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the bar, a board composed of lawyers is more satisfactory.⁶¹ However, some board members maintain that the presence of an engineer or architect on the board is more helpful than the testimony of experts on technical engineering problems.

It has been proposed that all the contract appeal boards be united in a single board or court which would determine contract appeals for all federal agencies. Regardless of their ultimate organization, contract appeal boards will continue to perform an important function in the construction of public works.

EXTRA WORK UNDER FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS

GILBERT A. CUNEO*

WHETHER it be Mrs. Jones building her dream house or Uncle Sam constructing a Rocky Mountain dam, the contractor may encounter extras and changes in specifications. In his business relations with Mrs. Jones, the contractor is generally in the superior position of the well-informed negotiator who drafts the agreement, including its fine print, for the signature of one who frequently is unfamiliar with construction terminology and unaware of the legal significance of the contractual provisions. Not so dominant is the contractor's position in his relations with the Federal Government. His voice in drafting the Government construction contract is hardly audible. He must perform under a contract consisting primarily of standard articles, specifications, and drawings prepared by the Government. Fortunately for the contractor, as for Mrs. Jones, certain moral and civil laws, as well as economic and political factors, preserve a balance between the powerful and the weak that encourages each to do business with the other.

A Government in a free enterprise democracy must satisfy many of its needs from private sources. The United States Government contracts for its requirements under the law of the land. When it comes down from its position of sovereignty and enters the market place, it submits itself to the same laws that govern individuals.¹ As with all generalities, there are exceptions to that statement. We need only mention a few of

61. See Reilly, *A Return to Legislative Intent*, 43 *Geo. L.J.* 372 (1955).

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1. *Cooke v. United States*, 91 U.S. 389 (1875).

those exceptions to facilitate our discussion of extra work under a Government construction contract.

A difference flows from the acts of the Government as a sovereign and as a contractor. Sovereign acts are those performed in its legislative or executive capacity which are public or general in scope, affecting Government as well as private contracts.² The United States as a contractor cannot be held liable for the public acts of the United States as a sovereign.³ On the other hand, the Government as a contractor is bound by its contracts properly made. Valid contracts of the United States and the rights of private individuals arising out of them are protected by the fifth amendment. Thus, Congress may not directly repudiate the Government's own contract.⁴

Another difference between Government contracts and private contracts that makes the relationship between Mrs. Jones and the contractor different from that between the Government and the contractor is the applicable law of agency with regard to authority. The official purporting to act for the Government must have actual authority which may be express or implied. Officers of the United States are special agents with only such powers as are expressly given or necessarily implied.⁵ Whoever deals with a Government agent does so at his own risk as to the agent's authority.⁶ The doctrine of apparent authority is not applicable to the Government on the grounds of public policy.⁷

Another such difference that might affect the contractor's rights against the Government is the doctrine of implied contracts. The Government has consented to be sued on "any contract, express or implied."⁸ This consent has been construed by the courts to extend to suits on contracts implied in fact but not to suits on contracts implied in law.⁹ In

2. *Jones v. United States*, 1 Ct. Cl. 383 (1865).

3. *Horowitz v. United States*, 267 U.S. 458 (1925). An act of the Government in its sovereign capacity may, however, be an excusable cause of delay under the "Termination For Default—Damages For Delay—Time Extensions" article of the contract (art. 5).

4. *Lynch v. United States*, 292 U.S. 571 (1934).

5. *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643 (1931).

6. *United States v. Christensen*, 50 F. Supp. 30 (E.D. Ill. 1943).

7. *Whiteside v. United States*, 93 U.S. 247 (1876). It has frequently been written that there can be no estoppel against the Government. However, for a discussion of such authorities and a holding that the Government is bound by the doctrine of estoppel where (1) there has been a waiver of sovereign immunity to suit; (2) the agent whose conduct is relied upon to work an estoppel acted within the scope of his authority lawfully conferred; and (3) application of the doctrine does not bring a result that is either inequitable or contrary to law, see *United States v. Certain Parcels of Land*, 131 F. Supp. 65 (S.D. Cal. 1955).

8. 28 U.S.C.A. § 1346 (1955).

9. *United States v. Minnesota Mutual Investment Co.*, 271 U.S. 212 (1926).

order to recover against the Government on a contract implied in fact, it is necessary to prove that: (1) the Government received a benefit, (2) authority existed to make an express contract involving the subject matter of the contract sought to be implied, and (3) the benefit was received for the Government by an authorized officer. Recovery may be had on the basis of an implied contract to pay reasonable value of what is received by the Government under an authorized express contract which fails to comply with prescribed statutory formalities, such as reduction to writing.¹⁰

Mrs. Jones' agreement with the contractor would be governed by the law of the state where it was executed and performed, whereas the contractor's agreement with the Government will be construed, and the rights of the parties thereunder will be determined, in accordance with Federal law.¹¹ The contractor will also have to realize, in the words of Mr. Justice Holmes, that "men must turn square corners when they deal with the Government."¹² He may, however, be somewhat comforted by the comment of Mr. Justice Jackson, that "... there is no reason why the square corners should constitute a one-way street."¹³

The contractor's lump sum construction contract with the Government will be on Standard Form 23, dated March 1953.¹⁴ General Regulation No. 13, developed cooperatively by the General Services Administration, other civilian agencies, and the Department of Defense, prescribes the use of this form.¹⁵ It must be used by Federal agencies for all construc-

10. *United States v. Andrews*, 207 U.S. 229 (1907); *Burchiel v. United States*, 4 Ct. Cl. 549 (1868); *Emery v. United States*, 13 F. 2d 658 (D. Conn. 1926).

11. *United States v. Allegheny County*, 322 U.S. 174 (1944); *Clearfield Trust Company v. United States*, 318 U.S. 363 (1943). Prior to these decisions *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), was considered by some to require that Government contracts be governed by state law. In *United States v. Certain Parcels of Land*, 131 F. Supp. 65 (S.D. Cal. 1955), which was a condemnation proceeding, the court followed the *Tompkins* doctrine without mentioning the *Allegheny County* or *Clearfield Trust* cases.

12. *Rock Island, A & L R. Co. v. United States*, 254 U.S. 141, 143 (1920).

13. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 387 (1947) (dissenting opinion).

14. 1 Commerce Clearing House, Government Contracts Reporter (hereinafter referred to as "CCH GCR"), § 18,201. The Standard Form 23 set out in 44 Code Fed. Regs., § 54.13 (Supp. 1954) is an outdated form and is no longer being used.

15. Issued March 19, 1953, 1A CCH GCR, § 24,965; Armed Services Procurement Regulation (hereinafter referred to as "ASPR"), § 16-008, 32 Code Fed. Regs., § 415.004 (Supp. 1954), 1A CCH GCR, § 29,929. The General Services Administration acts pursuant to the Federal Property and Administrative Services Act of 1949, 41 U.S.C.A. § 251 (1949). The ASPR was issued by the Procurement Secretaries of the Army, Navy, and Air Force, jointly on May 19, 1948, under the Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C.A. § 151. By directive of the Secretary of Defense, ASPR was adopted as a regulation of the Department of Defense on December 1, 1952, pursuant to 41 U.S.C.A. § 162.

tion work, except for (1) negotiated contracts, (2) contracts not exceeding \$2,000, (3) contracts for the construction, alteration and repair of vessels, (4) contracts for construction, alteration and repair work in foreign countries, and (5) as otherwise provided by regulations of the General Services Administration.

Whenever the contractor, because of an order received from the Government, must perform work not specified or omit work required by his contract, he should carefully study his contract to ascertain his rights and to determine the procedure to be followed in protecting them. Standard Form 23 has been developed as a result of many years of experience. Its use eliminates certain risks of the contractor for which he would otherwise make allowances in his bid. The Government thereby obtains its construction work at a lower cost. In order to permit the Government to modify the work after the contract is awarded, the "Changes" article was included in Standard Form 23. It gives the Government that right, but at the same time it also compensates the contractor for such modification in his performance by providing that for any change he will receive a compensating equitable adjustment in time and money.

I. EXTRAS

For any extra work the contractor must find a basis for relief under the "Changes" article. No longer is there a specific "Extras" article in Standard Form 23. The present "Changes" article has a caveat which provides that no charge for any extra work or material will be allowed except as therein provided. Article 5 of a previous version of Standard Form 23 was entitled "Extras," and provided as follows:

"Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order."¹⁶

Many lawyers are of the opinion that such a separate provision in addition to the "Changes" article is unnecessary. Every extra under a construction contract probably involves a change but, as will be seen later herein, not every change involves an extra, as where work is deleted. The stated purpose for having such a specific provision was to protect the Government against claims by contractors for extra work performed voluntarily or on the basis of oral understandings with superintendents, architects or others not authorized to act.¹⁷ The "Extras" article did not contain any grant of authority to order extras without the

16. Approved by the Secretary of the Treasury, revised April 3, 1942; 44 Code Fed. Regs., § 54.13 (Supp. 1954).

17. *Ford v. United States*, 17 Ct. Cl. 60 (1881).

consent of the contractor. The courts have relied on it¹⁸ to allow the contractor to recover when the approval by the head of the department was not obtained for a change order as required under a previous form of the "Changes" article.¹⁹

II. CHANGES

In one form or another the "Changes" article in Government contracts can be traced back at least to Civil War days.²⁰ Article 3 of Standard Form 23A, General Provisions (Construction Contracts), which is a part of Standard Form 23 now in use, provides as follows:

"3. CHANGES—The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim of the Contractor for adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the Contractor of the notification of change: Provided, however, That the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Clause 6 hereof. But nothing provided in this clause shall excuse the Contractor from proceeding with the prosecution of the work as changed. Except as otherwise herein provided, no charge for any extra work or material will be allowed."

To avoid difficulties, the provisions of this article should be carefully studied and meticulously followed. The field of changes is one of the

18. *W. H. Armstrong & Company v. United States*, 98 Ct. Cl. 519, 1 Commerce Clearing House, Contract Cases Federal (hereinafter referred to as "CCF"), 468 (1943). Originally when first published in 1944 Contract Cases Federal reported the full official texts of the decisions rendered by the Federal courts, as well as those of the War Department Board of Contract Appeals (hereinafter referred to as "W.D.BCA"); in 1947 its name was changed to the Army Board of Contract Appeals, hereinafter referred to as "A.BCA"), on the subject of Government contracts. The decisions begin with those first decided by the latter Board in 1942. With Volume 3 CCF the decisions of the Navy Board of Contract Appeals were included. Beginning with Volume 4 CCF, only digests of certain decisions were reported, including some decisions of the Comptroller General, that pertained to Government contracts. In Volume 4 CCF the decisions of the Armed Services Board of Contract Appeals (hereinafter referred to as "ASBCA") were first reported. The ASBCA was created by the joint directive of the Secretaries of the Army, Navy and Air Force, effective as of May 1, 1949. Digests of the decisions of the Interior Department Board of Contract Appeals (hereinafter referred to as "I.BCA") were first reported in the current volume, which is Volume 6 CCF. The I.BCA was established by Order No. 2509, Amendment No. 22, effective December 31, 1954. The purpose, organization, and procedure of these Boards will be discussed more fully later herein.

19. Article 3, Standard Form 23, approved by the Secretary of the Treasury, revised April 3, 1942; 44 Code Fed. Regs., § 54.13 (Supp. 1954).

20. *McCord v. United States*, 9 Ct. Cl. 155 (1873).

most fertile for the growth of disputes with the contracting officer. The latter has the authority to act for the Government under the "Changes" article and under the contract in general. In analyzing precedents of the courts and administrative agencies, attention must be given to the language of the particular "Changes" article that was under review, for many such decisions are based on provisions no longer a part of the article.

Delays in Making Changes

On occasion in the course of the construction of a dam, an airport, or a hospital, the Government has doubts about the wisdom of proceeding in accordance with the original specifications, just as Mrs. Jones might doubt that she actually must have a third bathroom in her house, even though she has planned on it during most of her adult life. The Court of Claims has repeatedly held that as an incident to its rights under the "Changes" article to issue change orders, the Government has the right, without liability, to delay a contractor's performance of the contract work for a reasonable period while it arrives at a decision as to the provisions to be incorporated in a change order which it desires to issue, or as to whether a change order is in fact to be issued.²¹ What is reasonable or unreasonable depends upon the extent of the proposed changes and other material circumstances. Recently the Court of Claims, in *F. H. McGraw & Co. v. United States*,²² decided that a delay of 30 days would have been reasonable, but since the actual delay was 159 days, it held the Government liable in damages for 129 days of delay. In *J. A. Ross & Co. v. United States*,²³ the Court of Claims in one instance held a delay of 24 days to be unreasonable to the extent of 15 days and in another instance held a delay of 35 days to be unreasonable to the extent of 29 days. The items of expense allowed as damages in these two cases because of the unreasonable delay were field office overhead and ex-

21. *George A. Fuller Co. v. United States*, 108 Ct. Cl. 70, 69 F. Supp. 409, 4 CCF, par. 60,232 (1947); *James Stewart & Co. v. United States*, 105 Ct. Cl. 284, 63 F. Supp. 653, 3 CCF 1479 (1946); *Harwood-Nebel Construction Co. v. United States*, 105 Ct. Cl. 116 (1945); *Severin v. United States*, 102 Ct. Cl. 74, 1 CCF 542 (1943), cert. denied, 322 U.S. 733 (1944); *Silberblatt & Lasker v. United States*, 101 Ct. Cl. 54, 2 CCF 253 (1944); *Langevin v. United States*, 100 Ct. Cl. 15, 1 CCF 547 (1943); *Magoba Construction Co. v. United States*, 99 Ct. Cl. 662, 1 CCF 611 (1943). General Condition 11, "Suspension Of Work," of military construction contracts permits the contracting officer to suspend work for the convenience of the Government and provides for certain adjustments to be given the contractor for such suspension.

22. 131 Ct. Cl. 501, 130 F. Supp. 394 (1955). In *Silberblatt & Lasker, Inc. v. United States*, 101 Ct. Cl. 54, 2 CCF 253 (1944), damages were not allowed for delay of 3 months and 17 days because of failure of proof. General principles on point discussed in *Magoba Construction Co., Inc. v. United States*, 99 Ct. Cl. 662, 1 CCF 611 (1943).

23. 126 Ct. Cl. 323, 115 F. Supp. 187 (1953).

pense, allocable portion of home office overhead, loss because of inability to maintain effective and efficient planning and coordination of work, cost of equipment, and loss of efficiency because of having to perform concrete work in cold weather.

Recovery of damages for the Government's unreasonable delay in making permitted changes is completely independent of the contractor's right to an equitable adjustment for any delay or expense that results from performance in accordance with the change order. This is clearly shown in the *J. A. Ross*²⁴ case, where recovery for damages because of such unreasonable delay was permitted even though the contractor had accepted an extension of time and a \$15,000 payment as an equitable adjustment for the change without reserving the right to sue for the damages incident to the Government's unreasonable delay in deciding about the change.

Authority to Order Changes

The contracting officer or his authorized representative is empowered to order changes under the "Changes" article. He, however, is frequently not present on the job site. Other Government personnel, such as inspectors, are present most of the time. On occasion, as the work progresses, Government personnel make "suggestions" to the contractor which at times might even be accompanied by statements of possible work rejections if the "suggestions" are not followed. The contractor must be cautious under such circumstances. The contracting officer may act through authorized representatives but, as was pointed out above, the courts have held that the contractor bears the risk of knowing the authority of Government agents. Since the doctrine of apparent authority does not apply to the Government, the contractor cannot rely on any appearance of authority that the Government agent might have. Many Government construction contracts have a special condition (SC-10) which specifically states that no inspector is authorized to change any provision of the specifications without written authorization of the contracting officer.

The weight of the burden upon the contractor to determine the authority of Government agents has led to liberal decisions in determining who are authorized representatives of the contracting officer to perform certain acts.²⁵ Even under those circumstances the contractor would still run a substantial risk in hoping for such liberality on review.

As far as legal protection of rights is concerned, the contractor should, as stated by the courts, protest to the contracting officer any demand of

24. *Ibid.*

25. *Jarvis Manufacturing Company, Inc.*, ASBCA No. 1723 (1954); *Keith S. Merritt*, ASBCA No. 85, 4 CCF, par. 60,740 (1949).

a Government agent which he feels to be improper.²⁶ As a practical matter the contractor might be willing to take the calculated risk of complying with what he believes to be an unauthorized order and subsequently endeavor to have the contracting officer ratify the unauthorized act. Such ratification would be retroactive to the time of the unauthorized order.²⁷

To be within the "Changes" article the change must be ordered by the contracting officer and must not be merely the result of voluntary action on the part of the contractor. The use of better material or performance by a more skillful procedure than specified in the contract, even if approved by the Government inspector and resulting in a better job, is not within the "Changes" article if the contractor merely acts voluntarily.²⁸ Instead of voluntarily making a change, the contractor should request that the contracting officer order the change. If the contracting officer then embodies the suggestions in a change order, such a change is within the "Changes" article. That may be true even if the change is made for the convenience of the contractor. The Government, however, would be entitled to a decrease in price for any resulting savings in cost of performance.²⁹

The contracting officer may insist that certain work be performed as part of the requirements of the contract which the contractor believes is a change in the specifications or drawings. In such a situation the contractor must be careful to preserve his rights. If the contractor's belief is correct that he is entitled to a change order which the contracting officer refuses to issue, then the Government has breached the contract by refusal to comply with the "Changes" article. At that point the contractor has a right to sue for breach of contract. If he continues performance, which as a practical matter he will in most instances do, the contractor should serve a written protest upon the contracting officer before he continues performance of the work in question. Otherwise, he

26. *Cauldwell-Wingate Co. v. United States*, 109 Ct. Cl. 193 (1947); *J. A. Ross & Co. v. United States*, 126 Ct. Cl. 323, 115 F. Supp. 187 (1953).

27. *Clews v. Jamieson*, 182 U.S. 461 (1901); *Ford v. United States*, 17 Ct. Cl. 60 (1881).

28. *Albert & Harrison, Inc. v. United States* (S.D.N.Y. 1943), only reported in 1 CCF 658; *Eitel-McCullough, Inc.*, ASBCA No. 754 (1951); *S. A. de Transports Nautilus*, ASBCA No. 793 (1951); *Basich Brothers Construction Co.*, A.BCA No. 1592, 4 CCF, par. 60,756 (1949); *J. D. Kissel*, W.D.BCA No. 1518, 4 CCF, par. 60,399 (1947); *Arthur Murray Co.*, W.D.BCA No. 569, 2 CCF 743 (1944). Where the method for cleaning stone specified in the contract was not satisfactory and the contractor used a more expensive different method not mentioned in the contract, but the Government agents refused to issue a change order, the contractor was held not to be able to recover any of his additional costs. *Diamond v. United States*, 98 Ct. Cl. 428, 1 CCF 457 (1943).

29. *Loneragan Mfg. Co.*, ASBCA No. 1601 (1954); *Remler Co., Ltd.*, ASBCA No. 1113 (1953).

might be held to have acquiesced in the decision of the contracting officer and be denied any recovery for a change.³⁰

Oral Change Order

If the contracting officer orders a change orally, the contractor should use his best efforts to obtain the order in writing. The "Changes" article specifically provides that the order be written. The contractor should again be careful to protect his rights by filing a written protest before performing the changed work.

Judicial Relief

Where the contractor performs changed work ordered orally by the contracting officer and seeks to recover on the basis of that oral order, he is not without possible relief. In many court cases statements are found that a contractor cannot recover additional costs for changes predicated on the oral direction of the contracting officer. The authority for such statements is frequently the following quotation from *Plumley v. United States*:³¹

"There was a total failure to comply with these provisions, and though it may be a hard case since the court found that the work was in fact extra and of considerable value, yet Plumley cannot recover for that which, though extra, was not ordered by the Officer and in the manner required by the contract."

The language of the Supreme Court indicates it found in fact that neither an oral nor written order had been issued by the officer authorized in the contract to direct a change. Hence, the facts in the *Plumley* case are clearly distinguishable from the situation where the contracting officer issues an oral change order under the current "Changes" article. Under the *Plumley* facts recovery could not be had under any legal theory.

On occasion courts have granted contractors relief when they have complied with oral orders of contracting officers but the basis for granting such relief is not entirely clear. In *Ford v. United States*³² the Court of Claims reviewed earlier cases on the point and discussed waiver, implied contracts, and ratification. A weakness in the waiver theory is evident from that discussion. In that case the court indicated that there could have been a waiver of the written order requirement by the contracting officer since no limitation had been placed upon his discretion as to the form of contract to be used. Such discretion in the contracting officer is not present today. In accordance with established policy and

30. *Fleisher Engineering & Construction Co. v. United States*, 98 Ct. Cl. 139 (1942); *Silberblatt & Lasker, Inc. v. United States*, 101 Ct. Cl. 54, 2 CCF 253 (1944).

31. 226 U.S. 545 (1913).

32. 17 Ct. Cl. 60 (1881).

regulations, he must use Form 23, which contains the "Changes" article that requires a change order to be in writing. He has no authority to deviate from the provisions of the "Changes" article without approval of certain higher authorities. Furthermore, if the written notice requirement is considered waived, then recovery should be permitted for whatever extra costs a contractor might incur in performing in accordance with the oral order even if at the time performance is terminated no benefit had yet been received by the Government. No court, however, has permitted recovery unless the Government has received a benefit from performance pursuant to the oral order.³³

A better basis for granting such relief might be the theory of implied contract when the necessary factual background is present. As pointed out above, a contract has been implied in fact where there has been performance under an oral contract even though such contract was required by statute to be in writing.³⁴ A change order lacking formal documentation appears to be less seriously defective than an oral contract which fails to comply with the statutory requirement that it be in writing.

*W. H. Armstrong & Co. v. United States*³⁵ is frequently cited as authority for holding that compliance with an oral order of the contracting officer is compensable on the basis of a contract implied in fact. The decision by the Court of Claims in that case was by a 3 to 2 vote. Two of the judges in the majority found that when the contracting officer orally directed the contractor to do the extra work and promised it an adjustment when the work was completed and the fair amount determined, and when the direction was followed by the contractor, a contract to pay the contractor the reasonable cost of the work resulted. These two judges based their finding on the "Extras" article in the contract,

33. *W. H. Armstrong & Co. v. United States*, 98 Ct. Cl. 519, 1 CCF 468 (1943). In *Morgan v. United States*, 59 Ct. Cl. 650 (1924), compliance with an oral order was being made when the changed procedure was abandoned. The contractor was finally paid for changed work completed but was not paid for materials and a machine on hand which were acquired solely for use in connection with the changed procedure and could not be used on any other work of the contractor. The Court of Claims cited the Plumley case for its conclusion that the contractor could not be paid "damages" sustained by reason of the abandonment of the changed procedure. The court pointed out that the contractor's proper course was to insist that he be directed in writing before he performed the changed work. Recently in *R. M. Hollingshead Corporation v. United States*, Ct. Cl. No. 119-54 (Dec. 6, 1955) (not yet reported), the court ruled that if the contractor proved that the Government orally promised to issue a change order, with appropriate price increase, substituting a more expensive component in place of one which had become unavailable, the contractor would be entitled to a judgment because of refusal of the Government, after the work was done, to issue a written change order.

34. See note 10 *supra*.

35. 98 Ct. Cl. 519, 1 CCF 468 (1943).

which, like the current "Changes" article, merely required the order of the contracting officer to be in writing and in that respect was unlike the standard form of the "Changes" article then in use which also required the written approval of the change order by the head of the department. A third judge found in the contractor's favor on a breach of contract theory, namely, that the Government did not permit the contractor to perform the contract as he had agreed in writing. The judges who followed the implied contract theory recognized that their conclusion was contrary to the *Plumley* case, which they considered to stand alone. They also pointed out that their conclusion was consistent with the Court of Claims' prior decision in *Griffiths v. United States*,³⁶ wherein no mention was made of the *Plumley* case. The third judge wrote that if either the "Changes" or "Extras" article applied he would conclude that the *Plumley* case would govern. The two dissenting judges held that a change was involved and since the approval of the head of the department was not obtained, as required by the "Changes" article in the contract, and since no written order had been issued, recovery should have been denied. The dissenting judges cited the *Plumley* case in support of their conclusion.

More recently, under somewhat similar facts in *Globe Indemnity Co. v. United States*,³⁷ the contractor was denied relief when the two dissenting judges in the *Armstrong* case were joined by a judge, recalled from retirement, to form the majority in denying relief on the basis of the *Plumley* decision. The two judges who granted relief on the theory of implied contract in the *Armstrong* case concurred in result, since they were willing to accept the contracting officer's finding that the contractor, in performing the alleged changed work, was doing no more than what the original contract required him to do. The third judge in the majority of the *Armstrong* decision did not participate. In this case the contractor never specifically requested a change order. At a conference a Government agent told the contractor to do the work later claimed to be a change and then to make up a proposal for his added cost. After the contractor did so, the claim was rejected as "not legally allowable." The "Changes" article had the requirement not in the current "Changes"

36. 77 Ct. Cl. 542 (1933). In this case the contracting officer refused to issue an order to allow payment for alleged extra grading and filling, holding that such work was required under the specifications. The Court of Claims found that the extra work resulted from a change. The Court did not discuss any theory of recovery but merely made the general statement that the contractor was entitled to recover the actual cost of the extra grading and filling. Since the contracting officer refused to issue any order, recovery could more properly have been on the basis of damages for breach of contract than a contract implied in fact.

37. 102 Ct. Cl. 21, 2 CCF 584 (1944), cert. denied, 324 U.S. 852 (1945).

article, that the approval of the head of the department be obtained for any change involving an estimated increase of \$500. Such approval was not obtained although the change amounted to more than that sum. The dissenters disagreed with the decision of the majority in so far as it denied relief for failure to comply with technical requirements, and cited the *Armstrong* decision in support of their view.

The majority of the court in the *Globe Indemnity* case stated that it was a hardship case in which the court was powerless to give relief because of the contractor's failure to insist on compliance with the plain provisions of the contract relative to changes. They further advised contractors that they must study their contracts and insist on compliance with their terms, and before relying on any promise they should ascertain that it is made by a person having the authority to make such promise. Advice was directed not only to contractors. The opinion of the majority was critical of the head of the department for not having ratified the unauthorized acts since the work was necessary and beneficial to the Government. The majority said that contracting officers and heads of departments should exercise the great powers conferred on them by these contracts "to do equity" and should not feel under obligation to take advantage of technicalities where to do so would defeat justice.

The United States Supreme Court refused to grant a writ of certiorari in the *Globe Indemnity* case. It should be observed that in this case there was the issue of the lack of the department head's approval, as well as the absence of a written order, both of which were required by the article. It is doubted that the court's decision would have been different if the first issue had not been present. In the future, however, when a court considers an oral change order by the contracting officer under the present "Changes" article, which does not require the approval of the head of the department, these older decisions might be distinguishable in this regard and not followed. The contract-implied-in-fact theory might there be advanced with success.

In *Stiers v. United States*,³⁸ by a unanimous decision, the Court of Claims determined that a contractor could recover on oral promises on the basis of a contract implied in fact and cited the *Armstrong* and *Griffiths* cases. The court said that the contractor should be compensated for the additional costs incurred and services rendered at the request and for the benefit of the Government.

The decisions of the courts, when recovery has been requested on the basis of an oral change order, are not too encouraging to contractors. When the Court of Claims has granted relief it appears to have desired to avoid a harsh and unjust result without undue emphasis being given to the niceties of legal theories.

38. 121 Ct. Cl. 157 (1951).

Administrative Relief

Remembering the admonition of the majority of the court in the *Globe Indemnity* case that though the Court of Claims was powerless to give relief the head of the department could have done so, we now pass to the consideration of the relief a contractor might obtain from the head of the department where the contracting officer has refused to issue a change order or has issued only an oral order.

The contractor presents his appeal for relief in such a situation to the Armed Services Board of Contract Appeals, to the Department of Interior Board of Contract Appeals, or to the Corps of Engineers Claims and Appeals Board, who act as the alter ego of the head of the department. These Boards are the authorized representatives of the heads of their departments, as will be discussed more fully later, and are given the contractual responsibility of deciding factual disputes between the contracting officers and contractors. In addition, they also take certain action on an administrative level to correct mistakes of contracting officers where relief under the contract is justified. As was said by the Court of Claims in *McWilliams Dredging Co. v. United States*,³⁹ the Board, as the representative of the head of the department, is like the owner of a business who would reverse his agent if he were wrong, not because the contract gave him the authority to make a final decision but because it would be the natural and fair way for an owner to act.⁴⁰ These Boards, upon finding that under the facts of the particular case the contracting officer should have issued a written change order, will, as an administrative matter, return the appeal file to him with directions to issue such an order and to grant any relief due under it.⁴¹ Thus it is that where the contractor relies on an oral change order he may be able to obtain relief before one of these Boards that might not be obtainable from the courts.

Scope of Change Order

The next important consideration is that of the scope of the change order. The "Changes" article permits the order to include "changes in the drawings and/or specifications of this contract and within the general scope thereof."

A caveat should be issued with regard to the application of Article 2 of

39. 118 Ct. Cl. 1 (1950).

40. The case of *Rappoli Co. v. United States*, 98 Ct. Cl. 499, 1 CCF 461 (1943), is also frequently cited for the proposition that mistakes should be corrected within the agency whenever possible.

41. *Harding*, ASBCA No. 2477 (1955); *Benjamin & Fleming*, ASBCA No. 219 (1950); *Thomas C. Brown Co.*, W.D.BCA No. 308, 1 CCF 736 (1943); *Ryall Engineering Co.*, I.BCA 1, 6 CCF, par. 61,639 (1955).

Standard Form 23, entitled "Specifications and Drawings." That article provides that anything mentioned in the specifications and not shown on the drawings or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both. An order to include anything in the drawings that is shown only in the specifications or to include anything in the specifications that is shown only on the drawings does not constitute a change under the "Changes" article. Such an order merely puts into effect the application of Article 2.⁴² The article also provides that in case of a difference between the drawings and specifications, the specifications shall govern. Hence, an order that changes the drawings and thereby makes them consistent with the specifications is similarly not a change under the "Changes" article.⁴³

Attention should also be called to the rule of construction that any ambiguity will be construed against the party who drafted the instrument. The Government prepares the specifications and drawings. If a contractor is ordered to do work he had not contemplated performing because of an ambiguous specification or drawing, he will be entitled to recover on the basis of a change.⁴⁴ Another point to remember is that a sovereign act of the Government does not constitute a compensable change.⁴⁵

A frequently quoted definition of the proper scope of a change order is the following statement in *General Contracting Co. v. United States*:⁴⁶

"Article 3 of the contract is a standard form used by the Government in all construction contracts. Its purpose is to enable the contracting officer to make any change in drawings and specifications he may find necessary or desirable as work under the contract progresses. It has reference, we think, entirely to structural changes like the substitution of one kind of material for another, changes in architectural design, the addition to or subtraction from work required by the specifications, etc."

In *United States v. Rice*,⁴⁷ the Supreme Court held that only structural changes come within the "Changes" article. However, not all struc-

42. Conn Structors, ASBCA No. 1499 (1954); Tokheim Oil Tank and Pump Co., ASBCA No. 1597 (1953) (fittings shown in specifications but not on drawings, deleted, held to be a change); Charles B. Johnson & Son, Inc., W.D.BCA No. 934, 3 CCF 461 (1945); John O. Burgwin & Co., W.D.BCA No. 582, 2 CCF 780 (1944).

43. John B. Gutmann, W.D.BCA No. 534, 2 CCF 958 (1944); Patti-MacDonald-Manhattan, Department of the Army, Corps of Engineers Claims and Appeals (hereinafter referred to as C & A) Board No. 174 (1950).

44. Octagon Process, Inc., ASBCA No. 616, 5 CCF, par. 61,236 (1951); Busch & Latta Painting Co., A.BCA No. 1756 (1948); Coupe Construction Co., W.D.BCA No. 1348 (1946).

45. Ottinger Bros., W.D.BCA No. 805, 3 CCF 236 (1945); M. E. Souther, Inc., W.D.BCA No. 915, 3 CCF 477 (1945).

46. 84 Ct. Cl. 570, 579 (1937).

47. 317 U.S. 61, 1 CCF 396 (1942).

tural changes are permitted within that article. There is the further requirement that the structural change must be within the general scope of the contract. The Supreme Court has defined this requirement in *Freund v. United States*⁴⁸ as meaning "what should be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into." Recently, in holding that changes were within the general scope of the contract, the Court of Claims said:

"Although the changes were extensive, they were not so extensive as to be a cardinal change."⁴⁹

The point at which the Government might exceed what is within the general scope of the contract in the issuance of a change order is to a large extent a matter of degree. The elimination of a building, with a reduction in price of \$99,520, where the original contract was for the construction of certain hospital buildings and utilities at a cost of \$911,376, was held to be a cardinal change which could not be accomplished under the "Changes" article but only by the consent of both parties to the contract.⁵⁰ In another case pile foundations could not be ordered as a change in the place of reinforced concrete footings resting on soil. The Court of Claims held, in considering those facts, that the "Changes" article permitted only changes in the details shown by the drawings and specifications and not such a fundamental change as required by an entirely new kind of foundation.⁵¹ In so holding the court recognized that it was giving a narrow construction to the word "specifications," and that the word is sometimes used in a broad sense with reference to anything required by the contract. A post office was originally designed to be faced with bluestone below the level of the first floor and with split-face granite above the first floor level and was to cost \$330,000. The materials were later changed to rubble or field stone and certain bluestone, for which change the contractor was to be paid \$30,393.33. The Court of

48. 260 U.S. 60 (1922).

49. *F. H. McGraw & Co. v. United States*, 131 Ct. Cl. 501, 130 F. Supp. 394 (1955). In construing the scope of a contract, the courts are not so much concerned about the mere number of change orders issued as they are with their substance. In *Magoba Construction Co. v. United States*, 99 Ct. Cl. 662, 1 CCF 611 (1943), the 62 change orders issued during performance were held not to be an abuse. In *Great Lakes Construction Co. v. United States*, 95 Ct. Cl. 479 (1942) some 700 additions and corrections were made in the plans and specifications for the construction of a Federal prison to cost \$2,781,000, which were incorporated in 109 changes, and yet no abuse was found.

50. *General Contracting Co. v. United States*, 84 Ct. Cl. 570 (1937).

51. *Stapleton Construction Co. v. United States*, 92 Ct. Cl. 551 (1940). Order that foundation be placed on piles was held to be beyond scope of "Changes" article in *Sobel v. United States*, 88 Ct. Cl. 149 (1938), and the contractor was permitted to recover his incidental costs and damages resulting from the delay occasioned by the change in the foundation even though he accepted the change order.

Claims held the change to be merely from one character of stone to another and within the general scope of the contract.⁵² The court's decision in this latter case appears to take a broader view of what can be done within the scope of the contract than the opinion expressed in the previous case where the court restricted the scope of a change order to specification details and frowned on a change in materials.

On occasion the Boards of Contract Appeals have specifically said that only structural changes may be made under the "Changes" article.⁵³ They have held, on the authority of *General Contracting Co. v. United States*, that the requirement that guards be provided at certain times could not be deleted from the specifications with a reduction in the contract price under the "Changes" article.⁵⁴ Yet, in another case, after calling attention to the above decision and also stating that only structural changes come within the "Changes" article, it was held that an acceleration order did come within the "Changes" article.⁵⁵ That was giving a broad meaning to "structural" change as well as to the word "specifications."

A study of the decisions of Boards of Contract Appeals indicates that such Boards have quite frequently given a broad meaning to those words. Orders requiring stoppage of work at certain times on certain days were held to come within the "Changes" article.⁵⁶ A stop order issued to vary the schedule of performance contained in the specifications has also been said to be within the "Changes" article.⁵⁷ Relief was granted under the "Changes" article where the specifications provided that work need not be performed when the ground was "frozen beyond workability" and the contracting officer "suggested" that work be continued when the ground was so frozen, which necessitated the rental and use of equipment that would not otherwise have been required.⁵⁸ The direction to laminate lumber in order to provide the large members not obtainable

52. *Silberblatt & Lasker, Inc. v. United States*, 101 Ct. Cl. 54 (1944). In *Schneider v. United States*, 19 Ct. Cl. 547 (1884), a contract for sandstone could not be changed to provide marble without readvertising.

53. *Swords-McDougal Co.*, W.D.BCA No. 533, 3 CCF 238 (1944); *Sanders, A.BCA* No. 1468, 4 CCF, par. 60,526 (1949).

54. *J. Emil Anderson & Sons, Inc.*, W.D.BCA No. 543, 2 CCF 757 (1944).

55. *Sanders, A.BCA* No. 1468, 4 CCF, par. 60,526 (1948). An order to work personnel overtime has been held to constitute a change. *C. H. Everitt, Inc.*, W.D.BCA No. 385, 2 CCF 629 (1944).

56. *Schaefer, ASBCA* No. 917 (1952).

57. See *Guthrie Electrical Construction, IBCA* No. 22, 6 CCF, par. 61,687. A stop order issued because of doubts concerning the availability of an appropriation was held to have led to changes in the work for which the contractor should have been compensated under the "Changes" article.

58. *Bauer Bros. Construction & Supply Co.*, A.BCA No. 1694 (1949).

from the sources specified in the contract was held to be a change.⁶⁰ Similarly, a compensable change was found where the Government was unable to fulfill its contractual obligation to provide lumber and nails and the contractor was directed to do so.⁶⁰ In another appeal⁶¹ the contractor protested before performing in accordance with an order of the contracting officer that he repair items damaged in shipment. The Board found that such repair work was not required by the contract and that it constituted a change which affected the cost of the performance of the contract. It directed that a formal change order be issued to confirm the instructions to accomplish the repair work. In making that direction the Board called attention to the *Globe Indemnity* case. On review, under lump sum contracts where the contract prices were based on estimated quantities and substantial overruns and underruns developed, change orders were directed to be issued.⁶² Months after completion of a contract in accordance with the specifications, the contracting officer directed that the work be modified in accordance with new specifications. The Board found that a change order should have been issued.⁶³

The Comptroller General also appears to be liberal in applying the "Changes" article. He has ruled that where wage rates obsolete prior to advertising and award were inadvertently included in a construction contract pursuant to the Davis-Bacon Act, the proper rates should be incorporated into the contract by a change order.⁶⁴

Extra work that must be performed because of faulty specifications or of errors by the contracting officer has been held to come within the

59. McIntyre, W.D.BCA No. 1035, 3 CCF 1081 (1945).

60. Robert M. Lee, W.D.BCA No. 610, 2 CCF 1029 (1944). Order to rebuild access roads where originally Government was required to provide such roads and the contractor to maintain them was held to come within the "Changes" article. Langenfelder, W.D.BCA No. 706, 2 CCF 1071 (1944).

61. Gennett & Sons, Inc., ASBCA No. 743 (1951).

62. Ottinger Bros., W.D.BCA No. 584, 2 CCF 982 (1944); Royals, A.BCA Nos. 1715 and 1727 (1949). The contractor consented to the application of the "Changes" article where 36 barracks of the 107 contemplated to be built under the contract were deleted. Randall Construction Co., W.D.BCA No. 404, 2 CCF 752 (1944). A substantial variance was found and a change ordered where 5,280 cubic yards of fill had to be hauled and placed instead of the estimated 2,800 cubic yards and 659 cubic yards of improved gravel had to be used instead of the estimated 400 cubic yards. Brezner, ASBCA No. 1187 (1953). A material difference was not found to exist where fill placed was only 15,836 cubic yards less than the 732,000 cubic yards estimated in the specifications. The change order which decreased the contract price to compensate for the lesser amount of fill placed was held not to come within the "Changes" article. Ben C. Gerwick, Inc., ASBCA No. 368 (1950).

63. Corey, A.BCA No. 1814, 4 CCF, par. 60,572 (1948).

64. Comp. Gen. Dec. No. B-106987, May 8, 1953, 6 CCF, par. 61,482. Bridgeman Construction Co., W.D.BCA No. 838 (1945) is to the same effect.

"Changes" article.⁶⁵ On the other hand, errors made by a contractor in his bid cannot be corrected by a change order.⁶⁶

The broad construction given by the Boards of Contract Appeals to the scope of the "Changes" article should not mislead contractors to believe that all orders by contracting officers which affect performance come within that article. It has been held not to apply where the work ordered is incidental to the required performance under the contract. Aerating of material was held to be incidental to the required preparation of a subbase.⁶⁷ A contractor's request for a change order because Government inspectors required him to comply strictly with the contract specifications was denied as being without merit.⁶⁸ Where a certain result is required by the contract, the contractor must use any available means to accomplish that result. The statement by the contracting officer that sandblasting was the only effective means to remove mill scale from tanks to make them clean did not result in a change for which the contractor could be paid the cost of sandblasting.⁶⁹ Nor was an order to install a gradation control unit, which was necessary to acquire a proper mix of aggregate, within the "Changes" article.⁷⁰ An order to work during inclement weather, including Saturdays, Sundays and holidays, in order to maintain the contract progress schedule, could not qualify as a contractual change.⁷¹ Where the specifications provided that the work would be done as directed by the contracting officer, the contractor was not entitled to a change under the contract when the contracting officer directed that he employ a different method of applying sheathing than the one which he had intended to use.⁷² An order to remove and replace a defective base course before acceptance of the work did not qualify as a change where the contractor had responsibility for the work performed prior to final acceptance.⁷³

65. Bolef, ASBCA No. 1922 (1954); Allen-Morrison Sign Co., W.D.BCA No. 1073, 3 CCF 992 (1945); Stephens-Brown, Inc., W.D.BCA Nos. 852 and 902, 3 CCF 431 (1945); Pfozter, W.D.BCA No. 113, 1 CCF 230 (1943).

66. S. N. Nielsen Co., ASBCA No. 1990 (1954); Trio Machine Products, ASBCA No. 1817 (1954); United States Air Conditioning Corp., ASBCA No. 1118 (1952); Reed Research, Inc., ASBCA No. 1073 (1952).

67. Hargrave, W.D.BCA No. 804, 3 CCF 1113 (1945). On further appeal on other claims, recovery was denied in *Hargrave v. United States*, — Ct. Cl. —, 130 F. Supp. 598 (1955).

68. Penker Associates, Inc., W.D.BCA Nos. 779 and 821, 3 CCF 117 (1944).

69. McCloskey & Co., W.D.BCA No. 559, 3 CCF 835 (1945).

70. Southern Construction Co., W.D.BCA No. 899, 3 CCF 880 (1945).

71. Green, W.D.BCA No. 230, 1 CCF 838 (1943).

72. Insulating Products Corp., W.D.BCA No. 282, 1 CCF 853 (1943). Similarly, see *Florence*, W.D.BCA No. 1159 (1945).

73. *J. A. Ross Co.*, W.D.BCA No. 1239 (1947), *aff'd*, 126 Ct. Cl. 323, 115 F. Supp. 187 (1953).

These decisions appear to warrant the conclusion that the Boards, on many occasions, have given a broad construction to the word "specifications" so as to include anything required by the contract. It might be more realistic and accurate to modify the "Changes" article to authorize specifically any change in the requirements of the contract within the general scope thereof instead of merely providing for changes in the drawings and/or specifications. The "Changed Conditions" article⁷⁴ was recently modified to substitute "contract" for "drawings or specifications" in one instance and in another "contract" for "plans and specifications."

Lengthy discussion might be had as to what changes are or are not within the scope of the contract. Extensive discussion herein, however, is not warranted. No hard and fast rule can be given. The standard adopted in one case would probably not apply to the next one. The complex Government project should be broken down to its simplest elements in an endeavor to answer the question. Clearly, under the "Changes" article a carpenter who has a contract to build a frame building cannot be ordered to construct one of marble. Nor can he be asked to build one of stone, probably not one of brick, and when asked to change the siding of the building from clapboard to slate shingle there might be doubt, but if directed to change the siding from clapboard to wood shingle the change would come within the "Changes" article. The nature and the amount of the original work must be considered as well as the character and resources of the contractor.

Time for Making Adjustment

When the contracting officer issues the change order he may not be in a position to make a reasonable estimate of the effect it will have on performance. As a result, in many cases he does not attempt at the time of issuing the change order to make a final compensating adjustment for the change. The Court of Claims has indicated that under certain circumstances the determination of costs could be deferred until the conclusion of performance, when the costs can be accurately computed.⁷⁵

Government policy is definitely against such after-the-fact pricing under change orders. In 1954, meetings were held between representatives of the Government and contractors to plan procedures for the expeditious processing of change orders. As a result of such meetings and an exchange of correspondence between a representative of the Associated General Contractors of America, Inc., and representatives of the

74. Article 4 of Standard Form 23A, General Provisions (Construction Contracts).

75. *W. H. Armstrong & Co. v. United States*, 98 Ct. Cl. 519, 1 CCF 468 (1943); *Whitman v. United States*, 124 Ct. Cl. 464, 110 F. Supp. 444 (1953).

Corps of Engineers, Department of the Army, the Bureau of Yards and Docks, Department of the Navy, and the Bureau of Reclamation, Department of the Interior, certain conclusions can be drawn. They concluded the general rule should be that the written change order setting forth the changed work and the adjustment in price and time should be issued before commencement of the changed work. Only where time is not available and the changed work must proceed may the change be initiated by a two-part change order. Part I will then set forth the scope of the change and will state that the adjustment will be made at an early date. A provision might also be included in Part I for progress payments to be made on the basis of undisputed cost estimates. It is contemplated that Part II of the change order will be issued as soon as sufficient cost data become available to enable final prices to be determined. In no event will after-the-fact pricing be allowed or approved.⁷⁶ Both parties to the contract realize that it is to their interests individually and mutually that delays in the issuance of final and complete change orders be avoided.

Contractor's Notice of Claim

The "Changes" article requires that any claim by the contractor for adjustment must be asserted in writing within 30 days from the date of receipt by him of the notification of change. Contractors must be careful to comply with these procedural requirements. The Court of Claims has upheld a contracting officer's denial of an adjustment where the contractor failed to present his claim within the time stated in the "Changes" article.⁷⁷ The current "Changes" article requires the claim to be asserted in writing, whereas such a requirement was not present in the prior version of the article.

If the contractor fails to comply with the 30-day notice of claim requirement, his situation is not always hopeless. The "Changes" article expressly permits the contracting officer to receive, consider and adjust any such claim at any time prior to the date of the final settlement of the contract provided he determines that the facts justify such action. The contracting officer's conduct in considering and passing on the contractor's claim under those circumstances has generally been described as a waiver of the thirty-day notice of claim requirement. Such a waiver authorized by a contract provision should not be confused with the waiver by the contracting officer of a contractual right of the Govern-

76. Progress Report, Nov. 1955, "Processing Change Orders and Disputes on Federal Construction Contracts," The Associated General Contractors of America, Inc.

77. *Shepherd v. United States*, 125 Ct. Cl. 724, 113 F. Supp. 648 (1953). See also, *Kirk*, W.D.BCA No. 1, 1 CCF 67 (1943).

ment. They are not comparable and have different legal status. The contracting officer waived the notice of claim requirement where he considered a late claim without any mention of the delinquency.⁷⁸

The contract does not define the facts that justify waiver of the thirty-day notice of claim requirement. The purpose of the requirement has been stated to be the protection of the Government against delays which are injurious to its interest. If the delay is not prejudicial to the Government, the contracting officer probably will consider the claim. The War Department Board of Contract Appeals held that the requirement should be waived where evidence is available to determine the merits of the claim.⁷⁹ There the Board said that the contracting officer, in dismissing the claim for not having been timely presented, was merely adhering to the letter but not to the reason for the requirement.

Another area of uncertainty concerns the time within which the contracting officer may waive the thirty-day notice of claim requirement. The "Changes" article provides that prior to the date of the final settlement this may be done for justifiable cause.

What constitutes "final settlement" is not definite. In recent years a broad construction has been given to it. Mere completion of work and full payment of contract price are not enough. As long as a binding release or an accord and satisfaction was not executed in connection with final payment, it has been held that the contract has not been finally settled.⁸⁰ Through a long line of cases, from its organization in 1942

78. *Arundel Corp. v. United States*, 96 Ct. Cl. 77 (1942).

79. *Sanders*, W.D.BCA No. 955, 3 CCF 862 (1945); original decision amended on another point, 3 CCF 923 (1945). A court might be hesitant to hold that the contracting officer was in error in not considering a late claim unless it finds that he abused the discretion given to him by the contract.

80. *Boyd Contracting Co.*, ASBCA No. 1504 (1953); *Production Line Manufacturers, Inc.*, ASBCA No. 816, 5 CCF, par. 61,334 (1951); *Menihan*, A.BCA No. 1759, 4 CCF, par. 60,581. See *Harrison Engineering & Construction Corp. v. United States*, 107 Ct. Cl. 205, 68 F. Supp. 350, 4 CCF par. 60,187 (1946). In *Globe Indemnity Co. v. United States*, 102 Ct. Cl. 21, 2 CCF 584 (1944), cert. denied, 324 U.S. 852 (1945), the check in payment of the final voucher was endorsed by the contractor without any protest and no reservations of rights had been made on the final voucher. Almost four months after final payment the claim on the basis of the oral change order was asserted. The only reason the Court of Claims gave for denying the claim was the failure to obtain a written order from the contracting officer and the written approval of the change from the head of the department. In another case under a supply contract the contractor made his final delivery and received payment therefor in 1939. In 1950 the contractor filed a claim for payment under the "Inspection" article of the contract for reasonable value of garments used by the Government which had been rejected in 1939. The Armed Services Board of Contract Appeals held that it had jurisdiction to consider the claim on its merits. *Conro Manufacturing Co.*, ASBCA No. 769 (1951). The Government withheld under 225 supply contracts from amounts due to the contractor in accordance with the alleged rights of the Government under the "Covenant Against Contingent Fees" provisions in those contracts. The

until June 1946, the War Department Board of Contract Appeals adhered to the principle that if a contract had been fully performed and final payment had been made and accepted, without reservation, the contract had been settled and was no longer an active contract for the purpose of further negotiation or compensation. In *Reed & Prince Manufacturing Co.*,⁸¹ performance had been completed and final payment made under documents which did not contain any release or reservation by the parties. Thereafter the General Accounting Office took exception to a payment that had been made for a change in the packing specifications. The contractor repaid the amount under protest and filed a claim for the repayment. The Board sustained the appeal and specifically stated that it was reversing its prior conflicting decision with regard to the time at which final settlement occurs.

The above construction of the time within which final settlement occurs is not necessarily inconsistent with the decision of the Supreme Court in *Globe Indemnity Co. v. United States*,⁸² decided in 1934. There the Court construed the meaning of "final settlement" as used in a provision of the Heard Act, repealed in 1935. Under that provision a subcontractor could sue on the performance bond of the contractor no later than one year after "the performance and final settlement" of the contract. The Court pointed out that the policy of the statute to afford protection to the interests of laborers and materialmen would not be accomplished unless the date of final settlement, which fixes the time within which suit is permitted, could be ascertained with reasonable certainty and finality. The Court held that the requirements of the Heard Act were met by the determination, made by the administrative officer or department having the contract in charge, that the contract had been completed and that the final payment was due. The limited purpose of the definition is shown by the Court's comment that such administrative "determination would be 'final settlement' for purposes of the Heard Act if payment had preceded action by the Comptroller General."⁸³ The Supreme Court might find on another occasion that the purpose for the use of the term "final settlement" in the "Changes" article is not comparable to the purpose it found in the Heard Act and conclude differently as to its meaning.

contractor contended that since final payment had been made under many of the contracts and since Certificates of Settlement had been issued by the General Accounting Office on the accounts of some of the disbursing officers who had made final payments under certain of these contracts, the contracts were concluded and no action could be taken under them. The contractor's jurisdictional motion was denied and the appeal was decided on its merits. *Metro Engineering & Manufacturing Co.*, ASBCA No. 1495, 6 CCF, par. 61,567 (1954).

81. W.D.BCA No. 1265, 4 CCF, par. 60,140 (1946).

82. 291 U.S. 476 (1934).

83. *Id.* at 484. The Act of Aug. 24, 1935, 49 Stat. 793, 40 U.S.C.A. 270-a, popularly known as the Miller Act, superseded the Heard Act.

Nature of Adjustment

Next we turn to the adjustment mentioned in the "Changes" article. If the change causes an increase or decrease in the amount due under the contract or in the time required for its performance, an equitable adjustment is to be made and the contract modified in writing accordingly. Only if the change causes certain results, an equitable adjustment is to be made. Hence, the contractual right to an equitable adjustment will depend upon proof by the claimant that the change did cause the results he asserts. Proof, therefore, is very important in obtaining an equitable adjustment.

As a rule, contractors and contracting officers are able to negotiate satisfactorily as to the time increase or decrease that resulted from the change. Unlike the money factor, the time factor of an equitable adjustment does not present complex problems.

Any study of the money factor to be included in an equitable adjustment begins with *United States v. Callahan Walker Const. Co.*,⁸⁴ decided in 1942. There the Supreme Court stated that the equitable adjustment for building a berm not originally required by the specifications merely involved "the ascertainment of the cost of digging, moving, and placing earth, and the addition to that cost of a reasonable and customary allowance for profit."

The Supreme Court's decision in *United States v. Rice*,⁸⁵ rendered on the same day as that in the above case, further refines the meaning of equitable adjustment. In this case the contractor was required to install certain equipment in a building to be constructed by another contractor. The Government made a number of changes in the construction contract, as a result of which the equipment contractor was unable to install equipment as planned. The Government granted him an extension of time for delay but refused to compensate for overhead expenses which accumulated during the delay and for decreased labor effectiveness resulting from

84. 317 U.S. 56, 1 CCF 396 (1942).

85. 317 U.S. 61, 1 CCF 396 (1942). In the report of this decision in 1 CCF at page 398, in the first paragraph of the column on the right hand side of the page, beginning with the thirteenth line after the word "consequential," which ends the twelfth line, a very serious printing error was made. The error consists of the inclusion of the following language which does not appear in 317 U.S.: ". . . changes in cost due to the structural changes required by the altered specification and not to consequential . . ." Many times the Court's language has been quoted by using the 1 CCF report with the error. Hereinafter an exact quotation is made from 317 U.S. In a few cases shortly after the Rice case was decided by the Supreme Court, the War Department Board of Contract Appeals, in following it, said that indirect costs could not be allowed a contractor for a change as a result of that decision. See *Ironall Factories Co.*, W.D.BCA No. 320, 1 CCF 761 (1943). The Boards have stated that they must follow the Rice doctrine even though that decision has been criticized. *Sanders*, A.BCA No. 1468, 4 CCF, par. 60,526 (1949).

performance of outdoor work in the winter rather than in warm weather as originally contemplated. In so deciding the Supreme Court made the oft-quoted statement:

"... for 'increase or decrease of cost' plainly applies to the changes in cost due to the structural changes required by the altered specification and not to consequential damages which might flow from delay taken care of in the 'difference in time' provision."

The Supreme Court explained its decision in the *Rice* case by giving this simple example. If an alteration in the specifications required the contractor to use an extra 50 tons of steel, the Government would be liable for the value of the steel and the cost of its installation, but an extension of time must be accepted as full equitable adjustment for all damages caused by the fact that the work was done at a later period made necessary by the ordered change. No allowance or provision is made for any increase in the cost of the work not changed.⁸⁶

Whenever the term, "consequential damages," is mentioned in a Government contract, many lawyers immediately associate it with the *Rice* case and with disallowance of cost for delay. This phenomenon led to a flood of appeals under a Government-furnished property article which provided that an equitable adjustment would be granted for delay in delivering Government-furnished property but such an adjustment would not include consequential damages or loss of profit. Some contracting officers decided that no adjustment in contract price was permitted for such delay since in the *Rice* case the Supreme Court held that damages resulting from delay were consequential. In pointing out the fallacy of that reasoning the Armed Services Board of Contract Appeals, in *Carteret Work Uniforms*,⁸⁷ went back to *Hadley v. Baxendale*,⁸⁸ and

86. The contractor was delayed in ordering special steel rails because of a change order. During the delay the price of steel advanced, with a resulting increase in the cost of the special steel rails. The change order did not affect that part of the work involving the special steel rails. The Board held that the issuance of a change order whereby the unchanged work was delayed was not tantamount to the issuance of a change order as to the unchanged work. Therefore, the adjustment claim for the special steel rails on the basis of a change order was denied. Gerwick, ASBCA No. 158, 5 CCF, par. 61,461 (1953). See also, Charles H. Tompkins Co., ASBCA No. 306 (1950); Gardner Displays Co., ASBCA No. 1598 (1954).

87. ASBCA No. 1015 (1952). The Board said that what may be consequential damages under one article are not necessarily consequential damages under another. When an equitable adjustment is permitted for a change, it is different from permitting an equitable adjustment for delay by the Government. In the first case delay caused by the Government is consequential under the *Rice* case but in the second situation it is the direct cause for which damages are to be paid. For the allowance of specific costs directly resulting from delay in delivering Government-furnished property, see *Carteret Work Uniforms*, ASBCA No. 1647, 6 CCF, par. 61,561 (1954).

88. 9 Ex. 341, 156 Eng. Rep. 145 (1854).

gave consideration to the differences between direct or general damages, on the one hand, and consequential or special damages, on the other. The distinction between the two groups is not absolute but relative, depending upon the facts of the particular case. Those damages which flow naturally and according to the usual course of things as the result of the change may be classified as direct damages from the change. Any other damages that result from the change would be incidental or consequential. In the language of the *Rice* case, the natural or direct damages resulting from the change are properly part of the equitable adjustment.

The result of the *Rice* decision has been criticized for causing contractors to increase their bids to cover the possibility that performance might have to be accomplished under the most adverse conditions which may reasonably be expected to occur during any part of the year in the place where the work is to be performed.⁸⁹

The reference to direct damages as being a proper part of an equitable adjustment should not be confused in discussing the types of costs that might be included. Direct costs, such as labor and material, as well as such indirect costs as factory burden and general and administrative, are included in the equitable adjustment as long as they flow directly from the change.

Two types of adjustments may be required to compensate for direct damages resulting from change orders. The first relates to work performed or commitments made prior to the issuance of the change order, as where the contractor has purchased machinery or materials or has work in process which the change order makes unusable, or has entered into subcontracts which the change order makes it necessary to cancel. The contractor's claim for such costs is similar in nature to a claim relating to the uncompleted portion of a contract terminated by the Government for its convenience. The methods and procedures of the applicable termination regulations may be used as a guide in determining that type of adjustment and in disposing of unusable material.⁹⁰ This type of adjustment may be made by a lump sum payment or credit. The second type of adjustment relates to the work performed on the remainder of the contract. The change order may have the effect of increasing or decreasing the contractor's cost with respect to the remaining work. Such an adjustment may be taken care of by an increase or decrease in contract unit prices.

The Armed Services Board of Contract Appeals has reviewed the

89. Anderson, "Changes, Changed Conditions and Extras in Government Contracting," 42 Ill. L. Rev. 29 (1947).

90. ASPR 8-101, 32 Code Fed. Regs., § 407.101 (Supp. 1954), 2 CCH GCR, § 41,702.

computation of an equitable adjustment where work had been deleted after partial performance. The Board held that the contractor was entitled to be paid the direct costs of his performance on the deleted work, plus an overhead allowance, plus profit.⁹¹ The resulting lump sum settlement was added to the total contract price. A somewhat different approach was approved where the "Changes" article in the contract was different from the current form and the contractor relied on the difference to justify the computation of the deduction to be made for a deletion. The Board approved his computation, which was made by deducting his cost of the deleted work estimated at the time of the contract plus six per cent profit from the contract price.⁹² In another appeal⁹³ the Board stated that where a change order involves the deletion of work the Government is entitled to a credit for the direct costs of the unperformed deleted work plus related overhead and anticipated profits. The Board approved twenty-six per cent of direct labor and material costs as the overhead and profit to be included in the amount of the deduction to be made as part of the equitable adjustment. That percentage had been used by the contractor for a number of years in computing bids on Government work. Since the Board found that the change order was clear and concise and did not require any clarification, it refused to accept as part of the equitable adjustment the cost of correspondence written and conferences held pertaining to the equitable adjustment after the execution of the change order. It also refused to include the cost of the appeal as part of the adjustment.

In another appeal steel tubing which cost \$.72 per unit was substituted for aluminum which had a unit cost of \$1.87 per unit. The Government was clearly entitled to a credit on cost of materials of \$1.15 per unit on such a change. The contractor, however, showed that the labor cost of install-

91. *Palmberg Construction Co., ASBCA No. 2155 (1954)*. In *John T. Brady & Co., W.D.BCA No. 303, 2 CCF 316 (1944)*, the Board stated that if the change reduced or deleted the amount due under the contract, the Government was relieved from paying for the amount reduced or deleted and was obligated to pay only to the contractor its actual expenses incurred in connection with the item deleted, "this to include the cost of the direct materials, direct labor expended thereon, cost of indirect materials used, the overhead and general expenses directly applicable, plus a proportionate profit on the work actually done in connection therewith prior to the deletion but not on the cost of the materials." The Board feared that to allow profit on purchased materials would be to pay a profit on something which was not a benefit to the Government. That fear was not warranted. The contractor acquired the purchased material for the benefit of the Government contract by expending his own funds. For the use of that money he is entitled to be paid some profit depending upon the effort required in purchasing the material and other circumstances. The Board admitted that if the deletion were a partial termination of the contract, profit might have been payable on the purchased materials.

92. *Chang, ASBCA No. 1700 (1954)*.

93. *C. H. Leavell & Co., ASBCA No. 2364 (1954)*.

ing the steel tubing was in excess of the labor cost for using the aluminum. As a result, he received a credit for the increased labor cost as part of the equitable adjustment for the change.⁹⁴

A contractor's view of what was a proper equitable adjustment was upheld in another case,⁹⁵ where he successfully contended that the contract price should not be reduced when a change order deleted the use of waterproof Kraft wrapping paper which he already had purchased and for which he had no use and was willing to give to the Government.

Under unit price contracts the Boards generally have held that the equitable adjustment consists of the application of the unit price to the portion actually completed. Contractors have argued against such a rule on the ground that the price for the unit deleted was originally computed to include a profit to balance the price of another unit bid at a loss,⁹⁶ or that the deletion of the particular units did not proportionately lower the remaining overhead expenses.⁹⁷ The answer given was that the contractor made his bid with knowledge that changes might be issued and, therefore, should have computed the individual unit prices to include all indirect costs and a reasonable profit.

In a few situations, however, unit prices have not been accepted as a fair basis for computing equitable adjustments where deletions have been ordered. Under a construction contract where the unit prices were based on estimated quantities, a Board has held that a deletion of eighty-five per cent of one item of work was unreasonable and that the application of the unit price to the work actually performed was not a proper equitable adjustment. In place of the contractual unit price it allowed the contractor his reasonable costs in performing the undeleted work, including the indirect costs allocable to it plus a fair profit.⁹⁸ The deletion was not unreasonable in relation to the performance required under the entire contract. Those decisions indicate that the unit prices will be used to compute the equitable adjustment only as long as the hardship, if any, is not too great. In another appeal where a contractor in his bid made the prices contingent upon his obtaining all the work, and such a conditioned bid was accepted, an equitable adjustment for deletion of part of the work based on unit prices was held not proper.⁹⁹ Where the overhead remained constant regardless of the deletion of part of the

94. *Pentagon Manufacturing, Inc.*, ASBCA No. 1711 (1954).

95. *Godard*, W.D.BCA No. 781, 3 CCF 23 (1944).

96. *Camouflage Co.*, W.D.BCA No. 368, 1 CCF 906 (1943).

97. *Randall Construction Co.*, W.D.BCA No. 404, 2 CCF 752 (1944).

98. *Ottinger*, W.D.BCA No. 584, 2 CCF 982 (1944).

99. *Pintura General, S.A.*, W.D.BCA No. 521, 2 CCF 725 (1944).

work, the equitable adjustment for the deletion has been computed in a few cases to include an allowance for part of such overhead.¹⁰⁰

If a contractor can show that the deletion constituted a partial termination of his contract for the convenience of the Government, he might then be able to obtain, under the "Termination For Convenience Of The Government" article, an increase in his prices for the continued portion of the contract to compensate for continuing overhead or other hardships resulting from the deletion.¹⁰¹ Contingent claims are not included as part of an equitable adjustment.¹⁰²

In computing the cost of the work required by a change order, the costs that will be reasonably experienced by the contractor should be used.¹⁰³ The costs of an experienced company should not be considered as a standard where the contractor is a newcomer in the field and not too efficient. The extent of a deletion in arriving at an equitable adjustment should be based upon the work actually described in the contract and should not depend upon what the contractor had been told would be its scope even though he based his bid upon such information.¹⁰⁴ In one case the contractor, in computing his bid for a lump sum contract, estimated \$34,800 as the cost for outside electrical work when in fact through a mistake such amount reflected only the labor cost without any allowance for material. After his bid was accepted the mistake was discovered. Subsequently, a change was ordered in the outside electrical work. The contracting officer determined that because of such change the contract price of \$361,000 should be reduced by \$41,510. The contractor argued that an adjustment was not equitable where, as a result of his mistake he, in effect, had to pay the Government \$6,710 to do the outside electrical work. The Board affirmed the findings of the contracting officer and said that a proper equitable adjustment was to determine the reasonable cost of the work as originally required and the reasonable cost of the work performed pursuant to the change and, since the latter was the lesser of the two, to reduce the contract price by the difference.¹⁰⁵

These decisions prove with certainty at least one conclusion, namely, rigid rules to be followed under all circumstances in computing an

100. *Ozark Dam Constructors, C. & A. No. 189* (1951). Further appeal on different point in *Ozark Dam Constructors v. United States*, 130 Ct. Cl. 354, 127 F. Supp. 187 (1955). *C. Ray Sykes Associates, Inc., C & A No. 504* (1953).

101. ASPR 8-703(i), 32 Code Fed. Regs., § 407.703 (Supp. 1954), 2 CCH GCR, § 41,863.

102. *Loneragan Manufacturing Co., ASBCA No. 1601* (1954).

103. *Dibs Production & Engineering Co., ASBCA No. 1438* (1954); *Mosser, W.D.BCA Nos. 711 and 727*, 2 CCF 1127 (1944).

104. *Langoma Industries, Inc. v. United States*, — Ct. Cl. —, 135 F. Supp. 282 (1955).

105. *S. N. Nielsen Co., ASBCA No. 1990* (1954).

equitable adjustment cannot be given. They probably are consistent with the statement of the Court of Claims that the courts and administrative boards should equitably adjust any increase or decrease in costs, depending upon the circumstances of the particular case.¹⁰⁶

Acceptance of Change Order

When a change order is presented to a contractor he is asked frequently to execute an acceptance thereof. If the order merely embodies the change without making an equitable adjustment, the contractor's acceptance has no effect upon his right to later claim an adjustment. That result is reached because there is no consideration for such an agreement. The contract specifically gives the contracting officer the right to issue change orders under certain conditions and the contractor has no choice as to performance.¹⁰⁷

On the other hand, a contractor who accepts in writing, without condition or reservation, a change order which specifies the adjustment to be made, cannot subsequently recover more on the ground that the adjustment is inadequate.¹⁰⁸ Where the accepted change order contained the statement that ". . . it is further understood and agreed that all other terms and conditions of said contract shall be and remain the same," the ordered work had to be performed at the unit contract price for that type of work. In that same case another accepted change order provided that there would be no "change in the contract cost." The contractor accepted these orders upon the representation of the area engineer that their acceptance would not jeopardize claims for extra compensation for the work performed under the change orders. The Court of Claims, upon finding that the area engineer had no authority to make such an agreement, held that the contractor was bound in accordance with the documents he accepted.¹⁰⁹ Such an accepted change order is also binding against the Government.¹¹⁰

Appeal

If the parties fail to agree on the adjustment to be made, the "Changes" article provides that the contractor may appeal pursuant to the "Disputes" article (Art. 6) of the contract. The Supreme Court has

106. *Great Lakes Dredge & Dock Co. v. United States*, 119 Ct. Cl. 504, 96 F. Supp. 923 (1950), cert. denied, 342 U.S. 953 (1952).

107. *Thompson v. United States*, 91 Ct. Cl. 166 (1940).

108. *Irwin & Leighton v. United States*, 104 Ct. Cl. 84 (1945); *Sanders v. United States*, 104 Ct. Cl. 1, 60 F. Supp. 483 (1945).

109. *Hargrave v. United States*, — Ct. Cl. —, 130 F. Supp. 598 (1955).

110. *DeKoning Construction Co.*, W.D.BCA No. 1423, 4 CCF, par. 60,358 (1947); *Kerby Saunders, Inc.*, W.D.BCA No. 865, 3 CCF 1079 (1945).

said that the determination of an equitable adjustment presents inquiries of fact and that the "Disputes" article provided the only avenue for relief if the contracting officer erroneously answered such inquiries.¹¹¹ The "Disputes" article covers appeals from decisions of contracting officers on disputes of fact. That article as it is now set out in Form 23 embodies the substance of Section 1 of Public Law 356, 83d Congress, 2d Session, approved May 11, 1954.¹¹²

The contractor must appeal to the administrative board, such as the Corps of Engineers Claims and Appeals Board, the Armed Services Board of Contract Appeals, or the Department of Interior Board of Contract Appeals, on all disputes of fact before he can obtain a court decision on such a dispute.¹¹³ All appeals under the "Disputes" article of the Department of Interior contracts must be taken to the Department of Interior Board of Contract Appeals.¹¹⁴ All appeals pursuant to the "Disputes" article in contracts of the Departments of the Navy and Air Force must be taken to the Armed Services Board of Contract Appeals.¹¹⁵

111. *United States v. Callahan Walker Const. Co.*, 317 U.S. 56 (1942).

112. 41 U.S.C.A. § 321 (1954). This Act is frequently referred to as the "Anti-Wunderlich Legislation," since the reaction to the Supreme Court's decision in *United States v. Wunderlich*, 342 U.S. 98 (1951) was the primary reason for its enactment. In substance, the Act provides that the decision of the head of any department or his authorized representative in a factual dispute shall not be final and conclusive if upon judicial review it is found to be fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. The application of the Act raises many questions that have not yet been answered. The background of the Act is discussed in Cuneo, "The Contracting Officer and the Wunderlich Remedial Legislation," *Procurement Legal Service*, Department of the Army, 8/1954, p. 10.

113. The contractor must first exhaust his administrative remedy. *United States v. Holpuch Co.*, 328 U.S. 234 (1946); *United States v. Blair*, 321 U.S. 730 (1944).

114. The LBCA was established by Order No. 2509, Amendment No. 22, effective December 31, 1954. The order and rules of procedure of the LBCA are set forth in 43 Code Fed. Regs. 4.1-4.16 and 1 CCH GCR, par. 10,765.

115. The ASBCA was created by the joint directive of the Secretaries of the Army, Navy and Air Force, effective as of May 1, 1949. Its Charter is Part I of Appendix A of ASPR (32 Code Fed. Regs., § 415a.1; 1A CCH GCR, par. 29,981), and its rules of procedure are Part 2 of Appendix A of ASPR (former rules—32 Code Fed. Regs., § 415a.1; present rules—1 CCH GCR, par. 10,721). For a discussion of the composition of and procedure before ASBCA, see Cuneo, "Armed Services Board of Contract Appeals: Tyrant or Impartial Tribunal," 39 A.B.A.J. 373 (1953). That article is based upon the rules of the ASBCA in effect prior to August 1, 1955. The procedure under the new rules is substantially the same as under the old rules except that now the contractor is required to file, in addition to his notice of appeal, a complaint setting forth simple, concise and direct statements of each of his claims in place of the old Rule 2 statement of specific facts and argument in support of the appeal, and now the Government must file an answer setting forth in simple, concise, and direct statements its defenses to each claim asserted by the contractor in lieu of the old Rule 4 memorandum of the factual and legal issues in the

The appeal procedure under construction contracts of the Department of the Army is somewhat different. The Corps of Engineers has the exclusive administration and performance of the civil works responsibilities of the Department of the Army pertaining to river and harbor and flood control activities of the United States.¹¹⁶ The Chief of Engineers has been designated as the duly authorized representative of the Secretary of the Army under the "Disputes" article of all contracts concerning the civil activities of the Department of the Army under the jurisdiction of the Corps of Engineers.¹¹⁷ The Chief of Engineers has in turn designated the Corps of Engineers Claims and Appeals Board as his authorized representative to determine such appeals.

When the factual dispute is under a military construction contract of the Department of the Army, examination of the "Disputes" article must be made to ascertain definitely who has the authority to first hear and determine an appeal from the decision of the contracting officer. The "Disputes" article in most Army military construction contracts provides for an intermediate appeal¹¹⁸ before the Corps of Engineers Claims and Appeals Board. If a contractor is not satisfied with the decision of that Board he may, pursuant to the "Disputes" article, take a further appeal to the Armed Services Board of Contract Appeals. Such appeal before the latter Board is *de novo*.

If the question involved in the dispute between the contractor and the contracting officer is not one of fact but one of law, such as one involving interpretation of a contractual provision, the contractor may appeal directly to the proper court. Most contractors, with good reason, are hesitant to say that their disputes involve only legal questions which may be appealed directly to the courts. As a result, they appeal to the administrative board as insurance against losing their rights to appeal to the courts.¹¹⁹

The last two sentences of the "Changes" article are important. One states that nothing provided in the article will excuse the contractor

appeal. The new rules specify motion and other procedures that were previously allowed and followed by the ASBCA but were not set out in the old rules.

116. Army Regulations 10-260, February 25, 1949, as changed by C 4, March 24, 1954; Special Regulations 10-5-1, April 11, 1950, as changed by C 2, August 1, 1951.

117. Basic delegation was set forth in a memorandum for the Chief of Engineers, dated March 4, 1937, signed by the Secretary of War. The rules of procedure of the Corps of Engineers Claims and Appeals Board may be found in 1A CCH GCR, par. 24,804.

118. Provision for the modification of the "Disputes" article to authorize such an intermediate appeal is set forth in ASPR 7-103.12, 32 Code Fed. Regs., § 406.103-12 (Supp. 1954), 1A CCH GCR, par. 29,363.

119. For an appraisal of the administrative appellate procedure available under Federal Government construction contracts from the view of counsel for contractors, see Mulligan, "Government Construction Contract," 27 Notre Dame Law. 167 (1952).

from proceeding with the prosecution of the work as changed. Hence, while the contractor may appeal his dispute with the contracting officer to the appropriate Board of Contract Appeals, he must continue with the performance of the work as ordered by the contracting officer.

The last sentence states that except as otherwise provided in the "Changes" article, no charge for any extra work or material will be allowed. As stated above, this provision is in lieu of the separate "Extras" article that had previously been in Standard Form 23.

III. CONCLUSION

This analysis is sufficient to show that the law of Government contracts, and in particular as it applies to changes, is in a state of development. The courts still require rather strict compliance with the contractual provisions. The administrative boards, on the other hand, as the representatives of the heads of departments, are somewhat more liberal in granting relief, as the Court of Claims recommended. That liberality does not extend to being inconsistent with any judicial pronouncement, such as the Supreme Court's decision in the *Rice* case.

Many risks have been eliminated by the use of the "Changes" article and to that extent bids may be lower, as the contractor can, with a greater degree of security, estimate his costs. This provision, however, was not designed to protect the contractor who boasts that he will take a job at cost and make his profit on changes and extras. Nor was it designed to permit officials to bail out a contractor from an improvident bid.

As a practical matter, it must be recognized that the "Changes" article does give a certain amount of discretion to officials who, in making their determinations, may be liberal yet honest. Similarly, it has created for courts an additional relief provision in the contract that may be broadly applied in the hardship case.

In the determination of the application of this article, or of any other dispute, in a doubtful case appealing facts persuasively presented and based on the proper legal foundation by skillful counsel is the best formula for success whether before an administrative official or board or before a court.