.

E-Systems amortized a portion of these past service costs in each year since 1975, and the USAF permitted E-Systems to recover the allocable portion of these costs through the service rates the parties negotiated for the annual aircraft maintenance contracts. However, in accord with appropriate accounting principles, E-Systems selected a thirty year amortization period. Therefore, less than twenty percent of the initial liability was amortized in the period between E-Systems's purchase of Air Asia and the negotiation of Contract 0001. E-Systems maintains that the entire unamortized portion, in excess of eighty percent of the initial liability, would have been recovered through the rates negotiated for Contract 0001 if E-Systems and the USAF had recognized that their contractual relationship would not continue for the balance of the thirty year period. E-Systems also contends that rates high enough to permit the recovery of all of the unamortized costs under Contract 0001 would have been lower than the rates which could have been obtained from any other source capable of providing these services. In support of this contention, E-Systems observes that Air Asia is the only proven source in the Far East capable of providing these services and points to the rates being charged by other sources of these services elsewhere in the world which are two to four times greater than Air Asia's actual rates and substantially greater than the rates that Air Asia would have proposed to amortize the remaining past service costs. Accordingly, E-Systems concludes that equity requires the adjustment of Contract 0001 to mitigate the effect of the mutual mistake.

The Board is not persuaded that relief should be granted under either of E-Systems' theories for relief. Relief is available pursuant to DAR §17-204.2(b) under a Government action theory when a contractor suffers a loss on a defense contract as a result of some action taken by the Government in its contractual capacity which is directed primarily at the contractor. The Board disagrees with

E-Systems' assertion that the decision not to obtain defense-related aircraft maintenance from any source in Taiwan was Government action directed primarily at either E-Systems or Air Asia. The decision was directly related to the termination of diplomatic relations with Taiwan. It is, therefore, more in the nature of a sovereign act than an act taken by the Government in its capacity as a contracting party. Furthermore, even though the corresponding reduction in Air Asia's work force will cause it to incur a great expense, the Board does not agree that the Government has increased the cost of performance under Contract 0001 or caused either Air Asia or E-Systems to sustain a loss on the Contract. Consequently, the character of the Government action involved does not justify relief under DAR §17-204.2(b).

Nor does the Board agree that an erroneous expectation of a continuing contractual relationship is the type of material fact which can provide a basis for relief under a mutual mistake theory pursuant to DAR §17-204.3(iii). The risk that an incumbent contractor may be displaced in a subsequent acquisition is part of the contractor's risk of doing business. Even though circumstances may create a reasonable expectation of a continuing contractual relationship, a contractor cannot reasonably rely on that expectation in the negotiation of an incipient contract. Therefore, since E-Systems does not contend, and the Board is unable to find, that the parties were mutually mistaken as to any other material fact in existence at the time of negotiations, relief under DAR §17-204.3(iii) is not available.

Nevertheless, pursuant to the Board's residual powers under Part 3 of Section 17 of the DAR, the Board determines that E-Systems' request warrants relief. E-Systems' acquisition of the Air Asia facility in Taiwan as a going concern assured the United States that a reliable source capable of providing defense-related aircraft maintenance would continue to be available in the Far East. There is little doubt that Air Asia would have continued to provide defense-related aircraft maintenance in the future, but for the derecognition of Taiwan. In acquiring Air Asia as a going concern, E-Systems also assumed Air Asia's existing liability for employee separation and retirement benefits, a liability that accrued while Air Asia's operations were controlled by, and for the benefit of, the United States. Although E-Systems was aware of this significant liability, E-Systems clearly expected to amortize the liability over a reasonable period of time and could not have reasonably anticipated the momentous change in American foreign policy which subsequently transpired. The reasonableness of E-Systems' expectation is borne out by its prior contract negotiations with the Government. E-Systems had amortized a portion of the accrued past service costs in each year since acquiring Air Asia and had recovered a part of the costs under each of its prior USAF contracts. If the impending change in American foreign policy had been public knowledge, negotiations over the portion of these costs to be amortized in 1978 and 1979 and allocated to Contract 0001 would certainly have been affected. However, because of the sensitive nature of this change in foreign policy, there was no advance

notice of the termination of diplomatic relations with Taiwan and, although the Board cannot determine with certainty the degree to which negotiations would have been affected, the Board is persuaded that E-Systems was deprived of a fair opportunity to raise the issue.

Under these unusual circumstances, fairness requires granting some measure of financial relief. It would be unfair to require that E-Systems bear the entire risk that an unforseeable change in foreign policy would preclude normal amortization of the liability it assumed. Accordingly, the Board believes that the risk should be apportioned between E-Systems and the Government. The Board finds that granting relief under such unique circumstances will facilitate the national defense by demonstrating that the Government will deal fairly with defense contractors.

The true measure of the amount of relief that should be granted is the amount by which the price of Contract 0001 would have been increased if E-Systems and the USAF had taken account of the impending change in foreign policy in their contract negotiations. There is, of course, no way to precisely determine that amount. Therefore, the Board awards relief in an amount that it believes is equitable under the circumstances. Pursuant to the Board's residual powers under Part 3 of Section 17 of the DAR, relief is granted in the amount of $2.4 million ($2,400,000.00).

This relief is expressly conditioned upon E-Systems' and Air Asia's release of the Government from any existing or future claim for the costs of retirement or separation benefits paid, or payable, to employees of either E-Systems or Air Asia located at Air Asia's Taiwan facility and pertaining to employee service prior to December 31, 1979. Because of the complex considerations which affected the Board's deliberations, the Board will, in this case, provide the Contracting Officer with a release to be used in the implementation of this relief.

The Board hereby authorizes and directs the Contracting Officer to take such action as is necessary to implement relief consistent with this Memorandum. In implementing this relief, the Contracting Officer shall comply with DAR §17-206 and shall furnish the Board with the documentation required by DAR §17-208.4(b) through the appropriate channel.

Section 7. Congressional Reference Cases

COUNTY OF SARPY, NEBRASKA v. UNITED STATES

Ct. Cl. No. 363-64 (1967)

* * * *

OPINION

Plaintiff seeks, pursuant to a Private Act, $135,560 as compensation for the closing by defendant of a segment of one of its roads.

FINDINGS OF FACT

1. This case is authorized by, and was instituted pursuant to, Public Law 88-425, 88th Congress, 2d Session, approved August 13, 1964, 78 Stat. 399. Such act provides:

AN ACT

Conferring jurisdiction upon the United States Court of Claims to hear, determine, and render judgment upon the claim of Sarpy County, Nebraska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding any statute of limitations pertaining to suits against the United States, or any lapse of time, or bars of laches, jurisdiction is hereby conferred upon the United States Court of Claims to hear, determine, and render judgment upon any claims of Sarpy County, Nebraska, arising out of the closing of the north-south county road connecting Bellevue and LaPlatte to make way for the principal east-west runway at Offutt Air Force Base, in said county.

Sec. 2. Suit upon any such claim may be instituted at any time within one year after the date of enactment of this Act. Nothing in this Act shall be construed as an inference of liability on the part of the United States. Except as otherwise provided herein, proceedings for the determination of such claim, and review and payment of any judgment or judgments thereon shall be had in the same manner as in the case of claims over which such Court has jurisdiction under section 1491 or Title 28 of the United States Code.

* * * *

16. No payment of compensation has been made to plaintiff by defendant either in eminent domain proceedings or otherwise for the severing of Modification Road and its destruction as a through route

from points north and east of the steel truss bridge in section 14 connecting the road with Country Road H-9, and points south thereof, by way of such country road.

* * * *

22. Upon the basis of all the considerations hereinabove set forth, there is a necessity to supply a substitute road for the intersected Modification Road. Plaintiff's highway system did not, after the destruction of Modification Road as part of a through route, provide road facilities equal in utility to those destroyed. No existing roads serve the country's requirements as adequately, and in the same manner and to the same extent, as the old Modification Road-County Road H-O combination. There is now no bridge crossing Papillion Creek east of Highway 73-75 which is part of a through road system.

No such substitute road has been built, although there have been demands for one by the people of the country.

* * * *

26. (a) The 1955 cost estimate of plaintiff's consulting engineers for the construction of the alternate proposed east-west county replacement road was $75,628. This estimate is reasonable.

(b) To construct the identical road at the present time would cost $110,600. However, this road necessitated, as stated, three railroad crossings at grade. Since then, one has been eliminated. In addition some flood control work has been performed in the area (i.e., the building of a levee in 1962 along the left bank of Papillion Creek), which has changed the drainage situation and reduced the need for some of the fill which the original estimate included. (The ground at this location is somewhat lower and at the time of the original estimate presented more earth work problems than the north-south substitute. 125,000 cubic yards of excavation was estimated for the east-west road as against only 50,000 for the north-south.) It would in all probability make unnecessary a proposed 70-foot concrete slab bridge over a drainage ditch for which $18,400 was included in the estimate, two 36-inch culverts now carrying the drainage at the point involved. It appears that an extension of the two culverts would now handle the situation. Accordingly, the reasonable cost of building the road at the present time, as so changed, would be approximately the same in 1955.

CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover, and judgment is therefore entered for plaintiff in the amount of seventy-five thousand six hundred twenty-eight dollars ($75,628), plus interest, as part of just compensation, at the rate of 4 percent from the date of taking in 1954, the amount to be determined under Rule 47(c).

Section 8. Freedom Of Information Act

CHRYSLER CORP. v. BROWN

U.S. Supreme Ct. No. 77-922 (1979)

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The expanding range of federal regulatory activity and growth in the Government sector of the economy have increased federal agencies' demand for information about the activities of private individuals and corporations. These developments have paralleled a related concern about secrecy in Government and abuse of power. The Freedom of Information Act (hereinafter "FOIA") was a response to this concern, but it has also had a largely unforeseen tendency to exacerbate the uneasiness of those who comply with governmental demands for information. For under the FOIA third parties have been able to obtain Government files containing information submitted by corporations and individuals who thought the information would be held in confidence.

This case belongs to a class that has been popularly denominated "reverse-FOIA" suits. The Chrysler Corporation (hereinafter "Chrysler") seeks to enjoin agency disclosure on the grounds that it is inconsistent with the FOIA and 18 U.S.C. § 1905, a criminal statute with origins in the 19th century that proscribes disclosure of certain classes of business and personal information. We agree with the Court of Appeals for the Third Circuit that the FOIA is purely a disclosure statute and affords Chrysler no private right of action to enjoin agency disclosure. But we cannot agree with that court's conclusion that this disclosure is "authorized by law" within the meaning of § 1905. Therefore, we vacate the Court of Appeals' judgment and remand so that it can consider whether the documents at issue in this case fall within the terms of § 1905.

I

As a party to numerous Government contracts, Chrysler is required to comply with Executive Orders 11246 and 11375, which charge the Secretary of Labor with ensuring that corporations who benefit from Government contracts provide equal opportunity regardless of race or sex. The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has promulgated regulations which require Government contractors to furnish reports and other information about their affirmative action programs and the general composition of their work forces.

The Defense Logistics Agency (DLA) (formerly the Defense Supply Agency) of the Department of Defense is the designated compliance agency responsible for monitoring Chrysler's employment practices.

OFCCP regulations require that Chrysler make available to this agency written affirmative action programs (AAPs) and annually submit Employer Information Reports, known as EEO-1 Reports. The agency may also conduct "compliance reviews" and "complaint investigations," which culminate in Compliance Review Reports (CRRs) and Complaint Investigation Reports (CIRs) respectively.

Regulations promulgated by the Secretary of Labor provide for public disclosure of information from records of the OFCCP and its compliance agencies. Those regulations state that notwithstanding exemption from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. § 552,

> records obtained or generated pursuant to Executive Order 11246 (as amended) . . . shall be made available for inspection and copying . . . if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCC[P] or the Compliance Agencies except in the case of records disclosure of which is prohibited by law.

It is the voluntary disclosure contemplated by this regulation, over and above that mandated by the FOIA, which is the gravamen of Chrysler's complaint in this case.

This controversy began in May of 1975 when the DLA informed Chrysler that third parties had made a FOIA request for disclosure of the 1974 AAP for Chrysler's Newark, Del. assembly plant and an October 1974 CIR for the same facility. Nine days later Chrysler objected to release of the requested information, relying on OFCCP's disclosure regulations and on exemptions to the FOIA. Chrysler also requested a copy of the CIR, since it had never seen it. DLA responded the following week that it had determined that the requested material was subject to disclosure under the FOIA and the OFCCP disclosure rules, and that both documents would be released five days later.

On that day Chrysler filed a complaint in the United States District Court for Delaware seeking to enjoin release of the Newark documents. The District Court granted a temporary restraining order barring disclosure of the Newark documents and requiring that DLA give five days' notice to Chrysler before releasing any similar documents. Pursuant to this order, Chrysler was informed on July 1, 1975, that DLA had received a similar request for information about Chrysler's Hamtramck, Mich. plant. Chrysler amended its complaint and obtained a restraining order with regard to the Hamtramck disclosure as well.

Chrysler made three arguments in support of its prayer for an injunction: that disclosure was barred by the FOIA; that it was inconsistent with 18 U.S.C. § 1905, 42 U.S.C. § 2000e-8(e), and 44 U.S.C. § 3508, which for ease of reference will be referred to as the "confidentiality statutes"; and finally that disclosure was an abuse of agency discretion insofar as it conflicted with OFCCP rules. The District Court held that it had jurisdiction under 28 U.S.C. § 1331 to subject the disclosure decision to review under the Administrative Procedure Act. 5 U.S.C. §§ 701-706. It conducted a trial de novo on all of the Chrysler's claims; both sides presented extensive expert testimony during August 1975.

On April 20, 1976, The District Court issued its opinion. It held that certain of the requested information, the "manning" tables, fell within Exemption 4 of the FOIA. The District Court reasoned from this holding that the tables may or must be withheld, depending on applicable agency regulations, and that here a governing regulation required that the information be withheld. Pursuant to 5 U.S.C. § 301, the enabling statute which gives federal department heads control over department records, the Secretary of Labor has promulgated a regulation, 29 CFR § 70.21(a)(1977), stating that no officer or employee of the Department is to violate 18 U.S.C. § 1905. That section imposes criminal sanctions on Government employees who make unauthorized disclosure of certain classes of information submitted to a Government agency, including trade secrets and confidential statistical data. In essence the District Court read § 1905 as not merely a prohibition of unauthorized disclosure of sensitive information by Government employees, but as a restriction on official agency actions taken pursuant to promulgated regulations.

Both sides appealed, and the Court of Appeals for the Third Circuit vacated the District Court's judgment. It agreed with the District Court that the FOIA does not compel withholding of information that falls within its nine exemptions. It also, like the District Court, rejected Chrysler's reliance on the confidentiality statutes, either because there was no implied private right of action to proceed under the statute, or because the statute, by its terms, was not applicable to the information at issue in this case. It agreed with the District Court that analysis must proceed under the APA. But it disagreed with that court's interpretation of 29 CFR § 70.21(a). By the terms of that regulation, the specified disclosures are only proscribed if "not authorized by law," the standard of 18 U.S.C. § 1905. In the Court of Appeals' view, disclosures made pursuant to OFCCP disclosure regulations are "authorized by law" by virtue of those regulations. Therefore, it held that 29 CFR § 70.21(a) was inapplicable.

The Court of Appeals also disagreed with the District Court's view of the scope of review under the APA. It held that the District

Court erred in conducting a de novo review; review should have been limited to the agency record. However, the Court of Appeals found that record inadequate in this case and directed that the District Court remand to the agency for supplementation. Because of a conflict in the circuits and the general importance of these "reverse-FOIA" cases, we granted certiorari and now vacate the judgment of the Third Circuit and remand for further proceedings.

II

We have decided a number of FOIA cases in the last few years. Although we have not had to face squarely the question whether the FOIA ex proprio vigore forbids governmental agencies from disclosing certain classes of information to the public, we have in the course of at least one opinion intimated an answer. We have, moreover, consistently recognized that the basic objective of the Act is disclosure.

In contending that the FOIA bars disclosure of the requested equal employment opportunity information, Chrysler relies on the Act's nine exemptions and argues that they require an agency to withhold exempted material. In this case it relies specifically on Exemption 4:

> "(b) [FOIA] does not apply to matters that are--
>
> * * * *
>
> "(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . ." 5 U.S.C. § 552 (b)(4).

Chrysler contends that the nine exemptions in general, and Exemption 4 in particular, reflect a sensitivity to the privacy interest of private individuals and nongovernmental entities. That contention may be conceded without inexorably requiring the conclusion that the exemptions impose affirmative duties on an agency to withhold information sought. In fact, that conclusion is not supported by the language, logic or history of the Act.

The organization of the Act is straightforward. Subsection (a), 5 U.S.C. § 552(a), places a general obligation on the agency to make information available to the public and sets out specific modes of disclosure for certain classes of information. Subsection (b), 5

U.S.C. § 552(b), which lists the exemptions, simply states that the specified material is not subject to the disclosure obligations set out in subsection (a). By its terms, subsection (b) demarcates the limits of the agency's obligation to disclose; it does not foreclose disclosure.

That the FOIA is exclusively a disclosure statute is, perhaps, demonstrated most convincingly by examining its provision for judicial relief. Subsection (a)(4)(B) gives federal district courts "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). That provision does not give the authority to bar disclosure, and thus fortifies our belief that Chrysler, and courts which have shared its view, have incorrectly interpreted the exemption provisions to the FOIA. The Act is an attempt to meet the demand for open government while preserving workable confidentiality in governmental decision-making. Congress appreciated that with the expanding sphere of governmental regulation and enterprise, much of the information within Government files has been submitted by private entities seeking Government contracts or responding to unconditional reporting obligations imposed by law. There was sentiment that Government agencies should have the latitude, in certain circumstances, to afford the confidentiality desired by these submitters. But the Congressional concern was with the agency's need or preference for confidentiality; the FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information.

Enlarged access to governmental information undoubtedly cuts against the privacy concerns of nongovernmental entities, and as a matter of policy some balancing and accommodation may well be desirable. We simply hold here that Congress did not design the FOIA exemptions to be mandatory bars to disclosure.

This conclusion is further supported by the legislative history. The FOIA was enacted out of dissatisfaction with § 3 of the Administrative Procedure Act, which had not resulted in as much disclosure by the agencies as Congress later thought desirable. Statements in both the Senate and House Reports on the effect of the exemptions support the interpretation that the exemptions were only meant to permit the agency to withhold certain information, and were not meant to mandate nondisclosure. For example, the House Report states:

> "[The FOIA] sets up workable standards for the categories of records which may be exempt from disclosure . . . .

". . . There may be legitimate reasons for nondisclosure and [the FOIA] is designed to permit nondisclosure in such cases.

"[The FOIA] lists in a later subsection the specific categories of information which may be exempted from disclosure."

We therefore conclude that Congress did not limit an agency's discretion to disclose information when it enacted the FOIA. It necessarily follows that the Act does not afford Chrysler any right to enjoin agency disclosure.

III

Chrysler contends, however, that even if its suit for injunctive relief cannot be based on the FOIA, such an action can be premised on the Trade Secrets Act, 18 U.S.C. § 1905. The Act provides:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reasons of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more that $1,000 or imprisoned not more than one year, or both; and shall be removed from office or employment.

There are necessarily two parts to Chrysler's argument: that § 1905 is applicable to the type of disclosure threatened in this case, and that it affords Chrysler a private right of action to obtain injunctive relief.

The Court of Appeals held that § 1905 was not applicable to the agency disclosure at issue here because such disclosure was "authorized by law" within the meaning of the Act. The court found the source of that authorization to be the OFCCP regulations that DLA relied on in deciding to disclose information on the Hamtramck and Newark plants. Chrysler contends here that these agency regulations are not "law" within the meaning of § 1905.

It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the "force and effect of law." This doctrine is so well established that agency regulations implementing federal statutes have been held to pre-empt state law under the Supremacy Clause. It would therefore take a clear showing of contrary legislative intent before the phrase "authorized by law" in § 1905 could be held to have a narrower ambit than the traditional understanding.

The origins of the Trade Secrets Act can be traced to Rev. Stat. 3167, an Act which barred unauthorized disclosure of specified business information by Government revenue officers. There is very little legislative history concerning the original bill, which was passed in 1864. It was re-enacted numerous times, with some modification, and remained part of the revenue laws until 1948. Congressional statements made at the time of these re-enactments indicate that Congress was primarily concerned with unauthorized disclosure of business information by feckless or corrupt revenue agents, for in the early days of the Bureau of Internal Revenue, it was the field agents who had substantial contact with confidential financial information.

In 1948, Rev. Stat. 3167 was consolidated with two other statutes--involving the Tariff Commission and the Department of Commerce--to form the Trade Secrets Act. The statute governing the Tariff Commission was very similar to Rev. Stat. 3167, and it explicitly bound members of the Commission as well as Commission employees. The Commerce Department statute embodied some differences in form. It was a mandate addressed to the Bureau of Foreign and Domestic Commerce and to its Director, but there was no reference to Bureau employees and it contained no criminal sanctions. Unlike the other statutes it also had no exception for disclosures "authorized by law." In its effort to "consolidate[ ]" the three statutes, Congress enacted § 1905 and essentially borrowed the form of Rev. Stat. 3167 and the Tariff Commission statute. We find nothing in the legislative history of § 1905 and its predecessors which lends support to Chrysler's contention that Congress intended the phrase "authorized by law," as used in § 1905, to have a special, limited meaning.

Nor do we find anything in the legislative history to support the Government's suggestion that § 1905 does not address formal agency action--i.e., that it is essentially an "anti-leak" statute that does not bind the heads of governmental departments or agencies. That would require an expansive and unprecedented holding that any agency

action directed or approved by an agency head is "authorized by law," regardless of the statutory authority for that action. As Attorney General Brownell recognized not long after § 1905 was enacted, such a reading is difficult to reconcile with Congress' intent to consolidate the Tariff Commission and Commerce Department statutes, both of which explicitly addressed ranking officials, with Rev. Stat. 3167. It is also inconsistent with a settled understanding--previously shared by the Department of Justice--that has been continually articulated and relied upon in Congress during the legislative efforts in the last three decades to increase public access to Government information. Although the existence of this understanding is not by any means dispositive, it does shed some light on the intent of the enacting Congress. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-381 (1969); Federal Housing Administration v. The Darlington, Inc., 358 U.S. 84, 90 (1958). In sum, we conclude that § 1905 does address formal agency action and that the appropriate inquiry is whether OFCCP's regulations provide the "authoriz[ation] by law" required by the statute.

In order for a regulation to have the "force and effect of law," it must have certain substantive characteristics and be the product of certain procedural requisites. The central distinction among agency regulations found in the Administrative Procedure Act (APA) is that between "substantive rules" on the one hand and "interpretive rules, general statements of policy, or rules of agency organization, procedures, or practice" on the other. A "substantive rule" is not defined in the APA, and other authoritative sources essentially offer definitions by negative inference. But in Morton v. Ruiz, 415 U.S. 199 (1974), we noted a characteristic inherent in the concept of a "substantive rule." We described a substantive rule--or a "legislative-type rule," id., at 236--as one "affecting individual rights and obligations." Id., at 232. This characteristic is an important touchstone for distinguishing those rules that may be "binding" or have the "force of law." Id., at 235, 236.

That an agency regulation is "substantive," however, does not by itself give it the "force and effect of law." The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes. As this Court noted in Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977):

> Legislative, or substantive, regulations are 'issued by an agency pursuant to statutory authority and . . . implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission . . . . Such rules have the force and effect of law.'

Likewise the promulgation of these regulations must conform with any procedural requirements imposed by Congress. Morton v. Ruiz, supra, at 232. For agency discretion is not only limited by substantive, statutory grants of authority, but also by the procedural requirements which "assure fairness and mature consideration of rules of general application." NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969). The pertinent procedural limitations in this case are those found in the APA.

The regulations relied on by the Government in this case as providing "authoriz[ation] by law" within the meaning of § 1905 certainly affect individual rights and obligations; they govern the public's right to information in records obtained under Executive Order 11246 and the confidentiality rights of those who submit information to OFCCP and its compliance agencies. It is a much closer question, however, whether they are the product of a Congressional grant of legislative authority.

In his published memorandum setting forth the disclosure regulations at issue in this case, the Secretary of Labor states that the authority upon which he relies in promulgating the regulations are § 201 of Executive Order 11246, as amended, and 29 CFR §d 70.71, which permits units in the Department of Labor to promulgate supplemental disclosure regulations consistent with 29 CFR pt. 70 and the FOIA. 38 Fed. Reg. 3192-3194 (1973). Since materials that are exempt from disclosure under the FOIA are by virtue of Part II of this opinion outside the ambit of that Act, the Government cannot rely on the FOIA as Congressional authorization for disclosure regulations that permit the release of information within the Act's nine exemptions.

Section 201 of Executive Order 11246 directs the Secretary of Labor to "adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof." But in order for such regulations to have the "force and effect of law," it is necessary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress. The origins of the Congressional authority for Executive Order 11246 are somewhat obscure and have been roundly debated by commentators and courts. The order itself as amended establishes a program to eliminate employment discrimination by the Federal Government and by those who benefit from Government contracts. For purposes of this case, it is not necessary to decide whether Executive Order 11246 as amended is authorized by the Federal Property and Administration Services Act of 1949. Titles VI and VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Enforcement Act of 1972, or some more general notion that the Executive can impose reasonable contractual requirements in the exercise of its procurement authority. The pertinent inquiry is whether under any of the arguable statutory grants of authority, the OFCCP disclosure regulations relied on by the Government are reasonably within the contemplation of that grant of authority. We think that it is clear that when it enacted these statutes, Congress was not concerned with public disclosure of trade secrets or confidential business information, and, unless we were to

hold that any federal statute that implies some authority to collect information must grant legislative authority to disclose that information to the public, it is simply not possible to find in these statutes a delegation of the disclosure authority asserted by the Government here.

The relationship between any grant of legislative authority and the disclosure regulations becomes more remote when one examines § 201 of the Executive order. It speaks in terms of rules and regulations "necessary and appropriate" to achieve the purposes of the Executive order. Those purposes are an end to discrimination in employment by the Federal Government and those who deal with the Federal Government. One cannot readily pull from the logic and purposes of the Executive order any concern with the public's access to information in Government files or the importance of protecting trade secrets or confidential business statistics.

The "purpose and scope" section of the disclosure regulations indicates two underlying rationales: OFCCP's general policy "to disclose information to the public," and it's policy "to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment." 41 CFR § 60-40.1 (1977). The Government argues that "[t]he purpose of the Executive Order is to combat discrimination in employment, and a disclosure policy designed to further this purpose is consistent with the Executive Order and an appropriate subject for regulation under its aegis." Government Brief, at 48. Were a grant of legislative authority as a basis for Executive Order 11246 more clearly identifiable, we might agree with the Government that this "compatibility" gives the disclosure regulations the necessary legislative force. But the thread between these regulations and any grant of authority by the Congress is so strained that it would do violence to established principles of separations of powers to denominate these particular regulations "legislative" and credit them with the "binding effect of law."

This is not to say that any grant of legislative authority to a federal agency by Congress must be specific before regulations promulgated pursuant to them can be binding on courts in a manner akin to statutes. What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued. Possibly the best illustration remains Justice Frankfurter's opinion for the Court in National Broadcasting Co. v. United States, 319 U.S. 190 (1943). There the Court rejected the argument that the Communications Act of 1934 did not give the Federal Communications Commission authority to issue regulations governing chain broadcasting beyond the specification of technical, engineering requirements. Before reaching that conclusion, however, the court probed the language and logic of the Communications Act and its legislative history. Only after this careful parsing of authority did the Court find that the regulations had the force of law and were binding on the courts unless they were arbitrary or not promulgated pursuant to prescribed procedures.

> Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the "public interest" will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise."

Id., at 224.

The Government argues, however, that even if these regulations do not have the force of law by virtue of Executive Order 11246, an explicit grant of legislative authority for such regulations can be found in 5 U.S.C § 301, commonly referred to as the "housekeeping statute." It provides:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

The antecedents of § 301 go back to the beginning of the Republic, when statutes were enacted to give heads of early Government departments authority to govern internal departmental affairs. Those laws were consolidated into one statute in 1874 and the current version of the statute was enacted in 1958.

Given this long and relatively uncontroversial history, and the terms of the statute itself, it seems to be simply a grant of authority to the agency to regulate its own affairs. What is clear from the legislative history of the 1958 amendment to § 301 is that this section was not intended to provide authority for limiting the scope of § 1905.

The 1958 amendment to § 301 was the product of Congressional concern that agencies were invoking § 301 as a source of authority to withhold information from the public. Congressman Moss sponsored an amendment that added the last sentence to § 301, which specifically states that this section "does not authorize withholding information from the public." The Senate Report accompanying the amendment stated:

> Nothing in the legislative history of [§ 301] shows that Congress intended this statute to be a grant of authority to the heads of the executive departments to withhold information from the public or to limit the availability of records to the public.

S. Rep. No. 1621, 85th Cong., 2d Sess., 2 (1958).

The logical corollary to this observation is that there is nothing in the legislative history of § 301 to indicate it is a substantive grant of legislative power to promulgate rules authorizing the release of trade secrets or confidential business information. It is indeed a "housekeeping statute", authorizing what the APA terms "rules of agency organization, procedure or practice" as opposed to "substantive rules."

This would suggest that regulations pursuant to § 301 could not provide the "authoriz[ation] by law" required by § 1905. But there is more specific support for this position. During the debates on the 1958 amendment Congressman Moss assured the House that the amendment would "not affect the confidential status of information given to the Government and carefully detailed in Title 18, United States Code, section 1905." 104 Cong. Rec. 6550 (1958).

The Government argues that this last statement is of little significance, because it is only made with reference to the amendment. But that robs Congressman Moss's statement of any substantive import. If Congressman Moss thought that records within the terms of § 1905 could be released on the authority of a § 301 regulation, why was he (and presumably the House) concerned with whether the amendment affected § 1905? Under the Government's interpretation, records released pursuant to § 301 are outside § 1905 by virtue of the first sentence of § 301.

The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history. Congressman Moss's statement must be considered with the Reports of both Houses and the statements of other Congressmen, all of which refute the Government's interpretation of the relationship between § 301 and § 1905. Of greatest significance, however, is the "housekeeping" nature of § 301 itself. On the basis of this evidence of legislative intent, we agree with the Court of Appeals for the District of Columbia Circuit that "[s]ection 301 does not authorize regulations limiting the scope of section 1905." Charles River Park "A", Inc., v. HUD, 519 F. 2d 935, 942-943 (1975).

There is also a procedural defect in the OFCCP disclosure regulations which precludes courts from affording them the force and effect of law. That defect is a lack of strict compliance with the APA. Recently we have had occasion to examine the requirements of the APA in the context of "legislative" or "substantive" rulemaking. In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), we held that courts could only in "extraordinary circumstances" impose procedural requirements on an agency beyond those specified in the APA. It is within an agency's discretion to afford parties more procedure, but it is not the province of the courts to do so. In Vermont Yankee we recognized that the APA is "'a formula upon which opposing social interests and political forces have come to rest.'" Id., at 547 (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950)). Courts upset that balance when they override informed choice of procedures and impose obligations not required by

the APA. By the same token courts are charged with maintaining the balance: ensuring that agencies comply with the "outline of minimum essential rights and procedures" set out in the APA. H. R. Rep. No. 1980, 79th Cong., 2d Sess., 16 (1946); see Vermont Yankee Nuclear Power Corp., supra, at 549 n. 21. Certainly regulations subject to the APA cannot be afforded the "force and effect of law" if not promulgated pursuant to the statutory procedural minimum found in that Act.

Section 4 of the APA, 5 U.S.C. § 553, specifies that an agency shall afford interested persons general notice of proposed rulemaking and an opportunity to comment before a substantive rule is promulgated. "Interpretive rules, general statements of policy or rules of agency organization, procedure or practice" are exempt from these requirements. When the Secretary of Labor published the regulations pertinent in this case, he stated:

> As the changes made by this document relate solely to interpretive rules, general statements of policy, and to rules of agency procedure and practice, neither notice of proposed rule making nor public participation therein is required by 5 U.S.C. 553. Since the changes made by this document either relieve restrictions or are interpretative rules, no delay in effective date is required by 5 U.S.C. 553(d). These rules shall therefore be effective immediately.
>
> In accordance with the spirit of the public policy set forth in 5 U.S.C. 553, interested persons may submit written comments, suggestions, data, or arguments to the Director, Office of Federal Contract compliance. . . .

38 Fed. Reg 3192, 3193 (1973).

Thus the regulations were essentially treated as interpretative rules and interested parties were not afforded the notice of proposed rulemaking required for substantive rules under 5 U.S.C. § 553(b). As we observed in Batterton v. Francis, 432 U.S. 416, 425 n, 9 (1977), "a court is not required to give effect to an intepretative regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise." We need not decide whether these regulations are properly characterized "interpretative rules." It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law. An interpretative regulation or general statement of agency policy cannot be the "authoriz[ation] by law" required by § 1905.

This disposition best comports with both the purposes underlying the APA and sound administrative practice. Here important interests are in conflict: the public's access to information in the Government's files and concerns about personal privacy and business

confidentiality. The OFCCP's regulations attempt to strike a balance. In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decision making require that agency decisions be made only after affording interested persons notice and an opportunity to comment. With the consideration that is the necessary and intended consequence of such procedures, OFCCP might have decided that a different accommodation was more appropriate.

B

We reject, however, Chrysler's contention that the Trade Secrets Act affords a private right of action to enjoin disclosure in violation of the statute. In Cort v. Ash, 422 U.S. 66 (1975), we noted that this Court has rarely implied a private right of action under a criminal statute and where it has done so "there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone." Nothing in § 1905 prompts such an inference. Nor are other pertinent circumstances outlined in Cort present here. As our review of the legislative history of § 1905--or lack of same--might suggest, there is no indication of legislative intent to create a private right of action. Most importantly, a private right of action under § 1905 is not "necessary to make effective the Congressional purpose." J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964), for we find that review of DLA's decision to disclosure of Chrysler's employment data is available under the APA.

IV

While Chrysler may not avail itself of any violations of the provisions of § 1905 in a separate cause of action, any such violations may have a dispositive effect on the outcome of judicial review of agency action pursuant to § 10 of the APA. Section 10(a) of the APA provides that [a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . .. is entitled to judicial review thereof." 5 U.S.C. § 702 (1976). Two exceptions to this general rule of reviewability are set out in § 10. Review is not available where "statutes preclude judicial review" or where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1), (2)(1976). In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971), the Court held that the latter exception applies "where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" Quoting S, Rep. No. 752, 79th Cong., 1st Sess., 26 (1945). Were we simply confronted with the authorization in 5 U.S.C. § 301 to prescribe regulations regarding "the custody, use, and preservation of [agency] records, papers and property", it would be difficult to derive any standards limiting agency conduct which might constitute "law to apply." But our discussion in Part III demonstrates that § 1905 and any "authoriz[ation] by law" contemplated by that section place substantive limits on agency action." Therefore we conclude that

DLA's decision to disclose the Chrysler reports is reviewable agency action and Chrysler is a person "adversely affected or aggrieved" within the meaning of § 10(a).

Both Chrysler and the Government agree that there is APA review of DLA's decision. They disagree on the proper scope of review. Chrysler argues that there should be de novo review, while the Government contends that such review is only available in extraordinary cases and this is not such a case.

The pertinent provisions of § 10(e) of the APA, 5 U.S.C. § 706 (1976), provide that a reviewing court shall:

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be-
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> * * * * *
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

For the reasons previously stated, we believe any disclosure that violates § 1905 is "not in accordance with law" within the meaning of 5 U.S.C. § 706(2)(A). De novo review by the District Court is ordinarily not necessary to decide whether a contemplated disclosure runs afoul of § 1905. The District Court in this case concluded that disclosure of some of Chrysler's documents was barred by § 1905, but the Court of Appeals did not reach the issue. We shall therefore vacate the Court of Appeals' judgment and remand for further proceedings consistent with this opinion in order that the Court of Appeals may consider whether the contemplated disclosures would violate the prohibition of § 1905. Since the decision regarding this substantive issue--the scope of § 1905--will necessarily have some effect on the proper form of judicial review pursuant to § 706(2), we think it unnecessary, and therefore unwise, at the present stage of this case for use to express any additional views on that issue.

Vacated and remanded

Mr. JUSTICE MARSHALL, concurring.

I agree that respondents' proposed disclosure of information is not "authorized by law" within the meaning of 18 U.S.C. § 1905, and I therefore join the opinion of the Court. Because the number and

complexity of the issues presented by this case will inevitably tend to obscure the dispositive conclusions, I wish to emphasize the essential basis for the decision today.

This case does not require us to determine whether, absent a Congressional directive, federal agencies may reveal information obtained during the exercise of their functions. For whatever inherent power an agency has in this regard, § 1905 forbids agencies from divulging certain types of information unless disclosure is independently "authorized by law." Thus, the controlling issue in this case is whether the OFCCP disclosure regulations, 41 (CFR §§ 60.40-1 to 60.40-4 (1978), provide the requisite degree of authorization for the agency's proposed release. The Court holds that they do not, because the regulations are not sanctioned directly or indirectly by federal legislation. In imposing the authorization requirement of § 1905, Congress obviously meant to allow only those disclosures contemplated by congressional action. Ante, at 17-28. Otherwise the agencies Congress intended to control could create their own exceptions to § 1905 simply by promulgating valid disclosure regulations. Finally, the Court holds that since § 10(e) of the Administrative Procedure Act requires agency action to be "in accordance with law," 5 U.S.C. § 706(2)(A), a reviewing court can prevent any disclosure that would violate § 1905.

Our conclusion that disclosure pursuant to the OFCCP regulations is not "authorized by law" for purposes of § 1905, however, does not mean the regulations themselves are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" for purposes of the Administrative Procedure Act. 5 U.S.C. § 706(2)(C). As the Court recognizes, ante. at 25n.40, that inquiry involves very different considerations than those presented in the instant case. Accordingly, we do not question the general validity of these OFCCP regulations or any other regulations promulgated under § 201 of Executive Order 11246. Nor do we consider whether such an Executive order must be founded on a legislative enactment. The Court's holding is only that the OFCCP regulations in issue here do not "authorize" disclosure within the meaning of § 1905.

Based on this understanding, I join the opinion of the Court.

Section 9. Interest

FEDERAL ELECTRIC CORPORATION

ASBCA No. 24002 (1982)

Supra, pg. 10-50

GOVERNMENT CONTRACT LAW CASES

Chapter Eleven

REMEDIES-GOVERNMENT

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CHAPTER XI

REMEDIES - GOVERNMENT

Section 1. Set-Off

REPUBLIC AVIATION CORPORATION

ASBCA No. 6826 (1963)

From an analysis of the Government's motion to dismiss as further elaborated in its answer as amended, the Government's position resolves itself to two contentions. First, that a set-off action is involved in this appeal, and the Board has no authority to review set-off actions. Second, even if the Board should assume jurisdiction of the appeal and find that the contracting officer's letter of 15 August 1960 to RAC was a finding within the purview of the Disputes clause, the instant appeal is untimely because it was not taken until more thaa 30 days after Republic had received the letter of 15 August 1960.

As to the Government's right of set-off, this Board has never questioned in any of its decisions the right of the Government to set off against one contract an indebtedness due it arising from another contract. When, however, that indebtedness is construed to arrive from an interpretation of the terms of a contract, and a factual question of whether the contractor is required to perform the contract in accordance with such interpretation exists, then the validity of said indebtedness becomes a question of fact requiring a determination by the contracting officer. As such, the decision of the contracting officer is appealable under the Disputes clause.

Applying this reasoning to the case before the Board, the determination of RAC's liability as made heretofore, was based upon an analysis of Republic's obligation under its Government contract AF 33(600)-8116. The initial assumption, as exemplified in the contracting officer's letter of 17 February 1959, appears to have been based upon an interpretation that certain provisions of the Operating Manual, incorporated by reference into Contract AF 33(600)-8116, required Republic to furnish a master tool fixture for the manufacture of the glass canopies by Aerfer. Later, as shown by the quoted excerpt from the Government's letter to the appellant dated 2 February 1962, Government trial counsel stated that it had always been recognized that the master tool for the canopy was not included on the list of specific tools which RAC was to furnish Aerfer, but that RAC

was obligated to furnish whatever technical assistance Aerfer required to insure complete interchangeability between RAC parts and those of Aerfer, a duty which RAC failed to accomplish. Therefore, maintains the Government, RAC is in breach of contract and liable for the rework costs of $71,000.

Such interpretations by administrative Government officials, as contracting officers, of the terms and requirements of contractual provisions involve questions of fact, and such factual determinations are appealable under the Disputes clause. The question, therefore, of whether RAC was required under its contract terms to insure complete interchangeability of parts, is a question of fact, and accordingly, is a matter within the jurisdiction of this Board for hearing on the merits of RAC's appeal. The motion to dismiss is overruled.

* * * * *

Modification No. 10, which was mutually agreed to by the parties, stipulated that, because of the extensive delays occasioned by the Government, plaintiffs were entitled to an equitable adjustment in the contract price in the sum of $87,270.92, which amount (in the express words of the agreement) "shall constitute full compensation for said delays." [Emphasis Supplied.] And in July 1953, plaintiffs, in applying for the final payment under the contract which amounted to $25,115.91, certified that the total contract price, which included the increase granted in Modification No. 10, was correct and just. In November they received and accepted that amount as final payment under the contract, without protest or reservation.

There is no ambiguity in language which states that a certain sum shall constitute full compensation for delays. From this--and the unequivocal conduct of the parties--we must conclude that plaintiffs knew that their claim for delays would be fully discharged upon payment of the $87,270.92. Full negotiation of the difference between the parties resulted in an agreement, evidenced in a written instrument, to accept an amount which was less than that originally claimed in full settlement of their expenses and losses from delays. Subsequently defendant paid the agreed amount in satisfaction of the compromised claim and plaintiffs accepted it. The agreement contained no specific reservation by them of a right to seek other damages for delays. Having voluntarily agreed to the modification and having accepted its benefits as "full compensation" for delays, plaintiffs are bound by it.

Plaintiffs seek to avoid summary judgment by asserting that in making settlement that element of their claim now sued upon (loss of profit) was expressly reserved for subsequent consideration, that any claim for loss of profit would have been premature at the time of the Modification No. 10 agreement, since the contract was then incomplete, and that a claim such as theirs for unliquidated damages was not within the authority of the contracting officer.

Plaintiffs' contention that there was an express reservation of loss of profit is based on language in their letter of August 11, 1952, previously quoted: "This is not a claim for profit or additional profit; we merely wish to recover the amount of our loss on the project."

They contend that by this language they reserved a claim for loss of profit. Clearly this is not an express reservation of a claim for profit. In fact, we think it might more reasonably be read as a renunciation of any claim to profit. From the language plaintiffs used in their claim on August 11, 1952, it was natural and reasonable

for the contracting officer to conclude that he had before him for consideration the plaintiff's entire claim. He recommended all eight items of the claim be allowed in full except for one item, that pertaining to extra overhead, which he recommended be reduced approximately $14,000.

The contract price was increased according to these recommendations, and it can hardly be said that it was not a generous settlement when measured by the amount actually claimed. Yet the contracting officer's recommendations as to the eight items actually presented might well have been different had he known that plaintiffs planned to present (if they did so plan) three years later a ninth item of alleged loss amounting to $81,000 which, stemming as it did from the same delays, by right should have been a part of the same equitable adjustment. He could not properly evaluate the claims before him without knowing that other claims were being reserved for future action. Having led the contracting officer to believe that there would be no claim for loss of profit, plaintiffs should be estopped from asserting it now.

If plaintiffs had intended to leave a claim for profits open, their intention to do so should have been manifest and explicit, not necessarily in the preliminary letter but certainly in the written agreement incorporating the actual settlement.

Nor do we find any merit in plaintiff's argument that they could not have made a claim for reasonable profits lost along with the eight items of loss actually claimed on August 11, 1952, on the ground that the contract was at that time still incomplete. As a matter of fact, plaintiff's claim was based upon damages for delays prior to June 30, 1952. On that date the contract as modified was 94 percent complete. Their certified accountant estimated that as of that date the dollar amount of unfinished work under the contract amounted to approximately $28,000. The accountant, in working up his profit and loss statement as of that date, assumed that there would be neither profits nor losses on the remaining work, a relatively small amount as compared to a total contract price at that time of $895,980.08.

Plaintiffs apparently rely on the rule to the effect that in a public contract executive officers representing the Government therein are not authorized to entertain and settle claims for unliquidated damages, either because of lack of statutory authority to do so, or because of lack of appropriations to pay damages. They cite the Continental Illinois National Bank & Trust Company case in which this court said: "The departments are authorized to spend money only for the purposes for which it is appropriated by Congress. Funds are not appropriated to pay damages for breaches of contracts."

To take advantage of this rule, plaintiffs seek to establish their claim as one for damages and therefore cognizable only in the courts in an action for breach of contract, as distinguished from a claim under the contract which must be determined by the contracting officer in the form of an equitable adjustment. It should be noted parenthetically, however, that out-of-pocket losses caused by the

delays were treated by the parties at the time as a payment under the contract, that is, an an equitable adjustment under the "Suspension of Work" clause. Even if such a distinction could be validly maintained it would be of little aid to the plaintiffs on the facts of this case. We are dealing here not with a unilateral determination by the contracting officer, but with a mutual agreement between the parties. Where the executive officer of the Government who is charged with administering a contract does in fact reach a mutual agreement with the contractor setting a claim for unliquidated damages flowing from Government delays, and the agreed amount is actually paid from funds appropriated for that procurement, such settlement is conclusive of all elements of the claim, except those specifically reserved by the parties to the contract.

As long ago as 1875 the Supreme Court considered the power of the executive department to effect settlements and, in the case of United States v. Corliss Steam-Engine Company, on appeal from this court, held that the executive department, acting through its duly authorized delegate, had inherent authority to enter into a binding agreement settling a claim which, because of the absence of a contract clause permitting or requiring payment, was necessarily one for damages for breach of contract. That case involved two contracts for installing engines on naval vessels. When still uncompleted, the Navy ordered the contractor to stop all work on the contracts. Since there was no reservation of a right to terminate, this was a breach of contract. The contractor offered, in full settlement of its claim for damages as a result of the breach, to deliver the uncompleted machinery to the Navy in return for payment in the amount of $259,068.40 (the contract price plus extra work minus the sum of $45,000 allowed as a deduction for not having to install the machinery as contemplated in the contract).

In lieu of payment, due to insufficient funds, the contractor was issued a certificate of indebtedness for the full amount of the settlement pending a further appropriation by the Congress. Subsequently both the Congress and the Navy sought to reduce the settlement by $110,000. In a suit to recover the full amount as provided in the agreement, the Government attempted to avoid its obligation under the settlement on the ground that the bureau chief was without authority to make the settlement and his act, therefore, did not bind the Government. The Government argued that, when a contract is broken by the Government, thereby entitling the contractor to whatever damages are provided by law, it becomes a matter solely for judicial determination in the Court of Claims; that the result of the order to cease work was "virtually to refer the matter at once to the tribunal devised by Congress to represent public justice in disputes about money between plaintiff and the United States." The court rejected this argument, holding that when such a settlement is made upon a full knowledge of all the facts, without concealment, misrepresentation, or fraud, it is equally binding upon the Government and the contractor.

The Supreme Court found the necessary authority in the Act of April 30, 1798, which created the Navy Department and defined the duties of the Secretary. Under the statute, his duties included the

construction and equipment of war vessels. From this duty was derived the implied authority to enter into numerous contracts, since it could not be discharged without doing so. The power to make contracts carried with it the power to suspend them and to agree to settlements with contractors, for if he could agree initially upon the amount of compensation for full performance, he had equal authority to agree upon compensation for partial performance, i.e., damages for breach of contract.

Subsequently the Supreme Court considered a case where the contractor executed without reservation a release, as provided in the contract, of all claims "under and by virtue of the contract", in order to obtain the final payment of the contract price then due it. Although the contract called for completion of the work in 3 years, it had taken 5 years because of Government delays. The contractor claimed, after giving the release, seven items of damage resulting from the delays in the total amount of $480,231.90. It brought suit in this court obtaining judgment for part of its claim, which on appeal was reversed by the Supreme Court. Before the Supreme Court the contractor's argument was similar to plaintiffs' in the case at bar. It argued that the release it gave under the contract did not encompass its claim for unliquidated damages for breach of contract, because "* * * unliquidated damages arising from the breach of the contract on the part of the United States, which were not only not presented or considered, but were of such a character that the Secretary of the Navy had neither the right, authority, or jurisdiction to consider, adjust, or pay." The Supreme Court, in sustaining the release as conclusive of all of the contractor's claims against the Government, necessarily sustained the power of the Secretary either to entertain the claim and provide for it, or at least to consent that the claim should be reserved for later consideration. In the second Cramp case, the Supreme Court upheld the validity of such a reservation in a release and thereby the power of the Secretary of the Navy to make such an agreement.

Significantly, plaintiffs have cited us no cases where this court has invalidated, on the ground of lack of authority, any agreement made by the contracting officer in the settlement of a claim for damages for breach of contract. On the contrary, we have held on numerous occasions that compromise settlements were valid and binding on both parties. One of these, Badger Manufacturing Co. v. United States, involved a settlement which included a claim for damages for delay in furnishing Government-furnished materials.

But aside from the question of the inherent authority of a contracting officer to settle unliquidated claims in the absence of specific provision for payment of such in the contract, we think that the "Suspension of Work" clause controls the rights and duties of the parties in the case at bar. The suspension clause converts an action for damages into a matter properly for determination and payment under and pursuant to the contract in the form of an equitable adjustment.

The Congress has enacted legislation authorizing the department to enter into construction contracts. The contract in issue authorized suspension by the Government and an equitable adjustment for any damages and losses occasioned by unreasonable delays caused by the Government. An equitable adjustment was made and agreed to by both parties and settlement was made pursuant thereto. No express reservation was made in the settlement agreement of any claim for lost profits. It was a complete accord and settlement. The claim plaintiffs now make grew out of the same contract and grows out of the same delays.

Defendant's motion for summary judgment is granted, plaintiffs' motion is denied, and the petition is dismissed.

BEST JANITORIAL SERVICE

ASBCA No. 7707 (1963)

* * * * *

The "Deductions" Claim

While this claim presents numerous subsidiary complaints it presents three ultimate questions. First: Did appellant perform all the work required by the contract or did it - as the Government contends - substantially fail to perform some required work at all and substantially fail to do some performed work to a reasonable standard? (The Board's decision is that appellant did substantially fail as contended by the Government.) Second: Did the Government have to pay the full monthly contract price or was it obligated to pay only for the work done to a reasonable standard of performance? (The Board's decison is that the obligation was to pay only for the work done to a reasonable standard.) Third: Is any additional amount due appellant for work done under the contract? (Appellant has not specifically questioned the amount paid nor suggested an adjusted figure but stands on its position that the total price had to be paid whether or not the work was done and without regard to its quality. The Board has nonetheless reviewed the amount paid and decided that the evidence does not show appellant to be entitled to any additional payments and does support the reasonableness of the amount paid.)

The evidence as to whether appellant performed all of the required services and as to the quality of the work done is, of course, conflicting.

Appellant and two of his workmen testified. Their testimony is that all, or substantially all, work was done with explanations as to the exceptions. One of the workmen worked about a month and left about 13 or 14 May 1961. The other worked for June only. Their testimony shows that neither ever inspected all work done on any night. Appellant was not on the job every night. And the record does not show that he inspected each night's work to see that all required services were performed. Appellant apparently kept no inspection reports for none were offered or referred to. While appellant was very positive that substantially all of the work was done and done in a creditable manner, and that such work as was not done was prevented by the Government, his testimony as to the amount of work done and undone and as to the quality of the work done is not persuasive.

Several Government witnesses testified, including three inspectors who made daily inspections, and their testimony is that much of the work was not done at all and that much of the work that was done

was of a quality below any reasonable standard. The Government's daily inspection reports for May through 7 September 1961 are also before the Board. They show much work not done at all and that certain of the work done was of poor quality. Except for the three inspectors the Government witnesses did not, on any regular basis at least, make any overall inspections of appellant's work but they did view the results of the work done - or undone - by appellant in their own buildings and testified with respect thereto.

On Tuesday, Wednesday, and Thursday nights there were 9 buildings (some 95 rooms for some 33,085 square feet) to be cleaned; and on Monday and Friday nights there were 11 buildings (some 113 rooms for some 40,205 square feet) to be cleaned.

All floors were to be swept daily; all floors were to be buffed daily; all latrines were to be cleaned daily; heel marks and accumulated wax were to be removed from all floors weekly; and all floors were to be waxed weekly, except in the Procurement Building which was not to be waxed. In addition two rugs in the Headquarters Building were to be vacuumed daily; drinking fountains were to be washed; the window shades and venetian blinds in the conference room were to be dusted; high dusting was to be done in the conference room; and low dusting was to be done in all buildings. Low dusting is defined in the contract as the dusting of all places easily reached by standing on the floor but not including desks, tables, office furniture and office equipment. The removal of heel marks and accumulated wax presented a problem. One of appellant's witnesses said, for example, that the personnel must have worn crayon soled shoes. The sense of the record is that heel marks and wax cannot be removed by sweeping, usually cannot be removed by mopping, and must be removed by scrubbing. The contract contemplates mopping, but only when a floor cannot be cleaned by sweeping; and contemplates scrubbing, but only when a floor cannot be cleaned by mopping. No mopping or scrubbing frequencey is specified. Accordingly the Board understands that almost all if not all floors had to be scrubbed once a week to remove heel marks and accumulated wax.

Appellant undertook performance with three men plus himself part time. During the "stripping" operation one man was added. But during the end of May only two men were on the job. In June and early July there were three part time men and one part time [wo]man on the job. Later in July and during August and September there were three men on the job. At the start appellant used three buffing machines, later only two, and thereafter at times there was only one. All employees appellant used were new employees as appellant used his former employees on other contracts. No employee who started on this job continued on it throughout its performance. Late in the period of performance appellant and his employees were arriving on the job as late as 10:00 and 12:00 P.M.

The record does not show how many men the other bidders on the original procurement intended to use. On the reprocurement one of the three bidders told the Government he planned to use four, another that he planned to use six, and the third (successful and lowest) that he planned to use six or seven.

While appellant, in his testimony, made certain estimates as to the time it would take to clean various buildings, which if correct show three people were sufficient under normal circumstances, the Board does not find them persuasive. The Board is convinced that this contract was undermanned and that appellant simply could not perform all the services called for with the number of men and amount of equipment used. The result was that some work was not done at all, other work was done but in a hasty slip shod - and totally unsatisfactory manner, and yet other work was done creditably and in accordance with contract requirements. That the work was so performed (some good and some bad) and unperformed is borne out by the daily inspection reports and by the testimony of the inspectors and other Government witnesses.

The contract lists the buildings to receive service, shows the square feet in each to be cleaned, shows a unit price per square foot, and shows a total monthly price for each building. It does not contain a unit price breakdown covering the various services to be performed. Nor does it contain a specific statement that less than the unit and/or total prices is to be paid if some services are omitted or are performed but in an unacceptable manner. And it does not contain a formula by which the price is to be adjusted if any of the various services are omitted or are performed but in an unacceptable manner. It does contain the following provisions:

> 2. PAYMENTS: The contractor shall be paid monthly upon the submission of properly prepared invoices for services rendered and accepted. Payments for periods of less than one month will be prorated.
>
> 4. PAYMENTS: The contractor shall be paid, upon the submission of proper invoices or vouchers, the prices stipulated herein for supplies delivered and accepted or services rendered and accepted, less deductions, if any, as herein provided. * * *

The Government provides that all services shall be subject to th Government inspection and designates the Base Engineer as the officer responsible for inspection and acceptance of services performed. The Base Engineer designated enlisted men as inspectors. Initially (Apri 1961 into late August 1961) they inspected beginning at about 7:30 AM one man inspecting all buildings. He had a form on which he stated

under four headings (1. Sweep; 2. Remove Heel Marks & Stains, etc.; 3. Buff; and 4. Clean Toilets and Lavatories) whether work was done and in some cases commented on its quality or appearance. These forms were turned in to Sergeant Buck in the Base Engineer's office and form the basis for payments for May, June, July and August. They are before the Board. Beginning on 28 August 1961 inspections were made at night. One inspector was assigned to each workman (3 men - 3 inspectors) and accompanies him observing what he did and how he did it. During this period the reports were in more or less narrative style in note books. The three books are before the Board. They too were turned in to Sergeant Buck and form the basis for computation of the amount earned during September. The last inspection entry is Thursday 7 September 1961.

Sergeant Buck, who did not testify, computed the amounts earned for each month. The computations were reflected in monthly receiving reports. The form used called for a statement of the "quantity received" and the "items" inspected and accepted. In fitting the results of his computations to the form Sergeant Buck would show that less than the number of square feet covered by the contract had been received. If, for example, a building with 1000 square feet was to be cleaned on 20 days a month at a unit price of $.05 per square foot for a total price of $50.00 and Sergeant Buck determined from the inspection reports that it had in fact only been cleaned on 10 days he would show 500 square feet received at $.05 per square foot for a total payment of $25.00. The actual computation was more complicated than this illustration as various services were to be performed in each building and the contract price was allocated among them.

For May and June 1961 Sergeant Buck made a general estimate as to the portion of the total contract price earned on each building. In July 1961 Sergeant Buck and the Base Engineer, without consulting appellant, jointly arrived at a formula under which they allocated 25% of the contract price to sweeping, 35% to buffing, 10% to the removal of marks and stains, 25% to the cleaning of lavatories and latrines, and 5% to dusting. This formula was used for July, August, and September 1961. Sergeant Buck's estimates and computations for each month were spot checked by the Base Engineer who signed the receiving reports and testified before the Board. The computations are not before the Board. The results of the computations are:

Each month appellant submitted an invoice for the total monthly price of $1,037.30. Each month the Government (Finance Office) returned it because it was for "more services than received" or because of "error in price", and forwarded a copy of the receiving report showing the amount computed to have been earned. Appellant would then submit a new invoice in the amount of the Government's computations. It was on this basis that appellant was paid.

Appellant's two principal objections to this basis for payment are (1) that it did all of the work as required by the contract and (2) that even if it did not it was entitled to the full contract price so long as the contract was not terminated. In addition appellant advances other objections.

One is that he bids on the basis of so much a square foot with variations in price depending on the size of the area to be cleaned. The Board asked appellant to break its unit prices down into the categories used by the Government in its formula and appellant - as an estimate - did so (sweeping 30%, buffing 30%, removal of marks and stains 30%, lavatories and latrines 10% to 15%, and dusting 5%) but testified he had never tried to break a unit price down that way before, that he did not bid that way, and that to do so would be impossible. Accepting appellant's testimony as to how he bids it is nonetheless the Board's decision that the cost of cleaning a building depends in large part not only upon the size of the area to be cleaned but also upon the operations to be performed and that the price to be paid for cleaning services will vary accordingly. We think it to be obvious that the price for sweeping the buildings covered by this contract would be lower than the price for both sweeping and buffing the same buildings; and that the price for sweeping and buffing the buildings would be lower than the price for sweeping, buffing, dusting, and waxing the same buildings. If the Government does not have to pay for services it does not receive then the unit prices must be broken down in some way to arrive at the prices to be paid when some work is done and some is not done in a building. It is the further decision of the Board that the formula used by the Government is - on this record - a reasonable formula in this case.

Another objection by appellant is that he was not currently advised of claimed defects or given an opportunity to correct what was considered inadequately done. For the most part it is true that appellant was not advised on a day to day or week to week basis of claimed defects. However, it is apparent that even if appellant had been so advised he could not have corrected them. When a building is to be swept on Monday night the defect cannot be corrected whether or not notice is given on Tuesday morning that it was not swept. These are the kind of defects that are involved in this case.

Another objection by appellant is that the Government was secretive about the results of its inspections and that despite his repeated requests to see the daily inspection reports he was refused permission to see them, except that on 10 July 1961 he was shown the report for that day. Other evidence is that the Base Engineer's orders were, and Sergeant Buck's orders were, that appellant was to b shown the reports if he asked to see them, and that he did on occasio ask to see them and was shown them. The Board is not persuaded that the Government was secretive about its inspection reports. Furthermore the Board is not persuaded that had the Government been secretiv this would in some way have obligated the Government to pay for work not done.

Yet another objection by appellant is that he had no advance information that anyone contended he was omitting any part of the work and that he would not be paid in full for each month, with specific reference to May, June, July and August 1961. He professed during the hearing not to know or understand why he had not been paid in full for each month - and with respect to the statements on the receiving reports that less than the contract quantity of square feet had been received contended that the contract quantity (i.e., area) had never been reduced. Other evidence shows that on 22 May 1961 the Government told appellant by telegram that the work was completely unsatisfactory; that by letter dated 29 June 1961 (in reply to a letter by appellant requesting an explanation of the payment made for May) appellant was told that the "deductions" were made because the contract work was not performed, was furnished the Government's position as to the percentage of completion on each building, and was referred to the payments article; and that by another letter dated 29 June 1961 citing the Default article appellant was advised that he had failed to make required deliveries and that termination for default was being considered. The record also shows that there were numerous conferences with appellant concerning his work under the contract during which it must have been made clear that the Government considered that some work was not being done at all and that some work was being done in an unacceptable manner. The Board is persuaded that appellant was not misled by the Government into believing that the work was all being done satisfactorily and that payment would be made at the total contract price.

Appellant advanced several other complaints with respect to the contract and the Government's actions thereunder.

Appellant complains that the contract was poorly written and contains impossible requirements. In support of this appellant points to a requirement that desk material not be disturbed and to another requirement that before vacuuming the two rugs in the Headquarters Building the furniture be removed. Since the desks were too big to go through the doors without being tilted these requirements conflicted and it was impossible to comply with both. As a result appellant did not remove the desks before vacuuming. There is no evidence that the Government ever objected to the failure to remove the desks or that any "deduction" ever resulted from the failure to remove them.

Appellant complains that initially the Government made its inspections in the morning after the occupants of the buildings had started to work and that accordingly the inspection reports are not reliable to show whether the building had been cleaned during the night. Appellant complains that later on the inspections were made at night by inspectors who followed or accompanied his workmen and that this annoyed and harassed the workmen. With one exception the Board is not persuaded that the morning inspections were made at an inappropriate time. These inspections started at about 7:30 AM and took in the neighborhood of one to two hours. The Board believes that

by inspecting at this time the Government could determine whether work had or had not been done and the quality of the work done. The exception is in the Chapel and Chapel Annex where Friday night's work was not inspected until Monday morning. Bearing in mind the uses to which Chapels and Chapel Annexes are put Monday morning seems to be a most inappropriate time to inspect Friday night's work and this has been considered by the Board in reviewing the payments made for work in these buildings. With respect to the inspections made at night the Board can see how they could be annoying to both parties but they are not precluded by the contract and bearing in mind the disagreements between the parties as to the work done the Board is not persuaded that the night inspections were inappropriate at the time they were instituted in this case.

Appellant complains that the buildings were open at night and were to some extent used by Government personnel at night. This should have been anticipated by appellant. The Board recognizes, however, that if a building is used at night this can have some effect on doing the work in the first place and on its appearance in the morning in the second place. However, the evidence in this case as to the effect is skimpy in the extreme. Appellant did not relate any particular "deduction" to night use of the buildings.

Appellant complains that inspectors set traps (little piles of sand on window ledges and in corners, paper clips on floors, dated pieces of paper under desks) which annoyed and harassed his workmen. That such traps were on occasion set is established by the evidence. How often, how many, and with what overall results is speculative. The evidence also shows that on occasion such traps would be found in the morning on a floor that was supposed to have been swept the night before. (Hearsay evidence by appellant is that one of his workmen was so annoyed by these traps that he would put them back after cleaning.) The Board recognizes that opinions differ as to the propriety of using such traps but expresses no opinion of its own thereon. In the instant case there is no showing that they were so numerous or onerous as to increase appellant's work or reasonably occasion a failure to perform.

Appellant complains that early in the contract he hired military personnel as workmen at the Government's suggestion and that one night, 6 June 1961, all of them, without notice to appellant, failed to report for work with the result that appellant, with some difficulty, had to secure civilian help late at night in order to do the night's work. Thereafter appellant did not use military personnel. The Board is not persuaded that appellant's use of military personnel was other than voluntary on his part or that their failure to show up was due to the fault of the Government. In this connection another complaint of appellant (supported by only hearsay evidence) is that Major Kelly, Base Procurement Officer, told the mother of one of the enlisted employees that appellant was not performing, would not get paid in full, etc., and that the employee quit because of this. This

complaint is not proved by any persuasive evidence. The record does show, however, that the military employees were not paid in full by appellant, and that one of appellant's civilian workmen quit at the end of June 1961 because he was dubious about being paid.

* * * * *

Decisions on the "Deductions" Claim

We find that appellant failed to perform at all a substantial portion of the work required by this contract and also failed to perform in accordance with a reasonable standard of performance a substantial portion of the work that it did so. We use the word "substantial" in our finding because under a contract of this kind it would be within the contemplation of both parties that there would be occasional failures and that such occasional failures would not affect payments.

We find further that except in isolated instances the failures by appellant were not occasioned by any act of the Government. The isolated instances are those involving unlighted latrines and construction work.

It is the decision of the Board that under this contract the Government did not have to pay for work that was not done and did not have to pay for work which was done but not done in accordance with a reasonable standard of performance. The Government's obligation to make payments is spelled out in the "Payments" articles in the contract. That obligation is to pay for services rendered and accepted. See Flight Test Engineering Company, ASBCA No. 7661, 19 November 1962, 1962 BCA ¶ 3606; Constructors Transport Company, ASBCA No. 8217, 24 January 1963, 1963 BCA ¶ 3640; and Cf. Machelor Maintenance & Supply Corporation, ASBCA No. 7997, 12 March 1963, 1963 BCA ¶ 3697. To this decision the Board in this case recognizes one exception and that is in connection with the isolated failures occasioned by acts of the Government. These failures in effect result from the failure of the Government to make the rooms concerned available for cleaning. Viewed as deductive changes there would be no measurable cost saving to appellant and no downward price adjustment would be equitable. Viewed from a performance standpoint the rooms concerned received service appropriate to rooms in their condition.

We reject appellant's argument that the contract was of a unitary nature and that absent termination of the contract the Government was obligated to pay the total monthly contract price whether or not the work was done and without regard to the quality of its performance. The cases cited by appellant in support of this argument all involve an employer - employee relationship which is not the relationship between the parties in this case, and they do not involve the payments provisions that are in this contract.

We likewise reject appellant's argument that because the contract contained no percentage formula, and because none was agreed upon between the parties, the procedure followed by the Government did not fit the type of contract entered into; and that because the contract sets the amount of compensation it was not competent for the Government to vary the method of payment prescribed by the contract. While we have discussed this claim as a "deductions" claim because that is the term used by the parties we do not view it as a "deductions" claim at all but as a "payment" claim. The problem is not what amount the Government can deduct because of appellant's substantial failure to perform the contract but is rather what amount appellant is entitled to be paid for the work it did do. This is the approach the Government in fact used. Since appellant did do a substantial amount of the work called for by the contract it was entitled to payment for such work and it would not have been proper for the Government under a service contract such as this to make no payment because part of the work was not done. Maintenance Engineering, Inc., ASBCA No. 8045, 27 March 1963, 1963 BCA ¶ 2694. Under these circumstances some allocation of the contract price between done and undone work was necessary and the use of a formula method was appropriate. This did not vary the method of payment prescribed by the contract. Instead it provided a basis upon which appellant could be paid for services rendered and accepted in a case where appellant performed only part of the work required by the contract.

The Board has reviewed the amount paid and the evidence does not show that appellant is entitled to any additional payment. The evidence does support the reasonableness of the amount paid. In reaching these decisions the Board has considered the Monday morning inspections of Friday night work, the Procurement floor, the construction work, and the unlighted latrines. It has also noted that it was Sergeant Buck's practice, as shown on the inspection forms, to allow full credit in those cases where the inspectors noted they had not inspected, said work was "fair" or "could be better" or was "maybe" done, or noted an unlighted latrine. The Board decision with respect to the amount paid is of necessity in the nature of a jury verdict. Its review of the record leads it to the conclusion that the May and June payments were generous and that the July and August payments were somewhat higher than a strict application of the formula would have produced.

The appeals, insofar as they relate to the "deductions" claim, are denied.

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PATHMAN CONSTRUCTION COMPANY

ASBCA No. 16,781 (1974)

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Findings of Fact-Liquidated Damages

The final issue is whether appellant is responsible for the 40-day delay in the completion and acceptance of the mess hall and consequent assessment of $4,000 in liquidated damages.

Contract Provisions

The portions of the contract relating to Government acceptance of the mess hall provide:

> General Provision
> "5. TERMINATION FOR DEFAULT-DAMAGES FOR DELAY-TIME EXTENSIONS
>
> * * *
>
> "(c) If fixed and agreed liquidated damages are provided in the contract and if the Government does not so terminate the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until the work is completed or accepted."
>
> General Provision
> "10 INSPECTION AND ACCEPTANCE
>
> * * *
>
> "(f) Unless otherwise provided in this contract, acceptance by the Government shall be made as promptly as practicable after completion and inspection of all work required by this contract. Acceptance shall be final and conclusive except as regards latent defects, fraud, or such gross mistakes as may amount to fraud, or as regards the Government's rights under any warranty or guarantee." (Id.)

General Condition

"10. Possession prior to completion.--The Government shall have the right to take possession of or use any completed or partially completed part of the work. Such possession or use shall not be deemed an acceptance of any work not completed in accordance with the contract. If such prior possession or use by the Government delays the progress of the work or causes additional expenses to the contractor, an equitable adjustment in the contract price and/or the time of completion will be made and the contract shall be modified in writing accordingly." (Id.)

Special Condition

"2. LIQUIDATED DAMAGES.--In case of failure on the part of the Contractor to complete the work within the time fixed in the contract or any extension thereof, the Contractor shall pay the Government as liquidated damages the sum of $100.00 for each calendar day of delay until the work is completed or accepted. No liquidated damages will be assessed for planting delays if establishment of grass, trees and shrubs extends beyond the time stated in SC-1." (Id.)

40 Day Delay in Project Completion

The contract completion date was extended from 5 June 1965 to 12 November 1965 by two separate time extensions totalling 160 days. The Government did not accept the mess hall, however, until 22 December 1965 or 40 days after the extended completion date. Appellant was assessed $100 in liquidated damages for each calendar day of delay under paragraph SC-2 of the contract.

Appellant contends the mess hall was ready for beneficial occupancy on or about Monday, 22 November 1964, and that delay time between 12 and 22 November 1964 was attributable to Government delay in selecting GSU colors the preceding year. The daily logs of both parties corroborate the mess hall's not being ready for beneficial occupancy prior to 22 November 1964, and we so find.

The construction status of the mess hall from 22 November to 22 December 1964 as reported in the uncontested Government daily logs is as follows:

"22 through 26 November 1965--No appellant supervisor on site 22, 23 and 24 November. Average of 5 to 7 men working each day doing the following: Installing hardware in toilets, grills and louvers in kitchen air conditioning units; insulating piping in kitchen equipment, and piping and equipment in the mechanical equipment room; cleaning

kitchen floor tile; installing oak benches in shower rooms and cork in the expansion joint on the north and south side. Kitchen mixers and doughnut machine were demonstrated with maintenance instructions to Post Engineer's personnel.

"29 November through 3 December 1965--Average of 4 to 7 workmen on project: Insulating piping and equipment in equipment room; checking heating system; installing racks in refrigerators; laying cement pad for and installing transformer; cutting expansion joints in sidewalk; adjusting air conditioning units; and punch list items. Army personnel had some type of open house on or about 3 December 1964 using the doughnut machine. They had also started to stock the mess hall and to prepare it at sometime prior to 1 December 1964.

"4 and 5 December 1965 (Weekend)--Three painters repainted kitchen walls and varnished benches in toilet rooms. One carpenter doing miscellaneous work.

"6 through 10 December 1965--Average of 4 to 8 workmen on the project: Cutting expansion joints in sidewalk and finishing concrete floor in equipment room; installing frames for oven hood filters in kitchen and insulation on pipe and equipment in equipment room; cleaning crawl space, fixtures and caulking floor sleeves; and punch list items. A process of checking and fixing heating and cooling units was required to lower average 78° to 80° temperature in mess hall to 74° to 76°, which was accomplished by Friday, 10 November. Operation of the heating system was also explained to Post personnel. Appellant had no representative at the site either Thursday or Friday.

"13 through 17 December 1965--No appellant representatives at project 13, 14, 15, 16 December, and no subcontractor representatives 15, 16 December; therefore no work performed those two days. Subcontract workmen insulated piping in the crawl space and replaced damaged ceiling tile 13 and 14 December. Three workmen cleaned walls in the north dining area on Friday, 17 December.

"18 and 19 December 1965 (Weekend)--Average of 7 to 8 workmen: Cleaning walls; repairing door handles; patching ceiling holes; working on dry storage shelving and wood trim on freezer door; washing windows.

"20 and 21 December 1965--Thirteen men at the project: Cleaning drains and installing drain funnels, cleaning mechanical room; rewiring circulating pumps and hot water heaters; installing meat racks in refrigerator room; changing location of a heater in the refrigerator hallway; cleaning up building; and punch list items.

"22 December 1965--Eight men doing punch list items. Mess hall is inspected and turned over to Post personnel who accepted it 'for Beneficial Occupancy (w/deficiencies) effective this date.'"

Thereafter, punch list items were intermittently corrected by appellant or its subcontractors from 23 December 1965 through 3 July 1967.

Subsequent to the Government's acceptance of the mess hall, the parties held meetings and exchanged correspondence relating to appellant's claims, acceptance of the facility and extensions of time. On 20 September 1967, the Government sent notice to appellant that deficiencies noted during the final inspection of 22 December 1965 had been corrected, and that final acceptance of the project would be considered effective as of 22 December 1965. Sixteen months later, appellant's president wrote the following three letters concerning the mess hall to the District Engineer on 30 January 1969. The first letter said:

"Gentlemen:

"We enclose herewith our letters dated January 30, 1969 regarding settlement of time extension and withdrawal of claim for doughnut machine with the understanding that our withdrawal of the claim of the doughnut machine is not effective unless the time extension settlement outlined in the attached letter is accepted.

"Very truly yours,

"PATHMAN CONSTRUCTION COMPANY"

The second letter said:

"Gentlemen:

"Confirming previous conversation we hereby withdraw our claim in the amount of $1,320.00 for additional cost for changes in the doughnut machine requirements.

"Very truly yours,

"PATHMAN CONSTRUCTION COMPANY"

In its third letter, appellant wrote:

"Gentlemen:

"A meeting was held in your office with Mr. Kaplan and Lieutenant May to discuss time extensions etc. in connection with the above project. As the writer indicated at the meeting, in our opinion, the project could have been accepted at a much earlier date than the December 22, 1965 indicated in your letter dated September 20, 1967, since it was substantially complete far earlier than the indicated date.

"In order to close out this matter of time extension we are willing to accept an extension of time of 138 calendar days providing this matter is acted upon at once so that we may obtain substantial monies due us.

"Very truly yours,

"PATHMAN CONSTRUCTION COMPANY"

One month later the contracting officer signed Change Order No. 16, dated 3 March 1969. It provided for time extensions and was accepted and signed by appellant's president on 5 March 1969. Change Order No. 16 states in pertinent part that:

"It has been determined that delay in the performance of the contract was due to causes beyond your control and without your fault or negligence, namely excessive rainfall, acts of the Government and a sheet metal strike.

"Therefore the contract completion date as set forth in Paragraph SP-1 of the contract specifications as amended is extended 138 calendar days.

"If the foregoing modification of said contract is satisfactory, please indicate your acceptance by executing Blocks 14, 15 and 16 below, and return the original and one signed copy to this office. The third signed copy is for your record."

By letter dated 16 April 1969, appellant's attorney wrote the Government's attorney concerning appellant's claim for the delay in the selection and installation of colored GSU as follows:

"Dear Mr. Wyant:

"This will confirm the advice of my phone calls to your office when I spoke to Mr. Gottner on April 9th and 10th and

to you on April 11th in connection with a claim of my client, Pathman Construction Co., under the subject contract, arising from selection and installation of glazed tile. Also, we discussed the fact that the Corps issued to Pathman Construction Co. a check in an amount over the sum requested for work done under this contract and that we wished the Corps to be on notice that the Company's right to negotiate this check did not prejudice its rights to present and press its claim concerning the glazed tile in the Enlisted Men's Mess Hall.

"The meeting which we set for Friday April 18th to discuss the details of the claim with you and members of the staff, pursuant to my phone call with you this morning has been rescheduled for 1:30 P.M., Monday, April 21st at your office.

"We appreciate the consideration and courtesies you continue to extend."

In a follow-up letter dated 1 May 1969, appellant's attorney set out the items of cost included in its GSU claim to the Government attorney in the following manner:

"Further reference is made to my letter of April 16, 1969 concerning the 'masonry glazed tile' claim of Pathman Construction Company which still remains open under the subject contract.

"This is the same matter with which we dealt in my letter to you dated February 8, 1965, with subsequent correspondence leading to a meeting with Colonel John C. Mattina, District Engineer, in March, 1965, which you and other members of his staff attended at the job site.

"The claim encompasses the following items:

"1. Double scaffolding and planking of all exterior bearing walls (inside and outside).

"2. Furnishing and installing and maintaining tarpaulins, visqueen and wood framing for same to enclose scaffolding, walls and work spaces.

"3. Heating costs, including heaters, fueling and maintenance of same, additional fire protection and night watchman.

"4. Additional cost of masonry material handling due to enclosures and cost of heating materials.

"5. Additional cost of field supervision and home office administration caused by delays attributable to the Government.

"6. Increased cost of glazed tile on account of change in colors selected different from that specified.

"7. Reduced efficiency of field masonry labor because of winter weather and adverse working conditions.

"The unaudited cost to Pathman Construction Company is $57,300.00, without mark-ups. Full break-down based on certified audit can be furnished if there is any likelihood that we can come to a mutually satisfactory arrangement on the question of liability.

"I would appreciate your lending your office to a full review of this claim in behalf of the Corps."

It must be noted that representatives of the parties who actual participated in the negotiations which culminated in Change Order No 16 were either deceased or unavailable at the time of the hearing, a we have taken this factor into consideration in our decision on this issue.

Decision-Liquidated Damages

Appellant contends there are two reasons it should not be assessed $4,000 in liquidated damages for the 40-day delay in the completion and acceptance of the mess hall. Appellant first asserts the Government caused the delay in the selection and installation of colored GSU and therefore is responsible for that portion of the del which is attributable to it. Appellant's other quarrel with the val dity of the liquidated damage assessment is that the mess hall was ready for beneficial occupancy on or about 22 November 1964, or at least 30 days before it was actually accepted by the Government. On the other hand, however, the Government insists that Change Order No 16 settled all claims for time extensions made by appellant under th contract, and that the mess hall was not ready for beneficial occupancy until the date it was accepted by the Government. We are convinced by the record and relevant law that appellant's arguments mus fail since we already have determined appellant was responsible for any delay in the selection and installation of colored GSU (Part II, supra), and because the evidence convinces us the mess hall was not substantially completed until the date it was accepted by the Government.

As to appellant's first premise, we are, in addition to our determination reached in Part II, supra, persuaded that, even if the Government were responsible in part for the GSU delay, Change Order No. 16 would preclude our granting a further time extension to appellant. Although the record concerning the extent of negotiation leading up to Change Order No. 16 is unclear, we believe appellant intended to and did settle all claims for time extensions through Change Order No. 16, as evidenced by its correspondence and actions contemporaneous with and subsequent to the issuance of this order. Mr. Pathman's letters strongly suggest that all time extensions were included in Change Order No. 16. The letters from appellant's attor ney confirm our conclusion in this regard since they relate solely t a monetary claim for extra costs that arise from GSU-masonry delays and do not mention time extensions. Contrary testimony offered at t hearing three years after these events occurred is, in our view, insufficient to change the clarity of the language contained in thes contemporaneous letters and the actions of the parties. Max Drill, Inc. v. United States, 192 Ct. Cl. 608, 620, 427 F. 2d 1233, 1240 (1970); International Telephone & Telegraph, ITT Defense Communications Division v. United States [17 CCF ¶ 81,071],--Ct. Cl. --, 453 F. 2d 1283, 1290 (1972); Catalytic Engineering & Manufacturi Corporation, ASBCA No. 15257, 72-1 BCA ¶ 9342, p. 43,356, mot. for reconsid. den. (30 May 1972).

The second reason advanced by appellant in attacking the impropriety of the Government's imposition of the disputed liquidate damage assessment is equally unpersuasive insofar as the evidence before us reflects. The rules for determining whether a project is substantially completed so as to preclude the accrual of liquidated damages are well settled. In a nutshell, substantial completion occurs on the date work is satisfactorily completed to the extent th facilities might be occupied or used by the Government for the pur- poses for which they were intended. Electronic & Missile Facilities Inc., ASBCA No. 10077, 66-1 BCA ¶ 5493, p. 25,741; W & J Constructio Co., Inc., ASBCA Nos. 12919, 13050, 69-2 BCA ¶ 7798. Consideration must be given to (1) the quantity of work remaining to be done, and (2) the extent to which the project was capable of adequately servir its intended use. W & J Construction Co., Inc., supra, at 36,209.

In this instance, the evidence of record is not as complete as might be. It consists of the Government's daily logs and two short testimonial statements to the effect the Government began stocking t mess hall at some undetermined time before 1 December 1965, and tha an open house of some nature--at which light refreshments from an undisclosed origin were served--had been held at the facility on or before 3 December 1965. Based on this evidence and the above cri- teria, we are persuaded the mess hall was not substantially complet for beneficial occupancy, i.e., capable of adequately meeting its intended use of serving 2,000 enlisted personnel, until 22 December 1965, the date on which the Government inspected and accepted it fo beneficial occupancy.

No evidence was introduced to show when the Government first started using the mess hall for serving meals to a substantial number of enlisted personnel. The fact the Government began stocking items and held an open house prior to 22 December 1965 does not establish the mess hall was substantially completed, nor do such actions establish Government acceptance of the facility since Government personnel had the contractual right to so use it under provision GS-10 o the contract. Moreover, the quantity and quality of work which remained to be done before 22 December 1965 was not minor. It involved a significant number of men and manhours, and was of such a nature as to preclude the Government's using the facility for its intended purpose. Much of the work that remained, even until the day before acceptance, was done in the kitchen where it would have signif icantly inhibited, if not prevented, the preparation and serving of food, and the washing of utensils during the week days as well as the weekends. Such work also raises the question of whether the kitchen would have met the standard of sanitary cleanliness required for such facilities. Other work affected the heating and cooling system of th building and evidence reflects that post personnel were still being instructed in the use of essential equipment during the time period i question.

To repeat the type and nature of other work already stated in ou findings would be a redundant exercise at this point. Therefore, we simply reiterate that appellant has failed to rebut the evidence whic establishes that the mess hall was not substantially completed or ready for beneficial occupancy by the Government before 22 December 1965. Consequently, we conclude appellant is solely responsible for the 40 day delay and liable for the consequent $4,000.00 in liquidate damages.

Section 3. Warranties - U.C.C.

THE GARRITY COMPANY

ASBCA No. 12174 (1967)

This is a timely appeal from a decision of the contracting officer assessing the contractor $17,522 for a shortage of 44,096 gallons of methanol called for by the contract. The Government's claim is asserted under a special warranty clause included in the contract. The parties are in agreement that there was a shortage of 44,096 gallons, but appellant disputes the Government's legal right to make any claim after inspection and acceptance and says that, if the Government has any valid legal claim, the correct amount is $11,464.96, being 26 cents per gallon for 44,096 gallons.

The appeal arises under a requirements contract for supplies described in the contract as follows:

> FSN 6810-224-8353 (507IV)1
> METHANOL, TECHNICAL: In accordance with Federal Specification C-M-232 Grade A. 99.85% minimum assay as Methanol. Specific gravity 0.7932 @ 20 degrees C/20 degrees C. 54 gallons per 55 gallon drum.

The contract called for the procurement of bulk methanol and filling it into drums, with both the bulk methanol and the drums to be supplied by the contractor and the filling to be done at the contractor's plant at San Pablo, California. The contract price was stated as a unit price per drum, the unit price being $21.33 per drum for "F.O.B. origin" deliveries and $21.56 per drum for "F.O.B. destination" deliveries. All deliveries were on an F.O.B. origin basis except deliveries to "Oakland Port" for shipment overseas, which were on an F.O.B. destination basis. The total estimated requirements shown by the contract were 17,954 drums. However, the actual quantities called for by delivery orders and delivered under the contract were 32,539 drums. The F.O.B. origin deliveries were shipped by the Government bill of lading to various destinations, the most important being Defense Depot Tracy.

The contract contains the standard Inspection clause of Standard Form 32, General Provisions, Supply Contract (June 1964 Edition). In addition, it contains the following special warranty clause:

SUPPLY WARRANTY (338A)

(a) Notwithstanding inspection and acceptance by the Government of supplies furnished under the contract or any provisions of this contract concerning the conclusiveness thereof, the Contractor warrants that at the time of delivery:

(i) All supplies furnished under this contract will be free from defects in design, material or workmanship and will conform with the specifications and all other requirements of this contract; and

(ii) the preservation, packaging, packing, and marking, and the preparation for and method of shipment of such supplies will conform with the requirements of this contract.

(b) The Contracting Officer shall give written notice to the Contractor of any breach of the warranties in paragraph (a) of this clause within one year from the last delivery under the contract.

(c) Conformance of supplies or parts thereof subject to warranty action shall be determined in accordance with the applicable sampling procedures contained in the contract except as provided herein. For sampling purposes, the Contracting Officer may group any supplies delivered under this contract. The size of the sample shall be that required by sampling procedure specified in the contract for the quantity of supplies on which warranty action is proposed. Warranty sampling results may be projected over supplies in the same shipment or other supplies contained in other shipments even though all of such supplies are not present at the point of reinspection, provided, the supplies remaining are reasonably representative of the quantity on which warranty action is proposed. The original inspection lots need not be reconstituted nor shall the Contracting Officer be required to use the same lot size as on original inspection. Within a reasonable time after notice of any breach of warranties in paragraph (a) of this clause as determined herein, the Contracting Officer may exercise one or more of the following options:

(i) require an equitable adjustment in the contract price for any group of supplies;

(ii) screen the supplies grouped under this clause at Contractor's expense and return all nonconforming supplies to the Contractor for correction or replacement;

(iii) require the Contractor to screen the supplies at depots designated by the Government within the continental United States and to correct or replace all non-conforming supplies;

(iv) return the supplies grouped under this clause to the Contractor for screening and correction or replacement.

(d) When return, correction or replacement is required, the Contracting Officer shall return the supplies and transportation charges and responsibility for such supplies while in transit shall be borne by the Contractor. However, the Contractor's liability for such transportation charges shall not exceed an amount equal to the cost of transportation by the usual commercial method of shipment between the designated destination point under this contract and the Contractor's plant, and return.

(e) Any supplies or parts thereof corrected or furnished in replacement pursuant to this clause shall also be subject to all the provisions of this clause to the same extent as supplies initially delivered.

(f) Failure to agree upon any determination to be made under this clause shall be a dispute concerning a question of fact within the meaning of the 'Disputes' clause of this contract.

(g) The word 'supplies' as used herein includes related services.

(h) The rights and remedies of the Government provided in this clause are in addition to and do not limit any rights afforded to the Government by any other clause of the contract.

The contract called for 54 gallons of methanol in each 55-gallon drum. The quantity of methanol put into each drum was determined by weight. The filling operation was performed with the drums on a conveyor. A drum was filled when it came to the part of the conveyor that was resting on a scale. The filling was through a hose running from a tank car into the drum. The filler stopped filling when the scale registered the proper weight for a filled dru

In early July 1966 Defense Depot Tracy reported that it was receiving many drums that were short in gross weight. The Governmer inspector and the contractor immediately made an investigation that disclosed that the conveyor scale had become jammed against the con· veyor platform, which had caused the scale to register incorrect

weights. This malfunction was corrected immediately, and appropriate measures were taken to prevent it from occurring again. The scale had been checked for accuracy before the filling operation started, and it was found to be still accurate when not obstructed.

The Government has stipulated that the jamming of the scale was unintentional on the part of the appellant, and neither appellant nor the Government inspector was aware of any incorrect weights until the Tracy Depot reported that it was receiving underweight drums. Appellant concedes that it was at fault, in that it was using labor that "was not too good at that time" without providing adequate supervision, but it contends that the Government was equally at fault and that there were extenuating circumstances. Due to the large quantities of methanol ordered by the Government and the inability of its supplier, Union Carbide, to make timely deliveries of bulk methanol in the quantities required, methanol being in short supply at the time, appellant had fallen behind in deliveries and was working overtime in response to the Government's urgings that it rush shipments. It points out that the Government quality control inspector was there each day to check the filling and weighing of the drums and that he "checked, accepted, and signed for each shipment including the weights." Appellant argues from this that the Government was just as much at fault as appellant for the occurrence of the unfortunate incident. In response to this argument, the Government contends that it owed no contractual duty to perform a quality control inspection for the benefit of the contractor and that the Government's inspection was solely for its own benefit. The Government also points out that at the commencement of the filling operation at San Pablo the Government asked appellant to provide a second scale on which drums could be weighed periodically as a check on the accuracy of the conveyor scale, but that appellant did not provide the second scale until after the scale-jamming incident. Laborers used by appellant were paid on a "piecework" basis by the amount of work done. After the scale-jamming incident, appellant transferred its best filler from its Oakland plant to the San Pablo plant.

The Government's investigation disclosed considerable variance in the underweight drums, the shortage running as high as 16 gallons for a drum and the average shortage being 9 gallons per drum. The Government attempted by sampling to compute the amount of the shortage but there was uncertainty as to when the scale first went awry. The contracting officer's report of investigation showed a shortage of 75,255 gallons in 6505 drums but stated that the reliability and representative character of the samples taken was questionable. Thereafter the parties agreed on the amount of the shortage on the following basis: At 54 gallons per drum for 42,539 drums the contract called for delivery of 1,757,106 gallons of methanol. An examination of invoices showed that Union Carbide delivered to appellant only 1,713,010 gallons of bulk methanol, which is 44,096 gallons less than

the quantity called for by the contract. It was agreed that the shortage due to the jamming of the scale was the difference between the quantity appellant received from its supplier and the quantity called for by the contract.

The warranty clause gives the Government several optional remedies when delivered supplies are found to be nonconforming. The contracting officer rejected the remedy of requiring the contractor to screen and correct the 6505 drums suspected of being underweight as imposing too great a hardship on the contractor and decided to invoke the option given by subparagraph (c)(1) of the warranty clause, which provides for an "equitable adjustment in the contract price". He computed the amount of the equitable adjustment as follows: The shortage of 44,096 gallons is equal to 816.6 drums, and the amount of the adjustment is the contract price for 816.6 drums. Of the total deliveries under the contract 44.8% were F.O.B. origin at a contract price of $21.33 per drum and 55.2% was F.O.B. destination at a contract price of $21.56 per drum. Accordingly, the contracting officer applied the price of $21.33 to 44.8% of the shortage and the price of $21.56 to 55.2% of the shortage. This produces a total adjustment of $17,522.

Appellant objects to the contracting officer's method of computing the adjustment. It complains that the contracting officer is charging it for 816 extra drums when there was no shortage of drums, the only shortage being in the contents of the drums. Furthermore, it says the contracting officer is charging it the F.O.B. destination price on 55.2% of the shortage when the lower F.O.B. origin was applicable to most of the shipments during the period while the scale was awry.

Appellant contends that the price adjustment should be computed as follows: Appellant paid 26 cents per gallon for bulk methanol, which at 54 gallons per drum totals $14.04 per drum. The cost of a drum was $6.60. Thus the cost of the methanol and the container was $20.64 per drum, leaving only 69 cents out of the price of $21.33 to cover the contractor's labor, overhead and profit. Except for the savings of 26 cents per gallon on the bulk methanol, appellant's costs on the underweight drums was exactly the same as if there had been no shortage, and it contends that the Government received everything it was entitled to receive under the contract except 44,096 gallons of methanol for which the deduction should be only 26 cents per gallon.

During performance of the contract the price of bulk methanol went up substantially, but Union Carbide honored its commitment to supply appellant bulk methanol at 26 cents per gallon for the entire contract requirements which greatly exceeded the estimated requirements. The price in the follow-on methanol requirements contract was $28.90 per drum for F.O.B. origin deliveries.

DECISION

We take up first the question of whether the Government is entitled to any price reduction under the warranty clause. The claim is not barred by the following provision of the standard Inspection clause: "Except as otherwise provided in this contract, acceptance shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud." The key words of the quoted provision are "except as otherwise provided". It was "otherwise provided" in the warranty clause. The warranty clause does not cover underruns in contract quantities as such. In order to bring the Government's claim within the scope of the warranty clause, it must be found that the underweight drums did not "conform with the requirements of this contract". The underweight drums did not conform with the contract requirements, as the contract required that they contain 54 gallons per drum whereas the drums filled while the scale was jammed contained substantially less than 54 gallons per drum.

Both appellant and the Government argue that the item of supplies called for by the contract was not gallons of methanol but drums of methanol. The Government makes the argument in order to bring its claim within the warranty clause. After making the point that the contract was for drums of methanol, appellant argues that the Government is not entitled to any price reduction, because the Government received and accepted the full contract quantity of drums and that Uniform Commercial Code Section 2-607(1) provides: "The buyer must pay at the contract price for any goods accepted."

Appellant cites the Uniform Commercial Code as constituting the law of California. Government contracts are governed by the Federal Law. United States v. County of Allegheny, 322 U.S. 174, 183 (1944). However, this Board held as early as 1964 that the Uniform Commercial Code is Federal Law applicable to Government contracts (Reeves Soundcraft Corp., ASBCA No. 9030 et al, 1964 BCA par. 4317), and this view of the Board was confirmed by United States v. Wegematic Corp., 360 F. 2d 674 (C.A. 2, 1966).

While we agree with appellant that the Uniform Commercial Code is applicable, we find that the Government's claim is not barred by UCC 2-607. The Government has not sought to reject or avoid paying the contract price for any of the drums of methanol, and UCC 2-607(3) expressly provides for the buyer making a claim for breach of warranty after the goods have been accepted and paid for. Although the Government's claim is theoretically based on breach, this characterization is academic. The claim is cognizable under the contract, as the remedy for the breach of warranty is provided for in the warranty clause itself. The Government has met its burden of proof on the breach of warranty. As a matter of fact, the parties have agreed that there was a shortage of 44,096 gallons resulting from nonconformity with the contract requirement of 54 gallons per drum.

We hold that the Government is entitled to an equitable adjustment under subparagraph (c)(1) of the warranty clause on account of the nonconformity to the requirement of 54 gallons per drum, which produced a shortage of 44,096 gallons. We take up now the question of how the equitable adjustment should be computed.

Although the contract called for drums of methanol, the drums were not furnished as an end product but only as a container for the methanol. Due to the drums not being full, the Government received in 32,539 drums a quantity of methanol that could have been put in 816 fewer drums. It would have been to the advantage of the Government to have received the same quantity of methanol in 816 fewer drums, as this would have saved the Government the expense of handling, storage, record keeping and transportation on 816 drums, which was obviously in excess of the salvage value (estimated at $1 per drum) for the 816 extra drums.

In arguing that the jammed-scale incident was just as much the fault of the Government, appellant is in effect arguing that it was the Government's fault for not making appellant do what appellant should have been doing all the time. The answer is that it was the contractor's responsibility all the time to maintain proper supervision and quality control, and this was not the Government's responsibility. The Government was not at fault, because the Government was not under any duty to supervise the contractor's performance. The consequences of the unfortunate incident cannot be split on a "share the blame" basis.

In its post-hearing brief appellant argues that the measure of "damages" for the breach of warranty should be as provided in UCC 2-714(2), which is as follows:

> The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of the different amount.

Appellant argues that there is no inconsistency between UCC 2-714(2) and subparagraph (c)(1) of the warranty clause, and we agree. Since subparagraph (c)(1) is an alternative to requiring the contractor to correct or replace nonconforming supplies, a proper measure of the subparagraph (c)(1) equitable adjustment is the difference between value of goods conforming to the contract and the value of the nonconforming of the goods actually delivered and accepted. A reasonable measure of the difference in value is what it would have cost to replace the deficiency resulting from the nonconformity with a sufficient quantity of drummed methanol to make up the deficiency. This

is much less than it would have cost to correct or replace the 6505 drums of methanol suspected of nonconformity. The cost of bulk methanol is not a proper measure of the difference in value, as the contract called for drummed methanol, and the value of a drum of methanol tends to vary in proportion to the quantity of methanol in the drum. A drum containing only 45 gallons of methanol would not have a value of 45/54ths of the value of a drum containing 54 gallons of methanol.

It was to the contractor's advantage that the contracting officer used the contract price as representing the value of conforming supplies at the time and place of the delivery and acceptance of the nonconforming supplies, as there is evidence indicating that the price of methanol went up between the date of the contract and the time when the nonconforming supplies were delivered.

When the contracting officer used the F.O.B. destination price in computing the price adjustment for 55.2% of the deficiency, this made the total price reduction $103.68 more than it would have been if he had used the F.O.B. origin price for the entire deficiency. The F.O.B. destination price represented the F.O.B. origin price plus transportation charges to Oakland Port. In view of the proximity of Oakland Port to appellant's plant in San Pablo, it would seem that the contractor's transportation costs on F.O.B. destination shipments could not have exceeded the Government's transportation costs on the same volume of F.O.B. origin shipments. The contracting officer's computation was lenient to the contractor in not adding any Government transportation costs to the F.O.B. origin price. Appellant's brief estimates the Government's shipping costs at $550. Rather than finding that the contracting officer erred in using the F.O.B. destination price for 55.2% of the deficiency, we are of the opinion that the contractor got a good break when the contracting officer did not add anything for shipping costs on the 44.8% on which he used the F.O.B. origin price.

The appeal is denied.

Section 4. Termination for Default

A. Directed Termination

IDEAL UNIFORM CAP COMPANY v. THE UNITED STATES

182 Ct. Cl. 571 (1968)

DAVIS, Judge, delivered the opinion of the court:

The question here is how to treat the Government's termination of plaintiff's contract for default. The defendant and the Armed Services Board of Contract Appeals take the position that the default-termination was proper. Our trial commissioner and the plaintiff insist that it was a breach of the contract and should be dealt with as such. We hold that the termination should be considered as one for the convenience of the Government.

* * * * *

Upon receiving the written award on May 3 the plaintiff learned for the first time that the delivery schedule which he had specified in his original bid had been unilaterally revised by the Government by postponing the deliveries for each month to Pennsylvania by one month, and the small delivery to Utah by two months. This general one-month postponement of the original delivery schedule was designed to offset the Government's 28-day delay in issuing the award (from March 17 to April 14), but the plaintiff was not consulted. He now says that he considered it doubtful that he could perform under the revised schedule but he made no mention of this until June 28, because, he contends, he felt at the time, on the basis of his experience in previous contracts, that he could secure reasonable adjustments from the contracting officer if need be.

The cutting operations for the caps were commenced toward the end of May. Plaintiff received the first two shipments of half of the Government-furnished cloth on April 29 and May 5, and the remaining half by May 26. In the garment trade it is desirable to have all of the cloth for cutting on hand at an early date, since the mass cutting of component parts is the first major step in production. We do not have the plaintiff's cutting schedule for he did not furnish weekly cutting reports as the contract required, perhaps because the Government failed to furnish him the forms (as the contract required) and he did not ask for them.

The contract also required plaintiff to submit to the Government for approval, prior to commencement of production, pre-production samples of 12 component materials which the contractor was to provide, plus two samples of the completed cap. From May 27 to June 17 the plaintiff submitted his 12 pre-production material samples to the contracting officer as fast as he obtained them from suppliers, and they were promptly inspected and approved by the Government well within the 10-day maximum period allowed by the contract. Plaintiff never submitted samples of completed caps because his contract was terminated for default before he delivered any of the items, and he had intended to obtain his sample caps from the earliest production run to satisfy the contract requirement. This may not have been strictly in accordance with the contract, but the plaintiff says that he reasoned that he had already demonstrated his ability to produce the identical cap in a completed contract for 240,000 of them the previous year, and felt that samples of actual production would be preferable to handmade specimens.

In any event, plaintiff failed to make the first delivery of 15,000 caps indicated by the revised delivery schedule to be due May 31. On June 14, 1955, the contracting officer advised him in writing that deliveries were delinquent, and observed that "satisfactory pre-production samples and components have not yet been approved although the contract award date was 14 April 1955". Actually by June 14 the plaintiff had submitted to the contracting officer for approval pre-production samples of all materials except the thread, which was not submitted until June 9 and 14; nor had he submitted the two pre-production sample caps. The contracting officer's letter of June 14 concluded with this paragraph:

> This letter notice is your first warning concerning delinquency in deliveries of Caps, service, under the subject contract. You are requested to immediately advise the Contracting Officer the specific dates on which deliveries can be expected. Upon receipt of the information further determination will be made regarding the status of your contract.

The Board properly held that this letter did not constitute an effective notice under Article 11(a)(ii) of the contract, relating to termination for such failure to make progress as to endanger performance of the contract. This provision required a 10-day notice of the condition, as well as a failure by the contractor to cure it, before a termination for default on that ground could be had. The Board also found, and we accept its determination, that, by this letter of June 14 and its failure to end performance at that time, the defendant waived plaintiff's default in not shipping 15,000 caps by May 31st. The Board found, too, that the non-delivery by May 31st was beyond plaintiff's control and without his fault or negligence.

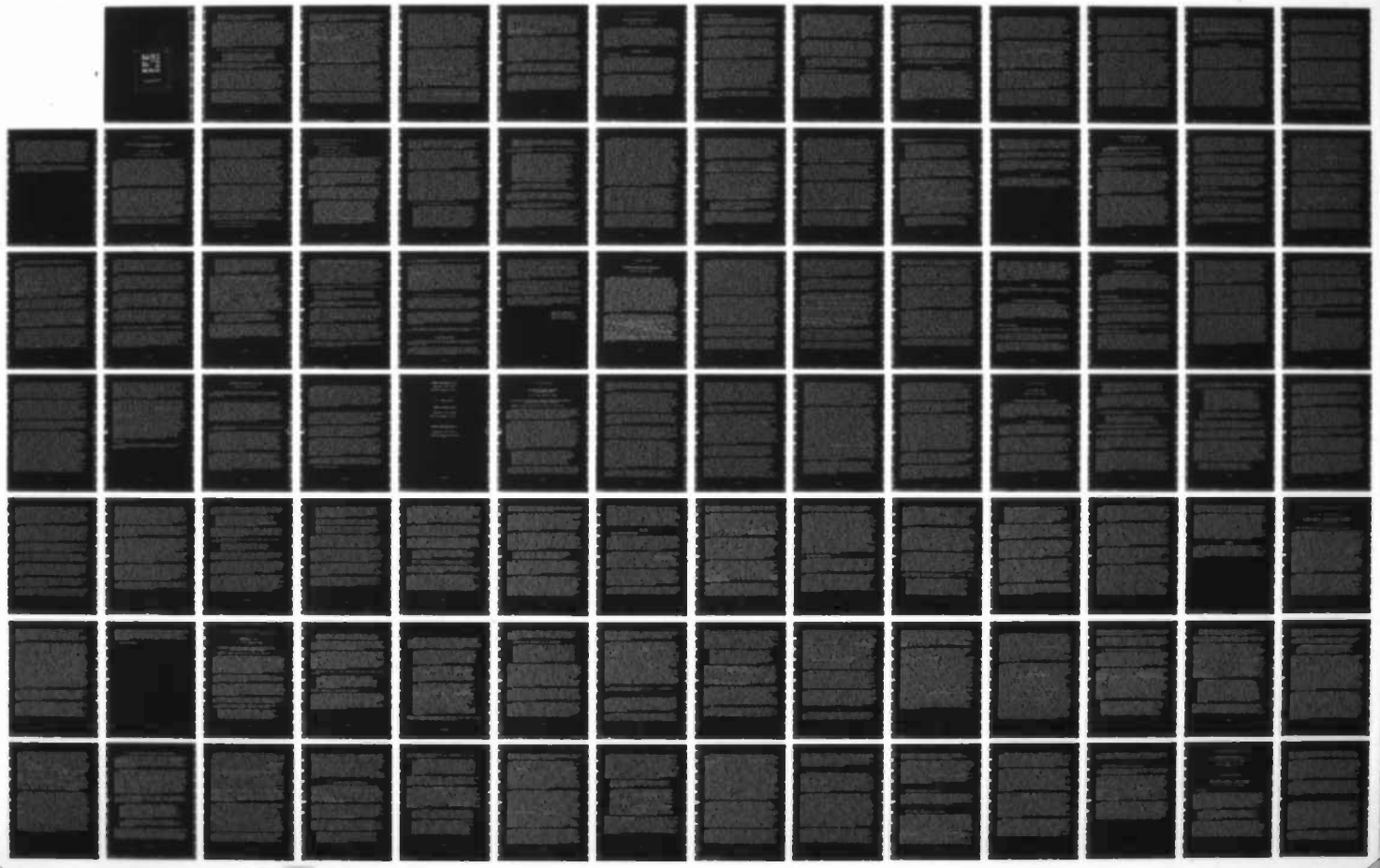
Plaintiff did not respond until June 28 to the contracting officer's warning notice of June 14. In the interim Mr. Schlesinger was to testify before the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations on June 21 in executive session and June 23 in public session. The Senate Subcommittee was investigating textile procurement in the military services, and plaintiff was a prime suspect in connection with certain alleged irregularities. Plaintiff says that he was busy preparing numerous records which Subcommittee investigators had demanded he produce. He testified that, en route to Washington on June 23 to attend public hearings that day as a witness, he ran into the contracting officer on the airplane, and told him that he had been busy in connection with the activities of the Subcommittee but that he would reply to the contracting officer's June 14th letter within the next few days. To which the contracting officer is said to have responded (although he could not recall it in testifying before the Board, agreeing only that they had met on the plane and had had some conversation) that "that was perfectly all right". The Board did not decide whether or not this exchange actually took place and, in view of the contracting officer's testimony, the evidence cannot be said to be conclusive in plaintiff's favor.

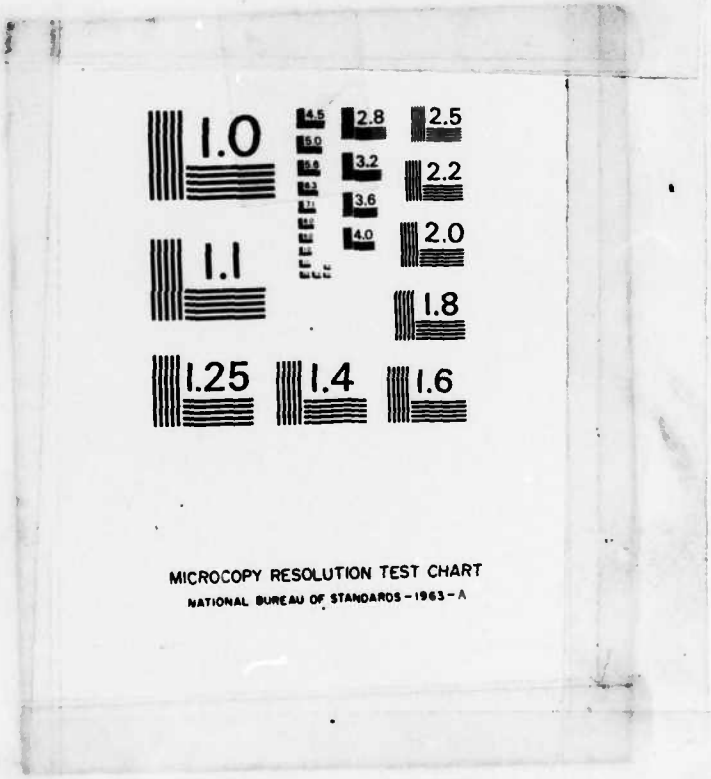
There is no doubt that Mr. Schlesinger did appear before the Subcommittee late in June, and the Board found that on June 27 a naval officer in Washington told the contracting officer that the Chairman of the Subcommittee had sent a letter to the Navy Department "asking as to the status of the contract and implying that the contract should be cancelled". This naval officer was the Assistant to the Assistant Chief of the Navy's Bureau of Supplies and Accounts for Purchasing, and he inquired from the contracting officer as to the status of plaintiff's contract and told him that, if investigation established that there was no urgent need for the caps, it was intended that the contracting officer should terminate for default. After the contracting officer had ascertained that there was no urgent need for the caps and that all pre-production components (but no completed caps) had been approved, and had communicated this information to the Assistant in Washington, the latter advised him to consider all the facts and to check with legal counsel to find out whether the contract could legally be terminated for default at that time.

A representative of the Inspector of Naval Material in New York then made a brief inspection of plaintiff's plant on June 29, and orally reported to the contracting officer that as of that time there were about 19,000 caps in various stages of manufacture, and about 3,000 to 4,000 caps completed and ready for blocking. Another shipment of 15,000 caps was due on June 30th but was not made. On that day (but before it had ended) the contracting officer advised the Bureau of Supplies and Accounts in Washington that he intended to terminate the contract for default. At 12:43 p.m., on the same day, he received a telegram from the Bureau instructing him as follows:

AD-A139 152 GOVERNMENT CONTRACT LAW CASES(U) AIR FORCE INST OF TECH 12/13
WRIGHT-PATTERSON AFB OH SCHOOL OF SYSTEMS AND LOGISTICS
J O MAHOY 01 OCT 83

UNCLASSIFIED F/G 15/5 NL





MICROCOPY RESOLUTION TEST CHART
NATIONAL BUREAU OF STANDARDS - 1963 - A

> Terminate contract * * * immediately for default. Advise when this action completed. Keep BUSANDA [the Bureau] informed of subsequent developments.

Meanwhile, on June 28, the plaintiff finally replied to the contracting officer's warning letter of June 14. This reply said that completed end-items would be coming through production within a few days, and requested a 45-day time extension on the delivery dates by reason of conditions which had arisen. These conditions included, in plaintiff's view, the Government's initial delays in accepting plaintiff's bid, and the fact that an insufficient adjustment in time was allowed when the revised delivery dates were written into the formal contract by the Government. The letter explained that plaintiff had not made the request for a time extension sooner because he was attempting to meet the revised delivery date and found that conditions rendered it impossible. This letter of June 28 was not received by the contracting officer until 2 p.m., on June 30, after the telegram from the Bureau in Washington directing the termination of the contract for default.

On July 1 the contracting officer telegraphed plaintiff:

> * * * Your contract * * * for caps * * * is hereby terminated in its entirety pursuant to clause entitled default of the contract effective immediately. Letter and instructions for disposition of all Government furnished property will follow.

Although this telegram probably arrived at plaintiff's office on Saturday, July 2, he first saw it on Tuesday, July 5, upon returning to his office from the July 4th weekend.

On July 5 plaintiff and his attorney called upon the contracting officer in New York City. On July 6 the contracting officer confirmed the contract termination with a letter. With this the plaintiff ceased production as directed, appealed the default-termination without avail to the Secretary of the Navy, applied to the Board of Contract Appeals, had a hearing there, and an adverse decision on October 31, 1955, plus a further Board decision on December 20, 1955, denying his motion for reconsideration. Suit was filed here on April 9, 1956. The long delay in this court is unfortunate but does not appear attributable in any substantial part to the court, and with respect to the parties there were extenuating circumstances.

As the Board found, plaintiff was at least in technical default when his contract was terminated on July 1st. He was required to deliver 15,000 caps by June 30th and did not do so. The default-termination article authorized the Government to terminate "if the Contractor fails to make delivery of the supplies * * * within the time specified herein or any extension thereof." Other parts of the clause (subparagraphs (b) and (e) make clear that such a failure to

deliver is a default even though excusable or justifiable because "due to causes beyond the control and without the fault or negligence of the Contractor." The Board was therefore correct in upholding the bare existence of the default.

Our difficulty is that the default article does not require the Government to terminate on finding a bare default but merely gives the procuring agency discretion to do so, and that discretion was not exercised here by the Navy. The existence of discretion is undeniable. The clause says that "the Government may *** terminate" (emphasis added), not "shall" or "must". We have recognized that a decision to terminate for convenience is rooted in discretion (Commercial Cable Co. v. United States, 170 Ct. Cl. 813, 821 (1965); John Reiner & Co. v. United States, 163 Ct. Cl. 381, 390, 325 F. 2d 438, 442-43 (1963), cert. denied, 377 U.S. 931 (1964)), and though the factors the Government will wish to consider may be different when a default is involved there is no reason to read the default article, contrary to its literal terms and the accepted practice, as compelling termination. We are certain that there have been a great many instances in which the Government has not terminated a contractor in technical default, but has granted an extension or waived the non-compliance. In this very case the defendant, as the Board found, excused the earlier non-delivery on May 31st which was, of course, also a default. Our ruling today is not new. More than ten years ago, the court specified that procurement officials had to exercise judgment in terminating an agreement for default and were not automatons. John A. Johnson Contracting Corp. v. United States, 132 Ct. Cl. 645, 658-60, 132 F. Supp. 698, 704-05 (1955).

We hold, too, that this discretion was never exercised but the Navy simply surrendered its power of choice. This is so clear from the Board's record that we are warranted in reaching the conclusion despite the Board's failure to consider the point. Although the Congressional communication does not appear to have suggested that the plaintiff's contract be canceled without consideration of his rights or situation, or even that it be terminated for default rather than for convenience (which would give the contractor his reasonable expenses to date), the Navy acted as if it had no option but to terminate for default (barring all compensation) once the mere fact of non-delivery was found. The Navy did not consider whether an extension should be granted or the June 30th default waived (as that of May 31st had been) so as to allow delivery in July. The guillotine was dropped immediately after the non-delivery of June 30th, and was strongly contemplated even before that day had been reached or passed.

The Bureau of Supplies and Accounts, on June 27th, called the contracting officer and put in motion the process of terminating the contract for default. So far as the record reveals, the Navy's only expressed concern involved the existence of a default and the need for the supplies. There was no indication of any concern for the contractor or whether a default would be excusable, no consideration of a

possible waiver or an extension, no weighing of a convenience-termination instead of a default-termination. After it was discovered, also on June 27, that there was no present requirement for the caps, the only interest of the Bureau was "whether we can legally terminate the contract for default at this time." (We emphasize again that this was even before the delivery date of June 30th, and not long after the Navy had indicated a less harsh position in waiving the non-delivery of May 31st.) Speed was demanded and quick action taken. The contracting officer was to call the Bureau on June 28th, the next day, "outlining our determination on the facts pro and con regarding termination." The actual decision to terminate was then made on the morning of June 30th (though the telegram was not sent until July 1st) and was apparently not reconsidered after the receipt, in the afternoon of June 30th, of the contractor's letter (of June 28th) requesting a reasonable extension. As for the contracting officer himself, he admitted that he exercised no discretion at all; his testimony was that he was directed to terminate for default and also that "he did not feel that [he] had any choice after the receipt of the direction from a superior in this case."

We do not put our decision on the failure of the contracting officer to exercise his own judgment. This agreement gave the default-termination power to "the Government" and did not single out the contracting officer as the official to decide that particular question. But the record affirmatively shows that nobody in the Navy, neither the contracting officer nor his superiors, exercised the discretion they possessed under the article. Plaintiff's status of technical default served only as a useful pretext for the taking of action felt to be necessary on other grounds unrelated to the plaintiff's performance or the propriety of an extension of time. As in John A. Johnson Contracting Corp., supra, the Navy used the termination article as a "device" and never made a "judgment as to the merits of the case". 132 Ct. Cl. at 659-60, 132 F. Supp. at 705. Such abdication of responsibility we have always refused to sanction where there is administrative discretion under a contract. New York Shipbuilding Corp. v. United States, 180 Ct. Cl. ___, ___, 385 F. 2d 427, 435, 436-37 (June 1967), and cases cited. This protective rule should have special application for a default-termination which has the drastic consequence of leaving the contractor without any further compensation. See Acme Process Equip. Co. v. United States, 171 Ct. Cl. 324, 355, 347 F. 2d 509, 527-28 (1965), rev'd. on other grounds. 385 U.S. 138 (1966).

Since the July 1st notice was thus issued improperly it cannot have the same status as a default-termination which is the fruit of true consideration. Cf. New York Shipbuilding Corp. v. United States, supra. There are two theories as to the consequences, but both lead to the same result. The first, and preferable one, is that the termination notice was a nullity and therefore there was no valid ending of performance on the ground of default. Under this view--that the contract was canceled on an unsound ground and in an illegal manner--

the termination must be treated, not as a breach of contract, but as a termination for convenience since the contract contained a "convenience" clause which could have been used to end performance if the Navy thought it well to do so on learning the Senate committee's views. This is the teaching of John Reiner & Co. v. United States, 163 Ct. Cl. 381, 325 F. 2d 438 (1963), cert. denied, 377 U.S. 931 (1964), and like cases. It is only where a contractor is defaulted when he is not at all in default that a breach can be said to occur. Klein v. United States, 152 Ct. Cl. 8, 285 F. 2d 778 (1961); Acme Process Equip. Co. v. United States, 173 Ct. Cl. 259, 264 n.6, 351 F. 2d 1004, 1007, n.5 (1965). Here, as we have pointed out several times, there was in fact a default.

The alternative theory is that the default should be treated, under paragraph (e) of the article (note 5 supra), as a "failure to perform this contract" which is "due to causes beyond the control and without the fault or negligence of the Contractor." It can be argued (1) that since the plaintiff actually failed to deliver, the termination notice, though improper, was valid enough to trigger the operation of the article; but (2) that the contractor's failure to perform on June 30th and to be allowed to perform thereafter was so tied to the Navy's refusal to exercise its discretion (as to waiving the default and granting a time-extension); that (3) this failure of the Navy was, as a matter of law under paragraph (e), a cause beyond the contractor's control and without his fault or negligence. In such a case paragraph (e) directs that the termination be treated as one for convenience.

On either ground the plaintiff is entitled to have his accounts settled as if his contract had been formally terminated for the Government's convenience. Since a convenience-termination arises under the contract, the determination of the award must be made, if the parties cannot agree, by the ASBCA in further proceedings before it.

Plaintiff is entitled to recover and judgment is entered for him on the issue of liability. Further action in this court will be suspended for six months from this date to allow the parties to return to the Armed Services Board of Contract Appeals for a determination of the amount, if any, to which plaintiff would have been entitled if his contract had been terminated pursuant to the Board proceedings, the plaintiff will report the result to the court and the parties will take further action looking toward the ultimate disposition of the case in this court.

B. Failure to Deliver on Time

NUCLEAR RESEARCH ASSOCIATES, INC.

ASBCA No. 13,563 (1970)

This is an appeal from a default termination. Appellant made delivery after the delivery date but before the default termination was received and contended that in these circumstances the contracting officer should have withdrawn the default termination and terminated the contract only if he found the equipment not in compliance with the specifications. The contracting officer did not accede to this view but offered to consider inspection if appellant requested it in writing. Appellant, in turn, rejected this course of action and this appeal ensued. The Government did not incur excess costs of reprocurement and the validity of the default termination is the only issue before the Board.

STATEMENT OF FACTS

1. The Contract

Contract No. F29601-67-C-0074 was awarded by the contracting officer of the Air Force Special Weapons Center, Kirtland Air Force Base (AFB), New Mexico, to appellant as the low bidder in the second step of a two step procurement on 16 May 1967. Prior to award there was some question whether appellant would be awarded the contract. The reasons for this doubt do not appear in the record but since the Government had sixty (60) days to make the award and made it in 28 days, the hesitation cannot have been either very serious or prolonged.

The contract provided for development and delivery to the producing activity at Kirtland AFB of a 100 megacycle recorder at a fixed contract price of $59,888. Under the contract, delivery of the end item was due in twelve months, or by 18 May 1968. In addition, monthly progress letters were required within 15 days after the end of each month. Preliminary drawings were due by 18 November 1967 and a preliminary acceptance test (PAT) plan as well as a draft of operations and maintenance (O&M) instructions were due by 18 March 1968. Drawings, final O&M instructions and a draft final report were also due by 18 May 1968 and the finished final report no more than two months later. The contract standard supply contract clauses cover default, convenience termination and disputes.

2. Appellant's Performance

The record reflects nothing of appellant's performance until the first half of March 1968 when the cognizant administrative contracting officer (ACO) invited appellant to explain its apparent default in furnishing proper monthly reports and preliminary drawings.

At a meeting early in April 1968 appellant indicated one to two months delay in delivery and promised to begin work on the O&M Manual right away and deliver a preliminary test plan by 12 April 1968. The preliminary drawings were approved on 1 May 1968 and the test plan, after certain changes had been made, orally on 16 May and in writing on 20 May 1968.

In view of appellant's impending default in delivering the recorder on or before 18 May 1968, cognizance over contract administration was transferred on 8 May 1968 to the termination contracting officer (TCO) at Los Angeles, California. The latter, after investigation, was willing to extend the delivery date against a nominal price reduction as consideration for his action and appellant was willing to agree thereto. Hence, effective as of 18 May 1968, the parties executed a contract amendment which extended the delivery date to 12 July 1968 and reduced the contract price by $250. The record does not reflect any further request for an extension of the delivery date and none was granted by respondent.

One of the "milestones" to be accomplished prior to delivery was preliminary testing. The first PAT date was 17 June 1968, but this date could not be kept because an employee of appellant accidentally damaged the recorder and it required repair. The PAT was, therefore, shifted to 24 June 1968. Respondent's technical observers arrived at appellant's plant late on that date and no testing was performed in their presence on 24 June 1968. On the following day the test was started but the "machine blew out" and high voltage started spraying all over the place. Appellant thought that the repairs could be completed and the test run on the following day (26 June 1968) but when the Government observers returned to appellant's plant on that day it was apparent that the necessary repairs would take time and that no PAT could be run for some days. Hence, the Government observers returned to their station in New Mexico and it was understood that appellant would perform the tests on its own and that all Government-observed testing would take place after delivery to the procuring activity.

The repairs, as testified to by appellant's chief engineer actually took until 7 July 1968 to complete. As of that date appellant was required to conduct PAT, pack the recorder and ship to the Government.

PAT and packing would consume one day and shipping by air on 11 July 1968 would result in delivery to the Government on 12 July 1968 as contractually required. The facts relating to appellant's subsequent delivery indicate that 24 hours would suffice for this purpose. Although appellant had, therefore, only about 50 to 60 hours to spare, its chief engineer decided to run the recorder for 100 consecutive hours before making delivery although admittedly no such test was required in the contract. This run was not completed until the early hours of 12 July with PAT and packing still to be accomplished before the recorder was ready for shipment. Since this would allow shipment at the earliest very late on Friday, 12 July 1968, appellant's chief persuaded his superiors to allow him to run the recorder further on Saturday and not to ship it until Sunday, 14 July 1968.

While these events were transpiring, appellant under date of 8 July 1968 requested from the Government engineer in charge instructions whether the Government would accept delivery of the recorder without the write-read tube. Appellant added that it understood that Government tests would not begin until 26 July 1968, and that, since the tube was very sensitive, it [appellant] would like it to be hand-carried by the engineer whom it was required to send to New Mexico to attend the tests. The TCO, to whom appellant had sent a copy of its request on 10 July 1968 replied by telegram in the following terms:

> You are again reminded that the delivery date of subject contract is 12 July 1968. I do not, Repeat, do not contemplate an extension of the delivery date for any reason and I consider your request for instructions as to whether or not to delay completion of delivery to be completely out of order.

3. Delivery and Default Termination

The record shows that appellant delivered the recorder to an air carrier at 4 PM on Sunday, 14 July 1968, that the equipment reached the Albuquerque, New Mexico airport before 8:15 AM MDT on 15 July 1968, and was delivered to the Government procuring activity on or about 10AM MDT on the same day. At 8:15 AM MDT the time in Los Angeles, California was 7:15 AM, the opening hour for the AF Contract Management Office where the TCO was stationed. At that hour the Government's engineer in charge called a colleague of the TCO in Los Angeles to advise that no delivery had been received from appellant. The TCO, upon learning of this call, composed the telegraphic default termination notice to appellant which was sent at 9:30 AM. It was received by appellant between 1:30 and 2:30 PM EDT. The TCO, as is apparent, acted with all possible promptness and did not by his conduct waive any rights of the Government.

Its president and vice president, the latter of whom testified, thereupon called the TCO and asked him to withdraw the termination notice and to inspect the recorder subject to rejection if it did not meet contract requirements.

The TCO responded that the Government would consider a request for inspection if made in writing and without jeopardy to the Government's position. Appellant's representatives then stated that they would consider the matter. On 17 July 1968, appellant's vice president called the TCO and advised him that appellant "had decided not to request testing but rather return of equipment because since the beginning of the contract and even before award the attitude of the Government had been one of barely controlled hostility topped off by his [the TCO's] lack of consideration and inconsistency". At the hearing the vice president testified to the same effect that at that time appellant felt most strongly that it wanted the recorder out of the Government's hand.

The TCO thereupon asked the procuring activity to return the recorder to appellant; it arrived back at appellant's plant on 20 July 1968 with slight external damage to its case but without impairment of its functioning (ibid.) Appellant's chief engineer testified that appellant caused the recorder to be tested by an outside expert and that it was reported to him to have met all test requirements. The recorder was damaged in 1969 and is no longer in functioning order.

Further correspondence of the parties did not lead to a resolution of their dispute, each adhering to its position.

DECISION

Under the default article of the contract out of which this appeal has arisen the Government has the right to terminate appellant's contract for default if appellant failed to deliver the supplies contracted for within the time specified in the contract, as extended. Since appellant did not make delivery of the supplies contracted for on or before the extended contract delivery date, the right to terminate appellant's contract accrued to respondent and its default termination action must stand unless appellant can show either excusable cause for its default or any other reason why the default termination should be converted into a termination for the convenience of the Government. The Court of Claims decision in Radiation Technology, Inc., 177 Ct. Cl. 227 (1966) makes it clear that timeliness of delivery under the default clause means just that and that any late delivery is untimely by definition. See ITT Federal Laboratories, ASBCA Nos. 11129, 11399, 69-1 BCA par. 7423. Excusable cause for appellant's failure to make timely delivery is neither claimed nor shown on the record.

Apparently misapprehending the nature of the default clause, appellant seems to argue that the default termination must be set aside because delivery, though untimely, was effected at the procuring activity in New Mexico about one-half hour earlier than the actual sending of the termination telegram from Los Angeles, California, and about two hours earlier than the time of appellant's receipt of such notice. But effective termination of the contract for default does not depend on which is first after default: untimely delivery or prompt dispatch or receipt of the termination notice. On the contrary, once an appellant has failed to deliver on time, the Government, absent excusable cause of delay, has an indefeasible right to terminate the contract, unless its own conduct deprives it of that right.

Aerospace Products, Inc., ASBCA Nos. 12989, 13164, 68-2 BCA ¶ 7383. The fact that appellant has made some kind of untimely delivery prior to default termination and while the latter is being considered by the contracting officer, by no means bars action to terminate the contract for default. See H. N. Bailey & Associates, ASBCA No. 12048, 68-2 BCA ¶ 7202; cf. Keogh, Trustee in Bankruptcy for Universal Transistor Products Corp., ASBCA No. 5665, 61-1 BCA ¶ 3025 (some testing after default no bar to termination). In essence, the Government loses its right to terminate a contract for default only, if by its subsequent conduct it condones the default, encourages or asks for continued performance, or fails to set a new delivery schedule for the contractor's performance after it has permitted performance to continue unhampered for too long a period of time. See Aerospace Products, Inc., supra; Ace Electronics Associates, Inc., ASBCA Nos. 11496, 11781, 67-2 BCA ¶ 6456; Lumen, Inc., ASBCA No. 6431, 61-2 BCA ¶ 3210.

Methode Electronics, Inc., ASBCA Nos. 12886, 12916, 68-1 BCA 7065, relied on by appellant, is not in point. The decision rests on the fact that respondent there failed to exercise its right to terminate the contract for default promptly and allowed performance to continue without setting new delivery dates. Hence, it lost its right to terminate the contract for default while negotiations for a new delivery schedule were pending. Legion Utensils Co., Inc., GSBCA No. 2732, 69-1 BCA ¶ 7745, also cited by appellant, is premised on a similar state of fact and equally inapplicable here. See also Nanofast, Inc., ASBCA No. 12545, 69-1 BCA ¶ 7566.

In sum, as the Board's opinions show, the Government's right to terminate, once accrued, is lost not by actions of the contractor against the will of the Government but by actions of the Government itself amounting to waiver or forbearance of the delay. In this light appellant's position is not strengthened by the language of the default termination notice which states that the action therein taken is to be "effective upon receipt of this notice." This language cannot be construed to import an extension of the delivery date which the contractor knows has passed and especially not in the instant case

where the TCO in clear and direct terms informed appellant before termination that no time extension would be granted. Nor does the record show that appellant took or failed to take any action affecting its position because of the quoted portion of the termination notice. It claimed, in effect, that the contractual duty to deliver on or before the date stated in the contract as the delivery date actually meant delivery on or before that date or at any time thereafter prior to receipt of default termination notice. That is not and has not been the law and the language of the termination is insufficient to establish such a right as appellant now claims.

The instant record discloses expeditious exercise of the Government's right to terminate appellant's contract for default by virtue of untimely delivery. It discloses, moreover, that timely delivery was entirely within appellant's grasp, and that the delay was due solely to the desire of its chief engineer to test run the recorder and his disregard of the fact that by doing so he prevented timely delivery. Appellant by disregard of the contract terms caused its own default and must accept the consequence.

Notwithstanding his correct understanding of the Government's contractual rights and his proper desire to preserve the Government's position, the TCO was willing to consider the possibility of inspecting the recorder if appellant would request such action in writing. However, its refusal to do so and its demand that the recorder be returned to it ended whatever rights it might have possessed to favorable action looking toward inspection and acceptance of its recorder. By demanding the recorder's return it undid even its belated delivery and put itself in the position of a contractor who had failed to make any delivery, even if untimely. Its explanation for its action that it felt unfairly treated by the Government appears without merit on the record which appellant has made, whatever may have been the feelings of its management at the time of termination. The only statement of the TCO which could possibly be pointed to is his phrasing in the 10 July 1968 telegram that he would not grant appellant a time extension for any reason. The statement might have been unwisely broad but it was not improper in the context of appellant's letter of 8 July 1968 and cannot be read as a statement that he would not grant a time extension if a contractually legitimate reason therefor had arisen between 10 and 12 July 1968.

Appellant also has cited Legion Utensils, supra, for the proposition that a contract may not be terminated for default solely because the Government's need for the supplies has disappeared before delivery. But the decision in Legion Utensils is predicated on a finding that appellant there was not in default and then went on to hold that the bare desire to avoid paying money for supplies no longer needed did not justify default termination where no default existed. As to the propriety of cost saving motives in exercising the right to terminate for default where it exists, see Manteo Manufacturing Co., Inc., ASBCA No. 1367 , 69-2 BCA par. 8066. Here, however, appellant

has not only failed entirely in its effort to prove that the default termination of appellant's contract was induced by the contracting officer's desire to buy a much less expensive recorder, but it also was in default. Moreover, default termination is a matter of right, not motive. If the right clearly exists, the Board does not examine into the contracting officer's "motives" or judgment leading to its exercise. Maneo Manufacturing Co., Inc., supra; Pioneer Chemical Company, ASBCA No. 10619, 65-2 BCA ¶ 5178; Fenton G. Keyes Associates, GSBCA No. 1726, 67-2 BCA ¶ 6642.

Appellant has not shown any reason why the termination of the contract for default should be set aside. Its appeal must, therefore, be and hereby is denied.

DISSENTING OPINION

This appeal presents an issue that has never previously been squarely decided by this Board or any court. The issue is whether the Government has the right under subparagraph (a)(i) of the standard supply contract form of default clause to terminate a contract for default solely because there was no delivery within the time specified when in fact supplies purportedly conforming to the contract requirements had been tendered to and were in the possession of the Government prior to the issuance of the termination notice. In this case tender and transfer of possession was made on the morning of the first work day after the due date and prior to the issuance of the termination notice, and the Government never inspected the supplies even though it had the opportunity to do so.

Under the default clause the contract does not terminate automatically when the due date passes without delivery having been made. The Government has the right to continue the contract in effect. The contractor has the duty to make delivery if the Government does not exercise its right to terminate. The default clause specifies that the Government "may" terminate the contract "by written notice of default to the contractor" if the contractor fails to make delivery of the supplies within the time specified, which is a recognition that there must be a "written notice of default to the contractor" before the contractor's right and duty to perform is terminated. ASPR 8-602.3, entitled "Procedure for Default", provides that if, after compliance with specified preliminary procedures, termination for default is determined to be proper, the contracting officer shall, where termination is predicated upon the contractor's failure to make timely deliveries, issue a notice of termination which shall, inter alia, state that the contractor's right to proceed with performance of the contract is terminated. This ASPR provision reflects an interpretation of the default clause by the Department of Defense as meaning that the contract remains in effect, subjecting the contractor to the duty of continued performance, until the receipt of a written notice of default termination. That the termination contracting officer

(TCO) himself interpreted the default clause and the implementing regulation as not making the notice of default termination effective until it was received by the contractor, is shown by the statement in his notice of termination that the contractor's right to proceed with performance was terminated "effective upon your receipt of this notice." This is itself a recognition that the contractor had a right to proceed with performance until receipt of a notice terminating such right.

As explained in detail in 2 Williston, Sales (1948 ed.), sections 453a and 453e, the strictness of the ancient common law rule giving the buyer the right to rescind when the seller is one day late in delivery has been ameliorated by the absorption of principles of equity into the law. According to Professor Williston (as set out in Restatement, Contracts, section 276, and cases cited), unless the nature of the contract is such as to make performance on the exact day vital, or the contract in terms so provides, failure of the party to perform on the day stated does not discharge the other party to the contract. Under the Restatement, it takes less delay to discharge the innocent party when there has been no part performance by the guilty party than when delivery has been made. The principles of part performance precludes the seller from treating time as strictly of the essence.

The present trend of the law is to get away from the ancient harsh rule which permitted a buyer who had not previously exercised his right of rescission for late delivery to reject a late tender of goods otherwise conforming to the contract requirements. Modern cases use such devices as holding that time is not of the essence unless expressly so stated in the contract, 46 Am. Jur. Sales, section 225, and applying the doctrine of substantial performance, particularly to contracts for goods to be specially manufactured in accordance with customer specifications, Id. at section 213. In this case the contract called for an item of electronic equipment to be specially manufactured in accordance with military specifications at a price of $59,888. There was a continuing need for the item, and obviously the Government could obtain it sooner by accepting appellant's delivery than by obtaining it from any other source.

The doctrine of substantial compliance was applied by the Court of Claims to a Government supply contract in Radiation Technology, Inc., v. United States, 177 Ct. Cl. 227. In that case the Court applied the rule, obiter dictum to minor deviations from the specifications that were of an easily correctable nature. It seems likely that the Court would apply the rule to insignificant deviations from the delivery requirement not shown to be prejudicial to Government, particularly for an expensive item specially made to Government specifications.

In an appeal from a default termination the Government has the burden of proving the default. Except for late delivery, the government has not alleged or proved any default, and it must be assumed for

the purposes of the appeal that the item delivered by appellant met all contract requirements except delivery time, as the Government did not avail itself of its opportunity to test the item delivered and did not offer any evidence in rebuttal to appellant's prima facie proof. Since the contractor made delivery of the supplies before its right to deliver was cut off by receipt of a notice of default termination, it follows that the contractor was not in default as to delivery on the day and hour that the notice of default termination became effective. Since the Government has failed to bear its burden of proof that the contract was in default at the effective time of the notice of default termination, the default termination should be converted to a termination for the convenience of the Government pursuant to paragraph (e) of the default clause.

The contractor's request made after the termination that the equipment be returned to it instead of being inspected did not operate as a legal forfeiture of its then existing right to be compensated on a termination for convenience basis.

C. Forbearance/Waiver

DeVITO, Receiver for Seaview Electric Company v. The UNITED STATES

413 F2d 1147 (1969)

United States Court of Claims

Plaintiff seeks recovery of $150,000 resulting from the default termination of a fixed-price supply contract awarded to Seaview Electric Company by the U.S. Army Signal Corps, for Seaview's alleged failure to timely deliver certain wire-splicing kits. The Armed Services Board of Contract Appeals (hereinafter, "ASBCA" or "the Board") upheld the action of the contracting officer in terminating Seaview's contract for default. Plaintiff contends that the adverse ASBCA decision is not supported by substantial evidence, is arbitrary and grossly erroneous. Also, that at the time of termination Seaview was not in default because (a) termination occurred prior to the expiration of a reasonable time for performance which should have been granted after Seaview encountered excusable causes of delay, or (b) the termination action was premature because it occurred prior to the passage of a reasonable time for performance after the Government had waived the established delivery schedule. The Board erred as will be shown.

The contract was awarded to Seaview on April 30, 1959, for 11,160 wire-splicing kits at a total contract price of $213,156. Within a month, however, the contract quantity and consideration were approximately doubled, to 22,319 items for $426,292.90, by Modification No. 1 to the contract, dated May 28, 1959. The delivery schedule required submission of preproduction samples by November 2, 1959, and production quantities commencing March 29, 1960. Subsequent to submission of bids, but prior to contract award, Seaview was advised by Government personnel that there were some errors and defects in the contract drawings and specifications. Upon request, Seaview advised that it would correct the deficiencies at no cost to the Government which was done. In all, over 200 changes to the drawings and specifications Seaview found to be necessary were approved by the Government. Preproduction samples were timely submitted on October 29, 1959, and approved by the Government on November 2, 1959. Formal Government acceptance of the samples was issued November 23, 1959.

Thereafter, and prior to the termination, Seaview encountered five alleged causes of delay. These were: (1) the impact of a nationwide steel strike upon the prime contractor and its suppliers

and subcontractors; (2) production tolerance difficulties attributed by plaintiff to the extensive changes to the contract drawings and specifications previously mentioned; (3) Seaview's inability to finalize production plans and tolerances claimed to be due to Government indecision between early March and mid-July of 1960 regarding the finish specified for the wire splicers, after the Government's discovery that the specified finish was unsuitable for field use; (4) a fire on August 30, 1960, which destroyed most of Seaview's production space; and (5) the closing of a key subcontractor's shop at a very critical point in production, on November 4, 1960.

The contracting officer never recognized the impact upon plaintiff caused by the second and third of these causes of delay. Due to the steel strike, however, the contract delivery schedule was extended by bilateral agreement in Modification No. 5 to the contract, dated April 7, 1960. This revised schedule required Seaview to deliver 1,000 units by July 29, 1960; 1,835 units each month thereafter through October 28, 1960; and 2,000 units on the 28th of November and each month thereafter until completion on June 28, 1961. This was the official contract delivery requirement at the time of termination on January 16, 1961. There was agreement by the parties to extend to November 29, 1960, the time for the initial delivery installment as a result of the fire at Seaview's plant, but this agreement was never consummated by formal contractual agreement. The fifth-cited cause of delay remains an issue in this litigation but mooted, as we shall see.

Seaview did not meet the July 29, 1960 first incremental delivery date established by Modification No. 5. It expected to make the first delivery that month. On August 22 the contracting officer advised the company by letter that default action would be withheld until August 31. As a result of the fire which occurred on August 30, the contracting officer indicated by letter dated November 1, 1960, that he would allow a three-months' delay in delivery, and subsequently forwarded a proposed supplemental agreement incorporating a new delivery schedule proposed by Seaview. This schedule called for 1,000 units to be delivered on November 29, 1960, and 2,000 units per month thereafter, until completion of deliveries on October 29, 1961. The proposed agreement was executed for Seaview and returned to the contracting officer on December 19, 1960, but was not executed by him, and consequently never became a formal part of the contract. The Board tacitly acknowledged this extension, and so do we.

Due to the previously mentioned abrupt shutdown of a key subcontractor, J. & P. Equipment Co., Inc. (hereinafter "J & P") on November 4, 1960, Seaview did not meet the proposed delivery schedule, but thereafter made deliveries of 420 wire-splicing kits, as follows:

130 units on 11-30-60 to Brooklyn, N.Y.

34 units on 12-8-60 to Fort Benning, Ga.

156 units on 12-20-60 to Fort Gordon, Ga.

100 units on 12-30-60 to:

Fort Devens, Mass. (17 units)

Fort Sill, Okla. (30 units)

Fort Leonard Wood, Mo. (53 units)

On November 25, 1960, the contracting officer requested authority to terminate, and on January 16, 1961, the contracting officer received authority to, and did, terminate, pursuant to the "default" article of the contract, Seaview's right to deliver the balance of the contract units, citing as cause therefor Seaview's failure to timely deliver on the incremental delivery dates. Appeal was timely taken from the termination action by Seaview's letter dated February 1, 1961, in accordance with the "Disputes" article of the contract.

In the ASBCA proceedings Seaview challenged the contracting officer's decision to terminate the contract on the grounds that its failure to timely deliver was excusable under the "Default" article of the contract, and that the Government had "waived" the delivery schedule. The appeal was denied in the March 27, 1962 decision referred to, supra, footnote 2, and a motion for reconsideration was denied on August 30, 1962.

By letter of December 20, 1962, Seaview submitted the matter to the Comptroller General of the United States for review. In accordance with standard General Accounting Office procedures, the ASBCA record was reviewed and both the Government and the contractor were invited to submit additional statements. Seaview's claim was denied by letter decision B-150515, dated July 1, 1963, which noted the decision of the United States Supreme Court in the previous month:

> Evidence has been furnished us to the effect that the contracting officer's representative urged Seaview on many occasions during December 1960 and early January 1961 to expedite delivery of the several small initial shipments which were made after November 29, 1960. We believe this evidence has a very material bearing on the question whether the Government led Seaview to believe its default had been "waived." However, none of this evidence was presented to the Board of Contract Appeals. In the light of the decision of the Supreme Court in United States v. Carlo Bianchi & Co., 373 U.S. 709, 83 S.Ct. 1409, 10 L.Ed. 2d 652, decided June 3, 1963, we believe our review of the Board's decision must be limited to the record before the Board.

We, too, cannot consider evidence not presented to the Board, but do not need it. Subsequently, upon request for reconsideration by Seaview, the Comptroller General declined to follow the "waiver" doctrine enunciated by this court in e.g., Stein Bros. Mfg. Co. v. United States, 337 F. 2d 861, 162 Ct. Cl. 802 (1963).

On December 17, 1965, petition was filed here. Thereafter, plaintiff filed a "Motion to Stay Proceedings", for the purpose of applying to the ASBCA for relief from its decision. Upon entry of a "Commissioner's Order Staying Procedures" on October 10, 1966, a "Petition for Relief from Decision" was filed with the Board, addressed solely to the "waiver" issue on the basis of the additional information presented in the General Accounting Office proceedings. After the Board's adverse decision dated May 12, 1967, referred to supra, footnote 2, proceedings were revived in this court, culminating in the commissioner's order, requiring the filing of a motion for summary judgment by both parties herein.

While both parties conceive the case to contain two principal issues, the first (excusability of Seaview's default) is subsumed and mooted by particular resolution of the second (termination after waiver of default). Thus, if in contemplation of law the conduct of the Government following plaintiff's November 29, 1960 delivery default constituted a constructive election to permit continued performance, a "waiver" occurred which was not subsequently cut off by a "cure" notice under the Default clause, so that the eventual termination on January 16, 1961 would be invalid. Should this be so we need then make no inquiry into the plaintiff's exemption from certain of the consequences of fault under the Default clause due to J & P's failure on November 4, 1960, to perform its subcontract, which failure was the principal cause of plaintiff's delay in the period following the restoration of plaintiff's productive capacity after its August 1960 fire damage. The onus of blame for delays preceding November 29 would then become academic. Initial attention must, therefore, be focused on the waiver-after-breach problem.

As to this issue the Board ruled as follows:

> We reject as untenable appellant's argument that the delivery schedule was waived. Termination was effected in this case on 16 January 1961 for failure to deliver the 29 November and 29 December installments. No evidence indicates an intent to waive the default and to permit continued performance. The termination notice was not unreasonably delayed, certainly not as to the 1,710 shortage with respect to the December installment. We attach no import to the fact that the contracting officer sought authority to terminate before the November installment was due because the evidence clearly established appellant was unaware of such action and hence it could not and did not affect

appellant's efforts to produce. If appellant had made the November and December deliveries prior to 16 January, we are certain the contracting officer would not have released the termination notice.

In its later opinion on the plaintiff's Petition for Relief from Decision the Board held:

> No final and irrevocable decision to terminate the contract for default had been made or could be made by the contracting officer prior to 16 January 1961, as the contracting officer was lacking in authority to terminate for default prior to 16 January. Up to that time there was the possibility that the contractor's performance would improve sufficiently to cause the contracting officer to decide that it was not in the best interest of the Government to exercise the right to terminate for default. Under these circumstances, it might have been imprudent, and possibly prejudicial to the contractor, for the contracting officer to have advised the contractor that he intended to terminate the contract for default if he succeeded in obtaining authorization from higher authority to do so. In holding that there was no waiver of the Government's right to terminate for default, we said:
>
> "If appellant had made the November and December deliveries prior to 16 January, we are certain the contracting officer would not have released the termination notice."

The factors controlling this legal issue start with the contracting officer's letter of November 1, 1960, which postponed the first delivery requirement to November 29, 1960, due to the fire damage to plaintiff's plant on August 30 and consequent disruption, but, said the notice--

> * * * In the event of your failure to meet this delivery schedule, the contract will be subject to an immediate termination for default. * * *.

Following that, on November 4 subcontractor J & P closed its doors due to financial difficulties brought about largely by labor troubles of which plaintiff had not been informed. Immediately the plaintiff removed from J & P's plant special tooling and supplies which it purchased from J & P and within a week relet the defaulted J & P subcontract work to three other suppliers, one of whom later proved unable to do the job and caused plaintiff further delay in again reletting that portion of the work. Plaintiff also purchased a quantity of additional tooling and equipment for standby use by its new suppliers in an emergency.

On November 23, 1960, the plaintiff advised the contracting officer that it had submitted 130 completed units for inspection and was making every possible effort to accelerate its production to meet shedule requirements. Upon receiving this advice on November 25, the contracting officer addressed a Disposition Form to the Economics Division requesting that action be taken to initiate default proceedings because as of then the contractor had produced for inspection only 130 units and it appeared to be impossible for it to meet the revised schedule calling for 1,000 units by November 29 and 2,000 each month thereafter. On November 29 the Economics Division consulted the Legal Office, and on December 1 the latter advised the Economics Division that there was no legal objection to default termination "provided action is promptly taken". Thereupon the contracting officer wrote to the Deputy for Procurement, USASSA, on December 2, 1960, requesting authority to terminate for default effective immediately. The latter recommended the termination on December 7, 1960, to the Chief Signal Officer in Washington. There the request inexplicably languished until January 11, 1961, when the Deputy Chief Signal Officer advised the Chief of the Procurement and Distribution Division that termination authority was approved, effective immediately, having coordinated the termination through the Deputy Chief of Staff for Logistics. On January 19, 1961, the Chief of the Procurement Branch advised the Commanding General of the Army Signal Supply Agency that the contracting officer could proceed to terminate immediately. In the meantime the contracting officer learned of his authorization by telephone and on January 16, 1961, issued a termination notice to plaintiff, who received it the following day.

We have purposely itemized this labyrinthine voyage of the request for termination authority through its time-consuming military channels to contrast the 48-days' delay in termination (from the delivery default of November 29, 1960, to formal termination on January 16, 1961) with the mandate of ASPR 8-602.3(c) (32 C.F.R., Chapter 1, Part 8, Rev. Jan. 1, 1961) that the contracting officer "shall * * * issue a notice of termination at once (emphasis supplied).", which coincides with the advice given by the Army's legal officer on December 1, 1960 (see supra). The requirement that the contracting officer receive authorization to terminate may serve to stretch the concept of what is a prompt notice, but cannot explain or excuse the 48-days' delay of termination in this case, 35 days of which were consumed in the Office of the Chief of the Signal Corps without any visible action or explanation for the delay.

Until receiving the termination notice on January 17, 1961, neither the plaintiff nor the Government inspector assigned to the plant had any inkling of the contracting officer's intention to terminate. During that entire period the plaintiff made every effort to compensate for its earlier misfortunes and to catch up on delivery requirements, both by augmenting its payroll, letting subcontracts expeditiously, purchasing additional tooling, and performing some of the machining itself. (Plaintiff's role in performing the contract

was essentially that of assembling parts which it acquired from suppliers and having them machined by subcontractors.) From November 30 to December 30, 1960, plaintiff made four deliveries totaling 420 units, which were accepted by the Government. At the time of contract termination on January 16, 1961, the plaintiff had nearly 2,000 assemblies in various states of completion and was on the verge of reaching full production. By the end of December 1960, according to its Certified Public Accountant, plaintiff has expended a total of $97,583.28 in contract performance. The contracting officer, through his subordinates, was actually or constructively aware of these efforts throughout the period he was waiting for authority to terminate.

The Government is habitually lenient in granting reasonable extensions of time for contract performance, for it is more interested in production than in litigation. Moreover, default terminations--as a species of forfeiture--are strictly construed. Murphy et al. v. United States, 164 Ct. Cl. 332 (1964); J. D. Hedin Construction Co. v. United States, 408 F.2d 424, 431, 187 Ct. Cl. 45, -- (March 1969).

Where the Government elects to permit a delinquent contractor to continue performance past a due date, it surrenders its alternative and inconsistent right under the Default clause to terminate, assuming the contractor has not abandoned performance and a reasonable time has expired for a termination notice to be given. This is popularly if inaccurately referred to as a "waiver of the right to terminate. 5 Williston, Contracts, Third Ed., § 683. The election is sometimes express, but more often is to be inferred from the conduct of the non-defaulting party. McBride and Wachtel, Government Contracts, § 31.170. The determination of what conduct constitutes such an election is more conjectural than to prescribe the proper method of effecting a valid termination once the election has occurred. The principles governing the election and its consequences are aptly presented in Cuneo, Waiver of the Due Date in Government Contracts, 43 Va.L.Rev. 1 (1957). He says at page 23:

> * * * Thus when the Government terminates prior to expiration of reasonable time after proper notice it takes a substantial financial risk. Such termination should not be attempted without full knowledge of all the facts and appreciation of the consequences.

The necessary elements of an election by the non-defaulting party to waive default in delivery under a contract are (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the Government's knowledge and implied or express consent.

What is a reasonable time for the Government to terminate a contract after default depends on the circumstances of each case. See Lumen, Inc., ASBCA 6431, 61-2 BCA 3210; Foster Sportswear, ASBCA 5754, 1962 BCA 3364. As stated earlier, ASPR 8-602.3(c) requires the contracting officer to issue a termination notice "at once". The period for termination after default will naturally be greater where the contractor abandons performance or where his situation is such as to render performance impossible or unlikely, than where he continues performance in reliance on the lack of termination and proceeds to incur obligations in efforts to perform, particulary where, as here, he has no reason to know that a decision to terminate has already been privately made by the contracting officer and is subject only to higher approval. Cf. Atlantic Fish and Oyster Co. v. United States, 116 F.Supp. 574, 126 Ct. Cl. 892 (1958).

The 48-days' period intervening between the default in delivery and the termination notice in this case cannot be considered in any sense to have been prompt, even allowing for the fact that the contracting officer was awaiting required approval from higher authority to terminate, as the contract required because of APP 8-602.3. The activities of the contractor in the interim, which have also been described, were known to the contracting officer and clearly constituted substantial reliance by the contractor on an election having been made not to terminate.

Time is of the essence in any contract containing fixed dates for performance. When a due date has passed and the contract has not been terminated for default within a reasonable time, the inference is created that time is no longer of the essence so long as the constructive election not to terminate continues and the contractor proceeds with performance. The proper way thereafter for time to again become of the essence is for the Government to issue a notice under the Default clause setting a reasonable but specific time for performance on pain of default termination. The election to waive performance remains in force until the time specified in the notice, and thereupon time is reinstated as being of the essence. The notice must set a new time for performance that is both reasonable and specific from the standpoint of the performance capabilities of the contractor at the time the notice is given. (See Lumen, Inc. and Foster Sportswear, supra, and also Bailey Specialized Buildings, Inc. v. United States, 404 F.2d 355, 186 Ct. Cl. 71 (1968).)

The latter problem is of no immediate concern, for the only post-default notice given by the contracting officer to Seaview was the termination notice on January 16, 1961, whereas the contracting officer would have been well-advised to precede his termination notice with a "cure" notice setting a reasonable time for performance, and then to terminate at the latter date if Seaview had remained in default. The so-called "cure" notice is that which is authorized in paragraph 1(ii) of the Default clause, which provides that the

Government may terminate the whole or any part of the contract by written notice--

> (ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

In the circumstances here, the elapsed time cannot be counted solely from the failure to deliver at the end of December 1960 until January 16, 1961. The defendant did not terminate because of the December failure which was apparently unknown to the higher authorities, but because of the lack of delivery at the end of November. Moreover, once the November failure was waived, as it was, the defendant had either to agree with plaintiff upon a new delivery schedule or clearly set a new schedule. Bailey Specialized Buildings, Inc. v. United States, supra, 404 F.2d at 359-360, 186 Ct. Cl. at 79-82. That was never done in this case.

Authorities relied upon by the Government do not alter these conclusions. In Zoda v. United States, 180 F. Supp. 419, 148 Ct. Cl. 49 (1960), the Government gave the contractor a cure notice setting a definite date for compliance, and seven days thereafter terminated the contract for default when it appeared not only that plaintiff had not met the requirements of the notice but also had informed the Government that production could not commence because of financial difficulties. In the case before us Seaview was not given a cure notice following the Government's election to waive the delivery delinquency, and furthermore gave every indication that it intended to perform the contract. In James E. Kennedy, Trustee, v. United States, 164 Ct. Cl. 507 (1964), the day after passing the second monthly delivery installment without any acceptable deliveries to that time, the contractor advised the Government that full scale operations could not be conducted "until proper financing is forthcoming". The next day the contract was terminated for "failure to make deliveries as required * * *". The court upheld the termination because it considered that the contract was incapable of being performed due to the contractor's admitted financial problems if nothing else, and was thus breached. At page 513 of the opinion--

> * * * Even construing defendant's failure to enforce the January delivery date as an extension of time, Greenstreet [the contractor] failed to meet the February date; failed to make any effective delivery, and gave every indication that no deliveries would ever be made. [Emphasis in original.]

The differences in the present case speak for themselves, principally that Seaview did not renounce its contract, was capable of performance, did continue performance with a fair likelihood of success, and made deliveries of acceptable end items. Neither the Zoda nor the Kennedy case contains a useful discussion of the principles involved in the termination-after-waiver area.

The issue is one of law based in this instance on the undisputed facts, and accordingly the court can decide it for itself without deference to the Board's conclusion. The court is free to reach the opposite result, as it does.

The plaintiff asks only that in these circumstances the termination be considered as a termination for convenience, and the case is to be returned to the ASBCA for determination of recoverable costs under the applicable formula, reduced by whatever is legally prescribed for the Government's actual damages for the plaintiff's unexcused delays.

CONCLUSION

For the reasons set forth above and to such extent, plaintiff's motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied. The case is returned to the ASBCA for appropriate proceedings to determine the cost plaintiff is to recover with proceedings in this court to be suspended for 90 days.

JOSEPH MORTON COMPANY, INC.

ASBCA No. 19793 (1980)

OPINION BY ADMINISTRATIVE JUDGE BURCH ON MOTION FOR RECONSIDERATION

Both parties have moved for reconsideration of the Board's decision under this appeal (78-1 BCA ¶ 13,173).

Under this construction contract for the rehabilitation of two airmen's dormitories, Building Nos. 6100 and 6200, executed on 3 August 1973 and terminated for default on 13 September 1974, the Board upheld the default termination with respect to No. 6200, but reversed that action as to No. 6100.

I. Respondent's Motion

We determined that since appellant's progress on No. 6100 had been delayed by the Government for a period of 34 days (See finding 15d), appellant was entitled to receive an extension for that period running from its proposed completion date (23 August) to 26 September. We also concluded that because the Government had failed to establish that appellant's progress was inadequate for completion of this building by 26 September, termination of No. 6100 was premature. Disagreeing with the latter conclusion, respondent argues, in addition, that there is ample evidence in the record to establish with mathematical precision that appellant would not have been able to complete the unfinished portion of No. 6100 within the 13 days remaining between the termination date (13 September) and 26 September.

We do not consider it necessary to examine respondent's arguments, for upon reexamination of our previous decision, we have decided that we reached inconsistent conclusions. We correctly concluded that the Government's forbearance to terminate for default was not an estoppel or election precluding the Government from terminating for default or insisting on liquidated damages from 28 April and 11 May. Yet we inconsistently gave appellant a 34 day time extension for Government-caused delay on Building No. 6100, measured from appellant's proposed completion date of 23 August. The Government-caused delay, while properly considered to reduce liquidated damages, could not operate to extend the contractual completion dates because it occurred after those dates, during the period of forbearance. While we found that the Government permitted appellant to perform toward the 23 August date, we did not find the Government bound to that date, nor could we in the absence of consideration or detrimental reliance. Even if viewed as a time extension period, the 34 days would have to be added to the 28 April completion date, not the 23 August forbearance date.

Accordingly, we hold that appellant was not entitled to a time extension from 23 August to 26 September, and the Government's termination for default on 13 September for failure to meet the 28 April completion date for Building No. 6100 was proper. We are not persuaded otherwise by the dissenting opinion. It is based upon the incorrect premise that a contractor can be entitled to an extension of a period of forbearance, which is by definition a gratuitous accommodation by the Government. We intended no such conclusion in our original opinion.

It is necessary for us to correct the error in our previous decision. Although the point was not raised by either party on the motion for reconsideration, the questions of waiver of due date and entitlement to an extension of time past the 28 April completion date were major issues in this case at all times which both parties had full opportunity to argue.

This disposition renders moot the question whether appellant's progress on the second half of Building No. 6100 was inadequate to permit completion by 13 September. Our findings on that issue in our previous decision are hereby withdrawn as unnecessary.

Upon reconsideration we determine that the default termination with respect to Building No. 6100 was proper and vacate our conclusions to the contrary. The foregoing reconsideration does not affect that portion of our decision awarding appellant the 34 day remission of liquidated damages arising out of Government delays pursuant to finding 15d, and also referenced in PART II-A-1 of the SUMMARY.

II. Appellant's Motion

Appellant takes exception to our decision sustaining the default termination meted out with respect to performance under Building No. 6200 and raises a number of legal and factual questions discussed below.

A. The Common Carrier as a Subcontractor.

The appellant takes legal exception to that portion of our decision holding that a common carrier is a "subcontractor" within the meaning of that term as it appears in the clause "Termination for Delay--Time Extension (1969 AUG)", and the resulting conclusion that the provisions excusing delays require freedom from fault or negligence on the part of both appellant, as the prime contractor, and the carrier as a subcontractor.

The delay for which appellant seeks additional time was the result of an accident damaging certain components or supplies -- metal wardrobe parts -- while these items were in transit in a railroad freight car.

In its initial brief, the appellant had set forth a limited argument that since the delay was caused by a lower tier subcontractor, viz., the railroad carrier, appellant was therefore shielded from any culpability and entitled to exculpation under a decision of the Court of Claims, Schweigert, Inc. v. United States, 181 Ct. Cl. 1184, 388 F.2d 697 (1967), which held that a subcontractor below the first tier was not, under the terms of this clause, within the chain of culpability as a subcontractor in the absence of express provisions intended to include lower tier subcontractors. We found that the current provisions of this clause, present in appellant's contract, in contrast to those appearing in the Schweigert case, contain explicit statements for the inclusion of subcontractors or suppliers at any tier within the circle of responsibility. Thus we held that the common carrier, as a subcontractor or supplier of services, regardless of the tier in which it stood, and the appellant, as the prime contractor, must be without fault or negligence under the clause to gain relief for appellant from the delays encountered in the delivery of the supplies. We concluded that appellant had failed to establish the carrier's freedom from fault.

In this connection, although the question raised by the appellant was limited to the issue discussed in Schweigert, i.e., whether or not a subcontractor below the first tier was covered by the clause, we also noted in passing, that this Board in Hogan Mechanical, Inc., ASBCA No. 21612, 78-1 BCA ¶ 13,164 at 64,332, had recently considered and reaffirmed its previously published views that a common carrier is a subcontractor as the term is used in the clause.

Seizing upon this aspect, the appellant now contends that the Board is constrained by what the appellant considers as controlling precedent, established by the Engineers Board of Contract Appeals, to follow views which are contrary to our decision on this issue, and thus concludes that we have exceeded our authority in reaffirming our views even though these are based upon precedent to be found in our previous decisions. See Hogan Mechanical, Inc., supra, at 64,332-33. The decision cited by appellant as an overriding precedent is the appeal of W. A. Rogers, ENG BCA No. PCC-25, 76-2 BCA ¶ 12,195, on a motion for reconsideration of a prior unpublished Rule 12 decision rendered on 12 April 1976, affirming the contrary view of the Engineers Board of Contract Appeals that a common carrier hauling contract supplies is not a subcontractor within the meaning of that term as it appears in the clause.

Citing both conflict of laws rules and the desirability of comity, appellant contends that because this contract was awarded and administered by the Corps of Engineers and as the Engineers Board has already advanced its interpretation of these provisions, the latter's views should be preferred. Appellant points to the confusion which may result from differing interpretations advanced by various agencies on the matter of a standard clause employed by the Corps. Finally, appellant asserts that this Board must look to the presumed intentions of the parties as the determinative factor in the application of the "dispositive law."

None of these considerations constitute a valid basis for a departure from the views announced in Hogan and followed under this appeal.

Although this contract, executed in August 1973, was awarded and administered by officials of the Corps of Engineers, an agency of the Department of Defense, yet under the Disputes clause and the terms of this Board's Charter, jurisdiction over the dispute is lodged in this Board. Insofar as comity is concerned, while this Board, as well as other agency boards have quite often cited the decisions of other boards, generally in support of various legal propositions, this Board has not hesitated to differ with others on substantive issues. (See e.g., J. Carlton Hudson, Jr., ASBCA Nos. 11659, 11660, 11661, 67-2 BCA ¶ 6503, where this Board refused to follow the decision of another agency board, stating that it did not find the decisions cited by the other board on the point in question to be persuasive; subsequently in Doral Construction Company, Inc., ASBCA No. 13734, and Manson, Smith, McMaster, Inc., ASBCA No. 14128, 74-1 BCA ¶ 10,432, this Board rejected a request by the Department of the Navy, joined by the Department of the Army through the Corps of Engineers, that its prior decision in Hudson, supra, be overruled.)

This is not a conflict of laws situation, as appellant imaginatively asserts, where we might be bound by the substantive law of another forum. The Engineers Board and this Board do not apply different substantive law of different jurisdictions. Both presumably apply the same federal law of contracts. This happens to be an instance where the two tribunals differ as to what the federal law is.

Examples of true conflict of laws situations would be differences between the law of two states or between federal law and state law. The differences involved here between the views of this Board and the Engineers Board may be compared to differences between two federal district courts or courts of appeals, from whom a similar independent approach is not uncommon. See Carmine Fiorentino v. United States, Ct. Cl. No. 390-77, 17 October 1979, Slip Op. at pp. 7-8; and Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., 16 October 1979, CA 5th, 48 L.W. 2290.

The plea that the parties executed this contract upon the basis of a presumed intention of following a uniform established construction or interpretation of a standard provision routinely employed in construction contracts is contrary to the facts as disclosed in the decisions issued by both boards on this issue. At the time of the execution of this contract in August 1973 there had been no published decisions of the Engineers Board on this issue, while as noted in Hogan, this Board had already spoken on this question on two separate occasions, the first decision issued in 1962 and again in 1964. (Citations noted in Hogan at 64,333) One of these, Metro-Tel, Division of Grow Corporation, ASBCA No. 8471, 1964 BCA ¶ 4164 issued

in March 1964 unequivocally restated the proposition that " . . . carriers, shipping supplies contracted for on behalf of a Government contractor [are] subcontractors within the meaning of the default clause." The only published decision of record from the Engineers Board i.e., W. A. Rogers, supra, did not appear until 1976, long after the execution of this contract, and represented an ostensible departure from the established views of another Department of Defense board.

Moreover, we observe that the very premise of appellant's comity, conflict of laws, and intent arguments is erroneous. By an organizational change made in 1962, of which appellant is apparently unaware, the responsibility for deciding appeals under military construction contracts of the Corps of Engineers was transferred from the Engineers Board to the Armed Services Board. 4 Gov't Contractor ¶ 202. Therefore, under appellant's own argument, the appropriate decisions concerning interpretation of such contracts would be those of the ASBCA.

Appellant has also sought to re-argue the Hogan decision with a critical analysis attacking the validity of the precedents employed therein as well as this Board's basis for rejecting or distinguishing certain precedents advanced in W. A. Rogers. Arguments similar to those advanced by the appellant were fully considered, discussed and rejected in the opinion issued by this Board. Appellant has presented no valid basis for a review or reconsideration of the opinion in that case and we decline appellant's invitation to depart therefrom under this appeal.

Finally, appellant has commented upon possible practical difficulties which may flow from our ruling when the issue of the lack of culpability results in a hearing involving a common carrier, perceiving added complications touching upon the Board's jurisdiction. At this point, these objections, in the absence of a controversy raising such issues or problems, if not speculative, are premature and unrelated to the legal issues under this appeal.

B. Refusal to apply rule in D. Joseph DeVito v. United States, 188 Ct. Cl. 979, 413 F.2d 1147 (1969).

This rule was enunciated by the Court of Claims in connection with its decision overturning a default issued some 48 days following a delinquent contractor's failure to fulfill an installment delivery due under a production or supply contract. During this period the contractor, unaware of the contracting officer's intention to issue a default termination, had with the knowledge of the contracting officer, continued performance and according to the Court, this resulted in an election on the part of the Government not to terminate for that delinquency as follows:

> The necessary elements of an election by the non-defaulting party to waive default in delivery under a contract are (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the Government's knowledge and implied or express consent. (188 Ct. Cl. at 990-91)

In this connection, we have adopted the views of this Board as set forth in Olson Plumbing and Heating Company, ASBCA Nos. 17965, 18411, 75-1 BCA ¶ 11,203, wherein we stated that the DeVito doctrine, which works an estoppel against the Government, does not normally apply to construction contracts for the following reasons: (1) By reason of the inclusion of certain provisions peculiar to construction contracts rendering the application of an estoppel against the Government untenable "since continuation of performance after the required dates entitles the contractor to payment for the work accomplished", and "continued performance in reliance on the Government's failure to enforce the contract schedule is not detrimental to the contractor . . ."; and (2) " . . . in providing for liquidated damages, the parties have agreed in advance upon the Government's damages for delay in completion. Where the contracting officer is assessing . . . liquidated damages after passage of the contract completion date, it could normally not be considered that he believes time is no longer of the essence of the contract." (Morton, Slip op. at 16). The second reason, cited above, is amply reinforced by the terms of the following provisions appearing in the default clause, which serve as a basis for the right of a contracting officer to assess liquidated damages beyond a completion date:

> (c) If fixed and agreed liquidated damages are provided in the contract and if the Government does not so terminate the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until the work is completed or accepted.

Here we found that the reasonable dates for completion of the work were 28 April and 11 May respectively for each of the buildings, and it was from these dates that liquidated damages were properly computed. The Government's forbearance from issuing a default termination was unquestionably conditioned upon completion of the entire job by appellant's proposed completion date of 23 August and cannot be construed reasonably as a waiver of the right to impose such damages as reserved under "(c)" above.

The Olson appeal was subsequently sustained by the Court of Claims in Olson Plumbing and Heating Company v. United States, 602 F.2d 950 (1979) after the filing of the parties' briefs seeking reconsideration under this appeal. In its consideration of the Olson case the Court did not undertake a discussion of our remarks with respect to the distinctions to be drawn between construction and supply contracts on the question of liquidated damages, but rather, addressing the contract in Olson as a production or design contract, it upheld the termination because (1) the contractor had failed to make substantial progress, thereby preserving the Government's right to terminate for failure to make timely deliveries; and (2), the contractor's abandonment "gave the Government a right to terminate the contract independent of its right to terminate the contract for failure to meet the delivery date, . . ." (602 F.2d at 957)

In its discussion of the DeVito rule the court also observed at F.2d 955 the following:

> Where the right to terminate has been expressly reserved or when liquidated damages have been imposed by the non-breaching party, the other party has a heavier burden of proving that the right to terminate for failure to deliver on time has been waived.

Regarding detriment, appellant argues that the last progress payment was for work through 15 August 1974, and that no payment was made for work through 13 September.

However, the appellant is entitled to payment (or credit against liquidated damages) for any work performed after the required completion dates. The Government does not dispute this, nor is there any evidence that the appellant has not been given appropriate credit for such work. It is the entitlement to payment or credit that removes the element of detriment necessary for a waiver of due date. If payment or credit has not in fact been given, that is a separate matter irrelevant here.

Regarding the assessment of liquidated damages as having placed appellant on notice that time was still of the essence, appellant correctly points out that the Government did not notify it of such assessment until a letter of 14 August, long after the required completion dates we found. But the absence of detriment, as discussed above, alone precludes waiver of due date. The notice of liquidated damages assessment strengthens our finding of no waiver at least for the period from 15 August to the end of the contract, which is the period for which appellant alleges it has not been paid.

Appellant's efforts to distinguish Olson factually do not affect the validity of Olson's discussion of the applicability of waiver of due date to construction contracts.

C. Allegations that Default Termination for Building No. 6200 must be considered premature.

At the outset of this argument appellant states that our decision supporting the default termination as to Building No. 6200 under that portion of the clause authorizing termination of a contractor's right to proceed if such contractor "refuses or fails to prosecute the work or any separable part thereof" (emphasis added) is erroneous because neither separate contracts nor severable elements were involved. It contends that the integrated work schedule for both buildings "conclusively established that work on Building No. 6200 was not separable from progress on Building No. 6100." Our determination above that the termination for default of Building No. 6100 was proper renders this argument moot. The 23 August date proposed by appellant never became a contractual completion date for either building. The latest previously extended date of 11 May was the applicable date for Building No. 6200, so the termination for default of that building on 13 September was proper.

D. Lack of keys for locks on demolished doors.

Appellant's assertions of delays due to inability to transfer locks from demolished doors to new doors until keys were furnished are not credible. We see no reason why locks could not have been transferred and the doors prevented from locking shut either by taping the latches or using a temporary stop; moreover, there is no probative evidence of the extent of the delays on this account, if any.

E. The balance of appellant's discussion deals with its arguments concerning the varied causes of delay previously advanced in its initial brief and proposals for application of these causes to both buildings indiscriminately for the purposes of enlarging the periods previously or seeking additional grants. We have previously considered each of these claims in detail and find no basis for reconsideration.

Upon the basis of the foregoing the appellant's motion is denied and the respondent's motion is sustained as set forth above.

DISSENTING OPINION

I dissent as to the reversal of the Board's original decision on Building No. 6100 and concur in the affirmance of the default on Building No. 6200.

When a contractor fails to meet the contractually established completion date the contracting officer may elect to terminate the contract for default or to permit the contractor to continue performance. Ling-Temco-Vought, Inc. v. United States, 201 Ct. Cl. 135, 475

F.2d 630 (1973). In this case, the contracting officer elected to permit continued performance until a specified date of 23 August 1974. The election to forbear termination of the contract is, of course, contingent upon the contractor's completion by the agreed date or within some reasonable time. Universal Fiberglass Corp. v. United States, 210 Ct. Cl. 206, 537 F.2d 393 (1976). The two buildings in this contract are completely severable items of work; in fact, they originally had separate starting and delivery dates. The appellant failed to meet the new date of 23 August and was making poor progress on Building No. 6200. This part of the contract was properly terminated for default.

As to Building No. 6100, the parties had agreed that upon completion of the first half the Government would turn over the remainder to the appellant for completion of the work. It delayed to turn it over by 34 days through the Government's own fault. There is an implied obligation that the Government may not interefere with the contractor's work. The original opinion in this case properly held that the forbearance period on Building No. 6100 should be extended by the 34 days of Government-caused delays.

The rate of appellant's progress on two building at one time had been miserable. But there is no persuasive showing that, if Building No. 6200 alone had been terminated, permitting appellant to concentrate his men and equipment in Building No. 6100, he could not have completed it within the extended schedule.

HARRIS J. ANDREWS, JR.
Administrative Judge
Chairman, Armed Services
Board of Contract Appeals

C. Default Excuse

SOUTHLAND MANUFACTURING CORPORATION

ASBCA No. 10519 (1967)

* * * * *

Appellant closed its plant on 7 December 1964. Nothing communicated to Government contracting personnel indicated that the contracts would be performed notwithstanding the plant closing. Mr. Milstein claimed that he felt that he could not afford to pay the extra wages and indicated that he would have gone ahead only if Mr. Elefant had told him how to proceed, of if he and Mr. Elefant could have resolved something quickly. Although denied by Mr. Milstein, we must accept the testimony of Mr. Borden corroborated by Mr. Duffy that Mr. Milstein said on 7 December 1964 substantially that appellant did not intend to open until conditions changed. We must also accept the testimony of Mr. Elefant that Mr. Milstein told him "I can't go on." Finally, we must accept the testimony that twice when confronted with the threat of default termination, Mr. Milstein indicated that this was up to the Government. Nowhere does Mr. Milstein even allege that he unconditionally informed the Government contracting personnel that he would perform. From this testimony the Board finds that appellant refused to reopen his plant except on unspecified conditions, presumably a rescission of the wage increase or an increase in the contract prices, neither of which the contracting officer was in a position to grant.

Under the above circumstances, we can only conclude that the plant closing combined with the making of statements indicating that appellant would not proceed was an anticipatory breach and an abandonment of the contract. James E. Kennedy, Trustee in Bankruptcy of Greenstreet, Inc., Bankrupt v. The United States, 164 Ct. Cl. 507, 513 (1964); American Canvas Products, Inc., ASBCA No. 10749, 66-1 BCA ¶ 5635, 20 June 1966; Washington Scientific Industries, Inc., ASBCA No. 9384, 65-1 BCA ¶ 4743, 22 March 1965; Wacline, Inc., ASBCA No. 8725, 1963 BCA ¶ 3903, 20 September 1963; Midwest Aero Mfg. Co., Inc., ASBCA No. 7878, 1962 BCA ¶ 3568, 30 October 1962; D. H. Dave and Gerben Contracting Co., ASBCA Nos. 6257, 1962 BCA ¶ 3493, 30 August 1962; Guy R. Allen, ASBCA Nos. 6896 and 6957, 1962 BCA ¶ 3360, 18 April 1962; The Aircraftsmen Company, A Corporation, Bankrupt, By Frank M. Chichester, Trustee in Bankruptcy, ASBCA Nos. 3592 and 3965, 58-1 BCA ¶ 1667, 26 March 1958, sustained on other grounds 312 F. 2d 275 (9th Cir., 1963)

The plant closing combined with the statements by Mr. Milstein indicating that appellant would not reopen also constitutes a failure to make progress endangering performance of the contracts. It is irrelevant that if appellant had reopened the plant the day after it was terminated for default, it might have been able to perform some or most of the contracts. Appellant's closure of the plant stopped performance and constituted a failure to make progress during the period that the plant was closed. This failure to make progress when looked at in the context of Mr. Milstein's statements endangered the performance of the contracts and was not cured within the ten-day period allowed by the Default clause and the cure notice. Therefore, even assuming appellant's actions did not constitute an anticipatory breach of the contracts or an abandonment of the contracts, default termination was justified under paragraph (a)(ii) of the Default clause contained in each terminated contract which provides "The Government may * * * terminate the whole or any part of this contract * * * if the Contractor * * * so fails to make progress as to endanger performance of this contract in accordance with its terms, and * * * does not cure such failure within a period of 10 days * * * after receipt of notice from the Contracting Officer specifying such failure."

The fact that the contracting officer did not go to Puerto Rico when requested by appellant does not change the fact that there was a failure to make progress endangering performance of the contract which was not cured within the ten-day period allowed by the cure notice and the Default clause as well as an anticipatory breach and abandonment of the contract. The contracting officer never agreed unconditionally to go to Puerto Rico but only promised to come if he could do so. His failure to come has not been shown to have caused appellant to fail to cure the endangering of performance nor has it been shown to have affected the anticipatory breach or abandonment of the contract. Had the contracting officer gone to Puerto Rico, he need have done nothing to relieve appellant; indeed it is doubtful that he could have done anything. There was no agreement to extend the ten-day period and when it expired, the Government was free to default appellant under paragraph (a)(ii) of the Default clause as it could have done previously for the anticipatory breach and abandonment of the contract.

The fact that appellant thought that the contracting officer was coming to Puerto Rico may have delayed appellant's indicating what he relied upon as an excuse for nonperformance. The reasons available to appellant at that time, however, are now available to appellant and are hereinafter considered. Hence, there could have been no prejudice from the failure of the contracting officer to go to Puerto Rico.

Several excusable causes of failure to perform have been suggested in this dispute. These include appellant's labor problems which resulted in the strike and problems with the Labor Department concerning alleged Walsh-Healy Act violations. The Strike did not cause the failure to perform since it began many months before the plant closing and appellant was able to operate notwithstanding the

strike. Hence, the strike cannot be the basis for converting the default termination to a termination for convenience. Clark Field Bus Lines, ASBCA No. 9281, 1964 BCA ¶ 4492, 30 September 1964. The Walsh-Healy Act problem was totally unrelated to appellant's failure to perform. In any event Labor Department action against violations of the Walsh-Healy Act even if they caused a failure to perform, could not be considered beyond the control and without the fault or negligence of the contractor. The simple answer is that Walsh-Healy violations are the contractor's fault and in and of themselves justify action against the contractor.

The primary allegation of appellant is that the Government acting in its sovereign or contractual capacity caused appellant's failure to perform by making it financially impossible for appellant to perform. The SBA action in not disbursing the loan and the Labor Department's action raising the minimum wage to which appellant was subject are cited as Government action which caused the financial inability to perform.

A contractor is required to have the financial ability to perform its contract with the Government. E.g., Shutter Microwave Corp. (Isadore Cherno, Trustee in Bankruptcy), ASBCA No. 9786, 66-1 BCA ¶ 5473, 23 March 1966, and the cases cited therein. Financial inability and unprofitableness of a contract do not by themselves excuse performance. E.g., Lucas Aircraft Supply Co. (A Division of S. C. Rudolph Lumber Corp.), ASBCA No. 11167, 66-1 BCA ¶ 5671, 30 June 1966. Even insolvency does not by itself excuse contract performance. E.g., Medical Fabrics Company, Division of Bell Pharmaceuticals, Inc., ASBCA No. 11458, 66-2 BCA ¶ 5887, 13 October 1966. Financial inability to complete performance of a contract will relieve the contractor under the default clause only if the financial inability to perform is directly and inevitably caused by something beyond the control and without the fault or negligence of the contractor. E.g., H & H Manufacturing Company, Inc. v. The United States, 168 Ct. Cl. 873, 879 (1964, rehearing denied 1965), Fabricated Products, Inc. (Harry Garland, Trustee in Bankruptcy), ASBCA No. 9631, 1964 BCA ¶ 4450, 25 September 1964; Security Signals, Inc., ASBCA No. 4634, 58-2 BCA ¶ 2045, 22 December 1958. It is against this background that appellants' contentions must be considered.

The SBA never consummated the loan to appellant. Appellant's auditor testified that with the wage increase appellant could not perform even if it got the loan. Accepting this testimony, we find that the failure of appellant to receive the SBA loan was not the cause of his failure to perform and, hence, cannot be a basis for conversion of the default termination into a termination for convenience.

Even if failure to obtain the loan were the cause of the failure to perform, it would not relieve appellant. As indicated previously, appellant is responsible for obtaining financing for its contract. It has been held many times that the failure to obtain a loan is not an

excusable cause of failure to perform in the absence of any underlying cause which is excusable. E.g., Petrofuels Refining Co., ASBCA No. 9986, 1964 BCA ¶ 4341, 30 July 1964; Security Signals, Inc., supra.

The fact that the SBA was involved in the loan rather than a private finance institution makes no difference. In this instance, the SBA loan and actions were independent of the contracting activity. This is not that unusual case where the contract was awarded as a result of the SBA loan commitment. Type Machine Company, ASBCA No. 3214, 57-1 BCA ¶ 1270, 13 May 1957. This is not a case where the Government's failure to make payment under the contract caused the failure to perform either. E.g., Q.V.S., Inc., ASBCA No. 3722, 58-2 BCA ¶ 2007, 17 November 1958. Here, appellant simply failed to get an adequate commitment from the SBA and hence did not get its loan.

This case is similar to Petrofuels, supra. There the appellant had a letter of credit from a bank. He then had a fire which led the bank to withdraw the letter of credit. Thereafter he obtained the contract which was the subject of the default. The Board held that this evidence alone did not prove that the appellant had made proper arrangements for financing before accepting the contract. Here we have a strike which in and of itself might have been an excusable cause of nonperformance if it caused the nonperformance. The fact that it influenced the SBA to withhold the loan is not enough. The strike began before the loan was approved. Thus, appellant did not have firm financing arrangements with the SBA made when the contracts were signed and was not deprived of an adequate arrangement by an excusable cause.

Appellant puts much emphasis on the fact that the wage increase made it impossible to perform. A contractor is responsible for doing the job he contracts for and this makes him responsible for the cost of labor necessary to perform the contract. The appellant must have adequate financing to pay its labor costs and it cannot be relieved of its obligation merely because its labor costs rise to a level which it did not expect. The fact that the increase in labor costs occurred because of a rise in the minimum wage rather than another cause does not change the situation. This Board has held that an increase in th
bor Standards Act minimum wage does not entitle a contractor to an adjustment under the contract. The Metrig Corp., ASBCA No. 8455, 9163 BCA ¶ 3658, 11 February 1963. The Interior Board has reached the same conclusion. R. G. Brown, Jr., and Co., IBCA No. 241, 61-2 BCA ¶ 3230, 12 December 1961. It follows that an increase in the minimum wage does not excuse contract performance and we so hold.

It should be added here that the minimum wage increase was not statutorily required but was an administrative increase in the minimum wage consistent with the statute. Appellant alleges that the wage increase was unwarranted and the industry committee was not properly

informed. Appellant did not offer evidence or otherwise attempt to present his case before the industry committee. During the period involved in this dispute, 7 December 1964 to 23 December 1964, appellant could have fought the wage increase by appealing to the U.S. Court of Appeals. Appellant did not do this but instead closed his plant. Later, appellant did appeal the duly promulgated minimum wage, but not in a timely manner. Under these circumstances, the increase was not beyond the control and without the fault or negligence of appellant. This Board has no jurisdiction to review the wage determination. If it was unwarranted, appellant should have appealed it through proper channels.

SUMMARY

The evidence shows that the appellant was in default and that there was no excusable cause for its default. Accordingly, the appeal is denied.

ON GOVERNMENT'S MOTION FOR RECONSIDERATION

On 31 January 1967 the Board rendered a decision denying the contractor's appeal from the default termination of the six contracts listed above (67-1 BCA ¶ 6128). The appellant filed a timely motion for reconsideration, following which the Board held another hearing and took additional evidence; whereupon, it rendered a new decision reflecting consideration of the additional evidence, in which it reversed its previous decision and sustained the appeal from the default termination of the six contracts (decision dated 5 June 1969, 69-1 BCA ¶ 7714).

* * * * *

Issues in the Appeal

1. On the date of default termination, had the contractor repudiated and abandoned its six contracts?

2. As to the four contracts as to which deliveries were either made on time or not yet due on the date of default termination, had the contractor so failed to make progress as to endanger performance of the contracts in accordance with their terms?

3. As to the two contracts where on the date of default termination deliveries were either slightly behind schedule or due in such a short time that the contractor would need a time extension in order to perform timely, had the contractor without excusable cause so failed to make progress as to endanger performance of these two contracts?

SOUTHLAND MANUFACTURING CORPORATION

ASBCA NO. 10519 (1969)

ON GOVERNMENT'S MOTION FOR RECONSIDERATION

On 31 January 1967 the Board rendered a decision denying the contractor's appeal from the default termination of the six contracts listed above (67-1 BCA ¶ 6128). The appellant filed a timely motion for reconsideration, following which the Board held another hearing and took additional evidence; whereupon, it rendered a new decision reflecting consideration of the additional evidence, in which it reversed its previous decision and sustained the appeal from the default termination of the six contracts (decision dated 5 June 1969, 69-1 BCA ¶ 7714).

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We shall discuss the Government's assignments of error as they relate to these three issues.

Abandonment or Repudiation of Contracts

Appellant's close-down of its plant on 7 December 1964 followed after (1) the cancellation by SBA on 23 October 1964 of a previously-approved loan in the amount of $95,000 and (2) an order by the Wage and Hour Division of the Department of Labor officially promulgated on 7 December 1964 establishing a new classification for military hats applicable to no employer except appellant and increasing the minimum wage for this new classification from $.935 per hour to $1.15 per hour. In its Motion for Reconsideration, the Government asked the Board to hold that the appellant closed its plant to defeat the labor

union, intending the closure to be permanent, which constituted abandonment of performance of all of its contracts, particularly where the contractor refused to give the contracting officer unconditional assurance during the ten-day cure period that performance would be resumed. The Government's argument of abandonment or repudiation has two aspects. First, it contends that appellant's failure to comply with the contracting officer's order to resume production within ten days was in and of itself a total breach of contract giving the Government the right to terminate all of appellant's outstanding contracts forthwith. Secondly, it contends that appellant's plant close-down was intended to be permanent, which was itself an abandonment and repudiation of all of appellant's outstanding contracts justifying a termination for default.

None of the contracts contained any provision prohibiting the contractor from closing its plant or giving the contracting officer the contractual right to order the contractor to resume production; hence, there is no basis for a holding that a plant shut down was in itself a breach of contract or that the failure of the contractor to comply with the contracting officer's order to resume production was itself a breach of contract. Yet, it is clear from the record that the real reason why the notice of default termination was issued was the contractor's failure to comply with the contracting officer's ten-day ultimatum or to give unconditional assurance that it would do so. The ten-day notice called for specific action, not an explanation or excuses, and appellant's request for an extension of the time to reply to the ten-day notice was not granted for that reason. Thus, the contracting officer was wrong as a matter of law in holding that appellant's plant close-down and failure to comply with the direction to resume production was a total breach of appellant's contract.

As to whether the plant close-down was intended to be permanent, while it is true that appellant's president made statements before and at the time of the plant close-down indicating that the closure would be permanent, this is a case where actions speak louder than words. If he ever intended the close-down to be permanent, he immediately had a change of heart after the close-down. His conversations with the contracting officer and others between the date of the close-down and the date of the notice of default termination evinced a keen desire to reopen the plant and complete the contracts. He literally pleaded with the contracting officer to come to Puerto Rico immediately in order that he might explain his problems to the contracting officer and have his assistance in working out his problems so he could reopen his plant and resume production; and he obtained from the contracting officer a promise to come to Puerto Rico as soon as he possibly could. When he found that the contracting officer could not obtain authorization to make the trip, he sent a telegraphic request for an extension of time to reply to the ten-day notice.

It is understandable why Mr. Milstein wanted Mr. Elefant to "come down so that we can iron out everything and get rolling again", as, on previous occasions, he had obtained Mr. Elefant's assistance in working out problems of a serious nature. On a previous occasion where Mr. Milstein had encountered a serious problem that had caused him to discontinue production operations and called Mr. Elefant to tell him "I can't go on," Mr. Elefant had gone to Puerto Rico and assisted Mr. Milstein in working out his problems satisfactorily.

After the plant shut-down, appellant retained a skeleton staff to get ready for shipment those articles that were completed and ready for inspection and between the time of the plant shut-down and the time of the default termination, 154,440 hats were accepted by the Government under the contracts. Appellant's entire course of conduct during the cure period preceding the notice of default termination was inconsistent with an intent to close its plant permanently and abandon performance of its Government contracts.

After the default termination, appellant continued its efforts to arrange for the reopening of its plant and the completion of its Government contracts. It asked that the contracts be reinstated, and when this was refused it asked for and obtained permission to complete the work in process in its plant at the time of the default termination, and it actually completed and delivered 250,274 hats which were inspected and accepted by the Government under appellant's contracts after the default termination.

We find no error in the Board's holding that the contractor had not abandoned or repudiated its Government contracts at the time of the default termination.

Failure to Make Progress

When no deliveries are past due, a contract cannot be terminated for default for failure to make progress, except pursuant to paragraph (a)(ii) of the Default clause which specifies as a condition precedent that the contractor be given a ten-day cure notice "specifying such failure," the theory being that the contractor will be notified specifically of the failure complained of and given the opportunity to cure such failure before the contract is terminated pursuant to paragraph (a)(ii). In this case the only deficiency specified in the ten-day cure notice was the plant close-down and the only cure action directed was the resumption of production. The failure to resume production was deemed by the contracting officer to be in and of itself a failure to make progress endangering performance without regard to the actual state of performance of any of the six contracts at the time of the default termination. Consequently, the contracting officer made no effort to ascertain the status of deliveries and delivery requirements, the number of hats completed and ready for inspection, the quantity and status of work in process, or the contractor's financial ability and productive capability before he issued the notice of default termination.

We have a situation where, at the time of the default termination, deliveries were not past due and the contractor had not abandoned or repudiated its Government contracts, but instead was diligently endeavoring to resolve its difficulties and resume production, and where the Government itself contends that the contractor had the financial ability and productive capability to perform the contracts in full. In order to prevail, the Government has the burden of proving that the contractor's failure to resume production by the date of termination was endangering performance of the contracts.

We are unable to give any weight or credibility to the testimony cited by the Government in support of its contention that the temporary curtailment of production would have made the contractor delinquent on the first two contracts and that the delinquency on the first two contracts would have caused the contractor to become delinquent on the four later contracts, because the testimony of such witness shows that he made no investigation of the status of the work at the time of termination or of the contractor's productive capacity. His testimony reflects the unproved assumption that the contractor did not have sufficient productive capacity to deliver at any faster rate than was necessary to meet the contract delivery schedules.

In its Motion for Reconsideration, the Government takes exception to the Board's findings that the sudden and unanticipated cancellation of the loan by SBA delayed appellant and that the imposition of the increase on the minimum wage rates was the direct cause of appellant's decision to close its plant on 7 December 1964.

The Government charges that the Board's finding of the wage increase to be the direct cause of the plant close-down is erroneous on the ground that it "directly contradicts" the conclusion reached by an NLRB Trial Examiner that "the closure was motivated by the desire to discourage and defeat the union and to punish the employees * * *." While we do not agree that the Board, in making fact findings in an appeal under the Disputes clause, is bound by fact findings made by an NLRB Trial Examiner in a different proceeding involving different issues and different evidence, we find no conflict between the Board's finding and the cited conclusion of the NLRB Trial Examiner. The Board made no fact finding about the contractor's mixed motives in closing its plant, just as it made no fact finding about the Government's motives in (1) cancelling the SBA loan after the contractor had beaten the strike and was in full production, (2) instituting a wage proceeding after appellant had been awarded and was in process of performing six contracts for more than four million hats that had been priced on the basis of a minimum wage of $.935 per hour and establishing a new wage classification applicable to appellant only involving a 23% increase in the minimum wage, and (3) terminating for default contracts in which no deliveries were to become due for several months without making any attempt to ascertain whether performance of these contracts was actually endangered. The distinction between motive and cause is obvious. Appellant's president himself

characterized the wage increase as "the straw that broke the camel's back". While we are of the opinion that the wage increase was much more than a straw, it is apparent from the record that it was the culmination of a series of developments, and there is not the slightest indication in the record that there would have been a plant close-down on 7 December if there had been no order increasing the minimum wage. Accordingly, we find no error in the Board's holding that the increase in the minimum wage was the direct cause of the decision to close the plant on 7 December.

The Government takes exception to the alleged finding that the cancellation of the SBA loan delayed the contractor. What the Board found was that the cumulative effect of the cancellation of the SBA loan plus the large increase in minimum wage rates (both acts of the Government) delayed the contractor. In Transportation Seat Company, ASBCA No. 2161, 59-1 BCA par. 2079, the Board held that the cancellation of a loan of Reconstruction Finance Corporation (predecessor to Small Business Adminstration) was an excusable cause of delay. In Typo Machine Company, ASBCA No. 3214, 57-1 BCA par. 1270, the cancellation of an SBA loan, if only conditionally approved and legally cancelled, was held to excuse the contractor's default when the contractor entered into the contract in reliance of obtaining the loan. In this case, SBA approved the loan on 22 July 1964, before four of the six contracts were awarded, to provide funds for appellant to purchase machines which it needed to perform the contracts. The record shows that appellant needed the loan to purchase machines which it needed to perform its Government contracts and that the vendor repossessed the machines when appellant was unable to pay for them after the loan had been cancelled. The natural effect of the Government's actions in cancelling the loan and ordering a 23% increase in the applicable minimum wage was to hinder and delay appellant's performance of its Government contracts.

Disposition

The Government's Motion for Reconsideration is denied and the Board's decision rendered on 5 June 1969 is confirmed without modification.

SUPERIOR FUSE AND MFG. CO., INC.

ASBCA No. 11532 (1967)

These are appeals from the default terminations of two supply contracts and the assessment of the excess costs of reprocurement in each instance.

* * * * *

The contractor assigns as reason for its failure to make timely delivery, its inability to obtain needed copper, and charges this inability to the ineffectiveness of the Government's system of priorities and the alleged failures of the Government to place restrictions on the use of copper. Its president claims, although at our hearing he was not prepared to support this with documentary proof or other detail, that in reliance on that system he accepted award of these contracts and placed timely orders with Anaconda. He further charges but without specifying that company, that suppliers generally withhold commitments beyond the quantities they are required to set aside, in order to obtain higher prices for civilian use.

* * * * *

These contracts each have a DO certification for National Defense use under DMS Regulation 1.

At a conference on 5 January 1966 with representatives of the Defense General Supply Center, the contractor's president, and representative on our hearing, while claiming that his delinquency on -069043 and other contracts was due to the copper shortage caused in part by the Government's minting of copper-clad coins, and claiming the DO ratings to be worthless, acknowledged that he had not tried to use that rating or to obtain help in securing copper. A representative of the Center's Industrial Production Division explained the use of DO ratings and gave to the contractor's representative a copy of "The Defense Materials Systems and Priorities", a 1961 publication of the U.S. Department of Commerce.

At another conference on 9 March 1966 when progress, or lack of it, on these and other contracts was discussed, the contractor's president acknowledged, concerning -072992, that he had not notified the Center of his inability to secure copper. Neither had he requested assistance, as instructed, under -069043. He declined to make definite promises of delivery until he received firm commitments from his supplier. It was agreed at this conference that termination could be withheld until 16 March to give the contractor an opportunity to submit a letter with proof of excusable cause of delay. No such letter was forthcoming.

* * * * *

A DO rating gives a defense order a contract priority over any unrated procurement. During the period of this contract the Materials Systems Officer in Charge of Priorities and Allocations in the Agency received numerous requests for assistance from contractors and except in the case of a higher DX rating, he was able in every instance to maintain delivery dates originally certified by suppliers or improve them for periods ranging from a few days to several months. He achieved these results on requests for assistance in obtaining copper. It was the practice of this official to attempt to satisfy contractors first by calls to their suppliers which revealed, in most instances, that the reasons for the difficulty was the contractor's failure to properly certify his order.

* * * * *

This contractor may not be relieved of liability for these excess costs unless its failure to perform was beyond its control and without its fault or negligence. (General Provision 11, Default, Sub-paragraph (c).) This record requires us to find that the contractor was at fault in its failure to make use of the Government's system of priorities and avail itself of the assistance in these instances expressly offered, to render that system effective.

The claim made by the contractor's president that he accepted awards of these contracts in reliance on that system cannot be reconciled with his admission on 5 January 1966 that he had not tried to use the rating given him, a circumstance which in the experience of the Agency involved, has accounted for most of the failures of Defense-rated contractors to obtain scarce materials.

Indefinite charges that suppliers, in general, and for selfish reasons, were unwilling to commit themselves to non-Defense orders are irrelevant to the issue of this contractor's excuse, in these instances, to obtain needed material, in view of its failure to avail itself of the assistance the Government offered. And we decline, on this record, to give any substance to the contractor's expressed fear that it might suffer reprisals for enlisting the aid of Government officials in enforcing its priorities. Such broad indictment of the industry is particularly irrelevant in this case of a disclosed and presumably responsible supplier.

It is pertinent at this point, we think, to observe that the reprocurement contracts were made when copper was less available than in September 1965 when the defaulted contracts were entered into, and deliveries were made in approximately the time the latter provided.

The appeals were denied.

JOHNSON ELECTRONICS, INC.

ASBCA No. 9366 (1964)

Reprinted supra at 5-48

E. Excess Costs

FEDERAL ELECTRIC CORP.

ASBCA NO. 11726 (1968)

Reprinted supra, at 1-32

FULFORD MANUFACTURING CO.

ASBCA No. 2143 (1955)

Reprinted supra, at 10-110

F. 8A Termination

PHILADELPHIA REGENT BUILDERS
v. THE UNITED STATES

Ct. Cl. No. 360-79C (1980)

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

BENNETT, Judge, delivered the opinion of the court:

This Government contract case is before us to review a decision in defendant's favor by the Veterans Administration Contract Appeals Board, VACAB No. 1179, 79-1 BCA ¶ 13,856 (1979). Both parties have moved for summary judgment. We have read and considered carefully the papers before us, and, without oral argument, grant defendant's motion, deny plaintiff's motion, and dismiss the petition.

The essential facts as found by the VACAB and sustained by the record are that plaintiff, Philadelphia Regent Builders (PRB), a minority contractor, was given a subcontract on July 30, 1973, by the Small Business Administration (SBA), pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a)(1976)(current version at 15 U.S.C. § 637(a)(Supp. III 1979). The prime contract, No. V613C-48, dated June 20, 1972, was between the SBA and Veterans Administration (VA) for roofing repair work at the Veterans Administration Center in Martinsburg, West Virginia. The subcontract provided for a price of $91,862 and a period of 90 days for performance. Plaintiff was to perform all the work. The SBA delegated to the VA the responsibility for administering the subcontract and PRB was to have the right of appeal from decisions of the contracting officer under the disputes clause of the subcontract. Appeals were to be taken to the VACAB. The contract between SBA and the VA also included the following special provision:

> It is agreed that the provisions of the "Termination for Convenience", "Changes", "Disputes", "Default", and "Price Reduction Clauses which are included in the contract between the SBA and its Contractor shall be invoked in appropriate cases when requested by the Procuring Contracting Officer (PCO). If the SBA does not agree with the Procuring Contractor Officer's (PCO) request, the case shall be referred to the Secretary or his designee for decision.

Work was scheduled to begin October 1, 1973, and did begin sometime in October. PRB initially sub-subcontracted the entire project to Zeus Construction and Painting Company for $65,000. On the night of October 28-29, 1973, the area was struck by heavy thundershowers

and winds. There was damage to the interior of the building due to leakage through the part of the roof being worked on. The VA determined that the contractor had not properly sealed the roof area and issued plaintiff a collection voucher for the damage in the amount of $26,509.

On November 7, 1973, plaintiff terminated its sub-subcontract with Zeus and requested and received a 90-day extension of time. Plaintiff then engaged Edward Bannister, roofing contractor, to complete the work. Bannister took up the work but ceased after about 5 weeks and thereafter PRB performed the work with its own forces. The work progressed with successive extensions of time being allowed to December 7, 1974, upon PRB's requests based on delay due to inclement weather. Six progress payments were routinely approved. In September 1974 plaintiff was notified that since the collection voucher and a follow-up inquiry had been ignored, no additional progress payments would be made until the voucher had been paid.

Plaintiff's president, Mr. Killebrew, responded that he was attempting to resolve the collection voucher matter, but that he was unable to resume work on the project because of the refusal to make further progress payments, because the cost of materials had escalated 30 percent, and because delays had increased certain overhead costs by $14,500.

The situation was discussed by officials of the VA and SBA. The SBA urged that the withheld progress payment be made and, after consultation among VA officials, it was made. However, even after the progress payment was made, no substantial work was done on the project. On December 12, 1974, plaintiff requested $24,623 from SBA, to cover costs so that the contract could be completed, and a 90-day time extension. The extension was granted until March 7, 1975.

On December 16, 1974, Mr. Odom, the contracting officer, telephoned Mr. Monteleone, the SBA representative involved in the contract, to discuss the situation. Mr. Odom complained that plaintiff was not making any progress. Mr. Monteleone indicated that SBA had no funds with which to assist PRB. The two men discussed the alternatives, including a termination for default. Mr. Monteleone agreed that default termination would be the next course of action although he was reluctant to see that happen. He promised to contact plaintiff to see if something could be worked out. Later that day, Mr. Monteleone called Mr. Odom back. He asked if the contract could be terminated for convenience rather than default. Mr. Odom replied that it could not be done because there was no convenience to the Government. Mr. Monteleone then remarked that the bonding company could finish the job when the contractor defaulted. Mr. Odom agreed. Shortly afterwards, VA concluded that it could not supply PRB with any additional funds.

On January 21, 1975, Mr. Odom urged plaintiff to resume work, since no recent work had been done and there was leakage in uncompleted areas. Plaintiff requested a 90-day extension of time from March 7, 1975, citing weather conditions, unavailability of

materials at quoted prices, and negotiations for a contract price increase as relevant factors. A 30-day extension was granted, and the contractor was notified that further extensions would be considered if work was resumed or evidence was otherwise given that the contract would be completed. The time was later further extended 15 days, and then another 21 days (to May 12, 1975) on the basis of information that the contractor's surety would bring in another contractor to complete the project. The notice of this final extension stated it was imperative that further physical progress be made before more extensions would be considered and that the contractor would be declared in default in the absence of evidence of intent to proceed.

No work was performed, no evidence of intent to proceed was received, and no extension of time from May 12, 1975, was requested or granted. A final decision terminating the contract for default was issued on June 4, 1975.

Our review of the board's decision is governed by the standards of the Wunderlich Act, 41 U.S.C. §§ 321, 322 (1976). All findings of fact by the board must be upheld unless they are fraudulent, arbitrary, capricious or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. Koppers Co. v. United States, 186 Ct. Cl. 142, 147, 405 F.2d 554, 557 (1968). Furthermore, our rules require that a party seeking to overturn administrative findings of fact must specifically enumerate such findings separately and in numbered paragraphs, and must give reasons why the administrative finding is not entitled to finality along with supporting citations to pertinent parts of the administrative record. Ct. Cl. Rule 163. Plaintiff has not complied with our rules but in any case appears to attack only three findings of fact by the board. These are totally insignificant and immaterial for the purposes of the instant motions. Therefore, all the facts found by the board that are included in the text of this opinion have not been excepted to by plaintiff and are taken as true.

Plaintiff's attacks on the default termination and the board decision upholding it can be boiled down to four main points: (1) the delays causing the default were excusable; (2) there were formal defects in the notice of termination; (3) the contracting officer had no authority to terminate the contract for default; (4) the board lacked jurisdiction over plaintiff's appeal.

Plaintiff's first argument is that the contract should not have been terminated for default because its delays in performance were excusable. Plaintiff offers as excusable causes of delay: (1) poor weather and acts of God; (2) faulty Government specifications; (3) interference by the VA in the form of restrictions on working hours and conditions; (4) anticipatory breach by the Government. However, the board decision reflects other factors involved: increase in overhead and materials costs and plaintiff's lack of necessary financing. Thus, we have a question as to what in fact was the cause of plaintiff's inability to complete the contract. The board found that: (1) plaintiff's assertions of excusable delay were

not supported by the evidence; (2) the VA restrictions were reasonable; (3) the one delayed progress payment had no substantial impact on plaintiff's inability to perform; (4) the VA was not responsible for the delay in the work or the financial difficulties which prevented plaintiff from completing the work. These are findings of fact not excepted to by plaintiff. Furthermore, we find them to be supported by substantial evidence in the record. We would further note that the board's decision reflects that great efforts were made to accommodate plaintiff. Extensions of time were repeatedly granted, totaling in the end about a year and a half, for a job that was supposed to take 90 days. In short, plaintiff has not shown why the board's findings on this issue should be overturned and they will stand. Plaintiff's default was not excusable.

Plaintiff next claims that the default termination was improper because the termination notice had several formal defects which violated procurement regulations. See 41 C.F.R. §§ 1-1.318-1(a), 1-18.803-4, -5 (1979). For instance, the notice did not have the proper contract number and date; it did not state that the Government reserved all its rights and remedies; it did not state that the notice constituted a decision pursuant to the disputes clause; and it was not signed by the contracting officer. However, at the time the notice was sent, plaintiff was not performing under the contract and had not been performing for some time. The board found that plaintiff was not misled by the notice and that all essential information was conveyed by the notice. Plaintiff apparently was also able to make a timely appeal of the contracting officer's decision and the appeal was tried on the merits before the VACAB. Furthermore, plaintiff does not claim that it was harmed in any way by the admitted defects of the notice. We hold, therefore, that such defects give plaintiff no cause to complain here. We do not favor sloppy practice nor approve of violations of the procurement regulations, but in the instant case no harm has come thereby. To nullify this termination for default solely on the grounds of these harmless technical defects would be to grant plaintiff an entirely unwarranted windfall. A case such as Bostwick-Batterson Co. v. United States, 151 Ct. Cl. 560, 283 F.2d 956 (1960), is not to the contrary. There the contractor received an insufficient notice of a final decision and thus did not appeal the decision within 30 days, whereupon the appeals board dismissed the appeal as untimely. The court reversed, holding the notice insufficient under the contract and regulations to constitute a final decison. 151 Ct. Cl. at 565, 283 F.2d at 958-59. It is precisely the lack of any harm to plaintiff in this case which distinguished it from the Bostwick case.

Plaintiff's last two arguments may be considered together. The third argument is that the contracting officer had no authority to terminate the contract for default. The fourth argument is that since the contracting officer had no such authority there was no valid termination and therefore no proper dispute over which the board could acquire jurisdiction. Hence, both arguments turn on the contracting officer's authority.

Plaintiff's argument regarding the contracting officer's authority turns on the above-quoted contract provision which provides that the default clause, among others, shall be invoked in appropriate cases when requested by the contracting officer but if the SBA disagrees with the request the matter is to be referred for resolution. Plaintiff interprets this to mean that only the SBA could terminate for default or that the VA could, but only after agreement by the SBA. Since the SBA refused to agree to the default termination, plaintiff continues, the VA contracting officer had no authority under the contract to default plaintiff.

The first flaw in plaintiff's logic is that there is no finding by the board that the SBA did disagree with the default termination. Indeed, the above-described conversations between Mr. Odom, the contracting officer, and Mr. Monteleone, the SBA representative, would seem to indicate there was express agreement, but the board made no specific finding to that effect.

However, the board did make the following relevant findings of fact, not excepted to by plaintiff: (1) the SBA did not intend to, nor did it establish the administrative organization for invoking the default clause itself; (2) the VA and SBA operated informally without any formal procedure for effectuating a default termination; (3) the determination to default plaintiff was made only after PRB was irretrievably in default and unable to proceed with the work; (4) the parties, VA and SBA, acted with full intercommunication; (5) the VA officially sent copies of all documents relating to the termination to SBA and Mr. Monteleone was informed of the impending default termination by telephone; *in short*, the SBA was fully notified of the VA's intent to terminate and of the termination. We think that under these circumstances, the SBA's failure to ever exercise its contractual right to disagree (if indeed it ever wished to), and have the matter referred for resolution, amounted to implicit agreement to the default termination. We need not and do not reach the question of whether the SBA's failure to disagree will in all cases authorize a default termination by another procuring agency under a clause such as the one above-quoted. We only hold that under the circumstances of this case SBA's inaction was properly treated by the VA as an implied agreement.

Finally, we reject plaintiff's contention that only the SBA could terminate PRB for default. There is nothing in the contract language to require that. Given the board's finding that SBA established no administrative organization for invoking the default clause and given that the VA was administering the subcontract, we think it permissible for the VA to issue the termination notice.

We therefore hold that defendant satisfied the contract terms and that the VA contracting officer had authority in this instance to terminate plaintiff for default. It follows that there was a proper dispute between the parties and the board acquired jurisdiction over plaintiff's appeal. The board's decision is correct in law and fact and is affirmed. The defendant's motion for summary judgment is granted and plaintiff's motion for summary judgment is denied. The petition is dismissed.

G. Failure of Proof

W. M. GRACE, INC.

ASBCA No. 23076 (1980)

OPINION BY ADMINISTRATIVE JUDGE GROSSBAUM

This appeal is taken from a final decision terminating a janitorial services contract for default. Also in issue is the propriety of deductions taken from appellant's invoices for services performed in the three calendar months immediately proceeding the default termination. The parties have agreed to defer for further negotiation computation of the exact amount of money properly deducted from appellant's invoices. Therefore, only entitlement is before us for consideration.

FINDINGS OF FACT

1. On 2 December 1977, the Government issued an invitation for bids (IFB) for performing complete custodial (janitorial) services at Aberdeen Proving Ground, Maryland for a period of twelve months. Work was to be performed both in the Aberdeen area and in the nearby Edgewood area in accordance with the specification set forth in Attachment "A" to the IFB.

2. Janitorial services were to be provided to designated buildings identified in separate schedules ("A" through "E") included in the specification. A total of approximately 350 buildings were to be serviced, of which more than 300 separate buildings were enumerated under schedule A. The total surface area to be serviced was estimated at approximately 2.7 million square feet and surfaces in schedule A buildings alone comprise 2.38 million square feet. The schedule A buildings, which were situated both in the Aberdeen and Edgewood area, were chiefly administrative buildings.

3. The general provisions of the IFB and the resulting contract contained standard Changes, Inspection of Services, Default and Disputes clauses required in service contracts. The contract schedule required bidders to quote a unit price per square foot per month for providing services in buildings under each of the separate schedules to the specification. Schedule provision K.15 provided for monthly payment for services based upon "the total square footage serviced for the various schedules multiplied by the applicable unit price." In addition, provision K.16, entitled "PRICE ADJUSTMENT FOR OMITTED OR DEFECTIVE WORK," provided:

Any work which is not performed or which does not meet the standards of performance set out in the contract shall be called to the Contractor's attention for correction by the contractor. Unless prompt corrective action is taken, an equitable adjustment shall be made in the monthly price for the area involved.

4. SP-03 of the specification described normal and special frequencies of cleaning to be performed. Various floor maintenance, restroom cleaning and trash removal services were required. Floor maintenance services included daily vacuuming of rugs and periodic waxing and buffing of floors in designated buildings. A significant floor cleaning service called out in SP-03a(1) was to "Sweep, dust mop or damp mop" all floors" . . . b. Twice weekly - in Bldgs in Schedule 'A'."

5. Paragraph 3 of schedule A to the specification, applicable to all schedule A buildings, provided:

> NOTE: The contractor will furnish a schedule of once weekly sweeping for approval by the contracting officer or his designated representative, prior to commencement of services of this schedule.

The Government concedes that there was a discrepancy between the foregoing note and SP-03a(1)b of the specification.

6. The IFB provided the name, address and telephone number of a Government contract specialist, Mr. D. Williams, as the person to be contacted "for information on this procurement."

7. Appellant quoted a unit price of $0.025 per square foot per month for servicing schedule A buildings and this price, combined with its quotations for other line items, resulted in the lowest bid. Accordingly, a pre-award survey was conducted at appellant's facilities at Hampton, Virginia on 12 January 1978 by a representative of the Richmond, Virginia office of the Defense Contract Adminstration Service (DCAS).

8. During this survey, appellant's understanding of the specification requirements was discussed and appellant's president, Mr. William Grace, inquired about the frequency for sweeping floors in schedule A buildings. Mr. Grace maintained that the note at paragraph 3 of schedule A indicated that only once weekly sweeping was required. However, the DCAS industrial specialist informed appellant that he interpreted the specification to require twice weekly sweeping and advised Mr. Grace to get a ruling on this matter from the contracting officer at Aberdeen. At the conclusion of the survey, the industrial specialist requested Mr. Grace to furnish DCAS with a letter setting forth appellant's interpretation of the specifications and confirming its bid price.

9. Mr. Grace complied with the foregoing request by hand-carrying to the Richmond DCAS office a letter dated 16 January 1978, which stated in pertinent part:

> 2. Confirming our bid price we would like to explain a difference of interpretation between us and the Contracting Officer regarding the specifications. In the specifications page 2 paragraph SP-03 (Normal and Special Frequencies of Cleaning to be Performed) it states that sweep, dust mop or damp mop will be performed in buildings of Schedule A twice weekly. It also said that these are the frequencies unless otherwise stated. Schedule A page A-1, notice 3 indicates sweeping will be scheduled once weekly, therefore, our bid price is based on the once weekly sweeping requirement, not twice weekly.
>
> Any ruling effecting a change in our interpretation of the specifications would have an effect on our price. Please do not hesitate to contact us if additional information is needed.

We find, from the text of the above-quoted letter and from Mr. Grace's testimony, that as of no later than 16 January 1978 Mr. Grace perceived that the Government interpreted the specification as requiring twice weekly sweeping of floors in schedule A buildings.

10. As a result of appellant's 16 January letter and of further conversation with Mr. Grace, on or about 19 January 1978, the DCAS industrial specialist informed Mr. Grace that DCAS would have to make a negative recommendation concerning appellant's ability to perform in accordance with the contract specifications.

11. On 19 January 1978, Mr. Grace called the Government contract specialist, D. Williams, at Aberdeen to get a reading on the schedule A building floor sweeping frequency requirement. Mr. Williams informed Mr. Grace that he could not discuss any interpretation of the specifications with him. On the following Monday, 23 January 1978, Mr. Grace called DCAS in Richmond and indicated that he needed a favorable pre-award survey recommendation in order "to get the contract and . . . will work it out later." Mr. Grace volunteered to eliminate paragraph 2 from his 16 January letter and was advised by DCAS that his firm would be given "a clean bill of health." Mr. Grace confirmed this conversation by letter dated 23 January 1978, which he hand delivered to DCAS that same day, wherein he stated:

> Pursuant to our telephone conversation on Monday, 23 January 1978, on Aberdeen, Maryland disregard paragraph two (2) in my letter dated 16 January 1978. The bid price quoted in the bid packet is correct.

12. According to Mr. Grace, his intent in transmitting the 23 January letter was "[j]ust to remove that paragraph so that the pre-award survey could go through positive rather than negative." As later admitted by Mr. Grace, in order to assure getting the contract, appellant was willing to assume the risk that the Government's twice weekly sweeping interpretation might prevail.

13. Appellant's 23 January 1978 letter was included in the pre-award survey file forwarded to the contracting officer. This letter led Government procurement representatives to conclude that the frequency of sweeping issue had been resolved and that the contractor understood that the specifications required twice weekly sweepings in schedule A buildings.

14. The captioned contract was awarded to appellant on 26 January 1978. Work was to be performed during the period from 1 February 1978 through 31 January 1979. The total amount of the contract was $973,891.08. SP-08c of the specification required the contractor to provide forms listing and checking all daily services performed for each building. These "daily" check sheets for each building were to be turned into the contracting officer's representative (COR). In addition, SP-08d required the contractor to "furnish another form listing all services other than those performed daily (which will be called 'frequency work')" listing "all frequency work performed in any building during the preceding day."

15. On 31 January 1978, a post-award conference was held between representatives of the contractor and the Government. During this conference there was no discussion of the floor sweeping frequency requirements for schedule A buildings.

16. At the commencement of performance in February 1978, Mr. Grace instructed his personnel to perform twice weekly floor sweeping in schedule A buildings and from 1 February 1978 until late March 1978 the contractor actually performed such twice weekly floor maintenance services. At no time during this period did the contractor ever bill the Government for the performance of these allegedly extra services. We are unpersuaded by Mr. Grace's testimony that he initiated twice weekly sweepings only for the purpose of getting "the job going, and once we get it going, that I would work it out with the Government."

17. Although SP-08 required the daily submission of two separate performance sheets to the COR, one for daily services and the other for frequency work, the COR admitted that the intention of SP-08c, pertaining to check sheets showing performance of daily services, was not clear. We find that, except for a period of about one or two weeks in late March-early April 1978, the contractor submitted to the COR only a single performance sheet each day reporting the accomplishment of both daily and frequency work. This reporting procedure was a consistent practice from the beginning of the contract and also conformed with the practice followed by the predecessor janitorial contractor working under a similar specification.

18. Each day the contractor would submit to the COR the performance sheets prepared by each of the contractor's supervisors. During the entire contract period, the COR had only five Government inspectors available; three at Aberdeen and two at Edgewood. Since it was impossible for five inspectors to check each of the 350 buildings under the contract, they would attempt only to inspect the frequency work reported on the contractor's performance sheets for the previous day. Daily services would be inspected only in those buildings where frequency work was being checked or in cases where a specific complaint had been received.

19. Based upon handwritten reports submitted by each of the five Government inspectors, every afternoon the COR compiled and prepared a consolidated typewritten report (the COR report, sometimes referred to as the daily "gig sheet") on the performance of janitorial services accomplished the previous day. The gig sheet showed discrepancies in the performance of services in particular buildings on specific dates. Copies of each daily COR report were furnished to the contractor's supervisors for correction of the discrepancies noted and a copy was also presented to the contracting officer.

20. The contractor was given an opportunity to correct deficiencies shown on the daily COR report and the work would later be reinspected by the Government inspectors, each of whom was also furnished a copy of the COR report. If the deficiencies were corrected, the items would be dropped from subsequent COR reports.

21. The contracting officer admitted that he expected some deficiencies to be reported by the COR each day and that it was not unusual, under a contract involving the servicing of approximately 350 buildings, for a number of individual deficiencies to be noted each day.

22. During the month of February 1978, the contracting officer received several reports from the COR concerning unsatisfactory janitorial services. On several occasions reductions from the contract price, totaling more than $2,000, for services not performed during February were negotiated with and agreed to by the contractor's vice president for operations and project superintendent, Mr. Robert Williams.

23. Because of dissatisfaction with the contractor's performance of services during the month of February, on 1 March 1978 a cure notice was issued to appellant. Thereafter, several meetings were held with the contractor's representatives with a view toward improving contract performance.

24. In the same manner that the five Government inspectors could not possibly check all 350 buildings each day, the contractor's supervisors were not able to inspect personally every building in which work was performed. As observed by the COR, there was such a large

number of buildings that "you just can't note every one that comes up." During the early weeks of contract performance appellant had experienced some problems with the submission of daily performance sheets showing the accomplishment of services in buildings which the contractor's supervisors had not personally checked, and appellant's supervisors had been accused by Government personnel of having "falsified" records. To overcome this problem, in mid-March 1978 the contractor instituted a practice whereby its supervisors would sign and submit performance sheets covering only services in those buildings that they had personally inspected themselves.

25. Under appellant's reporting practice, individual time cards for each janitor would reflect the work actually performed. However, the daily performance sheets signed and submitted by appellant's supervisors showed only the work the supervisor had checked personally and did not necessarily show all the services that were actually accomplished that day.

26. The contractor's reporting practice did not comply strictly with the frequency work reporting requirements of SP-08d of the specification and the COR maintains that he never agreed to accept this procedure. However, the record establishes that appellant's performance sheet reporting practice was discussed on several occasions with the COR and that the COR had actual knowledge of the contractor's practice of submitting signed performance sheets covering only the work which had been checked personally by its supervisors. Accordingly, we are unpersuaded by the COR's testimony that he assumed that the signed daily performance sheets reflected all the work that the contractor performed on a given day. Moreover, the record also establishes that, throughout performance of the contract, the five Government inspectors only inspected work in those areas shown on the contractor's daily performance sheets.

27. By letter to the contracting officer dated 17 March 1978, appellant responded to the cure notice and to the points raised at the several subsequent conferences. At the conclusion of this letter, appellant stated its position that schedule A buildings required only once weekly floor sweeping and expressed its intention to perform the contract on that basis thereafter unless the contract price was adjusted. This letter constituted the first time after award of the contract that appellant's position regarding once weekly floor sweeping had been presented to the contracting officer.

28. From the end of March 1978 until 12 June 1978 the contractor discontinued performing twice weekly floor sweeping in schedule A buildings and during this period the contractor actually swept floors in these buildings only once each week.

29. By letter to appellant dated 24 March 1978 the contracting officer reiterated his concerns regarding unsatisfactory performance. Replying to that portion of appellant's 17 March letter concerning frequency of sweeping, the contracting officer stated:

> Your interpretation that schedule A buildings under the contract are due once weekly sweeping is correct. Your weekly sweeping schedule is to be forwarded to the contracting officer's representative. In addition to this sweeping the specifications paragraph SP-03a(1)b requires once weekly either dry mop or damp mop."

The emphasized sentence makes no sense. SP-04 of the specification prescribed standards of performance. Paragraph b thereunder defined "Sweeping, Dust Mopping and Damp Mopping" as interchangeable operations, depending on the type of floor to be serviced, rather than as separate and distinct operations.

30. The contracting officer's 24 March 1978 letter concluded with the admonition that:

> Termination for default actions will not be exercised by the Government at this time, however, we reserve all the rights and remedies under contract and law.

By this statement, the contracting officer intended to waive any previous defaults up to that date, and to warn the contractor that the Government was reserving its rights to terminate the contract for default based upon failures of performance thereafter.

31. Between the end of March and 12 June 1978 the contracting officer received complaints from various tenant activities at Aberdeen regarding allegedly unsatisfactory performance of janitorial services on certain days in specified buildings. According to the COR, after April 1978 there were instances of failures by the contractor's janitors to empty ashtrays and some drop off in the frequency and thoroughness of waxing services performed.

32. By letter to appellant dated 28 April 1978, the contracting officer issued a second cure notice citing specifically appellant's failure to furnish schedules for frequency work. By letter dated 9 May 1978, appellant replied that required schedules had already been furnished. The parties have stipulated that appellant's alleged failure to provide forms and schedules should not be considered as a basis justifying termination of the contract for default. The cure letter also contained a further interpretation of the schedule A building floor sweeping frequency requirements, as follows:

. . . my position concerning SP-03a(1)b remains unchanged. This specification requires your personnel to sweep, dust mop, or damp mop twice weekly in Schedule 'A'. Schedule A page A-1 paragraph 3 requires you to furnish a Schedule for once weekly sweeping for the buildings contained in paragraph 3 of this Schedule.

As stated above, in Schedule A paragraph 2, you must sweep once weekly in these buildings as well as sweep, dust mop or damp mop paragraph SP-03(1)b one other time during the week.

Specifications SP-03a(1)b is a major task to be performed under the contract. Your failure to provide immediately the floor cleaning services as called for in SP-03 a (1)b will result in termination of this contract for default.

33. The Government deducted a total of $12,582.77 from appellant's invoice for services performed during the month of April 1978. Of this amount, $11,730.52 represented deductions taken for failure to sweep floors in schedule A buildings twice a week. The less than $800 balance of deductions taken pertained to alleged failures to wax floors in certain buildings. Appellant was paid a total of $70,191.62 for services performed during April 1978.

34. From appellant's more than $83,000 invoice for services performed during the month of May 1978, the Government deducted the amount of $10,766.96 and paid the contractor the balance of $72,363.02. Out of the total amount deducted, $10,218.66 represented deductions taken for failure to sweep floors in schedule A buildings twice weekly. Less than $600 was deducted for alleged failures to provide waxing and related services in certain buildings.

35. For services performed during the month of June 1978, the contractor billed the amount of $55,613.35 and was paid $46,783.72. Deductions totalling $8,829.63 were taken from the contractor's invoice, of which amount $7,589.79 represented deductions for failure to sweep floors in schedule A buildings twice weekly. The less than $700 balance deducted pertained to failures to wax floors in certain buildings.

36. The foregoing were computed by applying the contractor's "unit price per sq. ft/mo" to the number of square feet involved in each type of alleged performance failure. As admitted by the contracting officer, this method of computation may have resulted in overstating the amounts properly deductible.

37. The contracting officer assumed that recommended deductions were based upon discrepancies noted in daily COR reports. However, we find that deductions for work allegedly not performed were not based upon discrepancies disclosed by actual inspections by Government personnel and noted on daily COR reports. Instead, all deductions were based solely on the absence of contractor's performance sheets covering certain buildings. Nevertheless, there is no dispute concerning appellant's failure to sweep floors in schedule A buildings twice weekly during the months of April and May 1978 up until 12 June 1978. (Finding 28)

38. The contracting officer testified, and we find, that the authorization of payment for the balance of the contractor's invoices for the months of April, May and June 1978, after having taken deductions for the reduced value of certain specific services, constituted a determination by the Government that all other services for which payment was authorized had actually been accepted.

39. On Monday 12 June 1978, the contracting officer and other Government representatives met with the contractor's management personnel at Aberdeen. At the beginning of the meeting the contracting officer presented a prepared opening statement concerning schedule A building floor sweeping requirements and handed the contractor a final decision dated 12 June 1978 which provided in pertinent part:

> . . . floors in Schedule A will receive treatment as follows, sweep, dust mop or damp mop twice weekly. You are therefore directed to proceed with these instructions effective upon receipt of this letter or Tuesday, 13 June 1978, whichever is later.
>
> You are required to cure this condition by Friday 16 June 1978, or your contract will be terminated for Default.

40. After the conclusion of the 12 June meeting with the contractor, the COR was "directed to conduct inspection to insure that Contractor's performance is acceptable." However, no special inspection of such a nature was performed.

41. On 19 June 1978, the COR prepared and submitted to the contracting officer a special 10-page report purporting to cover the performance of floor cleaning and waxing services in schedule A buildings between 13-16 June 1978. This report indicated that a substantial number of buildings had not received sweeping and/or waxing services during this period. However, this report was not based upon an actual inspection of any of the spaces listed. Instead, the report was based solely upon an examination of the performance sheets prepared and submitted by the contractor's own supervisors.

Nevertheless the contracting officer assumed that this special 10-page report was based on actual inspections and correlated with the daily COR discrepancy reports for the same period.

42. Consistent with the contractor's performance sheet reporting practice throughout the contract (Finding 26), the performance sheets submitted by appellant's supervisors for the period 13-16 June 1978 did not reflect all the buildings that were actually serviced. Individual employee daily time cards show the buildings in which each janitor had actually performed work on a particular day. Appellant's contemporaneous records establish that, during the period 13-16 June 1978, frequency work was actually performed in many buildings which were not listed on the contractor's supervisor's daily performance sheets as submitted to the COR.

43. By telegram dated 21 June 1978, the contracting officer notified the appellant that its contract was terminated in its entirety for default effective immediately. By letter to appellant dated 26 June 1978, the contracting officer rendered a final decision confirming the telegraphic termination and setting forth reasons therefor. The COR's special 10-page report was attached as an enclosure to the final decision. The decision specifically referenced the 12 June 1978 final decision "directing you to provide twice weekly services; sweep, dust mop or damp mop of all floors in Schedule A" and stated in pertinent part that:

> On the basis that you failed to comply with the terms of the final decision, that is, that floors in Schedule A would be swept, dust mopped or damp mopped twice weekly, your contract is terminated for default.

44. The contracting officer admitted that, in preparing his decision to terminate the contract, no consideration was given to any performance deficiencies other than the alleged floor sweeping and waxing failures in schedule A buildings as reflected on the COR's special 10-page report. (Finding 42) Moreover, the contracting officer conceded that he did not make any detailed comparison of the discrepancies shown on the various daily COR reports to determine whether work had been corrected.

45. Notwithstanding the foregoing, the contracting officer testified that he based his decision to terminate appellant's contract for default on the daily COR discrepancy reports as well as on the COR's special 10-page report. Moreover, he stated that the alleged failure to provide twice weekly floor cleaning services in schedule A buildings was only "part of the reason" for terminating the contract. However, during his nearly one and one-half days of testimony, the contracting officer was unable to articulate specific examples of substantial noncompliance with contract requirements other than those mentioned in the termination letter. The only specific deficiency about which the contracting officer testified from his personal

knowledge was the appearance of coffee and coca cola stains on the floor of a hallway in administration building no. 314, which he was "pleasantly surprised" to find was cleaned up the next day after having been called to the contractor's attention. Accordingly, we find that based solely upon the special 10-page COR report submitted on 19 June 1978, the contracting officer believed that the contractor had failed to provide twice weekly floor sweeping services in schedule A buildings (together with waxing; a "twice monthly" requirement) during the period 13-16 June 1978. Notwithstanding unpersuasive protestations to the contrary, we conclude that this belief was the overriding reason for terminating the captioned contract for default.

DECISION

A. Floor sweeping deductions

Appellant seeks to recover approximately $30,000 deducted from contractor invoices for nonperformance of twice weekly floor sweeping in schedule A buildings during the months of April, May and June 1978. These deductions were taken pursuant to the Inspection of Services clause which permits the Government, in cases where "the services to be performed are of such a nature that the defect cannot be corrected by reperformance of the services," to "reduce the contract price to reflect the reduced value of the services performed."

By deducting money under the Inspection of Services clause, the Government bears the burden of proof both with respect to entitlement and to the accuracy of the amount deducted. Exquisite Service Company, ASBCA No. 21058, 77-2 BCA ¶ 12,799; Contract Maintenance, Inc., ASBCA No. 19603, 75-1 BCA ¶ 11,097. The record leaves unresolved the accuracy of the amounts deducted (Finding 36), a matter which has not been fully litigated but has been reserved for further negotiation by the parties. However, the question of the Government's entitlement to take these deductions is properly before us.

To satisfy its burden of establishing its entitlement to the deductions in question, the Government must prove that the services were required to be performed and that they were not actually performed. The latter issue is not genuinely in dispute because the record establishes that during the entire month of April and May 1978 and until 12 June 1978 appellant performed only once weekly sweeping services in schedule A buildings. (Findings 28, 37) Therefore, we are obliged to consider only whether twice weekly floor sweeping in schedule A building was a contract requirement.

SP-03a(1)b clearly required twice weekly floor sweeping services. However, the conceded discrepancy between this specification provision and the note at paragraph 3 of Schedule A (Findings 4, 5) created an ambiguity with respect to the floor sweeping frequency requirement,

which appellant contends should be resolved against the Government, the party drafting the instrument. However, the record establishes that appellant's contention is without merit.

Appellant's president conceded that, prior to award of the captioned contract, he perceived that the Government interpreted the specification as requiring twice weekly floor sweeping in schedule A buildings. However, he was anxious to obtain award of the contract and entered into it, without protest, with a view to working out the interpretation question at some later date. (Findings 9, 11, 12, 16) "A party who willingly and without protest enters into a contract with the knowledge of the other party's interpretation of it is bound by such interpretation and cannot later claim that it thought something else was meant." Perry and Wallis, Inc. v. United States, 192 Ct. Cl. 310, 314-315, 427 F.2d 722, 725 (1970); Cresswell v. United States, 146 Ct. Cl. 119, 173 F.Supp. 805 (1959); Globe Construction Company, ASBCA No. 21365, 78-2 BCA ¶ 13,486.

The above-quoted rule cuts both ways and would have operated against the Government had not appellant superseded its 16 January 1978 letter wherein it set forth its original "once weekly" interpretation. (Finding 9) However, appellant's subsequent 23 January 1978 letter expressly instructed the Government to disregard the earlier interpretation. (Findings 11, 13) The 23 January 1978 letter had been written for the purpose of inducing the Government to make a favorable pre-award survey recommendation in order to secure the contract. (Finding 12) Therefore, the Government was entitled to rely on that letter as expressing an interpretation which conformed with that entertained by the Government, and the contractor is estopped from now maintaining a contrary interpretation.

Appellant did not raise the issue of floor sweeping frequency in schedule A buildings at the post-award conference and, after commencing performance on 1 February 1978, appellant proceeded, without protest, to sweep floors twice weekly for the next seven or eight weeks. (Findings 15, 16) Accordingly, the contemporaneous interpretation given by the parties to the floor sweeping frequency requirement, as evidenced by the conduct of the parties during performance of the contract before the dispute arose, establishes that floors were required to be swept twice weekly. See, Julius Petrofsky v. United States, 203 Ct. Cl. 347; 488 F.2d 1394 (1973); J. A. Maurer, Inc. v. United States, 202 Ct. Cl. 813, 485, F.2d 588 (1973); Uniform Commercial Code § 2-208.

Accordingly, we hold that the floors in schedule A buildings were required by the contract to be swept twice weekly and that the Government is entitled to reduce the contract price to reflect the reduced value of the services actually provided during the period from 1 April through 12 June 1978. However, for reasons discussed in part B of our opinion, the Government has failed to prove that twice weekly sweeping was not provided between 13 June 1978 and the time that the

contract was terminated for default. Therefore, the Government is not entitled to take deductions for alleged failure to provide twice weekly floor sweeping services any time after 12 June 1978.

In the alternative, appellant argues that the contracting officer's 24 March 1978 letter, wherein he expressed agreement with appellant's interpretation concerning once weekly sweeping (Finding 29), constituted a change to the contract reducing the sweeping requirement from twice weekly to once weekly and, therefore, precluded the Government from taking deductions for failure to provide twice weekly sweeping services. We do not agree. Even though the last sentence of the penultimate paragraph of that letter makes no sense (Finding 29), the paragraph taken as a whole clearly indicates that the Government still required twice weekly floor maintenance services in schedule A buildings. Moreover, even if the contracting officer's 24 March 1978 letter did change the contract by reducing the floor sweeping frequency requirement, such a change would have caused a decrease in the cost of performing the work under the contract and would have entitled the Government to make an equitable adjustment reducing the contract price. Such a deductive equitable adjustment would have been computed in the same manner as the deductions actually taken under the Inspection of the Services clause. Therefore, appellant's alternative argument represents a distinction without a difference. In either event, the Government would have been entitled to reduce the contract price to reflect the reduced value of the only once weekly floor sweeping services actually provided by the contractor between 1 April and 12 June 1978.

B. The Default Termination

The threshhold question in determining the propriety of a default termination is whether the contractor was actually in default. The Government has the burden of proving the contractor's default and the contractor does not have to prove that it was not in default. Only after this threshhold issue has been resolved does the burden shift to appellant to establish such affirmative defenses as the excusability or waiver of the default. See Caskel Forge, Inc., ASBCA No. 6205, 61-1 BCA ¶ 2891.

The Government has propounded two alternative theories of default by appellant, either of which it contends justifies the termination. First, it is argued that appellant's performance failures during the period from the end of March until 12 June 1978, during which time deductions were taken from the contractor's invoices, support the default termination. Secondly, the Government contends that the contractor's failure to provide floor sweeping and waxing services during the period from 13-16 June 1978, as reflected in the COR's special 10-page report, constitutes another ground for terminating the contract for default.

In support of its first contention, the Government relies chiefly upon our decision in Pride Unlimited, Inc., ASBCA No. 17778, 75-2 BCA ¶ 11,436, wherein we upheld the default termination of a janitorial services contract on the ground that the magnitude of the contractor's performance failures was substantial. In that decison, we also observed that each individual failure to perform a daily task is technically a default, although not necessarily the basis for a default termination. However, in Pride Unlimited, no deductions had been taken against contractor invoices with respect to any of the substantial performance failures which gave rise to the default termination.

The Government argues that the performance failures during the two and one-half month period preceding 12 June 1978, as reflected by discrepancies reported on daily COR gig sheets and by deductions taken for nonperformance of floor sweeping and related functions, were substantial and justify the default termination. The record does not support this contention. To the contrary, we have found that no deductions were taken for discrepancies reported on daily COR gig sheets and that the authorization of payment for services for which no deductions were taken constituted a determination that such services had actually been accepted. (Findings 37, 38) The Government cannot ground a default termination upon the quality of performance of services which it has already accepted, regardless of how unsatisfactory the performance of those services may appear in retrospect.

It is undisputed that between the end of March 1978 and 12 June 1978 the contractor provided only once weekly floor sweeping services in the more than 300 schedule A buildings, rather than the twice weekly floor maintenance services required by the contract. (Finding 28) Moreover, appellant has not challenged the deductions taken for failure to provide certain floor waxing services during this same period. These failures of performance were substantial and would have justified the default termination of the contract. However, instead of terminating the contract for these performance failures, the Government elected to reduce the contract price for the reduced value of these services under the Inspection of Services clause.

The Inspection of Services clause in appellant's contract (ASPR § 7-1902.4, 1971 Nov) provides in pertinent part:

> (b) . . . When the services to be performed are of such a nature that the defect cannot be corrected by reperformance of the services, the Government shall have the right to (i) require the Contractor to immediately take all necessary steps to ensure future performance of the services in conformity with the requirements of the contract; and (ii) reduce the contract price to reflect the reduced value of the services performed. In the event the Contractor fails promptly to perform the services again or to take necessary

> steps to insure future performance of the services in conformity with the requirements of the contract, the Government shall have the right to either (i) by contract or otherwise have the services performed in conformity with the contract requirements and charge to the Contractor any cost occasioned to the Government that is directly related to the performance of such services; or (ii) to terminate this contract for default as provided in the clause of this contract entitled 'Default'." (emphasis added)

The emphasized passage signifies that the Government's right to elect, among other remedies, to terminate the contract for default arises only after there has been a later failure to perform the services for which deductions had previously been taken. Cf. Dillon Total Maintenance, ASBCA No. 20194, 76-2 BCA ¶ 12,097, (contract expressly reserved to the Government the right to take deductions for unperformed or improperly performed work without affecting the Government's rights under the Default clause).

By deducting amounts from the contractor's invoices for the months of April and May 1978, to reflect the reduced value of services performed, the Government effectively waived the performance failures occurring in those months as a basis for a default termination, while still reserving its right to terminate the contract for default if these failures were not cured in the future. The 12 June 1978 final decision, directing the contractor to commence twice weekly floor maintenance services in schedule A buildings and "to cure this condition" promptly (Finding 39), operated as a further waiver of such performance failures through 12 June 1978.

The foregoing observations are not to be construed as holding that the Government is obliged to pay the contractor in full for services not rendered in order to exercise its right to terminate a contract for default. A promissee is not required to pay for services not performed. Under the standard Payments clause in the contract (ASPR § 7-103.7, 1958 Jan) the contractor is entitled to be paid only for "services rendered and accepted, less deductions, if any, as herein provided." Therefore, if the Government has properly terminated a contract for default for failure to render particular services, in settling its account with the contractor after the termination the Government may take into consideration the value of services not rendered and may adjust its final payment accordingly. However, that is not the case here.

Nor has the Government satisfied its burden of proving that the contractor had actually failed to perform required frequency work during the period between 13 June 1978 and the date the contract was terminated. Appreciation of the events occurring during this period requires an understanding of the contractor's practices for reporting the performance of frequency work.

SP-08d required the contractor to furnish each day a list of "all frequency work performed in any building during the preceeding day." Appellant did not comply with this requirement and did not submit performance sheets listing the accomplishment of all frequency work. Instead, because appellant's supervisors were unable to inspect every building in which frequency work was accomplished, the contractor submitted performance sheets covering the performance of frequency work only in those buildings which were personally checked by its supervisors. (Finding 27)

The inability of the contractor's supervisors to inspect every building is not an excuse which relieves the appellant from its contractual obligations. The contractor was required to have sufficient personnel available to meet all of its requirements under the contract. Moreover, appellant's evidence that the parties agreed to waive the frequency work reporting requirement is rebutted by the Government. (Finding 26) Therefore, in the absence of actual knowledge to the contrary, the Government would be entitled to rely on the daily performance sheets, required to be submitted pursuant to SP-08d, as representing all the frequency work that was actually performed on a given day and the Government would have been justified in assuming that work not reported on the daily performance sheets had not actually been accomplished.

However, we have found that the COR had actual knowledge of the appellant's practice of submitting performance sheets covering only work which had been checked by its supervisors and was, or should have been, aware that the performance sheets submitted by appellant's supervisors did not reflect all of the frequency work that was actually accomplished on a given day. (Findings 25, 26, 42) Accordingly, we conclude that the Government was not entitled to rely on the absence of performance sheets as evidence that particular frequency work had not been accomplished.

On or about 12 Jun 1978, the contracting officer directed the COR to conduct inspections to ensure that contractor performance was acceptable. (Finding 40) Apart from the routine daily inspections normally performed by the five Government inspectors, the COR did not conduct any special inspection to verify the performance of frequency work after 12 June 1978. (Findings 40, 41) Instead, the COR provided the contracting officer with a special 10-page report purporting to show that floor sweeping and waxing services were not being provided in certain schedule A buildings between 13-16 June 1978. This report was generated solely upon the basis of an analysis of the contractor's daily performance sheets. (Finding 41) However, the record establishes that from 13-16 June 1978 frequency work services were actually performed in the buildings listed on the COR's 10-page report, although not included on the contractor's daily performance sheets for that period. (Finding 42) Accordingly, we conclude that the Government has failed to satisfy its burden of proving that the work listed in the COR's 10-page report was not actually performed.

Accordingly, there is no factual support for the COR's 10-page report and this report, suggesting that twice weekly floor sweeping together with certain waxing services in schedule A buildings were not performed, is insufficient to prove that the contractor was in default.

We are unpersuaded by the contracting officer's testimony that he considered matters other than those contained in the COR's special 10-page report as bases for terminating the contract. (Finding 45) That 10-page report was appended to the final decision terminating the contract, and the record suggests that the contracting officer was preoccupied with appellant's failure to provide twice weekly floor sweeping services in schedule A buildings. (Findings 32, 39, 43) Based on the COR's special 10-page report, the contracting officer concluded that appellant had failed to cure its failure to provide twice weekly floor sweeping services during the period 13-16 June 1978 and this belief appears to have been the overriding reason why the contract was terminated for default. However, this belief was without factual foundation. Accordingly, we hold that the Government has failed to prove the propriety of the default termination.

SUMMARY

The appeal from the termination for default is sustained and the termination is converted into one for the convenience of the Government. The appeal from the deductions taken with respect to twice weekly floor cleaning services is denied as to entitlement. The matter is remanded to the parties for negotiation of the amount of deductions properly to be taken and for negotiation of a termination settlement.

Section 5. Termination for Convenience

A. The Right to Terminate

UNITED STATES v. CORLISS STEAM-ENGINE COMPANY

91 U.S. 321 (1875)

MR. JUSTICE FIELD delivered the opinion of the court.

This case comes before us on appeal from the Court of Claims, and involves a consideration of the validity and binding character of a settlement, made between the Secretary of the Navy and the claimant, for work performed by the latter upon contracts with the Navy Department. There is no dispute about the facts of the case (they are fully and clearly stated in the findings of the Court of Claims); and it would seem that there ought not to be any dispute as to the law applicable to them. The validity of the contracts is not questioned. The work upon them was done under the supervision of an inspector of the Navy Department, and no complaint is made of the manner in which it was done. When, in 1869, the department, upon the recommendation of a board of officers of the Navy appointed by it, suspended the further progress of the work under the contracts, the claimant made a written proposition, in the alternative, either to take all the machinery and receive $150,000, or to deliver it in its then incomplete condition at the Navy Yard at Charlestown for $259,068, payable on delivery there. The department accepted the latter proposition, recognizing the amount specified as the balance due on settlement of the contracts; stating, however, that, in consequence of the very limited appropriations, only a partial payment would be made on delivery of the machinery at the Charlestown Navy Yard, and that the balance could not be paid until Congress should make a further appropriation, but that a certificate for the amount due would be given to the claimant.

The machinery was accordingly delivered at the Navy Yard, with the exception of a few articles, for which a deduction from the amount of the settlement was allowed, and the certificate stipulated was given to the claimant. Previous to this, however, the chief engineer of the Navy, under direction of the department, examined the machinery, and made a detailed report, by which the department was fully informed of its condition, the progress made in its construction, and what remained to be done for its completion under the contracts. There is no allegation or suggestion that the claimant was guilty of any fraud, concealment, or misrepresentation on the subject; but, on the contrary, it is clear that every fact was known to both parties, and that the whole transaction, as stated by the court

below, was unaffected by any taint or infirmity. If such a settlement, as the Chief Justice of the Court of Claims very justly observes, accompanied by the giving-up by one, and the taking possession by the other, of the property involved, cannot be judicially maintained, it would seem that no settlment by any contractor with the Government could be considered a finality against the Government.

The duty of the Secretary of the Navy, by the act of April 30, 1798, creating the Navy Department, extends, under the orders of the President, to "the procurement of naval stores and materials, and the construction, armament, equipment, and employment of vessels of war, as well as all other matters connected with the naval establishment of the United States." 1 Stat. 553. The power of the President in such cases is, of course, limited by the legislation of Congress. That legislation existing, the discharge of the duty devolving upon the secretary necessarily requires him to enter into numerous contracts for the public service; and the power to suspend work contracted for, whether in the construction, armament, or equipment of vessels of war, when from any cause the public interest requires such suspension, must necessarily rest with him. As, in making the original contracts, he must agree upon the compensation to be made for their entire performance, it would seem that, when those contracts are suspended by him, he must be equally authorized to agree upon the compensation for their partial performance. Contracts for the armament and equipment of vessels of war may, and generally do, require numerous modifications in the progress of the work, where that work requires years for its completion. With the improvements constantly made in ship-building and steam-machinery and in arms, some parts originally contracted for may have to be abandoned, and other parts substituted; and it would be of serious detriment to the public service if the power of the head of the Navy Department did not extend to providing for all such possible contingencies by modification or suspension of the contracts, and settlement with the contractors.

When a settlement in such a case is made upon a full knowledge of all the facts, without concealment, misrepresentation, or fraud, it must be equally binding upon the Government as upon the contractor; at least, such a settlement cannot be disregarded by the Government without restoring to the contractor the property surrendered as a condition of its execution.

But aside from this general authority of the Secretary of the Navy, under the orders of the President, he was, during the rebellion, specially authorized and required by acts of Congress, either in direct terms or by specific appropriations for that purpose, to construct, arm, equip, and employ such vessels of war as might be needed for the efficient prosecution of the war. In the discharge of this duty, he made the original contracts with the claimant. The completion of the machinery contracted for having become unnecessary

from the termination of the war, the Secretary, in the exercise of his judgment, under the advice of a board of naval officers, suspended the work. Under these circumstances, we are of opinion that he was authorized to agree with the claimant upon the compensation for the partial performance, and that the settlement thus made is binding upon the Government.

Decree affirmed.

B. Limitation on Termination for Convenience

TORNCELLO v. U.S.

Ct. Cl. No. 486-80C (1982)

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

BENNETT, Judge, delivered the opinion of the court:

This is a Government contract case, before us on motions for summary judgment. At issue is the Government's diversion of business away from a party, with whom it had executed a requirements contract, to a competing bidder on the original solicitation. The Government defends that this diversion was justified by the constructive application to its actions of the standard "termination for the convenience of the Government" clause in Federal procurement. For several simple and compelling reasons, involving basic tenets of contract law, we hold that the termination for convenience clause does not apply in the situation here and find the Government in breach.

Plaintiff was the president of Soledad Enterprises, Inc. (Soledad), a California corporation that is now bankrupt. Plaintiff has succeeded to all of the rights and entitlements of Soledad with respect to the claim in this suit.

On May 31, 1973, Soledad bid for grounds maintenance and refuse removal contract to service six Navy family housing projects in the San Diego, California area. The bid solicitation listed 12 types of work to be done under the contract, some of which were to be performed routinely and others only on a "call" basis, and the solicitation specifically provided that "Bids are solicited and award will be made on an all or none basis."

Soledad was awarded this 12-item contract, N62474-73-C-3195, on June 6, 1973. The contract term was one year, running from July 1, and it was extended in June of the next year for another year.

The present dispute concerns item 8 of the original bid, paragraph 4A.17 of the contract. This was a call item:

> PLANT DISEASE, INSECT AND RODENT CONTROL. The work shall include the control of agricultural pests, including rodents, weed control, and plant diseases which attack shrubbery, trees and turf grasses. Work authorizations for rodent and pest control will be issued by the Housing

Project Managers in accordance with Paragraph 3A.7. The Contractor shall comply with the current code and rules and regulations of the San Diego County Agricultural Department.

Soledad's bid itemization, accepted by the Government, specified a per call charge of $500 for any call under the pest control item. This was a high price for common pest control work but was warranted in Soledad's view by the open-ended phrasing of the item, that Soledad could be called in for potentially expensive tasks.

It turned out, however, that the Navy only needed gopher control at the housing projects, work that was customarily much cheaper than $500 per call. For this reason, the Navy did not call Soledad under item 8. Soledad realized by August 1973 that it was receiving no item 8 requests and, when it discovered the Navy's reason therefore, Soledad offered in writing to do special gopher control calls for only $35 per call. The Navy still did not request such work from Soledad, however, but called the Department of Navy Public Works, a competing bidder on the original solicitation which had submitted an item 8 figure that was less than Soledad's.

By letter of April 9, 1975, plaintiff took back its offer of $35 per call:

> Please be advised that the offer * * * is hereby rescinded. This action is being taken as there was no "Amendment of Solicitation / Modification of Contract" prepared and signed by the Government or Soledad Enterprises, Inc. Furthermore, we have reason to believe that the services contracted for in item 8 has [sic] been given to the public works department.

Soledad's bankruptcy followed soon thereafter.

It is stipulated that Soledad never received pest control work under item 8, either under the original contract or under its renewal, at $500 per call or at $35 per call, and it is further stipulated that the Navy did have such work which it gave to Public Works. Soledad's claim is that its agreement with the Navy was for all of the Navy's requirements under the contract and that the Navy breached the contract when it diverted the work under item 8. Soledad claims that it was entitled to service all of the Navy's pest control needs and protests the fact that it got none.

I

Soledad lost its claim before the contracting officer and lost its appeal to the Armed Services Board of Contract Appeals (ASBCA). Although the ASBCA cursorily accepted that the Government may have committed a breach, it viewed that issue as unimportant because of the overriding availability to the Government of constructive termination for convenience. In full the ASBCA's argument reads:

> It is the appellant's position that this contract was a requirements contract under which the Government was obligated to procure all of the services it required of the type covered by the contract, from the contractor. The appellant claims that the Government failed to order all of those services and that as a result the appellant suffered substantial financial difficulty which led to the eventual default of this and other contracts.
>
> In a similar situation the Court of Claims found it unnecessary to resolve the question of whether or not the contract was a requirements contract. Charles R. Nesbitt v. United States, 170 Ct. Cl. 666 [345 F.2d 583](1965), cert. denied 383 U.S. 926 (1966). In order to reach our decision, we assume, without finding, that the representations made by the appellant with regard to its interpretation of the bidding provisions and the subsequent contract were correct.
>
> When the Government fails to comply with its contractual obligations under the type of circumstance present here, the contractor is entitled to recover as if the contract had been terminated pursuant to the termination for the convenience provisions of the contract. Charles R. Nesbitt v. United States, supra; G. C. Casebolt Company v. United States, 190 Ct. Cl. 783 [421 F.2d 783](1970). This contract included what is commonly referred to as a short form termination for the convenience clause which provided that to the extent the contract was for services, the Government was liable only for payment of those services rendered prior to the effective date of termination. In this instance the appellant has established that the Government ordered no services in connection with pest control. Since no pest control services were ordered, under the contract's termination for convenience of the Government provisions, the appellant is not entitled to any additional compensation.

Appeal of Soledad Enterprises, Inc., ASBCA Nos. 20376, 20423 to 20426, 77-2 BCA ¶ 12,552 at No. 20425 (April 29, 1977).

We must digress for a moment to explain termination for convenience and its constructive application. Direct convenience termination is provided for in the clause in plaintiff's contract referred to by the ASBCA, and it is a standard term in Federal procurement:

> TERMINATION FOR CONVENIENCE OF THE GOVERNMENT
>
> The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the best interest of the Government. If this contract is for supplies and is so terminated, the contractor shall be compensated in accordance with ASPR Section VIII, in effect on this contract's date. To the extent that this contract is for services and is so terminated, the Government shall be liable only for payment in accordance with the payment provisions of this contract for services rendered prior to the effective date of termination.

The clause is intended to enable the contracting officer to stop or curtail a contractor's performance without involving the Government in a breach that would render it liable for the contractor's anticipatory profits. Constructive resort to the clause, as was had by the ASBCA in this case, occurs in situations in which the Government has stopped or curtailed a contractor's performance for reasons that turn out to be questionable or invalid. Constructively, the clause can justify the Government's actions, avoid breach and limit liability. This springs from a decision of the Supreme Court that actions by a contracting party may be supported at a later date by any reason that could have been advanced at the time of the actions, even though the party was not then aware of it. College Point Boat Corp. v. United States, 267 U.S. 12 (1925).

Returning to the case before us, the ASBCA's implicit conclusion that the Navy could, by invoking the clause, have had a convenience termination of plaintiff's pest control services at the time that it diverted that work to Public Works, allowed the ASBCA to justify the Navy's diversion constructively, at the time of litigation. And since the Navy had never turned to Soledad for such services, there were no incurred charges to pay off.

On appeal to this court, plaintiff's basic complaint is that the practical effect of this decision of the ASBCA is to exculpate the Government completely. The Government was allowed to walk away from plaintiff's contract with impunity. Plaintiff contends: (1) that the requirements aspect of its contract required that it received 100 percent of defendant's pest control business, not 0 percent as it happened, and (2) that the doctrine of constructive termination for convenience should not be allowed to render this requirement

meaningless. Defendant responds: (1) that the contract actually was of the indefinite quantities type, allowing the Navy to order a null amount, and (2) even if the contract was for requirements, that constructive termination is available as a valid excuse for non-performance nevertheless.

The primary issue in this appeal, raised squarely by the facts before us, is the coverage of the Government's termination for convenience clause. The ASBCA did not question but that it was available to the Government but we note that Nesbitt v. United States, 170 Ct. Cl. 666, 345 F.2d 583 (1965), cert. denied, 383 U.S. 926 (1966), on which the ASBCA placed its principal reliance, was a very different case. Nesbitt involved the Government's dilemma with a contractor who had agreed to service the Government's needs but then, after the contract award, refused to meet them. Id. at 670 n.3, 345 F.2d at 586 n. 3. It is far from clear that this court's recognition that the Government may terminate for convenience in such a circumstance should be extended to the present facts, where termination was invoked to take advantage of a price that the Government had known about at the award date and where the contractor, Soledad, remained at all times ready and willing to perform as per its agreement. Further, plaintiff's complaint is serious that the effect of the ASBCA's constructive use of termination for convenience has been to allow the Government to walk away from all of its contractual obligations. We note as one of the most elementary propositions of contract law that a party may not reserve to itself a method of unlimited exculpation without rendering its promises illusory and the contract void, and we question if the Government's termination for convenience clause should be construed that broadly. Since these issues are of great importance in the field of Government contracts, they will receive close attention.

Before reaching these questions, however, it is necessary to address several preliminary issues.

II

A contention of the Government that would forestall any further argument is its assertion that its contract with Soledad was not of the requirements type but was only for an indefinite quantity of pest control. Thus, defendant alleges, the Navy's diversion of work to Public Works was allowed by the contract. This would mean that there was no breach, and it would render unnecessary any consideration of the ASBCA's resort to constructive termination for convenience to justify the diversion.

The ASBCA made no ruling on the type of contract that it had before it, and so this court must make the determination as an original matter. In so doing, however, we bear several important principles in mind. First, we recognize that we sit, for Wunderlich Act

cases, as a court of limited review and are bound by the standards set out in the Act. 41 U.S.C. §§ 321 and 322. Thus we feel constrained to make no determination as an original matter that we could not make as a court of review in a case that properly presented the issue. Therefore, in determining whether the contract between Soledad and the Navy was for requirements or for an indefinite quantity, we will restrict our attention only to (1) the text of the contract itself, for contract construction is a matter of law that is always within our power, and (2) facts that are so well supported by the record that contrary findings would not be supportable. As we have said:

> [W]here the evidence is disputed but it is of such a nature that * * * the Board could have made only one finding of fact, it would seem that this court can make that finding without sending the matter back to the Board for determination of the factual issues; otherwise, litigation would be protracted and unnecessary delay and expense would result simply in order to have the Board formally decide a fact which legally can be decided in only one way.

Maxwell Dynamometer Co. v. United States, 181 Ct. Cl. 607, 631, 386 F.2d 855, 870 (1967); Koppers Co. v. United States, 186 Ct. Cl. 142, 405 F.2d 554 (1968); Dittmore-Freimuth Corp. v. United States, 182 Ct. Cl. 507, 390 F.2d 664 (1968). The second major principle is that we assume that the parties intended that a binding contract be formed. Thus, any choice of alternative interpretations, with one interpretation saving the contract and the other voiding it, should be resolved in favor of the interpretation that saves the contract. Arizona v. United States, 216 Ct. Cl. 221, 575 F.2d 885 (1978), and cases cited therein; Hol-Gar Mfg. Corp. v. United States, 169 Ct. Cl. 384, 351 F.2d 972 (1965), and cases cited therein.

The only pertinent terms are the item from the bid solicitation, which specified "Item 8 - Unit price per work authorization for rodent and pest control in accordance with the specifications, based on an estimated one work authorization per month," and the entry on plaintiff's bid response, filed on the appropriate standard form, which acknowledged the estimate, the call basis of each order and which fixed the price per call at $500. Our question is whether it is implicit in these terms, or in the circumstances surrounding the formation of the contract, that the Navy promised to give all of its work authorizations to Soledad or whether the Navy could use other contractors, too.

Looking just at the contract terms, we note that they must fit into one of the three possible types of supply contracts: those for a definite quantity, those for an indefinite quantity and those for requirements. Mason v. United States, 222 Ct. Cl. 436, 444, 615 F.2d 1343, 1347 (1980). With contracts for a definite quantity, the

promises and obligations flowing from each party to the other define both the minimum and maximum performances of each and furnish the consideration from each party that courts require for enforceability. With indefinite quantities contracts, however, the buyer's promise specifically is uncertain, and such a contract would fail for lack of consideration if it did not contain a minimum quantity term. Willard, Sutherland & Co. v. United States, 262 U.S. 489 (1923); Mason, 222 Ct. Cl. at 443 n.5, 615 F.2d at 1346 n.5; Gavin, Government Requirements Contracts, 5 PUB. CONT. L.J. 234, 240-44 (1972) [hereinafter Gavin]. Without an obligatory minimum quantity, the buyer would be allowed to order nothing, rendering its obligations illusory and, therefore, unenforceable. Requirements contracts also lack a promise from the buyer to order a specific amount, but consideration is furnished, nevertheless, by the buyer's promise to turn to the seller for all such requirements as do develop. Such contracts clearly are enforceable on that basis. Brawley v. United States, 96 U.S. 168, 172 (1878); Shader Contractors, Inc. v. United States, 149 Ct. Cl. 535, 540-43, 276 F.2d 1, 4-6 (1960); Gavin at 244-48. The entitlement of the seller to all of the buyer's requirements is the key, for if the buyer were able to turn elsewhere for some of its needs, then the contract would not be distinguishable from an indefinite quantities contract with no stated minimum, unenforceable as we have stated.

Under these principles, the contract before us is easily interpreted. We note that the Navy agreed to authorize pest control work, that plaintiff agreed to perform it and that there was an acknowledged estimate that one call would be made per month. A definite quantity certainly is not contemplated here, so the contract is not of that type. Just as certainly, the estimate is not stated in such terms as could be construed as an obligatory minimum, and so we could not hold that this contract is for an indefinite quantity without destroying it as lacking consideration. Thus, we must and do conclude that plaintiff's contract is for the Navy's requirements.

The facts, as they plainly appear from the record before us, support this conclusion completely. From the circumstances surrounding the bid solicitation and the contract, and from the testimony and the exhibits introduced at the ASBCA trial, it is clear that the Navy wanted someone, a single contractor, to take on the comprehensive task of providing grounds maintenance and refuse removal at the six housing projects covered by the contract. The Navy wanted to have to deal with only one contractor and executed a contract that was intended to obligate that one contractor for all of the tasks needed.

III

Also at the outset of the discussion of this case, we must say that it is not a case merely for construing a Federal regulation to see if a plaintiff has a monetary claim. Most of the cases in this court turn on specific statutes or regulations that do or do not

afford plaintiffs the monetary relief they seek, and this court is cautious in such cases to examine the statutes and regulations carefully to make sure that the plaintiffs are entitled to the recovery they claim. Congress creates rights and entitlements, or waives its sovereign immunity, as it sees fit, and this court will award judgment only where the statute or regulation relied upon so provides, directly or by express implication. Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599, 372 F.2d 1002 (1967). See United States v. Testan, 424 U.S. 392 (1976).

It is a different situation in the field of contracts, however. The Government contracts as does a private person, under the broad dictates of the common law. "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." Lynch v. United States, 292 U.S. 571, 579 (1934); Perry v. United States, 294 U.S. 330 (1935). While it is true that the Government has the power to abrogate common-law contract doctrines by specific legislation, see, e.g., the First War Powers Act, 1941, Pub. L. No. 77-354, 55 Stat. 838 (power to the President to authorize agencies to enter into contracts "without regard to the provisions of law relating to the making, performance, amendment, or modification of contract", 55 Stat. 839); U.C.C. § 2-209(1), "Modification, Rescission and Waiver" (contractual modifications within Article 2 do not need consideration), the general rule must be that common-law contract doctrines limit the Government's power to contract just as they limit the power of any private person. Thus, the Government's entry into the field of contracts is not like its selective creation of rights and entitlements in other fields. As we have explained, statutes and regulations in other fields circumscribe a prospective plaintiff's recovery strictly. If, however, a plaintiff's action or recovery purportedly is limited by a contractual term, that limitation will stand only if allowable under the doctrines of contract. Indeed, the Supreme Court has held as early as 1923 that the Government may not, by simple contract, reserve to itself a power that exceeds that which a private person may have. Willard, Sutherland & Co. v. United States, 262 U.S. 489 (Government may not reserve to itself a right of non-performance without destroying the contract). And it does not matter that a contract term is mandated by Federal procurement regulation. In the field of contracts, it is only by specific legislation that the Government may trespass the bounds of general contract doctrines. Therefore, this court will read the termination for convenience clause in the contract in this case as it would read any contract term and give effect to it or deny effect to it as dictated by the general law.

IV

The coverage of the Government's termination for convenience clause is now squarely at issue. Since we have concluded that the Navy indeed was obligated to give all of its pest control requirements to Soledad, and since it is stipulated that the Navy gave Soledad none, we are confronted directly with the ASBCA's use of constructive termination for convenience to allow the Navy not to continue with that obligation. And since the constructive use of convenience termination is directly dependent, under College Point Boat Corp., upon the availability of that ground at the time of the disputed actions, the ultimate question that must be asked is whether, at the time that the Navy first gave pest control work to Public Works, it could have had a convenience termination of that item under the clause in Soledad's contract. If the clause could have been invoked at that time, then the ASBCA was correct and the Navy's failure to use Soledad is excused. If not, however, then plaintiff must prevail because a breach was committed.

The full background and ramifications of the ASBCA's use of convenience termination as an exculpatory clause require a discussion over several parts. As we shall explain in Part A, below, the convenience termination clause developed as a wartime concept, and it was a way for the Government to avoid the continuance of contracts that the rapid changes of war, or the war's end, had made useless or senseless. See NASH & CIBINIC, FEDERAL PROCUREMENT LAW 1104-07 (3d ed. 1980) [hereinafter Nash & Cibinic]. The Government could halt a contractor's performance and settle with the contractor for the progress made. As such, termination for convenience functioned to allocate to the contractor the risk of losing the benefit of its full performance if full performance became unneeded. Even when termination for convenience was imported into peacetime military and civilian procurement, only 20 or 30 years ago, and receiving its almost universal application only from 1967, Nash & Cibinic at 1107, the basic idea remained constant that convenience termination was an allocation of the risk of changed conditions. A long line of cases in this court bear this out. Part B of this section will examine convenience termination in the absence of changed conditions, for purely exculpatory purposes. This is the latest development, dating only from 1974, Colonial Metals Co. v. United States, 204 Ct. Cl. 320, 494 F.2d 1355 (1974), and it is this use of the clause that the Government presses in the case before us. As we shall explain fully, such a use is not supported by the legal theory underlying the clause nor by the clause's history, and it has caused great concern among commentators and members of the bar. While it is plain that parties to a contract may freely agree to various forms of risk allocation, as with the basic use of the termination for convenience clause, it is just as clear that parties may not agree that one or both may walk away from all obligations without rendering the contract unenforceable. Part C explores this last point, that the availability of convenience termination for free exculpation cuts straight to whether the

Government's promises can be made to bind it. The question is whether a broad construction of the termination for convenience clause would make the Government's promises only illusory.

For the purposes of this entire section, we will apply part of what we said at the beginning of the last section, that we will not construe the termination for convenience clause in such a way that any contract that contains it is overpowered if there is an alternative reading of the clause that allows such contracts to be upheld.

A. The History of the Termination for Convenience Clause

The concept that the Government may, under certain circumstances, terminate a contract and settle with the contractor for the part performed dates from the winding down of military procurement after the Civil War. It originated in the reasonable recognition that continuing with wartime contracts after the war was over clearly was against the public interest. Where the circumstances of the contract had changed so dramatically, the Government had to have the power to halt the contractor's performance and settle.

The case that first articulated this idea, and which generally is credited as providing the basic legal theory to support the modern termination for convenience clause, is United States v. Corliss Steam-Engine Co., 91 U.S. 321 (1876). See Nash & Cibinic at 1104; Moss & Gantt, A Steam Engine and Contract Termination Settlement Procedures, 8 PUB. CONT. L.J. 188 (1976). In Corliss, the Government appealed a judgment of this court (Reported in 10 Ct. Cl. 494 (1874)), upholding a settlement agreement between the Navy and Corliss concerning two contracts that remained uncompleted when the Civil War ended. It was the Government's position on appeal, as it had been in this court, that the Navy did not have the power to bind the United States to a settlement. Indeed, Congress had passed legislation that money was not to be appropriated to pay Corliss until there was an investigation into the agreement to see if the amount could be reduced. The Supreme Court affirmed, however, holding that the Secretary of the Navy necessarily had the power to settle with contractors when the exigencies of war, or its termination demanded. It said:

> Contracts for the armament and equipment of vessels of war may, and generally do, require numerous modifications in the progress of the work, where that work requires years for its completion. With the improvements constantly made in ship-building and steam-machinery and in arms, some parts originally contracted for may have to be abandoned, and other parts substituted; and it would be of serious detriment to the public service if the power of the head of the

> Navy Department did not extend to providing for all such posssible contingencies by modification or suspension of the contracts, and settlement with the contractors.

91 U.S. at 323. Clearly, Corliss establishes as basic law and policy that procuring agencies must have the power to settle contracts that have been subjected to great changes in expectations.

During World War I, the Corliss doctrine expanded into a very important part of military procurement. Included here are two examples of this expansion, a statute and a contract clause, each plainly reflecting the idea expressed by the Supreme Court in Corliss that the Government must be able to settle with contractors when the circumstances of war require. In 1917, Congress passed the Urgent Deficiency Appropriation Act, Pub. L. No. 65-23, 40 Stat. 182, responding to a two-pronged concern that the Government not have to remain committed for obsolete items during the war or for stockpiles of items at the war's end. Vom Bauer, Fifty Years of Government Contract Law, 29 FED. B.J. 305, 313 (1970). The Act authorized the President, until 6 months after a final treaty of peace, 40 Stat. 183, "[t]o modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material." 40 Stat. 182. In such case, the Government was to make "just compensation therefor." 40 Stat. 183. The example of a specially drafted contract clause is from Davis Sewing Machine Co. v. United States, 60 Ct. Cl. 201 (1925), aff'd, 273 U.S. 324 (1927). Davis Sewing Machine involved a contract for the procurement of Very pistols, which provided:

> Termination--This contract being necessitated by a state of war now existing, it is desirable and expedient that provision be made for its cancellation upon fair and equitable terms in the event of the termination or limitation of the war, or if in anticipation thereof or because of changes in methods of warfare the Chief of Ordnance should be of the opinion that the completion of this contract has become unnecessary. It is therefore provided that any time, and from time to time, during the currency of this contract, the Chief of Ordnance may for any of the causes above stated notify the contractor that any part or parts of the articles then remaining undelivered shall not be manufactured or delivered.

Id. at 203. As with the Urgent Deficiency Appropriation Act, this contract provided that the Government would settle with the contractor, specifically for accrued costs and just compensation. Id. It is important that both of these examples make clear that convenience termination, as it was developing, was intended just to handle changed

conditions, relieving the Government of the risk of receiving obsolete or useless goods. The risk was shifted to the contractor that it could lose the full benefit of its expectations if circumstances changed too radically.

For World War II, the Corliss concept was embodied in a mandatory termination clause for fixed-price supply contracts, the direct predecessor of the modern termination for convenience clause:

> Termination for the convenience of the Government.
> (a) The Government may, at any time, terminate this contract, in whole or in part by a notice in writing from the Contracting Officer to the Contractor that the contract is terminated under this Article.

10 C.F.R. § 81.324 (Cum. Supp. 1938-43). Also provided for is payment to the contractor of accrued costs and a reasonable portion of anticipated profit. Id. It will be noted immediately that this clause seems to be worded for very broad availability. The power to terminate "at any time * * * in whole or in part" is much broader, for example, than the conditions recited in the World War I clause quoted above. It must be understood, however, that its use was restricted to the war period, Nash & Cibinic at 1106, and clearly was a response to wartime emergency conditions. Despite the broad wording, the World War II clause still was to allocate the risk of changed circumstances. As Congress said, when it enacted the Contract Settlement Act of 1944, Pub. L. No. 78-395, 58 Stat. 649, to provide an administrative structure for winding down World War II procurement, the main objectives of settlement procedures were "to facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit [and] to assure to prime contractors and subcontractors, small and large, speedy and equitable final settlment of claims under terminated war contracts * * *." Id. Contractors risked losing the benefits of full performance but only for the exigencies of war.

The next major steps in the development of termination for convenience occurred in 1950, when the concept first was applied to peacetime military procurement, and in 1967, when it first was given the general applicability to peacetime military and civilian procurement that it has today. Nash & Cibinic at 1107. It can readily be understood that these were very significant shifts, entailing a great potential for difficulty in adapting the concept to new settings. The modern formulation of the clause uses the same broad language that was used in World War II (see section I of this opinion for the clause that is in dispute in this case) but there was, and is, not the same kind of emergency situation. From the Corliss decision in 1876 to the last use of the World War II convenience termination clause in early 1944, the legal basis of the Government's power had always been that the great and unpredictable circumstances of war necessitated some ability to halt useless contracts and settle with the contractors. War was now absent.

The response in this court was to rely on the risk allocation nature of the concept and to allow termination for convenience only when the expectations of the parties had been subjected to a substantial change. The contractor risked losing the full benefit of his performance if something occurred, apart from the bargain and the expectations of the parties, that made continuance of the contract clearly inadvisable. The history of cases in this court demonstrates this. John Reiner & Co. v. United States, 163 Ct. Cl. 381, 325 F.2d 438 (1963), cert. denied, 377 U.S. 931 (1964)(irregularity in the bid award); Brown & Son Elec. Co. v. United States, 163 Ct. Cl. 465, 325 F.2d 446 (1963)(irregularity in bid award); Nesbitt v. United States, 170 Ct. Cl. 666, 345 F.2d 583 (1965), cert. denied, 383 U.S. 926 (1966) (refusal of contractor to meet requirements); Warren Bros. Roads Co. v. United States, 173 Ct. Cl. 714, 355 F.2d 612 (1965)(irregularity in the bid award); Coastal Cargo Co. v. United States, 173 Ct. Cl. 259, 351 F.2d 1004 (1965)(irregularity in bid award); Schlesinger v. United States, 182 Ct. Cl. 571, 390 F.2d 702 (1968)(plaintiff under investigation by Senate for procurement irregularities, and in technical default); Nolan Bros. v. United States, 186 Ct. Cl. 602, 405 F.2d 1250 (1969) (physical changes at site made performance impossible); G.C. Casebolt Co. v. United States, 190 Ct. Cl. 783, 421 F.2d 710 (1970) (irregularity in the bid award).

These cases recognized that the termination for convenience clause was only to be applied where there was some change from the parties' original bargain and was not to be applied as broadly as an untutored reading of the words might suggest. Especially, we point to Nesbitt, which quoted the "from time to time" wording of the clause but specified in a footnote that the plaintiff's failure to perform in that case undoubtedly was a proper circumstance for the clause's use, 170 Ct. Cl. at 670 and 670 n.3, 345 F.2d at 585-86 and 586 n.3; to Nolan, which said that it was "entirely reasonable * * * [to invoke the clause for] a post-contract recognition that the job is impossible or too difficult to perform or too costly for the Government if pushed through to its conclusion," 186 Ct. Cl. at 606, 405 F.2d at 1253; to Casebolt, where the court specifically recognized its obligation to see if the Government's directive to terminate the contract in that case "could lawfully come under that clause," 190 Ct. Cl. at 786, 421 F.2d at 712; and to Reiner, in which the court spoke in its broadest terms about the availability of the clause, that it could be used in a "host of variable and unspecified situations" and at the will of the Government, and still inquired into the propriety of its use on the facts before it. 163 Ct. Cl. at 390-91, 325 F.2d at 442-43. The message in those cases is clear that termination for convenience was to allocate the risk of a change in the circumstances of the bargain or in the expectations of the parties.

B. Termination for Convenience for Exculpation

In 1974, this court first allowed termination for convenience for a different reason than risk allocation. The case, Colonial Metals v. United States, 204 Ct. Cl. 320, 494 F.2d 1355 (1974), involved no changed conditions, only the Government's decision to terminate the contractor and remake the contract with someone else, for a reason that was known or should have been known to the Government before the contract was awarded.

Colonial Metals dealt with a supply contract for a definite quantity of copper, with a termination for convenience clause much like the one now in issue. Plaintiff's bid had been higher than what would have been charged by a primary source supplier, quotations for which regularly appear in the Wall Street Journal and trade papers, id. at 329, 494 F.2d at 1360, because plaintiff was a secondary source. The Government contracted with plaintiff, nevertheless, but then decided soon after to remake the contract with primary sources. Plaintiff was terminated for convenience before any performance. Although many aspects of the Government's decision-making were unclear, the court found that it was certain, "as the Board found, [that] the Government terminated to get a better price from another source, a price which the Government throughout knew or ought to have known was readily available." Id. at 329-30, 494 F.2d at 1360.

In the Colonial Metals opinion, by sustaining the Government's termination for convenience, this court made a clear break with all of the prior law on the subject. The requirement of changed conditions specifically was rejected:

> Termination to buy elsewhere at a cheaper price is essentially such a termination as had repeatedly been approved. The added element that the contracting officer knew of the better price elsewhere when he awarded the contract to plaintiff * * * means only that the contract was awarded improvidently and does not narrow the right to terminate. The clause is not designed to perpetuate error, but to permit its rectification.
>
> Termination for convenience is as available for contracts improvident in their origin as for contracts which supervening events show to be onerous or unprofitable for the Government.

Id. at 331, 494 F.2d at 1361. Termination for convenience was allowed to be used as an exculpatory clause, available at the unlimited discretion of the contracting officer. The broad wording of the convenience termination clause was applied without regard to the history of emergency, wartime situations in which the words were formulated or to the legal theory of risk allocation as it had dated from Corliss.

The commentary on Colonial Metals has not been favorable. Professors Nash and Cibinic, on the part of the opinion that says that "[t]ermination to buy elsewhere at a cheaper price is essentially such a termination as has repeatedly been approved", note that there are no authorities cited and assert that there simply are none to cite, except for an unpublished Comptroller General opinion. Nash & Cibinic at 1112. Other commentators note that the effect of Colonial Metals is to put contractors "in the untenable position of being subject to termination and loss of the benefit of the sale when the market falls but being saddled with a loss when the reverse occurs." Perlman & Goodrich, Termination for Convenience Settlements--The Government's Limited Payment for Cancellation of Contracts, 10 PUB. CONT. L.J. 1, 6 (1978). They assert that this result is unfair, id., but find it inescapable after Colonial Metals, because "[i]t can only be concluded that there are virtually no limitations on the Government's right to terminate for convenience." Id. at 7. Another writer has gone so far as to draft a hypothetical telegram for convenience termination that begins: "Your contract with me * * * is hereby terminated because you are in default, I think; in any event you are tardy in making progress, probably. Even if neither conclusion is true, said contract is still terminated because it suits me to do so." Newman, The Beginning of the End--The Encroachment of Federal Contract Termination Practices, 33 BUS LAW. 2143, 2143 (1978). It is the concensus that Colonial Metals is a far-reaching decision of major concern, imposing an onerous burden on anyone who would deal with the Government. Nash & Cibinic at 1105; Note, Tying Together Termination for Convenience in Government Contracts, 7 PEPPERDINE L. REV. 711, 721-22 (1980) (hereinafter Pepperdine).

Colonial Metals appears to be an aberration in the precedents of the court. The case came before the court on defendant's uncontested motion to adopt the trial judge's report as the basis for its judgment. Plaintiff had lost before the trial judge but did not request review, and the motion was granted, without oral argument. The attention of the court was in no way directed, as it is now, to the fundamental issues so important in the pending case, and plaintiff's failure to raise a contest dilutes the decision of much weight as precedent that we otherwise would accord it. It is clear, however, that Colonial Metals marked a dramatic departure from the development of convenience termination as a method of risk allocation. It established a new reading of the clause, convenience termination for exculpation, and it is this reading that the Government contends for in the case now before us. It is the only decision of this court in which a plaintiff was denied recovery after convenience termination that was based on knowledge acquired before the contract was awarded.

Were we to have only the historical argument before us, however, a decision on the breadth of the termination for convenience clause would be very difficult. Colonial Metals may have broken with historical development but it is, of course, within the power of contracting parties to evolve new types of agreements as long as the

basic tenets of contract law are followed. As Colonial Metals itself put it, "[i]t may well be * * * that the Government does not promote confidence in its procurement process when it terminates a contract and deprives the contractor of the profits of the bargain, for reasons which were known at the time of the award." 204 Ct. Cl. at 330, 494 F.2d at 1360. But this alone is not enough to say that such a power of termination cannot be had by the Government. The answer to this, however, is that the historical argument is not the only one against convenience termination for exculpation. When a party seeks to restrict to itself an unlimited right to escape its promises, as termination on knowledge acquired before the contract award surely is, it risks violating one of contract law's most fundamental principles, that all contracts must be supported by consideration. Nash & Cibinic at 1115.

C. The Requirement of Consideration

It is beyond dispute that the Government must furnish consideration for its contractual promises as must any private party. The Supreme Court so held in Willard, Sutherland & Co. v. United States, 262 U.S. 489 (1923), when it invalidated a contract because it lacked consideration from the Government, and this court has spelled out with particularity the forms of consideration generally required from the Government in using its various types of supply contracts. Mason v. United States, 222 Ct. Cl. 436, 615 F.2d 1343 (1980). See also Kelly, The Concept of Consideration in Government Contracts, 10 JAG L. REV. 20 (Jan.-Feb. 1968).

As we explained in section II of this opinion, it is the very essence of a requirements contract, such as plaintiff had with the Government in this case, that the buyer agree to turn to the supplier for all of its needs. If there is not a commitment for all needs, then the relation is not different from an indenfinite quantities contract with no required minimum, the very type of relation that the Supreme Court held in Willard, Sutherland & Co., could not be a contract. See section II of this opinion.

The effect of the ASBCA's decision in the case before us, however, was to allow the Government not to give Soledad any of its needs, to walk away from its cardinal contractual obligation. It is hornbook law, as the Government concedes in its supplemental brief, that a route of complete escape vitiates any other consideration furnished and is incompatible with the existence of a contract.

> A promise to buy such a quantity of goods as the buyer may thereafter order, or to take goods in such quantities "as may be desired", or as the buyer "may want" is no consideration since the buyer may refrain from buying at his option and do so without incurring legal detriment himself or benefiting the other party.

1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 104 (3d ed. 1957). According to Corbin:

> If what appears to be a promise is an illusion, there is no promise; like the mirage of the desert with its vision of flowing water which yet lets the traveller die of thirst, there is nothing there. By the phrase "illusory promise" is meant words in promissory form that promise nothing; they do not purport to put any limitation on the freedom of the alleged promisor, but leave his future action subject to his own future will, just as it would have been had he said no words at all.

1 CORBIN ON CONTRACTS § 145 (1963). It must be concluded, then, that the Government's promise to turn to Soledad for all of its pest control work, if it was also implicit in the termination for convenience clause that the Government could give Soledad none, was no promise at all. The contract would thus fail.

The approach of the RESTATEMENT (SECOND) OF CONTRACTS is to consider all of the possible performances under a contract's terms as alternative performances, and to require that each alternative be itself a sufficient obligation to support the contract. In this way, it is ensured that each party necessarily will end up performing in a way that reflects some binding obligation. "A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless * * * each of the alternative performances would have been consideration if it alone had been bargained for * * *." RESTATEMENT (SECOND) OF CONTRACTS § 77 (1979). Illustrations 1 and 4 to this section resemble the instant case:

> 1. A offers to deliver to B at $2 a bushel as many bushels of wheat * * * as B may choose to order within the next 30 days. B accepts, agreeing to buy at that price as much as he shall order from A within that time. B's acceptance involves no promise by him, and is not consideration.
>
> 4. A agrees to sell and B to buy between 400 and 600 tons of fertilizer in installments as ordered by B, A reserving the right to terminate the agreement at any time without notice. B's promise is without consideration. [Note that this illustration was taken from an old case which regarded consideration as flowing from the promisee to the promisor. B's promise is without consideration because none flowed from A due to A's right to terminate.]

The possible alternative of non-performance is unacceptable. Thus the ASBCA's view of the Government's power to terminate for convenience, allowing unlimited exculpation, is too broad.

It has been argued, however, that the procedures that the Government must follow when it terminates for convenience do not allow it to walk flatly away, and that the Government does give consideration to the extent that it is not completely free of obligations. Pepperdine at 727. To use the language of the RESTATEMENT section quoted above, this is an assertion that the Government's alternative performance of exculpatory convenience termination still involves promises that would be sufficient if they alone had been bargained for. This would mean that each of the Government's two alternatives, performance according to the contract or termination under certain sufficient procedures, would be enough to bind the Government, and the contract would not be jeopardized. Specifically, the asserted alternative measures of consideration contained in the procedures for terminating a services contract, as in this case, are: (1) an obligation to give notice of convenience termination and (2) an obligation to pay for services rendered.

On the facts of our case, however, if the ASBCA's free use of exculpatory convenience termination were allowed, these asserted obligations still could not provide an obligation sufficient to support the alternative performance of exculpatory termination. (1) On the point of notice, we need only note that convenience termination in this case was constructive, because the procedures for invoking the clause were not originally followed. There is never notice in a constructive case, and so it plainly cannot be the binding obligation that would supply consideration. Even if given, however, as in direct convenience termination cases, we would question whether it is sufficient to support a contract merely that one party promise to the other to tell him that he is walking away before he does so. But cf. Sylvan Crest Sand & Gravel Co. v. United States, 150 F.2d 642 (2d Cir. 1945)(finding consideration in an implicit requirement to notify of cancellation within a "reasonable time"). (2) On the point of paying for services rendered, it seems that requiring only that the Government pay for how far it has gone gives the Government the possibility of transforming virtually any contract into one for an indefinite quantity, with no required minimum term. We have said repeatedly in this opinion that such an arrangement fails. Willard, Sutherland & Co. v. United States, 262 U.S. 489 (1923).

Thus we must conclude that none of the termination procedures entails an alternative performance that would bind the Government to anything that would be sufficient for consideration if it alone had been bargained for. Termination for convenience for exculpation, then, as the ASBCA allowed in this case, if there were no restrictions on its use other than the termination procedures, would vitiate the consideration normally furnished by the Government for a requirements contract without substituting any other sufficient obligation. Such a reading of the clause would destroy the contract.

The Government argues further, however, that it is a sufficient fetter on convenience termination that the contracting officer must determine in good faith that termination would be "in the best interest of the Government." Thus, the Government cannot invoke the clause where it would not be in its interest to do so or where the contracting officer lacks good faith in making the determination of interest. On the first point, it seems hardly sufficient for the Government to promise not to do anything that would be against its own interest. This merely is promising only to do whatever suits it. On the second, we note that the Government, unlike private parties, is assumed always to act in good faith, subject only to an extremely difficult showing by the plaintiff to the contrary. Librach v. United States, 147 Ct. Cl. 605 (1959). As this court has phrased it, in a case specifically involving convenience termination:

> it requires "well-nigh irrefragable proof" to induce the court to abandon the presumption of good faith dealing. Knotts v. United States, 121 F.Supp. 630, 631, 128 Ct. Cl. 489, 492 (1954).
>
> In the cases where the court has considered allegations of bad faith, the necessary "irrefragable proof" has been equated with evidence of some specific intent to injure the plaintiff. Thus, in Gadsden v. United States, 78 F.Supp. 126, 127, 111 Ct. Cl. 487, 489-90 (1948), the court compared bad faith to actions which are "motivated alone by malice." In Knotts, supra, at 128 Ct. Cl. 500, 121 F.Supp. 636, the court found bad faith in a civilian pay suit only in view of a proven "conspiracy * * * to get rid of plaintiff." Similarly, the court in Struck Constr. Co. v. United States, 96 Ct. Cl. 186, 222 (1942) found bad faith when confronted by a course of Governmental conduct which was "designedly oppressive." But in Librach, supra, at 147 Ct. Cl. 614, the court found no bad faith because the officials involved were not "actuated by animus toward the plaintiff."

Kalvar Corp. v. United States, 211 Ct. Cl. 192, 198-99, 543 F.2d 1298, 1301-02 (1976), cert. denied, 434 U.S. 830 (1977). Thus, the Government's obligation to act in good faith hardly functions as the meaningful obligation that it may be for private persons. Since good faith is presumed unless bad faith is shown, the Government is prevented only from engaging in actions motivated by a specific intent to harm the plaintiff. It does not seem enough to support the Government's claim for otherwise unlimited convenience termination for the Government only to promise not to use it specifically to damage the contractor.

The Government also argues, as its final assertion, that its power to terminate for convenience is subject to sufficient limitation in that it recognizes that it cannot invoke the clause when it would be a clear abuse of discretion to do so. National Factors, Inc. v. United States, 204 Ct. Cl. 98, 492 F.2d 1383 (1974). This is an argument that the reservation of a power to "terminate within my discretion" involves an obligation sufficient to uphold a contract because discretion is limited. As soon as one wonders what those limits are, however, one realizes that this argument of the Government puts the cart before the horse. Discretion, and its abuses, are concepts that depend for their very meanings on the existence of other limits. Discretionary matters are those about which the party having discretion may be flexible, within an otherwise legal agreement, and abuse occurs in the rare situations when something arises that seems to make that normal action unfair. As concepts that only exist within limits, they cannot be the limits, as the argument of the Government suggests. If the Government is correct that its power to terminate for convenience is unlimited except that its exercise cannot be an abuse of discretion, how could such an abuse ever take place? What limits are there to abuse? Abuse of discretion is a valuable doctrine to enable otherwise legal actions to be overturned if there seems some clear wrong nevertheless, but it is not applicable to actions that simply are not legal at all. It is bootstrapping to say that the Government's claimed power of unlimited exculpation is saved by the limits on its discretion. Those limits must be derived from something else, but under the Government's view there is nothing else.

In the last analysis, then, if the ASBCA's free use of convenience termination is adopted, the asserted restrictions on the Government's termination power still would not provide an obligation that would satisfy the Government's requirement of furnishing consideration. There are no sufficient termination procedures: (1) notice is not given in a constructive case and (2) paying for services rendered would result only in converting all contracts that contained the clause to ones for an indefinite quantity with no stated minimum. Also, the requirement of good faith is not sufficient because the Government's presumption of good faith dealing is rebuttable only in the most extreme circumstances, when there is a specific intent to harm the contractor. And the Government's obligation to avoid clear abuses of discretion is only an illusion. Without any other limits, the concept of discretion is meaningless. We must conclude that free termination for convenience is not supportable.

We have said in this opinion that we will not construe a contract clause in such a way that the contract is destroyed if there is an alternate reading that will uphold the contract. Accordingly we will not read the clause as freely as did the ASBCA and we restrict the availability of the clause to situations where the circumstances of the bargain or the expectations of the parties have changed sufficiently that the clause serves only to allocate risk. This avoids the mistake of Colonial Metals and restores the meaning of the clause

to what it had been from 1876 until it was changed by Colonial Metals in 1974. Of course, if the Government were to change its convenience termination procedures in such a way that valid consideration was still furnished in an exculpation situation, by limiting its power to terminate in some way that would be consideration for the contract if it alone had been bargained for, then convenience termination for exculpatory purposes would also be proper.

V

It remains only to summarize what this opinion does and what it does not do. We are not holding here that the Government cannot settle with contractors on those contracts that the Government needs to settle. The termination for convenience clause is a valuable and important aspect of Federal procurement. It has a long history and is founded solidly on Corliss of 1876. Nor are we holding that the Government cannot draft for itself some method of exculpation so long as it also binds itself to something that will support the contract. We hold in this opinion only that the Government may not use the standard termination for convenience clause to dishonor, with impunity, its contractual obligations.

In the case before us, the Navy had accepted Soledad's bid and had executed a contract knowing that another bid was lower. This contract bound the Navy to give to Soledad all of its pest control needs at the six housing projects covered. The Navy could not just walk away from this promise without making a mockery of the contract. It is nothing more than basic contract law that a power to terminate must be limited in some meaningful way, as measured by the requirement of consideration. The Government has argued that there are no limits on its power to invoke termination for convenience. However, since the Government's convenience termination procedures (giving notice and paying for services rendered), at least as applied to this case, also put no sufficient limits on the Government, its unrestricted use of the clause cannot be correct. Any contract containing the clause, in the absence of something else to furnish consideration, would fail for the lack of any binding obligation. Therefore, we must read the termination for convenience clause in Soledad's contract to require some kind of change from the circumstances of the bargain or in the expectations of the parties. These are just the historical limits on the use of the clause as they have developed from Corliss.

On the facts as found by the ASBCA, at the time that the Navy first called Public Works to do the work that it had contracted with Soledad to have done, there were no changes from the circumstances of the bargain between the Navy and Soledad, or in their expectations. The Navy had known from the competitor's bids, before it made the contract with Soledad, that Soledad's price was high and that it could get pest control more cheaply elsewhere. The Navy contracted with Soledad anyway. The ASBCA erred in allowing constructive termination

for convenience to excuse the Navy's diversion of business. Termination for convenience was not available to the Navy, and so the Navy's breach of Soledad's contract is unexcused.

Defendant's motion for summary judgment is denied. Plaintiff's motion for summary judgment is granted to the extent that we find that the contract was breached by defendant. This case is referred to the trial division, for further proceedings on the issue of damages, in accordance with this opinion and Rule 131(c)(2). Defendant filed a motion on March 19, 1981, to strike an affidavit by plaintiff. In view of our conclusion that the contract as a matter of law is a requirements contract, plaintiff's affidavit that he so considered it is immaterial and mooted. Colonial Metals Co. v. United States, 204 Ct. Cl. 320, 494 F.2d 1355 (1974), to the extent that it is inconsistent with this opinion, is overruled. We cannot condone termination based on knowledge of a lower cost when that knowledge preceded award of the contract.

FRIEDMAN, Chief Judge, concurring:

As I understand the court's opinion, the court holds only that when the Government enters into a requirements contract, knowing that it can obtain an item the contract covers for less than the contract price and intending to do so, there cannot be a constructive termination for convenience of the Government when the Government follows that course. On that basis, I join in the opinion.

DAVIS, Judge, concurring in the result:

Although I fully concur with the end-result of Judge Bennett's opinion--that a convenience termination clause could not be properly used to end this requirements contract where the Government knew, at the time it entered into the agreement, that it could obtain a better price from another person--I cannot join in much of the opinion which seems to me unnecessarily broad (reaching out toward different cases not now before us) and, on some points, incorrect. I do agree that (a) the contract was of the requirements type, (b) there is, for this case, no statute or regulation absolving this contract from the normal requirement of being supported by consideration, (c) if the convenience-termination clause is used, in this instance of pre-existing knowledge, as the defendant would do, then this requirements contract would be without proper consideration, (d) accordingly, the contract should be construed otherwise in order to sustain it as valid, and (e) Colonial Metals Co. v. United States, 204 Ct. Cl. 320, 494 F.2d 1355 (1974), should be overruled. That is sufficient to reach the correct result, and nothing else need be said in this case.

There is, however, much else in Judge Bennett's opinion--unnecessary discussion which I cannot accept. For one thing, I do not agree at all with the suggestion that the scope of the convenience-termination clause is narrower today than during World War II. In my view, the type of emergency procurement conditions experienced in World War II can be, and not infrequently are, present in the post-war period--and the convenience-termination clause was deliberately continued into the present era for that precise reason.

Second, I do not agree that "abuse of discretion" is an inadequate or unsatisfactory general standard for gauging the contracting officer's use of the termination clause. The clause in the contract before us calls for use of the termination device only "when it is in the best interest of the Government." That is comparable to the "public interest" standard often used to control administrative rulings in the regulatory field, and is likewise parallel to the criterion by which several other procurement decisions are measured. In the present instance, I would have no difficulty in holding that it was an abuse of discretion to use the clause to end the contract because lower prices could be obtained elsewhere when the contracting officer already knew that very fact before he consummated the contract with plaintiff.

Third, I do not agree that "bad faith" is as narrow as Judge Bennett says it is. In Kalvar, supra--the case he cites--this court said, without in any way seeking to modify our prior holdings: "* * * many of our prior decisions seem implicitly to accept the equivalence of bad faith, abuse of discretion, and gross error." 211 Ct. Cl. at 198, note 1, 543 F.2d at 1301, note 1. Kalvar expressly held that that contractor had failed to show either bad faith or abuse of discretion (see footnote 2, supra) and the limited definition of bad faith quoted in the opinion gave merely one aspect of the concept of "bad faith." Here, too, I would be ready to hold that a contracting officer acted in bad faith when he terminated a contract for convenience to get a better price of which he had full knowlege (and which was available) at the time when he deliberately entered into the contract with plaintiff.

Finally, I consider it wrong and a mistake to intimate, even provisionally or gratuitously, that the convenience termination clause cannot be utilized when a better price appears after the contract is made. As Judge Bennett recognizes, the prime purpose of the clause is to take account of changed conditions occurring after the agreement is consummated, and a better price appearing at that time appears to be such a change in significant conditions. Yet his opinion cites, with apparent acquiescence or approval, extra-judicial commentary suggesting that a post-contract change in the price situation should not be enough to trigger the convenience termination clause.

As I have already pointed out, all the portions of the opinion to which I object are unnecessary to the result. At very best they will prove troublesome in future cases which are not now before us.

NICHOLS, Judge, concurring in the result:

I concur in the result, but I think the court takes a needlessly circuitous route to a destination we all agree on. In getting there, it tosses off needlessly sweeping dicta.

As regards the doctrine of consideration, the court puts aside the other 11 items and regards the "requirements" clause for pest control if needed, as if it stood alone. I am not sure a provision for use of pest control services at the Government's sole election is unsupported by consideration if other contract undertakings are not similarly avoidable on the Government side. Moreover, a termination of a contract for convenience is valid only in the absence of bad faith or a clear abuse of discretion. National Factors, Inc. v. United States, 204 Ct. Cl. 98, 492 F.2d 1383 (1974). Here we have a putative or "constructive" termination only, and the court will not suppose such a termination as exonerating defendant from all its commitments, if the act would be an abuse of discretion. If consideration is furnished, the court will not inquire into its adequacy. Mills v. United States, 187 Ct. Cl. 686, 410 F.2d 767 (1969).

As the termination cannot be postulated if it would [indeed] be an abuse of discretion, I turn to what would constitute the abuse. We need not consider cases not before the court. Here the Government stated it would evaluate bids on all the items as an entirety and make the award only to one who had bid on all items. Having promised this, it would be estopped to eliminate from the award by termination any items just because, separately considered, they were at unfavorable prices, while retaining all those bid at favorable prices. The administration of the contract must be consistent with the rules used in evaluating the bids, to which the bidders conformed in bidding.

C. Omission of Termination Clause

G. L. CHRISTIAN AND ASSOCIATES v. U.S.

312 F. 2d. 418 (Ct. Cls., 1963)

Reprinted, Supra, at P. 2-81

D. Wrongful Cancellation

JOHN REINER & COMPANY v. UNITED STATES

325 F. 2d. 438 (Ct. Cl. 1963)

DAVIS, Judge.

In May 1956 The Corps of Engineers advertised for bids on 3,567 generator sets to be purchased by the Army. The invitation stated that "the Government desires delivery" of the items in accordance with a definite schedule (ranging from September 30, 1956, to August 31, 1957), but it was also provided that "in the event bidder is unable to make deliveries in accordance with the foregoing schedule, he shall set forth in the space below his proposed delivery schedule." Immediately beneath this blank space for the bidder's own delivery schedule, the form declared:

> Bids offering a proposed delivery schedule which will extend the time for the delivery of the quantities as called for in any delivery period of the foregoing delivery schedule by more than 60 days, may be cause for rejection of bid [emphasis added].

Plaintiff John Reiner & Company submitted a bid with its own delivery schedule specifying dates more than 60 days after those listed by the Government in the invitation. When the bids were opened on June 21, 1956, Reiner was the lowest in price of the thirteen bidders. Seven others proposed their own delivery schedules, some (like Reiner) offering delivery dates more than 60 days beyond the invitation times. The Corps of Engineers then inquired of the requisitioning agency (the Signal Corps) whether plaintiff's schedule was satisfactory and met its requirements. Upon receiving an affirmative

reply, the Engineers notified plaintiff by telephone, on June 29, 1956, that its bid had been accepted; this was followed by a written notice of award received on July 2, 1956. The formal contract came shortly thereafter.

Plaintiff proceeded to negotiate with suppliers of the main components of the generator sets and to incur certain other limited costs under the contract. Before it was well launched, however, it received word from the defendant (on August 3, 1956) to suspend all operations under the contract until further notice and to inform its suppliers and subcontractors accordingly. This came about because, unknown to plaintiff, an unsuccessful bidder had prevailed upon the General Accounting Office to rule that the award was improper and the contract should be cancelled. That Office felt that the invitation did not adequately inform bidders as to how they should bid with respect to delivery dates.

Plaintiff's efforts to have the Comptroller General's decision reversed were fruitless, and on September 21, 1956, the contracting officer informed plaintiff that in compliance with the ruling its contract was cancelled. On September 24th, Reiner replied that the Comptroller General's decision was not binding on the Army and that the contractor considered the cancellation a breach for which it would seek recovery of full damages. This suit was then brought for breach of the contract.

I

The initial question is whether the award was illegal and void so that the plaintiff cannot found a court action upon it. This inquiry, we believe, is not precisely the same as that with which the Comptroller General dealt. Because of his general concern with the proper operation of competitive bidding in Government procurement, he can make recommendations and render decisions that, as a matter of procurement policy, awards on contracts should be cancelled or withdrawn even though they would not be held invalid in court. He is not confined to the minimal measure of legality but can sponsor and encourage the observance of higher standards by the procuring agencies. Courts, on the other hand, are restricted, when an invitation or award is challenged, to deciding the rock-bottom issue of whether the contract purported to be made by the Government was invalid and therefore no contract at all--not whether another procedure would have been preferable or better attuned to the aims of the competitive bidding legislation.

In testing the enforceability of an award made by the Government, where a problem of the validity of the invitation or the responsiveness of the accepted bid arises after the award, the court should ordinarily impose the binding stamp of nullity only when the illegality is plain. If the contracting officer has viewed the award as

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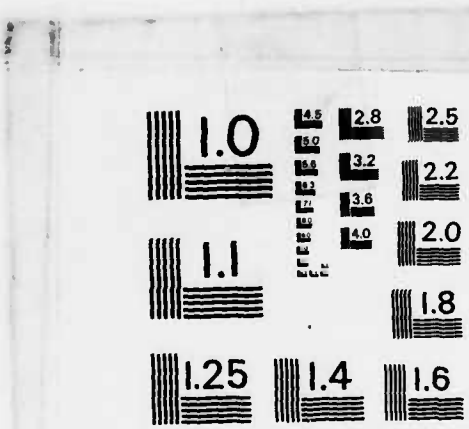
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lawful, and it is reasonable to take that position under the legislation and regulations, the court should normally follow suit. Any other course could place the contractor in an unfortunate dilemma. If he questions the award and refuses to accept it because of his own doubts as to possible illegality, the contracting officer could forfeit his bid bond for refusing to enter into the contract. The full risk of an adverse decision on validity would then rest on the bidder. If he accedes to the contracting officer and commences performance of the contract, a subsequent holding of nonenforceability would lead to denial of all recovery under the agreement even though the issue of legality is very close; and under the doctrine of quantum meruit there would be no reimbursement for expenses incurred in good faith but only for any tangible benefits actually received by the defendant. United States v. Mississippi Valley Generating Co., 364 U.S. 520, 566 n. 22, 81 S. Ct. 294, 5 L. Ed. 2d 268 (1961); Clark v. United States, 95 U.S. 539, 542, 24 L. Ed. 518 (1877). It is therefore just to the contractor, as well as to the Government, to give him the benefit of reasonable doubts and to uphold the award unless its invalidity is clear. Cf. 17 Comp. Gen. 53, 54-55 (1937).

Applying that norm, we cannot deem this award to have been a nullity. Reiner's bid was responsive to the invitation which allowed the bidders to set their own delivery schedules and went no further than to caution that schedules extending the time over 60 days beyond that designated in the defendant's preferred ("desired") schedule might be cause for rejection. There was no statement of indication that time was of the essence. On other occasions plaintiff, answering the same type of invitation, had proposed schedules extending the procurement agency's desired schedule by more than 60 days and had been granted the contracts. This was an accepted form for procurement by the Corps of Engineers. There was no reason to think that in this particular invitation "may be cause for rejection" (emphasis added) meant "will or shall be cause for rejection."

But, defendant urges, this very provision, with its implicit permission to propose longer schedules, vitated the invitation. The "full and free competition" envisaged by the Armed Services Procurement Act of 1947, § 3, 62 Stat. 21, 22-23, as amended, 69 Stat. 551-52 (1955), 41 U.S.C. § 152 (1952 ed.), was stifled, it is said by allowing bidders to present their own delivery program, no matter how protracted. One charge levied against this phase of the invitation is that it was so worded that bidders would not understand that they could depart from the listed schedule by more than 60 days. This does not seem probable. The form used the permissive word "may" instead of the mandatory "will" or "shall"; its ordinary meaning would be that bidders took their chances in offering a too-extended schedule but were not barred from shouldering that risk. In previous uses of this standard form bidders had apparently not felt themselves limited to a deviation of 60 days; in this very case others than Reiner extended their suggested dates for more than that period. There is no showing

that any bidder was actually misled. Like much procurement prose, the delivery section of the invitation was not a stylist's model, but we think it conveyed its meaning sufficiently to ward off the charge of undue ambiguity.

The second vice defendant marks in the invitation is that it left both bidders and the contracting officer too much at large. The latter might or might not accept a lower bid with an extended delivery schedule, rather than a "timely" one at a higher price. From the viewpoint of improving procurement procedures, the Comptroller General could well believe that some method of evaluating the bids according to both price and delivery dates should have been explicitly stated. That defect, however, was not so deep or so clear that it nullified the invitation as a matter of law. The bidders were not helpless. They were free to submit more than one bid if the delivery schedule affected their price proposals; they could file, if they wished, one price based on the Government's schedule, another on an extension of less than 60 days, and a third on an extension of over 60 days. The contracting officer, for his part, would be guided by the directives in the Procurement Act of 1947 to consider "the requirements of the agency concerned" and the bid which was "most advantageous to the Government, price and other factors considered." 62 Stat. 23, 41 U.S.C. § 152 (a), (b) (1952 ed.). To the extent that quicker delivery was called for by the procuring agency, the contracting officer would evaluate on the basis of price those bids meeting the earlier delivery requirement; if a delayed schedule turned out to be acceptable, the other bidders would enter the widened circle of competition. That would be the natural and proper way to proceed and that is the way the contracting officer did proceed. The Procurement Act was designed to leave to him business discretion of this type and measure. See S. Rep. No. 571, 80th Cong., 2d Sess., pp. 2-3. In the circumstances present here, the contracting officer did not assume for himself so great an area of judgment as to destroy the free competition (on a common basis) the statute demands. We hold, accordingly, that the award to plaintiff must be deemed lawful, not void.

II

The next inquiry concerns the nature of the cancellation resulting from the Comptroller General's ruling and the damages to which the contractor is entitled. Plaintiff characterizes the cancellation as a clear breach, entailing the full common-law measure of recovery; it points out that the contracting officer did not purport to terminate the contract for the Government's convenience or to follow the procedures established for that kind of termination. Those were in fact the circumstances of the cancellation but the plaintiff's conclusion does not necessarily follow.

If the contracting officer had deliberately employed the termination-for-convenience article of the contract, his action would have been entirely valid. Such termination is authorized "whenever the contracting officer shall determine" that it is "in the best interests of the Government." The broad reach of that phrase comprehends termination in a host of variable and unspecified situations calling (in the contracting officer's view) for the ending of the agreement; the article is not restricted, as plaintiff contends, to a decrease in the need for the item purchased. Under such an all-inclusive clause, the Government has the right to terminate "at will" (David Sewing Mach. Co. v. United States, 60 Ct. Cl. 201, 217 (1925), aff'd, 273 U.S. 324, 47 S. Ct. 352, 71 L. Ed. 662 (1927); Librach v. United States, 147 Ct. Cl. 605, 611 (1959)), and in the absence of bad faith or clear abuse of discretion the contracting officer's election to terminate is conclusive. See Line Constr. Co. v. United States, 109 Ct. Cl. 154, 187 (1947).

Here, termination would have been invoked in deference to the Comptroller General's declaration that the contract should be cancelled. The contracting officer did not agree with that opinion, but it is the usual policy, if not the obligation, of the procuring departments to accommodate themselves to positions formally taken by the General Accounting Office with respect to competitive bidding. That Office, as we have pointed out, has special concern with, and supervision over, that aspect of procurement. It would be entirely justifiable for the contracting officer to follow the general policy of acceding to the views of the Accounting Office in this area even though he had another position on the particular issue of legality or propriety. He would not be allowing the Comptroller General to dictate the termination of the contract but, rather, would be using termination as a means of minimizing a conflict with another arm of Government properly concerned with the contractual problem. It cannot be contrary to "the best interests of the Government"--the controlling standard of the termination clause--to end a contract which the Comptroller General has branded as incorrectly advertised.

Plaintiff refers to decisions holding that a contracting officer should not abdicate his functions to another official (e.g., Sun Shipbuilding & Dry Dock Co. v. United States, 76 Ct. Cl. 154, 187 (1932)), but those were cases in which someone else made specific determinations of fact under the contract, for example, that the contractor was in default or had no excusable delays. In this case the contracting officer would not be shifting a problem to the General Accounting Office; he would simply be deciding that the Government's "best interests" required that as a matter of general policy he bow to an opinion of the Comptroller General on competitive bidding, even though he thought it wrong.

Plaintiff emphasizes, of course, that the contracting officer did not invoke the termination clause as we hold that he could well have done. But this phase of the contractual history does not compel us to hold that in cancelling the contract the contracting officer committed a common-law breach. Almost forty years ago, in College Point Boat Corp. v. United States, 267 U.S. 12, 15-16, 45 S. Ct. 199, 69 L. Ed. 490 (1925) the Supreme Court gave us the lead (speaking through Mr. Justice Brandeis) in a closely comparable case. The defendant purported to cancel a Navy contract in mid-stream, without benefit of any power of termination reserved in the agreement and without knowledge that the Navy had such authority under a World War I statute. "[S]o far as appears, neither party knew that the United States had such a right. The Navy Department failed to give the notice requisite to terminate the contract" (id. at 15 of 267 U.S., at 200 of 45 S. Ct., 69 L. Ed. 490). It appeared on the surface that the defendant was anticipatorily breaching the contract. The Court held, nevertheless, that the contractor could only recover the measure of relief allowed by the termination statute. "A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him, although he was then ignorant of the fact. He may, likewise, justify an asserted termination, rescission, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later." Id. at 15-16 of 267 U.S., at 200-201 of 45 S. Ct., 69 L. Ed. 490 (footnotes omitted). The Government's right to terminate was held effective when asserted later in court, and recovery of prospective profits was barred.

The Supreme Court's ruling embraces this case. The broad termination clause in plaintiff's contract stands in the place of the statutory termination power involved in College Point Boat Corp. (the Act of June 15, 1917, 40 Stat. 182). Under that clause, we have shown above, the defendant had a valid ground to terminate. As the Supreme Court held, such "adequate cause" for termination may be asserted as a defense to a breach action even though it may not have been known at the time of cancellation. The contracting officer on plaintiff's contract probably thought that he was cancelling the agreement of illegality. That excuse was not a valid justification as we now know, but just as in College Point Boat Corp. a good ground did exist in the far-reaching right to terminate under the termination article. That justifiable cause controls the case and "operate[s] to curtail the damages recoverable" (267 U.S. at 16, 45 S. Ct. at 201, 69 L. Ed. 490).

Some of the foregoing may seem incompatible with certain observations in Klein v. United States, 152 Ct. Cl. 8, 16-20, 285 F. 2d 778, 782-785 (1961). That case dealt with an erroneous termination for default which the defendant later sought to turn into a convenience termination. The only holding of the court (on this point) is that, once the Government wrongfully terminates for default where

there has been no default, it cannot thereafter seek to avoid liability by invoking a convenience termination. That holding the court accepts and reaffirms today in Goldwasser v. United States, Ct. Cl. No. 447-61, 325 F. 2d 722. Although some portions of the Klein opinion may seem to go beyond that holding if taken out of context, we now read the case as confined to the issue of default presented by its facts. Indeed, the Klein decision appears to have put aside situations like the present when it said that that case "has no resemblance to that of one who has terminated a contract for a stated reason, which turns out to be insupportable, but later discovers and relies on a valid reason for cancellation" (152 Ct. Cl. at 19, 285 F. 2d at 784). See also Newark Fireproofing Sash & Door Co., Inc. v. United States, 69 F. Supp. 121, 124, 107 Ct. Cl. 606, 627 (1947).

Just as the failure to invoke the termination article leaves untouched the defendant's right to rely on the damage limitation of that clause, so the failure to follow the termination procedures of the Armed Services Procurement Regulations (ASPR) is ineffective to broaden plaintiff's rights of recovery. Those regulatory provisions have the force of law (G. L. Christian and Associates v. United States, Ct. Cl. 320 F. 2d 345), but a departure from their requirements does not convert a termination into common-law breach subjecting the United States to liability for unearned anticipated profits any more than would a deviation from the procedures set forth in a statutory provision for termination. Unless the contractor can show that he has been injured by the failure to pursue the ASPR procedures, such a lapse is immaterial to his recovery. Cf. J. W. Bateson Co., Inc. v. United States, 308 F. 2d 510 514 (C.A. 5, 1962). Plaintiff does not claim, and there is no reason to believe, that it was hurt by the informal procedures followed here. As soon as the Comptroller General had ruled, Reiner was told to suspend all operations, to defer incurring any further expenses, and to inform its subcontractors and suppliers. It did so immediately. The amount of plaintiff's termination expenses is known because it has stipulated the exact sum recoverable on the basis of a convenience termination, i.e., $17,000.

This stipulation facilitates our disposition of the case. Since we hold that Reiner is entitled to recover only the amount collectible on a termination for convenience, and that sum is agreed to be $17,000, we shall enter judgment in that figure.

* * * * *

Whitaker, Judge (dissenting in part).

Having written the opinion of the court in Goldwasser v. United States, Ct. Cl., No. 477-61, 325 F. 2d 722, this day decided, it follows that I disagree with the opinion in this case. It reiterates, I think, the positions taken in the dissenting opinions in the Goldwasser case.

In Goldwasser, the defendant became dissatisfied with plaintiff's performance but it did not refuse further to honor the contract because plaintiff had defaulted in performance, but, instead, took refuge in the "indefinite-quantities" clause of the contract, contending that under that clause it was no longer obligated to avail itself of plaintiff's services. Because we thought this clause was inapplicable and that defendant had wrongfully refused to further honor the contract unless plaintiff was actually in default, and because it did not take advantage of the termination-for-convenience-of-the-Government clause, we held this clause did not prescribe the measure of defendant's liability, if any.

Nor in the case at bar did defendant take advantage of the termination-for-convenience-of-the-Government clause; it cancelled the contract because, acting upon the opinion of the Comptroller General, it held that it had been awarded without compliance with the statute and was, therefore, a nullity. It is a contradiction to say that it terminated a contract that in law it asserted had never existed. Whether it had a right to do so or not is immaterial, because it did not in fact do so. The possession of a right means nothing unless that right is exercised.

As in the Goldwasser case, a cancellation of the contract because it had been illegally entered into involved no liability on the part of the Government; a termination for convenience did render the Government liable. The Contracting Officer chose the former course. The Government is bound by the action he took.

What I have said is in harmony with our holding in Klein v. United States, 152 Ct. Cl. 8, 285 F. 2d 778 (1961).

The majority relies upon College Point Boat Corp. v. United States, 267 U.S. 12, 45 S. Ct. 199, 69 L. Ed. 490 (1925), affirming 58 Ct. Cl. 380 (1923), but in that case there was no election by the Government between two alternative courses of action, one of which subjected the Government to liability and the other did not.

E. Settlement Rights

SEVEN SCIENCES INDUSTRIES

ASBCA No. 23337 (1980)

This is an appeal from the contracting officer's final decision, received by appellant on 25 September 1978, determining that appellant is entitled to $3,000 as a termination for convenience settlement under the above contract. Appellant had claimed $37,724 in its termination for convenience settlement proposal.

The contract had been terminated for default by final decision dated 23 February 1976. On appeal to this Board the default termination was converted to a termination for convenience of the Government for the reasons explained in Seven Sciences, Inc., ASBCA No. 21079, 77-2 BCA ¶ 12,730. The Board's decision was dated 30 August 1977. Following unsuccessful efforts to arrive by agreement at an amount payable to appellant pursuant to the Termination for Convenience of the Government clause, the contracting officer issued the final decision from which the instant appeal was taken. The record in the earlier appeal was made a part of the record in the instant appeal to the extent relied upon by the parties.

FINDINGS OF FACT

The instant contract and appellant's efforts to perform thereunder are discussed in detail in the Board's decision in ASBCA No. 21079. Briefly, the contract called for delivery of 178 battery chargers for a total fixed price amount of $42,561.18. The battery chargers were to be fabricated in accordance with detailed design drawings. Some of the drawings were illegible. Others called out various components to be custom built, such as transformers, but did not specify certain characteristics in sufficient detail to permit their ready manufacture. Most seriously, appellant learned as a result of a technical analysis that the charger design was defective in that inadequate provision was made for withdrawing heat from the unit. Appellant concluded that chargers manufactured in accordance with the Government's design would fail in a matter of minutes. On the record presented we found that appellant's conclusion was correct. Appellant reported its findings to the Government as part of a redesign proposal and sought guidance. Guidance was not provided as the Government maintained that its design for the charger was adequate. While awaiting the requested guidance appellant did not undertake any substantial new business, expecting that performance of the instant

contract would require its full resources once the requested guidance was received. Appellant's financial condition deteriorated and it went out of business shortly before the contract was terminated for default.

The dispute over the termination for convenience settlement involves direct material costs, direct labor costs, and termination settlement expenses. Overhead was stipulated at 65% times direct labor plus direct material. Profit was stipulated at 10% of any costs that are profit bearing. The hourly direct labor rate for Mr. Linker, appellant's president, was stipulated at $8.92. The hourly rate for Mr. Azar, the electrial engineer who was appellant's only other employee, was stipulated at $8.43. The number of direct labor hours incurred by these individuals in performing the contract is disputed. Some of the direct labor hours in dispute are not claimed as having been incurred in actually performing the contract work, but are claimed as standby or delay time compensable under the Government Delay of Work clause or the Changes clause. There is also a dispute over appellant's entitlement to interest pursuant to the Payment of Interest on Contractor's Claims clause, included in the contract.

The Termination for Convenience clause provides, in pertinent part:

(e) In the event of the failure of the Contractor and the Contracting Officer to agree, as provided in paragraph (d) upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, the Contracting Officer shall pay to the Contractor the amounts determined by the Contracting Officer, as follows . . .;

* * *

(ii) the total of --

(A) the costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto . . .;

(iii) the reasonable costs of settlement including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract . . .

* * *

(f) Costs claimed, agreed to, or determined pursuant to (c), (d) and (e) hereof shall be in accordance with Section XV of the Armed Services Procurement Regulation as in effect on the date of this contract.

Direct Material

In its termination for convenience settlement proposal submitted to the contracting officer appellant claimed $292. The contracting officer allowed nothing. The amount claimed reflects drawing enlargement and reproduction expenses. Appellant purchased these services from other firms. The testimony and appellant's check register establish that appellant incurred purchased reproduction and printing expenses during the contract period in excess of the $292 claimed. However the record is unclear as to how much of these expenses related directly to the contract effort, to appellant's other work, or to advertising. Appellant concedes in its post-hearing brief that the full $292 was not entirely proved. On the record presented, we find that $155 reflect material charges identifiable directly to the performance of the contract and which were not included in the overhead pool.

Direct Labor

Appellant's Mr. Linker and Mr. Azar were the only two individuals who performed direct labor under the instant contract. In its termination settlement proposal appellant claimed $18,885. The contracting officer allowed $1,388.

As indicated previously, Mr. Linker was appellant's president. He was also appellant's principal shareholder owning 70,000 shares out of the total 100,000 shares of capital stock. Mr. Azar owed 20,000 shares and a third individual owned the remaining 10,000.

Mr. Linker testified that he was owed a salary of $18,000 per year based on oral agreement of the shareholders. His testimony was corroborated by the independent accountant hired by appellant on an hourly basis, who had been appellant's accountant since the inception of the business. Mr. Linker was never actually paid any salary, nor was any salary accrued for him on appellant's accounting records, nor shown on appellant's Federal income tax returns. The accountant testified that the shareholders had agreed that Mr. Linker would be paid back salary when the company was in a position to do so. No note or other document reflecting corporate indebtedness for Mr. Linker's salary was ever executed. Mr. Linker explained that in his opinion there was no point in executing a note since he was the majority shareholder. No notation in the corporate ledger was made regarding

Mr. Linker's salary. The accountant testified that salaries accrued for Mr. Linker and Mr. Azar were legal debts of the corporation. Appellant's redesign proposal, dated 11 August 1975, described in our earlier decision, shows salaries for Mr. Linker and Mr. Azar at $9.62 and $8.17 per hour respectively. The rate for Mr. Linker translates to an annual salary of about $20,000. Mr. Linker testified that he anticipated increasing his salary to $20,000 during the following year.

In the case of Mr. Azar's salary both Mr. Linker and the accountant testified to an oral agreement between the shareholders that Mr. Azar was to earn $17,000 per year, which annual salary was applicable during the period between award and termination of the instant contract. They testified that pursuant to a further oral agreement, Mr. Azar was paid half his salary during the period June through November 1975 with the remainder reflected as a loan to the company. For the month of December 1975, Mr. Azar's salary was treated entirely as a company loan. No claim is made for January 1976. This treatment of Mr. Azar's salary is supported by appellant's check register and appellant's Federal income tax return for the period 1 July 1975-31 January 1976. Appellant's tax return shows an operating loss for 1 July 1975 through 31 January 1976 in the amount of $7,927.80.

Appellant's termination settlement proposal was audited by the Defense Contract Audit Agency (DCAA), San Francisco Region, which issued an audit report dated 4 April 1977. According to the audit report:

> We were unable to evaluate the proposed labor rates from payroll records. According to the company bookkeeper, Mr. Linker was never actually paid any salary during the period of performance and Mr. Azar was paid 50 percent of his salary. However, we consider the salaries shown in the settlement proposal to be reasonable considering the skills, education and experience of the two employees. Costs questioned are based on hours questioned at the proposed rates . . .

Neither the DCAA auditor nor the contracting officer maintained that salary said by appellant to be owed Messrs. Linker and Azar, but not paid, did not represent corporate indebtedness.

On the record presented we find that the salaries of Messrs. Linker and Azar were established at annual rates of $18,000 and $17,000 respectively during the period between contract award and termination. We further find that none of Mr. Linker's salary was paid and that only half of Mr. Azar's salary was paid. We find that the unpaid salaries were owed to Messrs. Linker and Azar and thus constituted corporate debts of appellant. In making these findings we

have taken into account the paucity of written documentation supporting the existence of corporate indebtedness, particularly in the case of Mr. Linker's salary. However, the sworn testimony of Mr. Linker as to the corporate indebtedness for his salary is uncontradicted and is corroborated by the testimony of appellant's independent accountant. The salary rates for Messrs. Linker and Azar, included in appellant's redesign proposal, are evidence that these individuals were salaried employees. Neither DCAA nor the contracting officer, prior to the hearing in this appeal, questioned the status of Messrs. Linker and Azar as salaried employees. Finally, as indicated by the stipulation, there is no dispute over the reasonableness of the salary rates claimed for Messrs. Linker and Azar.

The labor hours for Messrs. Linker and Azar claimed by appellant are based on Exhibit A-4 which consists of two spread sheets showing allocations of direct labor hours per week by Messrs. Linker and Azar to twelve contract performance tasks. The time frame covered begins 22 June 1975 and ends 28 December 1975 - a total of 707 productive labor hours is shown for Mr. Linker and a total of 624 productive labor hours is shown for Mr. Azar. In addition, delay time of 262 hours for Linker and 350 hours for Azar is shown. The delay time is attributed by appellant to the Government's failure to clarify the defective and illegible drawing package.

Exhibit A-4 was prepared by Mr. Linker the night preceding the hearing in the instant appeal which was conducted in San Francisco, California, on 12-13 September 1979. The exhibit was prepared almost entirely from Mr. Linker's memory, reflected on notes prepared two days before the hearing, and refreshed only by the few items of correspondence which appear in the record of the earlier appeal. Review of that correspondence does not indicate how it could provide a reliable basis for allocation of work hours to particular tasks, as shown on Exhibit A-4.

There is no indication that Mr. Linker conferred with Mr. Azar in the preparation of Exhibit A-4. Mr. Azar did not testify at the hearing in the instant appeal. Appellant's counsel explained that at the time of the hearing, Mr. Azar was located in Idaho and appellant could not afford to transport him to San Francisco. No effort was made to take Mr. Azar's deposition either orally or upon written interrogatories. However, since Mr. Azar worked directly under Mr. Linker's supervision for the entire contract period, we find that to the extent Mr. Linker's recollection as to the allocation of his own time is persuasive, it is equally persuasive as to Mr. Azar's time.

Although appellant retained its financial records for use during the termination for convenience settlement effort, it did not retain its technical files or drawings relating to its attempt to perform the contract. These records were in the possession of Mr. Azar who destroyed them prior to the preparation of Exhibit A-4. Mr. Linker testified that had he known that these records would have been useful

to prove costs he would have asked Mr. Azar to retain them. He understood the Termination for Convenience clause to require retention only of financial records. We find that appellant's technical records might have been of use in the preparation of Exhibit A-4 or as evidence in corroborating or refuting Mr. Linker's productive labor hour or delay time estimates. However, we do not find that these records were destroyed with the intention of rendering material evidence unavailable. We find that the weight to be given Exhibit A-4 depends entirely on the weight fairly accorded to Mr. Linker's largely uncorroborated recollection as to detailed events which occurred approximately four years prior to the preparation of Exhibit A-4.

Insofar as appellant's efforts to perform are concerned, Exhibit A-4 lists twelve types of tasks and allocates Linker and Azar work hours to each. The twelve tasks are as follows:

1. Prepare drawing tree and drawing cross-reference
2. Establish and maintain parts control system
3. List and consolidate consumables
4. Identify and consolidate purchased parts
5. Prepare and issue RFP's for parts and consumables
6. Locate sources for parts and consumables
7. Prepare RFQ's for fabricated items
8. Vendor surveys and conferences
9. Prepare assembly (manufacturing plan)
10. Prepare test plan
11. Engineering evaluation of chargers
12. Contract related administrative work

The exhibit also shows some labor hours allocable to appellant's commercial work designated as:

1. Path profiles
2. Battery chargers
3. Network pre-emphasis

The exhibit shows 10 Linker and no Azar hours allocated to path profiles. The time was described by Mr. Linker as devoted to assembling, packing and mailing a pre-printed book sold by appellant to radio engineers. Sixteen Linker hours and 80 Azar hours are shown on Exhibit A-4 as allocated to sales of appellant's commercial line of battery chargers. Forty of the Azar hours are shown for the work beginning 22 June 1975. Mr. Azar built and tested the commercial battery chargers. Mr. Linker did the packing, shipping and billing. He estimated that about 10 commercial battery chargers were sold during the period covered by Exhibit A-4. Twenty-seven Linker hours and 98 Azar hours are allocated to network pre-emphasis, a unit developed by appellant for use in telecommunications systems testing. Forty Azar hours are shown for the week beginning 22 June. The network pre-emphasis had potential as a commercial product line for

appellant, but was not pursued after award of the instant Marine Corps contract since appellant lacked the capital to invest in required test equipment.

Exhibit A-4 also shows holiday and illness time for Linker and Azar for which the Government is not being charged.

Mr. Linker testified, in considerable detail, concerning the twelve categories of productive labor which he identified on Exhibit A-4. We have reviewed that testimony but do not believe it necessary to recapitulate it here. Mr. Linker was a credible witness. However, we find that, in certain instances, his recollection as reflected on Exhibit A-4 was not entirely persuasive as to the quantum of hours reasonably assigned to various categories. On 7 July 1975 appellant notified the Government that it was in a work stoppage mode as a result of illegible, erroneous and missing drawings. Thereafter appellant received the 66 drawing package which required analysis. Appellant found further problems and ultimately determined the battery charger design deficiency which we found in sustaining the appeal from the default termination. On 11 August 1975 appellant submitted a redesign proposal which, we found, was related to correction of the defects. The record in the prior appeal indicates that little, if any, productive work was performed following submission of the redesign proposal.

In the instant appeal Mr. Linker explained that by announcing on 7 July 1975 that it was in a stop work mode appellant was unable to complete performance without additional information from the Government. He testified that appellant nevertheless elected to work around the deficiencies as best it could, and did all of the tasks that it could, based on the data it had, expecting momentary resolution of the design deficiencies and missing drawings. We find that some of appellant's actual efforts to perform were prolonged as a result of missing and defective drawings. This would be particularly applicable in the case of Task No. 1, preparation of the drawing tree and drawing cross-reference. On the other hand, Mr. Linker's estimate of time for contract-related administrative work appears unreasonably excessive when compared with the effort otherwise shown by the record to have been required. The Government challenges several items on the list as being for appellant's general benefit as distinguished from contract-related. The Government also says that appellant's redesign proposal was not required by the contract and appellant performed it as a volunteer. In the case of the redesign proposal, we find that most of the hours attributed thereto stemmed from the need to ascertain the deficiencies in the Government's design which we found to have existed, and that the work was contract-related.

The Government further challenges the hours assigned to development of a test plan as distinguished from a test procedure. Mr.

Linker explained the difference between a test plan and a test procedure. We find that development of a test plan was reasonably required for performance of the contract although the hours assigned to this task by Mr. Linker are likely excessive.

The Government's challenge to Mr. Linker's estimates of direct labor hours is in large part speculative. The Government presented no engineering witnesses to establish the alleged unreasonableness of Mr. Linker's assignment of hours to various contract-related tasks. The only Government witness was the Termination Contracting Officer who testified that if he had had the benefit of Exhibit A-4 well before the hearing, he would have had an engineering evaluation made of it with a view to reconsidering his allowance. The Government audit report reflects, as stated earlier, only that Mr. Linker's assignment of labor hours lacks documentary support. We make the jury verdict finding, on the weight of the evidence, that appellant's Mr. Linker and Mr. Azar engaged in productive contract related direct labor for 70% of the hours assigned by Mr. Linker to the 12 listed tasks. The remaining 30% we find to have been not reasonably related to contract production efforts but should nevertheless be taken into account as part of delay or standby time otherwise claimed.

The delay time, for which compensation is claimed, is shown as beginning the week of 5 October 1975 and ending the week of 20 December 1975. No Linker time is claimed for the weeks beginning 23 and 30 November during which Mr. Linker was ill and there was a holiday.

The following findings made in our decision in the earlier appeal relate to appellant's delay claim:

> Appellant expected the instant contract to require its full resources, and did not expect to obtain substantial other business during the anticipated period of performance. Appellant did sell a few of its standard model battery chargers and some other products after award of the instant contract but did not acquire any major new business. Appellant did not engage in production of substantial quantities of [commercial] battery chargers having decided to conserve its limited resources for production under the Marine Corps contract.

ASBCA No. 21079, 77-2 BCA ¶ 12,730 at 61,876)

We further find that appellant reasonably believed that the Government would promptly resolve the technical problems and provide the missing drawings impeding performance. We cannot find unreasonable

appellant's election not to commit its limited resources to another major venture but, instead, hold itself in abeyance pending receipt of information from the Government sufficient to enable completion of performance.

Although Exhibit A-4 shows 40 hours as the work week, five days at eight hours per day, Messrs. Linker and Azar also worked Saturdays throughout the contract period. Saturdays were used for tasks associated with the overall operation of the business as distinguished from particular contractual matters. The Government is not being charged for Saturday time. However, Exhibit A-4 indicates that the Government is being charged for delay time on Mondays through Fridays. The record does not establish a basis for charging the Government for Linker/Azar delay time on weekdays when they devoted Saturdays to company-wide tasks. We infer from the record that such tasks could have been performed on weekdays, particularly during periods of pure delay shown on Exhibit A-4 beginning during the week of 5 October 1975. In view of our finding, relating to productive direct labor, that 30% of the hours claimed are not supported, we further infer that some of the work performed by Linker and Azar on Saturdays prior to 5 October could have been performed on weekdays. However, there were periods, particulary shortly after the contract was awarded, when Messrs. Linker and Azar were reasonably required to have devoted all of their Monday-Friday time to performance of the contract. We find, on a jury verdict that 18 of the Saturdays worked by Messrs. Linker and Azar during the contract period need not have been worked, and that the tasks performed on those days could reasonably have been performed on weekdays, thereby reducing the delay time appellant claims to be chargeable to the Government.

There is no evidence of any vacation periods provided to Linker and Azar under the terms of their employment. Appellant's accountant testified that she assumed Linker and Azar were allowed normal vacation period but had no direct information on this matter. Exhibit A-4 indicates that neither Linker nor Azar took a vacation during the contract period. The Government is not being charged for holidays, i.e., Independence Day, Labor Day, Thanksgiving Day. Since appellant was holding its resources in abeyance pending expected prompt receipt of Government data, we find it reasonable that neither Linker nor Azar took vacations during the delay period. However, prior to award of the instant contract, appellant routinely incurred delay time in connection with commercial work averaging roughly 15% of its time. We find, taking into account the weight to be accorded Exhibit A-4 and the testimony explaining it, that 15% of the remaining delay hours claimed should be treated as allocable to appellant's commercial endeavors.

Based on the record in the appeal from the default termination we find that beginning with receipt of appellant's 7 July 1975 letter indicating that it was in a "stop work condition" the Government was aware that appellant was suffering delays due to lack of adequate data needed to complete performance of the contract. Appellant's 11 August

1975 letter transmitting its redesign proposal provided further indication that appellant was being delayed. Appellant did not inform the Government of a delay period specifically commencing on 5 October 1975, as is shown on Exhibit A-4. However, as recited in our prior decision, an engineer from the DCASR, San Francisco, Quality Engineering Branch visited appellant's facility on 22 August 1975, observed the status of appellant's performance and reported to the Administrative Contracting Officer (ACO). The ACO thereupon recommended to the Procuring Contracting Officer (PCO) that the Government should either modify the contract to incorporate appellant's recommended changes or terminate the contract. The ACO further indicated that if the contract is modified the delivery schedule should be extended due to Government delay. We find that by early September 1975, the Government was aware that appellant was continuing to experience performance delays pending receipt of adequate Government data and reaction to appellant's proposal to cure what ultimately proved to be design deficiencies.

Settlement Expenses

Termination settlement expenses incurred and claimed are broken down into three categories: Mr. Linker's time, the accountant's time, and appellant's attorney's time.

For Mr. Linker's time appellant appears to be claiming a total of 13 hours, six for preparing appellant's termination settlement proposal, two for consulting with appellant's attorney, and five for responding to questions raised by the TCO in a letter dated 24 March 1978. The hourly rate claimed for Mr. Linker is $25.00 on the ground that he was acting for appellant as a consultant and should be compensated for his time as would be any consultant with his particular skills. However, the work performed by Mr. Linker was primarily records research and submission of raw data to appellant's attorney. Mr. Linker was still appellant's president at the time of the termination settlement effort, although he was working for another firm. There is no evidence that, as appellant's president, Mr. Linker became entitled to a salary in excess of $18,000 per year. We find that the number of hours claimed for Mr. Linker is reasonable. However, we find that the applicable hourly rate for those hours is the stipulated rate of $8.92 per hour.

Appellant's claim for accounting expenses, as recapitulated in the Government's brief, totals $400, based on 16 hours at $25.00 per hour. Eight of those hours related to a meeting between appellant's accountant and the DCAA auditor lasting eight hours. We find an additional five hours established by the record. We further find that $25.00 per hour was the normal rate charged by appellant's accountant during the period when the instant accounting services were performed and that was the rate charged to appellant. There is no evidence indicating that $25.00 per hour was unreasonably high for the independent accounting services performed. We find that appellant reasonably incurred accounting services at $25.00 per hour for 13 hours.

The attorney's fee portion of the termination settlement expense claim is charged at rates of $50 per hour for work performed in 1977 and $60 per hour for work performed in 1978. We find these rates to be reasonable. For 1977 nine attorney's hours are claimed in connection with preparation of appellant's termination settlement proposal and discussions with Government representatives. Eight additional 1977 hours are claimed, plus $79 for air fare and automobile rental, for attendance by appellant's attorney at the same all day meeting with the DCAA auditor attended by appellant's accountant. Ten 1978 hours are claimed for responding to inquiries made by the TCO. The TCO testified that in his opinion some of appellant's attorney's 1978 effort was redundant and unnecessary. Appellant's attorney testified that he responded to the TCO's inquiries to the best of his ability, on the assumption that there would be face to face negotiations. The record contains indications that some bad feeling developed between appellant's attorney and the TCO over who was to blame for the inability of the parties to negotiate a settlement. We do not dwell on this matter. We are persuaded that the seventeen 1977 hours and ten 1978 hours claimed for appellant's attorney in connection with the preparation of appellant's termination settlement proposal and supporting data were reasonably incurred, and we so find. The air fare and rental car fees are unchallenged.

Interest

There is a dispute over whether interest payable to appellant pursuant to the Payment of Interest on Contractors' Claims clause accrues from the date the instant appeal was filed or from the date the appeal from the default termination was filed.

The instant appeal was filed by notice of appeal postmarked 10 October 1978. In the appeal from the default termination (ASBCA No. 21079) appellant's notice of appeal was its complaint postmarked 22 March 1976. In that complaint appellant requested conversion of the default termination to a termination for convenience, requested that it be awarded an equitable adjustment pursuant to the Changes and Government Delay of Work clause, requested that it be compensated for all cost incurred in the "estimate" amount of $50,000, and that it be paid interest from the date the appeal was filed pursuant to the Payment of Interest on Contractors' Claims clause.

By letter dated 23 December 1975 appellant requested an equitable adjustment in the amount of $32,178.43 as additional costs resulting from alleged Government delay and inaction in resolving the problems arising from the defective drawing package. In his final decision dated 23 February 1976, terminating the contract for default, the contracting officer further stated that appellant's claim for a price adjustment and other relief was without merit. Appellant's claim for an equitable adjustment was not litigated as such in the earlier appeal. Proceedings in ASBCA No. 21079 were limited to determining the propriety of the termination for default.

DECISION

Most of the issues disputed in this appeal have been resolved in our fact findings. However, the Government has raised some considerations relating to cost allowability which still need to be addressed. Also the dispute over the applicable period for accrual of interest must be decided and the parties raise a question over whether profit should be allowed on recoverable delay or standby costs.

At the outset we observe that in its briefs appellant alleges entitlement to recovery for "damages", or pursuant to the Changes or Government Delay of Work clauses, in addition or in the alternative to entitlement under the Termination for Convenience clause. However, as we have stated previously, "All of appellant's claims derived from operation of the terms of the contract merge into the settlement provisions of the 'Termination for Convenience' clause of the contract insofar as they do not, in the aggregate amount, exceed the contract price." H & J Construction Company, ASBCA No. 18521, 76-1 BCA ¶ 11,903 at 57,082. Upon conversion of the default termination to a termination for convenience, the fixed price contract was converted to a cost reimbursement contract. Appellant thus became entitled to recover its allowable costs incurred in performance of the terminated contract. New York Shipbuilding Company, ASBCA No. 15443, 73-1 BCA ¶ 9852. Accordingly it is necessary to ascertain the extent to which appellant incurred costs in the performance of the terminated contract but it is not relevant to assign such costs to changes, delays, or "damages" which might be recoverable absent a Termination for Convenience clause. The Changes and Government Delay of Work clauses would be relevant if there were contention that the contract price, imposing a ceiling on allowable termination for convenience recovery, should be increased. No such issue has been raised here. We have for determination only the amount of allowable recovery under the Termination for Convenience clause. See Systems & Computer Information, Inc., ASBCA No. 18458, 78-1 BCA ¶ 12,946 at 63,138. Under that clause, Section 15 of ASPR (DAR) is made applicable to determine allowability of costs.

The Government contends that Linker and Azar worked on contingencies, and the amounts said to be salaries are therefore unallowable under ASPR (DAR) 15-205.7. That regulation provides in pertinent part:

> (a) A contingency is a possible future event or condition arising from presently known or unknown causes, the outcome of which is indeterminable at a present time.
>
> (b) In historical costing, contingencies are not normally present since such costing deals with costs which have been incurred and recorded on the contractor's books. Accordingly, contingencies are generally unallowable for

> historical costing purposes. However, in some cases, as for example, termination, a contingency factor may be recognized which is applicable to a past period to give recognition to minor unsettled factors in the interest of expeditious settlement.

Except for $4250 actually paid to Mr. Azar, about half his salary for six months, the Government says that the direct labor compensation sought by appellant should not be allowed. The Government says that Linker and Azar were "Appellant's owners who were willing to work for an indefinite period of time without compensation so that Appellant might survive and prosper."

This contention raises considerations similar to those addressed by the Court of Claims in Norman M. Giller & Associates, 210 Ct. Cl. 80, 535 F.2d 37 (1976), affirming the decision of this Board in Norman M. Giller & Associates, ASBCA No. 14696, 73-1 BCA ¶ 10,016. The contractor in that case was a sole proprietorship performing architectural services under a cost-plus-fixed-fee contract. Following expiration of the contract an audit was conducted of appellant's direct and indirect cost. Neither the owner nor his wife, who performed administrative work, drew any salary nor were accruals for such services entered on the contractor's books. In seeking recovery of amounts due following completion of the contract, the contractor claimed constructive salaries for the owner and his wife, with the amounts based on an ex post facto canvassing of salaries for comparable positions. There was neither allegation nor evidence of outstanding company indebtedness for salary. The Board held that the constructive compensation sought was unallowable ". . . as representing nothing actually paid nor any company obligation charged or incurred." The Court agreed, concluding that the contractors-proprietors ". . . considered themselves satisfactorily compensated for their administrative duties from the outset of their multi-year contract by the contract's fixed fee, and that the instant claim amounts to a contrived attempt to recover from defendant an imaginary cost."

Absence of a bona fide accrual or obligation to pay salaries of corporate officers was also found in Space Dynamics Corporation, ASBCA No. 19118, 78-1 BCA ¶ 12,885, where salaries shown as having been accrued on earlier financial statements remained unpaid and were not carried forward to later statements. The absence of the carry-forward was not explained. The corporate books were prepared by the contractor's secretary-treasurer, not an independent accountant.

ASPR 15-201.1 provides that to be allowable the cost must be "incurred or to be incurred". We have carefully scrutinized the evidence to ascertain whether appellant incurred a bona fide indebtedness for Mr. Linker's salary and the unpaid portion of Mr. Azar's salary. As distinguished from Giller and Space Dynamics, Linker and Azar

constituted appellant's productive labor force; they were not merely administrative officers of a sort who might reasonably be expected to be compensated out of corporate profits. We note that in Space Dynamics, supra, amounts were allowed for the direct labor efforts of the two corporate officers whose administrative salaries were disallowed. Appellant here was a closely held corporation whose management kept poor records and relied on oral understandings on matters which should ordinarily have been reflected in writing. Nevertheless we are persuaded by the sworn testimony of Mr. Linker and the accountant that a bona fide indebtedness for the unpaid Linker and Azar salaries has been established. See C & H Construction Co., ASBCA No. 22193, 79-2 BCA ¶ 13,950; Fred Schwartz, ASBCA No. 23183, 80-1 BCA ¶ 14,272. The amounts of such salaries recoverable under the Termination for Convenience clause are determinable as of the time of the termination. The incurrence of appellant's indebtedness for those salaries was not contingent upon future events and the direct labor amounts are not unallowable contingencies.

The Government contends in the alternative that the unpaid Linker and Azar salaries should not be allowed under a provision of ASPR (DAR) 15-205.6(a)(i) which provides:

> Except as otherwise specifically provided in this 15-205.6, such costs are allowable to the extent that the total compensation of individual employees is reasonable for the services rendered and they are not in excess of those costs which are allowable by the Internal Revenue Code and regulations thereunder.

ASPR (DAR) 15-205.6(a)(i) deals generally with the allowability of compensation for personal services. In the case of Linker's salary the Government cites Section 267 of the Internal Revenue Code (26 U.S.C.A. § 267) which, inter alia, prohibits deductions from corporate income of expenses, otherwise deductible, where the expense is owed to a person owning more than 50% of the outstanding stock and the expense is unpaid 2-1/2 months after the close of the corporation's taxable year. One might question the propriety of appellant's failure to show Mr. Linker's salary on its tax return. However, there was clearly no income from which amounts owed to Linker could be paid or deducted. ASPR (DAR) 15-205.6(a)(i) generally allows reasonable compensation for services rendered by employees of the contractor. Linker's salary was so treated by the DCAA auditor who questioned only the number of hours claimed, not the existence of an owed salary. As concluded in our earlier decision the Government was responsible for the deterioration of appellant's financial condition and ultimate failure. Under these circumstances we cannot find that appellant's inability to pay Linker's salary within 2-1/2 months of the close of the taxable year operates as a bar to allowability of the cost.

In the case of Azar's salary the Government cites Treasury Regulation 1.461-1(a)(2) (26 C.F.R. § 1.461(a)(2) (1970)) which provides

> Under an accrual method of accounting, an expense is deductible for the taxable year in which all the events have occurred which determine the fact of the liability and the amount thereof can be determined with reasonable accuracy.

The "all events" test is explained in Putoma Corp. v. Commissioner of Internal Revenue, 601 F.2d 734 (5th Cir. 1979). Essentially it means that an expense cannot properly be accrued if it is contingent. We have concluded above that Mr. Azar's salary was not contingent. Consequently, the Treasury regulation cited by the Government is inapplicable.

The Government further contends that allowable direct labor costs should be reduced by at least 50% due to breach of appellant's obligation to preserve its records. Paragraph (k) of the Termination for Convenience of the Government clause obligates the contractor to preserve and make available to the Government, until expiration of three years from final settlement, " . . . all his books, records, documents and other evidence bearing on the costs and expenses of the Contractor under this contract and relating to the work terminated thereunder . . ." The alleged breach is appellant's failure to preserve its technical records. As stated above we were unable to find that the destruction of these records was motivated by a desire to render material evidence unavailable. We have taken the absence of these records into account in reaching our jury verdict conclusion on allowable productive direct labor hours. The additional forfeiture proposed by the Government is not warranted on the record presented.

Appellant contends that its delay cost should be compensated under the Changes clause, not the Government Delay of Work clause. The difference is in allowability of profit; profit would be allowable as part of a Changes clause equitable adjustment but not as part of an adjustment under the Government Delay of Work clause. Pursuant to the Termination for Convenience clause appellant is entitled to reimbursement of its costs actually incurred in performing the contract, and profit is allowable on all such costs. It is therefore not necessary to distinguish between different types of direct labor if it is properly chargeable to the terminated portion of the contract. As to the delays suffered by appellant during the performance of the contract, we have concluded that these resulted proximately from the Government's failure to respond to appellant's requests for needed drawings and to correct the defective design after the defects were explained to the PCO. Thus the "delay-time" claimed by appellant is in the nature of standby time and properly chargeable to performance of the contract, as adjusted in our findings.

The Government contends that appellant's delay claim should be denied as to hours claimed prior to 31 October 1975 due to absence of the notice specified by the Government Delay of Work clause. The clause provides in pertinent part:

> 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.

The Government cites Paul Hardeman, Inc., Eng. BCA No. 2889, 69-2 BCA ¶ 7833, in which a similar notice provision in the standard construction contract Suspension of Work clause was strictly enforced. Inasmuch as there is no separate delay claim for consideration, we treat this contention as challenging the reasonableness of the standby time or costs. In this regard respondent's argument fails. Since the Court of Claims decided Hoel-Steffen Construction Company v. United States, 197 Ct. Cl. 561, 456 F.2d 760 (1972), we have not enforced such notice requirements to bar otherwise valid claims where the Government was aware of the operative facts and the evidence does not establish that the Government would have acted differently if such notice was given. See Mil-Pak Company, Inc., ASBCA No. 19733, 76-1 BCA ¶ 11,836; Interlog Corporation, ASBCA No. 21212, 77-1 BCA ¶ 12,362. We have found that the Government was aware of the performance delays experienced by appellant due to inadequate Government-furnished data. Accordingly, appellant acted reasonably in remaining in a standby status until the necessary clarifications were received and absence of a formal notice by appellant does not render the costs resulting therefrom unreasonable.

Allowability of interest to appellant is governed by the Payment of Interest on Contractors' Claims clause which provides:

> (a) If an appeal is filed by the Contractor from a final decision of the Contracting Officer under the DISPUTES clause of this contract, denying a claim arising under the contract, simple interest on the amount of the claim finally determined owed by the Government shall be payable to the Contractor. Such interest shall be at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41; 85 STAT 97 for the Renegotiation Board, from the date the Contractor furnished to the Contracting Officer his written appeal pursuant to the DISPUTES clause of this contract, to the date of (i) a final judgment by a court of competent jurisdiction, or (ii) mailing to the Contractor of a supplemental agreement for execution either confirming completed negotiations between the parties or carrying out a decision of a Board of Contract Appeals.

(b) Notwithstanding (a) above, (i) interest shall be applied only from the date payment was due, if such date is later than the filing of appeal; and (ii) interest shall not be paid for any period of time that the Contracting Officer determines the Contractor was unduly delayed in pursuing his remedies before a Board of Contract Appeals or a court of competent jurisdiction.

In contending that interest should run from the date of its notice of appeal from the final decision terminating the contract for default appellant says that the instant appeal is merely an extension of the earlier appeal, i.e., the earlier appeal determined entitlement, the instant appeal concerns the amount owed. The Government says the earlier appeal was from a final decision terminating the contract for default and that no "claim" within the meaning of paragraph (a) of the clause was denied by the contracting officer. Several cases are cited by the parties, none of which are helpful to resolution of the instant clause.

In addition to terminating the contract for default, the contracting officer's 23 February 1976 decision denied appellant's 23 December 1975 claim for an equitable adjustment. Appellant is thus correct in stating that the final decision giving rise to the earlier appeal did deny a "claim" within the meaning of paragraph (a) of the Payment of Interest clause. However, upon termination of the contract the Government's obligation to compensate appellant became governed by the Termination for Convenience clause. The obligation is the same whether the contract is initially terminated for convenience or a default termination is converted at a later date to a termination for convenience by action of the parties or decision of this board or on appeal, the Court of Claims.

Upon termination of the contract, any amount due appellant was to be determined pursuant to the procedures, and in accordance with the criteria, established by the Termination for Convenience clause. Appellant became obligated to prepare a termination for convenience settlement proposal and any claim for payment under the contract had to be based on that proposal subject to adjustments authorized by the clause. Appellant's initial equitable adjustment claim necessarily became merged into its termination for convenience claim. H & J Construction Company, ASBCA No. 18521, 76-1 BCA ¶ 11,903 at 57,082. Thus there was no amount due at the time the earlier appeal was filed, since no amount could be due until appellant presented its termination for convenience settlement proposal. The only viable claim for purposes of the Payment of Interest clause is appellant's termination claim, denied in major part by the contracting officer's final decision received by appellant on 25 September 1978. Cf., A.C.E.S., Inc., ASBCA No. 21417, 79-1 BCA ¶ 13,809. We conclude that interest recoverable by appellant runs from 10 October 1978, the date it filed the instant appeal.

Based on the foregoing findings and conclusions, we make the following determinations as to the amount recoverable by appellant:

1. Direct material - $155 is allowed as indicated in our findings.

2. a. Direct productive labor - As stated in our findings 70% of productive labor hours claimed for Linker and Azar are allowable as such. Accordingly the following are allowed:

Linker - 707 hours (Exh. A-4) X 70% = 495 hours (rounded off)

Azar - 624 hours (Exh. A-4) X 70% = 437 hours (rounded off)

b. Standby time - On the basis of 2.a. above 212 Linker hours and 187 Azar hours should be added to the total delay hours pool shown on Exh. A-4 yielding total delay hours claimed at 474 for Linker and 537 for Azar. As stated in our findings the Government should be given credit for 18 delay days representing weekdays during which Linker and Azar could have performed administrative work testified to have been performed on Saturdays. Fifteen percent of the remaining delay pool should also be deducted as properly allocable to appellant's commercial work. Allowable standby time is thus:

	Linker	Azar
Claimed	474	537
Less 18 X 8	144	144
Subtotal	330	393
Less 15%	50	59
Allowable Standby Hours:	280	334

c. Total allowable direct labor hours:

	Linker	Azar
Productive labor	495 hours	437 hours
Standby time	280 hours	334 hours
Total hours	775 hours	771 hours

d. At the stipulated hourly rates the following are allowed for direct labor:

Linker	Azar	
775	771	
X 8.92	X 8.43	
$6913.30	$6499.53	Total: $13,412.83

3. Overhead - Overhead was stipulated at 65% times direct material plus direct labor. Accordingly, the following amount is allowable:

Direct Labor	-	$13412.83
Direct Material	-	155.00
Total Direct Costs	-	13567.83
	X	.65
Allowable Overhead:		$ 8819.09

4. Profit - Profit was stipulated at 10% of costs that are profit bearing. Since, as explained previously, appellant is entitled to be compensated solely pursuant to the Termination for Convenience clause all allowable costs, including standby costs, are profit bearing. Accordingly, allowable profit is calculated as follows:

Direct material	-	$155.00
Direct labor	-	13412.83
Overhead	-	8819.09
Subtotal		22386.29
		.10
Profit		$2238.63

5. Settlement expenses - On the basis of our findings the following amounts are allowed:

Linker $8.92 per hours X 13 hours = $115.96
Accounting expenses - 13 hours X $25 per hour = $325

Attorney expenses

17 hours at $50 per hour	=	850
10 hours at $60 per hour	=	600
Air fare and rental car		79
Total		$1529

Settlement expenses thus total:

Linker	115.96
Accounting	325.00
Legal	1569.96
	$1969.96

6. Total of above:

Direct Material	155.00
Direct Labor	13412.83
Overhead	8819.09
Profit	2238.63
Settlement expenses	1969.96
Total Termination for Convenience Recovery	$26,595.51

The contracting officer allowed $3000 in his final decision. Accordingly appellant is entitled to recover an additional $23,595.51 plus interest thereon commencing 10 October 1978 payable at the rates prescribed by the Payment of Interest on Contractors' Claims clause.

The appeal is sustained to the extent indicated and is otherwise denied.

Section 6. Fraudulent Claims

U.S. v. AERODEX, INC.

469 F.2d 1003 (1972)

This case is about aircraft engine bearings. In 1962 Aerodex, Inc. contracted to sell certain aircraft parts to the Navy Department. Three hundred master rod bearings for the Curtiss-Wright R1820 engine were included in the sale. The bearings delivered were not those specified in the contract. The district court, 327 F.Supp. 1027, held that the invoices submitted by Aerodex for payment for these bearings were "false claims for payment" within the meaning of the Federal False Claims Act, 31 U.S.C.A. § 231 (1970). The Government was awarded $381,838.36 with interest. We reverse as to Defendant Tonks and remand with directions to modify the amount of the judgment against Aerodex and Crawford.

At the time pertinent to this lawsuit, the Commercial Division of Aerodex, Inc. was engaged in the purchase and sale of spare aircraft parts. Defendant Raymond Tonks was president and general manager of Aerodex, and defendant Frank J. Crawford was vice president in charge of the Commercial Division.

On September 18, 1962, Crawford submitted to the U.S. Navy Aviation Supply Office a bid by Aerodex to sell 300 master rod bearings, Curtiss-Wright part number 171815, at a price of $90.00 each. This bid was accepted and was incorporated as a part of a contract entered into between Aerodex and the Aviation Supply Office on October 6, 1962.

As several of the contract provisions are crucial to this appeal, we set them out in full:

SPECIFICATIONS

Articles furnished from stocks of surplus material are acceptable under this contract provided that the articles so furnished meet the following requirements:

1. All articles furnished must be identified by the applicable Curtiss Wright Corporation, Wright Aeronautical Division part numbers . . . and must conform to the requirements of the respective drawings for said articles.

* * * * * *

3. All articles furnished . . . must be in new, unused condition.

INSPECTION AND ACCEPTANCE

* * * * * * *

At destination all delivered articles shall be subjected to 100% final inspection by the O & R shop for conformance to the applicable data, drawings and specifications required in the manufacture of said articles. Inspection shall include magnaflux or Zyglo or the equivalent thereof. Upon completion of inspection, and acceptance of satisfactory articles by the receiving activity, an inspection report shall be submitted by the consignee to the Aviation Supply Office, Philadelphia 11, Pennsylvania . . .

UNSATISFACTORY MATERIAL

Any articles delivered which have been determined by the receiving activity to have failed to conform to the applicable specifications and drawings or which are otherwise considered unsuitable for intended use shall be returned, at the Contractor's expense, for replacement. The necessary replacement articles shall then be shipped, all transportation charges paid, to the destinations specified herein. If any of the articles returned to the Contractor are not replaced, the total amount due to be paid under this contract shall be reduced by the contract value of the returned article or articles.

The bearings supplied by Aerodex to the Navy under this contract were not P/N [part number] 171815 bearings. They were P/N 117971 and 117971Y10 bearings which had been reworked by Aerodex employees. The rework consisted of replacing the metallic overlay on the inside diameter of each bearing. After reworking, each bearing was re-identified with P/N 171815. To the naked eye, the reworked bearings were indistinguishable from new, unused P/N 171815 bearings.

Aerodex' reworked bearings were received and accepted at the Jacksonville Naval Air Station without the "100% final inspection" required by the contract. A number of them were installed in aircraft engines. When the Navy subsequently discovered that the bearings were not the ones contracted for, it removed and replaced those which had been installed. This "retrofit" operation cost $160,919.18. That amount was added to the contract price of $27,000 and the total doubled as provided in the False Claims Act. This, together with the $2,000 statutory penalty for each of the three invoices, resulted in the $381,838.36 judgment for the Government.

I. Liability Under the False Claims Act

The defendants make a two-pronged attack on the district court's finding of liability under the False Claims Act. They allege that the

evidence was (1) legally insufficient in that it did not show the necessary element of scienter, and (2) factually insufficient in that it did demonstrate the individual defendants' personal knowlege and participation in the alleged fraudulent performance of the contract.

[1] The law is settled in this Circuit that to show a violation of the False Claims Act the evidence must demonstrate "guilty knowlege of a purpose on the part of [the defendant] to cheat the Government", United States v. Priola, 272 F.2d 589, 594 (5th Cir. 1959), or "knowledge or guilty intent", United States v. Ridglea State Bank, 357 F.2d 495, 498 (5th Cir. 1966). See also Henry v. United States, 424 F.2d 677 (5th Cir. 1970). This rule is in accordance with the position adopted by the Ninth Circuit, United States v. Mead, 426 F.2d 118 (9th Cir., 1970), the Sixth Circuit, United States v. Ueber, 299 F.2d 310 (6th Cir. 1962), and the Second Circuit, United States ex rel. Brensilber v. Bausch & Lomb Optical Co., 131 F.2d 545 (2nd Cir. 1942), aff'd by an equally divided court, 320 U.S. 711, 64 S.Ct. 187, 88 L.Ed. 417 (1943). The Tenth Circuit in Fleming v. United States, 336 F.2d 475 (10th Cir. 1964), cert denied, 380 U.S. 907, 85 S.Ct. 889, 13 L.Ed.2d 795 (1965), has reached a contrary conclusion.

The test is easily stated but difficult to apply in the circumstances of this case.

(a) The Mislabeled Parts

A master rod bearing for the R1820 engine is a cylindrical sleeve approximately 3¼ inches in length and 3¼ inches in diameter. The bearing is composed of steel, with a silver plating material on both the inside and outside surfaces. The inside of the bearing is further coated with a microscopically thin metallic overlay. The inside diameter of the bearing performs the function of a bearing surface which permits the free rotation of the crankshaft within the master rod bearing. This permits the crankshaft to rotate, turning the propellor. Failure of the bearing causes complete engine failure.

The bearing denominated P/N 117971 is impossible to distinguish visually from bearing P/N 171815 but has two basic differences. One difference is hardness of the steel in the shell backing: the P/N 117971 is made of a low carbon steel, while P/N 171815 is made of a harder, high carbon steel. The other difference lies in the composition of the metallic overlay used to line the inside diameter of the bearings: bearing P/N 117971's overlay consists of a lead and indium composition, while the overlay used in P/N 171815 is a lead-tin composition. Aerodex replaced the lead-indium overlay with lead-tin prior to renumbering the P/N 117971 bearings. This reworking did not change the hardness or composition of the bearings' steel shell.

Defendants do not deny that the bearings they sold to the Navy were reworked and renumbered. They argue, nevertheless, that their actions constituted no violation of the False Claims Act. They allege that all military and factory publications available to them showed that both P/N 117971 and P/N 171815 were approved for use in the R1820 engine and that the entire aviation industry at that time considered the two bearings to be interchangeable. Defendants argue, therefore, that they could not have had the requisite intent to "cheat" the Government.

[2] We think this argument requires too restrictive a reading of the False Claims Act. The mere fact that the item supplied under contract is as good as the one contracted for does not relieve defendants of liability if it can be shown that they attempted to deceive the Government agency. In United States v. National Wholesalers, 236 F.2d 944 (9th Cir. 1956), cert. denied, 353 U.S. 930, 77 S.Ct. 719, 1 L.Ed.2d 724 (1957), the defendant contracted to deliver to the Army a number of Delco-Remy generators. Unable to procure these generators, National Wholesalers had substitutes manufactured and attached spurious "Delco-Remy" labels to them. Although the substitute generators performed according to contract specifications, liability under the False Claims Act was held to attach because of the deliberate misbranding.

[3] We think that the deliberate mislabeling in the case at bar, coupled with the fact that the parts delivered did not actually meet the specifications of the contract, compels a finding of liability under the Act. If defendants had, in fact, believed that the reworked P/N 117971 bearings were interchangeable with the P/N 171815 bearings that they had contracted to deliver, they could easily have requested permission from the Navy to deliver the substitute parts or, at least, could have disclosed to the Navy the manner in which they thought they could comply with the contract. The failure to do so indicates nothing less than an intention to deceive.

(b) Defendant Crawford

[4,5] Defendant Crawford, who was in charge of the Aerodex division which actually performed the reworking operation, argues that the evidence did not make a case against him individually. Crawford signed the bid on the P/N 171815 bearings which Aerodex submitted to the Navy and both initialled the requisition covering the procurement of the P/N 117971 bearings which were used to fill the Navy order and the work orders authorizing the reworking and renumbering of the bearings.

In addition, Crawford gave false information to Government agencies investigating the affair. This behavior can only serve to underscore his knowing participation in Aerodex' fraud. In December, 1962, Crawford told the Navy that the P/N 117971 bearings had been obtained in 1959 from the Lycoming Corporation. Yet this was less

than two months after he had himself initialled the purchase order sent to James G. Boone, the California supplier from whom the P/N 117971 bearings were actually obtained. Subsequently, Crawford, after having talked to the Navy and having had ample time to check into the matter if he were unsure of the facts, gave the same false information to the Federal Aviation Agency.

Crawford argues here that the bid submitted to the Navy and the work orders for the reworking of the bearings were prepared by four Aerodex employees known as "planners", who were available to testify at trial but were not called as witnesses. From their failure to testify, Crawford would have us draw an inference unfavorable to the Government. These witnesses, however, were available to be called by the defendants as well as the Government. We therefore draw no inferences at all concerning their failure to testify. Jenkins v. Bierschenk, 333 F.2d 421 (8th Cir. 1964); cf. Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge, 424 F.2d 684 (5th Cir.), cert. denied sub nom. Ocean Drilling & Exploration Co. v. Signal Oil & Gas Co., 400 U.S. 832, 91 S.Ct. 65, 27 L.Ed.2d 64 (1970); Bowyer & Johnson, Inc. v. R. E. Sanders, 271 F.2d 275 (5th Cir. 1959).

Finally, Crawford finds it "unfathomable" that he could be found liable while his subordinate, Herman Waker, who was more directly in charge of the reworking and renumbering, was not held liable by the district court. We find no inconsistency here. The district court found that the reworking of bearings would, under some circumstances, be proper. It was not the actual reworking of the bearings, but their sale to the Government as unreworked bearings, that controls this controversy. The Government simply failed to prove that Waker knew, at his level of responsibility, that the reworking was improper in this case.

There was sufficient evidence to support the finding that Crawford was liable.

(c) Defendant Tonks

[6] The evidence as to defendant Tonks was considerably weaker. Tonks, Aerodex' chief executive officer, signed the October 6, 1962, contract with the Government. The purchase order for the reworked P/N 117971 bearings bears a rubber stamp facsimile of his signature. That is the sum total of the direct evidence linking Tonks to the sale of the mislabeled bearings. At trial he testified that he had no knowledge of the origin or subsequent use of the bearings until the Government began its investigation.

The Government argues that the requisite guilty knowlege on the part of Tonks can be inferred from the facts that he was in close contact with defendant Crawford and that the purchase order for the P/N 117971 bearings was signed less than three weeks before execution of the Navy contract.

We think these inferences are too weak to take the place of missing facts. The Government did not prove a case against Tonks, and the district court's finding to the effect that he knowingly caused the presentation of a false claim was clearly erroneous.

II. Failure to Inspect

[7,8] The Government admits that the Navy did not perform the "100% final inspection" called for by the contract. Defendants proved at trial that a simple and inexpensive non-destructive test, the Rockwell Hardness Test, would have shown that the bearings did not meet contract specifications.

The inspection clause in the contract does not, however, insulate appellants from liability for fraud. First, a reading of the clause shows that it is for the Government's benefit and imposes no duty on the Government in favor of the appellants. Second, Article 5, the inspection article, provides that inspection is not conclusive "as regards latent defects, fraud, or such gross mistakes as to amount of fraud." This provision embodies the established rule that, even where final inspection is the obligation of the Government, such obligation does not absolve a contractor on liability for fraud. See United States v. American Packing Corp., 125 F.Supp. 788 (D.N.J. 1954); United States v. United States Cartridge Co., 95 F.Supp. 384 (E.D.Mo. 1950), aff'd, 198 F.2d 456 (8th Cir. 1952), cert. denied, 345 U.S. 910, 73 S. Ct. 645, 97 L.Ed. 1345 (1953); United States v. Collyer Insulated Wire Co., 94 F.Supp. 493 (D.R.I.1950).

[9] To the extent that the wording of the clause itself does not militate in defendants' favor, they rely on the so-called "Christian doctrine" as a second line of defense based on the failure to inspect.

Briefly put, Aerodex argues that, regardless of the wording of the contract, if the Government had performed the tests required by specific Armed Services regulations, it would have discovered irregularities long before any of the bearings were installed in aircraft engines, and most of the consequential damages flowing from the "retrofit" program would have been eliminated. Aerodex contends that these regulations are a part of the contract as a matter of law.

G. L. Christian & Associates v. United States, 312 F.2d 418, 160 Ct. Cl. 1, cert. denied, 375 U.S. 954, 84 S.Ct. 444, 11 L.Ed.2d 314 (1963), was a suit for lost profits by contractors whose housing project had been cancelled by the Government when the Army decided to deactivate Fort Polk, Louisiana. The court held that anticipated profits were not allowable because, even though the contract did not contain any express provision allowing the Government to terminate the contract for its convenience, the Government was entitled to the benefit of the Armed Services Procurement Regulations which required that such a clause be inserted in all construction contracts. The court

held that the standard termination article required by the Regulations was incorporated in the contract by operation of law, even though it was not contained therein expressly.

Subsequently, the Court of Claims held that this Christian doctrine could be applied for the benefit of a claimant, as well as the United States. Moran Bros., Inc. v. United States, 346 F.2d 590, 171 Ct. Cl. 245 (1965). The court ruled that an appeal was timely when filed within 60 days after a hearing examiner's decision, as required by Atomic Energy Commission regulations, despite the fact that the contract contained a clause providing that an appeal should be taken within 30 days.

More recently, the Christian doctrine has been expanded in General Services Administration v. Benson, 415 F.2d 878 (9th Cir. 1969). Benson, embroiled in a dispute with the Internal Revenue Service over certain property he had purchased from the General Services Administration, filed suit to compel the GSA to produce various documents allegedly needed in presenting his case in the tax matter. In affirming the district court's order enjoining the GSA from withholding the records, the court cited a GSA regulation requiring disclosure of records in the absence of a "compelling reason" for non-disclosure.

Defendants here rely on §§ 14-101, 14-201, 14-204, and 14-205 of the Armed Services Procurement Regulations. These sections require, in unambiguous terms, that the Government inspect all goods prior to acceptance. They also require that, when the goods tendered do not meet specifications, the action taken shall be in accordance with the applicable contract provisions (which here would require that the goods be returned to the contractor).

Even if the regulations are considered to be incorporated into the contract by operation of law under the Christian doctrine, nevertheless, they do not insulate appellants from liability for their own fraud any more than the contract itself does for the same reasons.

In addition, appellants failed to prove that 100% inspection would necessarily have included a Rockwell Hardness Test. Since hardness of the steel used in the bearing is controlled at the manufacturing level and is the same for all bearings of a given part number, the appearance of that part number on the bearing gives notice of the bearing's hardness. Thus, only upon suspicion of fraudulent misnumbering would an inspector conduct a Rockwell Hardness Test.

The lower court was correct in holding that the contract "could not be relied upon by the defendant to escape liability because such an interpretation would allow a supplier to escape liability for any deception where the inspection was not made but the deception discovered by other means--an obviously unfair and unintended result." This holding also applies to the defendants' reliance on the regulations.

III. Measure of Damages

The question raised on this appeal as to the measure of damages applied by the district court is difficult to resolve because there appears to be no precedent against which to judge the facts of this case.

The district court computed damages by first adding the contract price of the bearings, $27,000.00, to the $160,919.18 cost incurred in removing and replacing the P/N 117971 bearings which had been installed in aircraft engines. This sum, $187,919.18, was then doubled under the statutory formula in the False Claims Act which imposes liability for the submission of a false claim in "double the amount of damages which the United States may have sustained by reason of doing or committing such act . . ." 31 U.S.C.A. § 231 (1970).

The cases that have considered the application of this statute's double damage provision have generally been of two kinds. One line of cases involves an overpricing for what was sold and delivered to the Government. Here the damage sustained by the United States is the difference between the reasonable cost of the goods sold and the price the Government actually paid for the goods, and recovery is double that amount. See, e. g., United States v. Foster Wheeler Corp., 447 F.2d 100 (2d Cir 1971); United States v. Ben Grunstein & Sons Co., 137 F.Supp. 197 (D. N.J. 1956); United States v. American Packing Corp., supra.

In the other line of cases, the Government has been billed and has paid for a greater quantity of goods or services than it has received. The basis for the double damage recovery is then the amount it paid for the goods that were short in delivery. See, e. g., United States v. Koenig, 144 F.Supp. 22 (E.D. Pa. 1956).

These cases all differ somewhat from this one because they involve a quantitative measure, a difference between what the Government paid and what it should have paid for goods that were acceptable. None involved consequential damages incurred as a result of defective goods.

[10] Upon careful analysis, we hold that the language of the False Claims Act does not include consequential damages resulting from delivery of defective goods. The statute assesses double damages attributable to the "act", which in this case is the submission of the false vouchers. The submission of these vouchers was not the cause of the Government's consequential damages. The delivery and installation of the bearings in the airplanes, not the filing of the false claim, caused the consequential damages.

In a case of this kind, damages under the False Claims Act must be measured by the amount wrongfully paid to satisfy the false claim. United States v. Woodbury, 359 F.2d 370 (9th Cir. 1966); United States v. American Packing Corp., supra.

Toepleman v. United States, 263 F.2d 697 (4th Cir.), cert. denied sub nom. Cato Bros., Inc. v. United States, 359 U.S. 989, 79 S.Ct. 1119, 3 L.Ed.2d 978 (1959), relied upon by the Government, is not authority to the contrary, in Toepleman, the defendants had obtained crop support loans from the Commodity Credit Corporation by fraudulently representing that the cotton collateral of the pledged promissory notes had been produced by the makers of the notes. The Government had sold the collateral for less than the total amount of the loans, and the Fourth Circuit permitted the Government to recover double the foreclosure deficiency under the False Claims Act. Toepleman's reasoning is inapposite here, because the damages were in no way consequential, i. e., additional losses incurred as proximate results of the act of submitting a fraudulent loan application. Rather, the Government was permitted to double the amount still owing on the fraudulently obtained loans. In this respect, Toepleman closely resembles both lines of False Claims Act cases, as an example of the Government being either overcharged for the correct quantity of goods or charged for goods short in delivery.

[11] We think that a proper application of the double damage provision limits the Government's claim to the amount that was paid out by reason of the false claim. We treat the matter as if the claims for $27,000 for P/N 171815 bearings were false because those bearings were never delivered. The Government paid $27,000 for bearings it did not receive. This amount must be doubled, and the $2,000 statutory penalty must be added for each of the three invoices. The correct amount recoverable under the False Claims Act, consequently, is $60,000.00, and the judgment for $381,838.36 is reversed.

IV. Breach of Warranty

The consequential damage award to the Government can be sustained on another theory. The district court found that Aerodex committed a breach of warranty in delivering to the Government bearings which were at variance with those required by the contract. The issue is whether Aerodex has an adequate defense to the recovery of damages for that breach of warranty.

The warranty provisions of the contract are contained in Clause 33, which reads in pertinent part:

> (a) Notwithstanding inspection and acceptance by the Government of articles furnished under this contract or any provision of this contract concerning the conclusiveness thereof, the Contractor warrants that at the time of delivery (i) all materials delivered under this contract will be free from defects in material or workmanship and will conform with the specifications, and all other requirements of this contract; . . . .

(b) Within one year after the delivery of any article under this contract, written notice may be given by the Government to the Contractor of any breach of the warranties in paragraph (a) of this clause as to such article. Within a reasonable time after such notice, the Contracting Officer may either (i) require the prompt correction or replacement of any article or part thereof (including preservation, packaging, packing, and marking) that did not at the time of its delivery conform with the requirements of this contract within the meaning of paragraph (a) of this clause, or thereafter does not so conform in consequence of any such breach; or (ii) retain such article, whereupon the contract price thereof shall be reduced by an amount equitable under the circumstances and the Contractor shall promptly make appropriate repayment. . . .

* * * * * *

(e) The remedies afforded the Government by paragraph (b) of this clause shall be exclusive as to any breach of the warranties in paragaph (a) of this clause, except any such breach involving latent defects, fraud, or such gross mistakes as amount to fraud.

[12] The Government did not pursue either of the remedies afforded by subparagraph (b) of Clause 33. This omission does not provide Aerodex with a defense to the breach of warranty claim, however, because cases of fraud are specifically excepted from exclusivity under subparagraph (e).

Aerodex' main contention is that the Government's failure to conduct the "100% final inspection" precludes it from any remedy for the breach of warranty.

Aerodex makes the following arguments to support its position:

(a) The damages were not foreseeable, since Aerodex could not have known that the Government would not make the required inspections;

(b) The Government cannot recover damages which it could have avoided by the exercise of reasonable diligence;

(c) The language of the "inspection" and "unsatisfactory material" clauses of the contract is repugnant to the warranty clause, and since the former are typed while the latter is printed, the former clauses must be given precedence, making rejection and return of nonconforming bearings the Government's exclusive remedy; and

(d) The Christian doctrine required the Government to perform tests required by specific Armed Services regulations.

[13,14] These arguments are irrelevant because the breached warranty was an express one. Aerodex expressly warranted that the delivered bearings were of a specific serial number, when in truth they were not. The general rule is that a buyer is entitled to rely upon the express warranty of the seller, especially where the warranty is descriptive and the defects are not readily apparent, and the buyer's failure to inspect constitutes no defense for the seller. 8 S. Williston on Contract § 973 (1964); 46 Am. Jur. Sales § 330 (1943); 77 C. J. S. Sales § 311(b) (1952); Refinery Equipment, Inc. v. Wickett Refining Co., 158 F.2d 710 (5th Cir. 1947). The Government was therefore entitled to rely solely upon Aerodex' express warranty describing the bearings, and its failure to inspect the delivered bearings is of no legal consequence.

* * * * *

Directions on Remand

In summary, we vacate the judgment of the district court and remand for entry of a joint and several judgment against Aerodex and Crawford in the amount of $60,000 under the False Claims Act, entry of a judgment in the additional amount of $160,919.18 against Aerodex, which is the only defendant liable for damages for breach of warranty, and dismissal of the claim filed against Tonks. Such judgments shall bear interest as provided by law. Tonks' costs will be borne by the appellee. The remaining costs will be divided equally between Aerodex and Crawford on the one hand, and the United States on the other.

Reversed and remanded with directions.

HONEYWELL, INC.

ASBCA No. 12353 (1968)

Reprinted, Supra, at p. 9-66

Section 7. Debarment/Suspension

P. E. C. CORPORATION

ASBCA No. 14241 (1969)

This is an appeal from the summary cancellation of a Purchase Order upon discovery that through administrative oversight it had been issued to a suspended contractor, Type D indefinite, contrary to Armed Services Procurement Regulation (ASPR) Section 1, Part 6.

DECISION

This Board has jurisdiction to determine the validity of a contract under which an appeal is brought to it to the extent necessary to determine if the Board has jurisdiction to proceed. Ordnance Parts & Engineering Co., ASBCA No. 12820, 68-1 BCA ¶ 6870; ITT Defense Communications Division, Defense-Space Group ASBCA No. 13420, 69-1 BCA ¶ 7548; Mission Valve & Pump Company, a Division of Mission Manufacturing Company, ASBCA Nos. 13552 & 13821, 69-2 BCA, and cases cited.

Quotations for small purchases may be solicited by the use of SF 18 or DD Form 1155, which expressly state that quotations submitted on those forms are not to be construed as offers that can be accepted to form a binding contract. Thus, as ASPR 16-102.1(b)(2) states, a Purchase Order issued pursuant to a quotation submitted on one of those forms is only an offer to buy goods and services specified in that order on the terms indicated therein. The result is the same where, as in this case, quotations are solicited by teletype. A quotation of prices is not an offer since all of the terms essential to the formation of a contract are not expressed. Although the mere use of the word "quotation" does not negate the possibility that all other essential terms were previously agreed upon, tacitly or otherwise, the party asserting that a contract has been formed must show that such was the case. Corbin, Contracts, § 26 (1950).

It is clear in this case that the subject Purchase Order, when issued on 11 March 1969, was only an offer, and, accordingly, could have been cancelled by the Government without liability at any time before appellant undertook a substantial part of the requested performance. Ordnance Parts and ITT cases, supra. But by the time the Government cancelled the Purchase Order, on 25 April 1969, appellant had commenced a substantial part of the requested performance, through its supplier, and, accordingly, but for appellant's suspended status, the Purchase Order by that date would have ripened into an irrevocable contract.

So far as respondent's motion to dismiss is based upon the lack of a Termination for Convenience clause in the Purchase Order, it is without merit. In the ITT case, supra, there was also involved a Purchase Order without such provisions, cancelled after the recipient had undertaken a substantial part of the requested performance, where the supplier would not accept a no-cost termination. In that case we noted that contracting officers have authority, and are expected by established policy, to enter into settlement agreements, before or after termination of a contract without termination provisions, thereby providing a contractual remedy for what would otherwise be a breach of contract. Therein we concluded that ASPR 3-608.5, read together with ASPR 8-201, compelled the conclusion that, in any case where a valid contract without termination provisions was to be terminated under circumstances not amounting to default, the contracting officer was required to follow the provisions of Section VIII of ASPR as a basis for settlement of such termination. Since in this case the Purchase Order amounted to less than $1,000.00, if it were to be found to be a valid and binding contract the contracting officer would be required, in lieu of termination, to permit the Purchase Order to run to completion.

Accordingly, since there is no dispute between the parties over any material fact herein, the proper disposition of this appeal depends upon the effect upon the contractual relationships between the parties to be given appellant's suspended status. Debarment as a remedy to insure compliance with various statutes has been enacted by Congress as a part of the so-called Buy American Act (41 U.S.C. § 10b), Walsh-Healey Public Contracts Act (41 U.S.C. § 37), Davis-Bacon Act (40 U.S.C. § 276a-2), and a number of other statutes, which procedures are reflected in the provisions of ASPR 1-603. Administrative debarment as a means of insuring responsible bidding, having no immediate statutory basis, but for various types of conduct tending to reflect upon the business integrity and responsibility of the firms and individuals concerned, has been authorized by regulations contained in ASPR 1-604. In the case of both statutory and administrative debarment, it has been held that such debarment is not a penalty but, if the procedures leading thereto are reasonable, a proper regulatory measure for protecting the interest of the Government in such matters. See ASPR 1-604, 1-605; Copper Plumbing & Heating Co. v. Campbell, 290 F. 2d 368 (D.C. Cir. 1961). ASPR 1-605 concerns temporary suspension for the same reasons that might lead to administrative debarment and is authorized only pending further investigation and the pendency of any legal proceedings that might ensue. The validity of both suspension and administrative debarment has been upheld. See Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957), cert. denied, 355 U.S. 939 (1958).

The effect of an award made during a period of statutory or administrative debarment or suspension contrary thereto, whether because of the deceptiveness of the contractor or administrative oversight on the part of the contracting officer, has not previously been considered by this Board.

The Comptroller General, in 33 Comp. Gen. 63 (1953), considered the claim of a copartnership, consisting of Harry and Samuel Paisner, doing business as Quality Manufacturing Company, who, while debarred for violation of the Walsh-Healey Act, had been awarded a contract for the manufacture of sleeping bags from Government-furnished material, cancelled after partial performance within 3 months, upon discovery that the partners, doing business under a different name, were currently debarred and so listed under their own names and previous firm name. When the deception was discovered, the partners were directed by an inspector to complete those bags for which material had already been cut. Some 12,000 bags were thus completed and delivered but the Government refused to pay for them. It was also shown that during the period of debarment the partners, doing business under their new firm name, had been awarded two additional contracts, satisfactorily performed them, and had been paid in full. The record was clear that the partners were fully aware of their debarred status. On this record, The Comptroller General refused all payment to the partners even for sleeping bags delivered. He held that debarment under the Walsh-Healey Act made the contract illegal and totally void. On these facts, however, the United States Court of Claims, in Paisner v. United States, 138 Ct. Cl. 420, 150 F. Supp. 835 (1957), cert. denied, 355 U.S. 941 (1958), in a split decision, apparently based on quantum meruit, determined that the partners should receive the contract price for sleeping bags delivered, less any profit thereon and the cost to the Government of removing the remainder of the Government-furnished material from the partner's plant. In addition, the Court of Claims allowed the Government's counterclaim for all profit the partners had received from the two other contracts performed during debarment for which they had previously been paid in full.

In a case involving circumstances similar to this appeal, The Comptroller General, in 36 Comp. Gen. 532 (1957) considered the claim of Manhattan Lighting Equipment Co., Inc. There the contractor, after notice of administrative debarment by the Department of the Air Force containing notice that such debarment was effective throughout the Department of Defense, nevertheless submitted the low bid in response to an IFB issued by the Department of the Army for the supply of lighting equipment. In ignorance of the contractor's debarred status, through administrative oversight, the Army contracting officer awarded that debarred firm the contract. Within two months the error was discovered, but only after the contractor had incurred expense toward fulfillment of the contract. Nevertheless, the contracting officer notified the contractor that its contract was rescinded and declared void and that no deliveries would be accepted. The Comptroller General found that the contractor had been duly notified concerning its debarred status and of the relevant provisions of ASPR by reason of their publications in the Federal Register. Accordingly, since the contractor knew, or should have known, that the Army contracting officer lacked authority to award a contract to it unless an exception to its debarred status for the purposes of such award had in fact been made by designated authority, The Comptroller General held that under

such circumstances it was incumbent upon the debarred contractor to ascertain whether such a determination had in fact been made before it could rely upon such award as valid. In reaching the conclusion that such a duty was properly imposed upon the debarred contractor, The Comptroller General cited Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). In that latter case, the United States Supreme Court, at page 384, has said:

> * * * anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation * * * even though, as here, the agent himself may have been unaware of the limitations upon his authority.

After finding that the contractor, in Manhattan Lighting, had made no inquiry, and that no exception had in fact been requested or granted, The Comptroller General held that, under such circumstances, award to an administratively debarred contractor was voidable at the option of the Government. Cancellation of the contract upon discovery of the contractor's debarred status was therefore deemed proper, and after such cancellation The Comptroller General concluded there was no longer any basis for payment by the Government of any expenses incurred by the debarred contractor in connection with that transaction.

In a related, unpublished opinion, B-129021, 25 January 1957, The Comptroller General advised the Secretary of the Army that administrative debarment becomes effective as a basis for rejection of a bid as soon as a determination to debar is made by designated authority, and notice to the debarred bidder for that purpose is not material. However, the award of a contract to an administratively debarred firm or individual would be voidable at the option of the Government if the debarred firm or individual had not in fact received such notice, irrespective in either case of notice to the contracting officer who made the award. Although no mention was made therein of suspension, it is clear that the same rules ought to apply to such status as well.

The foregoing cases indicate that a clear distinction is to be made between statutory debarment and administrative debarment and suspension. It is clear, from a consideration of Federal Crop Insurance Corp., supra, and in any event is a familiar and well-established rule, that concepts of estoppel and apparent authority, applicable against other contractors, are not applicable against the Government as a contractor. See, United States v. Hoffart, 256 F. 2d 186, 192 (8th Cir. 1958); Reese v. Government of the Virgin Islands, 277 F. 2d 329, 333 (3d Cir. 1960); Stone v. United States, 286 F. 2d

56, 59 (8th Cir. 1961), and cases cited. However, the doctrine of ratification is applicable in Government contracting, so that the superior of a Government contracting officer, if he has such authority, may ratify and thus confirm what the inferior was unauthorized to do. See, Ford v. United States, 17 Ct. Cl. 60, 76 (1881); Byrne Organization, Inc., et al. v. United States, 152 Ct. Cl. 578, 586, et seq. (1961), and cases cited.

Thus, in Paisner, supra, where award was made to a partnership debarred for violation of a labor statute by action of the Secretary of Labor, no contracting officer of the Government had authority to award a contract to that partnership so long as it was carried on the debarred list. The purported award, therefore, was void ab initio. On the other hand, in the Manhattan Lighting claim, supra, where award was made to an administratively debarred firm due to administrative oversight or ignorance of that firm's debarred status, the erroneous action of the contracting officer, upon its discovery, was susceptible of ratification by superior authority. That award, therefore, was not void ab initio but voidable at the option of the Government. If, upon discovery of his error, the contracting officer does not consider that the making of an exception in such a case would be in the best interest of the Government, and hence makes no request for ratification of the erroneous award, but instead notifies the debarred firm that the award is cancelled or rescinded, the purported award thereupon becomes void and thereafter no payment need be made by the Government of any expense incurred by the debarred contractor in connection with that transaction, except for goods delivered and accepted by the Government. For such goods, the Government need pay only the contract price, less profit, and may counterclaim for any profit made by a debarred contractor on other contracts performed during a period of debarment provided no exception was in fact made by designated authority to permit the award of any such prior contracts. These latter actions, of course, do not arise under a valid contract, and, accordingly, may not be brought before this Board for settlement.

Based upon the record before us in this case, we have found, or consider it reasonable to infer, that the OCAMA contracting officer who issued the subject Purchase Order to appellant on 11 March 1969 did so through administrative oversight or ignorance at that time of appellant's suspended status; but that on or shortly before 25 April 1969 he discovered or had it brought to his attention that appellant was currently listed as a suspended contractor, Type D indefinite. Upon such discovery and after reaching the conclusion that there were no circumstances in this case sufficient to justify his seeking ratification of the erroneous award from superior authority, the OCAMA contracting officer promptly notified appellant that the subject Purchase Order was cancelled. Thereupon the purported award became void. We do not consider that any inequity is imposed upon an administratively debarred or suspended firm or individual by the

requirement that such a firm or individual ascertain accurately whether in fact an exception to such status has been made for the purposes of a particular award during such a period of debarment or suspension.

Accordingly, on and after 25 April 1969, there being no valid and binding contract between the parties, the Board is without jurisdiction to consider this appeal. For that reason, respondent's motion must be granted. The appeal is, therefore, DISMISSED.

Section 8. Contractor Negligence

UNITED STATES v. M. O. SECKINGER, JR., etc.

397 U.S. 203

In the Supreme Court of The United States. No. 395. Dated March 9, 1970.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

This case concerns the construction of a provision common to fixed-price Government construction contracts which provides that the private contractor "shall be responsible for all damages to persons or property that occur as a result of his fault or negligence . . . ." The Court of Appeals for the Fifth Circuit held that the provision could not be construed to allow the Government to recover from the contractor damages suffered by the Government on account of its own negligence. 408 F. 2d 146 (1969). We granted certiorari because of the large amount of litigation which this contract clause has produced and because of the divergent result which the lower courts have reached in construing the same or similar provisions. 396 U.S. 815 (1969). We reverse.

I

The United States had entered into a contract with the Seckinger Company for the performance of certain plumbing work at a United States Marine [Corps] base in South Carolina. While working on this project, one of Seckinger's employees was directed by his foreman to assist a fellow employee on a particular section of pipe which had been partially constructed above a street. About four or five feet above the place where the employee was working, there was an electric wire which carried 2,400 volts of electricity. The employee accidentally came into contact with the wire, was thrown to the ground 18 feet below, and was seriously injured.

The injured employee recovered benefits under South Carolina's workmen's compensation law, S. C. Code §§ 72-1--72-504 (1962), and then commenced a suit in the Eastern District of South Carolina against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, on the theory that his injuries had been sustained as the proximate result of the Government's negligence. The United States, relying on the contract clause, moved to implead Seckinger as a third-party defendant. This motion was denied on the ground that the addition of Seckinger would "unnecessarily and improperly complicate the issues."

On the merits, the South Carolina District Court found that the United States had customarily deenergized its electric wires whenever Seckinger employees were required to work dangerously near them. The court therefore held that the United States had been grossly negligent in failing to deenergize the wire in this particular case. Alternatively, the Government was held to have been negligent in failing to advise Seckinger's employees that the electric wire had not been deenergized. Concluding also that the employee had in no way contributed to his injury, the district judge ordered that he recover a judgment against the United States in the amount of $45,000 plus costs. No appeal was taken from this judgment of the District Court.

Thereafter, the United States proceeded to the District Court for the Southern District of Georgia and commenced the instant suit against Seckinger. The complaint alleged that Seckinger's negligence was solely responsible for its employee's injuries and that therefore the United States should be fully indemnified for the judgment which it had satisfied. In a second count, the Government alleged that Seckinger, having undertaken to perform its contract with the United States, was obligated "to perform the work properly and safely and to provide workmanlike service in the performance of said work."

The District Court granted Seckinger's motion to dismiss the complaint on the alternative grounds, first, that the suit was barred by the prior litigation in South Carolina and, second, that the contractual language was not sufficiently broad to permit the Government to recover indemnification for its own negligence. The Court of Appeals rejected the first ground of decision, but sustained the holding that any recovery on the contract was foreclosed to the United States because its negligence had contributed substantially to the injury. The Court of Appeals held that, under the "majority rule", an indemnitee cannot recover for his own negligence in the absence of a contractual provision which unmistakably authorizes this result. Since the contract here did not unequivocally command that the Government be indemnified for its own negligence, and because the injuries in question were thought to have been caused by the "active direct negligence" of the Government with no more than a "slight dereliction" on the part of Seckinger, no recovery whatsoever on the contract would be permitted to the United States.

In the Government's view, this construction of the clause renders it a nullity, for the United States can never be held liable in tort under the Tort Claims Act or otherwise in the absence of negligence on the part of its agents. Thus, so the argument goes, the contractual provision in question can have meaning only in a context in which both the United States and the contractor are jointly negligent. In that circumstance, the contractor would be obligated to sustain the full burden of ultimate liability for the injuries produced. Alternatively, the Government suggests that it is entitled to indemnity on a comparative basis to the extent that the negligence of Seckinger contributed to its employee's injuries.

II

In the posture in which this case reaches us, the historical background of the clause and evidence concerning the actual intention of these particular parties with respect to that provision are sparsely presented. We do know that the clause was required in Government fixed-price construction contracts as early as 1938. This fact merely precipitates confusion, however, because it was not until the passage of the Tort Claims Act in 1946, Pub. L. 601, ch. 753, §§ 401--424, 60 Stat. 842, as amended, 28 U.S.C. §§ 2670--2680, that the United States permitted recovery in tort against itself for the negligent acts of its agents. Viewed in the pre-Tort Claims Act context, the purpose of the clause is totally unclear except, perhaps, as an exercise in caution on the part of the Government draftsmen, or, conceivably, as an attempt to insulate Government agents from liability in their private capacities if their negligence arguably combined with that of the contractor to produce a given injury.

In American Stevedores, Inc. v. Porello, 330 U.S. 446 (1947), we had before us a contractual provision which was similar to that involved here. There we noted that the clause was susceptible of several different constructions, 330 U.S. at 457-458, and remanded the case to the District Court to ascertain the intention of the parties with respect to the clause. It does not appear that a similar course of action would be fruitful in the instant case. In Porello there were clear indications from the parties that further evidentiary proceedings in the District Court would shed light on the actual intentions of the parties. Here, by contrast, there is not only no representation that further proceedings would aid in clarifying the intentions of the parties, but there is at least tacit agreement that the background of the clause has been explored as thoroughly as possible. In these circumstances, we have no alternative but to proceed directly to the contractual construction problem.

III

Preliminarily, we agree with the Court of Appeals that Federal law controls the interpretation of the contract. See United States v. County of Allegheny, 322 U.S. 174, 183 (1944); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). This conclusion results from the fact that the contract was entered into pursuant to authority conferred by Federal statute and, ultimately, by the Constitution.

In fashioning a Federal rule, we are, of course, guided by the general principles which have evolved concerning the interpretation of contractual provisions such as that involved here. Among these principles is the general maxim that a contract should be construed most strongly against the drafter, which in this case was the United States. The Government seeks to circumvent this principle by arguing that it is inapplicable unless there is ambiguity in the contractual

provisions in dispute and there exists an alternative interpretation which is, "under all the circumstances, a reasonable and practical one." Gelco Builders & Burjay Const. Co. v. United States [11 CCF ¶ 80,835], 369 F. 2d 992, 999-1000 (Ct. Cl. 1966). The Government itself, however, has proffered two mutually inconsistent interpretations of the contract clause. To be sure, one of them is pressed with considerably more enthusiasm than the other. The Government, nevertheless, must be taken implicitly to have conceded (a) that the clause is not without ambiguity and (b) that there is an alternative construction of the clause which is both "reasonable and practical." Even in the Government's view of the matter, therefore, there is necessarily room for the construction-against-drafter principle to operate.

More specifically, we agree with the Court of Appeals that a contractual provision should not be construed to permit an indemnitee to recover for his own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties. This principle, though variously articulated, is accepted with virtual unanimity among American jurisdictions. The traditional reluctance of courts to cast the burden of negligent actions upon those who were not actually at fault is particularly applicable to a situation in which there is a vast disparity in bargaining power and economic resources between the parties, such as exists between the United States and particular Government contractors. See United States v. Haskin, 395 F. 2d 503, 508 (C.A. 10th Cir. 1968).

In short, if the United States expects to shift the ultimate responsibility for its negligence to its various contractors, the mutual intention of the parties to this effect should appear with clarity from the face of the contract. We can hardly say that this intention is manifested by the formulation incorporated into the present contract. By its terms, Seckinger is clearly liable for its negligence, but the contractual language cannot readily be stretched to encompass the Government's negligence as well.

On the other hand, we must not fail to accord appropriate considerations to Seckinger's clear liability under the contract for all damages which resulted from its fault or negligence. (Emphasis added.) The view adopted by the Court of Appeals, and now urged by Seckinger, would drain this clause of any significant meaning or protection for the Government, and, indeed, would tend to insulate Seckinger from potential liability in any circumstance in which any negligence is also attributable to the United States. Whatever may have been the actual intention of the parties with respect to the meaning of the clause, it is extremely difficult to believe that they sought to utilize this contractual provision to reduce Seckinger's potential liability under common law or statutory rules of contribution or indemnity. Yet, that is arguably the result if the clause is interpreted to mean that Seckinger's liability is limited to situations in which it, as opposed to the United States, is the sole negligent party.

Furthermore, in this latter situation, it is perfectly clear that both before and after the passage of the Tort Claims Act, the United States could not, in any event, be charged with liability in the absence of negligence on its part. In short, the construction of the clause adopted by the Court of Appeals tends to narrow Seckinger's potential liability and, also, limits its application to circumstances in which no doubt concerning Seckinger's sole liability existed. In the process, considerable violence is done to the plain language of the contract that Seckinger be responsible for all damages resulting from its negligence.

A synthesis of all of the foregoing consideration leads to the conclusion that the most reasonable construction of the clause is the alternative suggestion of the Government, that is, that liability be premised on the basis of comparative negligence. In the first place, this interpretation is consistent with the plain language of the clause, for Seckinger will be required to indemnify the United States to the full extent that its negligence, if any, contributed to the injuries to the employee.

Secondly, the principle that indemnification for the indemnitee's own negligence must be clearly and unequivocably indicated as the intention of the parties is preserved intact. In no event will Seckinger be required to indemnify the United States to the extent that the injuries were attributable to the negligence, if any, of the United States. In short, Seckinger will be responsible for the damages caused by its negligence; similarly, responsibility will fall upon the United States to the extent that it was negligent.

Finally, our interpretation adheres to the principle that, as between two reasonable and practical constructions of an ambiguous contractual provision, such as the two proffered by the Government, the provision should be construed less favorably to that party which selected the contractual language. This principle is appropriately accorded considerable emphasis in this case because of the Government's vast economic resources and stronger bargaining position in contract negotiations.

For these reasons, we reverse the judgment of the Court of Appeals and remand this case to the District Court for further proceedings consistent with this opinion.

Reversed and remanded.

[Dissenting Opinion]

MR. JUSTICE STEWART, with whom CHIEF JUSTICE and Mr. JUSTICE DOUGLAS join, dissenting. The standard form that the Government used for its fixed-price construction contracts has long contained a single sentence saying that the contractor "shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work." For more than 30 years it has evidently been understood that these words mean what they rather clearly say--that the contractor cannot hold the Government for losses he incurs resulting from his own negligence. The provision, in short, is what the Court of Appeals called "a simple responsibility clause." 408 F. 2d, at 148. But today this innocuous boilerplate language is turned inside out. For the Court says that the provision really is a promise by the contractor to reimburse the Government for losses it incurs resulting from its negligence.

To be sure, the Court does not go quite so far as to hold that this obscure clause operates as a complete liability insurance policy. But the Court does hold that the clause requires the contractor to indemnify the Government "to the full extent that its negligence, if any, produced or contributed to the injuries to the employee." The magnitude of the burden the Court imposes is well illustrated by the circumstances of this case. Here an employee of the contractor was injured in the scope of his employment on plumbing work that the contractor was performing at the Paris Island Marine Depot in South Carolina. The employee recovered from the contractor the benefits to which he was entitled under the state workmen's compensation law. The employee then sued the Government under the Federal Tort Claims Act, claiming that the injuries had actually been caused by the Government's negligence. The Federal District Court agreed, finding that the negligence of the United States was the "sole cause" of the employee's injuries and awarding him $45,000 in damages. The Court today says that the United States can now recover an indeterminate portion of this $45,000 from the contractor, because the contractor has agreed to "respond by way of indemnity to the United States . . . ."

Despite intimidations in the Court's opinion to the contrary, we do not deal here with "common law or statutory rules of contribution or indemnity." The only question the Court decides is the meaning of the words of a clause in a Government contract. I think the meaning attributed to that clause today is as unconscionable as it is inaccurate.

The clause first appeared in Government contracts at least eight years before the enactment of the Federal Tort Claims Act in 1946. Before the passage of that Act the United States could not be sued in tort for personal injuries. Thus there was absolutely no reason for the Government to secure for itself a right to recovery over against an alleged joint tortfeasor. Yet we are asked to believe that the

drafter of this clause was so prescient as to foresee the day of Government tort liability nearly a decade in the future, and so ingenious as to smuggle a provision into a standard contract form, that would when that day arrived, allow the Government to shift its liability onto the backs of its contractors. This theory is nothing short of incredible.

In drafting its construction contracts the United States certainly has both the power and the resources to write contracts providing expressly that it will pass off onto its contractors, either in whole or in part, liability it incurs for damages caused by its own judicially determined negligence. The Government could require its contractors to hold it harmless without regard to fault on their part, or it could establish a proration of liability arising from the joint negligence of the parties. But the contractual provision before us does neither. It no more says that the contractor shall reimburse the Government for his share of joint negligence than that he shall be a liability insurer for the Government's sole negligence.

The Court nonetheless manages to discover that the clause amounts to a contribution agreement, relying for its conclusion upon cases involving not the simple responsibility clause before us, but express indemnification agreements with "hold harmless" clauses. This result is said to be desirable because it ensures a fair distribution of loss between those jointly responsible for the damage. But when Seckinger entered into this contract, he had every reason to expect that his liability for injuries to his employees would be limited to what is imposed by the South Carolina compensation law. That law relieved him of responsibility in tort in exchange for his guaranty that his employees would recover without regard to fault. Presumably his bid on the Government project reflected his reasonable expectation that this would be the extent of his liability on account of employee accidents. Now the Court heaps an unforeseen Federal contractual burden atop the requirement the State has already imposed.

If the Government wants to impose additional liabilities upon those with whom it contracts to do its work, I would require it to do so openly, so that every bidder may clearly know the extent of his potential liability. Even in the domain of private contract law, the author of a standard form agreement is required to state its terms with clarity and candor. Surely no less is required of the United States of America when it does business with its citizens.

Mr. Justice Holmes once said that "[m]en must turn square corners when they deal with the Government." I had always supposed this was a two-way street. The Government knows how to write an indemnification or contribution clause when that is what it wants. It has not written one here.

I would affirm the judgment.

Section 9. Defense Production Act

KEARNEY & TRECKER CORPORATION v. U.S.

Ct. Cl. No. 477-81C (1982)

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

FRIEDMAN, Chief Judge, delivered the opinion of the court:

In this case of first impression, the plaintiff seeks just compensation under the fifth amendment for the alleged taking of its property that occurred when, as a result of the Government's requiring the plaintiff to expedite delivery of a machine it was manufacturing for a Government contractor, the plaintiff lost a sale of a similar machine under a contract with a private contractor. The plaintiff seeks the damages it suffered on the aborted second sale, apparently consisting of its expenses and lost profits. The Government has moved for summary judgment, which we grant on the ground that the plaintiff has not stated a valid claim for a compensable fifth amendment taking.

I.

In late 1979, the plaintiff entered into contracts with Rolls Royce, Ltd., and Lockheed-California ("Lockheed") to manufacture for, and to sell to, each of them a complicated machining device called a "Moduline." The delivery date for the Rolls Royce Moduline was January 1981, and the purchase price was $682,480. The delivery date for the Lockheed Moduline was December 15, 1981, and the contract price was cost plus a fixed fee. Lockheed ordered its Moduline for use in a classified Air Force project.

In the second half of 1980, the Air Force decided that its requirements necessitated that Lockheed's production schedule be accelerated. This in turn required that Lockheed obtain its Moduline in June 1981. Acceleration of the Moduline delivery date was to be accomplished through the Defense Production Act of 1950, as amended, Pub. L. No. 81-774, 64 Stat. 798, codified at 50 U.S.C. App. §§ 2061 et seq. (1976 & Supp. IV 1980)(the "Act").

The Act authorizes the President "to require that performance under contracts or orders . . . which he deems necessary . . . to promote the national defense shall take priority over performance under any other contract or order." 50 U.S.C. App. § 2071(a). The President has delegated this authority to the Secretary of Commerce,

who in turn has delegated it to the Office of Industrial Management (the "Office"). The means by which the Office exercises this authority is the rating of contracts or orders. There are three categories of ratings, each of which gives the contract or order priority over unrated contracts or orders. One of the three ratings, called a directive, takes priority over the other two ratings and was issued in this case. The plaintiff does not contend that it was unaware when it accepted the Lockheed order in 1979 that the Government could expedite delivery under the Act.

When the plaintiff was informed that the Air Force was considering the rating of the Lockheed Moduline to expedite its delivery, the plaintiff told the Government that that action would delay the delivery of several Modulines to commercial customers with unrated purchase orders.

Because Modulines were "made to order", generally took two years to produce, and came off the assembly line at a rate of only two per month, the plaintiff could not expedite production of the Moduline originally designated for Lockheed to meet the June delivery date. Instead, the plaintiff would have to supply Lockheed with a different Moduline that was being manufactured for some customer with a lower priority but an earlier delivery date and that could be modified by June 1981 to meet Lockheed's specifications. Consequently, the delivery date for the commercial customer whose Moduline was delivered to Lockheed would be delayed--perhaps until the Moduline originally scheduled for Lockheed could be completed.

Two factors would increase further the delay for the commercial customer preempted by the rating of the Lockheed contract. First, a three-months' strike in the second half of 1980 shut down the plaintiff's assembly line and so delayed its overall delivery schedule. Second, the plaintiff had several governmentally rated orders for Modulines other than the Lockheed order. These orders would have to be given priority in any rearrangement of the plaintiff's delivery schedule (that is, efforts first would have to be made to minimize the delay on these rated orders before the needs of the commercial customers could be met).

After considering the plaintiff's concerns, the Office on November 6, 1980, telexed a directive to the plaintiff ordering that the Moduline be delivered to Lockheed by June 30, 1981.

On November 12, 1980, the plaintiff accepted the directive. The plaintiff, however, informed the Office that the new Lockheed delivery date would result "in a five month delay beyond our three month strike delay for one of our commercial customers." Rolls Royce was the unlucky commercial customer. Because of the delay, Rolls Royce notified the plaintiff in late January 1981 that it was cancelling its order.

The plaintiff informed the Office in February 1981 of the Rolls Royce cancellation and stated that it would look "to the Government . . . for the reimbursement for all financial loss and damages occasioned by the preemption of our products by the utilization of these priorities." Subsequently, the plaintiff calculated the total loss at $434,596, the amount for which it now sues.

The plaintiff's petition contends that the issuance of the directive constituted a taking of the plaintiff's property, for which the fifth amendment of the Constitution requires the Government to pay just compensation. The plaintiff argues the Government "took both [the plaintiff's] contract with Rolls Royce and the Modu-line" [sic] delivered to Lockheed.

II.

A. The Government argues that its directive that the plaintiff expedite the delivery of the Moduline to Lockheed did not constitute a taking. Assuming without deciding, however, that it was a taking, the plaintiff still cannot recover.

The only property of the plaintiff that the directive "took" was the Moduline intended for Rolls Royce but diverted to Lockheed. The plaintiff received for that Moduline the same compensation for which it had agreed to deliver a Moduline to Lockheed, i.e., cost plus a fixed fee. We cannot say that this amount did not constitute just compensation for the Moduline.

Just compensation for property the Government has taken ordinarily is determined by the fair market value of the property. Kimball Laundry Co. v. United States, 338 U.S. 1, 5-6 (1949); United States ex rel. TVA v. Powelson, 319 U.S. 266, 275 (1943); United States v. Miller, 317 U.S. 369, 374-75 (1943). See generally 4 NICHOLS' THE LAW OF EMINENT DOMAIN § 12.2 (3d ed. J. Sachman 1981) [hereinafter cited as NICHOLS' EMINENT DOMAIN]. Fair market value provides an objective standard that properly ignores the owner's or condemnor's "unique need for [the] property or idiosyncratic attachment to it." Kimball Laundry Co., 338 U.S. at 5.

In the present case, there is no established market price for Modulines. However, Lockheed and the plaintiff negotiated a price (i.e., cost plus a fixed fee) for the Moduline before the plaintiff began to manufacture it or the taking occurred. Cf. 4 NICHOLS' EMINENT DOMAIN, supra, § 12.311 (discussing the relevance for valuation of prior sales of the property or contemporary sales of similar property). The plaintiff does not assert that the price resulted from coercion or was below the market. It does not contend that the Moduline it delivered to Lockheed differed significantly from the one originally ordered by and intended for Lockheed, or that any changes it made in the Moduline being built for Rolls Royce to meet Lockheed's requirements so increased its costs as to make the Lockheed price unfair. In the circumstances, the negotiated price constituted just compensation for the Moduline itself.

The plaintiff, however, argues: "What was appropriated was not just the Modu-Line, but [the plaintiff's] investment backed expectations to produce and deliver a Modu-Line to Rolls Royce at a date certain. [The plaintiff] has not been compensated for this appropriation . . . ." To the extent this contention refers to the plaintiff's inability to perform its contract with Rolls Royce, we deal with that issue below. If, however, the plaintiff is arguing that because of the "idiosyncratic" needs of Rolls Royce, the English manufacturer would have paid more than the market price (i.e., the price Lockheed negotiated) for the particular Moduline delivered to Lockheed, that is not a factor which may be considered in determining just compensation. See, e.g., Kimball Laundry Co., 338 U.S. at 5. The frustration of the plaintiff's "expectations" is not compensable. E.g., Powelson, 319 U.S. at 281-82; see also R. J. Widen Co. v. United States, 174 Ct. Cl. 1020, 1029, 357 F.2d 988, 994 (1966); 4 NICOLS' EMINENT DOMAIN, supra, § 12.22[2] at p. 12-111 (it is the objective value of the property taken, not the loss to the property's owner, that is the measure of compensation).

B. The plaintiff also argues that the directive appropriated its contract with Rolls Royce. The Government, however, did not take the contract. Although the directive may have frustrated the plaintiff's performance of the contract, that frustration was an "unintended incident" of the taking of the Moduline, for which the plaintiff is not entitled to receive just compensation under the fifth amendment.

A contract is property within the meaning of the fifth amendment, e.g., Lynch v. United States, 292 U.S. 571, 579 (1934), and the Government may appropriate a contract with the resulting obligation to pay just compensation, e.g., Brooks-Scanlon Corp. v. United States, 265 U.S. 106 (1924). On the other hand, not every exercise of Governmental power that interferes with, or frustrates, performance of a contract constitutes a compensable taking. E.g., Omnia Corp. v. United States, 261 U.S. 502, 510-11 (1923); Knox v. Lee, 79 U.S. (12 Wall.) 457 (1870); Klein v. United States, 179 Ct. Cl. 910, 914-16, 375 F.2d 825, 818-29 (1967), cert. denied, 389 U.S. 1037 (1968); 4 NICHOLS' EMINENT DOMAIN, supra, § 13.33.

In Omnia, the plaintiff had entered into a contract with a steel manufacturer to purchase a large quantity of steel at below market price. Prior to any delivery of steel to Omnia, the Government requisitioned the manufacturer's entire production for the year. Omnia sued the Government for just compensation, claiming that the Government requisition effected a taking of its property, i.e., the contract.

The Court held that the requisition did not effect a compensable taking of Omnia's contract. The Court noted that the taking clause of the fifth amendment covers only direct appropriations of private property and not "consequential loss or injury resulting from lawful Governmental action." 261 U.S. at 510. The Court rejected Omnia's argument that the steel plate was so identified with the contract "that the taking of the former, ipso facto, took the latter." Id.

The Court stated: "As a result of this lawful Government action [the requisitioning of the steel] the performance of the contract was rendered impossible. It was not appropriated but ended." Id. at 511. "[T]he effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the Government. . . . Frustration and appropriation are essentially different things." 261 U.S. at 513.

The principles announced and applied in Omnia are equally applicable here, and similarly compel the conclusion that the directive did not effect a taking of the plaintiff's contract with Rolls Royce. The Government did not appropriate the contract. The directive that required the plaintiff to expedite delivery of the Moduline to Lockheed merely frustrated the performance of the plaintiff's contract with Rolls Royce. The Government did not appropriate any of the rights the plaintiff had under the contract but only made it impossible for the plaintiff to perform it. As in Omnia, "the effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the Government." See also T.O.F.C. v. United States, Ct. Cl. No. 207-81C, slip op. at 10-11 (decided June 30, 1982).

The fact that in Omnia it was the purchaser rather than the manufacturer who sued for a taking, does not provide a basis for distinguishing that case, as the plaintiff seeks to do. The Court focused not upon the effect of the Government's action upon the purchaser, but upon the effect of that action upon the manufacturer's ability to perform its contract with the purchaser. Omnia makes it clear that the mere frustration of a contract resulting from the Government's exercise of its power of eminent domain is not a "taking" for which just compensation must be awarded.

In determining just compensation for the taking of land, the courts have refused to include such items as "expenses incurred in having to readjust manufacturing operations, frustration of contract or business, loss of business, . . . [because they] are deemed non-recoverable consequential damages." Georgia Pacific Corp. v. United States, 226 Ct. Cl. ___, ___ n. 44, 640 F.2d 328, 361 n. 44 (1980); see also United States v. 7,216.50 Acres of Land, 507 F.Supp. 228, 235-36 (D.S.C. 1980). Since an owner of property appropriated by the Government "is not entitled to compensation for the loss of profits on his contracts (existing and expected) taken as a whole--that is, injury to his business--a fortiori he is not entitled to compensation for the loss of expected profits on a single contract." 4 NICHOLS' EMINENT DOMAIN, supra, § 13.33 at p. 13-238.

CONCLUSION

The defendant's motion for summary judgment is granted, and the petition is dismissed.

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