ADAPTATION OF PRIVATE CONTRACT PRINCIPLES TO GOVERNMENT CONTRACTS

Participation of the Federal Government in the market for goods and services has substantially increased in recent times as a result of a severe depression, extended periods of military preparedness, and the changing concept of the role of government in our economy. The result has been a huge expansion in the amount of goods and services absorbed by agencies of the government,[1] with a consequent multiplication of problems peculiar to public contracting. A current English view is that the sovereign may not fetter its freedom of action by any agreement the performance of which concerns the public welfare.[2] While the doctrine of sovereign immunity has been influential in defining the contractual prerogatives of the United States,[3] the inherent right of the governing authority to bind itself in contract has always been acknowledged.[4] The

1. In 1940, prior to the United States' entrance into hostilities, Government purchases of goods and services amounted to 30 billion dollars, or 15 per cent of the national product. By 1944, at the height of war activity, the total absorbed by the Government had increased to 149 billion dollars, equalling 45 per cent of the country's total output. Government purchases fell 100 billion from 1944 to 1946, reducing the percentage of federally appropriated goods and services to 17 per cent. No major changes in this ratio occurred between 1944 and 1950. However, a 15½ billion dollar increase, largely attributable to the expanding defense program, appeared between mid-1950 and the first half of 1951. The share of goods and services presently allocated to the United States, approximately 25 per cent, is expected to increase in proportion to the severity of the current emergency. THE MIDYEAR ECONOMIC REPORT OF THE PRESIDENT, TRANSMITTED TO CONGRESS, July, 1951.

2. Mitchell, *Limitations on the Contractual Liability of Public Authorities*, 13 MOD. L. REV. 318, 455 (1950). "The authorities seem to show that the doctrine is based upon a public policy which has ceased to be applicable and which . . . extends beyond the bounds where that policy could be operative. On the other hand, the authorities suggest that the rule is derived from a more general principle. . . . This is the principle that the state or . . . any public authority, cannot be prevented from performing functions essential to its existence and for which it was created." *Id.* at 466. However, his conclusion is that the doctrine is not adequately supported by the authorities and that certainly a right of action should exist against the state for breach of contract.

3. The doctrine of sovereign immunity originally precluded Government contractors from all legal redress. Petition to Congress concerning claims denied by disbursing authorities was the private contractor's sole recourse. Carusi, *Government Contracts Before the Court of Claims*, 41 AM. L. REV. 161 (1909). In Kawanakoa v. Polyblank, 205 U.S. 349, 353 (1907), Justice Holmes explained, "A sovereign is exempt from suit not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. . . . As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that, in actual administration, originate and change at their will the law of contract and property. . . ."

4. In United States v. Tingey, 5 Pet. 115, 128 (U.S. 1831), Justice Story declared: ". . . a question has been made . . . whether the United States have, in their political capacity, a right to enter into a contract or to take a bond in cases not previously provided for by law. Upon full consideration of the subject, we are of the opinion that

creation of the Court of Claims in 1855[5] and the Tucker Act in 1887[6] provided a means for aggrieved contractors to litigate their disputes with the Government before a judicial tribunal. However, Congress is under no obligation to create such a remedy, and the right to its withdrawal at any time is recognized.[7] It is commonly thought that these statutes were intended to place the United States on an equal basis with those with whom it deals, although the legislative history fails to reveal this as the motivating purpose.[8] Nevertheless, the courts have continually reiterated the proposition that the United States, upon entering the market place, subjects itself to the same rules which govern private contracting, unless such rules have been specifically abrogated by statute.[9]

It early became apparent that private contract principles were, in some respects, inadequate to the solution of problems arising out of the

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the United States have such a capacity. It is in our opinion an incident to the general right of sovereignty. . . ." See also United States v. Bradley, 10 Pet. 343 (U.S. 1836); United States v. Linn, 15 Pet. 290 (U.S. 1841); Neilson v. Lagoue, 12 How. 98 (U.S. 1851); Naylor, *Liability of the United States in Contract*, 14 TULANE L. REV. 580, 584 (1940).

5. 28 U.S.C. § 241 (1946).

6. *Ibid.*

7. In Lynch v. United States, 292 U.S. 571 (1934), cancellation of war-risk insurance policies by legislative action was held invalid as a taking of property under the Fifth Amendment. However, the Court recognized the difference between the contractual rights under the policies and the remedy to enforce them. If Congress had manifested an intention to eliminate only the remedy, presumably the court would have upheld the legislation. At page 582 the Court said: "Mere withdrawal of consent to sue on policies for yearly renewable term insurance would not imply repudiation. When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts."

8. Rather, the objective appears to have been a desire to relieve Congress of the burden occasioned by special legislation to adjust disputed contract claims. ". . . [T]hese claims should be asserted before a judicial and not a legislative tribunal. It is not fit that Congress should be a court to try causes, and the time it occupies in doing so is taken from its legitimate work of legislating for the great interests of the growing people." H.R. REP. No. 1077, 49th Cong., 1st Sess. (1886).

9. United States v. Smoot, 15 Wall. 36, 45 (U.S. 1875) is the classic example. Justice Miller asserted, ". . . for that branch of the Government [Congress] has limited the jurisdiction of the Court of Claims to cases arising out of contracts express or implied—contracts to which the United States is a party in the same sense in which an individual might be, and to which the ordinary principles of contracts must and should apply." Smoot had contracted with the Government to supply a certain number of horses to the cavalry. A subsequent official order required that the animals be inspected upon delivery. Smoot attempted to take advantage of the order by claiming that performance of his contract had become impossible. Applying the principle enunciated above, the court rejected this contention. Other cases which assert this principle include: Priebe & Sons v. United States, 332 U.S. 407 (1947); Lynch v. United States, 292 U.S. 571 (1934); Reading Steel Casting Co. v. United States, 268 U.S. 186 (1925); United States v. Atlantic Dredging Co., 253 U.S. 1 (1920); United States v. Spearin, 248 U.S. 132 (1918); Christier v. United States, 232 U.S. 234 (1915); Peck v. United States, 102 U.S. 64 (1880); United States v. Bostwick, 94 U.S. 700 (1878); The Floyd Acceptances, 7 Wall. 666 (U.S. 1869); Hunter v. United States, 5 Pet. 173 (U.S. 1831).

Government's business transactions. Several factors differentiate the state from private business in its commercial undertakings. Necessarily Government must operate solely through representatives,[10] who, unlike agents in private enterprise, lack supervising authority motivated by profit incentive to insure prudence and honesty. Division of governmental functions results in one instrumentality providing funds, another determining the manner of expenditure, and frequently, a third performing the actual purchasing. Hence, all transactions must be founded upon existing appropriations and statutory authorization,[11] and precautionary measures are required to assure compliance with these limitations. Further, the exigencies of war or other emergency often necessitate placing the Government in a favored position to facilitate mobilization.[12]

In numerous instances these differentiating factors have resulted in the Government being accorded certain contractual advantages normally unavailable to the private contractor. For example, when approval by a higher authority is required by statute, it has been held that the contract may become binding upon the contractor alone before the confirmation is granted.[13] Similarly, when a signed writing is required[14] it may be that only the Government may enforce the agreement from the time negotia-

10. This is a frequently recognized differentiation between the contractual status of the Government and that of a private contractor. To this effect see Coffman, *Wartime Contracts and Control in Equity of Inordinate Profits,* 9 GEO. WASH. L. REV. 693, 697 (1941); Thurlow, *Some Aspects of the Law of Government Contracts,* 21 CHI-KENT L. REV. 300, 301 (1943).

11. REV. STAT. § 3732 (1875), 41 U.S.C. § 11 (1946) provides: "No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law and under an appropriation adequate to its fulfillment."

12. In Lichter v. United States, 334 U.S. 742, 782, 783 (1948), the constitutionality of the Renegotiation Act of 1942, which conferred extensive powers to the War Contracts Price Adjustment Board to revise the terms of Government contracts, was upheld under Congress' war powers.

Support for this view may be found in Mr. Justice Frankfurter's dissenting opinion in Priebe & Sons v. United States, 332 U.S. 407, 419 (1947), he asserts: "Accordingly, if this contract were an ordinary commercial contract subject to the ordinary rules of the law of contract, I should have to find against the Government. . . . But this is not an ordinary peace-time Government contract. The Government may certainly assure the performance of contract upon which the effective conduct of the war depended by tightening the consequences of non-performance of each stage in the ultimate process of delivery of essential goods. . . . "

13. District of Columbia v. Singleton, 81 A.2d 335 (D.C. 1951).

Approval of various types of transactions entered into by the Army's contracting officers is required by the Army Procurement Procedure. A.P.P. § 1-604. Also see D.C. CODE § 1-245 (Supp. VII 1949); note 29 *infra.*

14. REV. STAT. § 3744 (1875), repealed by 45 STAT. 985 (1941). A similar statute in effect until recently was 45 STAT. 985 (1928), 5 U.S.C. § 219 (1946), repealed by PUB. L. No. 247, 82d Cong., 1st Sess. (October 31, 1951). The only requirements for formal writings at the present are those prescribed by regulations. *E.g.,* the Army Procurement Procedure provides, "All purchases made by a contracting officer will be evidenced by written contracts. . . ." A.P.P. § 1-601.

tions are concluded until such writing is effected.[15] Failure to comply with prescribed formalities in advertising for bids[16] also may render the contract enforceable only by the United States.[17] The usual doctrines of ostensible authority are not applicable and the contractor is bound to ascertain, at his peril, the authority of the officer with whom he is contracting.[18] The Statute of Limitations does not run against the United States[19] and interferences by government agents with a contractor's performance of government contracts does not subject the state to contractual liability.[20] Legislation authorizes renegotiation of certain gov-

15. United States v. New York & Porto Rico S.S. Co., 239 U.S. 88 (1915).

16. REV. STAT. § 3709 (1875), as amended, 41 U.S.C. § 5 (1946), providing: "Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies and services for the Government may be made or entered into only after advertising a sufficient time previously for proposals. . . ."

In recent years, the Government has recognized the economic plight of small businessmen who are unable to obtain Government contracts because they lack access to the requisite information. An extensive program has been initiated to acquaint the small business enterprises with current government contract opportunities. For a thorough discussion of this recent trend see Shestack and Long, *The Small Businessman and Government Contracts*, 11 LA. L. REV. 426 (1951).

17. United States v. Speed, 8 Wall. 77 (U.S. 1869); Schneider v. United States, 19 Ct. Cl. 547 (1884); Driscoll v. United States, 13 Ct. Cl. 75 (1877); Thurlow, *supra* note 10, at 303.

18. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947). A regulation promulgated by the F.C.I.C. and published in the Federal Register prohibited contracts of insurance covering certain planted wheat. Unaware of this provision, an agent had entered into a contract insuring an excluded crop. When the agency refused to cover a loss under the policy, Merrill sued for breach of contract. The Supreme Court determined that the regulation constituted a limitation on the authority of the officer, declaring: "Whatever the form in which the Government functions, anyone entering into an agreement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. . . . And this is so even though, as here, the agent may have been unaware of the limitation upon his authority." For a criticism of the case see Note, *Governmental Immunities, A Study in Misplaced Solicitude*, 16 U. OF CHI. L. REV. 128, 137 (1948), in which the writer criticizes the decision for denying private parties redress for losses occasioned by "mistake, delay or illegal actions" of government agents. He suggests that the prudence and honesty of such agents would be enhanced if they were required to answer to Congress for their increased expenditures due to satisfaction of such claims. See also, Note, *Legal Responsibility of Federal Agencies*, 24 IND. L.J. 427 (1949).

19. United States v. Nashville, C. & St. L. R.R., 118 U.S. 120 (1885). The United States failed to cash in coupons of bonds issued by defendant railway until after a Tennessee statute of limitations had expired. To defendant's contention that the statute extinguished its liability, Mr. Justice Gray replied: ". . . the United States asserting rights vested in it as a sovereign government is not bound by any Statute of Limitations unless Congress has clearly manifested its intention that it should be so bound." *Id.* at 124.

20. In Horowitz v. United States, 267 U.S. 458, 461 (1925) the Court defined this doctrine as follows: "the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." See also, Jones v. United States, 1 Ct. Cl. 383 (1865). This limitation applies as well to acts of a legislative character. Deming v. United States, 1 Ct. Cl. 190 (1864). See Naylor, *supra* note 4, at 585.

ernment defense contracts to eliminate excess profits.[21]

Several rationalizations have been advanced in support of the application of special rules to government contracts. It has been contended that a person dealing with the state enters into a fiduciary relationship which requires the utmost good faith and limits his compensation to an amount commensurate with the benefit conferred.[22] A similar conclusion is reached under the theory that the Fifth Amendment, which requires the Government to pay just compensation in the taking of property, conversely requires that no one doing business with the United States shall receive more than just compensation. Contrary to the rule applicable between private parties, under both of these theories the adequacy of the consideration would become a relevant subject of inquiry in every case.[23] Still another rationale involves the use of the Government's visitorial powers over corporations to justify the application of different principles where the contracting party is a corporate enterprise.[24] It has also been suggested that since the Government is essentially a non-profit organization, and its policies are formulated for the benefit of the entire body politic, it should be permitted to exact any conditions which the contract-

21. The most recent renegotiation statute is PUB. L. No. 9, 82d Cong., 1st Sess. (March 23, 1951) as amended by PUB. L. No. 183, 82d Cong., 1st Sess. (Oct. 20, 1951). See note 12, *supra*. The theory underlying renegotiation seems incompatible with the element of mutual risk-taking traditionally regarded as a characteristic of contractual relationships. See Fain and Watt, *War Procurement, A New Pattern in Contracts,* 44 COL. L. REV. 127, 154, 155 (1944).

Until recently, assignment of government contracts was prohibited by REV. STAT. § 3477, 3737 (1875), 31 U.S.C. § 203, 41 U.S.C. § 15 (1946). This legislative policy was reversed by the Assignment of Claims Act of 1940, 54 STAT. 1029 (1940), 31 U.S.C. § 203, 41 U.S.C. § 15 (1946) and contracts with the United States were made assignable as security for loans. Note, *Financing by Assignment of Government Contracts,* 60 YALE L.J. 548 (1951).

22. Coffman, *supra* note 10, at 701. The basis of the relationship would not be a technical trust, but a "confident reliance on the integrity, veracity and justice of another," and the trust would be in the "skill and integrity" of the contractor. See also, Grismore, *Contracts with the United States,* 22 MICH. L. REV. 749, 750 (1924). Discussion of the trust theory was engendered by United States v. Bethlehem Steel Corp., 113 F.2d 301 (3d Cir. 1940), in which the court allowed Bethlehem to recover profits on exorbitant World War I contracts. Subsequently, the case was affirmed by the Supreme Court. United States v. Bethlehem Steel Corp., 315 U.S. 289 (1942). Renegotiation was thereafter adopted to prohibit such excessive profits on existing and future contracts. See Reardon, *Problems Arising Under the Renegotiation Act,* 33 GEO. L.J. 153 (1945).

23. Grismore, *supra* note 22, at 757-58. This theory is criticized because it would entail overhauling of all agreements made by the Government. Moreover, since the statute of limitations is inapplicable to the United States, such a re-examination into the consideration could be done at any time in the future and would impair the security of transactions.

24. Coffman, *supra* note 10, at 699, 700. Equity courts have jurisdiction through the Government's reserved visatorial powers to protect the public from corporate activities injurious to their interests. Such powers logically could be invoked to

ing authority deems expedient.[25] Such a view would disregard the absence of statutory authorization and principles of contract law which would ordinarily nullify the condition or render the contract void. Opposed to all of these views is the position that no variances from ordinary contract doctrines should be countenanced unless Congress has specifically so provided.[26]

It is likely that additional instances may arise in which established contract doctrines initially appear inadequate to satisfactorily accommodate the interests of the sovereign with those of the contractors with whom it deals. Perhaps just such a situation is presaged by the occasional attempts of government agents to bind a party with whom they are negotiating while themselves remaining entirely unfettered until a later time. In the future it often may be expedient, or even essential, for the Government to avail itself of such an arrangement in order to secure the advantage of propitious market conditions or acquire scarce materials and yet retain the right to repudiate at a later time if further operation under the agreement would prove highly detrimental to the public interest.[27] The lengths to which some writers have gone in their attempts to justify deviation from existing contract principles in Government transactions might seem to suggest that a complete departure from the rules of contract is indicated in all instances of Government acquisition and

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recover inordinate profits made by corporations contracting with the Government, because such unreasonable exactions are detrimental to the public welfare.

25. See Note, *Penalties in Government Contracts,* 43 ILL. L. REV. 238, 242, 243 (1948), in which the writer concludes that "this view recognizes that some of the traditional, judicial safeguards for free contracting must be sacrificed to the efficacy of big government. It is also a reflection of faith in the fairness of administrative action."

26. Priebe & Sons v. United States, 332 U.S. 407, 413, 414 (1947). The dispute concerned the validity of a penalty provision inserted in a Government contract to supply dried eggs for shipment under the Lend-Lease Program. The provision was repugnant to the rules of private contract law which deny enforceability to liquidated damages clauses having no relation to the actual harm incurred. The Government contended that authority to impose such a penalty could be inferred from the broad power to purchase granted by the Lend-Lease Act. The Court replied: "The power to purchase on appropriate terms and conditions is, of course, inferred from every power to purchase. But if that is the source of Congressional authority to impose penalties, then any procurement officer, in war or in peace, could impose them. That is contrary to the premise underlying all our decisions on this question which involve government contracts. . . . The other view is such a radical break with the past and so counter to the whole development of the law as to indicate that the Congressional purpose should be plain before we take the step."

27. Such a need apparently was felt by the Judge Advocate General when he issued the ruling: ". . . bidders may, by appropriate provision in the form of bid, be legally bound to keep their bids open for a reasonable time after the date specified for receipts of bids." 2 BULL. J.A.G. 437 (1943). There is also a tendency among private contractors to provide for contingencies by requiring bidders to make irrevocable or "firm" offers. This practice is discussed in Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry,* 19 U. OF CHI. L. REV. 237 (1952).

sale of goods and services. However, such a step should not be taken lightly in view of the drastic readjustments in commercial practice it would require and the suspicion with which it would likely be viewed by the contractors who deal with the United States. A re-examination of concepts either already established or on the verge of recognition in the law of contracts reveals means of adapting existing law to the changing needs of the nation's largest businessman.

Analysis of a single instance in which there have been indications that private contract theory is inadequate to the needs of a government participating in commercial transactions on an ever-increasing scale may suggest a valuable approach to the accommodation of other discordant governmental and private interests which may emerge in future business transactions to which the United States is a party. In *D. C. v. Singleton,*[28] the Municipal Court of Appeals for the District of Columbia apparently perceived a need for a departure from the accepted requirement of mutuality of consideration. Singleton had submitted a bid to provide supplies for the schools of the District, which was accepted by a contracting officer. Subsequently, Singleton discovered his inability to comply with the terms of his bid because another dealer held an exclusive franchise for the area. A statute provided that all contracts made on behalf of the District of Columbia by its contracting agents, where the amount exceeded $3,000, must be approved by the Commissioners before constituting a contract binding on the District.[29] Singleton sought to take advantage of this approval requirement by asserting that there was no contract, binding upon himself or the District, until approval, and he therefore was free to withdraw his bid.[30] The Government argued that

28. 81 A.2d 335 (D.C. 1951).

29. D.C. Code § 1-245 (Supp. VII 1949), providing: ". . . but no contract of $3,000 or more entered into on behalf of the District of Columbia by any contracting officer appointed pursuant to sections 1-244 to 1-249 shall be binding upon said District of Columbia, or give rise to any claim or demand against said District of Columbia, until approval by the Commissioners or a majority of them sitting as a Board."

30. Singleton contended that the statute was a limited grant of authority to contracting officers and did not authorize them to enter into contracts in excess of $3,000, execution of the latter being reserved to the Commissioners by the approval requirement. The title of the Act, "An Act to Authorize the Commissioners of the District of Columbia to Appoint Officers to Make Contracts in Amounts Not Exceeding $3,000," was invoked in support of this position. His further theory was that the language of the statute, which indicates that no claim or demand shall arise against the District prior to approval, did not by its silence on the point mean that one did arise against the individual contractor. The intent of Congress could not have been to give the District an "escape-hatch" by making contracts binding only upon the private party until action by the Commissioners. Moreover, the acceptance of the contract was incomplete, being conditioned upon some future act on the part of the District, and could create no enforceable agreement. Brief for Appellants, pp. 7-19, Singleton, et. al. v. District of Columbia, in the United States Court of Appeals for the District of Columbia. Appeal of District of Columbia v. Singleton, 81 A.2d 335 (D.C. 1951).

the acceptance created a valid contract, which, however, was binding only upon Singleton until the requisite approval was effected.[31] In an attenuated opinion, the court found for the Government, cryptically observing that the statute was, "clearly enacted for the benefit of the District and not parties contracting with the District."[32] The court thus refused to accede to the contention that the contract was illusory.[33]

The court was confronted with competing lines of authority. Plaintiff relied on *United States v. N. Y. and Porto Rico S. S. Co.*,[34] a case in which the Government sought recovery for breach of contract where the agreement had not been reduced to writing and signed by both parties as required by the statute.[35] While the Supreme Court acknowledged that there could have been no recovery against the Government without compliance with the statutory directive, it perceived no objection to the action initiated by the official agency. Since the writing requirement was enacted to prevent fraud by government agents, it was designed for the benefit of the United States and not for the private contractor, who had no need of protection.[36]

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31. The District argued that the statute was clear in giving contracting officers the power to enter into contracts in excess of $3,000, while reserving only a power of review. This was said to be inferred from the wording of the statute to the effect that contracting officers, "may exercise any powers with respect to making and entering into contracts. . . ." The provision in the statute that no claim or demand shall arise against the District was alleged to signify that only the contractor's right to enforce, and not the creation of a valid contract, was postponed. It was further asserted that there were no principles of mutuality applicable to a situation of this sort, and the statute could not be invoked by a contracting individual to escape his obligation. Brief for Appellant, pp. 6-27, District of Columbia v. Singleton, 81 A.2d 335 (D.C. 1951).

32. 81, A.2d 335, 337 (D.C. 1951).

33. 1 CORBIN ON CONTRACTS § 146 (1950). "It has been said, thousands of times, that both parties to a contract must be bound or neither is bound. . . . The statement comes nearer the truth in bilateral contracts, promise exchanged for promise. Usually, both promises become binding at the moment of acceptance of the offer. If, at that moment, something prevents one of the promises from being legally enforceable, it is frequently assumed that the return promise is void for lack of sufficient consideration."

34. 239 U.S. 88 (1915).

35. REV. STAT. § 3744 (1875), 41 U.S.C. § 16 (1946), repealed by 45 STAT. 985 (1941), 41 U.S.C. § 16 (1946). "It shall be the duty of the Secretary of War, Navy, and Interior to cause . . . every contract made by them . . . to be reduced to writing and signed by the contracting parties with their names at the end thereof . . . within thirty days. . . ." Also included were certain provisions making it a misdemeanor for contracting officers to fail promptly to comply with the statute.

36. The Court conceived an analogy between this writing requirement and the Statute of Frauds. The two are distinguishable, however, since either party to a contract may avail himself of the latter, depending on which has signed the agreement. By contrast, under the Supreme Court's interpretation of the writing provision, no matter which party has failed to sign the contract it can be enforced only by the Government.

The writing requirement has been productive of much litigation. Although no indication of this appears in *Singleton*, the writing cases actually are in conflict as to when the contract is formed. In Sanger & Moody v. United States, 40 Ct. Cl. 47, 66 (1905), claimant sought reformation for mistake in the writing and contended that the ne-

Completely ignored in the *Singleton* case, however, were decisions involving approval by a higher authority. In *Monroe v. United States*,[37]

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gotiations constituted the actual contract. Acknowledging that the preliminary negotiations, bid, and acceptance are the essential components of a binding agreement between individuals, the court nevertheless indicated that in a government contract neither party is bound until the writing is signed. In Gillioz v. United States, 102 Ct. Cl. 454, 466 (1944), the Court of Claims again observed that a government contract does not come into being until both parties have affixed their signatures to a writing in conformity with the statute. Other cases to this effect include: Gillespie v. United States, 47 Ct. Cl. 310, 312 (1912); McLaughlin v. United States, 37 Ct. Cl. 150, 185 (1902); Lender v. United States, 7 Ct. Cl. 530, 533 (1872); Henderson v. United States, 4 Ct. Cl. 75, 83 (1868).

On the other hand, in Ackerlind v. United States, 240 U.S. 531, 534 (1916), the Supreme Court approved the *Porto Rico* decision. The court reformed the contract at the instance of the private party. Since the mistake occurred only in the formal contract the plaintiff could refer to the prior unsigned agreement in support of his contention. The initial unsigned contract was not void but merely unenforceable against the Government. American Smelting and Refining Co. v. United States, 259 U.S. 75, 78 (1922), held that the contemplation of a formal agreement did not prevent the negotiations from creating a binding contract where the claimant was attempting to repudiate the oral contract and recover a statutory price for supplies furnished to the Government. And in Waters v. United States, 75 Ct. Cl. 126 (1932), on facts nearly identical to the *Porto Rico* case, the Government recovered by a counterclaim based upon an unwritten agreement which violated the statute.

Some cases involving private parties seeking to hold the Government have avoided declaring a contract void for non-compliance with the statute. Erie Coal & Coke Co. v. United States, 266 U.S. 518, 521 (1925), held the United States was not bound because the necessary formalities had not been performed; and Camp v. United States, 113 U.S. 648, 652 (1885), merely indicated that no contract could bind the Government unless in writing as required by a regulation. In Lindsley v. United States, 4 Ct. Cl. 359, 365 (1868), the court explicitly pointed out that the statute does not prohibit verbal contracts but merely makes them unenforceable against the Government. See also, Clark v. United States, 95 U.S. 539 (1876). Other cases recognizing the existence of a contract before the writing is concluded are those which held that after performance no barrier to recovery on the contract is presented by the initial unenforceability. Clark v. United States, *supra;* St. Louis Hay & Grain Co. v. United States, 191 U.S. 159 (1903); Emery v. United States, 13 F.2d 658 (D. Conn. 1926); Moran Bros. v. United States, 39 Ct. Cl. 486 (1904).

Similarly, the statute requiring advertising for bids on government contracts, *supra* note 16, has evoked competing lines of authority. Where this requirement has not been met, contractors have been barred from recovery against the Government on the ground that the contract is void. United States v. Speed, 8 Wall. 77 (U.S. 1869); Schneider v. United States, 19 Ct. Cl. 547 (1884). However, as with the writing cases, it also has been held that the statute is for the protection of the United States and is unavailable as a defense to a suit by the Government. American Smelting and Refining Co. v. United States, *supra.* In a similar situation where advertising was a prerequisite to the sale of naval vessels, the Attorney General held that failure to comply did not render the contract void, but only voidable at the option of the Government. 38 OPS ATT'Y GEN. 328 (1935); Note, 4 GEO. WASH. L. REV. 520 (1936).

That the writing and advertising cases should not control the *Singleton* result is suggested by one crucial distinction. A private contractor may ascertain, prior to the bidding, whether the advertising requirement has been met, or he may insist upon prompt execution of a formal written agreement. But there is no means by which he can determine whether final approval will be accorded. Thus, under the *Singleton* decision, he cannot avoid binding himself prior to the time when the Government becomes bound.

37. 184 U.S. 524 (1902).

the contract by its terms was subject to approval by the Chief of Engineers. The contractor attempted to hold the United States prior to final approval. The Supreme Court, in dismissing the action, observed that the requirement constituted a condition precedent to the formation of a *valid* contract. The implication was that the Government could not have held the contractor. The rationale of this and other approval cases would seem to foreclose the issue in the *Singleton* case.[38]

The *Singleton* opinion is subject to serious criticism not only because it fails to reveal the basic reason for its result, but also because it prefers, as a governing precedent, a case far less apposite than the approval cases relied on by the defendant. Nevertheless, the result which the court was determined to reach may have been a legitimate one. However, before resorting to judicial fiat as a substitute for rational analysis of the basic considerations presented in a controversy where special contractual concessions are sought by the Government, future courts might profitably explore the existing body of contract doctrine.

Consideration of the law of voidable contract suggests a possible means of reconciling the special concessions accorded Government with the existing framework of contract law. There, the fundamental policy is to protect the infants or defrauded persons from improvident engagements, perhaps attributable to a recognized disability.[39] In dealing with voidable contracts, courts have experienced little difficulty in accounting for the absence of reciprocity necessary to satisfy traditional notions of consideration. The absence of mutuality stems, not from the bargain itself, but from some element outside its terms.[40] The present exchange

38. See Little Falls Knitting Mill Co. v. United States, 44 Ct. Cl. 1 (1908), in which the court stipulated: "A contract containing a clause which makes its final execution dependent upon the approval of the head of a department or some supervising official of the Government is not a binding obligation until such approval is had." *Id.* at 17; Cathell v. United States, 46 Ct. Cl. 368, 371 (1911), where the dispute hinged upon the time when a binding contract was formed. The court decided: ". . . a contract providing for the approval of a superior officer is not a valid subsisting agreement until such approval is made. . . . Neither the contractor nor the defendants [United States] incurred liabilities until it was approved."

39. See Willis, *Rationale of the Law of Contract,* 11 IND. L.J. 227, 249 (1936). "The last class of promises to which social control is applied is those promises which are voidable. . . . In such cases the law will . . . make the promises contracts. In addition, it will apply . . . social control, to allow the infant . . . to avoid the contract . . . [T]he social interests . . . are important enough so that the law protects them by giving the injured party a power of avoidance. . . ."

40. "In the second [voidable contracts] we have all the affirmative elements of a valid contract, but the obligation of one of the parties is affected or taken away owing to the presence of some defense or negative element which does not affect the obligation of the other. These cases of voidable contracts can therefore be satisfactorily explained only by the theory here advanced, *viz.,* that there is ample consideration at present in the reciprocity or mutuality of the respective undertakings, although one of the parties may have an absolute personal defense. A promise by a minor, therefore, furnishes

of promises constitutes sufficient consideration on both sides. It would seem arguable that in some respects the Government is incapacitated in its business dealings by handicaps equally as severe as those prompting judicial recognition of voidability in the case of minors and insane.[41] However, the voidable contracts concept has been narrowly applied and courts and legislatures are more ready to limit than expand it.[42] The merit of enlarging this doctrine would lie in the ability of the courts to allow or reject the Government's claim, depending upon whether a disability were shown to justify the need under the particular circumstances.

Another approach would necessitate implication of a promise on the part of the Government to use good faith and reasonableness in considering the contract. Such an obligation might be deemed sufficient consideration for requiring a contractor to be bound. Courts are frequently willing to imply promises, to uphold the validity of contracts, as where a promise to sell necessarily involves an implied agreement by the other party to buy.[43] In *Sylvan Crest Sand and Gravel Co. v. United States,*[44] the court approved such a theory in upholding an agreement against the objection that it was illusory. The Government had reserved a sweeping right of cancellation which would have rendered the consideration insufficient had the court not found an implied promise by the United States to give reasonable notice before exercising the right.

That such a requirement of good faith and reasonableness would constitute adequate consideration is suggested by the fact that the courts

consideration . . . because there is reciprocity in the terms of the bargain." Ballantine, *Mutuality and Consideration,* 28 HARV. L. REV. 121, 131, 132 (1914); SELECTED READINGS ON THE LAW OF CONTRACTS, 343, 351 (1931).

41. See notes 10-16 *supra,* and accompanying text.

42. See Note, *Avoidanee by Infants of Contracts for Performance of Services,* 21 ROCKY MT. L. REV. 213 (1949), discussing the recent case of Warner Bros. Pictures v. Brodel, 31 Cal. 2d 766, 192 P.2d 949 (1948), which upheld the constitutionality of a California statute limiting the power of infants to avoid their contracts. ". . . [I]t is . . . another step in the modern trend toward limiting the privilege of infants to avoid their contracts. . . ." *Id.* at 213.

43. ". . . [T]he tendency has developed, whenever possible, as a matter of interpretation of intention, to imply a promise where one is lacking in order that there may be mutuality." Whitney, *Implying a Promise to Establish Mutuality,* 11 ST. JOHNS L. REV. 51, 52 (1936). See also, 1 CORBIN ON CONTRACTS § 18 n.43, § 144 n.12 (1950).

44. 150 F.2d 642 (2d Cir. 1945). Plaintiff had contracted to deliver trap rock of a certain amount, "as required." The reservation of the power of cancellation was unrestricted as to time. The Government contended the power was exercised by a mere failure to order delivery. The court's implication of the promise to give notice seems to have defeated an attempt by the Government to create a contract wholly devoid of obligation upon its part. Perhaps this suggests that the courts are unwilling to validate attempts by the Government to dispense with mutuality of obligation.

have uniformly upheld "sales on approval" contracts.[45] There the buyer agrees to retain the purchase only if he is satisfied with it. Some cases permit rejection if the buyer is honestly dissatisfied[46] while others adopt a standard of reasonableness.[47] Conceivably this technique may be adopted to bind the private contractor while allowing the Government approval authority an opportunity to reject if reasonably dissatisfied.

The concept of firm offer, vigorously advocated in recent years as a valuable adjunct to private commercial transactions, suggests another contractual basis for enabling the Government to circumvent the consideration dogma which denies validity to one-sided government contracts. This notion converts the offeror's considerationless proposal, to remain irrevocable for a period of time, into a dependable basis of action while the offeree is in no way obligated. While firm offer has never been recognized as a matter of common law, New York and Pennsylvania have enacted legislation which provides for enforcement of such promises.[48] In addition, the proposed Uniform Commercial Code includes a provision that short-term firm offers be given effect according to their terms.[49] These instances indicate a trend toward enforceability of deliberately made promises despite the absence of consideration.

It has been asserted that firm offers should be enforced without specific statutory authorization when seriously proposed.[50] The deliberative and evidentiary functions of consideration would be performed

45. "That a binding contract exists in the case of a 'sale on approval,' before the buyer has expressed his approval or disapproval, seems seldom to have been doubted in Anglo-American law." Patterson, *'Illusory' Promises and Promisors' Options*, 6 IOWA L. BULL. 129, at 135 (1920), SELECTED READINGS ON THE LAW OF CONTRACTS, 401 at 406 (1931).

46. Hoffman v. Gallaher, 6 Daly 42 (N.Y. 1842).

47. Fechteler v. Whittemore, 205 Mass. 6, 91 N.E. 155 (1910).

48. N.Y. PERS. PROP. LAW § 33(5) (1949). "When hereafter an offer to enter into a contract is made in a writing signed by the offeror or his agent, which states the offer is irrevocable during a time fixed, the offer shall not be revocable during such period or until such time because of the absence of consideration for the assurance of irrevocability." And see Jarka Corp. v. Hellenic Lines, Ltd., 182 F.2d 916, 919 (2d Cir. 1950) in which Judge Clark stated: ". . . its [the contract's] clear intent was to keep the offer open for a stated time. . . . If New York law is applicable to the transaction, the offer is binding even though without consideration."

The Pennsylvania provision provides for the enforceability of a much wider group of promises. "A written release or promise, hereafter made and signed by the person releasing or promising, shall not be unenforceable for lack of consideration if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound." PA. STAT. ANN. tit. 33, § 6 (Purdon, 1949).

49. THE UNIFORM COMMERCIAL CODE, § 2-205 (1950), provides: "An offer by a merchant to buy or sell goods expressed in a signed writing to be 'firm' or otherwise irrevocable needs no consideration to be irrevocable for a reasonable time, or during a stated time. . . ." See Corbin, *The Uniform Commercial Code—Should It Be Enacted*, 59 YALE L.J. 821, 827, 829 (1950).

50. Sharp, *Pacta Sunt Servanda*, 41 COL. L. REV. 783, 788 (1941); Sharp, *Promises, Mistake, and Reciprocity*, 19 U. OF CHI. L. REV. 286, 292 (1952).

by requiring formalities in the making of the promise not to revoke.[51] Less easily dispensed with are the elements of equality and exchange in the concept of consideration. That one party cannot be bound unless the other is also bound—an idea which the law of contract has clung to with tenacity—is abandoned in the firm offer.[52] Moreover, the courts' diminishing solicitude for the requirement of benefit to the promisor, in return for his promise, is completely eliminated.[53] The latter obstacles suggest that the firm offer should not be recognized as a valid principle of the law of contracts under all circumstances but should be limited in its application to those situations in which the need for such a device more than offsets these objections.

The ability of one party to an agreement to bind the other without himself assuming any concurrent duties would constitute a formidable weapon in the hands of the contractor in the superior bargaining position. Hence, such an innovation should be sanctioned, even at the instance of the Government, only when the strongest justification can be demonstrated. Perhaps the propriety of such a departure is a subject of inquiry which exceeds the scope of the judicial prerogative. Surely the courts should not seek to justify the deviation solely on the strength of a statute such as that involved in the *Singleton* case, which is wholly devoid of any explicit manifestation of Congressional intent to dispense with mutuality of consideration.

It has never been conclusively demonstrated that the requirements of Government in its business dealings transcend the importance of retaining a single body of law governing contractual relations.[54] Adherence to such a unified theory, as opposed to recognition of Government's absolute

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51. *Ibid.*

52. "We are dealing . . . with the argument that it is unfair or somehow contrary to principle, or inconsistent with the nature of things to treat an undertaking against revocation as binding . . . in the absence of acceptance by the offeree."

"Equality is one of the . . . indispensable working notions of the law . . . it requires eareful use. It does not require that people be treated identically, if there is a practieal reason of the sort with which courts are qualified to deal, for distinguishing them. . . . There would be no violation of any simple working idea of equality if the bidder who has made a promise were treated quite differently from the contractor who has made none." Sharp, *Promises, Mistake, and Reciprocity, supra* note 50, at 289.

53. "There appears to be a feeling that undertakings for which no return is made ought not to be enforced. In Roman and continental law the limitations . . . dependent on . . . 'exchange' have been almost entirely superseded. . . . The doctrines of consideration . . . may be developing in the same direction." Sharp, *Promises, Mistake, and Reciprocity, supra* note 50, at 290, 291.

54. In some areas of the law of contracts, the ordinary rules have been manifestly inadequate to allow the courts to solve the peculiar problems confronting them. A notable example is the field of insurance, where the courts have resorted to tort principles to relieve individuals upon whom unconscionable conditions have been imposed by the insurer. See Kessler, *Contracts of Adhesion,* 43 COL. L. REV. 629 (1943).

right to exact any conditions it sees fit, seems preferable. If the United States were exempt from the rules of contract, considerations in support of or opposition to a claimed concession would become irrelevant. Conversely, such considerations are determinative of controversies resolved under existing contract law. Blanket endorsement of such an exemption would invite extreme business practices with ramifications affecting a sizeable percentage of commercial transactions. Such a license, manifestly impinging upon the security of government contractors, should be vindicated only upon a showing of positive necessity. Contractors' familiarity with existing commercial practice and aversion to uncertain change might necessitate a substitute for security in the form of increased cost of goods and services to Government. It should not be prematurely assumed that contract doctrine lacks the flexibility to adapt itself to the changing position of Government in our economy.

The delicate reconciliation of interests required can best be accomplished by adherence to existing contract doctrine whenever possible, by intelligent legislative or judicial adaptation of existing principles to new situations where necessary, and above all, by a method of judicial decision which clearly presents the competing factors in a controversy.

EFFECT OF ILLEGAL ABDUCTION INTO THE JURISDICTION ON A SUBSEQUENT CONVICTION

As prerequisites to a valid criminal conviction the accused must be present at all proceedings of the court[1] and must be tried in the state in which the alleged crime was committed.[2] While these requirements cause little difficulty when the accused is apprehended within the jurisdiction in which the crime occurred, frequently the individual has fled the jurisdiction of the accusing state. In contemplation of this possibility, the Constitution expressly permits rendition of prisoners from one state to another.[3] The procedures established to implement the Constitutional provision[4] are comparatively simple,[5] and rendition ordinarily will be granted,[6] usually as a matter of course. Nevertheless, at times overzealous police officers remove the accused from another jurisdiction with-

1. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 413 *et seq.* (1947).
2. See Note, 15 L.R.A. 722 (1892).
3. U.S. CONST. Art. IV, § 2.
4. 18 U.S.C. § 3182 (Supp. 1951).
5. See Note, 135 A.L.R. 973 (1941).
6. Plumb, *Illegal Enforcement of the Law,* 24 CORNELL L.Q. 337, 349 (1939)