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William Hughes Mulligan

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THE DISPUTES CLAUSE OF THE GOVERNMENT CONSTRUCTION CONTRACT: ITS MISCONSTRUCTION

THE Government of the United States has been and will continue to be the largest, most extensive and prolific client of the construction industry in this country. The tremendous military expansion required for World War II saw the erection of Army, Navy and Air Force installations of unprecedented scope and geographic distribution. The post-war era continued apace with the construction of mammoth hospitals for veterans in mute valedictory to the carnage of victory. The present period, which may well be a pre-war era, brings further extension of national defense facilities, construction of atomic energy installations and rehabilitation of the sprawling posts, camps and stations of the past war. This recent history of concentrated building on behalf of the United States has brought with it a corresponding flood of litigation which accentuates the importance of a document undramatically entitled, U.S. Standard Form of Contract No. 23, the legal instrument creating, defining and describing the mutual rights and obligations of the contractor and his Government in all of the varied construction opera-

tions described.[1] Much of the litigation arising from the performance of this gigantic program of construction involves the interpretation of the various standard clauses found in U. S. Standard Contract No. 23. With the tightening of credit controls and the conservation and allocation of scarce building materials, the contractor, small as well as large, is more and more occupied with federal building programs. The subcontractor (the plumber, the painter, the electrician, the ironworker, the plasterer and lather, the mason and the excavator) does not escape the requirements of the standard Government construction contract, since it is usual to incorporate in the private subcontract a provision subjecting the subcontractor to all of the terms, agreements and provisions of the contract subsisting between the prime contractor and the United States. It therefore behooves an ever-widening segment of the bar to be familiar with the standard contract.[2] This article will be limited to a discussion of the legal aspects of one of the clauses, Article 15, the "disputes" provision, found in this contract.

Perhaps most of the litigation involving the standard Government contract has been created by the very provision which was designed to avoid it. The "disputes" clause usually provides: [3]

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1 The United States Standard Form of Construction Contract No. 23 was adopted and approved by the President in 1926 and revised in 1940. On the back of the last page it is noted: "1. This form shall be used for every formal contract for the construction of or repair of public buildings or works, but its use will not be required in foreign countries. 2. There shall be no deviation from this standard contract form, except as provided for in these directions, and except as authorized by the Director of Procurement." See Pfotzer v. United States, 77 F. Supp. 390 (Ct. Cl. 1948).

2 Thus, in United States *ex rel.* Gillioz v. John Kerns Const. Co., 50 F. Supp. 692 (E. D. Ark. 1943), the subcontractor's right to recover against the contractor for delays was denied by reason of the finality of the contracting officer's decision which was binding not only upon the contractor, but also on the relator whose subcontract was expressly made subject to the main contract.

3 The "contracting officer" named in the contract is usually a professional engineer regularly employed by the department of Government requesting the construction. He might be the District Engineer, Corps of Engineers, U. S. Army, or a corresponding official in the U. S. Air Force, Navy, or in a civilian department of the Government. The head of department is, as the name implies, the administrative official in control, subject only to the President. Thus, the head of the de-

> Article 15—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 subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

The object of the quoted article has been stated by the Supreme Court of the United States as follows: [4]

> It creates a mechanism whereby adjustments may be made and errors corrected on an administrative level, thereby permitting the Government to mitigate or avoid large damage claims that might otherwise be created. . . . This mechanism, moreover, is exclusive in nature. Solely through its operation may claims be made and adjudicated as to matters arising under the contract.

However laudable and refreshing the thought of saving Government funds may be, a study of the cases will reveal that the failure of the Supreme Court to supply the "mechanism" with the necessary lubrication of reasonable construction and interpretation has resulted in a Frankenstein creation. Retooling and replacement of parts appear to be in order.

At the outset it should be noted that this procedure set up by Article 15 provides an exclusive avenue of relief. An aggrieved contractor must exhaust the administrative procedure before he can litigate in the Court of Claims.[5] He must first protest to the contracting officer; [6] if redress is

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partment might be the Secretary of the Army, Navy, Interior, etc. He may have delegated his duties under this type contract to a "Board of Contract Appeals" sitting in Washington, D.C. See the discussion of these boards in McWilliams Dredging Co. v. United States, 118 Ct. Cl. 1, 16, 17 (1950).

4 United States v. Holpuch Co., 328 U. S. 234, 239-40, 66 S. Ct. 1000, 90 L. Ed. 1192 (1946).

5 *Id.*, 328 U. S. at 240. The controlling statute, 28 U. S. C. § 1491 (Supp. 1951), provides: "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:

". . .

"(4) Founded upon any express or implied contract with the United States."

6 Usually the contracting officer has representatives on the job-site, project engineers, inspectors or superintendents. Protest to the contracting officer is usually required by the contract to be in writing. Oral protest, even though fol-

not forthcoming, he must then appeal in writing within thirty days to the head of the department concerned.[7] Failure to exhaust the administrative remedy is fatal to the contractor.[8] This rule has been adhered to by the Supreme Court [9] even though the conduct of the representative of the contracting officer was so abusive and flagrantly unreasonable that the contractor had concluded that protest and appeal would be a waste of time. In a dissenting opinion, Justice Frankfurter characterized the conduct of the Government engineers as "wilful and oppressive" and as a "systematic practice of unjustified demands and vexations." [10] The majority of the Court argued that it was not reasonable for the contractor to assume that the same antisocial attitude of the minor officials involved would pervade the entire department to top levels.[11] The contractor had been successful in the Court of Claims, urging *inter alia,* that as a practical matter, appeals and protests would only further antagonize the on-the-site representative of the Government who resented any reflections upon his judgment and who would further harass operations as the job continued.[12]

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lowed by a written opinion of the Judge Advocate General favorable to the contractor and approved by the Assistant Secretary of War, and unfruitful negotiation were held insufficient to waive the requirement of the contract. Sanford & Brooks Co. v. United States, 267 U. S. 455, 45 S. Ct. 341, 69 L. Ed. 734 (1925); *accord,* United States v. Cunningham, 125 F. (2d) 28 (D. C. Cir. 1941).

7 Upon appeal the contracting officer usually prepares findings of fact which are forwarded to the contractor who responds by comment and brief. Failure to serve the contractor with a copy of the findings has been held to nullify the finality of the department head's decision and to permit the contractor to proceed in the Court of Claims. Sachs v. United States, 63 F. Supp. 59 (Ct. Cl. 1945).

8 United States v. Callahan Walker Co., 317 U. S. 56, 63 S. Ct. 113. 87 L. Ed. 49 (1942).

9 United States v. Holpuch Co., 328 U. S. 234, 66 S. Ct. 1000, 90 L. Ed. 1192 (1946); United States v. Blair, 321 U. S. 730, 64 S. Ct. 820, 88 L. Ed. 1039 (1944).

10 United States v. Blair, 321 U. S. 730, 740, 64 S. Ct. 820, 88 L. Ed. 1039 (1944).

11 *Id.,* 321 U. S. at 736. The unreasonable conduct of a contracting officer, who is "repellant" of appeal, as distinguished from similarly unreasonable conduct of a contracting officers's underling, excused administrative appeal in United States v. L. P. & J. A. Smith, 256 U. S. 11, 41 S. Ct. 413, 65 L. Ed. 808 (1921).

12 Blair v. United States, 99 Ct. Cl. 71 (1942), *rev'd,* 321 U. S. 730, 64 S. Ct. 820, 88 L. Ed. 1039 (1944).

An Avenue of Escape?

At first blush it would seem that Article 15 does not completely shut the door to judicial review. As the clause in question is quoted above, it appears that the jurisdiction of the contracting officer and the department head are limited to "questions of fact." The ready suggestion would be that with respect to "questions of law," access to the Court of Claims could be gained without resorting first to administrative remedies. There is authority for this distinction and the contractor has been afforded a judicial review without appealing to the department head where the dispute involved a question of law rather than fact.[13] However, the contractor must be wary and his attempt to avoid the administrative toils may be thwarted.

First: In some cases Article 15 is not limited on its face to questions of fact. There are cases where the article provides that "*all disputes* arising under the contract" are to be determined by the contracting officer subject to appeal to the department head. The Court of Claims vigorously challenged the validity of the "all disputes" clause: [14]

> But the competency of the parties to so stipulate, as the courts have many times pointed out, is limited to the decision of questions of fact arising under the contract, such as the quantity and quality of materials delivered, whether the work performed meets contract requirements, causes of delay in the performance of the work, etc. These are questions of fact, the correct solution of which is usually largely dependent on professional knowledge and skill. . . . But the disputed question here — whether the plaintiff under the terms of the contract was required to furnish the materials demanded by the contracting officer — was not one of fact. It was a disputed question of law — the proper construction of the contract — a

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13 See Western Well Drilling Co. v. United States, 96 F. Supp. 377 (N. D. Cal. 1951), where a contractor was permitted to sue under the Tucker Act, 28 U. S. C. §§ 1346, 2401, 2402 (Supp. 1951), even though he did not first appeal to the department head, since the finding of the contracting officer that no "changed condition," as defined by Article 4 of the contract, existed was a determination of law and not of fact. Rust Engineering Co. v. United States, 86 Ct. Cl. 461 (1938), permitted the contractor to sue in the Court of Claims on a similar distinction.

14 Davis v. United States, 82 Ct. Cl. 334, 346-7 (1936).

> question the decision of which was outside the jurisdiction of the contracting officer or head of the department, it being the province of the courts to declare the law of the contract.

Three years later, the Court of Claims in *John McShain, Inc. v. United States* [15] reaffirmed this specific holding. The Solicitor General petitioned for a writ of certiorari, urging that the decision was the "culmination of a recent tendency in the Court of Claims to whittle away the authority of designated officers of the United States to make final decisions under contracts." [16] Certiorari was granted [17] and the judgment reversed by the Supreme Court of the United States in a per curiam opinion.[18] In a later decision the Court emphatically reaffirmed the validity of the "all disputes" clause.[19] With some reluctance [20] the Court of Claims has followed the determination of the Supreme Court.

It would seem clear, therefore, that if Article 15 provides for administrative jurisdiction of "all disputes," the contractor must exhaust his remedy in the department before proceeding to the Court of Claims.[21]

Second: Even if the disputes clause is limited to disputed questions of fact, the contractor's attorney must still be cautious. Article 15 commences with the language "except as otherwise specifically provided in this contract. . . ." Nor-

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15 88 Ct. Cl. 284, 297 (1939).

16 The petition is noted in United States v. Moorman, 338 U. S. 457, 460, 70 S. Ct. 288, 94 L. Ed. 256 (1950).

17 United States v. John McShain, Inc., 307 U. S. 619, 59 S. Ct. 1043, 83 L. Ed. 1499 (1939).

18 United States v. John McShain, Inc., 308 U. S. 512, 60 S. Ct. 134, 84 L. Ed. 437, *order amended,* 308 U. S. 520, 60 S. Ct. 134, 84 L. Ed. 437 (1939).

19 United States v. Moorman, 338 U. S. 457, 460-2, 70 S. Ct. 288, 94 L. Ed. 256 (1950).

20 George F. Driscoll Co. v. United States, 63 F. Supp. 657 (Ct. Cl. 1945) (Whitaker, J., and Madden, J., dissenting), *cert. denied,* 328 U. S. 854, 66 S. Ct. 1340, 90 L. Ed. 1626 (1946).

21 The vast weight of authority supports the validity of clauses in contracts appointing an impartial umpire as a final arbiter of all disputes arising under the contract. See Notes, 54 A. L. R. 1255 (1928), 110 A. L. R. 137 (1937). Indiana is contra. McCoy v. Able, 131 Ind. 417, 30 N. E. 528 (1892). There it was held that such a provision was an improper attempt to oust the courts of jurisdiction. The arbitrator's finding was entitled only to prima facie validity and was not conclusive.

mally, Article 1 of the contract incorporates into the main agreement the drawings and specifications. In these voluminous documents counsel for the contractor may find some interesting language which precludes escape from administrative appeal and finality of the determination of the department head. In *Pfotzer v. United States*,[22] the Court of Claims was faced with a situation where the contractor and the contracting officer had differed as to whether certain work performed was included within the drawings and specifications. The contractor urged that the decision of the contracting officer and department head denying him extra compensation was based upon an interpretation of the contract and was therefore a question of law and not fact. The Government relied on Paragraph 1-07 of the specifications which provided: [23]

> Unless otherwise specifically set forth, the Contractor shall furnish all materials, plant, supplies, equipment, labor, etc., necessary to complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the Contracting Officer shall be the interpreter.

Despite the incorporation by reference of the specifications, the Court of Claims held that where Article 15 mentions "this contract," it refers to the Standard Form 23 and not the specifications; that Article 15 was paramount to the specifications and that the quoted language of the specifications was only intended to keep the work progressing under the direction of the contracting officer and was not designed to give him final authority with respect to an *interpretation* of the contract, which was held to be a question of law and not fact. The Supreme Court denied the Government's petition for certiorari.[24] The Court of Claims, in *Moorman v. United States*,[25] was presented with a similar problem. The contractor had agreed to grade the site of an aircraft assem-

22 77 F. Supp. 390 (Ct. Cl. 1948).

23 *Id.* at 399.

24 United States v. Pfotzer, 335 U. S. 885, 69 S. Ct. 237, 93 L. Ed. 424 (1948).

25 82 F. Supp. 1010 (Ct. Cl. 1949).

bly plant at a unit price of 24 cents per cubic yard in strict accordance with the drawings and specifications. A taxiway was shown on the drawings but was not located within the plant site as described in the specifications. A dispute arose as to whether or not the contractor was required to grade the taxiway and whether the unit price applied. Paragraph 2-16 of the specifications provided that if the contractor objected to performing any work as not within the contract, he must protest in writing to the contracting officer and, if not satisfied, may appeal to the Secretary of War whose decision would be "final and binding." There was the usual Article 15 limiting administrative jurisdiction to questions of fact. Following its decision in the *Pfotzer* case, the Court of Claims held that Article 15, limited to fact questions, was governing; that the specification section involved, properly interpreted, only meant that such decision was final and binding to the extent provided in Article 15 of the contract; and that since under Article 15, only decisions upon disputed questions of fact were final, the instant determination involving a question of contract interpretation was one of law and thus not conclusive upon the contractor. The Court of Claims therefore made its own findings and permitted the contractor to recover 59.3 cents per cubic yard for the taxiway grading instead of the 24 cent unit price provided in the specifications. The Solicitor General again petitioned for a writ of certiorari which was granted.[26] The petition urged that this decision plus previous holdings of the [27]

> . . . Court of Claims had "weakened and narrowed the effectiveness of the well-established policy of the Government to settle, without expensive litigation, disputes arising under its contracts."

The Supreme Court reversed the judgment of the Court of Claims in a unanimous opinion written by Justice Black

[26] United States v. Moorman, 338 U. S. 810, 70 S. Ct. 58, 94 L. Ed. 490 (1949).

[27] The petition for certiorari is quoted in the opinion of the Supreme Court on the merits, United States v. Moorman, 338 U. S. 457, 460, 70 S. Ct. 288, 94 L. Ed. 256 (1950).

which castigated the lower court with obvious relish.[28] The Court reaffirmed the legality of contractual provisions designed to effect speedy settlement of all disputes, factual or legal, at an administrative level. Whether the determination at issue was one of fact or law, the contracting officer was held to have jurisdiction and the determination of the department head was final under the specific language of Paragraph 2-16 of the specifications, which was to be construed with Article 15 and which was not nullified by it. The Court pointed out: [29]

> The oft-repeated conclusion of the Court of Claims that questions of "interpretation" are not questions of fact is ample reason why the parties to the contract should provide for final determination of such disputes by a method wholly separate from the fact-limited provisions of Art. 15.

The staunch judicial blessing of the Supreme Court to specification provisions conferring finality upon decisions of the contracting officer (if affirmed by the department head) in interpreting the requirements of the contract, makes it mandatory for counsel representing the contractor to read beyond the standard printed contract form to the bewildering engineering and architectural data of the specifications, if he is to advise his client properly as to his remedies under the contract. The avenue of escape from appeal to department head or from the finality of his decision may well be a mirage.

How Final is Final?

Assume that an aggrieved contractor has appealed from an adverse determination of the contracting officer whose decision has been upheld by the department head. Assume further that the dispute involves a question of fact within the contracting officer's jurisdiction under the usual Article 15, or a question of law within his jurisdiction under the judicially sanctioned "all disputes" Article 15 or under a

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28 *Id.*, 338 U. S. at 462-3.
29 *Id.*, 338 U. S. at 463.

special clause of the specifications. The vexatious question arises: to what extent is his decision "final and conclusive" as the contract literally provides?

The Supreme Court in 1854,[30] in determining the conclusiveness to be accorded a commercial arbitration award provided for by contract, warned that a court of equity should not set aside an award simply for error in judgment or to substitute its judgment for that of the arbiter selected by the parties. However, the Court pointed out that "corruption" or "gross mistake" [31] on the part of the arbitrator would warrant equitable intervention. In 1878 the Court, in upholding the validity of the disputes clause, stated that the findings of a contracting officer were final "in the absence of fraud or such gross mistake as would necessarily imply bad faith. . . ." [32] The rule was restated in a later case which held that such determination was final and conclusive "unless impeached on the ground of fraud, or such gross mistake as necessarily implied bad faith." [33]

An even more complete exposition of the obligations of the contracting officer is revealed in *Ripley v. United States*,[34] decided by the Supreme Court in 1912. There, the contractor claimed that he was prejudiced by the arbitrary refusal of the contracting officer to permit blocks to be placed on a jetty, which delayed the progress of the job. The Court stated: [35]

> But the very extent of the power and the conclusive character of his decision raised a corresponding duty that the agent's judgment should be exercised not capriciously or fraudulently, but reasonably, and with due regard to the rights of both the contracting parties. The finding by the court that the inspector's refusal was a gross mistake and an act of bad

30 Burchell v. Marsh, 17 How. 344, 15 L. Ed. 96 (U. S. 1854).

31 *Id.*, 15 L. Ed. at 99.

32 Kihlberg v. United States, 97 U. S. 398, 24 L. Ed. 1106, 1108 (1878).

33 Martinsburg & P. R.R. v. March, 114 U. S. 549, 5 S. Ct. 1035, 1038, 29 L. Ed. 255 (1885).

34 223 U. S. 695, 32 S. Ct. 352, 56 L. Ed. 614 (1912).

35 *Id.*, 32 S. Ct. at 355.

faith necessarily, therefore, leads to the conclusion that the contractor was entitled to recover the damages caused thereby.

In 1950 the Supreme Court, in the *Moorman* case,[36] reiterated its position that either fraud or gross mistake would lift the curtain of conclusiveness so as to permit judicial scrutiny.[37] In *Penner Installation Corp. v. United States,*[38] which was held in abeyance until the Supreme Court reached a decision in the *Moorman* case, the Court of Claims reviewed its prior holdings on the question and concluded that it was not bound by the determination of the contracting officer on a question of fact, affirmed by the department head, when the evidence disclosed that "The decisions of the contracting officer and the head of the department . . . were arbitrary and so grossly erroneous as to imply bad faith." [39] The court had in the past formulated and continued to announce the rule in substantially that language.[40] The rationale of this rule espoused by the Court of Claims had its genesis in the language of the *Ripley* case [41] referred to above. The Court of Claims, after reviewing its prior rulings, admitted in the *Penner* decision that the contracting officer was properly in a unique, unenviable position. Although the representative of the Government in the performance of the

36 United States v. Moorman, 338 U. S. 457, 70 S. Ct. 288, 94 L. Ed. 256 (1950).

37 The Court, *id.*, 338 U. S. at 461, cited with approval the language of the Court in Martinsburg & P. R.R. v. March, 114 U. S. 549, 5 S. Ct. 1035, 29 L. Ed. 255 (1885). See note 33 *supra.*

38 89 F. Supp. 545 (Ct. Cl. 1950).

39 *Id.* at 563.

40 *See, e.g.,* Great Lakes Dredge & Dock Co. v. United States, 90 F. Supp. 963, 965 (Ct. Cl. 1950); Loftis v. United States, 76 F. Supp. 816, 827 (Ct. Cl. 1948); Needles v. United States, 101 Ct. Cl. 535, 601-7 (1944); Bein v. United States, 101 Ct. Cl. 144, 166 (1943). *But see* Henry Ericsson Co. v. United States, 62 F. Supp. 312 (Ct. Cl. 1945), where the court found that the contracting officer had ruled adversely to the contractor because he was "unaware" of the basis of the claim. The court, *id.* at 327, saw "no point in applying words as 'arbitrary,' 'capricious,' or 'bad faith,' which are obviously inapplicable, in order to reach the result which justice demands. We think that unawareness of the problem on the part of the deciding officer is an equally good reason why his decision should lack finality."

41 Ripley v. United States, 223 U. S. 695, 32 S. Ct. 352, 56 L. Ed. 614 (1912). See discussion in text at note 34 *supra.*

contract and charged with the responsibility of insuring that the Government receives precisely what it bargained for, he must, in the event of a dispute, assume the capacity of an impartial referee eager to do justice to the rights of both contracting parties. And if the evidence discloses his failure to act impartially, if there is no substantial basis upon which his decision can be supported, ("arbitrary and capricious" seem to be the judicial epithets characterizing this situation) or when it is grossly erroneous, he has not been faithful to his duty to act impartially, he is in bad faith and his determination is not conclusive. Bad faith, therefore, does not imply that the contracting officer has been unfaithful to his employer, but unfaithful to his duty as impartial arbiter. The Court of Claims concluded that the contracting officer had betrayed that trust in the *Penner* case and awarded judgment to the contractor.[42] The Supreme Court granted certiorari,[43] affirmed the judgment by an equally divided Court [44] and finally denied a rehearing.[45] One might conclude that the law was rather well settled.

The Wunderlich Case

In *Wunderlich v. United States*,[46] the Court of Claims was again faced with the usual problems which have been discussed. The plaintiff had contracted to erect a dam in Colorado in 1938. He performed certain work which was allegedly beyond the contract requirements. A principal dispute involved the amount recoverable for the maintenance and repair of machinery and equipment. The contracting officer fixed rates on an hourly basis which did not reflect any substantial variation in amount for equipment ranging from a

42 Penner Installation Corp. v. United States, 89 F. Supp. 545, 548-50 (Ct. Cl. 1950).

43 United States v. Penner Installation Corp., 340 U. S. 808, 71 S. Ct. 55, 95 L. Ed. 594 (1950).

44 United States v. Penner Installation Corp., 340 U. S. 898, 71 S. Ct. 278, 95 L. Ed. 651 (1950).

45 340 U. S. 923, 71 S. Ct. 356, 95 L. Ed. 667 (1951).

46 117 Ct. Cl. 92 (1950).

$207 jack hammer to a $39,000 drag line. This allowance was termed "arbitrary" and "capricious" by the court which permitted the contractor to recover some $172,000.[47] Certiorari was granted by the Supreme Court [48] and judgment was reversed in a 6-3 decision with a startling opinion by Justice Minton.[49] The opinion is startling not because it reversed judgment for Wunderlich but because the rule it announces has "wide application and a devastating effect." [50] The Court emasculated "gross mistake" from the exception to administrative finality and announced that fraud was the only exception to the conclusiveness of the determination under Article 15. The Court defined fraud as "conscious wrongdoing, an intention to cheat or be dishonest." [51] The Court further stated: "The decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract." [52] The Court admitted that other words such as negligence, incompetence, capriciousness and arbitrary had appeared in the opinions but stated that "this Court has consistently upheld the finality of the department head's decision unless it was founded on fraud, alleged and proved." [53] The Court suggested that the respondent was not coerced, but had voluntarily entered the contract providing for the settlement of disputes in this manner. If the standard of fraud proposed was too narrow, the Court suggested that this was a matter for Congress to determine.

In his dissenting opinion Justice Douglas eloquently expressed his abhorrence at a rule which dispensed such uncontrolled discretion to a contracting officer who would be immune from judicial intervention no matter how negligent,

47 *Id.* at 217-9.

48 United States v. Wunderlich, 341 U. S. 924, 71 S. Ct. 795, 95 L. Ed. 1356 (1951).

49 United States v. Wunderlich, ...U. S....., 72 S. Ct. 154, 96 L. Ed. *67 (1951). Justices Douglas and Jackson each dissented in separate opinions. Justice Reed concurred in the opinion of Justice Douglas.

50 *Id.*, 72 S. Ct. at 156.

51 *Id.*, 72 S. Ct. at 155.

52 *Ibid.*

53 *Ibid.*

capricious, stubborn or incompetent he might prove to be. Justice Jackson, in a separate dissenting opinion, commented unfavorably on the excision of gross mistake from the rule to which the Court had previously subscribed. He observed that "Men are more often bribed by their loyalties and ambitions than by money." [54]

The holding of the majority opinion would seem not only to be a departure from precedent, which was both unnecessary and unfortunate, but to be based upon specious reasoning. The argument that the plain meaning of the contract requires that only fraud be excepted overlooks the fact that *neither* "fraud" *nor* "mistake" is mentioned in Article 15. Both exceptions have been engrafted by the judicial interpretation of the Supreme Court in the line of decisions discussed above. The argument that the contractor voluntarily entered the contract and therefore agreed to the arbitral disposition overlooks the following points: (1) If the contractor had consulted counsel with respect to the finality of Article 15, he could hardly have had the good fortune to retain a combination lawyer-prophet-seer who would have been able to predict this departure from precedent. One of the homely virtues of stare decisis is the reasonable expectation of properly advising clients; (2) the argument further overlooks the fact that the Government construction contract is about as flexible as an insurance contract in so far as its standard clauses are concerned.[55] It is in reality a contract of "adhesion." The contractor is in no position to bargain as to its terms, to select an independent arbiter, or to propose an entire elimination of the disputes clause. Even if the courts do not go to the extremes of interpretation found in the insurance cases, it should not be overlooked that the Government prepared the instrument. Moreover, the Supreme Court has held: [56]

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54 *Id.*, 72 S. Ct. at 157.

55 See note 1 *supra.*

56 United States v. Standard Rice Co., 323 U. S. 106, 65 S. Ct. 145, 89 L. Ed. 104 (1944).

> Although there will be exceptions, 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.

This judicial accolade upon unfettered discretion of the arbiter has little support in analogous situations in the law.[57] (3) The argument finally overlooks a fact already adverted to: the lack of availability of other civilian work of comparable size. Tightening of credit requirements and shortages of materials constantly exert economic pressure upon the contractor to undertake governmental work. Choice to sign the contract may simply be choice to remain in business.

Aftermath to Wunderlich

More important than its questionable legal basis, the *Wunderlich* case presents grave practical and political difficulties which Congress should remedy. The clash between Court of Claims and Supreme Court has not been restricted to the interpretation of Article 15 alone.[58] The attitude of the lower bench has been consistently responsive to the fact that the contractor did not prepare and could not vary the terms of the instrument. That court has implied constructive conditions of good faith and co-operation on the part of the Government.[59] The Supreme Court has rarely acknowledged these considerations, although in a dissenting opinion in the *Blair* case,[60] Justice Frankfurter observed rather elegantly that ". . . government contracts have interstices that secrete

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57 See, *e.g.*, the architect certificate cases, RESTATEMENT, CONTRACTS § 303 (f) (1932), excusing the condition if the architect, surveyor or engineer is guilty of gross error in regard to the facts on which the refusal to award the certificate is based. See also 13 MCQUILLIN, MUNICIPAL CORPORATIONS § 37.155 (3d ed. 1950).

58 The courts have also differed in their interpretations of Articles 3, 4 and 9. See United States v. Rice, 317 U. S. 61, 63 S. Ct. 120, 87 L. Ed. 53 (1942) (Articles 3 and 4 referring to changed conditions); United States v. Foley Co., 329 U. S. 64, 67 S. Ct. 154, 91 L. Ed. 44 (1946) (Article 9 referring to delays). The law review comments were adverse to the rulings of the Supreme Court: Anderson, *Damages for Delays in the Law of Government Contracts*, 21 So. CALIF. L. REV. 125 (1948); Coblens, *Liability of the Owner for Delaying Contractor's Work — The Foley Case*, 21 So. CALIF. L. REV. 36 (1947); 26 NEB. L. BULL. 457 (1947).

59 *See, e.g.*, Kehm Corp. v. United States, 93 F. Supp. 620, 623 (Ct. Cl. 1950).

60 United States v. Blair, 321 U. S. 730, 64 S. Ct. 820, 88 L. Ed. 1039 (1944).

relevant implications." [61] The unreasonable, vexatious and oppressive conduct of the Government agents in that case prompted the dissenting justice to agree with the Court of Claims that appeal within the department involved was excused.

The Court of Claims has also been much more familiar with and cognizant of the stresses and strains accompanying the Government construction project and the relationship between the contractor and the contracting officer. The contracting officer is properly charged with the responsibility of assuring the Government of the performance it has bargained for. His presence personally or by representative, as the job progresses, is indispensable. Left to his own devices the contractor might attempt to disregard the stringent requirements of Government contracts. When a question of interpretation of drawings or specifications arises, it must be his responsibility to make decisions and keep the work progressing. No reasonable person could suggest otherwise. The difficulty arises where a dispute occurs and he is required to temporarily forsake his role of Government representative and act as impartial arbiter. It becomes extremely difficult in practice to suddenly change character. It is roughly comparable to suggesting that the attorney for the defendant who has represented his client through the pleadings, motions and negotiations be now the judge of the merits of the case on trial. The contracting officer, no matter how well disposed, does not and cannot operate in a vacuum. He can hardly help but be partial to the Government. Moreover, the actual performance of the work often engenders an aura of mutual suspicion and distrust. The Government representative may feel that the contractor's sole concern is to make a profit at Government expense. On the other hand, the contractor may consider him an unbending civil

[61] *Id.*, 321 U. S. at 738.

servant enmeshed in reams of red tape, directives and channels of command which have deprived him of any independence or flexibility of action. Whether one or the other is accurate in his appraisal or whether both are partially correct is wholly immaterial. The undeniable fact is that the atmosphere exists in many cases.

The unfortunate *Wunderlich* decision takes no cognizance of this reality. Incompetence, caprice, stubborn or unimaginative adherence to supposed duty are not proscribed; the sole criterion is a conscious design to be dishonest or to cheat. A striking example of the necessity of much broader judicial review was revealed in *Stafford v. United States*.[62] The contractor had agreed to plant some ten thousand trees and shrubs upon a Government project over an area 15 blocks by 3 blocks. The contract provided for liquidated damages in the event of delay beyond the specified time. There was only one Government inspector on the job and he insisted on personally supervising the planting of each tree and shrub. He even demanded the uprooting of those which were planted in his absence. The contractor's demand for more inspections was refused. The contractor, "between the rock and the whirlpool," [63] as the Court of Claims described it, had no alternative but to work with a single crew. The court permitted a recovery for the damages caused by this action. However, the court emphasized that it had "no doubt" of the inspector's sincerety.[64] It is precisely this type of arbitrary action which *Wunderlich* has placed beyond review. Rare indeed will be the case where the contracting officer is consciously attempting to defraud or cheat the contractor. And rare will be the case where it could be proved. The *Wunderlich* case teaches that fraud cannot be presumed. A determination which could not be arrived at by reasonable

62 74 F. Supp. 155 (Ct. Cl. 1947).
63 *Id.* at 162.
64 *Ibid.*

men could be the product of incompetence or of an over-developed, out-of-proportion sense of duty as well as the result of fraud.

That appeal to department head is an unsatisfactory method of curing improper action in lower echelons would seem to be attested by reviewing the cases in the Court of Claims. The reports and recommendations of subordinate officials, acquiring age, bulk and respectability as they proceed to swim upstream to top levels through the mystifying channels of Government departments, may well find acceptance at face value. The tendency to emphasize the solution of factual and legal disputes within the limits of Government agencies to the practical exclusion of courts of record, is alarming. Traditionally a suitor is entitled to a "day in court": this should be literally true, he should not be relegated to administrative bureaus. The jurisdiction of the Court of Claims has been seriously whittled down by these decisions. It would seem entirely proper and just that Congress revise and rewrite Article 15 so as to assure the contractor a day in the Court of Claims if the action taken below is "arbitrary, capricious or so grossly erroneous as to imply bad faith." If the contracting officer and department head are to be placed in the incongruous position of impartial arbiter, then their jurisdiction should not extend to the determination of questions of contract law. Presumably the Court of Claims is a more competent forum for the settlement of legal disputes if the system of "checks and balances" is to be maintained.

*William Hughes Mulligan**

*Professor of Law, Fordham University. A.B., 1939. LL.B., 1942, Fordham University. Associated with the firm of Manning, Harnisch & Hollinger, New York City. Member, New York County Lawyers Association. Contributor of articles to various legal periodicals.