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Default Termination of Defense Department Fixed Price Supply Contracts

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DEFAULT TERMINATION OF DEFENSE DEPARTMENT FIXED PRICE SUPPLY CONTRACTS

I

INTRODUCTION

The Government commonly reserves the right to terminate military contracts at any time. If there is no defect in the contractor's performance, the termination must be issued "for the convenience of the Government." As a consequence of such a termination, the contractor is entitled to recover in settlement from the Government the costs he has incurred toward the uncompleted portion of the contract plus a profit thereon. Such a settlement under the "termination for convenience" article frequently approaches but cannot exceed the amount of the contract price.

When the contractor has failed to make timely delivery or to perform some other provision of the contract, the situation is altered. Within certain limitations the Government then has the right to terminate the contract under

the provisions of the "default" article. A default termination has two important effects: (1) it deprives the contractor of the right to recover his costs under the "termination for convenience" article; (2) it permits the Government to repurchase the supplies elsewhere and charge to the account of the defaulting contractor the "excess costs" — the amount by which the repurchase price exceeds the original contract price.

These provisions are designed largely to facilitate administrative cancellation and settlement of contract obligations without resort to court action. They do not radically alter the common law rights of the parties. There are, however, in the "default" article two provisions in the contractor's favor which do represent a departure from the common law. They are applicable in those cases where the Government has terminated because of delays in delivery. First, a detailed provision increases the number of causes for delay which are deemed excusable and which will prevent liability for excess costs of repurchase. Secondly, by showing any such excuse for the delay, the contractor is not merely relieved from liability for the excess costs, but thereby becomes entitled to a settlement under the "termination for convenience" article for the expenses of his attempted performance and, perhaps, a profit. Thus, a contractor whose performance is long overdue at the time of termination, by proving excuse, may not only be spared liability for the loss to the Government on repurchase, but may actually enjoy a profit although he has failed to deliver a single item.¹

Included in appendices to this article are standard provisions relating to default and excusable delays. These

¹ Construction contracts do not ordinarily include a "termination for convenience" article. What relief is available to a defaulted contractor whose delays prove excusable does not seem clear. Perhaps a termination for convenience settlement may be allowed administratively in lieu of damages for which the Government would otherwise be liable. But cf. Armed Services Procurement Regulations (hereafter ASPR) 8-703 (Aug. 6, 1953), CCH GOV'T. CONTRACTS REP. ¶ 41,863, as to fixed price construction contracts.

provisions relate to supply contracts — Appendix A being for fixed price and Appendix B for cost reimbursement contracts. The text will deal with the fixed price contract clause except where noted, although the principles are generally the same. Clauses relating to default differ a good deal in form and detail but are alike in their elimination of certain risks of non-performance normally assumed by a seller in the absence of express provision. Delay is excused for such causes as strikes, material shortages, certain defaults of sub-contractors, and generally "causes beyond the control and without the fault or negligence" of the contractor.

It must not be supposed, however, that all departures from commercial custom in the standard forms are in the contractor's favor. The broader opportunity to prove excuse and the consequent right to recover costs through a termination for convenience practically exhaust the charity of the government draftsmen. The remainder of the many provisions are in favor of the Government and are calculated to insure performance. First of all, the provision permitting default termination for the slightest delay beyond the specified delivery time obviously makes time "of the essence" in all contracts, even where timely delivery seems of little importance. Thus the contractor is held to a higher standard of performance as regards time than in the usual private contract where, absent any express provision, the apparent urgency of the need for the goods would govern the materiality of the delays in delivery.² Secondly, the Government has the right, under subsection a(ii) of

² This view is in conflict with that suggested in an article appearing in the *Federal Bar Journal* in 1954. The author made the curious observation that "... the current view is that time is not of the essence in Government contracts unless it is apparent from all the facts and circumstances that time is a material factor." Corbin is cited as sole authority. It was apparently overlooked that the very language of the default article bestows power on the Government to terminate for any delinquency. Corbin was concerned with private contracts containing no specific provision regarding timely delivery other than a mere delivery date. Risik, *Defaults in Federal Government Contracts*, 14 *FED. B.J.* 339, 348 (1954). See also *RESTATEMENT, CONTRACTS* § 276 (1932).

the "default" article, to terminate the contract for default even before the delivery date where the contractor's failure to make satisfactory progress endangers performance and is not cured after notice. A third advantage already noted is the right of the Government to repurchase terminated supplies elsewhere and simply charge the account of the defaulted contractor with the excess costs that may be involved and/or liquidated damages if such are provided.³

The authors propose to discuss the relative rights of Government and contractor under the standard forms for fixed price supply contracts in the following general areas:

(1) the conditions and limitations of the Government's right to terminate for default; (2) the excuses entitling a defaulted contractor to relief from excess costs and to a termination for convenience; (3) the effect of the Government's consenting to late deliveries on the right to terminate; (4) problems relating to action following termination; and (5) remedies available to the Government other than termination. The term "delinquency" will be used to describe a situation where the contractor has failed to deliver on time but has not yet been terminated. "Default" will be used where termination has issued. The right to a termination for convenience will be discussed, but the complicated provisions for settlement under the "termination for convenience" clauses are beyond the scope of this article.

There is no pretense that the discussion here will exhaust the subject of default terminations. There are too many Government entities involved with varying and times

³ Liquidated damages currently are seldom used in supply contracts but are a standard provision in construction contracts.

⁴ A classic three-sided struggle among the Attorney General, the Comptroller General, and the Court of Claims appears in *Graybar Elec. Co. v. United States*, 90 Ct. Cl. 232 (1940). See also *McCabe v. United States*, 84 Ct. Cl. 291 (1936); 2 Comp. Gen. 784 (1923). In one opinion the Comptroller General has stated flatly that "While the accounting officers of the Government will give serious consideration to decisions of the Court of Claims, they are not required to follow such decisions as precedent." 27 Comp. Gen. 432 (1948), at 433.

disputed jurisdiction.⁴ There are too many complexities in too many standard forms and too many permutations of fact in the blizzard of appeals from default terminations. In the case of military contracts these appeals are normally decided as questions of fact under the "disputes" article by the Armed Services Board of Contract Appeals (hereafter "ASBCA" or "Board")⁵. Until recently the infrequency of judicial review was such that the Board's decisions (together with those of the Comptroller General) are the principal authority on defaults and will be relied on most heavily in this article.⁶ However, the commentator dealing with the Board's opinions faces several difficulties which give fair warning that conclusions must be tentative on the question of authority. First, the Board, in its primary role as a fact finding entity, frequently delivers opinions which are extremely terse in their conclusions. Long on facts and short on discussion, they often present a serious problem of analysis. Furthermore, the meaning of the occasional land mark case often is obscured

⁵ The Board derives its authority from a "disputes" article permitting appeal to the secretary of the department (Army, Navy, or Air Force) within 30 days from a written decision by the contracting officer. The authority of the secretary or his representative (the Board) is limited to questions of fact arising under the contract. Several issues commonly arising under the standard forms and appearing to be mixed questions of law and fact are made questions of fact by express provision. Although the excusability of a contractor's delays is not explicitly made a dispute of fact, it has been treated as such by the Board through perhaps two thousand decisions without challenge. For an excellent discussion of the history of the "disputes" article and its recent legislative alteration, see Joy, *The Disputes Clause in Government Contracts: A Survey of Court and Administrative Decisions*, 25 *FORDHAM L. REV.* 11 (1956). See also Cuneo, *Armed Services Board of Contract Appeals: Tyrant or Impartial Tribunal?* 39 *A.B.A.J.* 373 (1953).

⁶ Until recently the "disputes" article made the decision of the Board "final and conclusive" on questions of fact. In *United States v. Wunderlich*, 342 U.S. 98 (1951), factual questions determined under this clause were held subject to judicial review only upon the basis of "fraud, alleged and proved." The resulting protest inspired legislative changes in the "disputes" article, which now provides for review where the decision is "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." 68 *STAT.* 81 (1954), 41 U.S.C. §§ 321, 322 (Supp. 1955). See Volentine and Littleton v. *United States*, 145 F. Supp. 952 (Ct. Cl. 1956); Joy *supra* note 5.

in later decisions where a melange of facts that almost defies penetration may be followed by a laconic conclusion citing the earlier opinion as precedent. A second difficulty of analysis lies in that provision in the charter of the Board which permits decisions to be made in some instances by only two members of the sixteen member Board.⁷ That conflicts of principle may be generated within the Board seems evident, and such conflicts make prediction hazardous. Finally, and superimposed on these two problems, is the very real difficulty created by the absence of any digest of the Board's opinions since 1954. During the intervening period several hundred opinions have issued, of which but a small part are reported (and these inadequately) in the Government Contract Service.^{7a} The rest remain almost inaccessible because they are undigested and unavailable in all but a few non-government collections. There is, of course, some assistance to be had from opinions of the Court of Claims and other federal courts and from the opinions of administrative agencies. The occasional decision of the General Accounting Office and its principal officer, the Comptroller General, often exert a determining influence on the solution of particular problems. But the greater number and coverage of the Board's decisions and the relative paucity of appeals leave it the most persistent voice and in effect chief authority in the area.

⁷ The Board's charter, granted by directive of the three secretaries on May 1, 1949, divides the organization into three panels (Army, Navy, Air Force) which are then further broken down into "divisions" which normally consist of three or more members. However, when a division is short handed, a decision may bear the signature of only one division member plus the chairman of the panel involved (although it is also examined by the other panel chairmen who have the option to require a full Board decision). See *George E. Martin & Co.*, ASBCA 3117 (Oct. 19, 1956); *Maryland Wiping Cloth Co.*, ASBCA 3245 (July 3, 1956). (Note that the numbering of the appeal does not reflect the date of issuance).

^{7a} It is gratifying to note the appearance of the new Commerce Clearing House Reports of ASBCA and other cases dating from July 1, 1956. The preceeding two years, however, remain largely inaccessible.

i TERMINATION FOR DEFAULT / TERMINATION FOR CONVENIENCE

There is one other preliminary matter which we feel is worthy of brief comment. We have pointed out that supply contracts provide that they may be terminated for the default of the contractor and for the convenience of the Government. In the latter case, a settlement reached by negotiation is to be regarded as final and binding on the parties.⁸ And, although the contract does not spell this out, no reason is perceived why the Government may not cancel a contract without reference to either provision and enter into a supplemental agreement settling the rights of the parties.⁹ Is a choice among these alternatives available to the government contracting officer in the case of a delinquent contractor?

It is not immediately apparent from the contract whether the contracting officer may elect to terminate a contract for the convenience of the Government under the clause so entitled (or whether he may elect to cancel it without reliance on such provision) in the event that the contractor is, for one of the reasons specified in subclause "(a)" of the "default" clause, in delinquency. Certainly *the contract* does not provide that the contract-

⁸ *United States v. Corliss Steam-Engine Co.*, 91 U.S. 321 (1875). Cf. 18 Comp. Gen. 826 (1939) and 29 Comp. Gen. 36 (1949), in which the Comptroller General admitted the right to terminate and enter into settlement agreements but did not expressly concede the finality of such agreements. A settlement by determination (an *ex parte* determination of the contracting officer which he is to make when the parties fail to negotiate a settlement) is subject to appeal under the "disputes" clause (ASPR 7-103.12) of the contract and may be revised or set aside on such appeal. Whether an unappealed contracting officer's decision or an appellate decision is final is to be determined in the light of the provisions of the "Disputes Act", 68 STAT. 81 (1954), 41 U.S.C. §§ 321-22 (Supp. 1955).

⁹ *Ohio Savings Bank & Trust Co. v. Willys Corp.*, 16 F.2d 859 (3d Cir., 1926). In 18 Comp. Gen. 826 and 29 Comp. Gen. 36, *supra* note 8, the power of officers of the executive agencies to terminate and settle contracts for the convenience of the Government was recognized as existing even in the absence of authorizing contract provisions. See 5 CORBIN, CONTRACTS § 1236 (1951).

ing officer *must* terminate under the "default" clause in such a case. In the case of some delinquent contractors, the termination of their contracts under the "convenience" clause (or cancellation without reliance on that clause) must be appealing to the contracting officer, as, for example, where it is desired to retain the contractor in the mobilization base. Because a termination for convenience or cancellation may result in a "no-cost" settlement,¹⁰ the advantage of this procedure is apparent. The usefulness of settlement in this fashion is also apparent in a case where the Government does not desire to repurchase the items called for in a contract with a delinquent contractor and where the actual loss to the Government is insubstantial. Nonetheless, there seems to be a dearth of authority on whether cancellation or termination and settlement is permissible in such circumstances despite the apparent "convenience" to the Government of thus simply writing the contract off its books.¹¹ Partly, the question is one of the authority of any officer of the executive agencies to

¹⁰ That is, mutual releases by the parties without any duty of money payment being assumed by the Government. See ASPR 8-519.5. (Jan. 3 1955), CCH Gov't CONTRACTS REP., ¶ 48,819.5. It is believed that such a settlement could legitimately extinguish claims by the Government against the contractor by means of set-off against amounts owed to the contractor. It should be noted, however, that ASPR 8-519.5 appears to militate against such settlement: "If no costs have been incurred by the Contractor in respect of the terminated portion of the contract, or if the Contractor is willing to waive the costs incurred by it, and no amounts are due to the Government under the contract, a no-cost Settlement Agreement . . . shall be executed by the Contractor and the Contracting Officer."

¹¹ There are many decisions (which do not deal, however, with the precise issue raised in the text) holding or noting that officers of the Government may not "give away," "surrender" or "waive" vested rights of the Government without either statutory authority or without consideration to the Government. Some of these decisions are noted in the next footnote. On the other hand, the Court of Claims in *Lang Co. v. United States*, 141 F. Supp. 943 (1956), seemed to take the view that the Government and a delinquent contractor might by mutual agreement cancel their contract even though the Government incurred excess costs in repurchasing the contract items elsewhere. In such case the Government could not charge the contractor with such excess costs by setting off its claim against amounts due the contractor under other contracts. No notice in writing of termination under the default provisions of the contract was ever given.

release "vested" rights;¹² partly, it is a question of the authority of contracting officers, under administrative rules or policies governing their conduct, to exercise the right conferred upon them by the contract to terminate for convenience.¹³ It is beyond the scope of this article to attempt a definitive answer to an internal problem of Government except to indicate that it is not altogether clear why the right of the Government to performance

¹² In *Ms. Comp. Gen. B-128316*, July 13, 1956, 36 *Comp. Gen.* 27, the contractor had bid on a contract for supplies and its low bid contained an apparent error. The contracting officer twice requested that the bid be verified and twice was answered that it was correct. Award was made. One month later, the contractor discovered that there was, in fact, an error and requested "cancellation". The Comptroller General held that the cancellation request could not be granted, indicating that the reason for this was the absence of authority in any government officer, without statute, to give away or surrender the vested right of the Government. The decisions relied upon were: *Day v. United States*, 245 U.S. 159 (1917) (contractor not entitled to extra compensation when performance became more expensive or burdensome than anticipated); *Simpson v. United States*, 172 U.S. 372 (1899) (extra compensation denied where unforeseen circumstances added to expense of performance); *Chouteau v. United States*, 95 U.S. 61 (1877) (delay incident to change order increased cost of work not changed and no judgment could be granted for these costs); *American Sales Corp. v. United States*, 32 F.2d 141 (5th Cir. 1929), *cert. denied*, 280 U.S. 574 (1929) (government officer did not have authority to supersede surplus sales contract by a second "contract" merely reducing the price of the items sold); *Bausch & Lomb Optical Co. v. United States*, 78 Ct. Cl. 584 (1934) (contract for services previously rendered held unenforceable); *Pacific Hardware & Steel Co. v. United States*, 49 Ct. Cl. 327 (1914) (dicta on waiver or release of accrued liquidated damages) (also, see earlier opinion in the same case, 48 Ct. Cl. 399 (1913); 22 *Comp. Gen.* 260 (1942) (reduction of rent on property leased by the Government to parking lot operator unauthorized when lessee's income from premises was reduced due to World War II gas rationing). See also *Ms. Comp. Gen. B-129249*, October 11, 1956 (no authority to waive excess costs where they had already been established under a repurchase contract which was fully performed). The most that can be drawn from these cases seems to be that the Government can insist on performance of its contracts and that no government officer is authorized to reduce or increase prices without consideration, or waive accrued liquidated damages or excess costs. They do not really solve the question of whether a government contracting officer can elect to cancel a contract or terminate pursuant to the "convenience" clause and enter into a settlement agreement embodying mutual releases.

¹³ In general, officers of the Government have only such authority as is derived ultimately from the Constitution and laws of the United States, administrative regulations and from delegation of authority from superior officers. One of the recurring themes is that the United States is never

of its contracts according to their terms should not be regarded as a vested right, subject, at least, to divestiture pursuant to the "convenience" clause.

II

REDUCING THE CONTRACTOR'S RISK: EXCUSABLE DELAYS

Paragraph (b) of the standard "default" article sets out those causes of failure to perform which will immunize the contractor from liability for excess costs if the Government repurchases, and which will transform a default termination into one for convenience of the Government.

(b) The Contractor shall not be liable for any excess costs if any failure to perform the contract arises out of

estopped to deny the invalidity or unauthorized character of the acts of its officers or agents. *But see* George H. White Constr. Co. v. United States, 140 F. Supp. 560 (1956). Delegations of authority to a government contracting officer can be effective restrictions on the authority of contracting officers to act; naturally, the delegation itself must be sufficient to encompass the contractual act before the latter can bind the Government. See Gordon Woodroffe Corp. v. United States, 104 F. Supp. 984, *cert. denied*, 344 U.S. 908 (1952), in which the existence of authority was sought to be found in a telephone conversation between two officers of the Government.

Consequently, the authority of a contracting officer to bind the Government by an election to terminate a delinquent contractor for the convenience of the Government may well be restricted by administrative limitations on his authority to do so. For example, the Department of the Navy published a directive on the subject, stating Navy policy with respect thereto. This directive (NCPD 54-56, as revised Feb. 17, 1956) was incorporated in Navy Procurement Directives par. 8-001.

It should be noted that general authority to settle and adjust claims for and against the United States is given to the General Accounting Office pursuant to 42 STAT. 24 (1921), 31 U.S.C. § 71 (1952). To the extent that the Government has a claim against a delinquent contractor (and it would appear to have some right to actual damages for any breach), such claim is subject to the settlement powers of the GAO. Of course, it may also be settled in the courts in an action by the United States or on a counterclaim by the United States in an action, if any, brought by the contractor. See 62 STAT. 933 (1948), 28 U.S.C. § 1346 (2) (Z) (1950), 62 STAT. 940 (1948), as amended, 68 STAT. 1241 (1954), 28 U.S.C.A. § 1491 (1955 Supp.). On the functions of the General Accounting Office with respect to Government contracts, see Birnbaum, *Government Contracts: The Role of the Comptroller General*, 42 A.B.A.J. 433 (1956).

causes beyond the control and without the fault or negligence of the Contractor. Such causes include, but are not restricted to, acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and defaults of subcontractors due to any of such causes unless the Contracting Office shall determine that the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.¹⁴

Any cause is sufficient to excuse, then, which is "beyond the control and without the fault or negligence of the contractor."

An immediate problem, but one which has been authoritatively settled, is whether those causes of delay specifically mentioned are excuses in any and all circumstances, or whether they must conform to the general test. This question arose in *United States v. Brooks-Callaway Co.*,¹⁵ which involved a "default" article in a construction contract similar to the present article in supply contracts with the added requirement for excuse that the cause of failure be "unforeseeable." The contractor was delayed 278 days by floods. The contracting officer assessed liquidated damages for the 183 days of this delay which he held to be due to conditions of flood that normally occurred each year. The other 95 days of delay were considered to be unforeseeable and, therefore, excusable. His decision was upheld by the Supreme Court which stated that the general test conditioned the excusability of the named causes and that, if the delay were either foreseeable or within the contractor's control, or if it resulted from his fault or negligence, it was not excusable irrespective of its source.

There is no specific requirement of unforeseeability of delay in the current standard "default" article used in

¹⁴ See Appendix A *infra*.

¹⁵ 318 U.S. 120 (1943).

defense supply contracts. However, in effect, the tests are identical, for, if the contractor is late in delivering due to delays which, although beyond his control, are foreseeable, the delinquency is considered to arise from his own "fault or negligence." If the delays were foreseeable, they should have been provided for when the contractor made his delivery commitments, and failure to so provide is negligence.¹⁶

Barring specific provision to the contrary, it seems safe to say that no foreseeable cause will operate as an excuse. The converse, however, is not necessarily true. Causes which are essentially unforeseeable, such as negligence on the part of the contractor, of course are ineffective to excuse delay. Probably the whole formula could be reduced to the unitary notion of "fault," and the Board sometimes goes no further than this in articulating the excusability of delay.

Before examining the excusability of various specific causes for delay, there is another general problem that deserves attention. Assuming that excusable cause does exist, is a contractor relieved of liability if the supplies he was to furnish are procurable in the open market or can be obtained from an available subcontractor? For instance, if a strike delays him in manufacturing the items himself, must a contractor turn to a subcontractor for assistance where this is possible? Such a duty to purchase elsewhere if possible is specifically defined in the "default" article in those cases where the delay arises from the "defaults of subcontractors." Whether the express inclusion of the duty in that situation operates to exclude it in all others seems seldom to have been discussed by the Board. The matter might be decided simply by reference to the general test of excusability which conditions all causes. Thus the mere fact that the contractor is himself incapacitated by a fire or strike would not be con-

¹⁶ See e.g., *A. M. Loveman Lumber & Box Co., ASBCA 3029* (March 26, 1956). But cf. 35 Comp. Gen. 460 (1956).

clusive of the question whether failure to deliver was "beyond his control and without his fault and negligence" if it is shown that supplies were available elsewhere. At least one opinion of the Board seems to have reached this conclusion in holding a fire to be no excuse since the lumber called for was readily available elsewhere.¹⁷ In another opinion there is dictum that "... seldom would a delay be beyond the control of a contractor, if the supplies were procurable on the open market."¹⁸ The Comptroller General has taken a definite stand on the problem in a number of instances, stating that, "... where supplies are readily procurable from other sources, . . . causes which otherwise might . . . excuse performance . . . will not excuse . . ."¹⁹ Such a stand rigorously enforced would emasculate the concept of excusable cause. Every manufacturer involved in unavoidable delays from an epidemic or even from acts of the Government would be forced to waste his work in process and engage a subcontractor to complete the job. Every strike bound contractor would await the end of the strike at his own peril, if he failed to seek a substitute supplier. On the other hand, it seems unfair to the Government to excuse a contractor for a fire which destroyed his production facilities when there are other producers in the area from whom he could easily purchase the contract requirements. The present language of the "default" article is insufficient to distinguish these cases. The question almost never seems to be raised before the Board except when a subcontractor's failure is involved.

i THE DELAYS OF SUBCONTRACTORS

Having discussed excusability in general, an examination should be made of a few of the most important and controversial specific causes of delay. The delays of sub-

¹⁷ J. F. Weaver Lbr. Co., ASBCA 1448-50 (Aug. 24, 1953).

¹⁸ Andresen & Co., ASBCA 633 (Dec. 13, 1950).

¹⁹ 27 Comp. Gen. 621 (1948), at 624.

contractors have been by far the most troublesome of the various excuses. In the first place, the language of the "default" article leaves it doubtful whether the delays of the subcontractor would have to be excusable in order to excuse the prime contractor. This was for some time the interpretation favored by several members of the Board. In *Elite Specialty Metal Co.*,²⁰ it was held that, since the breakdown of machinery in his own plant would not have excused the prime, the same cause in the subcontractor's plant would not do so. This decision and others like it represented, over and above a mere contract interpretation, a fear that the opposite result would promote collusion. The prime contractor who wished to jettison a losing contract could well make a clandestine arrangement with the subcontractor whose deliberate non-performance would insulate the prime from liability.

This fear was belittled by opposing Board members, and they insisted that whether the delays were excusable to the subcontractor or not, if the contractor himself were faultless, the article required that he be excused. This interpretation seems to have prevailed since the decision of the full Board (several members dissenting) in *Andresen & Co.*²¹ in 1950. There it was held specifically that, if the prime contractor were without fault, this would be sufficient in any case to excuse him.

The *Andresen* approach by no means assures the prime contractor that his supplier's delays will excuse him. The

²⁰ ASBCA 419 (March 29, 1950). See also *Krauss v. Greenberg*, 137 F.2d 569 (3d Cir.), *cert. denied*, 320 U.S. 791 (1943). The Interior Department Board of Contract Appeals seems to adhere to this interpretation. See *Schmidt Steel Co.*, IBCA 29 (Nov. 10, 1955).

²¹ *Andresen & Co.*, ASBCA 633 (Dec. 13, 1950). This does not seem to be the rule, however, in the case of contracts to supply the Government with articles which were once war surplus. The risk of acquisition seems to be on the contractor in all such cases and no failure of a supplier will excuse. *Projects Unlimited*, ASBCA 2563 (Nov. 30, 1955). The Defense Department is currently considering the inclusion of a provision in the "default" article specifically requiring that the subcontractor's delays be excusable.

contractor himself may still be at fault in at least four ways. First, he may be held responsible for delays on the basis of negligent selection of a supplier. This was pointed out in the *Andresen* opinion which stressed the importance of the prudent selection, in that case, of a supplier with an excellent prior performance record.²² Secondly, the contractor must have some reasonable assurance of the availability of supplies prior to entering the contract, although just what constitutes such assurance is not clear.²³ Third, it is clear that the contractor must exercise diligence after the contract is entered by using reasonable pressure to require performance of his subcontractor.²⁴ Fourth, as already noted, the contractor is under a specific duty to find an alternate supplier if possible when the original subcontractor fails. Whether the contractor must buy elsewhere regardless of price is a practical problem which the Board has left in doubt. In several cases it has suggested that an increase in cost is nothing more than a business risk,²⁵ but in the more recent decision in *Harvey-Whipple* the door has been left open to possible excuse where there is "... concrete proof that the cost ... would have been fantastically out of proportion"²⁶

²² *Ibid.* See also *Adrena Giragosian*, ASBCA 567, March 20, 1951). No case was found in which excuse was actually denied on the basis of the supplier's general reputation. However, where the contractor knew that his supplier previously had experienced trouble with the specification involved, the delays were not excusable. *Merion Worsted Mills*, ASBCA 784 (Dec. 11, 1951). Cf. *Frank L. Weiss*, ASBCA 2786 (Oct. 24, 1955).

²³ The solidity of the commitment required probably varies directly with the degree of difficulty that can be foreseen in procuring the material. In *United Surgical Supplies Co.*, ASBCA 1328 (June 23, 1953), prior commitments were held unnecessary where the contractor had reasonable assurances and "In view of the limited and closely integrated nature of the industry. . . ." See also *Federal Fawick Corp.*, ASBCA 2468 (Oct. 25, 1955); *Metalcraft Engineering Corp.*, ASBCA 2276 (Sept. 22, 1955).

²⁴ No decision has been found turning upon this question alone. The problem tends to blend with that of the efforts made by the contractor to find an alternate supplier. See *Newark Weaving Mills*, ASBCA 3026 (July 17, 1956).

²⁵ *Johnson Automatic Arms, Inc.*, ASBCA 758 (Jan. 26, 1951); *River-side Screw Products*, ASBCA 354 (May 29, 1950).

²⁶ ASBCA 2045 (Sept. 30, 1954).

The tenor of liberality in the Board's decisions has been somewhat unsettled by a 1953 decision of the Court of Claims, which has apparently accepted the *Andresen* interpretation but has set a rigid standard of prognostication for the prime contractor in selecting his suppliers. In *Poloron Products Inc. v. United States*,²⁷ the failure of a subcontractor who was fabricating dies for newly designed canteens was held inexcusable to the prime contractor on the theory that, since the manufacturing process was a new one, delays were foreseeable. Although the test of foreseeability remains extant under this view, the contractor may have no basis on which to foretell, at least if he is required to be more prescient where the article previously has never been made than where it is a standard product. It is precisely when the specifications and design are new that it is most difficult to foresee the problems of manufacture. Foresight is frequently impossible in a new article when the contractor is manufacturing it himself. Where he is subcontracting, the difficulty is compounded. It seems unfair to tax the contractor with delays, the foreknowledge of which would be sheer clairvoyance. The test of foreseeability should be the same whether the item is new or standard and should apply to probable events and not merely to vague premonitions.

The Board appears restive under the *Poloron* approach and anxious to distinguish wherever possible. In the recent appeal of *Harwood Mfg. Co.*,²⁸ a full Board (with three dissents) distinguished the *Poloron* case without reference to the novelty of the specifications involved and held that, where the defaulting subcontractor is a sole supplier of a necessary metal, the Government has in effect chosen the supplier, and the prime contractor cannot be held for resulting delays. The opinion is far from clear,

²⁷ 126 Ct. Cl. 816, 116 F. Supp. 588 (1953).

²⁸ ASBCA 1831 (Nov. 23, 1955).

but it gives an impression of the distress of the majority of the Board over the strictures of *Poloron*. On the other hand, in the later opinion in *Newark Weaving Mills*,²⁹ signed by three members of the Board, two of them dissenters in *Harwood*, the failure of a supplier was held inexcusable although (1) the original subcontractor broke a firm commitment, later settling a resulting suit; (2) the contractor endeavored without success to get other suppliers to do the work; (3) there was no evidence either that the original subcontractor was poorly chosen or that the contract items were anything but standard. The Board suggested the importance of the fact that the unwillingness of the alternate suppliers was the result of the contractor's financial condition. One is inclined to wonder whether such circumstance is either foreseeable to or the fault of a contractor who has a prior firm commitment from a normally responsible supplier. The predictability of results in this area leaves a good deal to be desired.

ii ACTS OF THE GOVERNMENT

When the Government interferes with or hinders the contractor, the resulting delays may have several effects: they may (1) give rise to an action for damages, (2) require an equitable adjustment of the contract price according to its terms, (3) render the delays excusable to the contractor. This discussion will treat principally of the excusability of such delays. The problem of damages for the delay of the Government is an old one which still seems to provide a tilting ground for the Supreme Court and the Court of Claims. The latter continually asserts that unreasonable delays caused by the Government constitute a breach, while, to all appearances, the high Court still insists that such acts merely require extensions in the

²⁹ ASBCA 3026 (July 17, 1956).

delivery schedule.³⁰ The Defense Department has acted to effect contractually the conclusion of the Court of Claims by providing in the standard forms for equitable adjustments in price for certain delays of the Government, notably late delivery of government furnished property. These problems of damages and price adjustments for the Government's delay must be distinguished from the issue of excusability of the contractor's own delay caused by acts of the Government. The issue of excusability arises only after a termination for default or an assessment of liquidated damages—that is, as a defense to a claim of the Government. The defense, if proved, will entitle the contractor to positive relief under the contract itself through a termination for convenience granted administratively rather than through an action for damages before a court or through an adjustment in price.

The test of excusability for acts of the Government is no different from the general test of fault on the part of the contractor. It is uncomplicated by the casuistries of the damage cases where distinctions sometimes are made between acts of the Government done in its "contractual" as opposed to its "sovereign" capacity.³¹ In the termination appeals, if the delay is unavoidable and unforeseeable by the contractor, it does not matter whether it was caused by an Act of Congress or the sheer perversity of the contracting officer. For example, where a contractor in a foreign country was prevented by American embassy officials from performing acts necessary to procure food

³⁰ A series of reversals by the Supreme Court seems to have terminated with *United States v. Foley Co.*, 329 U.S. 64 (1946). Since that time the Court of Claims has twice assessed damages against the Government for delay. *Ozark Dam Constructors v. United States*, 130 Ct. Cl. 354, 127 F. Supp. 187 (1955); *Geo. A. Fuller Co. v. United States*, 108 Ct. Cl. 70, 69 F. Supp. 409 (1947). See generally, Anderson, *Damages for Delays in the Law of Government Contracts*, 21 So. CALIF. L. REV. 125 (1948); Seltzer and Gross, *Federal Government Construction Contracts: Liability for Delays Caused by the Government*, 25 FORDHAM L. REV. 423 (1956).

³¹ *Lynch v. United States*, 292 U.S. 571 (1934); *Horowitz v. United States*, 267 U.S. 458 (1925).

under an Army contract, the consequent delinquency was excusable and the default termination improper.³² Had the contractor been seeking relief in a court, it is not clear that such interference, being in a "sovereign" capacity, would have supported an action for damages.

Among the acts of the Government occasionally said to excuse delay are some specifically permitted by the contract forms. Exactly speaking, these acts do not excuse delay, but rather go beyond mere excuse and extend the delivery dates. Such acts, for instance, as changes in specifications and late or defective deliveries of government furnished property, entitle the contractor to compensating extensions of time. These are mentioned because the Board occasionally overlooks the distinction between excuse and extension of the schedule and uses acts such as change orders as the basis for "excusing" contractors' delays.³³ The importance of recognizing the distinction will be discussed further in the section on extension of the delivery schedule.

Acts which would constitute breaches of contract by the Government also frequently operate to excuse. An obvious case is a termination for default issued before any deliveries are overdue.³⁴ Another is the refusal to make partial payments where they are provided for in the contract.³⁵ The payment clause involved usually states that partial payments are in the discretion of the contracting officer, but, where such payments have been bargained for and consideration given, the Government clearly has no right to withhold them without excuse.

³² Mertz Merchandise Agency, ASBCA 608 (Aug. 24, 1950).

³³ See, e.g., Halstead & Mitchell, ASBCA 2424 (Jan. 30, 1956).

³⁴ Chevy Chase Pet Shop, ASBCA 2151 (July 28, 1954). Actually such cases do not involve an excuse problem at all. Since the contractor is not in delinquency, there is nothing to excuse. This seems true also where the delivery schedule has been waived.

³⁵ *United States v. Lennox Metal Mfg. Co.*, 131 F. 2d 717 (2d Cir. 1955); *Geo. E. Martin & Co.*, ASBCA 3117 (Oct. 19, 1956); *Valley Forge & Car Co.*, ASBCA 2394-95 (May 9, 1956); *Halstead & Mitchell*, *supra* note 33.

Further, the contractor also may be excused by failure of the Government to reasonably perform acts of assistance to the contractor which are, strictly speaking, not even required. The Government generally makes no promise to inspect completed items of manufacture. However, where an inspector was customarily present in the plant, his withdrawal and refusal to inspect because of erroneous reports of defects from the receiving installation was justification for the contractor's ceasing production.³⁶ In another appeal, *Presto Beverage Corp.*,³⁷ the Government took samples for testing long before delivery date. It delayed informing the contractor of unsatisfactory test results until after delivery date, at which time it terminated for default. The delay obviously prejudiced the contractor's opportunity to correct the defects before delivery date, and his failure to do so was held excusable. Generally speaking, however, the contractor cannot hold up production while awaiting the results of tests by the Government unless the delay in testing becomes "unreasonable."³⁸ Isolated Board opinions have suggested that, since there is no duty whatsoever on the Government to inform the contractor of the outcome of tests, resulting delay is never excusable.³⁹

Other governmental acts of assistance, which were bungled or refused have not excused the contractor. A delay in supplying unrequired drawings,⁴⁰ an erroneous statement of opinion as to the availability of suppliers,⁴¹ a refusal of government inspectors to give advice on specifications,⁴²

³⁶ *Northwestern Corp.*, ASBCA 2025 (Feb. 15, 1956). See also *Stafford v. United States*, 109 Ct. Cl. 479, 74 F. Supp. 155 (1947).

³⁷ ASBCA 1510 (April 13, 1954).

³⁸ *Reed & Prince Mfg. Co.*, ASBCA 1061 (March 21, 1955), where the refusal of government inspectors to cross picket lines at appellant's plant was excusable cause for delay. See also *Schwartz Mattress Co.*, ASBCA 403 (April 26, 1950); *Champion Pants Mfg. Co.*, ASBCA 312 (Jan. 30, 1950).

³⁹ *Bo-Jack Mfg. Corp.*, ASBCA 280 (July 27, 1950).

⁴⁰ *Keco Industries*, ASBCA 2755 (April 18, 1955).

⁴¹ *Newark Weaving Mills*, ASBCA 3026 (July 17, 1956).

⁴² *Jensen Dental Instrument Co.*, ASBCA 1451 (June 23, 1953).

and an approval of the wrong production method⁴³ have all been held not to excuse on the ground that, since there is no duty in the first place to perform these services, the contractor has no right to depend upon them. He may, however, depend on the Government to promptly clarify specifications once an ambiguity is brought to its attention, for the Government is bound to supply specifications possible of clear interpretation.⁴⁴

A last problem is the treatment of concurrent delays of contractor and Government. Generally, if it is found that the delays cannot be segregated, the Board, without explanation, holds for the contractor.⁴⁵ This approach is not inevitable, as is apparent from the recent decision in *Grosse Pointe Accessory Corp.*,⁴⁶ where the Board held for the Government despite a finding that the delays could not be segregated. However, in that case the delays by the Government were not significant when compared with the total delay involved, and the integrity of the general rule seems to be unaffected.

iii LACK OF KNOW-HOW

Where the contractor has difficulty with the actual manufacture of a contract item, the decisions offer him no basis for optimism. As early as 1915 the Supreme Court held that only where an article is impossible of manufacture is a contractor excused even though the contract grants absolution for "unavoidable causes." This arose in *Carnegie Steel Co. v. United States*,⁴⁷ where the contractor undertook to make armor plate to new specifications and was delayed by the necessity, unforeseen by either party, of developing an entirely new technique of manufacture. In holding for the Government, the Court considered and specifically rejected the application of the

⁴³ *Michigan Metal Products Co.*, ASBCA 2884 (April 2, 1956).

⁴⁴ *Dearborn Gage Co.*, ASBCA 2785 (August 12, 1955).

⁴⁵ *Sid's Truck & Auto Sales Inc.*, ASBCA 2041, 2093 (Dec. 15, 1955).

⁴⁶ ASBCA 2656 (Dec. 30, 1955).

⁴⁷ 240 U.S. 156 (1916).

"unavoidable causes" provision.

What was said earlier about the harshness of requiring foreknowledge in choosing a subcontractor is equally relevant here.⁴⁸ Only by an unwarranted stretch of imagination can any fault be found on the part of the contractor in such cases. Clearly it is not the intention of the "default" article to punish a contractor whose delays result not from his own negligence but from the limitations of the manufacturing art at the time he undertakes the contract. This is not a commercial undertaking by the Government; it may well be a scientific undertaking, however, if the specifications are new. Under such circumstances the experience and struggles of a competent contractor are of great benefit to the Government in determining methods and feasibility of manufacture. When the design is new, greater rather than less leeway should be allowed.

The problem created by the *Carnegie Steel* decision has been minimized by the advent of research and development contracts under which the contractor is generally not obliged to complete a specific product.⁴⁹ Most of the contracts resulting in appeals to the Board involve the manufacture of an item previously made, and short shrift is given the contractor who is unsuccessful in meeting specifications. Some few appeals, however, do involve newly designed items, and more deal with change orders which often have radically altered specifications during the time of performance. At least in the change order situation the Board has relaxed the requirement of "know-how." Although the "changes" article requires the contractor to perform any change "within the general scope" of the contract, lack of "know-how" is excusable wherever

⁴⁸ Note that *Poloron Products Inc. v. United States*, *supra* note 27 cites the *Carnegie Steel Co.* case as authority.

⁴⁹ No doubt, the use of cost reimbursement contracts has also materially reduced the contractor's risk of loss in case of failure to complete the work successfully.

"... a much higher degree of technical skill and ability than normally was to have been expected . . ." is required by a change in specifications.⁵⁰ This result seems entirely proper. Assuming even that the *Carnegie Steel* standard is correct, there is no reason to infer the same guarantees of performance with regard to change orders by a contractor who has no way of anticipating the alterations in design.

There is evidence in a 1955 decision of the Board that the lack of productive ability may sometimes be excused even where no change orders are issued. In *Federal-Fawick Corp.*,⁵¹ the appellant's own production dies were warped and useless, thereby delaying the work. The inability to use the dies was held excusable. This result seems at odds with most of the decisions which require the contractor to have and maintain adequate equipment⁵² and skilled laborers⁵³ to perform the work involved.

It may be relevant here to note the standard of manufacturing performance demanded of a contractor. Scores of ASBCA decisions have required a literal conformance with specifications, including cases where items were repeatedly rejected for insignificant deviations, different reasons being given for rejection each time the former deviations were corrected. Recent decisions, however, augur the acceptance of some form of the doctrine of substantial performance. Quite recently, in *Acme Litho Plate*

⁵⁰ The Stubnitz-Green Spring Corp., ASBCA 2608, 3651 (Aug. 9, 1956). Here the performance requirements of a burster casing were radically increased. Although perhaps possible of accomplishment, the necessary expertise was not available to the contractor. At some point, obviously, the change order exceeds "the general scope" of the contract and becomes a breach by the Government.

⁵¹ ASBCA 2468 (Oct. 25, 1955).

⁵² *The Northwestern Corp.*, *supra* note 36; *Welded Construction Engineering Co.*, ASBCA 618 (Dec. 6, 1950).

⁵³ *Bruce Tool & Die Shop*, ASBCA 3070 (June 28, 1956). Even a general labor shortage caused by competition in the area will not excuse. *Grosse Pointe Accessory Corp.*, *supra* note 46; *Stephens Garment Co.*, ASBCA 237 (April 24, 1952). But cf. *Lewis Construction Co.*, ASBCA 216 (May 31, 1950).

Graining, Inc.,⁵⁴ the Board held “. . . the plates did not meet specifications Whether or not there was substantial compliance we believe to be an issue properly before us” No such compliance was found because the contractor had failed to come within liberal tolerances already allowed in the specifications. The Board noted that its decision might have been different had the specifications been without tolerances. This is certainly a satisfactory result. The complex minutiae of Government specifications often rule out the practical possibility of literal compliance. Unless an equitable escape hatch is provided, the contractor is at the mercy of that rare but real contracting officer seeking a basis for termination among minuscule defects. There is nothing in the standard forms to impede the use of the doctrine of substantial performance.⁵⁵ The inspection article permits rejection for lack of “. . . conformity with the requirements of this contract . . .,” but this merely begs the question. Absent any further provision, the Board seems justified in looking to the purpose of the goods to be delivered and other indirect evidence to determine the extent of the contractor’s undertaking. Nit-picking by inspectors may be contemplated in a contract for guided missiles, but it hardly seems apropos in a sale of snare drums.⁵⁶

⁵⁴ ASBCA 2878-79 (Oct. 12, 1956). The writers’ memories insist this is not the Board’s first flirtation with substantial performance. It is, no doubt, indecorous to cite memory as authority, but this will have to suffice until the Board sees fit to publish another digest.

We may note here also the special situation of an accumulation of minor defects under a service contract to be performed to the “satisfaction of the contracting officer.” In that circumstance the Board suggests that a defect of performance, in itself minor, may yet act as the last straw to create a legitimate “dissatisfaction” and justify termination. *Ideal Vans*, ASBCA 2724 (Dec. 31, 1955).

⁵⁵ Except, possibly, where the termination is effected under Subsection a (ii) of the “default” article. See discussion *infra*, p. 214.

⁵⁶ *Slingerland Drum Co.*, ASBCA 2131 (Jan. 5, 1955), is the classic example. The Navy rejected repeatedly the drums for inconsequential defects and on each rejection named different defects. The Board upheld the termination for default.

IV MISCELLANEOUS CAUSES

Delays occur from a great variety of causes in addition to those noted. Those resulting from fires, floods, bad weather, and similar physical interferences cause little doctrinal difficulty and merely require an assessment of their duration, unless there is fault involved in some way. Strikes generally seem to excuse, except perhaps where an unfair labor practice by the employer may be involved.⁵⁷ Financial inadequacy is more complex, but, where it has been held excusable, it is usually traceable to some act of the Government, such as an improper assessment or a withholding of partial payments.⁵⁸ Absent such facts, the contractor guarantees that his financial resources will be sufficient to complete the work, unless its character is radically changed.⁵⁹

One of the curiosities in the way of excuses for failure to perform was pleaded in *Old Home Milk Company*.⁶⁰ The contractor, a milk dealer, had agreed to deliver milk to an Air Force base. Because of this contract the company was threatened with a ruinous boycott by the local retailers association. The Board held this no excuse since the contractor had the choice and power of performing if it wished, and the failure was therefore not beyond its control.

V WHEN THE ISSUE OF EXCUSABILITY MAY BE RAISED

If the contractor appeals a default termination and fails to prove excusable cause, he is precluded from raising the same issue in an appeal from a later assessment of excess

⁵⁷ See *Reed & Prince Mfg. Co.*, ASBCA 1061 (March 21, 1955).

⁵⁸ See note 35, *supra*.

⁵⁹ *West Coast Lbr. Corp.*, ASBCA 1131 (June 29, 1953). See also *Michigan Metal Products Co.*, ASBCA 2884 (April 2, 1956); *Adams Mfg. Co.*, ASBCA 2665, 2678 (April 2, 1956).

⁶⁰ ASBCA 2594, 2666 (Dec. 12, 1955).

costs.⁶¹ His failure to appeal the termination within the 30 day appeal period does not have the same effect, however, and he may raise the issue of excusability in an original appeal from the assessment of excess costs.⁶² This right is not affected by the fact that the contracting officer's termination decision contained a specific finding that the delay was not in fact excusable.⁶³ If the appeal, however, is only from the assessment, the contractor who proves excusable delay is not entitled to a termination for convenience but only to relief from excess costs.⁶⁴ The same results would obtain in the case of a termination followed by an assessment of liquidated damages.

III

TERMINATION FOR FAILURE TO MAKE PROGRESS AND FOR BREACH OF OTHER PROVISIONS

The great bulk of default terminations are based upon a present failure of the contractor to meet the delivery schedule. Where deliveries are overdue, the Government has clearly reserved the right to terminate for default by written notice, the issue being raised as to whether the delays of the contractor were excusable so as to require a termination for convenience. However, in paragraph a(ii) of the supply contract "default" article (Appendix A, *infra*), the Government also has reserved the same right to terminate where, though delivery is not yet due, the

⁶¹ Aero-Land Supply Co., ASBCA 1869 (May 25, 1954).

⁶² John Peterson, ASBCA 1633 (March 26, 1954); DeLisser Mfg. Corp., ASBCA 1002 (1952).

⁶³ *Ibid.*

⁶⁴ *Ibid.* When the contractor has failed to employ his contractual remedies, he may not sue in court. *United States v. Holpuch*, 328 U. S. 234 (1946); *Barrett-Cravens Co. v. United States*, 137 F. Supp. 423 (Ct. Cl. 1956); *Southeastern Oil Florida v. United States*, 127 Ct. Cl. 480, 115 F. Supp. 198 (1953). Query whether he may defend in a Government suit to collect excess costs or liquidated damages? Is failure to exhaust remedies a sword as well as a shield for the Government?

contractor either (1) "so fails to make progress as to endanger performance" or (2) "fails to perform any of the other provisions." In these two circumstances the contracting officer may terminate after he has allowed the contractor a grace period to cure such failure. This period must be established by a notice in writing⁶⁵ and must allow at least ten days from its receipt by the contractor.

The "failure to make progress" provision is designed to permit the Government to discard contractors who are making no real effort to perform or are hopelessly incompetent. Under the common law neither situation would permit unilateral termination before actual default.⁶⁶ Many procurement officials are inclined to discount the value of the provision, feeling that a minimum of action or a sham effort during the usual ten day period set by the notice will suffice in the Board's eyes to "cure" the failure to make progress which has endangered performance. The few ASBCA decisions which are relevant will be discussed shortly, but it should be noted here, that at least where literally *nothing* has been done by the contractor and a default is inevitable, the provision undoubtedly gives the Government a right to a default termination prior to delivery date. This in itself is a significant expansion of common law remedies.

The decisions suggest a broader interpretation of this provision, though none seems directly in point. In several cases the Government, because of a present delinquency, enjoyed the right to terminate without notice to cure, but mistakenly issued a notice under subsection a (ii) com-

⁶⁵ Although the Board has said that notice in writing is indispensable, *Fitzhenry-Guptill*, ASBCA 1885 (July 13, 1956), in *Bernal Narrow Fabrics*, ASBCA 1604 (Dec. 29, 1953), a course of dealing and negotiations was held to satisfy the notice requirement.

⁶⁶ Even where expressed in the contract as justification for termination, a failure to make reasonable progress may be simply a breach of condition and not promise. *United States v. O'Brien*, 220 U.S. 321 (1911). In this case the Government reserved no right to assess excess costs or damages following such a termination.

plaining of "failure to make progress" toward the date already past. Treating such action in effect as a limited waiver of a present right to terminate, the Board then has examined the effectiveness of the contractor's efforts during the grace period to see if the failure to make reasonable progress toward a new indeterminate delivery date had been cured. In *Silverman Bros.*,⁶⁷ it was held that the contractor's success during the time allowed in the notice must be such as ". . . would or should have inescapably led a reasonable man to the conclusion that appellant had overcome—or in the next day or two would overcome—its production difficulties and start delivering." Except for the last three words, the test also seems applicable where delivery is not yet due or delinquency has been waived. In cases where the delivery schedule has been clearly waived, termination has been upheld under section a(ii) simply on the finding that the contractor's efforts during the notice period did not cure the failure to make progress. Whether the contractor was currently in delinquency was not necessary to the decision.⁶⁸ In one such case the Board explicitly refused to consider whether deliveries were yet due, and held for the Government because the contractor had not cured his failure to make progress within the time required by the notice given.⁶⁹ Toward what date the contractor is obliged to make progress after the schedule is waived is left in doubt, but these cases do suggest that the Board will not reject out of hand a default termination for failure to make progress when the contractor is not currently in delinquency. After all, this is the obvious purpose of the provision, and the burden of proof should be on those who suggest its non-utility. The paucity of cases on the subject suggest non-use rather than

⁶⁷ ASBCA 1615, 2186 (May 10, 1955). See also *Keco Industries*, ASBCA 2755 (April 18, 1956); *Michigan Metal Products Co.*, *supra* note 59; *Metalcraft Engineering Corp.*, ASBCA 1906 (Sept. 19, 1955).

⁶⁸ *Michigan Metal Products Co.*, *supra* note 59.

⁶⁹ *Bernal Narrow Fabrics*, *supra* note 65.

uselessness. The appeals that do involve the question suggest consistent misuse. In many of these cases the delays were obviously excusable,⁷⁰ or the necessary formalities of notice were not observed by the Government.⁷¹ There seems to be no case in which obviously inadequate or sham efforts on the contractor's part were held sufficient to cure a failure to make progress. Properly used, this provision might prove a potent encouragement to performance. Whether it is a wise provision would be more difficult to answer and is not within the scope of this paper.

The dissatisfaction over the provision relating to progress of the work is directed also to the other clause of subsection a(ii) of the "default" article and, perhaps, with greater reason. This clause permits termination after notice if the contractor fails to "perform any of the other provisions" of the contract. Under the common law an injured party may generally terminate his obligation without notice in the case of a material breach. As a result of the provision in question, a serious question exists whether the Government retains this right except where explicitly reserved (as for failure to deliver). The Board has held that the notice provisions of subsection a(ii) apply to and limit the right of rescission for anticipatory breach.⁷² Apparently the contractor has the opportunity to withdraw his refusal to perform during the grace period permitted after receipt of the notice. If the notice requirement is to be thus extended to material breaches, the Government obviously has limited its otherwise unqualified right to refuse further performance.⁷³

⁷⁰ See, e.g., *The Northwestern Corp.*, ASBCA 2025 (Feb. 15, 1956) (refusal to inspect caused excusable delay); *Huntington Processing & Packaging*, ASBCA 1013, 1032 (Jan. 29, 1954) (government interference caused delays).

⁷¹ *Fitzhenry-Guptill Co.*, *supra* note 65; *The Cowan Co.*, ASBCA 2373, 2274 (Feb. 28, 1955).

⁷² *The Cowan Co.*, *supra* note 71.

⁷³ At least this seems true where the breach involves a provision which does not itself establish a specific remedy — for instance the "convict labor,"

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Since the provision is obviously intended to increase rather than to limit the Government's common law rights, wherein can this increase lie? The only answer seems to be in the types of breach contemplated. Unless some finer line than materiality can be drawn, the only conclusion possible is that all breaches, regardless of their importance, will justify issuance of a notice to cure the defect in performance. If the defect is uncorrected or cannot be corrected within the ten days or more allowed, default termination may issue. In other words, all breaches are material, and contracting officers may harass a contractor for any of the multitude of trivial derelictions which inevitably arise under the complexities of the standard forms. At least at present the problem seems academic, because termination under this clause is practically never used. However, if the clause is a useless encumbrance of the Government's right to rescind for material breach and yet justifies a termination for trivial breaches where notice is given, it seems that both parties would be better off if it were expunged from the forms.

IV

EXTENSION OF THE DELIVERY SCHEDULE

Next we consider the effect of the Government's encouraging or permitting attempts at performance where the contractor is already delinquent without excuse. When faced with the decision whether or not to terminate, the financial consequences are not usually the Government's sole concern. Other considerations may be involved, such as the contractor's importance to the mobilization base,

"nondiscrimination in employment," and "officials not to benefit," clauses. Query the effect, however, of subsection a(ii) on the "covenant against contingent fees" which specifically permits the Government "the right to annul this contract without liability." Note also that all this is in the face of the reservation of common law rights in subsection (f) of the "default" article.

the extent and nature of the delinquency, the degree to which the Government may have contributed to the delay, and concern for the elements of fairness and equity which may be involved. Ordinarily, when the goods are still needed, the most important question is whether this contractor will finish performance prior to any substitute who may be engaged. If termination will probably delay deliveries, the Government will permit the contractor to continue as long as there is a reasonable prospect of performance.

Financial considerations being secondary, the Government is considerably more patient with late delivery than the ordinary buyer. This is reflected in the tremendous number of appeals which turn on the nature of the Government's action or inaction during the often extended period between the original failure to deliver and the eventual termination for default. In these cases the rights of the parties are frequently shrouded in considerable doubt. Unless a new delivery schedule has been set by agreement, it is difficult to determine just when deliveries are due and when the Government may terminate for default. Since the days of the old War Department Board of Contract Appeals, such cases have been dealt with in terms of "waiver" of the delivery schedule.⁷⁴ Where the contractor is in delinquency, any action by the Government inconsistent with the right to terminate for default may be regarded by the Board as a waiver of that right. This includes the issuance of change orders,⁷⁵ requests for performance,⁷⁶ accepting forecasts of delivery,⁷⁷ accepting actual deliveries,⁷⁸ and any other

⁷⁴ Charles W. Spiedel, WDBCA 894 (Dec. 28, 1944); Modern Engineering Co., WDBCA 458, 6841 (Jan. 29, 1945). The WDBCA is the direct ancestor of the present Board.

⁷⁵ Halstead & Mitchell, ASACA 2424 (Jan. 30, 1956); Indiana Die Castings, ASBCA 2214 (Aug. 24, 1955).

⁷⁶ Frank Menard Mfg. Co., ASBCA 1558 (Nov. 10, 1953).

⁷⁷ Airline Mfg. Co., ASBCA 2213 (Nov. 15, 1955).

⁷⁸ Roosevelt Paper Co., ASBCA 1861 (Aug. 11, 1954).

activity which affirms the continued existence of the contract. However, a mere inquiry as to the contractor's ability to perform will not amount to a waiver,⁷⁹ nor will inspection of finished goods by government personnel, where such inspection is at the request of the contractor.⁸⁰ Whether silence and inaction will amount to waiver depends upon whether, under the circumstances, a reasonable man would interpret such silence as an approval of continued performance.⁸¹ At some point there is a duty to speak when the contractor is proceeding, with the knowledge of the Government, to act in reliance on the continued withholding of termination action.⁸²

It is doubtful whether the use of the waiver approach has contributed much to the clarification of the problem or the predictability of the results. The Board has even experienced difficulty in achieving a uniform approach among its own members. This does not seem surprising in view of the chameleon nature of the doctrine and the variety of its judicial interpretations,⁸³ but it does argue for an attempt at an alternative solution. With a brief obeisance to the text writers we should note that there is some doubt whether this is a "waiver" situation in the first place. Williston concedes the possibility of a surrender of rights in accepting late performance but insists that this is really not waiver but election of remedies—the choice being the termination of all rights of either party to the other's further performance or the continuation

⁷⁹ *M. A. Wyman Lbr. Co.*, ASBCA 145 (June 27, 1950).

⁸⁰ *Metalcraft Engineering Corp.*, ASBCA 2276 (Sept. 22, 1955).

⁸¹ *Sid's Truck & Auto Sales*, ASBCA 2041, 2093 (Dec. 15, 1955); *Industrial Lamp*, ASBCA 1825 (Nov. 23, 1954) (no waiver by mere silence or inaction in absence of reasonable reliance).

⁸² *Federal Fawick Corp.*, ASBCA 2468 (Oct. 25, 1955) ("Government cannot sit back" and watch contractor attempt performance); *United Boat Service Corp.*, ASBCA 2452 (Oct. 10, 1955).

⁸³ The diffuse character of waiver long has been a source of annoyance to the legal taxonomists. ". . . There are few principles in the law with vaguer boundaries. . . ." 1 WILLISTON, *CONTRACTS* § 203 (Rev. ed. 1936); "The word is . . . A cover for vague, uncertain thought," EWART, *WAIVER DISTRIBUTED* 5 (1917).

of all obligations.⁸⁴ He insists that true waiver can only take place prior to the happening of a condition and can only be enforced if action is taken in reliance thereon before revocation of the waiver.⁸⁵ However, the distinction between waiver and election is essentially a sterile analysis and of little assistance in dealing with the present problem. Williston, in treating late performance, is content to use the words interchangeably and even entitles the relevant section "Delay may be waived."⁸⁶ Nevertheless, as this essay goes to press we observe the appearance of an article^{86a} by a member of the ASBCA making much of this distinction. Whether such preoccupation by the Board with arid nuances is likely to disperse the fog seems doubtful. What is needed is greater simplicity, not more hairsplitting.

It seems worthwhile to note specifically some of the difficulties in which the Board is involved. First, there is no apparent agreement whether notice is required in order to revive the right to terminate for default after a waiver. Probably a majority of the ASBCA cases which turn on waiver require such notice or its equivalent—the setting of a new delivery schedule.⁸⁷ Does this requirement mean there is no obligation on the contractor in the meantime? This is unlikely, since there seems to be a requirement of at least some reliance to make the waiver irrevocable.⁸⁸ The amount of actual performance may be negligible, however, and even though it is very likely that the contractor will never deliver, he must be given

⁸⁴ 2 WILLISTON, CONTRACTS §§ 678-79, 683 (Rev. ed 1936).

⁸⁵ *Id.* § 689.

⁸⁶ *Id.* § 856.

^{86a} Cuneo, *Waiver of the Due Date in Government Contracts*, 43 VA. L. REV. 1 (1957).

⁸⁷ *Television Equipment Corp.*, ASBCA 1060 (Aug. 31, 1954). More recently, see *Halstead & Mitchell*, ASBCA 2424 (Jan. 30, 1956); *United Boat Service Corp.*, ASBCA 2452 (Oct. 31, 1955); *Harvey-Whipple*, ASBCA 2045 (Sept. 30, 1954).

⁸⁸ *Acme Litho Plate Graining, Inc.*, ASBCA 2878-79 (Oct. 12, 1956); *Pacific Welding Alloys Mfg. Co.*, ASBCA 2718 (Dec. 15, 1955). In both cases obvious waivers were overcome by a showing of no attempt at performance by the contractor.

notice and a reasonable time thereafter to perform the contract.⁸⁹ Generally, the notice requirement seems fair and in accord with the majority of court opinions,⁹⁰ especially where the delay is prolonged and the contractor is making a sincere effort. It does not mean that the Government cannot take any action to terminate even in the case of the apathetic contractor or the hopeless incompetent. Upon the giving of ten days written notice, section a(ii) of the "default" article is still available to effect a termination for "failure to make progress" toward the new delivery date. It should be observed also that a substantial minority of Board opinions does not impose the notice requirement and others have vacillated. Many of the opinions simply require that the contractor be permitted a reasonable time for performance after the waiver.⁹¹

With or without the notice requirement, the concept of reasonable time after waiver is a conundrum. For instance, how much time is reasonable for a contractor who originally had a year to deliver and who has done nothing? If after the waiver he immediately institutes preparations for delivery, shall he be given a year's time again? He probably needs it, but is it reasonable? In other words, should the Board objectively examine only the time the contractor will need from the day of waiver, or should it consider what he deserves? Presumably, unless the Government conditions its original waiver, all the past must be forgiven. If a buyer asks a seller to continue after

⁸⁹ Steel Products Inc., ASBCA 2605 (Sept. 19, 1955); B. F. Goodrich Co., ASBCA 2110 (Nov. 29, 1954).

⁹⁰ See RESTATEMENT, CONTRACTS § 311 (1932); WILLISTON, *supra* note 84 at § 856. For a recent decision on this point, see Bradford Novelty Co. v. Technomatic Inc., 142 Conn. 166, 112 A. 2d 214 (1955). But cf. Shy v. Industrial Salvage Material Co., 264 Wis. 118, 58 N.W. 2d 452 (1953).

⁹¹ Stubnitz-Greene Spring Corp., ASBCA 2469 (June 6, 1956); Federal Fawick Corp., ASBCA 2468 (Oct. 25, 1955). In J. H. Rutter-Rex & Bay Garment Corp., ASBCA 2957, 2958 (March 23, 1956), the incongruous conclusion is reached that there is a duty on the Government to establish a new delivery schedule, but that this confers no right on the contractor to delay beyond a reasonable time if no schedule in fact is set.

breach of delivery obligations, he cannot then permit him only half the time he knew the seller would need to finish. But this seems unsatisfactory if a notice requirement is superimposed, for the notice will start the time running once more and will maximize the time allowed the contractor who has made a minimum of effort. It is not surprising that the Board has shown an inclination to decide the reasonableness of the time allowed by fiat without niceties of calculation.⁹² Where notice is required but not given, there is, of course, no necessity to determine the reasonableness of the time allowed.⁹³ It should be observed that at least one opinion recognizes the right of the Government to condition its original waiver to less than a reasonable time.⁹⁴

Perhaps the most serious problem of the waiver doctrine lies in the consistent confusion by the Board of the three discrete concepts of extension of the delivery schedule, excusability, and waiver. If we accept the waiver doctrine (or election), an act of the Government inconsistent with the delivery schedule may have one or more of three effects on that schedule: (1) it may excuse late performance, (2) it may extend the delivery schedule, as does a change order under the provisions of the "changes" article, (3) it may constitute a waiver of delay (or election). Which effect is produced depends upon whether the contractor is in delinquency at the time of the inconsistent act—that is, whether the Government, at the time, could terminate for default without liability. An act of the Government can constitute a waiver or an election not

⁹² *Industrial Precision Products Co.*, ASBCA 3165 (May 8, 1956); *Frank L. Weiss*, ASBCA 2786 (Oct. 24, 1955); *Steel Products Inc.*, ASBCA 2605 (Sept. 29, 1935). Where the contractor suggests a delivery date he may be held to it as being reasonable. *Geo. S. Scott Co.*, ASBCA 2303-04 (June 26, 1956); *Dinges Corp.*, ASBCA 2067 (July 30, 1954), *rev'd on other grounds*, (Aug. 17, 1956).

⁹³ *Frank Edward Menard*, ASBCA 1558 (Nov. 10, 1953). Also see note 87 *supra*.

⁹⁴ *The Northwestern Corp.*, ASBCA 2025 (Feb. 15, 1956); also see *Julio Laabes*, ASBCA 1366 (Feb. 16, 1954).

to terminate only when it is the first inconsistent act following the contractor's delinquency. If deliveries are not yet due, have been already waived by a previous act, or their lateness is excusable, there is no possibility of waiving, simply because there is nothing to waive. A contractor is not in delinquency under these circumstances, and a non-existent delinquency is immune even from the most generous waiver. An act of the Government at such times which delays the contractor may *excuse* the lateness of future deliveries as we have seen, or a change order may *extend* the delivery schedule, but no waiver is possible except, perhaps, waiver of a future delivery date—a proper Willistonian waiver.⁹⁵ That situation never occurs in these cases. The Government rarely waives a delivery schedule in advance, nor indeed is it clear that the contracting officer has the power to do so without consideration.⁹⁶

Despite the evident impossibility of waiving a non-existent delinquency, the Board is in the questionable habit of finding waiver without making any determination of whether the contractor's delays were already waived or were excused or whether change orders or other acts had extended the schedule.⁹⁷ A contracting officer who has permitted a contractor to continue because his delays are excusable may find, when the excuses run out, that he has "waived" the right to terminate unless he allows a further substantial period of notice. It seems patently unfair to the Government to allow the contractor to take advantage of excusability and

⁹⁵ See *supra* note 84.

⁹⁶ See 36 Comp. Gen. 27 (1956). *But cf.* *Lang Co. v. United States*, 141 F. Supp. 943 (Ct. Cl. 1956).

⁹⁷ *General Construction Co.*, ASBCA 3131 (June 22, 1956); *J. H. Rutter-Rex & Bay Garment Corp.*, ASBCA 2957-58 (March 23, 1956); *A & P Wire and Cable Co.*, ASBCA 2615 (Feb. 10, 1956); *Halstead & Mitchell*, ASBCA 2424 (Jan. 30, 1956). In some cases the Board has even coupled waiver with a specific finding of excusability. See, *e.g.*, *Bolinders Co. Inc.*, ASBCA 2457 (Nov. 3, 1955); *United Boat Service Corp.*, ASBCA 2452 (Oct. 31, 1955).

waiver at the same time. On the other hand, to admit this would put government attorneys in the bizarre position of defending the contractor's excuses prior to the time of termination in order to forestall the invocation of waiver.

One final criticism of the waiver approach cannot be ignored. Under subsection (f) of the "default" article the Government has made a general reservation of all common law rights. Appendix A, *infra*. Presumably this includes rights to actual damages. There is respectable authority for the doctrine that an injured party does not waive his right to damages merely by waiving a delay in performance and/or electing to continue.⁹⁸ If the Government's action in continuing the contract is interpreted as the waiver of a default is it not likely that there remains an action for damages for the delay? The Comptroller General has recently taken this very position and held explicitly that the acceptance of delayed performance is not inconsistent with the right to demand damages for delays.⁹⁹ The existence of the right to damages is, of course, a further criticism of those cases finding waiver without reference to the factor of excusability which determines that right. It is interesting to ponder the existence of a contracting officer's duty to withhold actual damages following a decision by the Board finding a waiver of delinquency.

The problem is equally troublesome when the waiver is

⁹⁸ See CORBIN, CONTRACTS § 718 (1951); 2 WILLISTON, CONTRACTS §§ 704, 856 (rev. ed. 1936). However, very little in addition to the election to continue seems necessary to waive damages. Paying full price is admitted by Williston to do so at least where the payment is made after delivery so that an assumed requirement of consideration is met. The consideration is said to be found in the relaxation of the buyer's obligation to pay on the original delivery date. WILLISTON, *op. cit. supra*, § 704. The contrived quality of this argument illustrates the tenuousness of the rule against waiving damages for delay without consideration. It does seem clear, however, that an express reservation or a refusal to pay full price will preserve the right to damages even when coupled with an election to accept late performance.

⁹⁹ 35 Comp. Gen. 228 (1955), disapproving a contrary opinion in 29 Comp. Gen. 57 (1949).

used to support a remission of liquidated damages which have accrued before the waiver. In a recent decision of the Board a contractor had been assessed liquidated damages from the 22nd of January to the 28th of October, but the Board found that the schedule had been waived on the 25th of August. The entire assessment was held in error without any finding as to the excusability of the delays preceeding the 25th of August.¹⁰⁰ Even if the decision is regarded as correct on the law, the question remains as to the Board's authority to remit accrued damages. Clearly, no such authority exists.¹⁰¹

In passing, one might also speculate upon the source of the Board's authority to grant a termination for convenience after the schedule is waived. The contract provides for such relief only where the contractor is in fact delinquent at the time of termination, and where his delays prove to be excusable. When, because of a waiver, or because deliveries are not yet due, the contractor is not in delinquency, the contract gives no clue as to how an improper termination for default should be handled.^{101a}

Finally, it is impossible to ignore the substantial number of opinions that abandon the waiver formula altogether, and regard the Government's continuing encouragement of a delinquent contractor as a "mere forbearance" and not as a bar to termination for default, even though the contractor has relied thereon.¹⁰² In

¹⁰⁰ General Construction Co., ASBCA 3131 (June 22, 1956). See also Ampro Corp., ASBCA 1678 (March 1, 1954).

¹⁰¹ The Comptroller General has specific statutory power to remit liquidated damages when in his discretion it is "just and equitable" to do so. 62 STAT. 24 (1948), 41 U.S.C. § 155 (1952). This authority has been very narrowly construed, however. See 32 Comp. Gen. 67 (1952).

^{101a} For an interpretation justifying the granting of a termination for convenience under these circumstances see Cuneo, *supra* note 86a.

¹⁰² Skyway Clothing Corp., ASBCA 3244 (Oct. 29, 1956); Skarda, Inc., ASBCA 2356 (July 5, 1955); El-Tronics Inc., ASBCA 2173 (Aug. 19, 1954); Vevier Loose Leaf, ASBCA 1500 (May 28, 1954). See also *Atlantic Fish & Oyster Co. v. United States*, 126 Ct. Cl. 892, 116 F. Supp. 574 (1953).

Skarda, Inc.,¹⁰³ the contractor was permitted and encouraged to continue for thirteen months beyond the limit of excusable delay and was then terminated without notice. The Board held such action to be forbearance rather than waiver, even though changes in specifications were made during the period involved. This decision, and others, cannot be reconciled with the bulk of waiver cases. Furthermore, in some seemingly appropriate situations, the issue of waiver simply is ignored, leaving the impression that it must be raised by the contractor to be considered.¹⁰⁴ It could hardly be overlooked by the Board in view of the long standing concern over the problem.

This sketchy critique of the waiver doctrine demonstrates the need for an alternative formula. The proposal here will be extremely simple and is one suggested by a few Board opinions representing an exotic strain among the general run of decisions. It is based on the very language of the default article which provides that the Government may terminate for default under subsection a(i) only if the contractor fails to deliver within the specified time *or any extension thereof* (*italics added*). The suggestion is to regard any act of the Government inconsistent with the delivery schedule—delays, change orders, permission to continue performance, etc.,—not as evidence of a waiver of delay, but of an *extension of the delivery date* such as is expressly contemplated under the

¹⁰³ ASBCA 2356 (July 5, 1955). In the *El-Tronics* decision, *supra* note 102, the contractor was obligated to deliver nine different samples for testing on February 15. He delivered all but one or two of the items on the correct date. On February 17 the Government asked for "corrective action . . . immediately." Then on February 23 the Government asked the contractor to withhold shipment for the time being pending results of tests. On the 24th the Government terminated for default. This was held to be "mere Government forbearance."

¹⁰⁴ In *Hawthorne Mfg. Co.*, ASBCA 2521 (Oct. 27, 1955), the contractor delayed for over a year while the Government continually urged him and aided him to complete the work. The Government then terminated for default without notice and was upheld by the Board without mentioning waiver. See also *Industrial Precision Products Co.*, ASBCA 3165 (May 8, 1956); *Grosse Pointe Accessory Corp.*, ASBCA 2656 (Dec. 30, 1955).

default article. Such extension would preclude the possibility of a delinquency during its continuance, because it would, for the time being, postpone the obligation of the contractor. Evidence of such extension would be found in the same facts which now are used to support a waiver. Since it can be maintained that such extension operates from the time of the delivery date, the contractor would never have been in delinquency and there is no need for a finding of waiver. The question of common law damages for breach is also eliminated, for no breach would exist. If the Government wished to maintain a right to damages or liquidated damages, it might yet do so by declaring the default but explicitly electing not to terminate. In that one situation the old approach might be necessary, but the waiver (or election) and the reservation of a right to damages would have to be explicitly set forth to avoid the finding of an extension.

The extension approach was utilized by the Navy panel of the Board in the appeal of *Erd Co.*¹⁰⁵ which held, without resort to waiver, that, ". . . [T]he original contract delivery schedule was supplanted by at least an implied reasonable delivery schedule, under which appellant was entitled to reasonable notice before being terminated for default" In two very recent decisions there is evidence that the Army panel will also employ this test.¹⁰⁶ Without reciting the waiver cant, the opinion in *Fitzhenry-Guptill*¹⁰⁷ finds that ". . . the parties, by their conduct, including written and spoken words, extended the delivery date of the tooling" The opinion is written by the author of a number of previous "waiver" decisions (and, curiously, the recent article favoring the election analysis).

If the Government's action is to be regarded not as

¹⁰⁵ ASBCA 1518 (Feb. 26, 1954).

¹⁰⁶ *Acme Litho Plate Graining Inc.*, ASBCA 2878-79 (Oct. 12, 1956); *Fitzhenry-Guptill Co.*, ASBCA 1885 (July 13, 1956).

¹⁰⁷ ASBCA 1885 (July 13, 1956).

waiver or election but as an extension of the delivery schedule, a universal notice requirement is questionable. Instead, the proper question to be decided would be the intended length of the extension as determined from all the facts, of which notice or its absence may or may not be the most important. Considerations of fairness and equity may be used to the fullest extent without resort to the mechanical analysis required by the canons of waiver.

This approach does not eliminate the problem of finding a basis for the Board's power to grant a termination for convenience where the contractor is not in delinquency at the time of default, but that has not troubled the Board to this point. It would, in any event, be simpler in its application and would be a distinct relief to contracting officers and to counsel for both contractor and Government.

V

PROBLEMS RELATING TO ACTION FOLLOWING NOTICE OF TERMINATION

It will be worthwhile to indicate briefly that, in general, settlement of a Department of Defense cost reimbursement supply contract,¹⁰⁸ terminated by the Government for the default of the contractor, is governed by the same procedures, and settlement is made in accord with the same criteria as if the termination were for the convenience of the Government. As observed previously, provision for both kinds of termination is made in the same clause. In either case, the clause contemplates a negotiated settlement of the contractor's claim, including a portion

¹⁰⁸ The clause pursuant to which notice of termination is issued and settlement effected is found at ASPR 8-702 (3 Jan. 1955), CCH Gov't CONTRACTS REP. ¶ 41,862; ASPR 7-203.11 (3 Jan. 1955), CCH Gov't CONTRACTS REP. ¶ 29,371. "Excusable Cause," App. "B," *infra*, is applicable to determine whether a cost-reimbursement supply contractor is in default.

of the fixed fee. Should the parties find themselves unable to agree on the proportion of the fixed fee to be paid, then the contracting officer is required to determine such amount.¹⁰⁹ Allowance of costs, whether the settlement is negotiated or determined by the contracting officer, is subject to the same criteria in the case of default termination as in the case of termination for convenience, *i.e.*, the cost provisions included, or incorporated by reference, in the contract.¹¹⁰

The apparent simplicity, and directness of this method of settlement does not exist in the case of fixed-price supply contracts or construction contracts. In the former case, termination under the default clause of the contract¹¹¹ provides the Government with the right to "charge back" excess costs incurred in repurchase of the items called for by the contract, the right to charge liquidated damages if an appropriate clause¹¹² is included, and the right to enforce any other rights and remedies provided by law or by the contract, *i.e.*, the right to charge actual damages if they are able to be proved.¹¹³ A default clause is also included in construction contracts, but the limited scope of this article excludes any lengthy analysis of this clause.

¹⁰⁹ The parties may negotiate the amount of the fixed fee to be paid. Cf. ASPR 8-509.2 (3 Jan. 1955), CCH Gov't CONTRACTS REP. ¶ 41,809.2. In the event that the parties cannot so agree, the contracting officer will determine the amount to be paid. The criteria according to which this determination will be made are set out in ASPR 8-702 (e) (1) (iv).

¹¹⁰ Relevant cost principles are set forth in ASPR Section XV. ASPR 15-102 (28 May 1956), CCH Gov't CONTRACTS REP. ¶29,856 requires inclusion or incorporation by reference of applicable cost principles as set forth in ASPR XV in cost-reimbursement contracts of the Armed Services executed on and after March 1, 1949.

¹¹¹ ASPR 7-103.11 (23 Dec. 1955), CCH Gov't CONTRACTS REP. ¶29,363. See also Article 11, United States Standard Form 32 (1949 ed.), CCH Gov't CONTRACTS REP. ¶18,305. See appendix A *infra*.

¹¹² ASPR 7-105.5 (5 March 1956), CCH Gov't CONTRACTS REP. ¶29,365.

¹¹³ This subject will be discussed more fully *infra*. It is worthy of note here, however, that when the "liquidated damages" clause (ASPR 7-105.5 is included, liquidated damages are expressly provided therein to be "in lieu" of actual damages for delay.

i REPURCHASE UNDER THE SUPPLY CONTRACT CLAUSE

The term "repurchase" has some standing as a word of art to denote the action of the Government under subclause (c) of the "termination for default" clause to obtain from another source¹¹⁴ the supplies promised by the defaulted contractor. Normally, such action is to be expected because the Government has a continuing bona fide need for the supplies. Very often it may happen that development in technology or design or other improvements in the item of supply may make it desirable that certain changes be made in the item as it is ordered from the successor or "repurchase" contractor. Subclause (c) of the "default" clause allows a certain latitude: "[T]he Government may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated." Appendix A, *infra*. The word "similar" is therefore critical; its application determines whether or not excess costs of the repurchase may be charged back against the defaulted contractor.¹¹⁵ We think it may be assumed that the price

¹¹⁴ The repurchase may be made from another qualified source of supplies, see ASPR 1-201.9 (23 Jan. 1956) CCH Gov't CONTRACTS REP. ¶29,020, or from government agencies which manufacture the item of supply or furnish the services involved. For a case involving this type of repurchase, see Samuel Englander, ASBCA 1480 (April 26, 1954). Procedures governing the Armed Services in effecting inter-agency procurement are set forth in ASPR Sections IV and V. The Armed Services Board of Contract Appeals does not regard the acquisition cost of government stocks used to replace supplies under a contract terminated pursuant to the "default" clause as a suitable basis for charging excess costs; the basis for this view is that the "default" clause requires the Government to "procure". If a contracting officer, it is said, purchased items to take the place of stocks used to supply the items provided for by a terminated contract, the cost of such purchase may be chargeable as "excess costs". In this connection it should be noted that the "inspection" clause for fixed-price supply contracts might permit the use of stocks as "replacements" of items rejected under supply contracts and allow the contractor to be charged the cost of such replacement. ASPR 7-103.5 (b) (30 April 1956), CCH Gov't CONTRACTS REP. ¶29,363; Rockingham Poultry Marketing Cooperative, Inc., ASBCA 1319 (May 28, 1953). This decision was followed in Borin Packing Company, ASBCA 1505 (Aug. 7, 1953), 6 CCF 61,493.

¹¹⁵ *United States v. McMullen*, 222 U.S. 460 (1912), and *United States v. Axman*, 234 U.S. 36 (1914), are often cited in connection with repurchase

of substantially or materially dissimilar items obtained under the repurchase contract may not be the basis for computing excess costs.¹¹⁶ But the extent to which the word "similar" may be expanded is difficult to delimit. In *United States v. Warsaw Elevator Co.*,¹¹⁷ the court remarked that subclause (c) of the "default" clause allows the Government broad discretion in effecting repurchase. Certainly, minor deviations and improvements in the product (particularly where it is armament) seem only consistent with the intention of the parties and the Government may charge excess costs in such case. Decisions of the Armed Services Board of Contract Appeals recognize the elastic possibilities of the term "similar". In *Hoppenstand Industries Co.*,¹¹⁸ the defaulted contract called for galvanized steel storage drawers. The repurchase contract called for painted sheet steel instead of galvanized steel and was later modified by change order

contracts in determining whether the repurchase is commensurate with the terminated contract for purposes of excess costs. However, those cases deal with construction contracts where the work to be completed under the relet contract was to be the same as that under the terminated contract. See also, *California Bridge & Constr. Company v. United States*, 245 U.S. 337 (1917); *Schwartz T/A Sun Radio Company*, 106 Ct. Cl. 225, 65 F. Supp. 391 (1946).

¹¹⁶ See *Rosenberg v. United States*, 76 Ct. Cl. 662 (1933); *Doehler Metal Furniture Company, Inc. v. United States*, 149 F.2d 130 (2d Cir., 1945). A problem may arise where the repurchase contract is originally identical with the terminated contract, but due to change orders issued during the course of performance, the repurchase becomes "dissimilar." Supply contracts reserve to the contracting officer the right *ex parte* to order changes "within the general scope of this contract, in any one or more of the following: (i) drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery." If such change orders increase or decrease the cost of performance or the time required for performance, or both, an equitable adjustment in price or in the schedule may be made. ASPR 7-103.2 (30 April 1956), CCH Gov't CONTRACTS REP. ¶29,363. In this case the *final price* of the repurchase contract will not be a fair measure of excess costs. However, it is believed that the *original* price may serve as a measure of excess costs. See *California Bridge & Constr. Co. v. United States*, 245 U.S. 337 (1917); *McCORMICK, DAMAGES* § 175 (1935); *Hoppenstand Industries Co.*, ASBCA 1703 (Aug. 30, 1955) (dicta).

¹¹⁷ 213 F.2d 517 (2d Cir. 1954).

¹¹⁸ ASBCA 1703 (Aug. 30, 1955).

to call for three-piece construction instead of one-piece construction, different drawer pulls, and various other items. These changes were regarded as not having rendered the repurchase contract incommensurate with the defaulted contract.¹¹⁹ In *Projects Unlimited, Inc.*,¹²⁰ the defaulted contract called for war surplus type 1A gages, the contractor having been informed that type 1 gages were unacceptable. The repurchase contract called for both types (altogether the repurchase contract called for the total known available quantities of both types of gage, this total being slightly less than the quantity requirement of the defaulted contract). It was held that the repurchase was of "similar" supplies and the excess costs chargeable. Adding to the effect of these decisions is the decision of the Board in *Snap-Tite, Inc.*,¹²¹ which follows what might be called the "purposive" doctrine as a measure of validity of excess costs assessment. The defaulted contract called for 130,000 Grade "B" ammunition boxes and the repurchase contract called for 30,000 of such boxes plus 15,000 Grade "A" boxes. The price for both types of box on the repurchase was higher than the price for Grade "B" box under the defaulted contract; excess costs were assessed for all the items repurchased. The Board regarded this as erroneous. The only substantial differences in the two grades were

¹¹⁹ The addition of a delivery F.O.B. destination requirement in the repurchase contract was thought to require abatement of excess costs, however.

¹²⁰ ASBCA 2563 (Nov. 30, 1955). The Board indicated that the two types of gage differed in their components and maintenance, but not in function. While the Government could have rejected delivery of the type 1 gages if tendered under the terminated contract, still they were not so dissimilar as to fail to meet the test of the "default" clause with respect to repurchases. It might be observed that the amount of excess costs assessed in this case might also be allowable on another basis, i.e. as actual damages. "If there is no current market which can furnish a standard current value, then the cost of repurchasing at the best figure obtainable like goods, or the most practicable substitute therefor, so far as it exceeds the contract price, gives the measure." *McCORMICK, DAMAGES*, § 175 (1935). See 22 Comp. Gen. 1127 (1943).

¹²¹ ASBCA 1339, 1808 (April 26, 1954).

that the "B" box might be made with an inferior quality of wood and required a band to be painted about its exterior. The painted band established dissimilarity because it was intended to segregate the boxes for different purposes. Inasmuch as the defaulted contract was made for the purpose of procuring "B" boxes to fill a requirement, the replacement contract should not be the vehicle for fulfilling that need, *plus* another need—that for "A" boxes. For this reason, only the excess costs on the 30,000 "B" boxes could be charged to the contractor. Thus, in addition to being "similar" to the items called for under the terminated contract, the repurchased items should be obtained to fulfill the same need as the one for which the defaulted contract was let.

A collateral problem involves the terms of the repurchase contract. The "default" clause provides that the repurchase contract may be let "upon such terms" as the contracting officer may deem appropriate. Assuming that the items repurchased are "similar" within the meaning of the clause, may excess costs incurred under the repurchase contract be charged when its terms differ from those of the defaulted contract? Not included here are the specifications of the repurchase contract because they relate to the word "similar." Included are the remaining terms of the contract: its "boiler plate," *i.e.*, those clauses prescribed by law or regulation which the contracting officer *must* include, and those other clauses which the contracting officer *may* include to the extent he deems them appropriate, *e.g.*, the contracting officer may include price escalation or price redetermination provisions in the repurchase contract. Included also are other terms of the contract which may vary from those of the defaulted contract, such as the provision for F.O.B. points, and places of inspection. Obviously the clause literally contemplates that there may be variations.¹²² The principal

¹²² See *United States v. Warsaw Elevator Co.*, 213 F.2d 517 (2d Cir. 1954).

inquiry that ought to be made, we think, in determining whether that discretion has exceeded its bounds, is whether the inclusion of different clauses and terms has increased the costs of the repurchase so that the two contracts are not commensurable. If they are not commensurable, then it would seem that the repurchase contract is not a fair basis for charging excess costs. The best reason for this does not appear to lie in the clause itself, but rather in the generally applied principle that the injured contracting party must use reasonable means to avoid increasing the damages.¹²³ It is not always true, of course, that variant terms or clauses will increase contract costs.¹²⁴ But in some cases, charges of the repurchase contractor may be increased over those of the defaulted contractor. This, it would seem is often a matter of speculation; one of the real problems is which party, the defaulted contractor or the Government, should have to prove that repurchase costs have in fact been increased. One of the predecessors of the "default" clause provided merely that in the event of termination for default the Government might repurchase similar supplies and contained no reference to the terms of any repurchase contract.¹²⁵ In *Doehler Metal Furniture Co. v. United States*,¹²⁶ a contract containing such clause was terminated and a repurchase contract was awarded which included the "delays—liquidated damages" clause in-

¹²³ RESTATEMENT, CONTRACTS § 336 (1932).

¹²⁴ For example, an amendment of the "definitions" clause, ASPR 7-103.1 (30 April 1956), CCH GOV'T CONTRACTS REP. to increase the scope of the term "contracting officer" would not seem likely to cause an increase in price. Inclusion of price escalation clauses, ASPR 7-106, CCH GOV'T CONTRACTS REP. might actually decrease the initial and final prices under the repurchase contract (although their presence could also cause an increase of final price). However, inclusion in the repurchase contract of an "examination of records" clause ASPR 7-104.15 (5 March 1956), CCH GOV'T CONTRACTS REP. requiring costly maintenance of books, records, papers and documents pertaining to the contract might well have the effect of increasing the cost.

¹²⁵ Art. 5, U.S. Standard Form 32 (1935), 41 U.S.C. App. § 54.21 (1952). This clause was called the "delays-damages" article.

¹²⁶ 149 F.2d 130 (2d Cir. 1945). See also *Steffen v. United States*, 213 F.2d 266, 272 (6th Cir. 1954).

stead. Because of the provision for liquidated damages, not in the *Doehler* contract, it was contended that the price of the repurchase contract was increased as a matter of law. This was rebuffed by Judge Frank who regarded the question of increase as one to be settled by submission of pertinent evidence, the burden of proof being upon the United States (which was claiming the excess costs).¹²⁷ The present "default" clause, Appendix A *infra*, provides that the repurchase contract may be let "upon such terms" as the contracting officer directs. Judge Clark in the *Warsaw Elevator* case pointed out that the difference in the clauses required a different allocation of the burden than that stated in the *Doehler* case.¹²⁸

. . . [I]n the *Doehler* case the contract provided merely that, in the event of termination by the Government, "the Government may purchase similar materials or supplies in the open market or secure the manufacture and delivery of the materials and supplies by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby." Whereas here *Warsaw* has expressly consented to 'such terms' and 'such manner' of completion as the Contracting Officer may deem appropriate. . . . Having granted these wide powers to the government on its default, it [i.e. *Warsaw*] must take the burden of showing that the variations actually adopted by the government Contracting Officer have caused unreasonable expense. In addition it should show the amount of such unjustified expenditure; a holding that its entire liability is expunged is to the last degree inequitable.

It is submitted that this is a fair allocation of the burden.

It is also apparent that the Government, if it is to be held to the rule that the injured contracting party must use reasonable means to avoid consequences increasing the injuring party's liability, may not charge back a

¹²⁷ Judge Frank's interesting comment with, of course, wide-ranging footnotes stressing the speculative aspects of assessing the effect of changed contract terms on repurchase prices, will be found at 149 F.2d 133-135.

¹²⁸ 213 F.2d 517, 518-19.

repurchase which is made an unreasonable time after the termination of the original contract. The problem, of course, lies in the word "unreasonable." In cases where the repurchase is made during a rising market, the Government must not unduly delay so that a substantial part or all of the excess costs of repurchase are ascribable to the rise in the market. Mere lapse of time is not enough, unless, of course, there are significant market fluctuations.¹²⁹ The question is, therefore, one of fact. Decisions of the Armed Services Board of Contract Appeals have held that delays of seven and one-half months,¹³⁰ and twelve months¹³¹ after the contractor's delinquency were not to be regarded as unreasonable. In such cases, the Board felt that the principal criterion for measuring reasonableness was the effect delay had on costs under the repurchase contract. The burden of proving that this effect was achieved is allocated to the defaulted contractor.

The statutes and regulations governing the method by which the Government enters into its contracts prescribe, subject to certain exceptions, that award after competitive bidding is the normal procedure.¹³² One principal purpose of the competitive bidding requirement is to secure to the Government the price advantages that are assumed to result from competition.¹³³ In making a repurchase contract, is the contracting officer required to follow competitive bidding procedures? It might be presumed (unless one of the exceptions were available) that this would be the rule because (1) the repurchase is govern-

¹²⁹ Union Metal Spinning Co., ASBCA 1892 (Jan. 4, 1955).

¹³⁰ Metalcraft Engineering Corp., ASBCA 1967 (Sept. 22, 1955).

¹³¹ Frederick Alter, ASBCA 1898, (Oct. 29, 1954).

¹³² §§ 2(c) and 3, Armed Services Procurement Act of 1947, 62 STAT. 21,22 (1948), formerly 41 U.S.C. §§ 151(c)-52, now 10 U.S.C. §§ 2304 (a)-05 (a), (b); §§ 302(c)-03, Fed. Prop. & Admin. Services Act of 1949, as amended, 41 U.S.C. §§ 252(c)-53 (1952); R.S. 3709, as amended, 41 U.S.C. §§ 5 (1952).

¹³³ See *Conti v. United States*, 158 F.2d 581 (1st Cir. 1946); *United States v. Brookridge Farm*, 111 F.2d 461, 463 (10th Cir. 1940).

ment action, and (2) because repurchase by competitive bidding tends to secure lower prices, thus avoiding increase of the defaulted contractor's excess costs. However, in making repurchase the contracting officer is not, strictly speaking, acting under the procurement authority upon which the defaulted contract was based. Rather, he is acting under the authority contained in the "default" clause to "procure, upon such terms and in such manner" as he deems appropriate supplies or services similar to those terminated.¹³⁴ As a means of avoiding an increase in excess costs, competitive bidding does appear to offer advantages. Such advantages would be clearly apparent in cases where, for adequate reasons, repurchase has to be deferred for a substantial period of time or where the market is rising. Nonetheless, no flat rule can be laid down that repurchases must be subjected to competitive bidding in order for the repurchase price to be the measure for excess costs. In many cases, competitive bidding would serve no useful purpose, as where the market is in a stable condition, and has not altered in the period between the defaulted contractor's delinquency and the repurchase. In general it may be said that the contracting officer, in effecting repurchase, must use reasonable efforts to obtain the lowest price available, consistent with the Government's requirements.¹³⁵ This test would exclude repurchase from the highest of several bidders on the repurchase¹³⁶ or award in part to the low bidder on repurchase and in part to a higher bidder, where no adequate reason is apparent why the low bidder could not have furnished the whole quantity of items

¹³⁴ See *Lester Brothers, Inc.*, ASBCA 1373-74, (April 30, 1954); *Alco-Deree Co.*, ASBCA 513 (Feb. 16, 1951), 5 CCF 61, 227.

¹³⁵ See *Army Procurement Procedure 7-103.11 (e)* (19 Jan. 1955), CCH *Gov't Contracts Rep.*; *Langoma Lumber Co. v. United States*, 140 F. Supp. 460 (E.D. Pa. 1955), *aff'd*, 232 F.2d 886 (3d Cir. 1956); *Morton M. Rose v. United States*, 129 Ct. Cl. 715, 124 F. Supp. 419 (1954).

¹³⁶ See *Carlo Borghi*, ASBCA 575 (March 28, 1951); *Jac. A. Vonk's*, ASBCA 621 (Aug. 21, 1950), 5 CCF 61,083.

needed.¹³⁷ However, there may be cogent reasons for not awarding a contract for all of the items required to the lowest bidder or offeror on the repurchase—*e.g.* the contracting officer may believe that the facilities of that person or firm are not capable of producing the entire quantity.¹³⁸ In such case, award of the remaining quantity to the next lowest bidder or offeror on the repurchase would be proper.¹³⁹

An interesting problem in the assessment of excess costs appears when both the defaulted contract and the repurchase contract contain provisions allowing variations in the quantity of the item delivered. Most supply contracts contain the following clause:¹⁴⁰

VARIATION IN QUANTITY

No variation in the quantity of any item called for by this contract will be accepted unless such variation has been caused by conditions of loading, shipping, or packing, or allowances in manufacturing processes, and then only to the extent, if any, specified elsewhere in this contract.

Variations are, of course, reflected by proportionate increase or decrease in the contract price. Provided that both contracts do specify that a stated percentage of variations will be permitted [*e.g.*, 5%], what is the measure of excess costs when the original contract is terminated in its entirety and the repurchase contractor delivers 105% of the items called for, the overage being permissible under the "variations" clause? The Armed Services Board of Contract Appeals has held that in a case of this sort, excess costs are to be charged on the entire quantity of

¹³⁷ See *Morton M. Rose v. United States*, 129 Ct. Cl. 715, 718, 124 F. Supp. 419 (1954).

¹³⁸ *Lester Brothers, Inc.*, ASBCA 1373-74 (April 30, 1954).

¹³⁹ *Ibid.*

¹⁴⁰ ASPR 7-103.4 (30 April 1956), CCH Gov't CONTRACTS REP.

items delivered under the repurchase contract.¹⁴¹ This appears to be the correct solution in view of the fact that *both* contracts contained the identical provisions. However, if the terminated contract does not contain the clause, the result should be that the price of the increased quantity is not chargeable.

Several other miscellaneous points remain to be considered. First, because the purpose of the excess costs provision is to permit the Government to acquire the supplies called for by the defaulted contract without extra cost to itself, it seems logical to say that the Government may charge to the defaulted contractor only the "net" excess costs on repurchase. For example, if the Government finds that it must make the repurchase from two contractors, the total amount expended on both repurchase contracts is the sum by which excess costs are to be measured. Thus, if one of these contractors charges a price less than that under the terminated contract and the other charges a higher price, only the excess costs computed on the total of the two prices is chargeable.¹⁴² The same principle applies in a case where the defaulted contract called for more than two items and, on repurchase, savings were realized on one item while excess costs had to be paid on the other.¹⁴³

Secondly, an interesting problem involves "double termination," i.e., the case where not only the original contractor is terminated under the "default" clause but also the repurchase contractor and a second repurchase contract is entered. In such case, how are excess costs

¹⁴¹ Vevier Looseleaf Co., ASBCA 1500 (May 28, 1954). It would not be reasonable to say that the terminated contractor may claim that he owes excess costs on only 95% of the items called for under his contract on the ground that this was the limit on the number of items he could be called upon to deliver. The "variations" clause does not appear so to operate, except where an *actual* overrun or under-run is ascribable to the causes set forth in the clause.

¹⁴² 32 Comp. Gen. 328 (1953).

¹⁴³ 34 Comp. Gen. 41 (1954).

to be charged? Under the "default" clause and the "net excess cost" rule it would not seem that the terminated contractor should be responsible for excess costs if in fact the contract items have ultimately been procured at a saving. For example, A Company contracted to furnish 100 items at \$10 each. A Company's contract was terminated as to the entire quantity and a repurchase contract entered into with B Company for all 100 items at \$12 each. B Company's contract was, in turn, terminated and a repurchase of all 100 items made from C Company at \$8 each. A Company should not be responsible for excess costs.¹⁴⁴ The logical application of these principles would also seem to require this conclusion: if the second repurchase contract was made at a price in excess of the first (e.g. suppose that the price of the C Company con-

¹⁴⁴ See Ms. Comp. Gen. B-108570, May 20, 1953, which followed this theory. Two previous decisions of the Comptroller General had seemingly laid down the rule that a terminated contractor's liability for excess costs was to be measured at the time the repurchase contract was entered: 15 Comp. Gen. 149 (1935), and 22 Comp. Gen. 1035 (1943). In the first of these decisions the original contractor delivered nothing prior to termination, the first repurchase contractor delivered only a part of the items called for, the second repurchase contractor successfully delivered the remainder. The first repurchase was at a price in excess of the terminated contract and the second repurchase at a price in excess of the first. Held, that the terminated contractor should pay as excess costs the difference between his contract price and the price of the first repurchase contractor and the first repurchase contractor should pay as excess costs the difference between his contract price for the items he failed to deliver and the price charged by the second repurchase contractor therefor. In 22 Comp. Gen. 1035, *supra*, repurchase was made only once, but from two contractors. Deliveries were defective under the repurchases and were accepted only at a reduction in price. It was held that the terminated contractor could not claim this price reduction as a reduction of excess costs, which were to be measured at the time the repurchase contracts were made. The basis for this decision was that the repurchase furnished *prima facie* the test of market value, which of course is a recognized measure of common law damages, and that the reduction of price for deficiencies is irrelevant in determining damages by that standard. This seems valid enough, and it accords with the general rule that a terminated contractor is not entitled to claim savings made on repurchase. *Quinn v. United States*, 99 U.S. 30 (1878). In Ms. Comp. Gen. B-108570, *supra*, it was pointed out that the results in 15 Comp. Gen. 149 and 22 Comp. Gen. 1035 would have been the same "under any view," presumably indicating that the two decisions are correct and are to be followed today, at least on similar facts. Neither case involved the current "default" clause.

tract was \$14 per item), then the terminated contractor would be responsible for the total net excess costs incurred or, in the example, \$4 per item. If the first repurchase contract contained the "default" clause, there apparently would also be available to the Government recourse against the first repurchase contractor (B Company) for the excess costs incurred in the second repurchase contract (or \$2 per item).¹⁴⁵ This sort of collateral liability could not, it is assumed, be the basis for a double recovery by the Government, unless excess costs have a purpose other than compensation.

Thirdly, if the terminated contractor tenders delivery of the items called for, or a part of them, after the termination but before a repurchase contract is made, the Government must accept such deliveries and, thus, reduce or eliminate the contractor's responsibility for excess costs.¹⁴⁶

Fourthly, sometimes the Government in making its contracts to purchase supplies agrees that it may furnish the contractor materials out of government-owned prop-

¹⁴⁵ The Comptroller General in Ms. Comp. Gen. B-108570, *supra* note 144, noted this possibility without disapproval, apparently thinking that the result could in part be predicated on the decision in *Doehler Metal Furniture Company v. United States*, 149 F.2d 130 (2d Cir. 1945). The status of 15 Comp. Gen. 149, discussed in the preceding footnote, is thus a problem. It should be conceded that that decision was reached without any distinction being made between the common law principle of damages (difference between market and contract prices at time and place of breach) and the excess costs provisions of the contract there involved. The price of the second repurchase contract might, under the common law, be regarded as too remote to furnish a measure of damages as of time of the breach of the terminated original contract. *Arguendo*, this result might also follow under the current "default" clause.

¹⁴⁶ See *All-Stainless, Inc.*, ASBCA 1899 (May 7, 1954). The Government, after termination, could not be compelled to accept a tender of deliveries as a contract obligation because the contractor's right to deliver had been put to an end. However, to reject tender of deliveries under these circumstances, where the items tendered are acceptable and to insist on making a repurchase contract would not furnish a basis for charging excess costs. Such excess costs would be an "avoidable consequence" (or, as otherwise stated, a violation of the "duty to mitigate damages"). See *RESTATEMENT, CONTRACTS* § 336 (1932). It is reasonable to conclude that the rule of the *All-Stainless* case does not apply to a tender of supplies by the terminated contractor *after* a repurchase contract has been made.

erty.¹⁴⁷ In the event that the contractor is terminated and a repurchase contract is let, the Government in furnishing the materials to the repurchase contractor may have to incur costs for transportation to him over and above any excess costs it may incur on account of his contract price. In such cases it is held that the extra transportation costs are chargeable as excess costs.¹⁴⁸

Finally, it seems clear that, when the Government repurchases only a part of the items called for under the terminated contract,¹⁴⁹ excess costs are to be charged only on the items actually repurchased. However, in this situation there is more than meets the eye. Let us take two hypothetical sets of facts:

(a.) A Company contracts to deliver 1000 items at \$10 per item. The contract is terminated as to the entire quantity and a repurchase contract is made with B Company for 500 items at \$11 per item. No more than 500 items are to be repurchased because of reduced government needs.

The maximum amount that should be charged to A Company is \$500. Is this the correct amount of excess costs to be charged? If we further assume that B Company would have charged only \$10.50 per item if 1000 items had been repurchased, is it correct to say that A Company should be charged only 50 cents per item excess costs, *i.e.*, \$250? Viewed from the standpoint of common law damages (difference between contract and market price at the time of

¹⁴⁷ Regulatory provisions related to such furnishing may be found in ASPR Section XIII.

¹⁴⁸ There are a number of Board of Contract Appeals decisions on this point. Among them are: *Alpheus Aughenbaugh*, ASBCA 511 (April 6, 1951), 5 CCF 61,254; *Norman G. Roof*, ASBCA 68 (May 25, 1950), 4 CCF 61,002; *Wexler*, War Department BCA 524 (June 7, 1944) 2 CCF 866; *H. Dukart, Inc.*, War Department BCA 163 (Dec. 31, 1943) 1 CCF 1003. See also *Manufacturer's Research Corp.*, ASBCA 1119 (April 30, 1956) 6 CCF 61,929.

¹⁴⁹ As, for example, where Government needs for the item have been reduced because of development of new and superior replacement items or because the termination of military programs (such as occurred after the termination of hostilities in Korea).

breach) B Company's \$11 per item charge would appear to be a fair prima facie measure of damage, and, accordingly, \$500 would be chargeable to A Company. Even as a matter of excess costs under the "default" clause, A Company is certainly no worse off than it would have been had the Government repurchased the entire 1000 items, which it could have done. Posing the problem in a slightly different manner indicates the plausibility of a different solution:

(b.) A Company contracts to deliver 1000 items at \$10 per item. A Company's contract is terminated and a repurchase contract is entered into with B Company for 500 items reflecting reduced government need for the item. B Company's price is \$10.50 per item, but B Company also reveals that its overhead rate would have been substantially reduced if 1000 items had been ordered. Its price for 1000 items would have been \$9.75 per item.

Under this assumption, it may be asked whether the Government may charge excess costs at all. Certainly, the Government had to spend more for 500 items under the B Company contract than it would have had to spend for them if A Company had performed. But it was because of the Government's independent determination, unrelated to the contract obligations of A Company, to reduce the number of items ordered that these excess expenditures had to be made. If the repurchase had included 1000 items, there would actually have been a saving. No controlling authority has been found,¹⁵⁰ but we suggest that, if the

¹⁵⁰ In *Press-Rite Metal Products*, ASBCA 2263 (March 21, 1955), a contract was let for some 160,000 safety nuts at a price of \$.61 per item. After default a repurchase was made for only 40,000 items at an average price of approximately \$.865 per item. Requirements for the safety nuts had dropped off considerably. The Board commented, obiter:

... [I]n the abstract of bids upon the original invitation for bids, the bidder next higher to appellant [Press-Rite] bid 88 cents per unit.

We mention this last fact for the reason that a repurchase of only a part of the originally defaulted number of units might lead one to a belief that the repurchase price was not good evidence of

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Government actually spends less than the total amount involved under the original contract, it should not charge any excess costs.

ii THE MANUFACTURING MATERIALS PROVISION

One of the important rights acquired by the Government pursuant to its issuance of a notice of termination under the "default" clause is provided for in subclause (d). Appendix A, *infra*. In addition to permitting the contracting officer to direct transfer to the Government of completed supplies at the contract price, this provision also permits him to direct transfer of title and delivery to the Government of "such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights . . . as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated. . . ." The items listed are collectively referred to as "manufacturing materials." The principal purpose of the Government in inserting this provision is clear. The "manufacturing materials" in the terminated contractor's hands may be of considerable use to the Government in con-

the Government's loss, as it is a rather well known fact that the larger the quantity purchased, the lower the unit price may be. But we see from the comparison of the repurchase price with the next highest original bid, that the sums are not out of proportion with each other. It would seem to follow that the repurchase price of a lesser quantity was not productive of such an unreasonable variance in unit price that it might be thought of as increasing rather than mitigating losses.

The case was disposed of on the basis that the contractor had an excusable cause for his delinquency and, therefore, that the excess costs were not chargeable. Insofar as the above dicta are concerned, it would seem that the Board's point was that the repurchase prices were not out of line with reasonable market costs existing at the time the original contract was let, as established by the second low bid. This would be appropriate to an actual or common-law damage assessment. Technically, it might be argued that the second low bid has no relevance to excess costs on a repurchase of a fewer number of items. If the second low bidder had been asked to bid on the fewer number of items, he might well have placed his bid at a higher figure. This would accord with the argument in the quotation above.

nection with repurchase contracts. For example, by furnishing the "manufacturing materials" to the repurchase contractor the Government may save both time and money under the repurchase contract. In addition, such items as plans, drawings and "information" may be of benefit to the Government with respect to its general procurement plans for other purchases of the same or related items. Where the contracting officer exercises the right vested in him to require delivery of "manufacturing materials," the Government is required to pay to the contractor the "amount agreed upon by the Contractor and the Contracting Officer" for such materials as are delivered to and accepted by the Government. If the contractor and the contracting officer fail to agree, their failure is characterized as a "dispute concerning a question of fact" able to be resolved under the "disputes" clause of the contract.¹⁵¹ It has been held that title to contractor-owned materials transferred to the Government by direction of the contracting officer will prevail over liens of subcontractors.¹⁵² Subclause (d) also permits the contracting officer to direct the contractor to protect and preserve property in the possession of the contractor when the Government has an interest in it. Payment for such protection and preservation is as agreed upon, just as in the case of "manufacturing materials," and failure of the contracting officer and the contractor to agree is to be resolved under the "disputes" clause.

iii PROBLEMS RELATED TO APPROPRIATED FUNDS

One of the intramural concerns of the Government is to

¹⁵¹ ASPR 7-103.12 (23 Dec. 1955), CCH GOV'T CONTRACTS REP. ¶ 29,363. This clause is used instead of the clause at Article 12, U.S. Standard Form 32 (1949 ed.), CCH GOV'T CONTRACTS REP. ¶ 18,302, in order to reflect section one of the act of May 11, 1954, 68 STAT. 81, 41 U.S.C. § 321 (Supp. 1955).

¹⁵² See *Thomson Machine Works v. Lake Tahoe Marine Supply Company, Inc.*, 135 F. Supp. 913 (N.D. Cal. 1955). The construction contract clause contains a parallel provision, Article 5(a), "Termination for Default—Damages for Delay—Time Extensions," U.S. Standard Form 23A, CCH GOV'T CONTRACTS REP. ¶ 18,202.

make funds available for repurchase contracts entered into pursuant to the "default" clause of a terminated contract. A large number of contracts are entered into under "one-year" appropriations.¹⁵³ Under the rule established by section one of the "Surplus Fund-Certified Claims Act of 1949,"¹⁵⁴ a one-year appropriation can be obligated, insofar as contracts are concerned, only by contracts entered into during the fiscal year for the service of which the appropriation was enacted. Thus, an appropriation for the fiscal year 1957 may be obligated only by contracts properly made¹⁵⁵ during the period July 1, 1956, to June 30, 1957. Unless so obligated, it is not available for expenditure after the close of the fiscal year.¹⁵⁶ Section two¹⁵⁷ of the act per-

¹⁵³ A "one-year" or "annual" appropriation has been defined as "one which is available for incurring obligations only during a specified fiscal year." Par. 21, Budget-Treasury Regulation No. 1, Sept. 1950. Probably the majority of appropriation acts provide "one-year" funds. The existence of appropriations is necessary to provide authority to contract unless the contract is otherwise authorized by law. See R.S. § 3732, as amended, 41 U.S.C. § 11 (1952).

¹⁵⁴ 63 STAT. 407 (1949), 31 U.S.C. 712 § a (1952). This statute did not, of course, restrict the use of appropriations of the "no-year" or "available until expended" category.

¹⁵⁵ For example, to obligate an "annual" or "one-year" appropriation act, a contract must be made during the fiscal year for the service of which the act was intended and must fulfill a *bona fide* need of that fiscal year. An interesting decision related to this point is 32 Comp. Gen. 565 (1953). In addition, it ought to be noted that, in order to be recorded as an obligation of the United States and against available appropriations, contracts must comply with the provisions of section 1311(a) of the Supplemental Appropriation Act, 1955, 68 STAT. 830, 31 U.S.C.A. § 200 (Supp. 1956).

¹⁵⁶ 63 STAT. 407 (1949), 31 U.S.C. § 712 a (1952), *supra* note 154. It should be noted that the act of July 25, 1956, sec. 1 (a) (2), 70 STAT. 648, contains a proviso: "that when it is determined necessary by the head of the agency concerned that a portion of the unobligated balance withdrawn is required to liquidate obligations and effect adjustments, such portion of the unobligated balance may be restored to the appropriate accounts." This means that funds not obligated may be used to liquidate obligations properly incurred against the same appropriation. Presumably, it does not mean that unobligated Navy funds may be used to liquidate Army obligations or that funds appropriated to the Army for one purpose may be diverted to accomplish another dissimilar purpose for which funds separately were appropriated and obligated. See R.S. § 3678, 31 U.S.C. 628 (1952) (However, section three of the act permits a certain amount of exchange between appropriations available for the same "general pur-

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mitted the agency for whose use the funds were appropriated to *expend* them on a contract so made during the year for which the appropriation was enacted and during the next two succeeding fiscal years. In case a contract made under a "one-year" appropriation is terminated and the repurchase contract is entered into¹⁵⁸ in a year after the fiscal year for which the "one-year" appropriation was available for obligation, the obvious inquiry is: should the funds for the repurchase contract be obtained from the appropriation charged by the terminated contract or from funds available for obligation during the fiscal year during which the repurchase contract is made.¹⁵⁹ Because the terminated contractor is still under a duty to reimburse the United States for excess costs and because the repurchase contract is made pursuant to subclause "(c)" of the "default" clause, the repurchase contract is regarded as chargeable to the appropriation obligated by the terminated contract, that is, chargeable to the "account" of the

poses"). The purpose of the quoted proviso was apparently to permit the Department of Defense to make adjustments at the end of a fiscal year without the necessity of recourse to Congress for new appropriations. See H.R. Rep. 2015, 1956 U.S. CODE CONG. & ADM. NEWS, p. 4534, 4536. The Department of Defense problem arose particularly because of price re-determination and price escalation provisions in contracts, the "variations in quantity" clause (ASPR 7-103.4) and other contract pricing features which make it possible that the amount originally obligated for a contract may be exceeded by repricing, permissible deliveries of additional quantities, etc. See Hearings before the House Committee on Government Operations on H.R. 9593, 7658, 7688, March 27, 1956, particularly at pages 9, 19, 25-35.

¹⁵⁷ 63 STAT. 407 (1949), 31 U.S.C. § 712 b (1952). This section was repealed by section 7(b) of the act of July 25, 1956, 70 STAT. 650, referred to in the previous footnote, but the repeal is not effective until June 30, 1957. However, the purpose of the delayed repeal is apparently only to permit final settlement of claims now in process under the "certified claims" procedure set up by 31 U.S.C. § 712 b. The act of July 25, 1956, is effective as to appropriations for fiscal years 1954 and thereafter. See H.R. Rep. 2015, 1956 U.S. CODE CONG. & ADM. NEWS, p. 4534, 4538.

¹⁵⁸ See 32 Comp. Gen. 565 (1953).

¹⁵⁹ In Ms. Comp. Gen. B-53731, December 13, 1945, the Comptroller General held that the fiscal year appropriation obligated by the terminated contract must be used to fund the repurchase contract and that subsequent year appropriations were not available for that purpose.

terminated contractor.¹⁶⁰ Thus, a currently available appropriation is not necessary for the repurchase contract.

Under section two of the "Surplus Fund-Certified Claims Act," a further problem arose: if the repurchase contract¹⁶¹ were unable to be performed during the period allowed for expenditure of the appropriation obligated by the terminated contract,¹⁶² how were payments to be made to the repurchase contractor for performance rendered after the end of the period? Section two provided that funds no longer available for expenditure were to be transferred to the "payment of certified claims" account, and that disbursements from this account were to be made only on the certification of the Comptroller General that they were lawfully due. Thus, a repurchase contractor who was owed for performance rendered after the expenditure period was required to submit his claim to the General Accounting Office for allowance. In most cases, this involved an unnecessary review, because payments were clearly due. Pursuant to a 1956 statute¹⁶³ the amount of such processing through the GAO will be reduced. This act permits amounts properly obligated under section one of the "Surplus Fund-Certified Claims" Act to be retained by the agency concerned for such period as is necessary to liquidate accounts. Consequently, repurchase contractors can obtain payment from the agency with whom they contract even though performance is rendered beyond the former period of limitations on expenditures.

¹⁶⁰ See 9 Comp. Dec. 10 (1902); 21 Comp. Dec. 107 (1914); 2 Comp. Gen. 130 (1922); Ms. Comp. Gen. B-53731, December 13, 1945; 32 Comp. Gen. 565 (1953); 34 Comp. Gen. 239 (1954).

¹⁶¹ The same problem would, of course, arise when the original contract was unable to be performed within the three-year period.

¹⁶² That is, the fiscal year for which the appropriation was made plus the next two succeeding fiscal years. See note 157, *supra*.

¹⁶³ The act of July 25, 1956, 70 STAT. 647 (P.L. 798, 84th Congress), section 7(b) of which repeals section two of the "Surplus-Fund-Certified Claims Act". See note 157 *supra*.

IV LIQUIDATED DAMAGES

No exploration of all the implications of the law of liquidated damages insofar as it pertains to government contracts will be undertaken in this paper. First, the use of liquidated damages provisions in supply contracts of the Army, Navy and Air Force is not the general practice.¹⁶⁴ Second, the general outlines of the law of liquidated damages as applied to Government contracts are fairly well drawn¹⁶⁵ and there is some useful literature on the subject already extant.¹⁶⁶

¹⁶⁴ While the clause for supply contracts is optional, it may be considered for use "only where time for delivery or performance is an important factor in the award of the contract." ASPR 7-105.5, as revised December 12, 1956. Par. 41 b, Army Regulations 35-3220 (as changed July 18, 1955) provided that liquidated damages clauses may be used only with the permission of the Chief of the Procuring Activity concerned. Use of a liquidated damages provision in construction contracts is more frequent (Cf. Article 5, U.S. Standard Form 23A, CCH GOV'T CONTRACT REP. ¶ 18,202. At one time, certain construction contracts were required by statute to contain clauses providing for liquidated damages. Act of June 6, 1902, sec. 21, 32 STAT. 326, formerly 40 U.S.C. 269, repealed by § 1(91) of the act of October 31, 1951, 65 STAT. 705.

¹⁶⁵ See *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947); *Wise v. United States*, 249 U.S. 361 (1919); *United States v. Bethlehem Steel Co.*, 205 U.S. 105 (1907); 35 Comp. Gen. 484 (1956); 28 Comp. Gen. 435 (1949). These decisions establish the general proposition that, just as in contracts between private persons, if liquidated damages are fixed in a fair and reasonable attempt to approximate the prospective actual damages and are not, therefore, in the nature of a penalty, they will be enforced. The fact that no actual damages are shown by the United States will not result in a denial of enforcement of an otherwise valid liquidated damages provision; nor, of course, will an after-the-fact discovery that liquidated damages exceed actual damages have such effect. In one case, a liquidated damages assessment in excess of the contract price was upheld: 28 Comp. Gen. 435 (1949); but see *Germain Lumber Company v. United States*, 56 F. Supp. 1001 (W.D. Pa. 1944); 35 Comp. Gen. 43, 45 (1955). Very frequently, damages to the Government arising from delays of its contractors are speculative, uncertain in nature or amount, or immeasurable. This is most obviously true in cases of contracts involving munitions during war time. See, in this connection, RESTATEMENT, CONTRACTS § 339, comment c, and *Priebe & Sons, Inc. v. United States*, *supra*, at 411. The state law on the subject does not govern. *United States v. Le Roy Dyal Co.*, 186 F.2d 460-61 (3d Cir. 1950) *cert. denied*, 341 U.S. 926 (1951); instead, validity is for determination under the general law of contracts as applied by the federal courts. *Priebe v. United States*, *supra*.

¹⁶⁶ See: Haas, *A New Look at the Liquidated Damages Provision of the "Default" Clause in Government Contracts*, 14 FED. B.J. 407 (1954); Anderson, *Damages for Delays in the Law of Government Contracts*, 21 SO. CALIF.

Regulations of the Armed Services permit the inclusion of a clause in supply contracts providing for liquidated damages *for delay* in performance.¹⁶⁷ When used, this clause is incorporated in the "default" clause, other portions of which have an important bearing on the operation and interpretation of the liquidated damages clause. The general import of the clause and its close inter-relation with the "default" clause are evident from its terms:¹⁶⁸

(f) If the Contractor fails to deliver the supplies or perform the services within the time specified in this contract, or any extension thereof, the actual damage to the Government for the delay will be difficult or impossible to determine. Therefore in lieu of actual damages the Contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay the amount set forth elsewhere in this contract; *provided* that the Government may terminate this contract in whole or in part as provided in paragraph (a) of this clause, and in that event the Contractor shall be liable, in addition to the excess costs provided in paragraph (c) above, for liquidated damages accruing until such time as the Government may reasonably provide for the procurement of similar supplies or services. The Contractor shall not be charged with liquidated damages when the delay arises out of causes beyond the control and without the fault or negligence of the Contractor, as defined in paragraph (b) above, and in such event, subject to the "Disputes," clause the Contracting Officer shall ascertain the facts and extent of the delay and shall extend the time for performance when in his judgment the findings of fact justify an extension.

Liquidated damages are fixed at an amount specified in the contract for each calendar day of delay. This amount may

L. REV. 125 (1948). For analyses of the general topic see: McCormick, *Liquidated Damages*, 17 VA. L. REV. 103 (1930); Brightman, *Liquidated Damages*, 25 COLUM. L. REV. 277 (1925); Loyd, *Penalties and Forfeitures*, 29 HARV. L. REV. 117 (1915).

¹⁶⁷ ASPR 7-105.5 (December 12, 1956) CCH GOV'T CONTRACTS REP. ¶ 29,365. Liquidated damages are, of course, impossible under appropriate contract provisions for breaches of contract other than delayed performance. The ASPR clause, however, restricts liquidated damages to damages for delay.

¹⁶⁸ *Ibid.*

be stated as a lump sum per day, or as a stipulated percentage of the contract unit price for each day of delay in the delivery of each unit called for by the contract, or in some other fashion.¹⁶⁹ In whatever manner the liquidated damages are thus fixed, they are valid and collectible so long as they do not amount to a penalty.¹⁷⁰ Several of the problems connected with the operation of the liquidated damages provision are discussed in the following paragraphs.

As previously mentioned, vested rights of the United States may not be given away by any of its officers except where authorized by law.¹⁷¹ When liquidated damages have accrued pursuant to a contract provision imposing them, may the contractor secure their remission?¹⁷² The present statute provides: "Upon the recommendation of the head of any agency, the Comptroller General may remit all or part, as he considers just and equitable, of any liquidated damages assessed for delay in performing a contract, made by that agency, that provides for such damages."¹⁷³

¹⁶⁹ See 33 Comp. Gen. 395 (1954), where liquidated damages were the difference between the contract price and the low bid on the procurement. Award had been made to a higher bidder on the basis of an earlier delivery date.

¹⁷⁰ See note 165 *supra*, and 35 Comp. Gen. 43 (1955).

¹⁷¹ See notes 11 and 12 *supra*.

¹⁷² It should be noted that if the contractor's delay is based on an excusable cause as defined in subclause (b) of the "default" clause, then liquidated damages are not to be imposed. In case the contracting officer makes findings of fact and a decision that delays are not so excusable, the contractor may appeal his decision pursuant to the provisions of the "disputes" clause, ASPR 7-103.12 (23 Dec. 1955), to the Armed Services Board of Contract Appeals (see ASPR Appendix "A"), which may reverse his decision. Pursuant to such a reversal, liquidated damages will not be collectible, the basis for this being that they were not due in the first place. This is sometimes referred to as a remission. See 35 Comp. Gen. 484-85 (1956). But remission seems to be a far broader term and to comprehend also a waiver of a finally accrued right to liquidated damages, in a case where there is no "excusable cause" or in a case where the contract does not provide that liquidated damages will not be imposed during periods of excusable delay. For an example of this sort of provision, see *Broderick Wood Products Co. v. United States*, 195 F.2d 433 (10th Cir. 1952).

¹⁷³ 10 U.S.C. § 2312 (1956). The act of August 10, 1956, Pub. L. No. 1028, 84th Cong. 2d. sess., "revised, codified and enacted into positive law" titles

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Therefore, under the statute, two things must occur: the agency head¹⁷⁴ must recommend remission and the Comptroller General must make his determination as to whether all or any part of liquidated damages should, in justice and equity, be remitted. Interpreting his authority under similar statutes, the Comptroller General has laid down the following criteria for remission:

Where a claim is presented for consideration under [this act], this Office has required, for favorable action, the existence of strong and persuasive equities on behalf of the claimant. This is particularly true if, as indicated by the record, the contractor through the exercise of proper diligence could have avoided a substantial part of the delay.¹⁷⁵

The Comptroller excluded consideration of contentions

10 and 32 of the United States Code and repealed earlier statutes on which the revision is based. One of these earlier statutes, thus repealed, is the Armed Services Procurement Act of 1947, 62 STAT. 21, section six of which [formerly 41 U.S.C. § 155 (1952)] pertained to the same subject as 10 U.S.C. § 2312 (1956), quoted in the text. The wording of the two sections differs but not in any apparent substantial effect.

Language similar to that of former 41 U.S.C. § 155, *supra*, also is found in section 10(a) of the act of September 5, 1950, 64 STAT. 591 (1950), 41 U.S.C. § 256a (1952) [replacing § 306 of the Federal Property and Administrative Services Act of 1949, 63 STAT. 396 (1949)].

Cf. § 707 of the Defense Production Act of 1950, 50 U.S.C.A. § 2157 (Supp. 1956). This section (providing that no person shall be liable for damages or penalties for any act or failure to act resulting from his compliance with rules, regulations or orders issued under the act) was held in 31 Comp. Gen. 408 (1952) not to provide an excuse from liquidated damages where the contractor's delay was due to his *supplier's* inability to get priority orders, as required under the act. The act was amended so as to change this rule, act of June 30, 1952, 66 STAT. 306, 50 U.S.C.A. § 2157 (Supp. 1955); 32 Comp. Gen. 497 (1953). The act is currently in effect (until June 30, 1958), act of June 29, 1956, 70 STAT. 408.

¹⁷⁴ 10 U.S.C. § 2302 (1956) defines "head of an agency" as meaning "the Secretary, the Under Secretary, or any Assistant Secretary, of the Army, Navy, or Air Force; the Secretary of the Treasury; or the Executive Secretary of the National Advisory Committee for Aeronautics." Favorable recommendation by the appropriate officer is a prerequisite to action by the General Accounting Office. See 34 Comp. Gen. 251, 252 (1954). Such recommendation is not, of course, a matter of right as far as the contractor is concerned.

¹⁷⁵ 32 Comp. Gen. 67-69 (1952). This decision was rendered under § 10a of 64 STAT. 591 (1950), 41 U.S.C. § 256a (1952). This statute lays down the same criteria ("just and equitable") as are stated in 10 U.S.C. § 2312. See also, 34 Comp. Gen. 251 (1954).

that the amount of liquidated damages was disproportionate (they amounted to a high percentage of the contract prices) and that there was no actual damage or loss to the Government shown.¹⁷⁶

Liquidated damages are not, pursuant to the clause, computed during extensions of time granted by the contracting officer.¹⁷⁷ The clause provides that liquidated damages will continue to accrue when the Government has terminated the contract¹⁷⁸ and repurchased from another contractor. In such case the liquidated damages are *in addition to excess costs*¹⁷⁹ and are computed up to such time

¹⁷⁶ 32 Comp. Gen. 67, 70 (1952). *Sun Printing and Publishing Association v. Moore*, 183 U.S. 642 (1902), was cited for the proposition that where the liquidated damages provision is a valid one, it is not necessary for the Government to prove any damage or loss.

¹⁷⁷ The contracting officer will normally, of course, grant extensions of time when the contractor's delay is based on an excusable cause. If the contracting officer issues a "changes order" (see the "changes" clause, ASPR 7-103.2, CCH Gov't CONTRACTS REP. ¶ 29,363, involving extra work or delay in the work, he should extend the delivery schedule or time for performance to the extent reasonably necessary. If he fails to do so and the contractor cannot complete the work within the time allowed by the contract, because of the changes, an extension will be effective by operation of law. See 34 Comp. Gen. 230, 234-35 (1954); 30 Comp. Gen. 345 (1951). In the event that the cause for the contractor's delay is an excusable one within the meaning of the clause, liquidated damages are not chargeable. See 29 Comp. Gen. 149 (1949). *But cf.* *Broderick Wood Products Co. v. United States*, 195 F.2d 433 (10th Cir. 1952), where the contract did not provide for relief of the contractor from liquidated damages where his delay was excusable. If a part of the delays involved are excusable and a part not excusable, liquidated damages will, of course, be charged for the latter. As to the problem of apportionment of responsibility for delay when both the contractor and the Government are each responsible for a portion thereof, see *Anderson, supra*, 21 So. CALIF. L. REV. 125, 134-36; *Haas, supra*, 14 FED. B.J. 407, 421-22.

¹⁷⁸ At one time, construction contract liquidated damages provisions gave the Government the right to charge such damages only when the contractor was not terminated but was permitted to complete the work. Excess costs were chargeable in the event that the contractor was terminated and the contract relet. In *United States v. American Surety Co.*, 322 U.S. 96 (1944), it was held that liquidated damages were not collectible when the contract was terminated and the work relet.

¹⁷⁹ The decision in *United States v. American Surety Co.*, *supra* note 178, did not have the effect of establishing that the Government might not, under a clause so providing, charge both liquidated damages and excess costs on a relet or repurchase contract. See *Hartford Accident & Indemnity Co. v. United States*, 130 Ct. Cl. 490, 127 F. Supp. 565 (1955); 31 Comp. Gen. 428 (1952). The "delays-liquidated damages" clause, once widely used in supply contracts, authorized imposition of both types of damages. See 41 U.S.C.

as the Government may reasonably provide for the procurement of similar supplies or services. The language used poses the problem of whether the liquidated damages will accrue under this provision until the time when the repurchase contract *provides for delivery*, the time when deliveries are *actually made* under the repurchase contract, or the time when the Government *makes the contract of repurchase*. Of the three possibilities the last seems the correct interpretation of the language used, although no reason is perceived why either of the first two possibilities would be inapposite to the situation.¹⁸⁰ The conclusion that the third possible interpretation is the correct one has been reached by the Armed Services Board of Contract Appeals under the language quoted.¹⁸¹ The language would also require that the Government not take an unreasonable time to arrange for repurchase.¹⁸²

App. § 54.21 (1952), "Directions for Preparation of Contract" where the text of this clause is included; *United States v. Walkof*, 144 F.2d 75 (2d Cir. 1944); *Manart Textile Company*, 111 Ct. Cl. 540, 77 F. Supp. 924 (1948).

¹⁸⁰ The "delays-liquidated damages" clause, frequently used in the past, permitted charge of both excess costs and liquidated damages in the event of repurchase, the liquidated damages continuing to accrue until such time as "the Government may *reasonably procure* such supplies or services elsewhere" (Emphasis added). This is open to the interpretation that liquidated damages are to run until the repurchase contract *provides for* (i.e., schedules) delivery of the replacement supplies, and also to the interpretation that liquidated damages will run until such time as the Government actually receives deliveries under the repurchase contract. Although the word "procure" is not absolutely clear, the latter interpretation seems, on the face of it, more reasonable. If on the other hand, the rule *contra proferentem*, and the "duty" to mitigate damages is given effect, the former interpretation can be supported. The Armed Services Board of Contract Appeals appears to follow the former interpretation. *Racine Screw Co.*, ASBCA 2260 (May 17, 1955). See also 17 Comp. Gen. 503 (1937). The language of the current "liquidated damages" clause (liquidated damages shall continue to run "until such time as the Government may reasonably provide for" reprourement) lends itself most easily to the interpretation that liquidated damages run only to the date the repurchase contract is made.

¹⁸¹ *Acme Chair Co.*, ASBCA 2019 (April 11, 1955).

¹⁸² This is a somewhat different problem than that posed by an unreasonable delay when excess costs are sought to be charged. If the repurchase contract is unreasonably delayed, it may not afford a basis for computing excess costs. In the case of liquidated damages, however, the Government may not aggravate the amount of such damages by unreasonably delaying repurchase; such aggravation is within the rule of "avoidable consequences" (or the "duty to mitigate damages"). See *RESTATEMENT, CONTRACTS* § 336

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The obvious implication of the Government's omission to repurchase the supplies called for under a contract containing the "liquidated damages" provision is that the Government sustains no real loss by reason of delay in delivery and that no liquidated damages should be charged. However, the Court of Claims and the Comptroller General appear to be divided on this point. To illustrate, let us assume that a contract calls for delivery of 1,000 items on January 1st and 1,000 items on February 1st. The contract contains the "liquidated damages" clause appended to the "default" clause. The items scheduled for delivery on January 1st are not delivered until February 15th on which day the contracting officer terminates the contract insofar as the remaining 1,000 items are concerned. Liquidated damages clearly seem able to be assessed on the 1,000 items delivery of which was in arrears during the period January 1—February 15th.¹⁸³ If the contracting officer enters into a repurchase contract for the remaining 1,000 items, this seems to demonstrate that the Government needed the items and therefore was damaged by delay in receiving them and should be able to impose liquidated damages until the date of the repurchase contract. However, where the Government does not make a repurchase contract, it would seem reasonable to say that it has not sustained any real loss by reason of delay in receipt of supplies which it did not want. Nor does it seem that, strictly speaking, there is a "delay" involved. The Court of Claims has said that, under circumstances similar to the

(1932); 5 WILLISTON, CONTRACTS § 1353 (1937); *Morton M. Rose v. United States*, 129 Ct. Cl. 715, 124 F. Supp. 419 (1954) (decided under the "delays-liquidated damages" clause); Army Procurement Procedure 7-105.5 c (May 5, 1954), CCH Gov't CONTRACTS REP. ¶ 19,684; *United States v. American Employers Ins. Co.*, 141 F. Supp. 281, 290 (E.D. Pa. 1956).

¹⁸³ Saturdays, Sundays and holidays are included. The "liquidated damages" clause provides for assessment for "each calendar day" of delay. See *Skyline Clothing Corp., ASBCA 298* (Dec. 16, 1949), 4 CCF 60,836; *Norman G. Roof t/a Carolyn Clothes, ASBCA 68*, (May 25, 1950), 4 CCF 61,002. *But cf. Lebanon Woolen Mills v. United States*, 99 Ct. Cl. 318, 71 F. Supp. 744 (1943).

above, liquidated damages can be charged only on the items delivered.¹⁸⁴ A 1946 decision¹⁸⁵ of the Comptroller General indicated that liquidated damages should be charged on all deliveries delinquent on the date of termination. Under the latter view, liquidated damages for the period February 1-15 would be assessable as to the 1,000 items scheduled for delivery on February 1st. Inasmuch as liquidated damages are (as provided in the clause) in lieu of actual damages for delay and in view of the fact that actual damages for delay, may be allowable even in the absence of repurchase,¹⁸⁶ there is something to be said for the position of the Comptroller General. The Armed Services Board of Contract Appeals, nonetheless, has adopted the position taken by the Court of Claims.¹⁸⁷ The Supreme Court does not seem to have commanded clearly that either rule be followed.¹⁸⁸ However, a charge for

¹⁸⁴ *Manart Textile Company v. United States*, 111 Ct. Cl. 540, 77 F. Supp. 924 (1948).

¹⁸⁵ *Ms. Comp. Gen. B-54425*, Jan. 25, 1946.

¹⁸⁶ For example, the Government might have kept warehouse or depot space empty pending receipt of the supplies and prior to the decision not to repurchase. If this decision followed termination, actual damages for delay seem allowable, if this amount can be proved. Certainly actual damages for delay are recognized as a separate head of damages. See 30 Comp. Gen. 191 (1950). See also 35 Comp. Gen. 228 (1955); 28 Comp. Gen. 717 (1949); 23 Comp. Gen. 717 (1944). As to a buyer's damages, see *UNIFORM SALES ACT* § 67; *McCORMICK, DAMAGES* § 175; *UNIFORM COMMERCIAL CODE*, §§ 2-713, 2-715. Damages to the Government of delay are very often spoken of as "impossible to assess". The "liquidated damages" clause reflects this point. See *Lebanon Woolen Mills v. United States*, 99 Ct. Cl. 318, 71 F. Supp. 744 (1943).

¹⁸⁷ *John N. Stebbing, Jr., ASBCA 2204* (Nov. 23, 1954); *Jules Segal & Company, ASBCA 305* (March 6, 1951), 5 CCF 61,245.

¹⁸⁸ The two closest cases involving the United States seem to be *United States v. Bethlehem Steel Co.*, 205 U.S. 105 (1907) and *Priebe & Sons v. United States*, 332 U.S. 407 (1947). *United States v. Bethlehem Steel Company, supra*, involved a contract to furnish gun carriages, which had been entered into by the Ordnance Department in 1898 at the time when the country was preparing for war with Spain. The contract provided for liquidated damages. The court said, 205 U.S. at 121:

The fact that not very long after the contract had been signed and the war with Spain was near its end, the importance of time as an element largely disappeared, and that practically no damage accrued to the Government on account of the failure of the company to deliver, cannot affect the meaning of this clause as used

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liquidated damages under the circumstances supposed above is an unfair imposition and the "liquidated damages" clause should be redrawn so as clearly to obviate the possibility that the contractor will be charged any liquidated damages on items not repurchased.

Following is a brief discussion of a miscellany of rules pertaining to liquidated damages. First, it would seem a reasonable inference from the terms of the "liquidated damages" clause that, when the Government terminates a contract under the "default" clause, liquidated damages should not be charged on those deliveries which are not due at the time the repurchase contract is entered into. This, we think, follows from the provision of the "liquidated damages" clause that damages accrue for delay up until the time the Government reasonably *provides* for the procurement of similar supplies or services.¹⁸⁹ The clause

in the contract, nor render its language substantially worthless for any purpose of security for the proper performance of the contract as to time of delivery.

While this language seems to indicate that the fact that there was little damage is irrelevant, still the gun carriages were delivered, and, apparently, used by the Government. See 41 Ct. Cl. 19, 25 (1905). It does not appear to be a case where the Government was possibly benefited by a deliverance from the contract, which is an issue involved in the cases discussed in the text. *Priebe & Sons v. United States*, *supra*, dealt with a contract containing two liquidated damages provisions, one relating to delays in deliveries, the other relating to failure to have contract items inspected and ready for delivery by a certain date. The latter was held to be invalid, 332 U.S. at 412-13:

But under this procurement program delays of the contractors which did not interfere with prompt deliveries plainly would not occasion damage. That was as certain when the contract was made as it later proved to be. Yet that was the only situation to which the provision in question could ever apply. Under these circumstances this provision for "liquidated damages" could not possibly be a *reasonable forecast* of just compensation for the damage caused by a breach of contract. (Emphasis added).

In one view, this might mean that a liquidated damages clause which *could* operate as a penalty, where no damage could be shown (as in the case where the Government elects not to repurchase supplies), should be struck down. In another view, the court only condemns liquidated damages provisions which do not, as of the time of their making, relate to a situation where actual loss could appear. It would seem that the latter, or the "prospective" criterion, is the one the court intended to adopt. The decision, then, does not exactly cover the situation discussed in the text.

¹⁸⁹ *Acme Chair Co.*, ASBCA 2019 (April 11, 1955).

does not clearly provide that liquidated damages shall be charged on deliveries which are not delinquent *at the time of termination* but become so prior to the *time of repurchase*. Army Regulations have provided for charging liquidated damages on deliveries due after the date of termination.¹⁹⁰ The Armed Services Board of Contract Appeals, however, follows the rule that liquidated damages may be charged only on deliveries already delinquent at the time of termination but not on those falling due thereafter.¹⁹¹

In our discussion of excess costs on repurchase contracts, *supra*, we mentioned the so-called "net excess costs" rule under which the Government is entitled to recover only the total amount it is out of pocket by reason of having to repurchase. Thus, if some of the items are repurchased at a saving and others at added costs, a balance should be struck

¹⁹⁰ Army Regulations 35-3220, 18 July 1952, paragraph 42 *e*, referring to the "delays-liquidated damages" clause. The regulations cite Ms. Comp. Gen. B-86513, May 29, 1951, as authority.

¹⁹¹ See *Cabot Mills*, ASBCA 378, (April 6, 1951); *Needle Arts, Inc.*, ASBCA 241, (Oct. 11, 1950); *Monarch Coat Co.*, ASBCA 501 (Sept. 21, 1950); *M. M. & W. Garment Co.*, ASBCA 370, (May 8, 1950), 4 CCF 60,986 (*but cf.* Ms. Comp. Gen. B-86513, *supra*); *Welsh Company*, WDBCA 240 (Oct. 19, 1943), 1 CCF 753. The *Welsh* case was decided under the "delays-liquidated damages" clause, which provided:

... [T]hat the Government reserves the right to terminate the right of the Contractor to proceed with deliveries or such part or parts thereof *as to which there has been delay*, and to purchase similar materials or supplies . . . charging against the Contractor and his sureties any excess cost . . . together with liquidated damages accruing until such time as the Government may reasonably procure similar materials or supplies elsewhere . . . (Emphasis added).

Under similar language relating to the right to terminate, it was held that the Government had no right to partially terminate as to deliveries which were not in delinquency. *Sussex Hats, Inc.*, WDBCA 66 (April 17, 1943), 1 CCF 105. (contract for 300,000 items, termination as to 200,000 items at a time when deliveries on only 15,000 were delayed). Hence, there was no right to liquidated damages as to such deliveries. It should be noted that the current "default" clause provides that the contracting officer may "terminate the whole or any part" of the contract when deliveries are delinquent. (Emphasis added). Despite the differences between the older provisions and the provisions currently in use, the Board's position seems supported by the facts that liquidated damages are charged for *delays* and that a termination notice puts an end to the contractor's duty to deliver according to delivery schedules affected by the notice.

and only the amount by which the total excess costs exceed the original contract price should be charged. It does not follow from this that a savings on repurchase should be offset against liquidated damages accrued against the terminated contractor until the date of the repurchase contract. Excess costs and liquidated damages are two different heads of damages; excess costs are levied to allow the Government to obtain the contract items at the same price it would have had the contractor performed, and liquidated damages are imposed to compensate it for the contractor's delay. The contractor is not entitled to a *credit* for savings on repurchase (except insofar as "net excess costs" is concerned);¹⁹² the "liquidated damages" clause and the actual assessment of such damages should not be subject to such credit. Decisions of the Armed Services Board of Contract Appeals indicate that this view is taken by that body.¹⁹³ It would also appear that the terminated contractor is not entitled to any offset against excess costs chargeable to him by reason of liquidated damages chargeable to the repurchase contractor.¹⁹⁴ Inasmuch as a terminated contractor is bound to pay liquidated damages until

¹⁹² *Quinn v. United States*, 99 U.S. 30 (1879), holding that the terminated contractor could not recover the savings from the Government.

¹⁹³ *Pennsylvania Rubber & Supply Company*, ASBCA 644 (Oct. 27, 1950); *Sentinel Aircraft*, ASBCA 886-91 (Oct. 23, 1951); and see *Keystone Coat and Apron Mfg. Co.*, WDBCA 456, 762 (Nov. 10, 1944), 3 CCF 38.

¹⁹⁴ See 20 Comp. Gen. 374 (1941). The theory of this decision was that the liquidated damages assessed against the repurchase contractor were intended to compensate the Government for delay in receiving the items he had undertaken to deliver; they were not intended to operate as a reduction of the repurchase contract price, although, of course, such damages were able to be collected by offset against amounts due the repurchase contractor for deliveries. The force of this holding is weakened by the subsequent history of the case. The contractor (*Doehler Metal Furniture*) sued in the District Court for the Southern District of New York for amounts withheld under the contract and was met with a counterclaim for affirmative judgment for excess costs still due. The petition was dismissed but it was ruled on the counterclaim that liquidated damages collected from the repurchase contractor should be offset against the excess costs claimed by the Government. The theory was that the difference between the excess costs and the liquidated damages was all that the Government was out of pocket and, since the purpose of damages is compensation, it was all that should be allowed. *Doehler Metal Furniture Co. v. United States*, (S.D. N.Y.

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the Government repurchases and not beyond that time,¹⁹⁵ liquidated damages collectible from the *repurchase contractor* on account of *his* delays in meeting the delivery or performance schedules set out in *his* contract should not be offset against liquidated damages owed by the terminated contractor. Under the current "liquidated damages" clause, the two periods do not overlap¹⁹⁶ and each contractor should be responsible for his delays to the full extent provided by the clause.

VI

RIGHT OF THE GOVERNMENT TO ACTUAL DAMAGES

Like any other buyer of supplies or services the Government may suffer "common law" or "actual" damages when the seller is in delinquency under his contract. It is not

1944) 2 CCF 864. The Second Circuit reversed. *Doehler Furniture Co. v. United States*, 149 F.2d 130 (2d Cir. 1945). The opinion states that there should be no set-off but suggests that, if Doehler could prove the amount by which the liquidated damages charged the repurchase contractor exceeded the actual damages caused the Government by his delay, the surplus of liquidated damages over actual damages should be offset against excess costs chargeable to Doehler because such surplus reduced the Government's costs. Such offsetting should be allowed, although the "delays-liquidated damages" clause in the contract provided that "the actual damage to the Government for the delay will be impossible to prove," and although prior opinions of the Supreme Court recognized that in claiming liquidated damages the claimant need not prove actual damages. *United States v. Bethlehem Steel Co.*, 205 U.S. 105 (1907); *Sun Printing & Publishing Association v. Moore*, 183 U.S. 642 (1902). Judge Hand dissented, reaching the same conclusion as the District Judge. To the writers, the Comptroller General's decision seems most persuasive; in any event, the alternatives seem to be either that decision or the decision of the District Judge in the Doehler case. We are unaware of the current status of 20 Comp. Gen. 274 as precedent in the General Accounting Office.

See *United States v. American Employers Ins. Co.*, 141 F. Supp. 281 (E.D. Pa. 1956) in which it is revealed that the Government (Army Quartermaster Corps) offset savings on repurchase and liquidated damages collected from repurchase contractors against the indebtedness of the terminated contractor on account of liquidated damages.

¹⁹⁵ *Acme Chair, ASBCA 2019* (April 11, 1955).

¹⁹⁶ *Ibid.*

our purpose to explore the general law of contract damages in all its complexities; that has been covered elsewhere in thorough detail.¹⁹⁷ Our purpose is to examine briefly the relation of that general law to supply contracts terminated pursuant to the provisions of the "default" clause. Subclause (f) of the "default" clause¹⁹⁸ provides: "The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract."

The broad problem that presents itself in considering the effect of termination of a supply contract on the Government's right to recover for the breach by the contractor is whether or not the termination results in a limitation of the rights of the Government to those expressly stipulated in the "default" clause, including the right to liquidated damages, where the "liquidated damages" clause is appended. It has been said that termination of a contract pursuant to the "default" clause amounts to a "rescission" thereof and that the consequ-

¹⁹⁷ See 5 CORBIN, CONTRACTS §§ 990-1101 (1951); 5 WILLISTON, CONTRACTS §§ 1338-57, 1383-96 (1937); RESTATEMENT, CONTRACTS §§ 327-346 (1932). See also UNIFORM SALES ACT §§ 67, 70; UNIFORM COMMERCIAL CODE §§ 2-711, 2-712, 2-713, 2-714, 2-715, 2-717, 2-718, 2-720, 2-723, 2-724. Insofar as these materials state the "general law" they are pertinent to the law of damages under government contracts. However, the law of damages on such contracts is a matter of federal law uncontrolled by the law of any state. See *Avey v. Leather Products Co.*, 73 Ohio App. 245, 55 N.E.2d 813 (1942), for a discussion of this point and an analysis of pertinent federal decisions. In general, federal courts, when seeking an appropriate rule of damages applicable to a government contract, can look to the "general law" for guidance in the absence of statute controlling the subject.

¹⁹⁸ ASPR 7-103.11 (23 Dec. 1955); CCH Gov't CONTRACTS REP. ¶ 29,363. Note that the contract may contain other provisions allowing the Government remedy for violation of the contract by the contractor. *E.g.*, see the "inspection" clause, ASPR 7-103.5 (30 April 1956), CCH Gov't CONTRACTS REP. ¶ 29,363 (allowing the Government to require delivery of defective supplies at a reduced price); ASPR 7-103.20 (23 December 1955), CCH Gov't CONTRACTS REP. ¶ 29,363, the so-called "covenant against contingent fees," permits the Government to annul the contract or charge back the amount of the fee to the contractor where the warranty is found to be breached; the "gratuities" clause, ASPR 7-104.16 (5 March 1956), CCH Gov't CONTRACTS REP. ¶ 29,364, permits the Government to pursue breach of contract remedies where the clause is violated and also permits it to charge as exemplary damages not less than three, nor more than ten, times the cost of the gratuity furnished in violation of the provision. *Cf.* 68 STAT. 353-54 (1954), 5 U.S.C. § 174(d) (Supp. 1956).

ence of such "rescission" is to extinguish the right of the Government to common law damages.¹⁹⁹ Although the clause does allow the Government to "terminate the whole or any part of this contract,"²⁰⁰ it is not carelessly to be assumed that these words extinguish all rights of the Government to damages for a breach by the contractor, and that the only method by which the Government can obtain such damages is by eschewing termination and suing for damages. Literally, the effect of the words quoted might mean that the contract and all rights and remedies arising out of it were destroyed, including those rights and remedies provided in the "default" clause, such as "excess costs."²⁰¹ However, powers given to one contracting party to "cancel," "rescind," or "terminate" for the other party's fault in performance are not reasonably so to be interpreted;²⁰² indeed the very circumstances to which they are intended to apply seem to negative such result as well as the result that the party exercising such rights intends thereby to give up his remedies at law or equity for the fault of the guilty party.²⁰³ Nor does it seem to us that a notice of termination issued under the "default" clause should be

¹⁹⁹ Risik, *Defaults in Federal Government Contracts*, 14 FED. B. J. 339, 346, 353-54 (1954).

²⁰⁰ The comparable construction contract provision, "Termination for Default-Damages for Delay—Time Extensions," Art. 5, Standard Form 23A, CCH GOV'T CONTRACTS REP. ¶ 18,202, contains more aptly chosen words: "... the Government may, by written notice to the Contractor, terminate his right to proceed." (Emphasis added). Similar language used to be employed in supply contracts; see the "Delays-Damages" article in the former Standard Form 32, 41 U.S.C. App. § 54.21 (1952). See also the "delays-liquidated damages" clause, *ibid.* See *Holland Page v. United States* 120 Ct. Cl. 27 (1951); *Modern Industrial Bank v. United States*, 101 Ct. Cl. 808 (1944); *John M. Whelan & Sons, Inc. v. United States*, 98 Ct. Cl., *cert. denied*, 319 U.S. 770 (1942).

²⁰¹ See *American Transformer Co. v. United States*, 105 Ct. Cl. 204, 222, 63 F. Supp. 194 (1945), rebutting a similar argument under the language allowing termination of the "right to proceed."

²⁰² See 1 CORBIN, CONTRACTS § 166 (1951); Annot. 166 A.L.R. 391 (1947). RESTATEMENT, CONTRACTS § 410, comment b (1932), contains some pertinent remarks about the rights of a party injured by breach; these remarks are made, it is presumed, without reference to any contract provisions. See also, *Lang Co. v. United States*, 141 F. Supp. 943 (Ct. Cl. 1956).

²⁰³ See 23 Comp. Gen. 234 (1943); *United States v. United States Fidelity & Guaranty Company*, 236 U.S. 512 (1915). Cf. UNIFORM COMMERCIAL CODE §§ 2-106, 2-720.

called a rescission of the contract with the consequence that the Government must restore benefits received.²⁰⁴ "Rescission" is used in a number of meanings,²⁰⁵ but as used in the case where one party to a contract "rescinds" because of material breach by the other, it does not imply that he thereby foregoes his right to seek such general and special damages as the law may allow for the breach.²⁰⁶ Certainly such implication seems definitely refuted by the words of subclause (f).²⁰⁷

Thus, we think it may be said that the Government retains, after termination pursuant to the "default" clause, such remedies for "general" or "actual" damages as are available to it under the law. Of course, to the extent that excess costs are chargeable, this covers one item of such damage. So also, if liquidated damages are collectible, they are in lieu of actual damages for delay. In the absence of a liquidated damages provision, the Government may suffer actual damages for delay and the right to recover such damages would seem to be enforceable.²⁰⁸ Other

²⁰⁴ Risik, 14 FED. B. J. 339, 346, *supra*. Such a statement is, of course, pertinent to the case where "a party asserting a right of rescission seeks restitution of what he has given or where the only ground for rescission is that the contract was originally voidable." 5 WILLISTON, CONTRACTS § 1460A. (1937). Cf. *United States v. Haynes School District No. 8*, 102 F. Supp. 843 (E. D. Ark. 1951).

²⁰⁵ Besides its use in connection with an action for restitution (see note 192 *supra*), it may also indicate a mutual agreement by the parties to a contract to discharge and put an end to their duties under it. It has also been used to indicate the right of the party injured by a breach of contract to consider his duties thereunder at an end. See the excellent discussion in 5 CORBIN, CONTRACTS §§ 1236-37 (1951).

²⁰⁶ 5 CORBIN, CONTRACTS § 1237 (1951). And see *United States v. Southern Gulf Lumber Co.*, 106 F. Supp. 815 (S. D. Ala. 1952).

²⁰⁷ The language of subclause (f) would seem also to indicate that termination pursuant to the "default" clause is not to be taken, without further facts, to indicate an "assent to a termination of all duties arising from the contract." RESTATEMENT, CONTRACTS § 410, comment b (1932). And see 35 Comp. Gen. 228 (1955); 34 Comp. Gen. 347 (1955); 30 Comp. Gen. 191 (1950).

²⁰⁸ 28 Comp. Gen. 717 (1949); 23 Comp. Gen. 717 (1944). See also *Schmoll v. United States*, 105 Ct. Cl. 415, 63 F. Supp. 753 (1946); *Modern Industrial Bank v. United States*, 101 Ct. Cl. 808 (1944); *American Surety Co. v. United States*, 136 F.2d 437 (9th Cir. 1943), *aff'd*, 322 U.S. 96 (1944) (these cases recognize the Government's right to actual damages for delay where a liquidated damages provision was inapplicable). See also 35 Comp. Gen. 446 (1956); *Kolker v. United States*, 40 F. Supp. 972 (D. Md. 1941).

heads of actual damages may be involved, *e.g.*, the expenses of advertising for a repurchase contract,²⁰⁹ or expenses caused by the terminated contractor's delinquency.²¹⁰

Even in the absence of a repurchase contract, it is still true that the Government may be entitled to some damages.²¹¹ Where a repurchase contract is made but is not suitable as a basis for charging excess costs, for reasons such as those stated earlier in this paper,²¹² the Government has, despite the fact that it may not charge back excess costs, nonetheless been legally injured due to the contractor's delinquency and should be able to collect its actual damages.²¹³

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²⁰⁹ See 23 Comp. Gen. 234, 237 (1943).

²¹⁰ See 19 Comp. Gen. 55 (1939).

²¹¹ At least nominal damages. Cf. UNIFORM COMMERCIAL CODE § 2-713. See 34 Comp. Gen. 347 (1955). The Comptroller General advised with respect to a terminated contract where no repurchase was to be made:

"Section 11 (f) of the General Provisions of the subject contract [*i.e.*, the Default clause, subclause (f), see Appendix A *infra*], after providing for the recovery of excess costs, specifically states that 'The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.' This section was made a part of Standard Form 32 subsequent to the passage of the Armed Services Procurement Act of 1947, 62 STAT. 21, and the Federal Property and Administrative Services Act of 1949, 63 STAT. 377, and is believed to have been adopted for the purpose of affording the Government protection in such instances as this and obviously lends itself to such an interpretation. While it does not appear that the question has previously been presented to this Office in such a way as to call for a formal decision, the rule has been adopted that in the statement and settlement of claims the clause quoted will be accepted as preserving to the Government the right to damages occasioned by virtue of a breach of contract in cases where no repurchase will be made, the measure of damages ordinarily to be the difference between the contract price and the market value at the time of breach." (34 Comp. Gen. 347, 348).

²¹² See pp. 231-45 *supra*.

²¹³ See 35 Comp. Gen. 695 (1956); 23 Comp. Gen. 234 (1943); 22 Comp. Gen. 1127 (1943).

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APPENDIX A — DEFAULT CLAUSE (ASPR 7-103.11)

(a) The Government may, subject to the provisions of paragraph (b) below, by written Notice of Default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:

(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

(b) The Contractor shall not be liable for any excess costs, if any failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes include, but are not restricted to, acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and defaults of subcontractors due to any of such causes unless the Contracting Officer shall determine that the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

(c) In the event the Government terminates this contract in whole or in part as provided in paragraph (a) of this clause, the Government may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated and the Contractor shall be liable to the Government for any excess costs for such similar supplies or services, *provided* that the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.

(d) If this contract is terminated as provided in paragraph (a) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. The Government shall pay to the Contractor the contract price for completed supplies delivered to and accepted by the Government, and the amount agreed upon by the Contractor and the Contracting Officer for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property. Failure to agree shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(e) If, after notice of termination of this contract under the provisions of paragraph (a) of this clause, it is determined that the failure to perform this contract is due to causes beyond the control and without the fault or negligence of the Contractor pursuant to the provisions of paragraph (b) of this clause, such Notice of Default shall be deemed to have

been issued pursuant to the clause of this contract entitled "Termination for Convenience of the Government," and the rights and obligations of the parties hereto shall in such event be governed by such clause. Except as otherwise provided in this contract, this paragraph (e) applies only if this contract is with a military department.

(f) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

APPENDIX B — EXCUSABLE DELAYS CLAUSE — COST REIMBURSEMENT CONTRACTS (ASPR 7-203.11)

The Contractor shall not be in default by reason of any failure in performance of this contract in accordance with its terms (including any failure by the Contractor to make progress in the prosecution of the work hereunder which endangers such performance) if such failure arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes include, but are not restricted to: acts of God or of the public enemy; acts of the Government; fires; floods; epidemics; quarantine restrictions; strikes; freight embargoes; unusually severe weather; and failure of subcontractors to perform or make progress due to such causes, unless the Contracting Officer shall have determined that the supplies or services to be furnished under the subcontract were obtainable from other sources and shall have ordered the Contractor in writing to procure such services or supplies from such other sources, and the Contractor shall have failed reasonably to comply with such order. Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of such failure and, if he shall determine that such failure was occasioned by any one or more of the said causes, the delivery schedule shall be revised accordingly, subject to the rights of the Government under the clause hereof entitled "Termination."