Fordham Law Review

Volume 25 | Issue 3 Article 2

1956

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# FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS: LIABILITY FOR DELAYS CAUSED BY THE GOVERNMENT

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RECENTLY the United States Court of Claims ruled that the Federal Government could not avoid liability for extra costs incurred by a Government construction contractor, resulting from the Government's delay in delivery of cement it had agreed to deliver to the contractor as needed, notwithstanding that the contract expressly exempted the Government from liability for any expense caused the contractor for such delay.[1]

At first glance, this ruling seems to be contrary to decisions of the Supreme Court of the United States to the effect that the Government cannot be held liable for delays from which it has exempted itself,[2] and similar decisions of the Court of Claims itself.[3]

The court's reasoning, however, indicates that recognition was given to the principle that a party to a contract may not escape responsibility,

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The views expressed in this article are those of the authors, and do not necessarily represent those of the United States Army Corps of Engineers, The Department of the Army, or the Department of Defense.

1. Ozark Dam Constructors v. United States, 130 Ct. Cl. 354, 127 F. Supp. 187 (1955). The exculpatory clause read as follows: "The Government will not be liable for any expense or delay caused the contractor by delayed deliveries except as provided under Article 9 of the contract." Supra at 356, 127 F. Supp. at 189. Article 9 provided for extensions of time for completion of the work where it was delayed due to causes beyond the control of the contractor.

2. Wood v. United States, 258 U.S. 120 (1922); Wells Bros. Co. v. United States 254 U.S. 83 (1920). The exculpatory clauses in the contracts under consideration in these cases provided: ". . . no claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States." 258 U.S. at 121; 254 U.S. at 85. See also note 34 infra.

3. John N. Knauff Co. v. United States, 78 Ct. Cl. 423 (1933) (contract terms expressly provided that no claims would be allowed for delays caused by the Government—the Government took occupancy of the hospital before completion, thereby causing a slowdown of construction operations); Carroll v. United States, 67 Ct. Cl. 513, 518 (1929) (contract provided that the contract price would cover all expenses of whatever nature or description; Government delays to be considered unavoidable—Government delayed in performing certain antecedent work necessary to enable the plaintiff, who was the electrical contractor, to commence his own operations). General Contracting & Engineering Co. v. United States, 62 Ct. Cl. 433 (1926) (work suspended under authority of contract clause exempting the Government from liability); Merchants Loan & Trust Co. v. United States, 40 Ct. Cl. 117 (1904) (contract expressly provided that there would be no claim for delay, that an extension of

merely by exculpatory language in the contract, for conduct which is opposed to public policy.[4]

The court's ruling is a highlight of the many cases which have been presented to the Court of Claims during the past ninety odd years,[5] as well as the few which have been reviewed by the Supreme Court,[6] involving the right of a construction contractor to recover damages resulting from delays attributable to the Government. This discussion will attempt to determine the rationale of these decisions.

## I. General Principles

Before analyzing the Supreme Court and Court of Claims cases on the subject of delays, it might be well to restate the general principles of law applicable to damages suffered by a construction contractor, because of delay caused by the contractee. The law in this regard, in its application to Federal Government contracts, has been held to be no different basically than the law which governs construction contractors in their contractual relations with private owners.[7] To be recoverable, the damages suffered

time only would be granted—the Government delayed in awarding other contracts, thereby preventing plaintiff from commencing his own work of interior finishing, etc.). See also George J. Grant Construction Co. v. United States, 124 Ct. Cl. 202, 109 F. Supp. 245 (1953), and Edward H. Meyer Construction Co. v. United States, 124 Ct. Cl. 274 (1953).

4. 4 Williston, Contract § 1751 A (Rev. ed. 1938): "There is no reason for denying a contract operation according to its terms, unless its tendency is to provide immunity for future conduct that is tortious or opposed to public policy." In the Ozark case, the Government's failure to deliver cement in time was due to a railroad strike, but the court found that the Government could have avoided the serious effects of the railroad strike on the construction contractor's operations by arranging for delivery of the cement through other relatively inexpensive means of transportation. As pointed out by the court, the Government had ample warning that the strike was contemplated. The court ruled that the non-liability provision of the contract, when fairly interpreted in the light of public policy and of the rational intention of the parties, did not provide for immunity from liability on the part of the Government under these circumstances. Ozark Dam Constructors v. United States, 130 Ct. Cl. 354, 360, 127 F. Supp. 187, 191 (1955). See also 17 C.J.S. Contracts, § 262 (1939).

5. The Court of Claims was originally established in 1855, but by Act of Congress in 1866 was re-established in its present form, to decide, inter alia, contract claims against the Government. Its reported cases date from 1863.

6. United States v. Howard P. Foley Co., 329 U.S. 64 (1946); United States v. Blair, 321 U.S. 730 (1944); United States v. Rice, 317 U.S. 61 (1942); United States v. Wyckoff Pipe & Creosoting Co., 271 U.S. 263 (1926); H. E. Crook Co. v. United States, 270 U.S. 4 (1926); Wood v. United States, 258 U.S. 120 (1920); Wells Bros. Co. v. United States, 254 U.S. 83 (1920); Ripley v. United States, 223 U.S. 695 (1912); United States v. Mueller, 113 U.S. 153 (1885); Chouteau v. United States, 95 U.S. 61 (1877); United States v. Smith, 94 U.S. 214 (1876).

7. Northwestern Engineering Co. v. United States, 154 F.2d 793, 797 (1946), where the Circuit Court of Appeals stated: ". . . a contract executed by the Government is controlled by the same laws as a contract executed by an individual and . . . obligations which would be implied against an individual contracting party will be implied against the Government in

by the contractor must be due to a delay resulting from a default, i. e., a breach of contract by the contractee.[8] Thus, even though a contractor is delayed by an act of the contractee, and suffers increased costs thereby, he cannot recover his damages unless he can show the act of the contractee constituted a breach of a contractual obligation, express or implied.[9] Once such default or breach is established, the Government's liability for delays resulting therefrom has never been doubted.[10]

It is well established, however, that persons dealing with the Government must take notice of the extent of the authority given its agents, and that the Government is not bound by their unauthorized acts.[11] Obviously, therefore, the Government Contracting Officer has no authority to settle claims other than in accordance with the terms of the contract. The Government construction contract, although it provides for compensation

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the same circumstances. There is, and can be, no dispute about this abstract principle." George A. Fuller Co. v. United States, 108 Ct. Cl. 70, 94, 69 F. Supp. 409, 411 (1947), where the court stated: ". . . it is, however, an implied provision of every contract, whether it be one between individuals or between an individual and Government, that neither party to the contract will do anything to prevent performance thereof by the other party, or that will hinder or delay him in its performance." See also dissenting opinion of Mr. Justice Frankfurter in United States v. Blair, 321 U.S. 730, 738 (1944): "Unless the terms of a contract are so explicit as to preclude it, the presupposition of fair dealing surely must underly a Government as well as a private contract. Ripley v. United States, 223 U.S. 695, 701-02; United States v. Smith, 256 U.S. 11, 16."

8. H. E. Crook Co. v. United States, 270 U.S. 4 (1926); Carroll v. United States, 67 Ct. Cl. 513 (1929). See also annotation 91 L. Ed 48; and 115 A.L.R. 70.

9. See, e.g., Carroll v. United States, 67 Ct. Cl. 513, 518 (1929), where the court stated: "The true principle is that acts of the Government or its omission to act, even though they cause delay, will not make the Government liable unless they constitute some breach of the contract, either express or implied." See also Stafford v. United States, 109 Ct. Cl. 479, 505, 74 F. Supp. 155, 158 (1947), where the court stated: "The sum total of these facts clearly establishes a case of hardship on the part of the contractor who entered into his contract in good faith, apparently calculating his bid price in reliance upon labor and material scales obtaining a year earlier. The increased expenses were not his fault. He was compelled to pay them in order to perform his contract. At the same time, they do not show the Government to have been at fault. There is no showing that the Government's representatives were lacking in diligence. . . ." And see discussion of Northwestern and Parish cases pp. 445-46 infra.

10. United States v. Mueller, 113 U.S. 153 (1885); United States v. Smith, 94 U.S. 214 (1876); United States v. Speed, 75 U.S. 77, 84 (1868); Clark v. United States, 73 U.S. 543 (1867). In the Smith case, the Government suspended work without contractual authority. The Court stated that as between individuals, this would be an improper interference, and damages would be awarded, and the United States must answer according to the same rule. In the Mueller case, the Government had suspended the work pending the determination of the desirability of completing certain buildings with the type of stone being furnished by the contractor in accordance with the contract specifications. The Supreme Court ruled that the enforced suspension and resulting delay were unjustified, and allowed recovery.

11. Kelly v. United States, 116 Ct. Cl. 811, 818-19, 91 F. Supp. 305, 307-08 (1950).

for additional work, for encountering of unforeseen conditions,[12] and for release of the contractor from liability for delays if such delays are not due to the contractor's fault or negligence,[13] does not provide additional compensation for delays attributable to a breach of contract by the Government.[14] Any attempt to provide in a Government contract, without Congressional sanction, that damages for breach of contract will be determined and paid for by the Contracting Officer would be held unauthorized as a usurpation of the function of the Court of Claims,[15] to say nothing of the functions of the United States General Accounting Office.[16] Thus, even though a Government agent recognizes that the Government has breached its contract, he cannot adjust the matter.[17] Under the Standard Form of

12. Article 3, United States Standard Form 23 A; Article 4, United States Standard Form 23 A. See also Cuneo, Extra Work Under Federal Government Construction Contracts, 24 Fordham L. Rev. 556 (1956); Gaskins, Changed Conditions and Misrepresentation of Subsurface Materials As Related To Government Construction Contracts, 24 Fordham L. Rev. 588 (1956); Article 15, American Institute of Architects Standard Building Agreement Form, text in Parker and Adams, The A.I.A. Standard Contract Forms and the Law, at 35 (1954); Gantt, Selected Government Contract Problems, 14 Fed. B.J. 388, 392 (1954).

13. Article 5, United States Standard Form 23 A; Article 18, American Institute of Architects Standard Building Agreement Form, text in Parker & Adams, op. cit. supra at 37.

14. Compare discussion of "Suspension of Work" clause in note 19 infra.

15. Clyde v. United States, 80 U.S. 35 (1871); Continental Illinois Nat'l Bank & T. Co. v. United States, 126 Ct. Cl. 631, 640, 115 F. Supp. 892, 897 (1953), where it was pointed out that Government agencies "are authorized to spend money only for the purpose for which it is appropriated by Congress. Funds are not appropriated to pay damages for breach of contract."; Anthony P. Miller Inc. v. United States, 111 Ct. Cl. 252, 330, 77 F. Supp. 209, 212 (1948), where the court said that the power of the contracting officer does not extend to determining whether unliquidated damages should be assessed against the Government for its breach of an express or implied obligation under the contract; B.-W. Construction Co. v. United States, 101 Ct. Cl. 748 (1944), where the court held that an agreement to leave to the party who drew the contract (the Government) the determination of whether the contract is breached would be contrary to the Act of Congress (28 U.S.C.A. § 1491 (4)) whereby the United States consents to be sued in the Court of Claims on all claims founded upon "any contract express or implied with the Government of the United States." But see Haas, A New Look At The Liquidated Damage Provision of The "Default" Clause In Government Contracts, 14 Fed. B.J. 407, 432-34 (1954); 32 Comp. Gen. 333, 337 (1953).

16. 7 Comp. Gen. 645, 648 (1928). See also concurring opinion in B.-W. Construction Co. v. United States, 101 Ct. Cl. 748, 771 (1944), where Judge Madden stated: "The Comptroller-General whose powers are somewhat undefined and whose expenditures are, so far as the Government is concerned, practically unreviewable, sometimes gives relief." Cf. generally, Birnbaum, Government Contracts: The Role of the Comptroller General, 42 A.B.A.J. 433 (1956).

17. Langevin v. United States, 100 Ct. Cl. 15, 31 (1943): "We have consistently held that [the contract provisions] gives the Contracting Officer [no] power to determine a contractor's claim for damages for delay."; Phoenix Bridge Co. v. United States, 85 Ct. Cl. 603, 630 (1937): "None of these provisions [of the contract] require plaintiff to submit to the Department its claims for the amount of damages for delays." In Clyde v. United States, 80 U.S. 35, 39 (1871), the Court held that to require claimants to first submit their claims to the

Government Construction Contract, Government contracting agencies may not help the contractor other than to make findings of fact which may disclose a breach of contract.[18] Some Government agencies have sought to ameliorate this situation by providing in the contract for additional compensation for unreasonable delays due to suspension of work for the convenience of the Government,[19] and, on occasion, the contractor may obtain relief from the General Accounting Office without resorting to litigation.[20] The private construction contract, on the other hand, not infrequently provides for damage payments.[21] But, even in the absence of such clause in the private contract, a private owner who recognizes that he has breached his contract, can, of course, adjust the matter with the contractor without resorting to litigation.

There seems to be no question that the right of a construction con-

Department was "establishing a jurisdictional requirement which Congress alone had the power to establish." See also Plato v. United States, 86 Ct. Cl. 665, 678 (1938); Anderson, The Disputes Article In Government Contracts, 44 Mich. L. Rev. 211, 232 (1945).

18. See Joy, The Disputes Clause in Government Contracts: A Survey of Court and Administrative Decisions, 25 Fordham L. Rev. 11, n. 62 (1956).

19. For example, the "Suspension of Work" clause (as revised recently) in United States Army Corps of Engineers contracts, states as follows:

"The Contracting Officer may order the contractor to suspend all or any part of the work for such period of time as may be determined by him to be necessary or desirable for the convenience of the Government. Unless such suspension unreasonably delays the progress of the work and causes additional expense to the contractor, no increase in contract price will be allowed. In the case of suspension of all or any part of the work for an unreasonable length of time causing additional expense, not due to the fault or negligence of the Contractor, the Contracting Officer shall make an adjustment in the contract price in the amount of the additional proper expense and modify the contract accordingly. An extension of time for the completion of the work in the event of any such suspension will be allowed the contractor; provided however, that the suspension was not due to the fault or negligence of the contractor."

This "Suspension of Work" clause seems to involve the settlement of damage claims against the Government, but not only was its use suggested as far back as 1932 in hearings before the Government Interdepartmental Board of Contracts and Adjustments, but in the recent case of Ozark Dam Constructors v. United States, 130 Ct. Cl. 354, 127 F. Supp. 187 (1955), the Court of Claims recognized the existence of such clause and made no attempt to question it in any way. This is even more significant when it is noted that the clause has been interpreted by the Army Board of Contract Appeals (predecessor of the Armed Services Board of Contract Appeals) to be applicable even where the work was not actually suspended by the Government. See Guerin Bros., BCA No. 1551 (1948), and Basich Bros. Construction Co., BCA No. 1592 (1949). In the Ozark case, in fact, the Government had not issued any suspension order as contemplated by the "Suspension" clause. For a further comparison of this clause with damage claims, see appeal of Chas. H. Tompkins Co., ASBCA No. 2661 (1951). See also Gantt, op. cit. supra note 12 at 397-400.

20. See note 16 supra. See also Birnbaum, Government Contracts: The Role of the Comptroller General, 42 A.B.A.J. 433, 492 (1956).

21. Article 31, American Institute of Architects Standards Building Agreement Form, text in Parker and Adams, op. cit. supra note 12 at 48.

tractor to recover damages resulting from delay caused by default of the contractee, Government or private, may be precluded by provisions of the contract,[22] although, as seen in *Ozark Dam Constructors v. United States*,[23] even exculpatory clauses may not be sufficient to prevent recovery of damages resulting from a delay which could have been avoided by reasonable action on the part of the contractee. In the case of *George J. Grant Const. Co. v. United States*,[24] where the Government delayed in furnishing materials required for the orderly prosecution of the work, the court found that the express provisions of the contract which relieved the Government from all liabilities for delays caused by it, was controlling "at least in the absence of fraudulent or malicious or arbitrary conduct of the Government's agents causing the delays."[25]

## II. The Rationale of Cases Establishing Governmental Liability

In determining the rationale of the decisions of the Supreme Court and Court of Claims on the right of Government construction contractors to recover damages resulting from delays attributable to or caused by the Government, an excellent starting point is the case of *Chouteau v. United States*,[26] decided in 1877. This was the earliest decision by the Supreme Court enunciating guide-lines in the determination of the Government's liability for delays caused by it. It was the first of several cases on the point.[27] This case involved an 1863 contract for the construction of an "iron-clad steam battery" for the Navy. This vessel was, at the time,

22. Rogers v. United States, 99 Ct. Cl. 393 (1943); John N. Knauff Co. v. United States, 78 Ct. Cl. 423 (1933); 115 A.L.R. 77. See also 91 L. Ed. 54 annotation. Occasionally the Government's prime contractor, in his contractual arrangements with his subcontractors, includes an exculpatory clause to the effect that the prime contractor will not be liable to the subcontractor for delays, etc. Where such clauses are used, the Court of Claims has denied recovery to the prime contractor for damages suffered by the subcontractor for delays caused by the default of the Government. Continental Illinois Nat. Bank & T. Co. v. United States, 121 Ct. Cl. 203, 101 F. Supp. 755 (1952); Continental Illinois Nat'l Bank & T. Co. v. United States 112 Ct. Cl. 563, 81 F. Supp. 596 (1949); Severin v. United States, 99 Ct. Cl. 435 (1943). See also Chas. H. Tompkins Co., ASBCA No. 2661 (1951), which goes into the matter very thoroughly. Since the subcontractor cannot sue the Government directly, (United States v. Blair, 321 U.S. 730 (1944)) this situation leaves the subcontractor without relief except to the extent his contract price covers the contingency. The courts, of course, recognize the right of the prime contractor to bring suit on behalf of the subcontractor in the absence of an exculpatory clause. United States v. Blair, 321 U.S. 730 (1944); Chas. H. Tompkins Co. ASBCA No. 2661 (1951).

23. 130 Ct. Cl. 354, 127 F. Supp. 187 (1955).

24. 124 Ct. Cl. 202, 109 F. Supp. 245 (1953).

25. See also Edward H. Meyer Construction Co. v. United States, 124 Ct. Cl. 274 (1953).

26. 95 U.S. 61 (1877).

27. United States v. Foley Co., 329 U.S. 64 (1946); United States v. Rice, 317 U.S. 61 (1942); H. E. Crook Co. v. United States, 270 U.S. 4 (1926).

a new type of warship. As stated by the court below (Court of Claims),[28] it involved "a sudden and complete revolution in naval warfare" with changes continually demanded by the experiences of "iron-clads" under fire in service. Thus, numerous changes in the contract were to be expected. The Supreme Court found that both parties to the contract contemplated the probability that the work would not be completed within the eight-month contract period and that both parties contemplated that changes would be made in the specifications for the warship. Changes were effected and delayed the contractor in the completion of the project for approximately eighteen months. Meanwhile, labor and material prices had risen, but the contract modifications, which were issued to adjust the contract prices for the changes ordered, did not take into account the increased cost of doing *work which was not changed.* In holding that the Government was not liable for these costs, the Supreme Court stated:

"For the reasonable cost and expenses of the changes made in the construction, payment was to be made; but for any increase in the cost of the work not changed, no provision was made . . . Without any such provision, he must be held to have taken the risk of the price of the labor and materials which he was bound to furnish, as every other contractor does who agrees to do a specified job at a fixed price. It is one of the elements which he takes into account when he makes his bargain, and he cannot expect the other party to guarantee him against unfavorable changes in those prices."[29]

The Supreme Court found, in effect, that since the contract contemplated delays, there could be no breach of contract where the contemplated delays in fact occurred. Incidentally, the Court of Claims had held that the Government was not liable because the delays on the part of the Government in deciding on the various changes were not unreasonable.[30]

In the case of *H. E. Crook Co. v. United States*,[31] delay to the plaintiff resulted from delay by the Government's construction contractor in completing the buildings in which plaintiff was to install heating systems. The Court of Claims found a breach of an implied contractual obligation by the Government in failing to have the buildings ready for plaintiff until after plaintiff's original contract date for completion had expired, but denied recovery because the contractor went on with the work without making any demand upon the Government for payment for the increased wages paid at the time work was actually commenced.[32] On certiorari to the Supreme Court, it was held that there was no breach by the Government. As stated by Justice Holmes, the whole frame of the contract contemplated delays and shut out claims for delays other than extensions of

28. McCord v. United States, 9 Ct. Cl. 155, 169 (1873).
29. 95 U.S. at 68.
30. McCord v. United States, 9 Ct. Cl. 155, 169 (1873).
31. 270 U.S. 4 (1926).
32. 59 Ct. Cl. 593, 597 (1924).

time.[33] The Court found that the contract expressly provided that delays on the Government's side were to be regarded as unavoidable, and that the contract price covered all expenses of every nature.[34]

In *United States v. Rice*,[35] the plaintiff-contractor, whose obligation it was to install the plumbing, heating and electrical equipment in a building being constructed for the Government under a separate contract, was delayed in the performance of his work because the Government building contractor had encountered unexpected soil conditions which required a shift in the work site. Here, too, the Court of Claims had thought there was a breach of an implied obligation on the part of the Government to have the building ready for plaintiff's work within a reasonable time after notice to proceed was issued. The Court of Claims distinguished the *Crook* case on the basis that the Rice contract did not state that the contract price should cover all expenses of any nature or that the Government would be relieved of any responsibility for delays.[36] The Supreme Court refused to recognize this distinction, and ruled that in the exercise of the Government's contractual right to make changes in the contract which might interrupt the work, there could be no breach of contract for delays resulting from such changes and that an extension of time was the sole relief available.

In *United States v. Howard P. Foley Co.*,[37] the plaintiff-contractor was delayed in the installation of a field lighting system at the Washington National Airport because the Government, as the result of unstable soil conditions, was unable to make runways available as scheduled. In reversing the finding by the Court of Claims, that there was a breach of an implied obligation,[38] the Supreme Court characterized the Government work as having been "performed with diligence." The Court of Claims had tried to distinguish the *Rice* and *Crook* cases on the basis that, unlike those cases, the Government in this instance was actually performing the preparatory work itself, and that when the Government issued a notice

33. 270 U.S. at 7.

34. The court's thinking at that time was still controlled by the type of Government contract then in existence, as more clearly described in Wood v. United States, 258 U.S. 120 (1922). In the Wood case, the contract was for the installation of a boiler plant and heating system in a Post Office building. Extensive delays resulted from suspension of the construction work pending contemplated changes, but the contract had provided that no claims were to be made or allowed for any changes due to delays caused by the United States. Following its opinion in Wells Bros. Co. v. United States, 254 U.S. 83 (1920), the Court held there could be no recovery for delays caused by the Government, since the contract specifically excluded such claims.

35. 317 U.S. 61 (1942).

36. 95 Ct. Cl. 84, 100 (1941).

37. 329 U.S. 64 (1946).

38. 105 Ct. Cl. 161, 174 (1945).

to proceed to the plaintiff-contractor, it impliedly warranted that the runways would be ready for Foley's work when required, since Foley's contract period for performance commenced with the issuance of the notice to proceed. Three Justices of the Supreme Court agreed with this analysis in dissenting from the majority opinion.[39]

These decisions emphasize the Supreme Court's reluctance to impose liability on the Government for delays resulting in increased costs to contractors on Government work, in the absence of express contract language to such effect.[40] Such reluctance on the part of the Court may be due in some part to its attitude expressed in *Wells Bros. Co. v. United States:*

"Men who take million dollar contracts for Government buildings are neither unsophisticated nor careless. Inexperience and inattention are more likely to be found in other parties to such contracts than the contractors, and the presumption is obvious and strong that the men signing such a contract as we have here protected themselves against such delays as are complained of by the higher price exacted for the work."[41]

*United States v. Blair*[42] offers an excellent illustration of the Supreme Court's reluctance to impose liability on the Government for delay in

39. 329 U.S. at 69.

40. There has been some criticism of the Foley decision. For example, in an article (Damages For Delays in the Law of Government Contracts) appearing in 21 So. Calif. L. Rev. 125-53 (1948), Leslie L. Anderson (now Judge Anderson of Minnesota), in commenting on the Supreme Court decisions in the Crook, Rice and Foley cases, as well as in Blair v. United States, 321 U.S. 730 (1944), observes at page 151: "State court decisions, whether in state or local government or private contracting, have made it obligatory on one party to a contract to do his part to facilitate performance by the other." If this be true, it would imply that the Supreme Court is somewhat more hesitant than are State courts to impose a duty on the contractee (owner) to see to it that one contractor does his work with such dispatch as will enable another to do his within a stipulated time. That the party for whom work is being done must do his part to facilitate the performance of the work seems to be supported by cases such as Mansfield v. New York Central & Hudson River R.R., 102 N.Y. 205, 6 N.E. 386 (1886); Shore Bridge Corp. v. State, 61 N.Y.S.2d 32 (Ct. Cl. N.Y. 1946); Town & Country Engineering Corp. v. State, 46 N.Y.S.2d 792, 800 (Ct. Cl. N.Y. 1944). The following dictum in the case of Brooker Engineering Co. v. Grand River Dam Authority, 144 F.2d 708, 710 (10th Cir. 1944), is informative on this point: "It may be conceded, without deciding, that where the owner of property initiates a program of construction or development and awards separate contracts to different contractors for integrated parts of it, and the contracts together with the attending circumstances fail to indicate that the parties contemplate otherwise, the owner is impliedly obligated to keep the work in such state of forwardness as will permit a given contractor to complete the work under his contract within the time fixed."

However, the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), does not require that Federal Government contracts be governed by State law. The Supreme Court has stated that the contractor's agreement with the Federal Government is to be construed, and the rights of the parties thereunder are to be determined in accordance with Federal law. United States v. Allegheny County, 322 U.S. 174 (1944); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). See also 31 Cornell L.Q. 500-06 (1946).

41. 254 U.S. 83, 87 (1920).

42. 321 U.S. 730 (1944).

the absence of express language to that effect. In this case, the delay resulted when the Government failed to take the "necessary" steps to force the mechanical contractor (plumbing, heating and electric) to speed up his work which was in a delinquent status, so that the plaintiff-contractor could proceed efficiently and promptly with the general construction. In the court below,[43] it was pointed out that had the Government made reasonable inquiries when the plaintiff-contractor called its attention to the fact that the mechanical-contractor was behind schedule because of financial difficulties and willful neglect, it would have sooner terminated such defaulting contractor's operations and arranged for completion by others, and thus sooner enabled plaintiff-contractor to complete his own work. The Court of Claims was of the opinion that a duty was imposed on the Government to take more prompt action in terminating the delinquent contract, so as to not interfere with plaintiff-contractor's operations. On appeal to the Supreme Court, however, it was held:

". . . error for the Court of Claims to award damages to respondent based upon a breach of this non-existent obligation.

"If the parties did intend to impose such an obligation or duty on the Government, they failed to embody that intention expressly in the contract."[44]

The Supreme Court pointed out that the desire of the plaintiff to complete his work much sooner than provided for under the terms of his contract was not disclosed at the time of the execution of the plaintiff's contract and the mechanical construction contract, both of which were grounded on the same time estimates. The Court summarized the proposition by stating:

"To hold that he can exact damages from the Government for failing to cooperate fully in changing the contract by shortening the time provisions would be to imply a grossly unequal obligation. We cannot sanction such liability without more explicit language in the contract."[45]

*Delays Attributable to Negligence on the Government's Part*

The Supreme Court and the Court of Claims, however, do not hesitate to hold the Government liable for breach of an implied obligation where the delay is attributable to a "lack of diligence" or other similar negligent conduct on the part of the Government. In the case of *B.-W. Construction Co. v. United States*,[46] there were involved not only errors in the contract drawings, but impracticable specification provisions as well. As a result of this carelessness, numerous change orders were necessitated. Furthermore, the Government was extremely "slow" in acting on proposed and neces-

43. 99 Ct. Cl. 71 (1942).
44. 321 U.S. at 733.
45. Id. at 734.
46. 104 Ct. Cl. 608 (1945).

sary changes, all of which delayed the contractor greatly. The Court of Claims found that delays on the part of the Government were unreasonable, and that the Government therefore breached an implied obligation of the contract not to delay unreasonably, and allowed the contractor to recover increased costs resulting from the delay. The Government's application for certiorari was denied.[47] Similarly, in the case of *Henry Ericsson Co. v. United States*,[48] the Government was found by the Court of Claims to have unreasonably delayed furnishing certain drawings to the plaintiff and without explanation, to have failed to execute in time a contract with the utility company for electric service necessary for the contractor's orderly operations These unreasonable delays on the part of the Government constituted, in the opinion of the court, a breach of an implied contract obligation. Here too, the Government's petition for certiorari was denied.[49] The extent to which the court will go in holding the Government liable for delays attributable to negligent conduct on its part is well illustrated by *Chalender v. United States*.[50] In this case, the contractor was delayed by actions of the Government, as well as by causes not attributable to acts of the Government. The court was able to separate the Government-caused delays from delays not caused by the Government, because it found that the Government knew before notice to proceed was issued, that the materials it was obligated to furnish could not be obtained in time. The court found that the Government could have ordered the material sooner than it did.[51] Nor has the United States Court

47. 327 U.S. 785 (1945).

48. 104 Ct. Cl. 397, 62 F. Supp. 312 (1945).

49. 327 U.S. 784 (1945). Cf. Daum v. United States, 120 Ct. Cl. 192 (1951), where recovery was not allowed when steel delivery was delayed because of war difficulties, there being no "lack of diligence" on the part of the Government. See also on this same point, Otis Williams & Co. v. United States, 120 Ct. Cl. 249 (1951).

50. 127 Ct. Cl. 557, 119 F. Supp. 186 (1954).

51. In measuring the damages recoverable in the Chalender case, the court stated: "The rule which precludes recovery because of uncertain or speculative damages . . . ." has application ". . . only to situations where the fact of damage is itself uncertain." It does not apply where the fact that damage has been suffered is certain, in which event it is enough ". . . if there is a basis for a reasoned inference as to the extent of damage." Id. at 566, 119 F. Supp. at 191. But cf. J. J. Kelly Co. v. United States, 107 Ct. Cl. 594, 69 F. Supp. 117 (1947), where the contractor was delayed by acts of the Government (not shown to have been the result of willful, negligent or careless action on the part of the Government—on the date of notice to proceed, the Government ordered protector units which the contractor required before he could proceed with certain portions of the work), the priority system and unusually severe weather conditions. As the contractor could not definitely show that his own delays were due to the delay of the Government in furnishing these units, the court held that, since delays caused by the Government (contractee) could not be separated from delays caused by actions not attributable to the Government, there could be no recovery. Incidentally, the Kelly case was decided January 6, 1947, shortly after the Supreme Court had reversed the Court of Claims decision in the Foley case to the

of Claims hesitated to hold the Government liable on the basis of breach of an implied obligation, for delay by the Government in delivery of material it had obligated itself to furnish to the contractor, if it can be shown that the Government had made a representation on which the contractor was entitled to rely. For example, in *Myers v. United States*,[52] the Government had obligated itself to furnish all lumber requirements to the plaintiff-contractor. Notwithstanding that there was no express obligation in the contract to furnish the lumber at a specific time, and notwithstanding that the Government exerted all reasonable effort to obtain the lumber, the court allowed recovery, because the contract provided that approximately seventy-five per cent of the lumber had been requisitioned and it developed that the Government had not in fact requisitioned the lumber at the time the bidding papers were issued. As stated by the court:

"It is difficult to escape the conclusion that the use of such language was calculated to cause the bidder to believe that the Government had that amount of lumber spotted and available."[53]

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effect that the Government had breached an implied contractual obligation. The Court of Claims expressed its disappointment in the Supreme Court's Foley decision, but recognized that it was bound. In a dictum, the court interpreted the Supreme Court decision in the Foley case as preventing a contractor from getting payment for damages (even for Government "misconduct"!) in those cases where an extension of time was granted under a contract clause authorizing such extension. The court stated:

"We are convinced from a reading of the history of the gradual working out of the present form of the standard contract by the Interdepartmental Board [on Government contracts] and from the record of discussion of the Board that it was not the intention to exclude the allowance of necessary costs due to wrongful delay.

"To anyone at all familiar in the practical side of construction, it must be readily apparent that a mere extension of time within which to allow the contractor to complete the contract does not at all conpensate him for losses which he may sustain by virtue of delays which are due to wrongful acts on the part of the Government.

"While most of the contracts are carried out in good faith and in fairness, and this Court gets only the troublesome ones, yet it is in the nature of things that those in charge of bureaus or departments sometimes obey the impulse to exercise their powers. They are not always fair and just. In such rare cases surely a remedy should be provided. When a contractor has scores of employees who must be paid for semi or total idleness during a period of delay through no fault of his own, but which is due to the wrongful acts or omissions of the other party to the contract, and at the same time his bonds, his interests, his capital investment, his overhead, his employees' wages, and his rental or use of machinery must go on, there is brought home to him in a very real and sometimes in a bankrupting way the heartbreaking realization that no mere extension of time will compensate him for the additional outlay on these expensive items." Supra at 604, 69 F. Supp. at 119.

However, in a concurring opinion, Judge Whittaker stated: "I do not understand that opinion [Foley] to hold that the United States is not liable for willfully or negligently delaying a contractor." Supra at 605, 69 F. Supp. at 120. This latter view has been sustained in many decisions since the Kelly case, commencing with the case of George A. Fuller Co. v. United States, 108 Ct. Cl. 70, 69 F. Supp. 409 (1947), which was decided February 3, with Judge Whittaker writing the majority opinion, scarcely three months after the Kelly decision!

52. 120 Ct. Cl. 126 (1951).

53. Id. at 137.

Similarly, in the case of *Torres v. United States*,[54] where the contractor specifically eliminated a contingency item from his contract price, on the Government's representation that the materials which it had obligated itself to furnish under the terms of the contract were available and that there would be no delay in furnishing them, the court allowed recovery of increased costs attributable to the Government's delay in furnishing the materials. The Government had sought to excuse its failure on the basis that it had "used due diligence to fulfill its promise." In rejecting this approach, the court stated that the representation:

". . . was an unequivocal promise, one given for a valuable consideration. This was not true in W. E. Barling v. U. S., No. 49190 C. Cls., decided May 5, 1953. In that case, there was no representation that the materials were available and would be furnished on time, and [no] reduction in the contract price in consideration of this representation."[55]

In *Barling v. United States*[56] where recovery was *not* allowed, the Government was obligated to furnish certain materials (steel, cement, etc.) to the construction contractor. It could not deliver these materials on time, although through no lack of diligence on its part. Apparently, a Government representative had stated to the plaintiff, prior to his bid, that the Government would deliver the materials in time. The court pointed out that this was not binding on the Government, since persons dealing with the Government must take notice of the Government agents' authority, and the Government is not bound by its agents' acts or declarations in the absence of a showing that they acted within the scope of authority, or were held out as authorized to do acts or make declarations for or on behalf of the Government.

*Where The Government Acts in its Sovercign Capacity*

Where delay under a Government construction contract is caused by the Government acting in its sovereign capacity, as distinguished from its contractual capacity, the decisions are very clear that in no event can there be any liability imposed on it.[57]

The question at once arises as to the distinction between acts of the

54. 126 Ct. Cl. 76, 112 F. Supp. 363 (1953).

55. Id. at 78, 112 F. Supp. at 364.

56. 126 Ct. Cl. 34, 111 F. Supp. 878 (1953).

57. Horowitz v. United States, 267 U.S. 458 (1925); Derecktor v. United States, 129 Ct. Cl. 103, 128 F. Supp. 136 (1954); Froemming Bros. v. United States, 103 Ct. Cl. 193, 70 F. Supp. 126 (1947); J. J. Kelly Co. v. United States, 107 Ct. Cl. 594, 602, 69 F. Supp. 117, 118 (1947); Gothwaite v. United States, 102 Ct. Cl. 400 (1944); Wilson v. United States, 11 Ct. Cl. 513, 520 (1875); Jones v. United States, 1 Ct. Cl. 383, 384 (1865); Deming v. United States, 1 Ct. Cl. 190, 191 (1865). See also editorial, 135 N.Y.L.J. No. 102, p. 4, col. 1 (1956).

Government in its contractual capacity and acts of the Government in its sovereign capacity. The distinction was succinctly stated in *Jones v. United States,* as follows:

"The two characters which the Government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States, while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the Government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons. . . . In this court the United States appear simply as a contractor; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants."[58]

A most interesting illustration of how acts of the Government which may delay a construction contract are nevertheless held to be within the realm of the sovereign's performance, thereby absolving the Government from liability, is found in the case of *Froemming Bros. v. United States,*[59] where military authorities diverted labor and materials from the contractor's work to what was considered a more important objective. After the attack on Pearl Harbor and the threatened danger to the Panama Canal and the United States which was made apparent by that attack, the military authorities of the United States in the Caribbean area, pursuant to orders from Washington, diverted the labor and materials which would have been available to the plaintiff-contractor, to other and more immediately important work. The doctrine of the *Jones* case was invoked. The Court of Claims held:

"The doctrine of these cases, that the Government as a contractor is excused from performance of its contracts if the Government as a sovereign makes laws, regulations or orders which prevent their performance, seems to us to be an equitable doctrine. If the contract interfered with were between private contractors, and the interposition of a Government priority order or military regulations delayed performance, the contractor who was hurt by the delay could not, of course, claim compensation from the other party to the contract, and would have to bear his own loss. There seems to us to be no reason why a contractor whose contract happens to be with the Government should be in a more favored position, with reference to inconvenience and damages caused by the application of a law or government regulation, than other persons who must accommodate themselves to the law or regulation."[60]

58. 1 Ct. Cl. 383, 384 (1865). The contractors were two surveyors engaged by the Government to survey Indian lands which had been the subject of treaties negotiated in 1855 and 1856 with several Indian tribes. Shortly after plaintiff's contract was signed, the Military authorities decided to remove all military troops from the military post in Indian territories. This action handicapped the contractors in their survey activities. For this delay, the court found that the contractors could not recover because the delay was caused by an act of the Government in its sovereign capacity.

59. 108 Ct. Cl. 193, 70 F. Supp. 126 (1947).

60. Id. at 212, 70 F. Supp. at 127.

The contractor attempted to show discriminatory conduct on the part of the Government so as to negative the "sovereign capacity" doctrine. To this argument, the court replied:

"The plaintiff has presented evidence that, in some instances, labor and materials were used in work that seems to have been no more urgent than the plaintiff's work. But whatever was done was done by the military command and it was the responsible agent of the sovereign at the time. There is no indication that any discrimination was purposely practiced against the plaintiff."[61]

## III. Analysis of Instances Where Liability Will Be Found

Delays caused by the Government in its contractual capacity, on the other hand, may of course result in an imposition of liability on the Government. For the purposes of our discussion, these delays will be grouped as follows:

a. Delays by the Government in the determination of proposed changes in the contract work, either as a result of encountering of unexpected conditions or for other reasons.[62]

b. Delays by the Government in the furnishing of materials, equipment, drawings, models or other data, which it may be obligated under the terms of the contract to furnish to the contractor in the performance of his work.[63]

c. Delays resulting from failure to issue promptly a notice to proceed with the work.[64]

d. Delays resulting from faulty specifications.[65]

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61. Id. at 213, 70 F. Supp. at 128. In the Jones case the court observed: "This distinction between the public acts and private contracts of the Government—not always strictly insisted on in the earlier days of this court—frequently misapprehended in public bodies, and constantly lost sight of by suitors who come before us, we now desire to make so broad and distinct that hereafter the two cannot be confounded; and we repeat, as a principle applicable to all cases, that the United States as a contractor cannot be held liable, directly or indirectly for the public acts of the United States as a sovereign." 1 Ct. Cl. at 385.

62. F. H. McGraw & Co. v. United States, 131 Ct. Cl. 501, 130 F. Supp. 394 (1955); Continental Illinois Nat'l Bank & T. Co. v. United States, 126 Ct. Cl. 631, 115 F. Supp. 892 (1953); Continental Illinois Nat'l Bank & T. Co. v. United States, 121 Ct. Cl. 203, 101 F. Supp. 755 (1952); Harwood-Nebel Construction Co. v. United States, 105 Ct. Cl. 116 (1945); Langevin v. United States, 100 Ct. Cl. 15 (1943).

63. Thompson v. United States, 130 Ct. Cl. 1, 124 F. Supp. 645 (1954); Barling v. United States, 126 Ct. Cl. 34, 111 F. Supp. 878 (1953); Torres v. United States, 126 Ct. Cl. 76, 112 F. Supp. 363 (1953); George A. Fuller Co. v. United States, 103 Ct. Cl. 70, 69 F. Supp. 409 (1947); James Stewart & Co. v. United States, 105 Ct. Cl. 284, 63 F. Supp. 653 (1946); Karno-Smith Co. v. United States, 84 Ct. Cl. 110, 122 (1936); Lange v. United States, 61 Ct. Cl. 666 (1926); Moran Bros. Co. v. United States, 61 Ct. Cl. 73 (1925).

64. Parish v. United States, 120 Ct. Cl. 100, 98 F. Supp. 347 (1951); Ross Eng. Co. v. United States, 92 Ct. Cl. 253 (1941).

65. Warren Bros. Roads Co. v. United States, 123 Ct. Cl. 48, 105 F. Supp. 826 (1952); Karno-Smith Co. v. United States, 84 Ct. Cl. 110, 123 (1936).

With respect to all of such delays, it is a fundamental principle of contract law that neither party should adversely affect the timely performance of a contract to which it is a party, except as contemplated by the terms of the contract.[66]

*Delays in Determination of Proposed Changes*

Under the terms of the Government's standard form of construction contract, delays are within the contemplation of the parties by virtue of Article 3 (Changes), Article 4 (Changed Conditions) and Article 5 (Termination for Default—Damages for Delay—Time Extensions) thereof.[67] The right of the Government to take a reasonable time in determining the necessary changes authorized by Articles 3 and 4 has been clearly recognized.[68] But it is equally clear that, in the exercise of its authorized right to make such changes, the Government is limited to a reasonable time. *Harwood-Nebel Construction Co. v. United States*,[69] considered infra, emphasizes this point. And it is also equally clear that Article 5 (Ter-

66. Houston Construction Co. v. United States, 38 Ct. Cl. 724 (1903); United States v. Peck, 102 U.S. 64 (1880). As stated by the Court of Claims in Lovell v. United States, 59 Ct. Cl. 494, 513 (1924): "To say that the contract in terms absolves the defendant from making its word good, and imposes loss upon the contractor because of its [the Government's] own stupidity, borders closely upon the absurd." In this case, the construction contractor had agreed to construct a hospital on an existing foundation. After commencing operations under the contract, the Government decided to provide a new foundation. But this decision was not reached until after much "procrastination and vacillation," with resultant delays to the contractor. The court would not tolerate this vacillation on the part of the Government, and allowed plaintiff-contractor to recover his damages for the Government's breach. In United States v. Peck the Supreme Court stated: ". . . he who prevents a thing being done cannot avail himself of the non-performance which he has occasioned," and ". . . the conduct of one party to a contract, which prevents the other party from performing his part, is an excuse for non-performance . . . ." Supra at 65. In the Houston Construction Co. case, the Court of Claims stated: "It is well settled that, for an improper interference with the work of a contractor, the United States, like individuals, are liable." Supra at 736. In this case, the contract was for the reconstruction of a pier of the Aqueduct Bridge across the Potomac. In April 1898, while the work was going on, the Secretary of War ordered the temporary suspension of the removal of the pier until the current crisis (the war with Spain) was over. The contractor sought his expenses incident to the suspension of the work. The court held that the Government was not exempt from an ordinary contractor's liability merely because it suspended the contractor's work from motives of public consideration. (There was nothing in the record of this case to indicate that the Government was in any way acting in its sovereign capacity.)

67. United States Standard Form 23 A, arts. 3, 4 and 5. See also notes 12 and 13 supra.

68. J. A. Ross & Co. v. United States, 126 Ct. Cl. 323, 332, 115 F. Supp. 187, 191-92 (1953); Continental Illinois Nat'l Bank & T. Co. v. United States, 121 Ct. Cl. 203, 243, 101 F. Supp. 755, 757-58 (1952); Cauldwell-Wingate v. United States, 109 Ct. Cl. 193 (1947); James Stewart & Co. v. United States, 105 Ct. Cl. 284, 328, 63 F. Supp. 653, 655 (1946); Severin v. United States, 102 Ct. Cl. 74, 85 (1943); Lange v. United States, 61 Ct. Cl. 666 (1926); Moran Bros. v. United States, 61 Ct. Cl. 73 (1925).

69. 105 Ct. Cl. 116 (1946).

mination for Default—Damages for Delay—Time Extensions) does not per se prevent recovery of damages for delays caused by the Government in its contractual capacity.[70]

The *Harwood-Nebel* case involved a contract for construction of an extension to the Capitol Power Plant in Washington, D. C. The court found that the Government took an unreasonable length of time in making a decision regarding certain changes to be effected in the contract construction work. In holding the Government liable for the damages suffered by the contractor, the court examined at length the proceedings of the Interdepartmental Board of Contracts and Adjustments of the United States Government, the agency set up to establish standard forms of Government contracts, the Government construction contract among them.

These proceedings of the Interdepartmental Board disclosed the desire of the Government to eliminate certain hazards and uncertainty of construction contract operations in order to obtain lower bid prices.[71] The court observed that the proceedings also disclosed, that the Interdepartmental Board did not interpret the various contract clauses of the standard Government construction contract so as to deprive a contractor of payment for actual costs incurred as a result of delays caused by some unwarranted act or omission to act on the part of the Government in its contractual capacity.

The *Harwood-Nebel* decision was merely a restatement of previous decisions by the Court of Claims to the effect that an unreasonable delay in effecting changes vitiates the Government's protection from responsibility for the contractor's increased costs occasioned thereby.[72] For example, in *Magoba Construction Co. v. United States*,[73] although recovery was not allowed because the delays were found to have been reasonable under all the circumstances, the plaintiff had contended that the many changes effected by the Government in the specifications, even though authorized under the terms of the contract, cumulatively affected the contractor's remaining operations causing him increased overhead and other expenses which it would not have incurred but for the "unusually large

70. James Stewart & Co. v. United States, 105 Ct. Cl. 284, 328, 63 F. Supp. 653, 655 (1946); Magoba Construction Co. v. United States, 99 Ct. Cl. 662, 690 (1943); Karno-Smith Co. v. United States, 84 Ct. Cl. 110, 122 (1936); Moran Bros. Co. v. United States, 61 Ct. Cl. 73 (1925); Sanborn v. United States, 46 Ct. Cl. 254 (1911); Cramp & Sons Ship & Engine Building Co. v. United States, 41 Ct. Cl. 164 (1906); Kelly & Kelly v. United States, 31 Ct. Cl. 361 (1896).

71. 105 Ct. Cl. at 155 (Reporter's Statement of the Case). See also note 51 supra, for a further reference to the Board's proceedings.

72. Severin v. United States, 102 Ct. Cl. 74 (1943); Magoba Construction Co. v. United States, 99 Ct. Cl. 662, 690 (1943).

73. 99 Ct. Cl. 662 (1943).

number" of changes required. The court ruled that the Government "cannot be held liable in damages for delay in completion of the original work called for by the contract due to changes authorized therein, unless it abused its privilege to make changes or otherwise unreasonably delayed the proper prosecution of the work in such a way and under such circumstances as to constitute a breach of some express or implied provision of the contract."[74] The court found that the facts did not warrant such finding.

In *F. H. McGraw & Co. v. United States*,[75] the Government had issued a stop-order, which served, among other things, to delay the contractor 159 days before modifications to the contract effecting certain design revisions were issued, and accordingly the contractor was allowed to recover his increased costs,[76] attributable to what the court found were unreasonable delays.

In *Continental-Illinois National Bank v. United States*,[77] the facts involved a variety of delays. The court ruled that, for the delays attributable to unsuitable soil conditions, the Government was not required to pay the contractor's overhead losses caused by that circumstance. As stated by the court, "They were not due to the fault of either party to the contract."[78] But for the delay resulting in connection with the re-

74. Id. at 690.

75. 131 Ct. Cl. 501, 130 F. Supp. 394 (1955).

76. In this case, the court emphasized the proposition that a contractor must prove his damages. This does not mean absolute certainty. In this connection, it referred to its decision on the question of measure of damages in Great Lakes Dredge & Dock Co. v. United States, 119 Ct. Cl. 504, 96 F. Supp. 923 (1951), cert. denied, 342 U.S. 953 (1952), and MacDougald Construction Co. v. United States, 122 Ct. Cl. 210 (1952), and warned that those decisions were not to be taken as the standard. In these latter cases, the court had approved measure of damages on the basis of the difference between the contract price and the actual contract cost of completion. In the McGraw case, the court stated that this method ". . . is by no means satisfactory, because among other things it assumes plaintiff's costs were reasonable and that plaintiff was not responsible for any increases in costs, and because it assumes that plaintiff's bid was accurately computed, which is not always the case by any means." Supra at 511, 130 F. Supp. at 400. The court further said, "Our opinion in the Great Lakes case was not intended to give approval to this method of proving damages except in an extreme case and under proven safeguards." Supra at 511, 130 F. Supp. at 400. In the Great Lakes case, the plaintiff had not received any equitable adjustment from the Contracting Officer for the changed conditions in the manner prescribed by the Changes article. Therefore, the court in that case said, the adjustment should be based on the increased costs under actual conditions and not on what might have been costs if some other method had been employed to meet the changed conditions. In the McGraw case, there was not included in the amount found by the Contracting Officer any item covering damages for delay, and since there was proof of these damages more reliable than the difference in plaintiff's bid price and his actual cost, it proceeded to determine the plaintiff's damages factually. As a result, the plaintiff was allowed to recover approximately $57,000, as against approximately $390,000 which it had sought under the Great Lakes and MacDougald theories.

77. 121 Ct. Cl. 203, 101 F. Supp. 755 (1952).

78. Id. at 242, 101 F. Supp. at 757.

design of a boiler house, which took the Government 175 days, the court felt that there was a breach of the contract, and allowed recovery by the contractor of the expenses incurred by him as a result.

*Delays in Furnishing Materials, Equipment, etc.*

As for the cases involving delays by the Government in furnishing materials, models, drawings and other data, where the item to be furnished is completely within the control of the Government, the court has held that the Government is under an implied obligation to have such item available for the contractor's use when the item is needed by the contractor. For example, in *George A. Fuller Co. v. United States*,[79] the Government had agreed to furnish to the plaintiff certain models covering interior and exterior ornamental features of the Archives Building in Washington, D.C., which plaintiff was under contract to construct for it. These models were essential for the plaintiff to have before he could complete his performance under the contract. The Government did not furnish these models to the contractor when he needed them, although it had complete control over the production of the models. As a result, the contractor suffered a six-month delay, carrying him into an extra winter and requiring him to furnish temporary heat for an extra winter season. Under these circumstances, the court ruled that the contractor was entitled to recover costs incurred in furnishing the additional temporary heat plus job overhead costs for the period of delay, even though the contract did not expressly state when models were to be furnished to the contractor, and even though the contract included the usual provision for extensions of time for delays caused by the Government.

Having just had its decision in the *Foley* case reversed by the Supreme Court, the court in the *Fuller* case re-examined the various Supreme Court and Court of Claims decisions on the subject of delays, and concluded that the Supreme Court decisions in the *Crook, Rice* and *Foley* cases did not bar recovery under the facts set forth. The court pointed out that the *Crook* and *Rice* cases exempted the Government from liability for damages caused by delays incident to the making of changes, but this was for the reason that the Government had reserved the right to make changes and because it necessarily followed that some delay would result therefrom. In the *Fuller* case, on the other hand, there was no reserved right to delay furnishing the model. As for the *Foley* case, the court pointed out that there the Government, because of conditions beyond its control, was unable to furnish the runways in time for the contractor to complete its work within the contract time.

The court observed that it had never been thought that the standard

79. 108 Ct. Cl. 70, 69 F. Supp. 409 (1947).

"Delays" article providing for an extension of time for completion of the work on account of delays due to unforeseen causes, including those caused by the Government, would serve to relieve the Government from liability for damages for such delays. The court also pointed out that it had never been doubted that the Government could be held liable for delays caused by it, in the absence of a clause in the contract expressly exempting it from liability therefor. As stated by the court:

"Shortly after this court was established, the Supreme Court so held in *Clark v. United States,* 6 Wall. 543. It also so held in *United States v. Speed, supra;* and in *United States v. Smith, supra;* and in *United States v. Mueller,* 113 U. S. 153, 156; and in *United States v. Wyckoff Pipe Co.,* 271 U. S. 263; and this was implied in *Plumley v. United States,* 226 U. S. 545, 548."[80]

The court also cited several of its own cases in support of this proposition, including the *Harwood-Nebel* case, supra. The court concluded as follows:

"We think that the Government when it agreed to furnish the models without condition was bound to furnish them on time as much as if an express provision to this effect had been incorporated in the contract, and that if it failed to do so it breached this provision of the contract and is therefore liable for any damages resulting therefrom.

"Certainly the Supreme Court would not exempt the Government from liability when the delay was willful, as in *James Stewart & Co. v. United States,* 105 C. Cls. 284, where the architect, who had to pass on the models to be furnished by the Government, went to Europe before selecting them and stayed there three months, disdainful of the effect this would have on the progress of the plaintiff's work. . . . We think the plaintiff has carried the burden upon it when it shows failure to deliver the models on time, and that thereupon the burden of showing an excusable reason therefor is cast upon the defendant. No reason has been shown for the delay in this case except the meticulosity of the architect in passing on the models. This is not a sufficient excuse. The Government should have ordered the models in sufficient time to have enabled the contractor to proceed without delay, or, if it desired to furnish them in its own good time with impunity for any delay caused the contractor, it should have incorporated in the contract a provision exempting it from liability for failure to furnish them when needed."[81]

In *James Stewart & Co. v. United States*[82] the facts were somewhat similar to those existing in the *Fuller* case. The court did not hesitate to find for the contractor, the Government's "procrastination" being largely responsible for the delays. The court recognized that for some delay necessarily caused by making changes, the Government would not be liable, citing the *Rice* case, supra, but emphasized that the Government could not escape liability for any unnecessary delay.

In *Thompson v. United States,*[83] where the Government was required

80. Id. at 96, 69 F. Supp. at 412.

81. Id. at 101, 69 F. Supp. at 415.

82. 105 Ct. Cl. 284, 63 F. Supp. 653 (1946).

83. 130 Ct. Cl. 1, 124 F. Supp. 645 (1954).

to furnish the steel for the construction contractor's operations, the court found that the Government was at fault in getting the steel in that it did not advertise for the steel until September 1945, notwithstanding that the construction contract was entered into in August 1945. Furthermore, the evidence showed that the contractor, had he known about the Government's difficulties in getting steel, could have obtained it himself. In allowing recovery, the court distinguished this case from the Supreme Court holding in the *Foley* case and its own decisions in cases such as *Barling v. United States*,[84] supra, and *Otis Williams & Co. v. United States*.[85] In the *Williams* case, recovery was not allowed because there was no showing that the Government had been lacking in diligence in obtaining reinforcing steel, which it was obligated under the terms of the contract to furnish to the contractor. In fact, the court found that the Government had acted with great diligence under all the circumstances. Although bids had been issued in early 1945 at a time the required type of steel was in ample supply, award of the contract was not made until a year later, at a time when the type of steel required was scarce. The delay in award was due to lack of funds, a contingency specifically anticipated in the bidding documents. The fact that notice to proceed had been issued immediately after the award of the contract, when the steel was still not available, was not considered significant, because it was found by the court to have been issued solely for the convenience of the contractor to enable him to receive contract payments for work performed at his own risk prior to award of the contract.

*Delays From Failure to Promptly Issue Notice to Proceed*

The effect of a failure to issue notice to proceed within a reasonable time after award of the contract was considered in *Ross Engineering Co. v. United States*.[86] In that case, the court ruled that there was clearly an implied obligation on the part of the Government to give such notice within a reasonable time in the absence of express language in the contract governing the time of issuance, and allowed the contractor to recover his extra expenses attributable to the Government's unreasonable delay in issuance of the notice to proceed. The Government had thought that the case of *Detroit Steel Products Co. v. United States*[87] was authority for the proposition that delay in issuance of notice to proceed created no right in the plaintiff to recover resulting increased costs. But the court distinguished the *Detroit* case as follows:

"In the Detroit case, the court pointed out at page 697 that the contract in that case

84. See p. 435 and note 56 supra.
85. See note 49 supra.
86. 92 Ct. Cl. 253 (1940).
87. 62 Ct. Cl. 686 (1926).

provided that the contractor was to commence the work, for which a claim for delay was made, when it received notice from the Government that the building on which it was to perform the work was ready, and there was no finding or conclusion by the court that any delay complained of [in the issuance of the notice to proceed] was unreasonable. A reading of the opinion in that case will show that it is not authority against the plaintiff-contractor's claim for recovery under the facts disclosed in the instant case."[88]

The *Detroit* case also involved suspension of work and other interferences by the Government, *after* notice to proceed was issued. The following quotation from that case is concise and illuminating:

"There have been many cases in this court where the Government has been made to respond to damages for delays in or suspension of or interference with the contractor's work, caused by unwarranted acts of the Government's agents.

"In *Smith's case,* 94 U. S. 214, it has held that by reason of its improper suspension of the contractor's work, the Government was liable in damages. There being no specified time within which the work should be done, the court said that the law implied it would be completed within a reasonable time and 'that the United States would not unnecessarily interfere to prevent this'. It is further said in the *Smith case* (Page 217): 'In *Clark's case,* 6 Wall. 546, it was decided that the United States were liable for damages resulting from an improper interference with the work of a contractor; and in *Smoot's case,* 15 id. 47, that the principles which govern inquiries as to the conduct of individuals, in respect to their contracts, are equally applicable when the United States are a party. The same rules were applied in the case of *Amoskeag Co.* 17 id. 592. Here the work was stopped by order of the United States.' See also *Barlow case,* 184 U. S. 123, 136; *Mueller case,* 113 U. S. 153; *Behan case,* 110 U. S. 338; *Houston Construction Co. case,* 38 Ct. Cl. 724, 736. . . . But, after being notified that it could proceed, it should have the right to rely on this notification, and for any subsequent unwarranted interferences and interruptions, the Government should answer to the extent of the damages naturally and proximately arising therefrom."[89]

*Delays Resulting From Faulty Specifications*

*Warren Bros. Road Co. v. United States*[90] is illustrative both with respect to delays in issuance of notice to proceed and with respect to delays attributable to faulty specifications prepared by the Government. The Government withheld issuance of notice to proceed because of unusually rainy weather. Delays also occurred as a result of bad drainage, attributable to faulty specifications issued by the Government. As to the first item, the court did not allow recovery, since such delays were not due to any wrongful act of the United States. But as for the faulty specifications, the court stated:

"Where a contractor suffers damage on account of faulty specifications, he is entitled to recover."[91]

88. 92 Ct. Cl. at 261.
89. 62 Ct. Cl. at 697.
90. 123 Ct. Cl. 48, 105 F. Supp. 826 (1952).
91. Id. at 82, 105 F. Supp. at 830.

## IV. Conclusion

The cases examined in this discussion demonstrate quite clearly that the Government will not be held liable for damages due to delay caused by it in its sovereign capacity, and that it will not be held liable for damages due to delay caused by it in its contractual capacity unless it has breached an express obligation or a representation on which the contractor was entitled to rely, or in the alternative, has exhibited a lack of diligence or other similarly unreasonable conduct in carrying out any of its contractual obligations, express or implied. In the absence of one of these conditions, the Government cannnot be held liable no matter how great are the increased costs resulting from Government-caused delays. The cases of *Northwestern Engineering Co. v. United States*,[92] *Parish v. United States*,[93] and *Stafford v. United States*[94] are good ilustrations of how increased costs alone, even though unanticipated, cannot constitute a basis for recovery.

In the *Northwestern* case, the plaintiff's contract was for the furnishing of a travelling road-building machine and operating crew, to be paid for on a production basis, with capacity to place at least 150 tons of material per hour, the aggregate being supplied by the Government together with the necessary bituminous paving materials. The contractor had obtained the machine through a rental arrangement with the owner. Obviously, the longer the machine was used, the more the rental liability of the plaintiff-contractor-lessee. Production had to be continuous to assure a reasonable profit. The Government did not furnish sufficient aggregate in time, thereby requiring rental of the machine for a longer period than contemplated by the contractor. He brought suit against the Government on the basis of a breach of contract, and alleged that the Government had unduly delayed his operations. The trial court had found that delays in completing the Government contract were caused by the weather, climate and other conditions over which the Government had no control. On appeal to the Circuit Court, the latter ruled that not only would this be sufficient to prevent recovery against the Government, *but that recovery was also prevented on the basis that the Government had made no representation to supply the aggregate by a fixed date.*

In the *Parish* case, the contractor had brought his equipment on the job site in anticipation of the Notice to Proceed. Notice to Proceed was not issued until almost a year later. Under the terms of the contract, the contractor was aware that the CAA (the contracting agency) had to get

92. 154 F.2d 793 (8th Cir. 1946). One of the relatively few "Breach of Contracts" cases against the Government involving Government-caused delays which have been litigated in the District Courts, rather than in the Court of Claims.

93. 120 Ct. Cl. 100, 98 F. Supp. 347 (1951).

94. See note 9 supra.

War Production Board clearance before Notice to Proceed could be issued. In disallowing recovery, the court held that the Government could not be liable in the absence of a breach of contract. The fact that the contractor sustains losses is not enough to enlarge the provisions of a written contract, said the court, citing *Wells Bros. Co. v. United States,* supra. Having been damaged by circumstances that were neither foreseeable nor attributable to the fault of either party, the contractor must bear the loss himself. The court recognized the distinction between instances of delay to a contractor resulting from some want of diligence on the part of the Government in making work or materials available, citing the *Fuller* case, and instances of delay resulting from the exercise by the Government of some right reserved to itself, citing the *Stafford* case, and placed the *Parish* case in the latter category. It also recognized that the withholding of a Notice to Proceed for an unreasonable period without cause may be construed to be a breach of contract, citing *Ross v. United States,* supra, but emphasized that reasonableness in each instance was a question of fact.

Question arises as to the application of the principles governing liability of the Government for delays to a situation where the Government contract includes a so-called "suspension of work" clause. As was mentioned earlier in this discussion,[95] this type clause is utilized by some Government agencies to furnish a contractual remedy for adjustment on account of unreasonable delay by the Government. It is not intended to increase the contractor's substantive rights. In the application of such clause, the crucial issue is always one of fact, that is, whether a determination can be made that the act of commission or ommission attributable to the Government was unreasonable. Where the course of conduct by the Government is negligent, unreasonable, or not consistent with an express warranty, the "suspension" clause is brought into operation. But, if a situation arose similar to that existing in the *Foley* case, where it was held that the Government did not breach any contract obligation, the "suspension" clause could not be invoked to compensate for delay.

Closely allied to the problem of delays arising in the performance of Government construction contracts is the problem of recoverable costs and other damages. If recovery is sought under the provisions of Articles

95. See note 19 supra. The Atomic Energy Commission has utilized a "Suspension" clause in its construction contracts since 1951; the Department of Interior has under current consideration use of a "Suspension" clause in appropriate Bureau of Reclamation construction contracts. In this connection, see Comp. Gen. Dec. No. B-127764, October 11, 1956, 6 CCF ¶ 62011, upholding the validity of such clause. This opinion emphasizes that the Rice decision by the Supreme Court was governed by the contract provisions involved in that case, and that such Supreme Court decision does not preclude payment of additional costs resulting from unreasonable delays incident to changes or changed conditions where specifically authorized by appropriate contractual provisions.

3 (Changes) and 4 (Changed Conditions) of the Government's Standard Form of Construction Contract, such recovery, under the *Rice* doctrine, is limited to extra expenses incurred in the performance of that part of the work which has been changed under the above cited provisions of the contract. This means that if the delay for which extra costs are sought is inherent in the changed work, extra costs are recoverable, but if the delay relates to work not changed, only an extension of time is permissible. But if recovery is sought under the "suspension of work" clause, extra costs resulting from delays attributable both to the changed and unchanged work may be recoverable. In other words, where a suspension of all or part of the work ordered for the convenience of the Government pending a change in plans and specifications is for an unreasonable period, the contractor will be entitled not only to be compensated under Article 3 of the contract for the increase in costs, including reasonable overhead and profit, of the work as changed, but may be compensated as well under the "suspension" clause for increased costs (which may include or consist of overhead but not profit) resulting from the unreasonable delay or suspension.[96]

96. See note 76 supra. See also Cuneo, Extra Work Under Federal Government Construction Contracts, 24 Fordham L. Rev. 556, 561-62 (1956), regarding items of expense allowed as damages because of unreasonable delay in effecting changes under the contract provisions. Field office overhead and expense, 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, are examples of the type of expenses generally allowed by the Court of Claims. As further pointed out by Cuneo, "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," issued under the provisions of the contract clause authorizing changes. And see also Gaskins, Changed Conditions and Misrepresentation of Subsurface Materials as Related to Government Construction Contracts, 24 Fordham L. Rev., 588, 595 (1956), and annotation 115 A.L.R. 65 (1938), where it is pointed out in passing, that in connection with the measurement of damages for breach of contract based on unreasonable delay, "among the common items of damages allowed are increased costs, such as those due to the rises in labor or material costs, or to carrying over into an unfavorable season, and overhead expenses continuing during a period of suspension, such as wages of laborers kept idle, and rental value of equipment, depreciation on machinery kept idle, etc." The Court of Claims apparently has established the principle that, in connection with idle equipment, no more than fifty per cent of the fair rental value will be allowed, presumably because of the absence of "wear and tear" on such idle equipment. Henry Ericsson Co. v. United States, 104 Ct. Cl. 397, 62 F. Supp. 312, cert. denied, 327 U.S. 784 (1945); Brand Investment Co. v. United States, 102 Ct. Cl. 40, 58 F. Supp. 749, cert. denied, 324 U.S. 850 (1944). In the Ericsson case, the court stated, at 427, 62 F. Supp. at 326: "In computing the plaintiff's damages resulting from the delays caused by the Government's breaches of contract, we have included . . . compensation for machinery owned by the plaintiff and rendered idle by the delay, . . . and because of the absence of wear and tear upon it, awarded one-half of the fair rental value of it."

On the other hand, if a breach of contract can be established and there is no "suspension" clause in the contract, the contractor may recover all the damages reasonably flowing from the Government-caused delays, through appropriate litigation in the United States District Courts or the Court of Claims.[97]

The problem of responsibility for increased costs due to delays encountered in the performance of Government construction contracts, is inseparable from the constant conflict between the extent of the risks to be assumed by the contractor under Government construction contracts and the Government's desire to obtain the lowest possible bid price for the performance of Government work. Clearly, if the Government assures the contractor by appropriate contract provisions that any unexpected expenses resulting from delays not attributable to the contractor's fault will be compensated for by the Government, the bid prices should be relatively lower. But where is the dividing line? To what extent should the Government relieve the contractor (with a resultant increase in Government costs) of the risk of delay in achieving the ideal of bid prices without contingency items?

97. The Ericsson case, supra note 96, also emphasizes this right of recovery. The Government had contended in that case that the change orders which the contractor had accepted and which extended the contract completion date, so that in fact all work was completed within the contract period, barred the contractor from recovery for damages due to Government-caused delays. The court did not agree with this contention because: "There was no relation between these change orders and the delays which we have found to be breaches of contract." Supra at 428, 62 F. Supp. at 326. The court stated they (the change orders) were not given by the Government or accepted by the plaintiff as a compromise or settlement of any dispute between the parties as to whether there had been delays, involving breaches of contract, not related to the subject matter of the change orders. In these circumstances, the acceptance of the change orders did not foreclose the plaintiff from a remedy for breach of contract which in fact delayed and damaged the plaintiff. See also Houston Ready-Cut House Co. v. United States, 119 Ct. Cl. 120, 190, 96 F. Supp. 629, 637 (1951); Tobin Quarries, Inc. v. United States, 114 Ct. Cl. 286, 84 F. Supp. 1021 (1949).