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INTRODUCTION

ONE of the most complex problems presented in claims under the standard Government construction contract[1] is to prove the amount of damages sustained where the contract work cannot be performed as planned. This article deals principally with proof of the amount of damages where there is a breach of contract, and proof of the amount of increased costs sustained, where a remedy is provided under the terms of the contract, when the contract work is delayed and operations are disrupted.

As the law now seems to stand, there is a great difference between the extent of damages recoverable where a breach of a contract is involved, and the extent to which increased costs are compensable under the terms of the contract. The author uses the words "damages" and "increased costs" advisedly, because the courts hold that administrative agencies are without authority to pay claims for damages as the term is used in the ordinary sense of the word.[2] It is the duty of the administrative agencies to pay a contractor for increased costs incurred where a remedy is provided in the contract.[3] As to the latter, particular reference is made to the standard "Changes" article[4] and the "Changed Conditions" article[5] of the Standard Form of Government Construction Contract. These two articles provide for an equitable adjustment in the contract price. In the case of breach of contract, in the absence of a contract remedy, the contractor must look to the courts for relief. However, under some circumstances, such as where there is no substantial dispute as to the facts, and

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1. U.S. Standard Form 23, approved by the Secretary of the Treasury, revised April 3, 1942; 44 C.F.R. § 54.13 (Supp. 1956).

2. Langevin v. United States, 100 Ct. Cl. 15, 30 (1943); Phoenix Bridge Co. v. United States, 85 Ct. Cl. 603, 630 (1937).

3. John A. Johnson Contracting Corp. v. United States, 132 Ct. Cl. 645, 132 F. Supp. 698 (1955).

4. U.S. Standard Form 23, art. 3. For a general discussion of this matter see Cunco, Extra Work Under Federal Government Construction Contracts, 24 Fordham L. Rev. 556, 560 (1956).

5. U.S. Standard Form 23, art. 4.

a question of law is involved, relief may be had at the General Accounting Office.[6]

No attempt will be made here to deal with such questions as the right of the contracting officer to order changes in the contract, the permissible extent thereof, or with factors pertinent to determining whether or not a changed condition was encountered.[7] However, an effort will be made to deal with the similarity of the evidence required to establish the amount of increased costs sustained where a changed condition causing delays and disruption of operations is encountered, and the amount of damages suffered through a breach of contract which has a similar effect upon the contractor's operations.

In estimating the contract cost, a contractor has the right to base his cost upon the performance of the work in an orderly manner and upon the carrying out of an uninterrupted operation such as any competent contractor must plan in advance of bidding. Of course the contractor must allow for certain contingencies which may normally be foreseen, such as adverse weather conditions and other expected delays. The Government, in preparing its estimate of cost, must do likewise. Specific cases dealing with an equitable adjustment will first be set forth and discussed.

Equitable Adjustment for Changed Conditions

The leading and most recent case decided by the Court of Claims dealing with equitable adjustment under the terms of the "Changed Conditions" article of the contract is that of *John A. Johnson Contracting Corp. v. United States*.[8] In that case recovery was allowed for increased costs sustained as a result of defective roads which were constructed by the Government and used by the contractor in building a hospital project. The court held that both parties to the contract assumed that plaintiff would use the roads furnished by the Government as haul roads in connection with its building operations. The contracting officer took the position that it was plaintiff's responsibility to keep the roads passable, or to construct its own roads. The court rejected the Government's contention and held that both the Government and the contractor expected that the roads would be adequate for use as construction roads in performing the contract, and that the poor condition of the roads constituted a changed condition. The court said that plaintiff was entitled to recover under article 4, the "Changed Conditions" article, for expenditures reasonably and naturally flowing from encountering the unforeseen conditions. In this case the Court of Claims, probably for the first time, clearly

6. 31 U.S.C.A. §§ 71, 74 (1954).

7. See Gaskins, Changed Conditions and Misrepresentation of Subsurface Materials as Related to Government Construction Contracts, 24 Fordham L. Rev. 588 (1956).

8. 132 Ct. Cl. 645, 132 F. Supp. 698 (1955).

laid down a rule of law with respect to the extent of the applicability of article 4 of the contract. Plaintiff's theory of the case was that the Government had impliedly guaranteed to supply a usable system of roads and its failure to do so constituted a breach of the contract. The court held, in effect, that the theory advanced by plaintiff was immaterial, and that the real problem was, ". . . whether the disastrous failure of the roads was an unforeseen event from the expense of which the contractor was entitled to be relieved by the application of Article IV."[9] The court ruled that the measure of plaintiff's compensation would have been the same on either basis. Therefore, the effect of the court's decision was that regardless of whether the damages suffered were caused by an unforeseen condition, or whether they resulted from a breach of the contract, the measure of damages would have been the same. Indeed, the nature of the types of damages awarded by the court makes this clear.

The claims asserted were for the costs of: road stabilization and reconstruction, drainage maintenance and reconstruction, regrading areas, unusual construction methods, work damage and restoration, unusual distribution methods and rehandling of materials, reduced efficiency of workmen, and administrative and supervisory costs. Approximately one-half of the amount of damages was awarded for costs caused by reduced efficiency of the workmen arising out of the unfavorable conditions under which the contractor had to operate resulting from the unforeseen conditions.

It is important to note from the decision in this case that the amount allowed largely covered cost increases which had nothing to do with structural changes, or with the cost of performance after access to the buildings covered by the contract was accomplished. The majority of the items allowed represented increased costs incurred in gaining access to the various buildings and excess costs occasioned by reduced efficiency of labor after the workmen and materials were transported to the buildings. In short, the damages allowed were in the nature of collateral costs resulting chiefly from delays and disruption of operations. The completed project as built was the same as contracted for. Hence the increased costs allowed may be said to have been more in the nature of consequential damages than direct damages.

Except for the difference in the language used in article 4 of the contract, it is difficult to distinguish the *Johnson* case from the case of *United States v. Rice*.[10] The contract provision in the former case provides, with respect to equitable adjustment, that the contract shall be modified to provide for any increase or decrease of cost "resulting from such condi-

9. Id. at 656, 132 F. Supp. at 703.

10. 317 U.S. 61 (1942).

tions."[11] Article 4 of the contract in the *Rice* case provides for an equitable adjustment for changes made in the drawings or specifications as may be found to be necessary if changed conditions are encountered, and further provides that any increase or decrease of cost resulting from *such changes* shall be adjusted under article 3.[12]

For purposes material to this discussion, article 3, authorizing the Government to make changes in the drawings or specifications, is the same in both contracts. Thus, no discussion of that article is deemed necessary. The distinction relative to the extent of the adjustment to be made in the contract price under article 4 in the two contracts cannot be too strongly emphasized.

In the *Rice* case, article 4 relating to a changed condition limits the contract adjustment to increased costs resulting from actual changes made in the drawings or specifications.[13] Therefore, a price adjustment, as the Supreme Court said in the *Rice* case, is required only when structural changes are made to cope with a changed condition, and then only for the value of the changed work, plus profit.[14] In that case plaintiff's work was seriously delayed due to encountering changed conditions which had the effect of greatly increasing the cost of performing other parts of the contract work which were not changed. The Supreme Court held that since the Government, by the terms of the contract, reserved the right to

11. "'ARTICLE 4. Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.'" 132 Ct. Cl. at 710.

12. See note 4 supra.

13. "'ARTICLE 4. Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.'" 317 U.S. at 66.

14. 317 U.S. at 67.

make changes, plaintiff was not entitled to recover the additional costs resulting from delays caused by the changed conditions.

In article 4 of the *Johnson* contract no reference was made to limiting adjustment in contract price to changes necessitated by encountering a changed condition. It simply and clearly provides for a price adjustment to cover any increase or decrease of cost resulting from *encountering changed conditions.*

The decision in the *Rice* case seems to have been based entirely upon the language of article 4. The Supreme Court held that since the Government reserved the right to make changes upon discovery of materially different subsurface or latent conditions from those shown on the drawings or indicated in the specifications, it could not be said that delays incident to the permitted changes amounted to a breach of the contract.[15] As stated, no such language is contained in article 4 of the contract in the *Johnson* case. Indeed, it makes no specific reference to changes. It unqualifiedly provides that the contract shall be modified to cover any increase or decrease in cost or time resulting from the changed conditions.

In the *Rice* case the Court stated:

"If there are rights to recover damages where the government exercises its reserved power to delay, they must be found in the particular provisions fixing the rights of the parties." (Emphasis added.)[16]

It is suggested that under the revised article 4 as used in the *Johnson* case the rights of the parties are fixed, and the contractor is entitled to payment, under the contract, of the increased costs of performance and adjustment in contract time resulting from encountering unforeseeable conditions. Further, it appears that the increased costs allowable should include those costs attributable to delays and disruption of operations occasioned by the changed conditions. Accordingly, it may be said that the bar to recovery of such increased costs as presented by the Supreme Court in the *Rice* case has been removed.

In the *Johnson* case, the court, in determining an equitable adjustment, allowed recovery for a number of specific items. The total amount of $310,000 allowed for increased costs occasioned by the changed condition included the sum of $150,000 for reduced efficiency of workmen.[17] This item is worthy of particular note. It covers the amount of increased labor costs which the court found was incurred, ". . . due to the inconsistent flow of materials and conditions hampering operations and time of travel to and from work."[18] Obviously, such increased costs are not susceptible

15. Id. at 65-66.
16. Id. at 66.
17. 132 Ct. Cl. at 696.
18. Ibid.

of proof by actual cost records. The amount, therefore, must of necessity be based upon an estimate. The court said: "Time and volume were estimated on the basis of experience with a similar job during the preceding winter. Costs were itemized in terms of increased pay-rolls."[19] Such a method assumes that the other job was substantially the same as the one covered by the instant contract. There are so many factors to be taken into account in determining whether another job or the method of operation were similar enough to justify a comparison that extensive comment is not undertaken here. It will be interesting to observe the court's decisions in future cases dealing with similar situations.

The author suggests that the increased costs in the *Johnson* case could have been more accurately established by a comparison of the actual cost of the entire contract work as performed, with an estimate of the reasonable cost of the work if performed without interference. Such a method was adopted by the court in an earlier case, *Great Lakes Dredge & Dock Co. v. United States*,[20] decided July 9, 1951, which also involved an equitable adjustment for encountering changed conditions. Plaintiff there claimed the difference between the actual costs of the work and its estimated costs. The difference was adjusted by taking into account certain admitted errors on the part of plaintiff in making its estimate, and also certain costs actually incurred which were not attributable to encountering the changed conditions. The court rejected plaintiff's contention on the principal ground that the evidence failed to establish that plaintiff's estimated costs were correct. The court awarded judgment based upon the difference between the reasonable cost of the parts of the work which were affected by the changed conditions and the actual cost thereof. The actual cost was based upon plaintiff's cost records. The reasonable cost of the work as found by the court was the average amount of all other bids received, together with the amount of the Government estimate. From the difference thus determined there was deducted the extra cost of performing certain work for which plaintiff was responsible.

The court found that the method used was the fairest one for determining plaintiff's increased costs due to encountering the changed conditions. No allowance was made for profit on the increased costs of performance. In arriving at the fair and reasonable cost of the work the amounts considered by the court included profit on the original contract work. It is suggested that if the entire contract work had been affected by the changed conditions, the method used would have been extended to include all work instead of being confined to certain items. Indeed, in the case of a lump sum bid both the reasonable and the actual costs must

19. Ibid.

20. 119 Ct. Cl. 504, 96 F. Supp. 923 (1951), cert. denied, 342 U.S. 953 (1952).

of necessity be established on an over-all basis. The end result should be substantially the same. It should not be difficult to establish, if such is the case, that the unaffected work was performed in an efficient manner and at a reasonable cost.

It is significant to note that in this opinion the Court of Claims did not cite any authority in support of the method used in arriving at the amount of increased costs awarded.

The case seems to stand for the proposition that once the actual cost and the reasonable cost are established, the difference represents increased costs due to the fault of the Government, with the exceptions noted above. Succinctly stated, after proof embracing all the factors mentioned is introduced, plaintiff has made out a prima facie case and the burden then seems to shift to the defendant.

That the court had no doubt about the propriety of awarding judgment for increased costs in accordance with the method adopted in the *Great Lakes* case, where the circumstances justify it, is shown by the case of *MacDougald Construction Co. v. United States*,[21] decided May 6, 1952, about one year after the *Great Lakes* decision. There the court cited that case in following substantially the same method of determining increased costs resulting from encountering a changed condition.

It is to be remembered that both the *Great Lakes* and *MacDougald* cases involve equitable adjustments for encountering unforeseen conditions; a breach of contract is not involved. However, in both cases plaintiff's operations were completely disrupted which is often the case when there is a breach of contract.

The Court of Claims recognized the similarity of proof in the two types of claims in its most recent opinion dealing with the question of the measure of damages to be applied in a claim involving a breach of contract, *F. H. McGraw & Co. v. United States*,[22] decided April 5, 1955. This case is set forth and discussed below.

Damages for Breach of Contract

The courts uniformly hold that the Government is liable for delays caused by it in the absence of a clause in the contract expressly exempting it from liability.[23]

21. 122 Ct. Cl. 210 (1952).

22. 131 Ct. Cl. 501, 130 F. Supp. 394 (1955).

23. Plumley v. United States, 226 U.S. 545 (1913); United States v. Mueller, 113 U.S. 153 (1885); United States v. Speed, 75 U.S. (8 Wall.) 77 (1868); Clark v. United States, 73 U.S. (6 Wall.) 543 (1867); Geo. A. Fuller Co. v. United States, 103 Ct. Cl. 70, 69 F. Supp. 409 (1947); Harwood-Nebel Constr. Co. v. United States, 105 Ct. Cl. 116 (1945); Sobel v. United States, 88 Ct. Cl. 149 (1938); Plato v. United States, 86 Ct. Cl. 665 (1938); Rust Engineering Co. v. United States, 86 Ct. Cl. 461 (1938); Phoenix Bridge Co. v. United

Uncertainty of Amount

"Uncertainty as to the amount of damage . . . does not preclude recovery where the fact of damage is clearly established . . . if a reasonable basis for computation is afforded although the result may be only approximate."[24] In *First Citizens Bank & Trust Co. v. United States*,[25] the Court of Claims said that when the plaintiff has proved that the contract was breached and he was damaged as a result thereof, ". . . absolute certainty as to the amount of damages is not essential, this being a matter for reasonable determination according to the circumstances of each case."[26] The court went on to say that: "The underlying principle is full compensation for the wrong done, and the general rule is that the compensation shall be equal to the injury. 'The breach is the standard by which the compensation is to be measured, and all that the law requires is that such damages be allowed as, in the judgment of fair men, directly and naturally resulted from the breach of the contract for which the suit is brought.' "[27]

Where the breach of a contract interferes with the proper performance of the contract in accordance with its terms, the injured party may recover damages to the extent, at least, of any loss which was the necessary consequence of such interference.[28] As a part of damage sustained for breach of contract, anticipated profits prevented by the breach may also be recovered where properly proved.[29] The law seems to be well established that a party who has broken his contract will not be permitted to escape liability because of the lack of a perfect measure of damages caused by his breach.

The Supreme Court has gone so far as to say that the party who

States, 85 Ct. Cl. 603 (1937); Karno-Smith Co. v. United States, 84 Ct. Cl. 110 (1936); John N. Knauff Co. v. United States, 78 Ct. Cl. 423 (1933); Pope v. United States, 75 Ct. Cl. 436 (1932); Donnell-Zane Co. v. United States, 75 Ct. Cl. 368 (1932); Levering & Garrigues Co. v. United States, 73 Ct. Cl. 566 (1932); Carroll v. United States, 67 Ct. Cl. 513 (1929); Weehawken Dry Dock Co. v. United States, 65 Ct. Cl. 662 (1928).

24. Reiss & Weinsier, Inc. v. United States, 126 Ct. Cl. 713, 721, 116 F. Supp. 562, 567 (1953). See also Palmer v. Connecticut Ry. & Lighting Co., 311 U.S. 544 (1941); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927).

25. 110 Ct. Cl. 280, 76 F. Supp. 250 (1948).

26. Id. at 326, 76 F. Supp. at 274.

27. Id. at 326, 76 F. Supp. at 274, citing Needles v. United States, 101 Ct. Cl. 535, 618 (1944).

28. United States v. Barlow, 184 U.S. 123 (1902); United States v. Smith, 94 U.S. 214 (1876).

29. Anvil Mining Co. v. Humble, 153 U.S. 540 (1894); Howard v. Stillwell and Bierce Mfg. Co., 139 U.S. 199 (1891); United States v. Benhan, 110 U.S. 338 (1884); Suburban Contracting Co. v. United States, 76 Ct. Cl. 533 (1932).

voluntarily and wrongfully puts an end to a contract, and prevents the other party from performing it, is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred.[30]

Measure of Damages

It appears that the general rule is that the courts are more liberal in awarding damages for a breach of contract than they are in awarding increased costs in cases involving an equitable adjustment under the terms of the contract. However, in their most recent decision involving damages for a breach of contract the Court of Claims seems to have departed in some respects from this rule. In *F. H. McGraw & Co. v. United States,* heretofore referred to,[31] the court said that their opinion in the *Great Lakes* case, which has already been discussed at some length, was not intended to give approval to the method of proving damages there adopted except in an extreme case and under proper safeguards. After reciting that the *Great Lakes* and *MacDougald* cases involved equitable adjustment for encountering unforeseen conditions, the court stated that approval was not given to proof of damages for a breach of contract claim by showing the difference in plaintiff's bid and his costs on the entire job. The reason given by the court was:

"This method of proving damage 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 cost, and because it assumes plaintiff's bid was accurately computed, which is not always the case by any means."[32]

The facts in the *McGraw* case are discussed here for the purpose of emphasizing the similarity in the nature of damages suffered in cases involving breach of contract and those involving an equitable adjustment under the contract. Plaintiff had a contract for additions to a veterans' hospital. The work was in full progress when the Government issued a partial stop order because of contemplated changes which affected McGraw's entire work program. A period of 159 days elapsed between the date of the stop order and the date of receipt of the notice to proceed under the revised plan. McGraw was paid by the contracting officer for changes made, and was granted an extension of time. This adjustment did not include any damages for delay.

The court held that the Government had a reasonable time to make changes in the plans, but that it was a breach of contract if the Government's delay in making changes unreasonably disrupted the work for

30. United States v. Benhan, 110 U.S. 338, 345-46 (1884).

31. See p. 627 and note 22 supra.

32. 131 Ct. Cl. at 511, 130 F. Supp. at 400.

which the Government was liable in damages. All delay over one month was held to be unreasonable.

In rejecting the method of awarding damages as adopted in the *Great Lakes* case, the court held that there was present proof of damages more reliable than the difference in plaintiff's estimate and its actual costs.[33] The court noted that damages measured by showing the difference in plaintiff's bid and his cost on the entire project, as adopted in the *Great Lakes* and *MacDougald* cases, were not thereby approved for breach of contract cases. The court went on to say that in the *Great Lakes* case they were forced, by lack of other proof, to compute the increased costs resulting from the unforeseen conditions encountered in the manner adopted.

An examination of the facts as found by the court in the *McGraw* case discloses that the principal reason why the Court of Claims refused to follow the doctrine laid down in the *Great Lakes* case appears to be that all the losses claimed were not due to causes attributable to the fault of the Government. The evidence in the *McGraw* case did establish that plaintiff had proved the propriety and reasonableness of its bid, and the reasonableness of the contract price, both by expert testimony and by an analysis and comparison of its bid with all the bids on the project, and that the difference represented plaintiff's losses.[34] It thus appears that the court's refusal to follow the *Great Lakes* case was due to the fact that the evidence failed to establish the amount of damages sustained which was attributable to causes other than the fault of the Government. Other evidence was before the court showing the increased field office and home office overhead, and the damages incurred through inefficiency of labor resulting from the Government's breach. The court adopted the evidence showing specific amounts which was considered more satisfactory than the evidence purporting to establish damages on an over-all basis.

The court found that the actual loss of approximately $412,500 was attributable in the main to two factors, namely, increased wages paid as a result of the lifting of wage controls upon the termination of the war, and the disruption, loss of continuity, and delay caused by the issuance of the stop order. The court further found that plaintiff had complained about difficulty experienced in obtaining an adequate supply of various types of labor throughout the job, and that no doubt some part of the loss was attributable to this condition. Hence, there were two factors causing plaintiff's loss which were not attributable to the fault of the Government, i.e., increased wages paid as a result of lifting wage controls, and difficulty in obtaining adequate labor. The opinion does not show that there was

33. Id. at 512, 130 F. Supp. at 400.
34. Id. at 576-77.

any proof segregating the amount of increased costs occasioned by the two latter causes, which were not due to the fault of the Government and should have been deducted from the over-all loss.

With respect to the increased wages paid due to the lifting of wage controls, it is suggested, in proving the amount of damages suffered in cases of this nature, that after establishing that the contract work would have been completed by a certain date except for the breach, the increased wages paid due to lifting wage controls should be segregated, and the portion for which the Government was not responsible deducted from the claim. With respect to the amount of damages occasioned by an inadequate supply of labor, it is suggested that evidence showing a reasonable approximation of the amount may be introduced in claims of this nature, thereby making it possible to confine the amount claimed to losses due to the fault of the Government. The court allowed damages in the amount of $41,812.77, approximately ten per cent of the sum which the court found represented plaintiff's loss arrived at through the use of the *Great Lakes* method. As it turned out, the amount allowed by the court for inefficiency of labor due to disruption of operations was no doubt based largely upon conjecture. This amounted to $28,531.15. It is impossible from a practical standpoint to prove in dollars and cents how much more per hour or per day the actual labor, equipment and other costs amount to when the contractor's operations are delayed and disrupted.

It is therefore suggested that the most competent and reliable proof that can be introduced in proving damages occasioned by a breach of contract causing disruption of operations is to establish on an over-all basis the reasonable cost of the work and the actual cost. The difference between the two, less any amount due to causes not attributable to the fault of the Government, fairly represents the amount of damages sustained as a result of a breach of the contract. Of course, the evidence must show that the contract work was performed in an efficient and workmanlike manner. Failing this, it is necessary to resort to specific items of damages.

The cases discussed above dealing with the measure of damages appear to be the exception rather than the rule. Two other cases which are pertinent in some respects are *McCloskey v. United States*,[35] and *Chalender v. United States*.[36] The *McCloskey* case, decided in 1928, involved a breach of contract occasioned by the Government's failure to furnish the site within the time required. The court allowed the difference between plaintiff's estimated cost of the portions of the work affected by

35. 66 Ct. Cl. 105 (1928).
36. 127 Ct. Cl. 557, 119 F. Supp. 186 (1954).

the breach, and the actual cost. The estimated cost adopted was based upon the difference between offers of subcontractors, which formed the basis of plaintiff's bid estimate, and the actual cost. The *Chalender* case, decided in 1954, also involved a breach of contract. The court, in determining the reasonable cost of the work took into account the amount of the Government estimate and the average of the next three highest bids. It is to be noted that in the *Great Lakes* case the court considered the average of all bids. In the *Chalender* case, the court awarded plaintiff one-half the amount of its loss on the ground that the other half was not due to the fault of the Government.

The case of *Rodgers v. United States*,[37] involving a breach of contract, is an example of the evidence failing to establish an adequate amount of damages. The Court of Claims said the record showed that the contractor was damaged in a much greater sum than they were permitted to allow.[38] The court found that the contractor was highly efficient, had adequate facilities, had performed every part of the contract in a workmanlike manner, and that, with a minor exception, the contractor was not responsible for any of the delays. The claim was itemized as to a number of specific items of increased costs.

In the case of *Stapleton Construction Co. v. United States*,[39] also involving a breach of contract, the court allowed recovery of an amount based upon the difference between the subcontract prices and the actual cost of the work.

A few of the cases in which damages were allowed for specific items proved will now be discussed.

In *Myers v. United States*,[40] involving a breach of the contract by the Government through its failure to furnish material within the time required by the contract, the court stated: "It is difficult, however, to find a correct measuring rod for the amount of damages thus caused."[41] The court said that the greater portion of the claim was not satisfactorily proved although it had no doubt that the actual damages were much more than awarded. Instead of awarding damages on an over-all basis, the court allowed specific items, the amounts of which were substantially less than claimed.

In *Warren Bros. Roads Co. v. United States*,[42] where a breach of a contract arose out of delays caused by the Government, the court allowed damages for increased labor, field and home office overhead, and rental

37. 99 Ct. Cl. 393 (1943).
38. Id. at 413.
39. 92 Ct. Cl. 551 (1940).
40. 120 Ct. Cl. 126 (1951).
41. Id. at 137.
42. 123 Ct. Cl. 48, 105 F. Supp. 826 (1952).

value of equipment,[43] as well as other miscellaneous items. No attempt was made to base damages on the difference between a reasonable cost of the work and the actual cost.

There are a number of other breach of contract cases in which specific items of overhead, equipment rentals for idle time, increased labor and material costs, and other miscellaneous items which were proved with reasonable certainty have been allowed by the Court of Claims. However, in most of these cases there were other substantial damages sustained for which no recovery was allowed because of inadequate proof. A study of the evidence in some of these cases[44] discloses that the plaintiffs were deprived of recovery under circumstances where the evidence clearly established that they were seriously damaged, but the amounts could not be determined from the proof. It is suggested here that if proof had been introduced on an over-all basis, where it was proved that the breach of the contract seriously affected the performance of the contract work as a whole, or such major portions thereof as could be segregated, as was done in the *Great Lakes* and *MacDougald* cases, substantial justice would have resulted.

In *Bushnell Steel Co. v. United States*,[45] which involved a contract covering the construction of eleven barges, the performance of which was delayed by acts of the Government constituting a breach of contract, the Court of Claims adopted an unusual method for awarding damages. The amount allowed was based upon a comparison of plaintiff's actual costs of fabrication of certain barges during a period when there was no congestion, with the costs incurred during the period of the delay by the Government causing congestion and the resultant disruption of operations.

In the case of *Houston Ready Cut House Co. v. United States*,[46] the court found the Government breached the contract in four respects by (1) failing to provide access roads, (2) delay in site preparation, (3)

43. The rental value of equipment allowed was based upon OPA rates from which the court deducted 50% for idle time. This is believed to be the only case in which the Court of Claims used OPA rates for determining the reasonable value of equipment. In a number of cases the Contractors Ownership Expense Manual of the Associated General Contractors of America has been adopted by the Court of Claims for such purposes.

44. Allied Contractors, Inc. v. United States, 129 Ct. Cl. 400, 124 F. Supp. 366 (1954); Continental Nat'l Bank v. United States, 121 Ct. Cl. 203, 101 F. Supp. 755 (1952); Irwin & Leighton v. United States, 105 Ct. Cl. 398, 65 F. Supp. 794 (1946); Geo. A. Fuller Co. v. United States, 105 Ct. Cl. 248, 63 F. Supp. 765 (1946); Brand Inv. Co. v. United States, 102 Ct. Cl. 40, 58 F. Supp. 749 (1944); Langevin v. United States, 100 Ct. Cl. 15 (1943); Sobel v. United States, 88 Ct. Cl. 149 (1938); Plato v. United States, 86 Ct. Cl. 665 (1938); Phoenix Bridge Co. v. United States, 85 Ct. Cl. 603 (1937); Donnell-Zane Co. v. United States, 75 Ct. Cl. 368 (1932).

45. 117 Ct. Cl. 348, 91 F. Supp. 576 (1950).

46. 119 Ct. Cl. 120, 96 F. Supp. 629 (1951).

delay in furnishing grade lines, and (4) delay in furnishing certain drawings and specifications. The principal items of damages claimed were excess labor and material costs occasioned by the breach. Plaintiffs introduced evidence of a comparison of cost between its construction of a similar project at another location and the cost of constructing the project involved in the claim. The Court of Claims said such a comparison cannot be expected to yield perfect accuracy but cited the case of *Needles v. United States*,[47] in which it was stated that "absolute certainty as to the amount of damages is not essential, this being a matter for determination according to the circumstances of each case . . . . [A]ll that the law requires is that such damages be allowed, as in the judgment of fair men, directly and naturally resulted from the breach of contract for which the suit is brought."[48] The court awarded judgment for excess labor and materal costs, plus payroll taxes and insurance, based more or less upon what may be said to have been a jury verdict.

Lost Profits

In order to recover lost profits as damages for breach of contract plaintiff must show the loss to be the immediate proximate result of the breach, and that the loss in event of breach was within the contemplation of the parties, either because it was natural and inevitable, and hence foreseeable, or because of some special circumstances known to the defaulting party when the contract was entered into.[49] Furthermore, the claimant must establish a sufficient basis for estimating the amount of profits lost with reasonable certainty.[50] No recovery is allowable for profit on the amount of plaintiff's damages.[51]

Competency of Evidence

A very early case dealing with the competency of evidence in proving the amount of damages sustained is that of *Harvey v. United States*.[52] There the Supreme Court reversed the Court of Claims[53] in its holding that plaintiffs had no right to rely on the testimony of experts introduced by them on the value of the work, and that they should have kept and produced accounts of this cost and expense. The Court of Claims had based its judgment upon the testimony of experts introduced by the United States in awarding damages. The Supreme Court held that plaintiffs could not be deprived of reasonable compensation for their work because they did not produce evidence of the character referred to, when

47. 101 Ct. Cl. 535 (1944).
48. Id. at 618.
49. McCormick, Damages § 25 (1935).
50. Chain Belt Co. v. United States, 127 Ct. Cl. 38, 58, 115 F. Supp. 701, 714 (1953).
51. Torres v. United States, 126 Ct. Cl. 76, 79, 112 F. Supp. 363, 365 (1953).
52. 113 U.S. 243 (1885).
53. 18 Ct. Cl. 470 (1883).

it did not appear that such evidence existed; provided, that the evidence plaintiffs produced was the best evidence available to them and that it enabled the court to arrive at a proper conclusion.

SUSPENSION OF WORK

As previously stated, the contracting agencies are generally without authority to pay claims for damages for unreasonable delays caused by the Government.[54] However, the Corps of Engineers, Department of the Army, has included in its contract a provision designed to create a remedy for paying certain types of damage claims arising out of delays caused by acts of the Government. This provision is commonly known as either paragraph G.C. 11 or G.C. 12.[55] This paragraph gives the contracting officer the right to suspend work for periods determined by him to be necessary or desirable for the convenience of the Government, and provides that where work is suspended, and the contractor is unreasonably delayed thereby, an equitable adjustment shall be made in the contract price. The provision in question is at present peculiar to the Corps of Engineers contracts, and contracts of the Atomic Energy Commission.

There have been a number of appeals decided by the Corps of Engineers Claims and Appeals Board involving the suspension of work provision. Some have been allowed and others denied. Before discussing the Board decisions, the one case decided by the Court of Claims in which paragraph G.C. 11 was before it, should first be noted.

In *Ozark Dam Constructors v. United States*,[56] the court held that plaintiffs were entitled to recover on the ground that the Government had breached the contract. The Corps of Engineers Claims and Appeals Board had refused to grant relief under paragraph G.C. 11 on the ground that a non-liability provision of the contract purporting to exempt the

54. See p. 621 and note 2 supra.

55. "SUSPENSION OF WORK: 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 or loss 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 or loss, not due to the fault or negligence of the contractor, the contracting officer shall make an equitable adjustment in the contract price and modify the contract accordingly. An equitable 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. Provided, further, that no suspension will be ordered or adjustments made under this paragraph for delays arising as the result of changes ordered or as the result of changed conditions encountered under the respective articles relating to Changes and Changed Conditions or as the result of any delays for which an extension of time may be granted under the Delays—Damages Article of this contract." Corps of Engineers, U.S. Army, Construction Contract.

56. 130 Ct. Cl. 354, 127 F. Supp. 187 (1955).

Government from liability for damages for delays caused by it in furnishing materials controlled. The court held that the non-liability provision, in light of the circumstances of the claim, was against public policy. The court, in its opinion, mentioned paragraph G.C. 11 but did not decide the question as to its applicability to the situation there involved. However, the dicta of the court indicated that such a contract provision would be upheld in a proper case.[57]

Some of the appeals decided by the Corps of Engineers Claims and Appeals Board which were allowed will now be discussed.

In an appeal where the contract provided that the right-of-way would be furnished by others, and further provided that in the event of delay only an extension of time would be granted, it became necessary during the performance of the contract for the Government to procure the right-of-way itself, and the work was delayed in doing so. The Board held that since there was a change in responsibility, the delay was for the convenience of the Government, and that the contractor was entitled to an equitable adjustment for the unreasonable delay under the suspension of work provision.[58] The author suggests that even if there had been no change in responsibility there would still have been a breach of the contract. Since it was the duty of the Government to provide the right-of-way it seems immaterial whether the Government provided it or had someone else do it. In other appeals equitable adjustments were allowed by the Board for unreasonable delays in making the site available.[59]

In an appeal where there were delays caused by collateral contractors, occasioned by encountering changed conditions, the Board allowed an equitable adjustment under paragraph G.C. 11. The Board held that appellant's work was suspended for the convenience of the Government, because the delays were necessary for the redesign of the work due to the changed conditions.[60]

In a situation where the Government unreasonably delayed the contractor in furnishing information on the length of concrete piling, the Board held the delay to be for the convenience of the Government, and ruled in favor of the appellant.[61] Other appeals were decided in favor of the contractor on similar grounds.[62]

57. Id. at 360-61, 127 F. Supp. at 191.

58. Harrison & Burrows, Inc., Corps of Engineers, C & A No. 117.

59. Dennis & Sons, Corps of Engineers, C & A No. 518 (1954); Consolidated Builders, Inc., Corps of Engineers, C & A No. 451 (1954); Gaasland Co., Corps of Engineers, C & A No. 213 (1950).

60. Harris Structural Steel Co., Corps of Engineers, C & A No. 140 (1950).

61. Ottinger Bros., Corps of Engineers, C & A No. 149 (1950).

62. Walden, Fulton & Payne, Corps of Engineers, C & A No. 579 (1954); Curphy Co., Corps of Engineers, C & A No. 366 (1952); Flippen Materials Co., Corps of Engineers, C & A No. 203 (1952).

A few appeals where the Board refused to allow an equitable adjustment under Paragraph G.C. 11 will now be discussed.

In a case where the contract provided for an extension of time for delays caused by other contractors, the Board held the appellant was not entitled to an equitable adjustment under the suspension of work provision, on the ground that it had not been established that the delay was for the convenience of the Government, and that a specific provision of the contract allowing a time extension only superseded the general provisions relating to suspension of work.[63] Similar rulings were made in other appeals.[64]

Contract provisions similar to the one included in contracts of the Corps of Engineers referred to above are also presently included in contracts of the Atomic Energy Commission. The Comptroller General has ruled that there is no legal objection to such provisions, subject to certain modifications.[65] It is clear that except for a contract provision of this kind, which is designed to compensate a contractor for delays caused by the Government, there would be no remedy under the contract and contractors would have to resort to the courts for relief.

There is now under consideration by various agencies and departments of the Government the question of including a provision similar to the suspension of work clause in their construction contracts.

CONCLUSION

The law is well established that a person who has violated his contract will not be permitted to reap advantage from his own wrong, and that he should not be permitted to escape liability because of the lack of a perfect measure of damages caused by the breach. This applies with equal force to Government contracts. It is considered safe to say that in the great majority of breach of contract cases the contractor's operations are disrupted, and it is impossible to segregate in cost records the additional number of hours, days, weeks, or months of labor, equipment, or other costs incurred as a result of delays and disruption of operations.

It therefore seems necessary to consider the difference between the reasonable cost of the work and the actual cost in determining with any degree of accuracy the amount of damages sustained where there is a serious disruption of operations. Appropriate allowances must be made for items of cost which resulted from causes other than those due to the fault of the Government.

63. Sager Constr. Co., Corps of Engineers, C & A No. 309 (1952).

64. Albeni Contractors, Corps of Engineers, C & A No. 566 (1954); McDonald Bros., Corps of Engineers, C & A No. 433 (1954); Armiger Constr. Corp., Corps of Engineers, C & A No. 351.

65. Comp. Gen. Dec. No. B-127764, Oct. 11, 1956.