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Some Aspects of the Law of Government Contracts

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THE Federal Government from its inception has been in the position of a contractor, but the law regarding its relationship as such, though slow in development, is now proceeding with accelerated tempo. When the government steps down from its position as a sovereign power and takes upon itself the legal position of an ordinary private citizen entering into contracts, it is, and should be, in general bound by the same laws that govern contracts entered into between individuals.1 If the government is to buy and sell, construct, hire, purchase, condemn, procure, or take part in business activities, it should place itself in a position where damages may be claimed against it. It was not until 1855, however, that the Court of Claims was established to deal with such problems, and the original law thereof had to be subsequently amended by the Tucker Act.2

While the government, as a contracting party, is subject to the general rules of law relating to contracts, there are exceptions to this general proposition. For example, the statute of limitations does not run against the government, nor may its position be jeopardized by the laches of its officers and agents. Failure on the part of the government to plead the statute of limitations cannot confer jurisdiction on a court;3 when proceeding as a litigant it is not estopped by its acts as a sovereign power;4 nor is it bound by those acts of its agents which are detrimental to its own interests. Courts have frequently adopted a principle, analogous to that controlling a guardian and ward, that the government, by reason of the fact that it can act only through its agents, is to be treated as a ward. Its agents are, therefore, placed in the position of guardians, and they are not permitted to take

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3 American Ship Fittings Corp. v. United States, 70 Ct. Cl. 679 (1930).
any action which would be detrimental to the position of the ward and thereby bind it. As was aptly said in Garman, Administrator v. United States:

This court has always regarded the Government as somewhat in the character of a ward, and its officers in the character of its guardians, and it has never given effect to a contract where it appeared that the contractor has directly or indirectly, by direct bribes or corrupt influences, sought to impair the good faith of the guardian. The corrupt purchase of political or personal influence is more insidious, and in its result as bad as direct bribery. Whoever has business dealings with a trustee, a guardian, an executor, or officers of the Government can sway them by no influence which will be prejudicial to the interests of the cestui que trust.5

Persons negotiating contracts with the government must, therefore, approach the task with this fundamental requirement in mind.

LIMITATIONS ON THE AGENT'S AUTHORITY

It is equally well settled that no officer can bind the government when he acts outside the scope of his authority.6 An individual seeking to do business with the government is bound to know the extent of the authority of its representative.7 One common limitation is that no expenditure from government funds, except in a few categories, may be made beyond the fiscal year, and no officer in signing a contract has power to bind the government to pay more money than the amount which has been appropriated for the contract.8 There


6 In Whiteside v. United States, 93 U.S. 247 at 257, 23 L. Ed. 882 at 885 (1876), the court said: "... it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations, or collusion, might be turned to the detriment and injury of the public."

7 Bausch & Lomb Optical Co. v. United States, 78 Ct. Cl. 584 (1934).

8 R. S. § 3679; 33 Stat. 1257, as amended by 34 Stat. 48; 31 U.S.C.A. § 665 reads in part: "No executive department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law." R. S. § 3732; 34 Stat. 255; 41 U.S.C.A. § 11, also reads: "No contract or purchase
are instances, however, in which contracts may be made even though no money has been appropriated to pay the contractor, as in instances where Congress has passed special legislation authorizing the making thereof. Clearly, in all such cases, the government agent possesses the authority, but if the act limits the amount of money that the contractor shall receive, the government is not bound to pay more than that sum. Conversely, whenever an appropriation act has been passed, there is implied authority to enter into a contract in order to carry out the purposes for which the money was appropriated. It should also be borne in mind that when a contract comes to an end by reason of the termination of the fiscal year, or when the funds to pay the contractor have been exhausted, the contract cannot be modified to carry it on into a subsequent year, nor can an additional appropriation be made; but a new contract must be entered into.

Furthermore, a federal statute provides in part: "Nor shall any department nor any officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property." By reason thereof, it has been the well-settled policy of the government not to accept gratuitous services. Since many instances have arisen during the last two years in which it has been to the advantage of the contractor to render gratuitous service, the Army Service Forces have been forced to issue the following ruling: "No department or officer of the Government may accept voluntary service for the government except . . . when a written statement is obtained that the service rendered will not be on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year."

9 Curtis v. United States, 2 Ct. Cl. 144 (1886).
10 Shipman v. United States, 18 Ct. Cl. 138 (1883).
made the basis of a future claim against the Government for compensation."

ADVERTISING FOR BIDS

Another important aspect of the law concerning government contracts which must be considered is that dealing with advertising for and soliciting of bids. The provisions of the First War Powers Act of 1941,\(^{14}\) empowered the President to authorize agents of the government to enter into contracts without regard to statutory requirements as to advertising. By the provisions of Executive Order No. 9001 dated December 27, 1941, the President has, in turn, authorized the War Department to negotiate contracts without such preliminary advertising for bids. Since then, the War Production Board has also generally prohibited the letting of contracts by advertising and competitive bidding. However, due to the fact that the provisions of Section 3709 of the Revised Statutes are still applicable to contracts not having to do with the prosecution of the war,\(^{15}\) it would be well to bear such statute in mind as well as the decisions thereunder. At the same time, it should be remembered that another statute requires advertising for the purchase of supplies for the Army, except in cases of emergency.\(^{16}\) These provisions are for the sole benefit and protection of the government and cannot be pleaded by the contractor.\(^{17}\) Any contract which comes within such statutes and is entered into in violation thereof is void.\(^{18}\)

There is no set standard of advertising as to quantity, number of prospective bidders contacted, or sufficiency of advertising, but it seems that any advertising that meets the particular circumstances will be deemed sufficient. A former Attorney General set forth a general formula to be used to test the adequacy of the advertising when he wrote:

\(^{13}\) Procurement Regulations, § 109.1.
\(^{16}\) 31 Stat. 905; 10 U.S.C.A. § 1201; Act of March 2, 1901, Ch. 803.
\(^{17}\) American Smelting & Refining Co. v. United States, 259 U.S. 75, 42 S. Ct. 420, 66 L. Ed. 833 (1922).
\(^{18}\) United States v. Speed, 75 U.S. (8 Wall.) 77, 19 L. Ed. 449 (1869); Schneider v. United States, 19 Ct. Cl. 547 (1884).
While there is no express provision as to the persons with whom the Postmaster-General shall contract or to whom he shall by advertisement address his proposals, he is justified in doing so to those who are able to do the work or furnish the supplies which he needs in his Department. In such a matter he will exercise his own discretion as to that which shall be for the best interests of the public, and will carry out the policy of the statute by thus limiting his advertisements when he shall deem it expedient so to do. If, knowing the articles needed and knowing that they can only be supplied by particular classes of persons, he sees fit to limit his advertisement to them, he may properly do so. Contracts thus made will not ordinarily be the subject of traffic or of transfer, but will be performed by those with whom they are made.  

By way of interpreting the words “personal services” as used in the statute, it has been suggested that the personal services must be such as could only be rendered by the contractor himself, so that he thereby becomes a servant of the government and not the employer of persons to carry out the terms of the contract for him. As to just what constitutes a “public exigency” within the meaning thereof is not entirely clear, as neither the courts nor the Attorney General nor the Comptroller General have laid down any precise definition. All the reader can do is to consult the few cases which have attempted an interpretation of such phrase.

Obviously advertising for bids is not required in situations where there is only one source of supply; where the service is to be rendered by a public utility; or where the price is fixed by statute. Similarly, where a patent is purchased or rights thereunder are obtained by contract, there need be no advertising as there can be no competition. Contracts involving small purchases and the like may often be completed without the solicitation of bids. In that regard it


may be noticed that the following departments, offices, and agencies of the government may let contracts up to the following amounts without advertising and competitive bidding:

<table>
<thead>
<tr>
<th>Department</th>
<th>Maximum Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>American Battle Monuments Commission</td>
<td>$500.00</td>
</tr>
<tr>
<td>Botanic Garden (for supplies and equipment)</td>
<td>50.00</td>
</tr>
<tr>
<td>Botanic Garden (for plants, trees, and shrubs)</td>
<td>300.00</td>
</tr>
<tr>
<td>Bureau of the Budget (for office equipment)</td>
<td>50.00</td>
</tr>
<tr>
<td>Bureau of Foreign and Domestic Commerce</td>
<td>100.00</td>
</tr>
<tr>
<td>Bureau of Interparliamentary Union for Protection</td>
<td>As necessary</td>
</tr>
<tr>
<td>of International Arbitration (for stenographic reporting services)</td>
<td></td>
</tr>
<tr>
<td>Department of Interior</td>
<td>100.00</td>
</tr>
<tr>
<td>Department of State (acting in the United States)</td>
<td>100.00</td>
</tr>
<tr>
<td>Department of State (acting outside of the United States)</td>
<td>300.00</td>
</tr>
<tr>
<td>Federal Communications Commission</td>
<td>25.00</td>
</tr>
<tr>
<td>The International Committee of Aerial Legal Experts</td>
<td>As necessary</td>
</tr>
<tr>
<td>(for stenographic and other services)</td>
<td></td>
</tr>
<tr>
<td>Medical Department of the Army (for medicines and medical supplies)</td>
<td>As necessary</td>
</tr>
<tr>
<td>Social Security Board</td>
<td>100.00</td>
</tr>
<tr>
<td>Bureau of Mines</td>
<td>500.00</td>
</tr>
<tr>
<td>Bureau of Reclamation</td>
<td>300.00</td>
</tr>
<tr>
<td>Architect of the Capitol</td>
<td>200.00</td>
</tr>
<tr>
<td>Geological Survey</td>
<td>50.00</td>
</tr>
</tbody>
</table>

Further exceptions to the rule against contracting without advertising for bids, except as to contracts having to do with the prosecution of the war, are set out in Title 41, Section 6 of the United States Code.\(^{24}\)

**NECESSITY FOR A WRITTEN CONTRACT**

Under ordinary circumstances all government contracts must be in writing,\(^{25}\) but, owing to the war situation, this requirement was temporarily abrogated.\(^{26}\) Section 303 of the Procurement Regulations, as amended May 28, 1943, however, reads: "Every purchase transaction except those where payment is made coincidentally with receipt of sup-

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\(^{26}\) Public Law 276, Oct. 21, 1941, 55 Stat. 743.
plies will be evidenced by a written contract." Existence of a formal written contract is, therefore, desirable. Again, the former of the statutes has been construed to be for the benefit of the government, and cannot be pleaded by the contractor. A leading decision by the late Justice Holmes involving such statute, that of United States of America v. New York & Porto Rico Steamship Company^27 contains the following pertinent language:

By this section it is made the duty of the Secretaries of War, the Navy, and the Interior to cause every contract made by their authority on behalf of the government "to be reduced to writing, and signed by the contracting parties with their names at the end thereof;" all the copies and papers in relation to the same to be attached together by a ribbon and seal, etc. . . .

The statute does not address itself in terms to the effect of the form upon the liability of the parties, like the statute of frauds. Whatever effect it has in that way is not a matter of interpretation in a strict sense, but is implied. The extent of the implication is to be gathered from the purpose of the section and such other considerations as may give us light . . . It is called "An act to Prevent and Punish Fraud on the Part of Officers Intrusted with Making of Contracts for the Government," and this was recognized as the purpose in Clark v. United States, 95 U. S. 539, 24 L. Ed. 518 [1877]. In that case some of the justices thought that the decision went too far in treating the section as a statute of frauds even in favor of the United States; and while it is established that a contract not complying with the statute cannot be enforced against the government, it never has been decided that such a contract cannot be enforced against the other party. The prevailing opinion cannot be taken to signify that the informal contract is illegal, since it went on to permit a recovery upon the quantum valebat when the undertaking had been performed by a claimant against the United States . . . Of course the statute does not mean that its maker, the government, one of the ostensible parties, is guilty of unlawful conduct, or that the other party is committing a wrong in making preliminary arrangements, if later the Secretary of the Navy does not do what the act makes it his duty to do. There is no principle of mutuality applicable to a case like this, any more than there necessarily is in a statute requiring a writing signed by the party sought to be charged. The United States needs the publicity, form, regularity of returns and affidavit in order to prevent possible frauds upon it by officers. A private person needs no such protection against a written undertaking signed by himself. The duty is imposed upon the officers of the government, not upon him. We see no reason for extending the implication of the act beyond the evil that it seeks to prevent. Even when a statute in

^27 239 U.S. 88, 36 S. Ct. 41, 60 L. Ed. 161 (1915).
so many words declares a transaction void for want of certain forms, the party for whose protection the requirement is made often may waive it, "void" being held to mean only voidable at the party's choice.\textsuperscript{28}

\section*{APPROVAL BY SENIOR OFFICIALS}

Many government contracts must also be approved by a higher officer before they can take effect. This is often true where a directive has been issued containing the precise term concerning which a contract is to be executed but it is later discovered that these terms cannot be strictly met. In such instances, the contracting officer will insert a statement in the body of the contract that the same is subject to approval of a certain higher officer, and is to possess no force and effect until so approved. The customary procedure in such cases is for the higher official to indicate his approval upon the face of the contract, but this method is not exclusive. In the case of \textit{Tenney v. United States},\textsuperscript{29} for example, the court held that, where the approval of a superior officer was required, the fact that the superior officer personally approved the payment of vouchers under the contract constituted approval of the contract itself. In arriving at that result, the court relied on \textit{Speed v. United States}\textsuperscript{30} and said: "\ldots where a contract provides that it shall be subject to the approval of the Commissary-General, but does not prescribe any mode by which the approval shall be evidenced, there being no rule of law which prescribes any, it may be approved circumstantially."\textsuperscript{31} In the \textit{Speed} case, a contract was entered into for the slaughtering of hogs and the packing of pork for the Army, which required approval by the Commissary-General. The contract did not state how such approval was to be indicated, but the Court of Claims allowed a recovery since the Commissary-General had written to the contracting officer expressing satisfaction at the progress made under the contract.

In the case of \textit{Monroe v. United States},\textsuperscript{32} however, a contract was drafted containing the words: "This contract shall

\textsuperscript{28} 239 U.S. 88 at 91, 36 S. Ct. 41, 60 L. Ed. 161 at 163.
\textsuperscript{29} 10 Ct. Cl. 269 (1874).
\textsuperscript{30} 2 Ct. Cl. 429 (1888).
\textsuperscript{31} 10 Ct. Cl. 269 at 273.
\textsuperscript{32} 184 U.S. 524, 22 S. Ct. 444, 46 L. Ed. 670 (1902).
be subject to the approval of the Chief of Engineers, United States Army." The form used was that furnished in advance by the Chief of Engineers. After the contract had been accepted by the contracting officer and the contractor had made preparations to do the work, the United States, a few days after the work was to have commenced, ordered all work stopped and the contract abrogated. Suit for damages was dismissed by the Court of Claims and an appeal was taken. The Supreme Court, sustaining the holding of the Court of Claims, said:

It is the final written instrument that the statute contemplates shall be executed and signed by the parties, and which shall contain and be the proof of their obligations and rights. And it was such written instrument that was to be approved by the chief of engineers. The approval was to be a future act . . . The approval, therefore, did not consist of something precedent, but was to consist of something subsequent. That which preceded was inducement only, and contemplated an instrument of binding and remedial form, and hence to contain covenants imposing obligations and giving rights and remedies, containing provisions . . . for changes and extra work—indeed, of the provisions which prudence and necessity require and those which the statutes of the United States might require. And the final right to see that this was done, the parties agreed, should be devolved upon the chief of engineers, and it was not satisfied by prior instructions. In other words, a final reviewing and approving judgment was given to the chief of engineers, and was given by a covenant so expressed as to constitute a condition precedent to the taking effect of the contract. If the covenant did not mean that, it was idle. Construed as prospective, it had a natural purpose. The engagement of the parties did not end with the bid and its acceptance. The performance of the work was to be secured, and the final judgment of what was necessary for that, as we have already said, was to be given by the chief of engineers.33

From these foregoing authorities, the rule may be deduced that, when approval by a higher official is necessary, that approval is a condition precedent and must be given in order to give validity to the contract, but the form of the approval is immaterial.

EXISTENCE OF AN IMPLIED CONTRACT

Where no formal written contract exists, a question may arise as to the possibility of finding an implied contract. In that regard it may be noted that the law, as applied in govern-

33 184 U.S. 524 at 527, 22 S. Ct. 444, 46 L. Ed. 670 at 672.
mental situations, has had a long and tortuous history due mainly to the fact that the United States is a sovereign power. In *Russell v. United States*, it was stated that:

If the United States was a person, on the facts of this record (assuming, of course, the petition to be true), it could be sued as upon an implied contract, but it is the prerogative of a sovereign not to be sued at all without its consent or upon such causes of action as it chooses. It has not chosen to be sued in an action sounding in tort this court has declared, as we have seen.

It may be noted, in passing, that the Russell case was decided in 1900 and since then several statutes have been passed by Congress allowing payment of claims even though they arise out of tort. In fact, as recently as July 3, 1943, further provision has been made to provide for the settlement of claims for damage to or loss or destruction of property or personal injury or death caused by military personnel or civilian employees, or otherwise incident to the activities of the War Department or of the Army. It might also be pointed out that, regardless of such statutes, the officers and agents of the government have always been personally liable in tort actions.

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34 182 U.S. 516, 21 S. Ct. 899, 45 L. Ed. 1210 (1901).
35 182 U.S. 516 at 535, 21 S. Ct. 899, 45 L. Ed. 1210 at 1217.
37 Public Law 112, 78th Congress, 1st Session, Ch. 189, § 1026, reads in part: "That the Secretary of War, and, subject to appeal to the Secretary of War, such other officer or officers as he may designate... are hereby authorized to consider, ascertain, adjust, determine, settle and pay in amount not in excess of $500.00, or in time of war not in excess of $1,000, where accepted by the claimant in full satisfaction and final settlement, any claim against the United States arising on or after May 27, 1941, when such claim is substantiated in such manner as the Secretary of War may by regulation prescribe, for damage to or loss or destruction of property, real or personal, or for personal injury or death, caused by military personnel or civilian employees of the War Department or of the Army while acting within the scope of their employment, or otherwise incident to noncombat activities of the War Department or of the Army, including claims... for damage to or loss or destruction of personal property bailed to the Government and claims for damages under a lease, express or implied, or otherwise: Provided, that the damage to or loss or destruction of property, or the personal injury or death, shall not have been caused in whole or in part by any negligence or wrongful act on the part of the claimant, his agent, or employee. The provisions of this Act shall not be applicable to claims arising in foreign countries or possessions thereof... The Secretary of War may report such claims as exceed $500, or in time of war $1,000, to Congress for its consideration."
for any wrong committed to the property rights of persons, even though that wrong be done pursuant to direction of the United States.  

By the express terms of the Tucker Act, the government is subjected to liability on contracts implied in fact, and perhaps the leading case illustrative thereof is that of Clark v. United States. In that case, an oral agreement had been entered into between the claimant and an officer of the Quartermaster Department, with the approval of the Commanding General, whereby the Quartermaster's Department should have the use of the steamer "Belle" at the rate of $150.00 per day on condition that if the steamer performed in a satisfactory manner on a trial trip, a written agreement was to be entered into. According to the terms of the oral agreement, the boat was to be tested by agents of the government at government expense and, if she should be lost on the trial trip, the government would reimburse the owner for the value of the vessel. On the trial run, the "Belle" was wrecked and became a total loss. The claim of the owner for the total value of the vessel was resisted on the ground that the contract was not in writing as required by the provisions of the existing statute. In holding such statute to be mandatory and not directory, the court said:

The facility with which the Government may be pillaged by the presentation of claims of the most extraordinary character, if allowed to be sustained by parole 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. And we think that the statute in question was intended to operate as such. It makes it unlawful for contracting officers to make contracts in any other way than by writing signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. A

38 See, for example, Belknap v. Schild, 161 U.S. 10, 16 S. Ct. 443, 40 L. Ed. 599 (1896).


40 95 U.S. 539, 24 L. Ed. 518 (1877).
party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part. Such a party aids in the violation of the law.\textsuperscript{41}

The court did find, however, that there was an implied contract of bailment for hire; that the bailee for hire was responsible only for ordinary diligence, and as negligence on the part of the agents of the government was not shown, there was no liability on the part of the government for the value of the vessel. It did allow a recovery on a quantum meruit basis for the value of the use of the vessel while in the hands of the government.

In contrast thereto is the case of \textit{Crouch v. United States}\textsuperscript{42} in which a written contract was entered into by an officer of the government for the rental of a pile driver. While the pile driver was being used by the agents of the government, acting within the scope of their authority, it was lost in a severe storm. The court, addressing itself to the question of jurisdiction, held that there was an implied obligation on the part of the government to use due care, and that liability for failure so to do could be enforced by suit under the Tucker Act. In that regard, the court said:

There was undoubtedly a written contract entered into for the rental of the pile driver by the officers of the government, who had authority to make such a contract. The government was therefore a bailee for hire, and under an implied obligation to use reasonable care in the use of the property and for its preservation. If a bailee for hire is guilty of negligence, and the property through such negligence is either lost or damaged, he is liable to the bailor, not for a tort, strictly speaking, but upon the implied obligation to use due care arising out of the contract. If the contract had in express terms required the use of due care, the action could hardly be said to be one sounding in tort. The fact that the obligation to use due care arises as an implied obligation from the contract cannot change the situation. The suit, therefore, can be maintained under the Tucker Act as a suit upon implied contract.\textsuperscript{43}

In cases where the United States has received the benefit of a mechanism invented by an individual, the courts have construed an implied contract to be in existence, so that it may be safely asserted that where the government uses a patented invention "with the consent and express permission

\textsuperscript{41} 95 U.S. 539 at 541, 24 L. Ed. 518 at 519.
\textsuperscript{42} 31 F. (2d) 211 (1928).
\textsuperscript{43} 31 F. (2d) 211 at 212.
of the owner” and does not “repudiate the title of such owner,” an implied contract to pay a reasonable compensation for such usage will arise.44 Similarly, as in Reeside v. United States,45 a recovery has been allowed on quantum meruit, but denied on the theory of an implied contract, where the agent of the government, illegally appointed and lacking authority to act as such, has made purchases on behalf of the government from which it received a benefit by reason of the fact that the goods were accepted by a properly appointed authority.46 The government, however, has been adamant on the point of denying that an implied contract exists where an individual goes beyond the scope of his authority and attempts to contract on behalf of the government.47 The burden is, therefore, upon the contractor to ascertain for himself the scope of the authority of the agent who pretends to do business on behalf of the government. While, at first blush, this might seem to be a hardship upon those desiring to do business with the government, it must be remembered that greater hardship would prevail on the people at large if any one, under pretext of proper authority, were able to place the government in a position in which it would have to pay out money for something wholly unauthorized.

44 Bethlehem Steel Co. v. United States, 53 Ct. Cl. 348 (1918).
45 2 Ct. Cl. 1 (1866).
GOVERNMENT CONTRACTS

The court has, however, refused to allow a recovery on a contract implied in law. In that regard the case of Goodyear Tire & Rubber Company v. United States is significant. The facts therein are briefly these. In October, 1921, a lease was signed with the government for the rental of real estate in Ohio for a term of five years. No appropriation was made beyond June 30, 1922. The lease provided that in the event no appropriation was made available for occupancy beyond that date, the lease would automatically terminate. An appropriation was made for the fiscal year ending June 30, 1923, and another for the following year. Prior to June 30, 1923, the government notified the lessor that the premises would not be occupied after that date, but the government failed to vacate the premises and remained until December 20, 1923. Under the common law of Ohio, where rent is reserved annually and the tenant holds over and states that he does not intend to be bound for another year but the landlord declares an opposite intention, the tenant is held for the entire succeeding year. Despite such rule, the court, in affirming the finding of the Court of Claims that there was no cause of action, said:

The right here invoked to sue the United States under the Tucker Act on a claim founded on contract—as this is—must rest upon the existence of a contract express or implied in fact, no right of action being given by the Act in cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law.

The doctrine that a recovery may be had on a contract implied in fact, but not upon one implied in law, may now be regarded as well established.

MEASURE OF DAMAGE

Occasionally the government finds it necessary to breach a valid contract, as in cases where the government

49 276 U.S. 287 at 293, 48 S. Ct. 306, 72 L. Ed. 575 at 579.
has contracted for the production of certain types of machines and improvements in design have rendered obsolete the articles called for under the contract. Where no provision has been inserted in the contract covering such contingency, the law is well settled as to the measure of damages to be recovered. In the case of *United States v. Behan*\(^{51}\) that measure was fixed as the reasonable amount of loss sustained by the injured party. In arriving at that figure, two categories need be considered. The first involves the amount of money the aggrieved party has expended in preparing to perform the entire contract. The second represents the profits he would have realized had he been permitted to perform the entire contract. These profits must be determined from all the facts and circumstances of each individual case, but they cannot be speculative or remote, and must be clearly proved. The court, in *Speed v. United States*,\(^{52}\) said such profits were "the difference between the cost of doing the work and what claimants were to receive for it, making reasonable reduction for the less time engaged, and for release from the care, trouble, risk and responsibility attending a full execution of the contract." A further statement of the rule may be found in *Broadbent Laundry Corporation v. United States*\(^{53}\) where the court said:

In arriving at the profits to which the plaintiff is entitled the court must take into consideration the progress attained, the unfinished part of the contract, the probable cost of completion, the whole contract price, the estimated pecuniary result, favorable or unfavorable to it, had it been permitted to go on and complete its contract . . . The court will also take into consideration the relief of the contractor from responsibility for a large part of the contract, and for the time and trouble which a full performance would have required and imposed upon it and the release of contractor's plant for other work.\(^{54}\)

Of course, in all cases where the contract contains a termination clause providing for the payment to the contractor of

\(^{63}\) L. Ed. 835 (1919); Tempel v. United States, 248 U.S. 121, 39 S. Ct. 56, 63 L. Ed. 162 (1918).

\(^{51}\) 110 U.S. 338, 4 S. Ct. 81, 28 L. Ed. 168 (1884).

\(^{52}\) 75 U.S. (8 Wall.) 77, 19 L. Ed. 449 (1869).

\(^{53}\) 56 Ct. Cl. 128 (1921).

\(^{54}\) 56 Ct. Cl. 128 at 132.
certain costs and profits, but not prospective profits, the latter cannot be recovered.\textsuperscript{55}

The First World War produced some interesting litigation concerning the cancellation of government contracts pursuant to the authority of the Act of June 15, 1915, which permitted the President to "modify, suspend, cancel, or requisition any existing or future contracts for the building, production, or purchase of ships or material."\textsuperscript{56} In the case of \textit{Russell Motor Car Company v. United States},\textsuperscript{57} the company contracted with the United States to manufacture certain gun mounts, the last of which was to be delivered on April 30, 1919. On November 18, 1918, the Navy Department requested the manufacturer to decrease his production under the contract, and on November 23, 1918, the contract was cancelled. The court, addressing itself to the question of the measure of damages, said:

It is contended, further, that even if the action of the Secretary of the Navy was warranted by the statute, the Car Company was nevertheless entitled to have included, as just compensation, its anticipated profits. This contention confuses the measure of damages for breach of contract with the rule of just compensation for the lawful taking of property by the power of eminent domain. In fixing just compensation the court must consider the value of the contract at the time of its cancellation, not what it would have produced by way of profits for the Car Company, if it had been fully performed.\textsuperscript{58}

In similar situations, other courts have held that the loss to the contractor was caused by the cessation of hostilities, that the contractor knew of that contingency before he entered into the contract, and took a chance on the date on which an armistice might be signed.\textsuperscript{59}

A different situation arises in condemnation cases. Thus, where a navigation company had placed a lock and a dam in a river and held a franchise to collect tolls, which the government seized to its own use, the court held that the franchise to collect tolls was as much a vested right of the

\textsuperscript{55} Dorris Motor Car Co. v. United States, 60 Ct. Cl. 68 (1924).
\textsuperscript{57} 261 U.S. 514, 43 S. Ct. 428, 67 L. Ed. 778 (1923).
\textsuperscript{58} 261 U.S. 514 at 523, 43 S. Ct. 428, 67 L. Ed. 778 at 784.
\textsuperscript{59} Savage Arms Corporation v. United States, 57 Ct. Cl. 71 (1922); Meyer Scale & Hardware Co. v. United States, 57 Ct. Cl. 26 (1922).
navigation company as was the ownership of the tangible property, hence "just compensation required payment for the franchise to take tolls, as well as for the value of the tangible property."\textsuperscript{60} The assertion by Congress of its purpose to take the property was held not to destroy the state franchise. While this was a condemnation proceeding rather than one based on contract, it nevertheless indicates that the court might allow a recovery of future profits which could be determined to be a property right. Certainly, where private property has been appropriated by the government prior to formal proceedings, the courts have felt justified, in order to do equity, in awarding a recovery of interest.\textsuperscript{61}

Since the passage of the First War Powers Act, attempts have been made to standardize the business of contracting with the government so that, despite the emergency of the situation with its consequent urge to get into production promptly forcing a sudden terrific expansion of war industries, equity might prevail between the government and the contractors. In this spirit a standard form of "termination for the convenience of the government" clause is inserted in virtually all government contracts in order to protect both the government and the private contractor. The present text of such clause is printed in Appendix I hereto.\textsuperscript{62} It should go far in preventing litigation over the question of the measure of damage in the event of cancellation before completion.

**TENDER OF PERFORMANCE**

When dealing with problems of tender of performance, the courts have taken the same attitude toward those contracting with the government as they would take toward purely private contractors. This attitude seems, however, to have caused no small amount of dissatisfaction among litigants who apparently feel that the United States, while a sovereign, should be a benevolent one and not permit its

\textsuperscript{60} Monongahela Navigation Co. v. United States, 148 U.S. 312 at 344, 13 S. Ct. 622, 37 L. Ed. 463 at 474 (1893).
\textsuperscript{62} See page 323, post.
constituents to suffer loss. The court, in Smoot's Case, unburdened itself on this point by saying:

There is, in a large class of cases coming before us from the court of claims, a constant and ever recurring attempt to apply to contracts made by the government, and to give to its action under such contracts, a construction and an effect quite different from those which courts of justice are accustomed to apply to contracts between individuals. There arises, in the minds of the parties and counsel interested for the individual, against the United States a sense of the power and the resources of this great government, prompting appeals to its magnanimity and generosity, to abstract ideas of equity, coloring even the closest legal argument. These are addressed in vain to this court. Their proper theater is the halls of Congress, for that branch of the government has limited the jurisdiction of the court of claims to cases arising out of contracts express or implied—contracts to which the United States is a party in the same sense in which an individual might be, and to which the ordinary principles of contracts must and should apply.

In that case, two contracts had been entered into between Smoot and the government whereby the former was to deliver a certain number of horses. The contractor did not have the horses at the time the contract was executed, but was going to procure them for purpose of delivery. Before delivery could be made, the Bureau of Cavalry adopted a ruling that when horses were delivered they should be held one day for inspection, and, if rejected, should be branded with the letter "R." After this ruling was passed, the contractor could not procure horses with which to fulfill his contract and he filed suit in the Court of Claims for the profits he would have made. Addressing itself to the proposition of the necessity of tender of performance, the court said:

We think it was equally his duty to have tendered horses at Chicago, and if the new regulations would have relieved him at all from that duty, it would have been after he had made a tender and objected to the application of the new rule of inspection, and the proper officer had refused to receive the horses without subjecting them to those rules. Until then he could not justly claim that the government had violated its contract.

Where the government by its own acts makes performance impossible, a recovery may, of course, be allowed without tender of performance.

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63 82 U.S. (15 Wall.) 36, 21 L. Ed. 107 (1873).
64 82 U.S. 36 at 45, 21 L. Ed. 107 at 110.
65 82 U.S. 36 at 50, 21 L. Ed. 107 at 111.
66 United States v. Peck, 102 U.S. 64, 26 L. Ed. 46 (1880).
COMPROMISE OF CLAIMS

Naturally, in times like these, when the volume of contracts made and completed, money paid, and suits filed, reach staggering proportions, a great many compromises are also being accomplished. The tendency on the part of the government has been to close the cases as rapidly as possible consonant with fairness and equity, and where a settlement has been made in good faith, the courts are loathe to disturb it. Thus, in *Trumbull Steel Co. v. United States*, a compromise settlement, under which the taxpayer paid a sum of money in full settlement of interest on a tax in addition to that already paid, though paid after the statute of limitations had barred the collection of the tax, was held valid as being made in good faith. Likewise, in *United States v. Kraus*, it was held that where the government had accepted the benefit of the act of its agent in making a settlement of a claim for excess profits, and had retained the money received by it thereunder, it could not repudiate the authority of the agent to act for it.

In effecting compromises and settlements, if the sum of money agreed upon is fixed by both parties in good faith and with all the facts known, it will be binding and cannot later be disturbed. If, however, a lesser amount is accepted by the contractor than that originally claimed, the compromise may be set aside and a greater amount allowed, unless it can be affirmatively established that the contractor freely and without duress accepted such a settlement. As the court, in *St. Louis, Brownsville & Mexico Railway Company v. United States*, stated:

Acquiescence by the claimant in the payment by the government of a smaller amount than is due will ordinarily effect the discharge. Acquiescence can be established by showing conduct before the payment which might have led the government to believe that the amount allowed was all that was claimed, or that such amount, if paid, would be received in full satisfaction of the claim. Acquiescence can also be established by showing conduct after payment which might have led the government to believe that the amount actually received was accepted in full satisfaction of the original claim. But to constitute acquiescence within the

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67 76 Ct. Cl. 391 (1932).
68 61 F. (2d) 886 (1932).
meaning of this rule, something more than acceptance of the smaller sum without protest must be shown. There must have been some conduct on the part of the creditor akin to abandonment or waiver, or from which an estoppel might arise. Every case in which this Court has sustained the affirmative defense of acquiescence rests upon findings which include at least one of these additional features.70

The use of duress in affecting settlements has time and again been productive of litigation. Just what acts will constitute "duress" is a matter of some difficulty as the word itself has not been clearly defined by the courts. Threatening to cancel a present contract in order to arrive at a settlement is apparently not sufficient, according to Harts-ville Oil Mill v. United States,71 where the court said: "... a threat to break a contract does not in itself constitute duress. Before the coercive effect of the threatened action can be inferred, there must be evidence of some probable consequence of it to the person or property for which the remedy afforded by the courts is inadequate."72 In Swift and Company v. United States,73 however, the Supreme Court said with reference to such a transaction:

The parties are not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, volenti non fit injuria."74

The opinion in the case of Hazelhurst Oil Mill & Fertilizer Co. v. United States75 presents a goodly collection of other cases bearing on this point.


72 271 U.S. 43 at 49, 46 S. Ct. 385, 70 L. Ed. 822 at 827.

73 111 U.S. 22, 4 S. Ct. 244, 28 L. Ed. 341 (1884).

74 111 U.S. 22 at 29, 4 S. Ct. 244, 28 L. Ed. 341 at 343.

75 70 Ct. Cl. 334, particularly p. 353 (1930).
RENEGOTIATION OF CONTRACTS

One of the most significant pieces of legislation having to do with government contracts, produced during the present emergency, is the Renegotiation of War Contracts Law, passed to prevent repetition of the excessive profits which were realized by contractors during and after the last war. Following the Armistice in 1918, a great cry was raised from one end of the country to the other against war "profiteering." Between February, 1919, and April, 1942, approximately 170 bills and resolutions were offered in Congress to eliminate excessive profits from war contracts, or, to use the oft repeated phrase coined by the American Legion, to "take the profits out of war." In 1934, the Vinson Trammel Act was passed which placed a limitation of 10% on the profits to be obtained from contracts for naval vessels and naval aircraft. Prior to 1941, several other laws had been placed on the statute books which limited the power of the government to make purchases.

These limitations were temporarily thrown into the discard by the First War Powers Act which permitted the President to authorize any department or agency of the government to enter into contracts without regard to the provisions of the law relating to the making, performance, amendment, or modification of contracts, subject, however, to the limitation that the cost-plus-a-percentage-of-cost system of contracts was forbidden. Effectiveness was given to the statute by Executive Order No. 9001, pursuant to which many contracts were negotiated. Subsequently, Congress enacted the Renegotiation of War Contracts Law. By reason of these

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77 The Federal Trade Commission reported that in 1917 the profits gained by salmon canneries, 80% of whose output was purchased by the government, averaged 52% profit. The profit on the building of cruisers that year ranged from 25% to 27%. One steel company made a profit of 49% in 1916, 58% in 1917, and 48% in 1918. Other steel companies made between 30% and 320%. Profits in the lumber industry based on capital investment ran as high as 121%, while in the oil industry they amounted to 122%, and in sulphur were 236%.
81 50 U.S.C.A., following § 611.
GOVERNMENT CONTRACTS

statutes, any department or agency may amend or modify any war contract without regard to provisions of other statutes to the contrary.

Certainly, where a contractor comes in voluntarily and agrees with the government that his contract should be renegotiated and the price lowered, he has the right, and the government has the power, to enter into such a modification. Of that, there can be little question. Where the government and the contractor sign a contract which contains a clause providing for renegotiation and the time for such action arrives, should the parties be so far apart in their figures that agreement is impossible, a question will arise as to whether or not the government can step in and arbitrarily say that the contractor shall get so much and no more. An answer would seem to be that, when the contractor signed the contract it was understood by and between the parties that the price designated in the contract was not the true price but was only tentative, and subject to final adjustment downward based upon experience, costs, production, skill, efficiency, and countless other factors. In such a situation, the government as a sovereign power could not allow itself to be precluded from what it considers to be a fair and equitable price by the arbitrary stand or caprice of the auditing and cost accounting departments of the contractor. Under the provisions of the amendment of October 21, 1942, where an agreement has been reached and signed by the parties, there can be no further renegotiation of the contract by any department of the government and the agreement cannot be disturbed. When such a provision was put into the law, it certainly indicated that the intention of the government was to be fair and equitable. When it directly provided that there should be no harassment of contractors by repeated renegotiation, cannot it be fairly assumed that the government will see to it that a fair profit is realized on the part of the contractor?

The statute may strike an attorney, at first blush, as rather peculiar in that there should be no yardstick in the law for measuring "excessive profits." An attempt was made by amendment to define that term, but it merely resulted in a restatement of the two words. The policy of the govern-
ment in not fixing a more definite standard is in line with a general policy to rely on administrative wisdom and judgment rather than on the words of a law. Those charged with the duty of renegotiation must take a number of factors into consideration which do not lend themselves to accurate measurement, such as the past experiences of the contractor, profits on non-war contracts, profits on previous like contracts, and others. It is left to the renegotiation board, in the light of all the facts and circumstances that can be brought to play on the situation, to determine what would be a fair profit and what would, therefore, be regarded as excessive. Because common sense must play a large part in determining the answer to the question, there can be no fixed standard of measurement. To have one which could be applied to all situations alike with any degree of fairness would be an utter impossibility.

A more difficult problem is encountered when the government steps in and says that a contract shall be subject to renegotiation whether or not it contains a renegotiation clause. The question involves the problem of the government repudiating the provisions of its own contracts with a possible violation of the due process clause of the Constitution. In the first place, it must be remembered that the basic renegotiation statute was not passed until April 28, 1942. In the interim period between the attack on Pearl Harbor and that date, the country had gone to war and a multiplicity of essential contracts had been let. Corporations engaged in normal civilian production turned their equipment over to the war effort, but, totally inexperienced in the manufacture of war products, they could only estimate costs as a matter of conjecture. Speed was essential, so contracts had to be made when it was utterly impossible for the parties to arrive at a fair price. Why should the government then be powerless to remedy a situation which was unavoidable? Certainly one of the attributes of sovereignty is the power of the government to protect itself, even in times of dire emergency. When the United States makes a contract with an individual, that contract becomes the property right of the individual and, as such, receives the protection of the Fifth Amendment to the Constitution, but implicit therein is the
fact that, by reason of the police or some other paramount power, the government can alter, amend, or even repudiate its contracts.\textsuperscript{82} While the war-time contracts remain executory they are, therefore, open to renegotiation. If fully executed and final payment has been made thereon prior to the effective date of the statute, the status quo may not be disturbed.\textsuperscript{83}

From this incomplete examination of the subject,\textsuperscript{84} it may be seen that the Federal Government has gone a long way in yielding its position as a sovereign power in order to meet contractors on equal terms. In the service of a nation engaged in a war of unprecedented scale, it has called upon its industrial leaders from coast to coast for hitherto unheard of production. They have responded in a fashion possible only in a democracy. It should be clear, then, that the intent to be fair and equitable, on the part of government and industry alike, is mutual.

\textbf{APPENDIX I.}

\textbf{EXCERPT FROM PROCUREMENT REGULATIONS}

Section 324 of the Procurement Regulations has the following provision dealing with the termination of contracts for the convenience of the government:

Every lump-sum supply contract regardless of subject matter, except:

(a) contracts to be completed in six months or less for an amount of less than $500,000 and

(b) contracts for an amount less than $50,000 regardless of the date of completion will contain an article without deviation as follows:

\textbf{Article . . . 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

\textsuperscript{82} Lynch v. United States, 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434 (1934).

\textsuperscript{83} Act of April 28, 1942, c. 247, Title IV, § 403(c); 56 Stat. 245; 41 U.S.C.A., note preceding § 1.

\textsuperscript{84} Many other aspects of the law of government contracts exist, but were not included in this article by reason of editorial limitations on its length. To mention but a few, some consideration is required of such statutes as the Walsh-Healy Act, the Eight-Hour Law, the Bacon-Davis Act, the Kick-Back Act, the Buy American Act, the Miller Act, etc. In addition thereto is the problem of the cost-plus-a-fixed fee type of contract with its subordinate problems of what is a fixed fee, and what is a legitimate cost. These problems may be treated in a subsequent article.
Contractor that the contract is terminated under this Article. Such termin-
ination shall be effective in the manner and upon the date specified in said 
notice and shall be without prejudice to any claims which the Government 
may have against the Contractor, or any claims which the Contractor 
may have against the Government. Upon receipt of such notice the Con-
tractor shall, except as the Contracting Officer directs otherwise, (1) dis-
continue all work and the placing of all orders for materials and facilities 
in connection with the performance of this contract, cancel all existing 
orders chargeable to this contract, and terminate all subcontracts charge-
able to this contract; (2) transfer to the Government, by delivery f.o.b. 

. . . . . or by such other means as the Contracting Officer may direct, title 
to all completed supplies (including spare parts, drawings, information 
and other things) called for herein, not previously delivered, and partially 
completed supplies, work in process, materials, fabricated parts, plans, 
drawings, and information acquired or produced by the Contractor for 
the performance of this contract; and (3) take such action as may be 
necessary to secure to the Government the benefits of any rights re-
maining in the Contractor under orders or subcontracts wholly or par-
tially chargeable to this contract to the extent that such orders or 
subcontracts are chargeable. If and as the Contracting Officer so directs 
or authorizes, the Contracting Officer shall sell at a price approved by 
the Contracting Officer, or retain at a price mutually agreeable, any such 
supplies, partially completed supplies, work in process, materials, fab-
ricated parts or other things. The proceeds of such sale or the agreed 
price shall be paid or credited to the Government in such manner as the 
Contracting Officer may direct so as to reduce the amount payable under 
this Article.

(b) The Government shall, upon such termination of this contract, pay 
to the Contractor the contract price of all supplies, (including spare parts, 
drawings, information, and other things) called for herein which have 
been completed in accordance with the provisions of this contract and 
to which title has been received by the Government under the provisions 
of Paragraph (a)(2) of this Article and for which payment has not 
previously been made.

(c) In addition to, and without duplication of, the payments provided 
for in paragraph (b) or of payments made prior to the termination of this 
contract, the Government shall pay to the Contractor such sum as the 
Contracting Officer and the Contractor may agree by Supplemental 
Agreement is reasonably necessary to compensate the Contractor for his 
costs, expenditures, liabilities, commitments, and work in respect to the 
uncompleted portion of the contract so far as terminated by the notice 
referred to in paragraph (a). The Contracting Officer shall include in 
such sum such allowance for anticipated profit with respect to such un-
completed portion of the contract as is reasonable under all the circum-
stances.
(d) If the Contracting Officer and the Contractor, within 90 days from the effective date of the notice of termination referred to in paragraph (a) or within such extended period as may be agreed upon between them, cannot agree upon the sum payable under the provisions of paragraph (c), the Government without duplication of any payment made pursuant to paragraph (b) or prior to the termination of this contract, shall in the above events compensate the Contractor for the uncompleted portion of the contract as follows:

(1) By reimbursing the Contractor for all actual expenditures and costs certified by the Contracting Officer as having been made or incurred with respect to the uncompleted portion of the contract;

(2) By reimbursing, or providing for the payment or reimbursement of, the Contractor for all expenditures made and costs incurred with the prior written approval of the Contracting Officer in settling or discharging that portion of the outstanding obligations or commitments of the Contractor which had been incurred or entered into with respect to the uncompleted portion of the contract; and

(3) By paying the Contractor, as a profit on the uncompleted portion of the contract insofar as a profit is realized hereunder, a sum to be computed by the Contracting Officer in the following manner:

(A) The Contracting Officer shall estimate the profit which would have been realized on the uncompleted portion of the contract if the contract had been completed and labor and material costs prevailing at the date of termination had remained in effect.

(B) Estimate, from a consideration of all relevant factors, the percentage of completion of the uncompleted portion of the contract.

(C) Multiply the anticipated profit determined under (A) by the percentage determined under (B). The result is the amount to be paid to the Contractor as a proportionate share of profit, if any, as above provided. Notwithstanding the above provisions, no compensation shall be paid under this Paragraph (d) by way of reimbursement for expenditure, including expenditures made in settling or discharging obligations or commitments, or by way of profit on account of supplies and other things which are undeliverable because of destruction or damage, whether or not because of the fault of the Contractor.

(e) The Government shall pay to the Contractor such sum as the Contracting Officer and the Contractor may agree upon for expenditures made and costs incurred with the approval of the Contracting Officer (a) after the date of termination for the protection of Government property, and (b) for such other expenditures and costs as may be necessary in connection with the settlement of this contract, and in the absence of such agreement as to the amount of such expenditures and costs shall reimburse the Contractor for the same.
The obligation of the Government to make any of the payments required by this Article shall be subject to any unsettled claim for labor and material and to any claim which the Government may have against the Contractor under or in connection with this contract, and payments under this Article shall be subject to reasonable deductions by the Contracting Officer on account of defects in the materials or workmanship of completed or partially completed supplies delivered hereunder.

The sum of all amounts payable under this Article, plus the sum of all amounts previously paid under this contract, shall not exceed the total contract price, adjusted in the event that this contract contains an article providing for price adjustment, on the basis of the estimate of the Contracting Officer, to the extent which would have been required by such article if this contract had been completed and labor and materials costs prevailing at the date of termination had remained in effect.

Should the above provisions of this Article not result in payment to the Contractor of at least $100.00, then that amount shall be paid to the Contractor in lieu of any and all payments hereinbefore provided for in this Article.

The Government shall promptly make partial payments to the Contractor:

1. on account of the amounts due under paragraphs (b), (c) and (d) of this Article to the extent that, in the judgment of the Contracting Officer, such payments are clearly within the amounts due under such paragraphs, and

2. of such amounts as the Contracting Officer may direct, on account of proposed settlements of outstanding obligations or commitments, to be made by the Contractor pursuant to paragraph (d) (2) of this Article, if such settlements shall have been approved by the Contracting Officer and subject to such provisions for escrow or direct payment to the persons entitled to receive such settlement payments as the Contracting Officer may require.

Any dispute arising out of termination under this Article shall be decided in accordance with the procedure prescribed in Article 12 of this Contract.

Upon the making of payments called for by this Article, all obligations of the Government to make further payments or to carry out other undertakings hereunder shall cease forthwith and forever, except that all rights and obligations of the respective parties under the Articles, if any, of this contract applicable to patent infringements and reproduction rights shall remain in full force and effect.
(1) The Government shall terminate this contract only in accordance with this Article, except as otherwise provided by law, or by Article ... (Delays-Damages). Notwithstanding Article ... (Delays-Damages) and any defaults of the Contractor, the government shall terminate this contract only in accordance with this Article if such termination is simultaneous with or part of or in connection with a general termination of war contracts at, about the time of, or following the cessation of the present hostilities or the end of the present war, unless the Contracting Officer finds that the defaults of the Contractor (1) have been gross or wilful and (2) have caused substantial damage to the Government.