

# NOTES

## CONTRACTORS' PROBLEMS UNDER THE STANDARDIZED GOVERNMENT CONTRACT

The business activities of the United States Government have become a pervasive element of the nation's economy<sup>1</sup> and find manifestation in Government loans,<sup>2</sup> corporations,<sup>3</sup> employment,<sup>4</sup> business supervision,<sup>5</sup> and contracts.<sup>6</sup> These activities vitally affect the individual and, accordingly, necessitate constant efforts to achieve and maintain a judicious adjustment of interests. The area of Government<sup>7</sup> contracts exemplifies a failure to assure private parties adequate protection.

The compass of the Government as a contracting party is illustrated by the statistic that in 1952 over 4½ billion dollars were spent by the Federal Government for public construction.<sup>8</sup> Add to this the amounts expended in purchase and service contracts, and the Government contract entity develops into enormous proportions.

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1. "The growing role played by governmental activity in America's development is one of the most striking aspects of her history. From the provision of a few minimum essential services governmental functions have grown to the point where they touch virtually every phase of an individual's life." WILLIAMSON, *THE GROWTH OF THE AMERICAN ECONOMY* 925 (2d ed. 1951). In 1953 the Federal Government's expenditures were about 75,000,000,000 dollars while the gross national product was 367,200,000,000 dollars. *SURVEY OF CURRENT BUSINESS* 12 (U. S. Treasury Dept., March 1954).

2. The Government functions both as a lender and a borrower. Many Governmental agencies—whether within the executive department, organized as a corporation, or set up as an independent administrative agency—engage in making loans. For example, a selected list includes the Commodity Credit Corporation, Federal Deposit Insurance Corporation, Housing and Home Finance Agency, Production and Marketing Administration, and Veterans' Administration. As a borrower the Federal Government has a public debt of about 265,000,000,000 dollars. *TREASURY BULLETIN* 10 (U. S. Treasury Dept., March 1954).

3. For a discussion of the Government corporation and its status in relation to contract law, see Note, 6 *Geo. Wash. L. Rev.* 489 (1938).

4. Federal employment of civilians in 1952 averaged throughout the year at about 2,765,000. *MONTHLY LABOR REVIEW* 327 (U. S. Dept. of Labor, March 1954).

5. Into this classification could be placed many instances of Government influence that do not fit into other broad categories. The Federal Reserve System and the Grants-in-Aid program serve as examples.

6. Public contracts may be divided into four convenient categories: (1) construction contracts; (2) purchase contracts; (3) service contracts; (4) leases and privileges in public property. In this note primary discussion revolves around the Government construction contract. Much of what is said, however, applies equally well to the other types.

7. The word "Government" as used in this note refers to the Federal Government. Related problems, of course, do exist in the area of state government but this discussion is restricted to operations on a national level.

8. *CONSTRUCTION* 11 (U. S. Dept. of Labor, February 1954). In 1953 the amount spent fell to 2,823,000,000 dollars.

When a party contracts with the National Government, he enters into an agreement with a sovereign, and the well-known adage applies that the sovereign cannot be sued without its consent.<sup>9</sup> The Government gave the requisite approval concerning contract claims in the Tucker Act of 1887,<sup>10</sup> but this same statute has been interpreted as a limitation that precludes recovery on contracts implied in law.<sup>11</sup> Jurisdiction in these cases is vested concurrently in the Court of Claims<sup>12</sup> and the district

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9. *Maricopa County, Arizona v. Valley National Bank of Phoenix*, 318 U.S. 357 (1943); *Cohens v. Virginia*, 6 Wheat. 266 (U.S. 1821). Prior to broad Congressional authorization which permitted contract suits against the Government and provided a forum, recourse to Congress was the sole remedy for aggrieved contractors. Carusi, *Government Contracts*, 43 AM. L. REV. 161 (1909). For a historical discussion of suits against the Government on contract claims, see Naylor, *Liability of the United States in Contract*, 14 TULANE L. REV. 580 (1940). Even today Congress may provide special legislation to relieve contractors. See for a brief discussion, Note, 31 CORNELL L.Q. 500, 506-507 (1946). For a general study of the liability of Government on contract claims, see Notes, 27 IND. L.J. 279 (1952); 31 CORNELL L.Q. 500 (1946).

10. 28 U.S.C. § 1491 (Supp. 1952). The Act after amendments now reads: "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:

" . . .

"(4) Founded upon any express or implied contract with the United States. . . ."

Though a suit may be brought and carried to judgment in the Court of Claims, or a district court where such court has jurisdiction, it is to be remembered that Congress still controls the purse strings. See Naylor, *supra* note 9, at 583. This carries special weight when it is remembered that relief available in these cases is restricted to monetary judgments. *United States v. Jones*, 131 U.S. 1 (1889).

11. *United States v. Minnesota Mutual Investment Co.*, 271 U.S. 212 (1926); *Gazda v. United States*, 108 F. Supp. 516 (Ct. Cl. 1952); Dept. of Water and Power of Los Angeles v. *United States*, 105 Ct. Cl. 72 (1945). In one case the Government paid the prime upon default by the Government \$3.20 per unit for the benefit of a sub-contractor. The prime misrepresented the amount recovered and settled with the sub for \$2.50 per unit. The Government sued and recovered the \$.70 difference per unit. The sub sued the Government to recover this amount arguing that the Government held the money as trustee, but the court denied recovery. *Merritt v. United States*, 58 Ct. Cl. 371 (1923), *aff'd*, 267 U.S. 338 (1925).

In *Braun v. United States*, 46 F. Supp. 993, 1005 (Ct. Cl. 1942) the Court of Claims said, "Whether in equity and good conscience on the basis of a quasi-contract, that is, an obligation solely implied in law and not in fact, the plaintiffs should be paid the balance of the overpayment . . . is a matter solely for the decision of Congress."

However, it appears ". . . that the court has at times, for obvious reasons, found an implied contract in a situation which would normally be regarded as giving rise at most to a quasi-contract." Grismore, *Contracts with the United States*, 22 MICH. L. REV. 749, 757 (1924).

There has been criticism of the Government for refusing to be held liable on contracts implied in law. "It is difficult to justify on principle the government's unwillingness in normal times to hold itself accountable to the full standard of fairness and morality to which private parties are held." Anderson, *Tort and Implied Contract Liability of the Federal Government*, 30 MINN. L. REV. 133, 138 (1946).

Where a contract does exist but no mention is made as to compensation, the court will imply an amount based on *quantum meruit*. *Reid Wrecking Co. v. United States*, 55 Ct. Cl. 453 (1920).

12. 28 U.S.C. § 1491 (1952).

courts.<sup>13</sup> Where legislative mandate is reticent, general contract law governs<sup>14</sup>—at least this concept is true as an abstract proposition. Practically, however, in addition to statutes,<sup>15</sup> numerous regulations<sup>16</sup> and exceptions<sup>17</sup> to contract law significantly affect the contractual relationship.

13. 28 U.S.C. § 1346 (1952).

It was argued in the dissenting opinion in *United States v. Jones* that the Act of 1887 which extended jurisdiction to the district courts also broadened considerably the remedies available against the Government “. . . to meet all such cases in law, equity and admiralty, against the United States, as would be cognizable in such courts against individuals.” *United States v. Jones*, 131 U.S. 1, 20 (1889). The majority rejected this idea, holding that only a new forum was provided.

14. *Priebe & Sons v. United States*, 332 U.S. 407 (1947); *United States v. Atlantic Dredging Co.*, 253 U.S. 1 (1920); *The Floyd Acceptances*, 7 Wall. 666 (U.S. 1869).

One commentator stated: “. . . [W]here such contracts [in which the government is a party] are made, and governmental immunity from suit is waived, the United States is subject to the same rights and responsibilities as the individuals who are parties to such instruments. In other words, the same acts or omissions which constitute a breach of contract by an individual constitute a breach when done or omitted by the government.” Naylor, *supra* note 9, at 584.

It is still uncertain whether state law or federal law governs, though it appears the latter is the sounder view, otherwise state legislatures could thwart Government projects. Anderson, *supra* note 11, at 136; see also, Pofcher, *The Choice of Law, State or Federal, in Cases Involving Government Contracts*, 12 LA. L. REV. 37 (1951). One writer questions whether local law should apply even in cases involving subcontractors and the prime, especially where the sub recovers from the prime before the prime recovers from the Government. Feldman, *The Subcontractor's Relationship to the Government*, 12 FED. B.J. 299, 308-309 (1952).

At least one authority, however, suggests that state law may apply where a Government contract is involved. Nemmers, *The Problem of Government Liability to Subcontractors under Terminated CPMF Prime Contracts—The Third Party Beneficiary Theory*, 31 VA. L. REV. 161, 162-164 (1944).

15. For example, some statutes that affect the contractual relationship are: 65 STAT. 7 (1951), 50 U.S.C. APP. § 1211, *et seq.* (1952); 62 STAT. 21 (1948), 41 U.S.C. §§ 151-161 (1952); 63 STAT. 393 (1949), 41 U.S.C. §§ 252-260 (1952); 65 STAT. 41 (1951), 41 U.S.C. § 15 (1952); 62 STAT. 989 (1948), 40 U.S.C. § 276c (1952); 63 STAT. 1024 (1949), 41 U.S.C. § 10a-10d (1952). This list includes only a sample of recent amendments and is simply suggestive of the complexity of having to keep abreast of the various statutory changes.

16. Construing the term “regulation” loosely, this would include decisions of the Comptroller General, executive orders, and departmental regulations. All of these are issued from time to time and do have their effect on the contractual relationship. Such “regulations” may be directed toward particular contract clauses or toward the authority of the Government’s representatives to enter into contracts. Though such information is available to the public in the Code of Federal Regulations, Federal Register, Decisions of the Comptroller General and related publications, it is a specialist’s task to stay well informed.

17. For example, a plaintiff cannot sue the Government just to collect nominal damages. *Nortz v. United States*, 294 U.S. 317 (1935). An injunction does not lie against the United States even when the United States comes into court to sue on a claim and the defendant then argues that by suing in court the Government subjects itself to being enjoined. *United States v. Patterson*, 206 F.2d 345 (5th Cir. 1953). The statute of limitations does not run against the Government. *United States v. Nashville C. & St. L. R.R.*, 118 U.S. 120 (1885). Ostensible authority of an agent is not enough to bind the Government; actual authority is required. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947).

The Government's conventional contracting procedure is to enter an agreement with a prime who, in turn, subcontracts most phases of the job.<sup>18</sup> This practice is extensive; in the construction industry, for example, the erection of a simple dwelling may require as many as 20 subcontracts.<sup>19</sup> Frequently, these secondary agreements extend below one tier which makes a subcontractor a prime contractor for another sub.

In dealings with the Government's representative a private contractor often finds himself in a helplessly poor bargaining position.<sup>20</sup> Such a one-sided contractual relationship is referred to as a "contract of adhesion."<sup>21</sup> The Government, by utilizing advantageously its superior bargaining position, is able to insert clauses in the contract providing that any disputes arising under the contract are to be adjusted by a Govern-

For a general discussion of these exceptions see Mitchell, *The Treatment of Public Contracts in the United States*, 9 U. OF TORONTO L.J. 194, 237-249 (1952); Thurlow, *Some Aspects of the Law of Government Contracts*, 21 CHI-KENT L. REV. 300 (1943).

18. "Usually a general contractor will himself perform only a few of these specialties—ordinarily those of a structural character, such as bricklaying, carpentry, and concrete work—and will handle the remainder through subcontracts. In some cases practically the entire work will be sublet, the general contractor providing only coordination and supervisory services." COLEMAN AND NEWCOMB, *STABILIZING CONSTRUCTION: THE RECORD AND POTENTIAL* 97 (1st ed. 1952).

The Armed Services Procurement Regulation, which was issued pursuant to the Armed Services Procurement Act of 1947, 62 STAT. 21 (1948), 41 U.S.C. §§ 151-161 (1952), defines the term "subcontract" as ". . . any contract, agreement, or purchase order, and any preliminary contractual instrument, other than a prime contract, calling for the performance of any work, or for the making or furnishing of any material, required for the performance of any one or more prime contracts. The term also includes any such contract, agreement, purchase order or other instrument placed under any one or more subcontracts as defined in this section." 32 CODE FED. REGS. § 407.227 (Cum. Supp. 1953).

19. The construction of a multi-story apartment building may utilize as many as fifty-three possible subcontracts. COLEMAN AND NEWCOMB, *op. cit. supra* note 18, at 276-278.

20. The Government's standard construction contract, form 23A, and standard supply contract, form 32, preclude much negotiation on many points. Even where negotiation of certain discretionary provisions is allowed, the contractor still faces various statutes and regulations which restrict the negotiations. Often, too, the contractor is not represented by legal counsel and as a result will lose advantages that might have been obtained had he known the correct method of approach. See Moss and vomBaur, *Government Contracts and the Practice of Law*, 20 J.B.A.D.C. 534 (1953). The authors stress the point that the extreme complexity of contracting with the Government requires expert legal advice, in contrast with today's frequent utilization of non-legal advisors. See also, Schultz, *Proposed Changes in Government Contract Disputes Settlement: The Legislative Battle over the Wunderlich Case*, 67 HARV. L. REV. 217, 248 (1953).

21. This phrase was coined by Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919). For a more complete discussion of the "contract of adhesion" and its relationship to the court system and general contract law, see Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COL. L. REV. 629, 635 (1943). See also Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Issacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917); Sales, *Standard Form Contracts*, 16 MOD. L. REV. 318 (1953).

ment contracting officer<sup>22</sup>—an agent of the same party who dictates the terms of the agreement.<sup>23</sup> Since many of these officials are not experts,<sup>24</sup> the prime bears great risks that they may abuse their discretion in demanding alterations or settling disagreements and, consequently, may fail to adjust adequately the amounts due him. The contractor, theoretically of course, may reject the Government's contractual offer;<sup>25</sup> real-

22. The four clauses in point can be termed the "changes," "changed conditions," "extras," and "disputes" provisions.

Part of the "changes" provision reads: "The Contracting Officer may at any time . . . make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made. . . . If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Clause 6 hereof." Standard Form 23A, Article 3. "Clause 6" is the disputes clause.

The "changed conditions" section states, in part: "The Contracting Officer shall promptly investigate . . . and if he finds that such conditions do so materially differ and cause an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly." Standard Form 23A, Article 4. Any dispute that arises is referred to the disputes clause.

The "extras" clause reads: "Except as otherwise provided in this contract, no payment for extras shall be made unless such extras and the price therefor have been authorized in writing by the Contracting Officer." Standard Form 32, Article 3.

For an excellent discussion of the "changes," "changed conditions," and "extras" clauses, see Anderson, *Changes, Changed Conditions and Extras in Government Contracting*, 42 ILL. L. REV. 29 (1947).

The "disputes" provision reads, in part: "Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer. . . ." Standard Form 23A, Article 6. Appeal is provided to the head of the department and, finally, a review by the courts is permitted.

This clause has caused great difficulty recently. Communication to the *Indiana Law Journal* from the Associated General Contractors of America, Inc. indicates that it is the most troublesome contract provision faced by construction contractors. See for discussions of this problem Anderson, *The Disputes Article in Government Contracts*, 44 MICH. L. REV. 211 (1945); Mulligan, *The Disputes Clause of the Government Construction Contract: Its Misconstruction*, 27 NOTRE DAME LAW. 167 (1952); Schultz, *supra* note 20. Since *United States v. Wunderlich*, 342 U.S. 98 (1951), legislative action has culminated in Pub. L. No. 356, 83d Cong., 2d Sess. (May 11, 1954).

23. The Supreme Court has drawn no distinction between third party arbiters selected by mutual consent of private contracting parties and a contracting officer selected by the Government. See Anderson, *supra* note 22, at 215. Ordinarily, arbitration may not be employed when the Government is a party to the contract. *Id.* at 217-221. See Braucher, *Arbitration Under Government Contracts*, 17 LAW & CONTEMP. PROB. 473 (1952). For a recent case upholding arbitration, see *Grant Construction Co. v. United States*, 109 F. Supp. 245 (Ct. Cl. 1953), 53 COL. L. REV. 879.

24. For example, no professional standards or discipline exist. One writer vividly describes the contracting officer as ". . . a ubiquitous character. He may be a Reserve or Regular Army officer, or a civilian governmental employee. His background may be engineering, business, or nothing even slightly related to the contract in question. One contracting officer has described his job as a combination of 'accountant-auditor-engineer-business man.'" Schultz, *supra* note 20, at 224 n.27.

25. "Looking at the matter dispassionately, the contractor, before entering into the contract with the government, knows, or could know, the differences in contract law between private individuals, and the law as it relates to the government, and if he never-

istically, however, such action is improbable because these contracts are appealing transactions. The possibility of benefits seem to counterpoise the undesirable provisions.

Private contractors, in addition to being confronted with the Government-dictated contract, encounter a second, equally harassing obstacle. The courts are extremely solicitous of the Government's interest and, though enunciating conformance to general contract law, are prone to find exceptions which extend to the Government preferential consideration.<sup>26</sup> Thus, they interpret the contract in favor of the party who made it, contrary to the common practice of construing it against such a party.<sup>27</sup> The explanation for the courts' failure to employ the usual rule stems, apparently, from an unwillingness to recognize the Government as just another contracting party. Several theories have been advanced in explanation of why special rules of construction have been applied to Government contracts,<sup>28</sup> but they all originate in the realization that the Government is sovereign.<sup>29</sup> The courts' attitude and the difficulties which it

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theless desires to contract with the government, he may be held to have assumed the risk." Naylor, *supra* note 9, at 593. The author concludes that the injustices to contractors that may occur are necessary evils in order that the Government and the people as a whole may benefit. *Ibid.*

26. See note 17 *supra*. ". . . [T]he Government, as a contractor, has insisted on and received favorable treatment in its contracting capacity which it would not receive under ordinary principles of private contract law." Schultz, *supra* note 20, at 220.

27. See 3 CORBIN, CONTRACTS § 559 (1951). The rules are but guides and not hard and fast principles. This rule is used often in insurance contract cases. *Id.* § 559 n.10. However, another rule of construction exists to the effect that the contract should be construed in a manner most favorable to the public interest. *Id.* § 550. "Where government is itself a party, application of this rule often runs counter to the one preferring a construction that bears against the party in whose interest the contract language was chosen." *Ibid.*

Corbin distinguishes these contradictory rules by calling the former a rule of interpretation as to the parties and the latter a rule of construction pertaining to a certain "legal effect" which is desirable. One affects the words of the contract; the other affects the contract's operation. The argument could be made that the courts are not really interpreting the provisions of the contract in favor of the Government but are construing the entire contract so as to give it a legal effect beneficial to the public interest. Such a contention must, of course, show the necessity for utilizing this rule of construction. See note 29 *infra*.

28. For elaboration on several of these theories, see Note, 27 IND. L.J. 279, 283-284 (1952).

29. *United States v. Shaw*, 309 U.S. 495 (1939); *Horowitz v. United States*, 267 U.S. 458 (1925); *Deming v. United States*, 1 Ct. Cl. 190 (1864). For a discussion of this aspect see Naylor, *supra* note 9, at 585-587.

The Government as sovereign and the Government as a contracting party are distinct concepts. The Court of Claims has pointed out that: "The two characters which the government possesses as a contractor and as a sovereign cannot be . . . fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons." *Jones v. United States*, 1 Ct. Cl. 383, 384 (1865).

creates are exemplified by the predicament of the subcontractor in this contractual scheme.

The Government, being aware of the extensive subcontracting system, is on notice that should it terminate or breach its contract many parties besides the prime will be injured. Apparently this fact is recognized, for in the Armed Services Procurement Regulation<sup>30</sup> a detailed procedure is provided to protect the interests of the numerous subs as well as primes in instances of contract termination for the Government's convenience.<sup>31</sup> A similar provision exists in statutory form in regard to cancellation of war contracts.<sup>32</sup> But Governmental concern for subcontractors is evidenced only in these limited circumstances and even here is not adequate.<sup>33</sup>

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The court indicated further that the liability of the Government can be no more than a private defendant's liability. *Id.* at 384-385. Neither, by this token, should the liability of the government be any *less* than a private individual's. The Government, then, as a contracting party should be the same as *any* contracting party. This means relief from liability should be measured with the identical tools that are used when a contract between private individuals is involved: illegality, impossibility, and frustration, for example. Rather than talk in nebulous language about "an act of sovereignty," it is more precise to demand that the Government as a defendant show how "an act of sovereignty" brings about the requisite illegality, impossibility, or frustration.

In *Hamilton Rubber Mfg. Co. v. Greater New York Carpet House*, 47 N.Y.S.2d 210 (1944) the court translated a ruling of the War Production Board which prevented performance of the contract into the doctrine of frustration which was then held to be a good defense to a breach of contract claim. This approach is a move toward making the Government contract a private contract. It is submitted that this is a sounder approach.

A caveat should be added that the entire preceding discussion might require a breakdown of the Government contract according to its nature. Thus it should be determined whether the contract is essentially commercial in character or one primarily for the public benefit and service. See Friedmann, *Changing Functions of Contract in the Common Law*, 9 U. OF TORONTO L.J. 15, 33-37 (1951).

30. 32 CODE FED. REG. §§ 400.112-415a.4 (Cum. Supp. 1953). The Armed Service Procurement Regulation shall be referred to as ASPR in the remainder of this Note; section numbers refer to the Code of Federal Regulations.

31. 32 CODE FED. REG. §§ 407.100-407.712 (Cum. Supp. 1953). Section 407.518 deals with the settlement of subcontract claims. As illustration, § 407.518-3 suggests that the prime contractor include in all subcontracts a termination clause so as to prevent suits by subs against the prime. Nevertheless, judgments by subs against the prime are recognized as the cost of settling with these subs in certain instances. See § 407.518-8. For a discussion of the termination of contracts section of the ASPR see Hardee, *Termination of Military Contracts*, 32 TEXAS L. REV. 172 (1953).

32. 63 STAT. 380 (1949); 41 U.S.C. § 107 (1952). For a recent case coming under this act, see *Erie Basin Metal Products v. United States*, 109 F. Supp. 402 (Ct. Cl. 1953). This statute applies only to the termination of war contracts.

33. For an analytical exposition of the ASPR which points up some of the inadequacies of the current regulation, see Wienshienk and Feldman, *The Current Challenge of Military Contract Termination*, 66 HARV. L. REV. 47 (1952).

The subcontractors may bear greater risks than primes in cases of termination for ". . . the subcontractor must ordinarily rely upon the continued solvency of the prime whereas payment to the prime is assured. . . ." *Id.* at 52.

Another area in which the government has taken an interest concerning the position of subcontractors has to do with the practice of bid-shopping by primes. Some primes will use bids of subcontractors in making up their bid to the government, and, then, after

When the government breaches its contract, the subcontractor's position is even more precarious than in cases of termination. Due to the lack of privity, the sub cannot recover against the Government.<sup>34</sup> Even where the Government, in its contract with the prime, reserved control over the subs, the Court of Claims in *Continental Illinois National Bank and Trust Co. v. United States*<sup>35</sup> denied relief because these provisions only *almost* created privity.<sup>36</sup> Moreover, the existence of statutory and administrative regulations<sup>37</sup> applicable to subs, albeit in restricted fashion, makes more feasible the contention that privity does exist. Yet the courts are generally unwilling to broaden, even slightly, the traditional concept.<sup>38</sup>

Of course, the subcontractor would need no remedy against the Government if his rights against the prime proved satisfactory, but there are circumstances in which he has no adequate remedy. The prime

getting the government contract shop around for lower subcontract bids. See *Joint Hearing before the Subcommittees of the Committees on the Judiciary on S.848*, 83d Cong., 1st Sess. (1953).

34. *Petrin v. United States*, 90 Ct. Cl. 670 (1940); *Herfurth v. United States*, 89 Ct. Cl. 122 (1939). *But cf.* *Corum v. United States*, 81 F. Supp. 728 (Ct. Cl. 1949); *Maneely v. United States*, 68 Ct. Cl. 623 (1929). In the two latter cases recovery was granted to subs because of certain contract provisions which the court interpreted as providing the necessary privity.

In the area of private contract law, also, the sub cannot by-pass the prime and sue the owner. Lack of privity precludes recovery. *Baker v. McMurry Contracting Co.*, 282 Mo. 685, 223 S.W. 45 (1920); *Marks v. Indianapolis B. and W. Ry. Co.*, 38 Ind. 440 (1871).

35. 81 F. Supp. 596 (Ct. Cl. 1949).

36. The contract provisions quoted by the court were:

"1. . . . The Contractor shall not award any work to any subcontractor without prior written approval of the Contracting Officer and the terms of all subcontracts shall be subject to the prior approval of the Contracting Officer.

"2. The Contractor shall be as fully responsible to the Government for the acts and omissions of subcontractors and of persons either directly or indirectly employed by them, as he is for the acts and omissions of persons directly employed by him.

"3. The Contractor shall cause appropriate provisions to be inserted in all subcontracts relative to the work to bind subcontractors to the contractor by the terms of the General Conditions and other Contract Documents insofar as applicable to the work of subcontractors . . . and to give the Contractor the same power as regards terminating any subcontract that the Government may exercise over the Contractor under any provisions of the Contract Documents. . . .

"4. Nothing contained in the Contract Documents shall create any contractual relation between any subcontractor and the Government." *Id.* at 597-598.

37. In some instances the statute will apply directly to subs; in other instances the statute may be directed to the prime requiring him to include in his subcontracts certain provisions or to take certain action pertaining to the subcontracts. In still other instances, the statute may simply be suggestive as to a course to be followed. Regulations follow a similar pattern. *E.g.*, ASPR, § 407.518-2 (directed to the sub); § 407.518-12 (directed to the prime); § 407.518-3 (suggested to the prime). See Feldman, *supra* note 14.

38. In *Corum v. United States*, 81 F. Supp. 728 (Ct. Cl. 1949) and *Maneely v. United States*, 68 Ct. Cl. 623 (1929) the wording of the Government contracts gave so much control that the subs were given the right to sue the Government on them. See also the provisions in note 36 *supra*.

is often in a superior bargaining position. This may result because he is a large, well-established business or because he has the Government contract as tempting bait to wave before a prospective sub. By utilizing this bargaining position, the prime is frequently able to include in the subcontract an exculpatory provision relieving him from liability if the Government breaches its contract.<sup>39</sup> Some jurisdictions, under certain circumstances, even hold that the prime is not liable to subs notwithstanding the absence of an exculpatory clause.<sup>40</sup>

In these instances the courts have consistently denied recovery to the prime for the amounts which would have gone to the subs in the absence of such a clause.<sup>41</sup> Such a determination, however, cannot be attained under general contract law and constitutes another exception in favor of the Government. The liability of the Government is limited by the prime contract; however, when the prime sues for damages, the Court of Claims considers the subcontract's exculpatory provision. This results in the Government's *liability* being measured by the prime contract and the *damages* being gauged by the entire contractual scheme—subcontracts included. This, obviously, violates the rule that liability and damages should be determined by the same criteria.<sup>42</sup>

If the court were to grant proper damages, the prime would be "unjustly" enriched<sup>43</sup> by the amount that, in the absence of such a clause, would go to the sub, but this enrichment is not to the Government's detriment but to the sub's. By refusing recovery the court has decided that

39. For Government breaches the exculpatory clause for subcontracts might read something like this: The contractor shall not in any event be held responsible for any loss, damage, detention or delay caused by the owner.

40. See *Philadelphia Boiler Works v. Foundation Co.*, 190 N.Y. Supp. 696, 697 (1921) in which the court said: "Both parties having had in view the contingency that performance might not be permitted by the United States, it was an implied part of their agreement that if performance was prevented by the government both were to be released from subsequent obligation." See also *Dolan v. Rodgers*, 149 N.Y. 489, 44 N.E. 167 (1896); *Union Paving Co. v. City of Philadelphia*, 95 Pa. Super. 342 (1928).

Whether the prime is liable to the sub in instances of breach or termination by the Government depends upon who assumes the risk of the Government's breach or termination. See 6 WILLISTON, *CONTRACTS* § 1932 (2d ed. 1938); 6 CORBIN, *CONTRACTS* § 1340 (1951); RESTATEMENT, *CONTRACTS* § 457 (1932).

41. *Continental Illinois National Bank and Trust Co. v. United States*, 101 F. Supp. 755 (Ct. Cl. 1952), *cert. denied*, 343 U.S. 963 (1952); *Continental Illinois National Bank and Trust Co. v. United States*, 81 F. Supp. 596 (Ct. Cl. 1949); *Severin v. United States*, 99 Ct. Cl. 435 (1943), *cert. denied*, 322 U.S. 733 (1944). See also 1 MERCER L. REV. 117 (1949), 34 MINN. L. REV. 143 (1950).

42. See discussion of the relationship of liability and damages in *Patterson, Builder's Measure of Recovery for Breach of Contract*, 31 COL. L. REV. 1286 (1931).

43. Whether or not the prime is "unjustly" enriched depends on whether or not the exculpatory clause was bargained for or forced upon the sub because of the prime's superior bargaining position. Even if such a clause is a result of a superior bargaining position, it might be contended that recovery from the Government is not an "unjust" enrichment.

of the two undeserving parties—the Government and the prime—the former shall retain the amount. If the equities were equal, such a conclusion would be just, but they are not because the Government owes this money under ordinary contract principles.<sup>44</sup> The court, therefore, refuses to apply an exception to the general contract law and thereby permit recovery by the sub when he sues the Government directly, but it does find an exception and deny partial recovery when the prime sues the Government. The consistency of the court's approach lies basically in its solicitude for the Government. In cases where no exculpatory clause exists, the court does permit recovery by the prime for the sub's benefit before the latter has obtained a judgment against the prime or even instituted an action.<sup>45</sup>

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44. Just what the measure of damages is in cases of delay or suspension by the Government appears to be a subject of uncertainty. The Court of Claims has indicated that where a subcontractor is the real party who loses and the prime is not liable to the sub because of an exculpatory clause, the prime has lost nothing and can recover nothing. *Pope v. United States*, 75 Ct. Cl. 436 (1932). See a like holding in *Degnon Contracting Co. v. City of New York*, 235 N.Y. 481, 139 N.E. 580 (1923).

The Court of Claims in a more recent holding said: "Plaintiffs [prime contractors] therefore had the burden of proving, not that someone suffered actual damages from the defendant's breach of contract, but that they, plaintiffs, suffered actual damages." *Severin v. United States*, 99 Ct. Cl. 435, 443 (1943). But the Court of Claims has expressed a more satisfactory view in an 1875 case: "In estimating the damages caused by this suspension of the work, both parties have gone . . . upon the actual expenditures of the contractor to his subcontractors. . . . We do not understand this to be the rule for measuring the damages in such cases. The Government is a stranger to the subcontractors . . . and is not interested in the amounts paid to them. If the contractor had paid to them three or four times as much as the necessities of this case required, the Government would not be liable for such excess; and if they had waived all claims upon the contractor, or compounded with him for a nominal consideration, his good fortune would not have enabled the Government to throw off its own liabilities. The instructions which should be given to a jury in such a case, we apprehend, would be not to inquire into the private or *ex-parte* transactions of this contractor, but to estimate the natural and inevitable losses caused to any contractor by such a suspension. . . . *Smith v. United States*, 11 Ct. Cl. 707, 710 (1875), *aff'd*, 94 U.S. 214 (1876) (emphasis supplied).

The damages arising, admittedly, are speculative and must be estimated. See 6 CORBIN, CONTRACTS § 1094 (1951). Such estimate need not be itemized. *United States v. Smith*, 94 U.S. 214 (1876).

As a practical matter once the Government has paid for its breach to the prime it then may let the prime and the subs settle among themselves. If a sub—assuming privity exists—were later to sue on the contract, the Government could plead as a defense the judgment to the prime which completely covered the Government's liability for the breach.

45. *Pneumatic Gun-Carriage and Power Co. v. United States*, 36 Ct. Cl. 71 (1901).

Judge Whaley stated in a dissent to another case: "For fifty years it has been the settled doctrine of this court that a contractor could bring suit for himself and his subcontractor for losses occasioned by delay by the defendant before payment was made to the subcontractor." *Severin v. United States*, 99 Ct. Cl. 435, 444 (1943).

Any assumption by the Court of Claims that the sub will exercise its right is negated, however, by the statement: "I think that in most of the suits involving wrongs committed by Government agents to the harm of subcontractors, there would be no ground on which the prime would, in fact, be liable to the subcontractor. Yet we consistently allow recovery in such cases without first trying the hypothetical suit of the subcontractor against the prime contractor. We do not allow recovery because we presume the ex-

The Court of Claims, itself, has been split on this issue of whether the prime, when not liable on the subcontract, should recover for the sub. One judge, Madden, has even reversed his position. Writing for the majority in *Severin v. United States*<sup>46</sup> which denied recovery to a subcontractor and then dissenting from a similar denial of recovery in *Continental Illinois Bank and Trust Co. v. United States*,<sup>47</sup> he stated that he would be glad to see the *Severin* case overruled for it “. . . introduces to [sic] large an element of the accidental into our decisions in these frequently recurring cases involving subcontractors.”<sup>48</sup> A rationale suggested by Judge Madden would have the prime hold in trust for the sub a right to have the Government comply with its contract.<sup>49</sup>

Several alternative solutions to the subs' problem are available. The court could broaden the concept of privity to permit them to recover. This would consist of just another exception to the general contract law;<sup>50</sup> however, such an exception would be a novelty since it benefits the subs and not the Government. Utilization of a third party beneficiary theory enabling the subs to sue directly would constitute a lesser departure from accepted contract principles.<sup>51</sup>

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istence of such liability.” *Continental Illinois National Bank and Trust Co. v. United States*, 81 F. Supp. 596, 599 (Ct. Cl. 1949).

Recovery by the prime from the Government has no relation to recovery by the sub from the prime. See *Baker v. McMurry Contracting Co.*, 282 Mo. 685, 223 S.W. 45 (1920).

46. 99 Ct. Cl. 435 (1943), *cert. denied*, 322 U.S. 733 (1944).

47. 81 F. Supp. 596, 598 (Ct. Cl. 1949).

48. *Id.* at 599.

49. *Ibid.* This suggestion is commented on and an alternative suggestion offered in 34 MINN. L. REV. 143, 145 (1950). Both proposals recognize the subcontractors' dilemma and are attempts to clarify it.

Judge Madden cites *United States v. Blair*, 321 U.S. 730 (1944) as providing a new rule in regard to recovery by a prime for the benefit of a sub in the face of an exculpatory clause. *Continental Illinois National Bank and Trust Co. v. United States*, 81 F. Supp. 596, 598 (1949). However, the *Blair* case had to do with extra costs and services demanded by the government. In “damage” cases no benefit accrues to the Government; in “extras” cases the Government does receive the benefit. Recovery by the prime in the latter instance is based on an implied contract. An exculpatory clause with the subcontractor relating to “damages” would seem to be immaterial in these implied contract cases. Furthermore, there was no evidence introduced that an exculpatory clause did exist in the *Blair* case. *Id.* at 737. See also *Leary Construction Co. v. United States*, 63 Ct. Cl. 206 (1927) (money was admittedly owed to prime; hence prime-sub relationship immaterial). However, though *Blair* can be explained away, a similar argument can be made where the suit is one for damages. In both cases the suit is on the contract.

It is worth mentioning that in cases where damages are sought for delay, the recovery, though in contract, seems to border on tort damages. The Government, it could be maintained, has interfered with an advantageous relationship of both the prime and the sub and is liable to both. Note the language of the court in *Smith v. United States*, 11 Ct. Cl. 707, 710 (1875) quoted in note 44 *supra*.

50. See note 17 *supra*. See also discussion in the text at pp. 73-74 *infra*.

51. *Maneely v. United States*, 68 Ct. Cl. 623 (1929). Here the contract between the Government and the prime contained a clause which established the Government's

The simplest and most candid approach the court can pursue is to follow the general contract law with a stricter adherence. Accordingly, the prime would recover the amounts that belong to the subs, and, if necessary, a court of equity could then require him to compensate them thereby preventing unjust retention by the prime.<sup>52</sup> This would not violate the subcontract's exculpatory clause because it only concerns the contract liability of the prime and has no pertinence to recovery received by the prime for the sub's benefit.<sup>53</sup> The prime would serve as a constructive trustee of such amounts due the subs.<sup>54</sup> Utilization of this constructive trust scheme should be distinguished from Judge Madden's proposal.<sup>55</sup> Reliance on the trust concept is certainly less speculative than permitting recovery before a sub has even instituted an action against the prime.

The problems in this area, as indicated, arise from the fact that private contractors who engage the Government face a double blast of disadvantages in that they must accept a standard contract prepared by the Government and can expect a court interpretation of this contract favorable to that entity. It might be contended that the solution lies in a modification of the law by which the Government-specified contract is interpreted. This implies that the important realization is that the primes' and the subs' problems are not isolated instances of injustices but are examples of what the Government's one-sided contract engenders—a result of the trend from contract to status.<sup>56</sup> The conclusion, then, is not that the general contract law is inadequate, per se, but that these situations do not always fit within its scope.<sup>57</sup> Thus it is urged that a new law is needed

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liability to third parties; for this the prime gave up his claim against the Government. See also Nemmers, *supra* note 14. See note 50 *supra*.

52. This is Judge Whaley's approach as suggested in the dissenting opinion in *Severin v. United States*, 99 Ct. Cl. 435, 445 (1943).

53. This point is brought out in 34 MINN. L. REV. 143, 145 (1950). The subcontract would seem to be beyond consideration when a prime sues the government on its prime contract. What relevancy can the one have on the other? See notes 44 and 49 *supra*.

54. See 3 SCOTT, TRUSTS § 462.2 (1939).

55. See note 49 *supra*. Judge Madden would have the prime hold a "right" in trust; whereas under this approach an "amount of recovery" would be held in trust.

56. See Goble, *Trends in the Theory of Contracts in the United States*, 11 TULANE L. REV. 412 (1937); see also note 21 *supra*.

"Contract" implies rights and duties that are bargained for; "status" refers to rights and duties that arise from a relationship that has become established other than by contract. Where a contract becomes so one-sided that little room exists for bargaining, the relationship borders on being one of status.

57. "The common law systems are thus gradually coming to grips with the problem of infiltration of public law into contract, within the confines of the common law itself; but it can hardly be denied that the absence of a clear-cut system of administrative law and tribunals greatly impedes and retards the clarification of this increasingly important branch of the law." Friedmann, *supra* note 29, at 37. Another writer states, ". . . [T]he

to cover the Government's "contract of adhesion." Proponents of this view might further suggest that the new law take the form of control by an administrative agency.<sup>58</sup> Flexibility and informality would then prevail, and the interests of the contractors would, perhaps, be better guarded.

Such a change appears satisfactory as an abstract notion, but it is not a practical, immediate answer.<sup>59</sup> Legislative action on controversial subjects is slow. The effects on business practices must, of course, be ascertained, and contractors would probably distrust such wholesale innovations. Furthermore, the drastic nature of this proposal encourages examination of other, less revolutionary solutions.

Alternatively, the position could be maintained that a satisfactory solution lies in a change of philosophy by the courts toward the Government. Such a new philosophy, one favoring the contractor, would be expressed through a liberal interpretation of the contract in his behalf. Contemporaneously with the contract to status movement there has been a counter-movement from status to contract which provides elasticity in the contract relationship.<sup>60</sup> This counter-movement which is court sponsored, involves, for example, freer application of constructive conditions, an extended use of the third-party beneficiary theory, a more liberal utilization of parol evidence—all in the direction of molding the contract to fit the supposed true intent of the parties. The advocates of this position seem to imply that many of the injustices which arise because of the Government's standard form contract may be alleviated by flexible and equitable interpretation of contracts by the courts. This means that the courts would continue to create exceptions to the general law but only where necessary to equalize the inequitable effects of the existing standard contract. Inherent in such a view is the recognition that the sovereign need not be protected in the manner it is today.

This proposal which embodies an extended reversal by the courts of their philosophy of interpretation of Government contracts coupled with a utilization of exceptions<sup>61</sup> to the general law meets the same criticism that today's approach of employing exceptions to favor the Government

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use of the word 'contract' does not commit us to indiscriminate extension of the ordinary contract rules to all contracts." Kessler, *supra* note 21, at 633.

58. See PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* 145 (1937). In the areas where administrative control is utilized today in the Government contract area there is need for revision. See, for example, Anderson, *supra* note 22, at 51; Schultz, *supra* note 20, at 246-250; Wienshienk and Feldman, *supra* note 33, at 80-82.

59. "While [administrative supervision] is to be welcomed, where available, its availability in most of the fields concerned will be a long time in coming; and new fields are constantly emerging." Llewellyn, *Book Review*, 52 *HARV. L. REV.* 700, 705 (1939).

60. Goble, *supra* note 56, at 423-424.

61. See note 67 *infra* and accompanying text for a view on exceptions.

faces; namely, it tends to undermine the "security," in the sense of predictability of actions at law, which the parties to a contract require. Neither party could be sure that his words would be given the intended meaning.<sup>62</sup> What may appear to be a one-sided, unjust contract may actually have been bargained for. These possibilities should serve as a check to the loose interpretation of contracts.

Though each of the two suggested approaches appears unsatisfactory when standing alone, both contain ideas which may be extracted and blended to form a tentative solution. First, a recognition is needed that the movement from contract to status, that is, from free bargaining to a standardized contract, is not intrinsically bad. On the contrary it is very desirable in that it provides certainty, uniformity, and expeditious conduct of business.<sup>63</sup> The danger lies in that the certainty achieved may be unjust to the person who must accept the standard form. Consequently, what is required is a revised standard contract that is fair to all interested parties.<sup>64</sup> This acknowledges that the standard contract is a natural concomitant to contemporary economic development and at the same time assures a status relationship that is just. Secondly, the courts should adopt a new philosophy, one which does not favor the Government. Hence, the courts would not indulge in granting wholesale exceptions to the Government. Utilization of exceptions to prevent *obvious injustices* to either the contractors or the Government would be, of course, permissible, but the revised standard contract should operate to keep such exceptions to a minimum.<sup>65</sup>

In the absence of a revised contract, the courts should utilize exceptions sparingly. General contract law should still be followed with neither party receiving special consideration.<sup>66</sup> For example, a satisfactory solu-

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62. According to Professor Llewellyn: "No man is safe when language is to be read in the teeth of its intent." Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 732 (1931).

63. For a discussion of the advantages and disadvantages of a standard form contract, see Sales, *supra* note 21, at 337-342.

64. Sales suggests setting up a board consisting of lawyers, businessmen, and other representatives to draft various standard contracts and clauses. A standard contract need not be completely inflexible; certain clauses may be discretionary. *Ibid.*

65. If the standard contract should, in an instance, prove unjust or unworkable, then the courts might have to apply an exception to prevent an injustice, but this should then be the cue for a revision of the contract so as to preclude this problem arising thereafter. The object is to reduce exceptions to the minimum.

66. "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." Note, 27 IND. L.J. 279, 292 (1952).

tion of the subcontractors' problem is better obtained by adhering to accepted contract principles, rather than by creating an additional exception in favor of subcontractors.<sup>67</sup> A revolutionary attempt at administrative control of the Government contract need only be considered as a possible alternative if the courts refuse to adopt this new outlook.

### NONFEASANCE: A THREAT TO THE PROSECUTORS' DISCRETION

It is generally conceded that punishment for the commission of a criminal act is an effective means<sup>1</sup> of reducing the steadily increasing crime rate in the United States.<sup>2</sup> Under present criminal law standards, however, there can be no punishment until there has been legal prosecution and conviction.<sup>3</sup> Thus, the prosecution of criminal offenses becomes a pivotal point in all attempts to reduce crime.

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67. Two possible methods exist of overcoming the favorable exceptions granted to the Government. One is to utilize another exception to counteract the first; second is to neutralize the exception by adhering to general contract law. See notes 61 and 65 *supra* and text.

1. "Punishment should be inflicted, firstly, because it is right to do so. But such punishment may also have very useful effects: it may stimulate reformation by bringing a wrongdoer to a realization of the ethical significance of his behavior; it may also deter. Such punishment provides far-ranging instruction in the social values." HALL, PRINCIPLES OF CRIMINAL LAW 130 (1947). See also Ewing, *A Study on Punishment*, 21 CAN. B. REV. 102, 116 (1943); Gausewitz, *Considerations Basic to a New Penal Code*, 11 WIS. L. REV. 346, 353 (1936); Note, *Punishment and Moral Responsibility*, 7 MOD. L. REV. 205 (1944).

The modern proponent of deterministic behaviorism is likely to object to punishment of any sort, preferring the view that society, and not the violator of the law, is the sinner or that the criminal is sick and should be treated accordingly. See MENNINGER, *THE HUMAN MIND* (1945); WHITE, *CRIME AND CRIMINALS* (1933).

2. In 1952, crime in cities increased 8.1 percent, showing gains in all offenses for the first time in seven years. This was a general rise in crime of 8.2 percent over the 1951 figures. 23 UNIF. CR. REP. 71 (1952). The first six months of 1953 showed a 2.5 percent increase over the same period in the preceding years and a 9.0 percent increase over that period of 1951. 24 UNIF. CR. REP. 1 (1953). Since 1950, there has been a 20 percent increase in the crime rate in contrast with a population rise of only 6 percent. *The Indianapolis Star*, April 22, 1954, p. 20, col. 1.

Prior to 1951, the crime problem in the United States was serious enough to warrant national attention. KEFAUVER, *CRIME IN AMERICA* (1951).

3. This idea is embodied in what Professor Hall calls the "principle of legality" and defines as the "limitation on penalization by officials, effected by the required prescription and application of *specific rules*." HALL, PRINCIPLES OF CRIMINAL LAW 19 (1947). The principle, which springs from an ultimate concept of justice, expresses itself in the due process clauses of the Fifth and Fourteenth Amendments.

The general process of prosecution embraces the activities of several law enforcement agencies; *i.e.*, police, prosecutor, jury, and judge. Traditionally, the initial charge against an alleged offender is made by the police, and, then, carried to the prosecutor or the grand jury. In most jurisdictions either of these agencies may institute prosecution