

1956

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Recommended Citation

Robert S. Pasley, *The Interpretation of Government Contracts: A Plea for Better Understanding*, 25 Fordham L. Rev. 211 (1956).

Available at: <https://ir.lawnet.fordham.edu/flr/vol25/iss2/1>

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THE INTERPRETATION OF GOVERNMENT CONTRACTS: A PLEA FOR BETTER UNDERSTANDING

ROBERT S. PASLEY*

A GOVERNMENT contract is a complex document. The standard supply contract form contains twenty separate clauses and fills six closely printed pages.¹ The Armed Services Procurement Regulation² lists twenty-two required clauses for fixed-price supply contracts,³ plus another twenty or so to be used where appropriate.⁴ The text of these various clauses fills some thirty-six large size pages in the regulation. Some of these clauses in turn incorporate by reference large portions of relevant regulations.⁵ In addition to these standard clauses, a contract may include a set of technical specifications, running anywhere from two to one hundred pages.

These are ordinary, run-of-the-mill contracts. Contracts devised to meet special situations may be much more complex. A contract form for "Alkylation Facilities Expansion," prepared by the Armed Services Petroleum Purchasing Agency, comprises seven pages of general provisions, sixteen pages of special provisions, and fourteen pages of specifications, constituting the basic "construction inducement contract," and then incorporates a twenty-one page supply contract, which is an entirely separate instrument, but still part of the same basic document. One such contract entered into by that Agency includes a termination payment provision which requires five and one half pages of arithmetical formulas, so complex that only an expert mathematician can apply them.

The Dixon-Yates contract reads like a corporate trust indenture. Its text takes up fifty-six printed pages of the complaint in the action now pending in the Court of Claims, and appendices and related memoranda fill another twenty-eight pages.⁶

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1. U. S. Standard Form 32, General Provisions for Supply Contract, effective April 28, 1950, 1 CCH Gov't Contracts Rep., ¶ 18,305.

2. 32 C.F.R. Subchapter A (Supp. 1955). Hereafter cited as ASPR.

3. ASPR § 7-103.

4. ASPR §§ 7-104, 7-106.

5. See, e.g., ASPR §§ 7-104.11, 7-104.12, 8-701(b), 12-604.

6. Petition, pp. 14-99, Mississippi Valley Generating Co. v. United States, Ct. Cl., filed Dec. 13, 1955.

Faced with this sort of thing, it is no wonder the average lawyer is tempted to throw up his hands. It is not surprising that the courts should refer to "verbose and complicated Government writings," out of which the contractor's "rights must be culled."⁷ Nor is it wholly accidental that some courts at least have declared the enterprise hopeless, and by applying the *contra proferentem* rule, construing the contract most strongly against the Government, worked out what they conceive to be an equitable solution of a particular controversy, without paying too much attention to the precise language chosen.⁸

Is there a way out of this maze? Certainly there is no simple solution. But there is a rational explanation for the complexity of Government contracts and there are a few basic principles which are applicable to their interpretation. The rest of this article will be devoted to setting forth these principles, to outlining a few problems which remain unresolved, and to discussing certain court decisions involving the interpretation of specific contract clauses which the writer believes to have been incorrectly decided.

I. GENERAL PRINCIPLES OF INTERPRETATION

A. Reason for Complexity

Government contracts are complicated for a very simple reason: the subject matter with which they deal is inherently complicated. The Government buys virtually every type of product which the American economy produces, from nuts and bolts to battleships, from aircraft to rocket launchers. Some of these are "off-the-shelf" items, others are manufactured to special order over a long period of time. Directly or indirectly the Government contracts or subcontracts with almost every major concern in the country, and with a very great number of small business firms. The sheer volume involved is almost astronomical.⁹

To meet this situation, a few basic forms, with variations, have been devised: the supply contract, the construction contract, the contract for research and development; each found in two basic types, fixed-price or cost-reimbursement. For particular situations, more specialized forms have been created, such as the master ship-repair contract, the facilities contract, the engineering services contract, and so on.

Each of these forms is intended to cover, so far as can be anticipated,

7. *Elastic Stop Nut Corp. v. United States*, 126 Ct. Cl. 100, 107, 113 F. Supp. 446, 449 (1953).

8. See cases discussed *infra*, pp. 222-40.

9. From March 1952 to January 1955 the Department of Defense placed \$63,000,000,000 worth of contracts. Commission on Organization of the Executive Branch of the Government, Task Force Report on Military Procurement 25 (1955). The Department's inventory in 1955 was estimated at \$124,000,000,000. N.Y. Times, Oct. 30, 1955, § 1, p. 1, col. 7.

every situation which may be encountered by either party, from the initial tooling up for production to final delivery and payment. Among the subjects thus treated are variations in quantity, changes in specifications, patent rights, state and local taxes, Government-furnished property, inspection, termination for default, termination for convenience, price escalation, and many others.

In short, a Government contract is complicated for the same reason that a corporate trust indenture or a securities registration statement is complicated, namely the complexity of the economy with which these instruments deal. There is no malice prepense involved in all this; it is simply inherent in the nature of things.

There is a further factor, not present in the ordinary private transaction. Congress has required the inclusion of a large number of clauses, principally in the areas of social policy and ethical considerations.¹⁰ Examples are the labor clauses required by the Walsh-Healy Public Contracts Act,¹¹ the Davis-Bacon Act,¹² and the Eight-Hour Law,¹³ as well as such clauses as the "Covenant Against Contingent Fees,"¹⁴ and the "Officials Not To Benefit" provision.¹⁵ A few more are required by Executive Order, such as the Anti-Discrimination Clause,¹⁶ and the clause prohibiting the use of convict labor.¹⁷ But the vast majority of clauses in actual use have been promulgated administratively.¹⁸ This brings us to the next topic, the manner in which these clauses are prepared.

B. *The Genesis of Standard Forms and Clauses*

There is no question that the Government contract, with rare exceptions, is a "contract of adhesion," that is, a standard form, prepared by one party and required of the other, designed to fit a wide variety of situations by the filling in of appropriate blanks or the annexing of detailed technical specifications, and with very little opportunity for variation. Such contracts of adhesions have become common in private dealings. The insurance contract is a long-standing illustration. Most com-

10. See Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 Va. L. Rev. 27 (1955); Risik, *Federal Government Contract Clauses and Forms*, 23 Geo. Wash. L. Rev. 125 (1954).

11. 41 U.S.C.A. §§ 35-45.

12. 40 U.S.C.A. §§ 276(a)-(c).

13. 40 U.S.C.A. §§ 324-26.

14. ASPR § 7-103.20, required for negotiated contracts by 41 U.S.C.A. § 153(a), and 41 U.S.C.A. § 254(a).

15. ASPR § 7-103.19, required by 41 U.S.C.A. § 22.

16. ASPR § 12-804, required by Exec. Order No. 10557, Sept. 3, 1954, 3 C.F.R. 69 (Supp. 1954).

17. ASPR § 12-203, required by Exec. Order No. 325A, May 18, 1905.

18. See Risik and Miller, *op. cit. supra* note 10.

mercial concerns today use standard forms of purchase orders, agency contracts, sales contracts, employment contracts, and the like. Obviously, this sort of contractual instrument is a somewhat different creature from the old-fashioned informal contract formed by an exchange of letters, the first-year law student's "offer and acceptance." Trying to fit it into the mold of case law developed around the latter is apt to produce some strange results.¹⁹

At the same time, it must be pointed out that the Government contract is not just a contract of adhesion, forced upon the unwilling contractor by an arbitrary Government on a take-it-or-leave-it basis. On the contrary, it is the result of a long process of negotiation and bargaining, although one which of necessity takes place on an over-all rather than an individual basis. True, there can be no bargaining about the clauses which are required by statute or executive order. But the rest of the standard clauses are hammered out only after exhaustive discussions between representatives of the Government and industry. At these conferences the Government is represented by experts from the procuring agencies, industry by committees designated by the various trade associations whose members have the principal interest. Beside the more specialized associations, organizations such as the Chamber of Commerce and the National Association of Manufacturers seek to protect the interest of the small businessman and the general manufacturer. Lawyers, accountants, purchasing agents, patent experts, and similar specialists participate in these conferences, on both sides of the table.

As in all negotiations of this kind, there is a great deal of give and take, points are conceded, first by one side, then the other, thorny issues settled by compromise, and so on. In the final outcome, there usually remain only a few issues on which agreement cannot be reached. As to these, the Government has the final say, but they are ordinarily resolved at a high policy level, such as by an Under or Assistant Secretary of the Department concerned. The over-all result is a contract of adhesion which nevertheless represents a substantial measure of genuine agreement, if not by the individual contractors concerned, at least by those who speak for them.²⁰

Secondly, it should be pointed out that the forms and clauses thus agreed upon are not fixed and unalterable. They are constantly being reviewed and revised, as ambiguities, difficulties, or hardships appear.

19. See Miller, *op. cit. supra* note 10, at 56-57; Fain and Watt, *War Procurement—A New Pattern in Contracts*, 44 *Colum. L. Rev.* 127 (1944); Symposium on "Compulsory Contracts," 43 *Colum. L. Rev.* 569-752 (1943); Llewellyn, *Book Review*, 52 *Harv. L. Rev.* 700 (1939).

20. It should be noted that these conferences are informal, and do not follow the rule making procedures of the Administrative Procedure Act. 5 U.S.C.A. § 1003.

Finally, no contractor need accept a form or a clause which he honestly believes to be unsuited for his particular situation. If he or his lawyer believes that a legitimate reason exists for a deviation from the standard language, he should not hesitate to request one.²¹ Such deviations are not favored, especially where they would result in unfairly preferring one contractor over another, but where this is not the case, and good reasons are adduced for the deviation requested, it stands a reasonably good chance of being granted.

C. *On Understanding a Government Contract*

The lawyer whose client is considering entering into a Government contract for the first time has no easy task. Properly to advise his client, he must understand the document which the client is asked to sign. Naturally, the first thing to do is to read it. This presents no particular problem in any given case, because the prospective contractor will have been furnished with a copy.

But to acquaint oneself on an over-all basis with the contract forms currently in use, or to compare the form issued to the contractor with the forms officially promulgated, is not quite so easy. Theoretically, all this information should be available in the Code of Federal Regulations.²² But the Code is not always up to date, and must be supplemented by reference to the daily issues of the Federal Register. Even then, surprising *lacunae* appear. For example, one consulting the Code would assume that Standard Form 23 is the approved, official form currently in use for construction contracts. It says so, quite unmistakably.²³ Nowhere does it appear that on March 19, 1953, General Services Administration issued its General Regulation No. 13, promulgating a new form, 23a, General Provisions (Construction Contract), superseding, at least in part, the older form.²⁴ Standard Form 32, "General Provisions for Supply Contract," prescribed by General Services Administration in 1949,²⁵ is quite different from Standard Form 32, "Contract for Supplies," as found in the Code.²⁶ This sort of thing seems inexcusable. But the situation nevertheless exists.²⁷

The best solution is to arm oneself with the Government Contracts

21. The procedure to be followed, in the case of Department of Defense contracts, is set forth in ASPR § 1-109.

22. 44 U.S.C.A. §§ 301-14, as amended, 44 U.S.C.A. § 311 (Supp. 1955); 5 U.S.C.A. § 1002.

23. 44 C.F.R. § 54.13 (Supp. 1955).

24. 1 CCH Gov't Contracts Rep. ¶ 18,202 (1953).

25. 1 CCH Gov't Contracts Rep. ¶ 18,305 (1949).

26. 44 C.F.R. § 54.21 (Supp. 1955). See also 41 U.S.C.A. § 54.21.

27. See Newman, Government and Ignorance—A Progress Report on Publication of Federal Regulations, 63 Harv. L. Rev. 929 (1950).

Service,²⁸ an unofficial publication which does a remarkable job in keeping up to date on all current changes in this whole area. Another solution is to subscribe to the Government Printing Office bulletins announcing new publications, and order all copies of new or revised regulations as soon as they are promulgated, without waiting for them to appear in the Federal Register or the Code of Federal Regulations.

Having found the form and read it, the next problem is to understand it. The difficulties in doing so have been exaggerated. The cardinal rule is that *the contract means exactly what it says*. There are no hidden meanings, no "traps for the unwary," no deliberate ambiguities. The form may sound verbose and complicated, but if one will have the patience to read it carefully, line by line, and word by word, it will become reasonably clear.

If one still has difficulty, one should seek help in the writings of the specialists. There are not many good texts; most of the standard works are out of date. But Lupton's *Government Contracts Simplified*²⁹ is a good, compact work which explains most of the clauses currently in use. Much useful material has appeared in the law reviews.³⁰ Many seminars and institutes on problems in the area of Government contracting have been conducted in recent years, sponsored by bar associations and law schools.³¹ The proceedings of these institutes, if they can be obtained, will often prove invaluable.

Finally, one should consult the court decisions, especially those of the United States Supreme Court and the Court of Claims. These can be misleading, however, because they often involve contract clauses or forms which have since been superseded. And occasionally, as the writer hopes to show below, they seem to be based on a misunderstanding of the clause or form involved.

28. CCH Gov't Contracts Rep., vols. 1, 1A, 2.

29. Lupton, *Government Contracts Simplified* (1953).

30. See, e.g., the articles on construction contracts appearing in prior issues of this review, 24 *Fordham L. Rev.* 535, 556, 588 (1956), 25 *Fordham L. Rev.* 1 (1956), and on the disputes clause, 25 *Fordham L. Rev.* 11 (1956). Comprehensive bibliographies have been published in 12 *Fed. B.J.* 334 (1952), and by the Law Branch of the Army Library, *Bibliography on Government Procurement*, etc. (1954).

31. An Institute on "Some Practical Aspects of Government Construction Contract Law," sponsored by the Fordham University School of Law and the Federal Bar Association (Empire State Chapter) was held at Fordham on December 2 and 3, 1955. The George Washington University Law School has sponsored three such Institutes, the first on Government Contracts generally (1954), the second on Termination of Defense Contracts (1955), and the third (in co-operation with the Federal Bar Association) on Subcontractor Problems (1956).

D. *The Contra Proferentem Rule*

If, despite the steps suggested above, ambiguities in a Government contract still remain, they will be resolved against the Government as the draftsman. There is no question about this rule. It has been applied from the earliest times to date.³² The statement to the contrary in a recent law review note³³ cannot be supported.

The writer's only quarrel is with those who would apply this rule too hastily, without making an honest effort to understand what the contract really does say. In the old days, the rule was a standard war-horse in the case of the insurance contract. Now that insurance policies have become widely standardized, often by statute, some courts at least are willing to ascribe to them their ordinary meaning, without straining to discover an ambiguity to resolve against the insurance company.³⁴ Perhaps it is time to adopt a similar approach in the case of the Government contract.

E. *Law Applicable to Government Contracts*

It is now well settled (after some initial vacillation on the part of the lower courts) that in interpreting a Government contract, or in deciding any other question of law arising thereunder, federal law applies.³⁵ The rule of *Erie Railroad Co. v. Tompkins*³⁶ has no bearing on the situation. And since the federal law controls, conflict theories based on the place of contracting, or of performance, or of payment, or on the "center of gravity"³⁷ are irrelevant. Basically this law is to be sought in the United States statutes and in the regulations promulgated thereunder. But where these are silent, resort must be had to a general body of law which can only be characterized as a federal "common law" of Government

32. *Garrison v. United States*, 74 U.S. (7 Wall.) 633, 650 (1868); *United States v. Lennox Metal Mfg. Co.*, 225 F.2d 302, 315 (2d Cir. 1955); *Appeal of Fluor Corp.*, IBCA-53, 6 C.C.F. ¶ 61,777 (1956); JAGT 1954/10233, Dept. of the Army Circ. 715-50-4 (Procurement Legal Service) par. 3, p. 3.

33. Note, *Contractors' Problems Under the Standardized Government Contract*, 30 Ind. L.J. 60, 65 (1954).

34. *Neas v. Home Fire and Marine Ins. Co.*, 135 F. Supp. 205 (N.D. Tex. 1955); *Liberty Mutual Ins. Co. v. Hercules Powder Co.*, 126 F. Supp. 943 (D. Del. 1954), rev'd, 224 F.2d 293 (3d Cir. 1955).

35. *United States v. County of Allegheny*, 322 U.S. 174 (1944); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943); *United States v. Lennox Metal Mfg. Co.*, 225 F.2d 302, 307 (2d Cir. 1955); *United States v. Jones*, 176 F.2d 278, 281 (9th Cir. 1949). See Pofcher, *The Choice of Law, State or Federal, in Cases Involving Government Contracts*, 12 La. L. Rev. 37 (1951); Notes, 34 Cornell L.Q. 110 (1948), 59 Harv. L. Rev. 966 (1946); 67 Harv. L. Rev. 347 (1953); 53 Colum. L. Rev. 991 (1953); Comment, 40 Cornell L.Q. 561, 566-71 (1955).

36. 304 U.S. 64 (1933).

37. *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954).

contracts, especially since in a few instances it departs from generally accepted common law contract principles.³⁸

On the other hand, it is equally settled that questions arising under subcontracts are determined by local law, including any applicable conflict-of-laws rules.³⁹ This is on the theory that there is no privity of contract between the Government and the subcontractor. The rule has been criticized, and the suggestion made that the relations between a Government prime contractor and his subcontractor should also be governed by federal law,⁴⁰ but so far, at least, the courts have not accepted this idea.

The rule of no privity may, however, be modified by federal statute. Thus, the Contract Settlement Act of 1944⁴¹ included numerous provisions affecting subcontractors.⁴² The Renegotiation Act of 1951⁴³ is another example.

Moreover, the rule of no privity may be eroded by requirements which the Government imposes on its prime contractors affecting their relations with their subcontractors. Thus, if a statute, regulation or contract provision requires that a prime contractor include a particular contract clause in his subcontracts, he must do so or be in default. Whether such subcontract clause, when inserted, is then to be interpreted under federal or state law is, however, another question. It is submitted that the state courts would be bound to follow the federal courts in construing such clauses, where the text thereof is specifically required by a federal statute, but not where it is merely a matter of contractual arrangement between

38. See, e.g., *United States v. Lipman*, 122 F. Supp. 284, 287 (E.D. Pa. 1954); *Refining Associates, Inc. v. United States*, 124 Ct. Cl. 115, 109 F. Supp. 259 (1953).

39. *Edward E. Morgan Co. v. United States for Use and Benefit of Pelphrey*, 230 F.2d 896 (5th Cir. 1956); *Southern Painting Co. of Tennessee v. United States*, 222 F.2d 431 (10th Cir. 1955); *United States v. DUBY*, 201 F.2d 800 (9th Cir. 1952); *United States for Use and Benefit of Lichter v. Henke Construction Co.*, 157 F.2d 13 (8th Cir. 1946); *United States for Use and Benefit of Magnolia Petroleum Co. v. H. R. Henderson & Co.*, 126 F. Supp. 626 (W.D. Ark. 1955).

40. Feldman, *The Subcontractor's Relationship to the Government*, 12 Fed. B.J. 299, 308-09 (1952).

41. 41 U.S.C.A. §§ 101-25, as amended, 41 U.S.C.A. §§ 114(a), 117(d) (Supp. 1955). See especially 41 U.S.C.A. § 107, 109.

42. See, e.g., *Rumsey Mfg. Corp. v. United States Hoffman Machinery Corp.*, 187 F.2d 927 (2d Cir. 1951) (subcontractor may elect either his statutory remedy under the Contract Settlement Act, or his common-law remedy, but he cannot claim benefits of both); *Erie Basin Metal Products, Inc. v. United States*, 124 Ct. Cl. 95, 109 F. Supp. 402 (1953), cert. denied, 346 U.S. 831 (1953), noted in 21 Geo. Wash. L. Rev. 638 (1953) (Government is not required by Contract Settlement Act to settle directly with subcontractor, but may elect to do so).

43. 50 U.S.C.A. App. §§ 1211-33, as amended, 50 U.S.C.A. App. §§ 1212, 1215(d)(f), 1216(a)(c), 1231(h) (Supp. 1955).

the Government and the prime contractor. But authority on this point is scant.⁴⁴

As a practical matter, the Government can control relations between a prime and a sub by refusing to reimburse the prime for payments made under subcontracts which have not been approved by the Contracting Officer, if the prime contract includes such a requirement.⁴⁵ The same thing is true of settlements of claims between a prime and a sub, if approval of such settlements is required.⁴⁶ But, and this is often misunderstood, the existence of this veto power does not affect the *legal* relation between the prime and the sub.⁴⁷ The former is free to pay if he wishes; he may even be obligated to do so. It is solely a question whether he is then going to be reimbursed by the Government or be out of pocket.⁴⁸ Naturally, no prime contractor is going to pay in such a situation, if he can avoid it, unless he is assured of reimbursement. The result is that in many areas the Government, as a practical matter, does control relations between a prime and a sub, whatever the legal theories may be.

II. A PROBLEM OF INTERPRETATION: LAW VERSUS FACT

The supposed dichotomy between law and fact is important in all areas of administrative law.⁴⁹ Government contracts are no exception,

44. On the effect of the Renegotiation Act on subcontractors, see Barton, *Renegotiation of Government Contracts*, §§ 7.4, 7.6, 7.7 (1952).

The Davis-Bacon Act applies expressly to subcontracts as well as prime contracts, and both must include the required stipulations. 40 U.S.C.A. § 276(a).

Some courts have held that an agent, hired to obtain Government contracts on a contingent fee basis, is barred from recovery by the policy underlying the statutory (or executive order) Covenant against Contingent Fees, which literally binds only the contractor. *Le John Mfg. Co. v. Webb*, 222 F.2d 48 (D.C. Cir. 1955); *Mitchell v. Flintkote Co.*, 185 F.2d 1008 (2d Cir. 1951), cert. denied, 341 U.S. 931 (1951). *Contra*, *Gendron v. Jacoby*, 337 Mich. 150, 59 N.W.2d 128 (1953); *Buckley v. Coyne Electrical School, Inc.*, 343 Ill. App. 420, 99 N.E.2d 370 (1951). Cf. *Eastern Woodworks, Inc. v. Vance*, 206 Md. 419, 112 A.2d 231 (1955). See Note, *Recovery of Contingent Fees for the Procurement of Federal Government Contracts*, 69 Harv. L. Rev. 1280 (1956); McClelland, *The Covenant Against Contingent Fees as a Method of Eliminating the "5-Percenter"*, 41 Cornell L.Q. 399 (1956).

45. ASPR § 7-203.8, for use in cost reimbursement type supply contracts, is an example of a clause requiring such approval.

46. ASPR §§ 8-518, 8-701(b)(5), 8-702(b)(5), require such approval of settlements of terminated subcontracts, with certain exceptions.

47. See Everberg, *Rights of the Contractors and Subcontractors of War Goods*, 57 Com. L.J. 313 (1952).

48. Judgments obtained by subcontractors against their primes will normally be reimbursed, subject to certain conditions. ASPR § 8-518.8.

49. See Jaffe, *Judicial Review: Question of Law*, 69 Harv. L. Rev. 239 (1955); *Judicial Review: Question of Fact*, 69 Harv. L. Rev. 1020 (1956); Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 Harv. L. Rev. 70, 93-124

but this particular phase of the problem has not received much attention from the commentators.⁵⁰ A thorough treatment of the subject is beyond the scope of this article, but one aspect of it has a direct bearing on the interpretation of Government contracts.

The problem is high-lighted by the following provision of the Act of May 11, 1954, the so-called *Wunderlich* legislation:

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."⁵¹

The immediate occasion for the enactment of this legislation was the decision of the Supreme Court in *United States v. Wunderlich*,⁵² holding that under the standard "Disputes Clause" a determination by the contracting officer of a dispute concerning a question of fact, affirmed on appeal by the head of the department, was final and conclusive, and could not be set aside by the courts, unless actual fraud was alleged and proved. Section 1 of the Act of May 11, 1954, broadened the scope of judicial review to embrace determinations found to be ". . . capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or . . . not supported by substantial evidence."⁵³

Section 2 of the Act, however, deals with a somewhat different problem, the setting for which was provided by the decision of the Supreme Court in *United States v. Moorman*.⁵⁴ Prior to the *Wunderlich* legislation, disputes clauses in Government contracts were of two types, those limited to disputes of fact, and those not so limited (sometimes called "All Disputes" clauses). The Court of Claims had consistently held, however, that even under an all disputes clause, an administrative determination of a question of law was not final but was subject to judicial review.⁵⁵ The Court of Claims held that any question involving the interpretation of a Government contract was a question of law, and applied this rule to the interpretation of technical contract specifications.⁵⁶

(1944); Brown, Fact and Law in Judicial Review, 56 Harv. L. Rev. 899 (1943); Davis, Administrative Law, § 245 (1951).

50. But see Joy, The Disputes Clause in Government Contracts: A Survey of Court and Administrative Decisions, 25 Fordham L. Rev. 11, 20-22 (1956).

51. 41 U.S.C.A. § 322 (Supp. 1955).

52. 342 U.S. 98 (1951).

53. 41 U.S.C.A. § 321 (Supp. 1955).

54. 338 U.S. 457 (1949).

55. *Moorman v. United States*, 113 Ct. Cl. 159, 82 F. Supp. 1010 (1949), rev'd, 338 U.S. 457 (1949); *Pfotzer v. United States*, 111 Ct. Cl. 184, 227, 77 F. Supp. 390, 400, cert. denied, 335 U.S. 885 (1948); *Callahan Constr. Co. v. United States*, 91 Ct. Cl. 538, 616 (1940).

56. *Farwell Co. v. United States*, 126 Ct. Cl. 317, 115 F. Supp. 477 (1953); *Binghamton Constr. Co. v. United States*, 123 Ct. Cl. 804, 839, 107 F. Supp. 712, 733 (1952).

This view of the Court of Claims received a setback in *United States v. Moorman*,⁵⁷ in which the Supreme Court held that under an all-disputes clause, a decision by the Contracting Officer, affirmed by the War Department Board of Contract Appeals, involving the interpretation of contract specifications and drawings, was final and binding upon the parties. The Court reached this result, however, without expressly deciding the issue whether a dispute concerning the meaning of contract specifications was a question of law or fact. The Court leaned to the view that such a dispute was a question of fact, but thought it unnecessary to consider the question, because it was clear that by the all-disputes clause the parties intended to make the Contracting Officer's decision final and binding, subject only to administrative appeal, and the Court held that such a contract provision was valid and enforceable.⁵⁸

It is by no means clear that the Act of May 11, 1954, changes the precise result of the *Moorman* case. For that statute, in outlawing finality provisions on questions of law, does not define the term "question of law" and, specifically, does not say whether the interpretation of technical contract specifications is a question of law or fact. Certainly a case can be made for the proposition, as suggested by the Supreme Court in the *Moorman* case, that it is a question of fact. The dispute in that case was whether the contractor was required to grade a proposed taxiway for an aircraft assembly plant, under a contract for grading the site of the plant, "in strict accordance with the specifications, schedules and drawings." The taxiway was shown on the drawings, but was not located within the plant site as described in the specifications. From one point of view, this was a question of resolving inconsistent contract provisions, a question of law in the traditional sense. From another, it was a question of ascertaining the meaning of engineering drawings and specifications, a question of fact for technical experts to decide.

Whatever the final answer of the Supreme Court may be, the Court of Claims has made it clear that under the *Wunderlich* legislation it will not be bound by findings of a Contracting Officer which involve the interpretation of contract specifications.⁵⁹

The picture is somewhat confused by the recent case of *United States v. Looney*,⁶⁰ decided by the Court of Appeals for the Ninth Circuit. Here the contract included the following provision:

57. 338 U.S. 457 (1949), reversing 113 Ct. Cl. 159, 82 F. Supp. 1010 (1949).

58. *Id.* at 462-63.

59. *Wagner Whirlers and Derrick Corp. v. United States*, 128 Ct. Cl. 382, 393-94, 121 F. Supp. 664, 671 (1954), noted in 40 Cornell L.Q. 355 (1955).

60. 226 F.2d 144 (9th Cir. 1955). Cf. *United States for Benefit of Lanchart v. United Enterprises, Inc.*, 226 F.2d 359 (5th Cir. 1955).

"C. Interpretation of Specifications. On all questions relating to the acceptability of material or machinery, classification of materials, the proper execution of the work, and the interpretation of these specifications, the decision of the contracting officer, or his duly authorized representatives, shall be final."⁶¹

The precise question was whether the Contracting Officer's construction of certain other sections found in the contract specifications amounted to an "interpretation of the specifications" within the meaning of the contract provision quoted above. The court held that it did and that it was final and binding, despite the fact that the Contracting Officer was not making a finding on a technical engineering question, but was interpreting language of the specifications as constituting a condition rather than a warranty. This would seem pretty clearly to be a question of law. The court did not say whether it was a question of law or fact, but merely held, citing the *Moorman* case, that the contract provision as to finality was broad enough to cover it, and that such provision was valid and enforceable.

The case was decided after the enactment of the *Wunderlich* legislation, but involved a contract made beforehand. Therefore section 2 of the Act of May 11, 1954, did not apply.⁶² It is interesting, however, that the court did not even discuss the statute. It seems clear that, on the precise facts, the act, if applicable, would have compelled a different result. It is not so clear, however, what the result would be under the act (except in the Court of Claims) if the dispute were to involve a technical engineering question arising under the specifications. This question will have to await clarification by the Supreme Court.

III. SOME EXAMPLES OF MISINTERPRETATION

In general, the courts have performed admirably the difficult task of interpreting Government contracts and developing a body of case law in this area. Occasionally, however, they have rendered decisions which to the writer seem unsupportable. In each such case it is submitted that the error has arisen from treating a particular clause or a specific controversy in isolation, without considering the entire context of statute law, regulation, policy and procedure in which it arises.

Three specific cases have been chosen for discussion. If the criticism of these cases seems severe, it should be remembered that they are not necessarily representative of the huge volume of such cases being decided every year. But two of the three have been widely cited, and promise to have an influence out of proportion to their possible intrinsic importance. The third contains language about the verbosity and complexity of Gov-

61. 226 F.2d at 145.

62. § 2 operates only as to future contracts, unlike § 1 which applies to any suit "now filed or to be filed." 41 U.S.C.A. §§ 321, 322 (Supp. 1955).

ernment contracts which has been seized upon by those eager to proclaim that such contracts are in truth incomprehensible.

The writer does not claim that the actual result reached in each of these cases was necessarily wrong, on the facts and as between the parties. It is the route by which this result was reached, and the violence done to the intention and meaning of the clauses involved, which give him concern.

A. *The Disputes Clause and the Sunroc Case*

The clause here construed and applied by the court was the following version of the standard disputes clause:

"Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the contractor shall diligently proceed with performance."⁶³

This was a form of disputes clause in common use before the *Wunderlich* legislation, discussed above, and was substantially the same as that construed by the Supreme Court in the *Wunderlich* case.

After *Wunderlich*, the United States District Court for the Eastern District of Pennsylvania had before it the case of *Sunroc Refrigeration Co. v. United States*.⁶⁴ This case involved conflicting claims concerning water coolers and refrigerators shipped by the contractor to the Navy. Some of these proved to be defective. Some of the defective coolers were returned to the contractor; some were not. Some of the items so returned were replaced by the contractor; some were not.

The contractor claimed \$9,985 as the contract price of items delivered and not returned. The Government claimed a refund of \$9,759.20 for items returned and not replaced. Involved in this controversy were such questions as the effect of inspection and acceptance prior to shipment; whether the defects were attributable to faulty manufacture or to damage in transit; and whether the Government or the contractor was responsible for damage in transit.

Discussions between the Navy and the contractor having failed, the contractor presented his claim to the General Accounting Office for settlement.⁶⁵ The General Accounting Office, in accordance with its usual

63. *Sunroc Refrigeration Co. v. United States*, 104 F. Supp. 131, 133 (E.D. Pa. 1952).

64. 104 F. Supp. 131 (E.D. Pa. 1952).

65. The record shows that this is what happened. The court's statement that the Navy referred the matter to the General Accounting Office for settlement is erroneous. The authority of the General Accounting Office to settle such claims is found in 31 U.S.C.A. § 71.

practice, asked the Navy for a recommendation and report.⁶⁶ Before making such report, the Navy held further conferences with the contractor. This time the parties agreed on a proposed settlement which could be recommended to the General Accounting Office. The Contracting Officer prepared a report in which he stated the facts, insofar as they could be determined (many remained uncertain), and recommended that the controversy be settled by a payment to the contractor of \$3,573. It was clear from this report that the recommended settlement would involve, *inter alia*, a resolution of controverted responsibility for damages and alleged unsatisfactory performance.

The Contracting Officer sent this report and recommendation to the General Accounting Office, with a statement that it had the contractor's concurrence. A copy was sent to the contractor for his information.

The General Accounting Office refused to accept the recommended settlement, but affirmed the Government's original claim of \$9,759.20. After setting off an amount admittedly due the contractor under another transaction, it found a balance due the Government.

The contractor sued in the District Court for \$3,573, the amount of the recommended settlement, plus the amount admittedly due on the other transaction, a total of \$8,339.70. The court held that the Contracting Officer's report and recommendation constituted a final determination, which the General Accounting Office had no authority to review or change. The court cited the *Wunderlich* case, and also *Leeds & Northrup Co. v. United States*,⁶⁷ and *James Graham Mfg. Co. v. United States*,⁶⁸ in support of this conclusion.⁶⁹

It is submitted that the court erred. The report and recommendation of the Contracting Officer were not, and did not purport to be, the settlement of a dispute under the disputes clause of the contract. This clause had not been invoked by either party. On the contrary, the Navy had disclaimed authority to settle the controversy, and the contractor had voluntarily presented his claim to the General Accounting Office for settlement under the latter's statutory authority.⁷⁰

66. The court was clearly in error in saying that the General Accounting Office may have returned the file to the Navy Department because of the Contract Settlement Act, 41 U.S.C.A. §§ 101-25 (1952), as amended, 41 U.S.C.A. §§ 114(a), 117(d) (Supp. 1955). The contract here had not been terminated and the Contract Settlement Act was in no way involved.

67. 101 F. Supp. 999 (E.D. Pa. 1951).

68. 91 F. Supp. 715 (N.D. Cal. 1950).

69. Cf. *Bell Aircraft Corp. v. United States*, 120 Ct. Cl. 398, 100 F. Supp. 661 (1951), *aff'd* by equally divided Court, 344 U.S. 860 (1952). And see Cable, *The General Accounting Office and Finality of Decisions of Government Contracting Officers*, 27 N.Y.U.L. Rev. 780 (1952).

70. See note 65 *supra*.

It is true that the Contracting Officer's report included a section somewhat inartistically labeled "Findings of Fact." But this should not have obscured the true nature of the action taken, which was clear from the report taken as a whole. The court misread the Contracting Officer's report, and seized upon a mere caption therein to convert it into something it was never intended to be. Moreover, the court's statement that the Contracting Officer made ". . . factual determinations as to the only items in dispute . . . the amount of the damage and the responsibility therefor,"⁷¹ is open to question. Neither the Court of Claims nor the General Accounting Office have ever conceded that questions of legal responsibility for damages, or claims for breach of contract, are questions of fact.⁷² The Armed Services Board of Contract Appeals has disclaimed any authority to rule with finality on such questions, and usually declines jurisdiction unless there is also an issue of fact involved.⁷³ And a fortiori, under the *Wunderlich* legislation discussed above, today no ruling of a Contracting Officer or administrative appeal board can be final on such a question.⁷⁴

If the court in the *Sunroc* case had considered the controversy on the merits, and had resolved the issues of liability against the Government, the writer would have had no quarrel with the result. But the court never reached these issues.

In fairness to the court, it should be pointed out that the Assistant United States Attorney who tried the case seems to have invited this result. The record shows that the trial was confined to the receipt of documentary evidence and oral testimony concerning the report and recommendation of the Contracting Officer, following which Government counsel asked the court to rule on the force and effect of the "Findings of Fact" and to decide whether the case came within the scope of the *Wunderlich* rule.

The Government did not appeal this decision. The amount involved was small, and the situation somewhat special, not apt to recur under precisely the same set of circumstances. But the case has been frequently cited as an illustration of the *Wunderlich* rule. In the opinion of the writer, it is not a correct application of that rule. Actually, it is an illustration of what can happen when a court fails to understand, or have properly explained to it, the administrative processes followed in han-

71. 104 F. Supp. at 133.

72. *Railroad Waterproofing Corp. v. United States*, — Ct. Cl. —, 137 F. Supp. 713 (1956); 34 Comp. Gen. 565 (1955); 34 Comp. Gen. 676 (1955); 4 Comp. Gen. 404 (1924).

73. *Surplus Outlet, Inc.*, ASBCA No. 2723, 6 C.C.F. ¶ 61,829 (1955); *Specialized Products Co.*, ASBCA No. 2365, 6 C.C.F. ¶ 61,823 (1955); *Tallen Co.*, ASBCA No. 2305, 6 C.C.F. ¶ 61,834 (1955); *Stainless Steel Corp.*, ASBCA No. 2523, 6 C.C.F. ¶ 61,848 (1955).

74. Except as to contracts executed prior to May 11, 1954.

ding claims by Government contractors, including those arising under the disputes clause and those arising outside the scope of that clause.⁷⁶

B. The Uniform Termination Article and the Elastic Stop Nut Case

The *Elastic Stop Nut* case⁷⁶ involved, among other things, the meaning of subsection (f) of the Uniform Termination Article. This article was prescribed for use under the Contract Settlement Act of 1944.⁷⁷ It was a comprehensive outline of the rights and duties of the parties in the event of termination of a war contract for the convenience of the Government.⁷⁸ Subsection (f) was a provision for equitable price adjustment, which read as follows:

"In the event that, prior to the determination of the final amount to be paid to the Contractor as in this Article provided, the Contractor shall file with the Contracting Officer a request in writing that an equitable adjustment should be made in the price or prices specified in the contract for the work not terminated by the Notice of Termination the appropriate fair and reasonable adjustment shall be made in such price or prices."⁷⁹

What this clause meant was this. It was recognized that if a contract was terminated in part, rather than as a whole, so that the contractor still had to deliver a certain portion of the items originally called for, it might not be equitable to hold him to the original contract price per item. Accordingly, in the event of such a partial termination, the contract was divided, as it were, into three parts:

(i) *Completed Portion of the Contract*—as to items completed and accepted by the Government prior to the effective date of termination, the contractor would be paid at the contract rate.⁸⁰

(ii) *Terminated Portion of the Contract*—as to items not to be com-

75. In contrast with the *Sunroc* case stands the decision of another District Court in *Old Dominion Stevedoring Corp. v. United States*, 130 F. Supp. 662 (E.D. Va. 1955). The Contracting Officer had asserted a claim against the contractor for damages caused by negligence in performing stevedoring. No reference was made to the disputes clause, and no attempt was made to follow the procedure therein outlined. Yet Government counsel tried to claim the benefit of that clause and argued that the Contracting Officer's finding of liability was final and binding. The court properly held that the disputes clause had no application.

76. *Elastic Stop Nut Corp. v. United States*, 126 Ct. Cl. 100, 113 F. Supp. 446 (1953). For subsequent proceedings in this case see 132 Ct. Cl. 631, 132 F. Supp. 466 (1955).

77. 41 U.S.C.A. §§ 101-25, as amended, 41 U.S.C.A. §§ 114(a), 117(d) (Supp. 1955).

78. The text of the Joint Termination Regulation may be found in 1 CCH War Law Service—Government Contracts, §§ 10,111-12,402 (1945). The Uniform Termination Article is found in 1 CCH War Law Service—Government Contracts § 8001 (1945). The text of this article is also set forth in the court's findings of fact in the *Elastic Stop Nut* case, 126 Ct. Cl. at 111-15 (1953).

79. *Ibid.*

80. Uniform Termination Article, subsection (d)(1).

pleted, the contractor would be paid an amount intended to compensate him for all his work done and costs incurred on such items prior to the effective date of termination, plus a fair profit on work done.⁸¹

(iii) *Portion of the Contract Not Terminated*—as to items not completed, but yet not terminated, the contractor would continue to receive payment at the contract rate, unless he requested and obtained an equitable adjustment in the price of such items, as provided in subsection (f).

This scheme is clear and understandable, once explained. But the contract clause was ambiguous, in that it used the phrase “work not terminated by the Notice of Termination” to refer to work still to be done, instead of a more explicit phrase such as “continued portion of the contract.” Accordingly, the claim was made from time to time that the phrase referred to items already completed (since in a literal sense these items also constituted work not terminated by the Notice of Termination), and that as to such items the contractor could obtain an equitable adjustment. But this attempted construction was ruled erroneous, first by the Appeal Board of the Office of Contract Settlement in *Gardner & Son v. War Department*,⁸² and then by the United States Court of Appeals in *Rubin v. United States*.⁸³ Both cases squarely held that the provision for equitable adjustment applied only to the continued portion of the contract, and had no application to items delivered and accepted prior to the effective date of termination. The *Rubin* case is clear and decisive on the point.

The *Elastic Stop Nut* case was a good deal more complicated than the *Rubin* case, and greater equities appeared in favor of the contractor. But on the question of the meaning of subsection (f) of the Uniform Termination Article, the legal issue was identical.

The contract in question (No. 1932) called for the production of 1,011,000 fuzes at plaintiff's plant in New Jersey at \$1.58 a unit. This contract contained a price revision clause. The contractor was also manufacturing the same type fuze at its plant in Nebraska under a separate contract (No. 828). As a result of experience at both plants, it was mutually agreed to transfer all production to Nebraska. It was decided to terminate Contract No. 1932 for the convenience of the Government, and to double production under the Nebraska contract. Accordingly, under date of February 22, 1945, the Government sent a Notice of Termination to the contractor, which included the following:

“You are notified that your Contract No. W-30-069-ORD-1932 . . . is hereby terminated (in part) for the convenience of the Government. Such termination will be effective: solely as to 931,000 units of Item A . . . as soon as you have delivered un-

81. *Id.*, subsections (c),(d)(2).

82. 1 O.C.S. Appeal Board, Proceeding No. 3, 3 C.C.F. 1005 (1945).

83. 167 F.2d 113 (2d Cir. 1948).

der the Contract 80,000 units of such Item A, including those heretofore delivered. The Contract is further terminated as to any of said 80,000 units not completed on 28 February 1945. The remainder of the Contract is not affected by this notice."⁸⁴

On February 23, 1945, the contractor signed a no-cost settlement agreement, waiving any claim against the Government under the terminated portion of Contract No. 1932.

On February 28, 1945, the total number of units completed under the contract was 54,250, leaving a balance of 956,750 canceled by virtue of the termination notice.

Later, the contractor sought to reopen the no-cost settlement agreement on the ground that it was based on mutual mistake, in that the parties had not intended that the contractor waive his rights to price revision as to the completed items. The Contracting Officer denied any relief. The contractor appealed to the Appeal Board of the Office of Contract Settlement,⁸⁵ which held:⁸⁶

- (i) The effective date of termination was February 28, 1945;
- (ii) The termination notice canceled all production in excess of 80,000 units, or in excess of the number of units completed by February 28, 1945, whichever figure should be less;
- (iii) The intention of the transaction as a whole was to leave the parties in the same position as if production had been transferred to the Nebraska plant by transfer of Contract No. 1932 as a continuing instrument, instead of by the termination—new contract device actually chosen;
- (iv) The no-cost settlement agreement waived all claims with respect to the terminated portion of the contract (i.e. the 956,750 uncompleted items), and there was no basis for a claim of mutual mistake;
- (v) The settlement agreement did not bar the contractor's claim for price revision as to the 54,250 completed items, but the contractor had not met the necessary conditions for relief under the price revision clause of the contract, and furthermore, under the terms of that clause, the contractor's only remedy upon refusal of the Contracting Agency to negotiate a revised price was to treat the contract as terminated under the Uniform Termination Article, which gave no right to price revision as to completed items:

"This clause has been authoritatively interpreted⁸⁷ as providing for price adjustment of items continued and not canceled, the cost of which is increased as a result of termination. It does not afford a right to price revision for items completed on the effective date of termination."⁸⁸

84. 126 Ct. Cl. at 121-22.

85. Established by § 13(d) of the Contract Settlement Act. 41 U.S.C.A. § 113(d).

86. 3 O.C.S. Appeal Board 97 (1948).

87. Citing the Rubin case, note 83 *supra*.

88. 3 O.C.S. Appeal Board 97, 103.

The contractor then appealed to the Court of Claims, which reversed the Appeal Board, and allowed an equitable adjustment on the completed items.⁸⁹ The court thought that the Appeal Board had “. . . overlooked, or failed to see the significance of article 12(f). . . .”⁹⁰ Now the Appeal Board had certainly not overlooked article 12(f), and if it had misinterpreted it, it was in good company.⁹¹

The Court of Claims had an alternative basis for its decision, namely, that the no-cost settlement agreement did not reflect the intent of the parties and that therefore the plaintiff was entitled to have it reformed.⁹² This approach might have some justification under the facts of the case. If the court had chosen to rest its ruling squarely on this ground, it might not have been necessary for it to upset the accepted interpretation of the equitable adjustment clause.⁹³ However ambiguous this clause may have been, it was part of the Uniform Termination Article authorized under the Contract Settlement Act. This article was promulgated as part of the Joint Termination Regulation by the War and Navy Departments in 1944.⁹⁴ Over sixty-five billion dollars worth of contracts containing this article, or prior versions thereof which were similar in effect,⁹⁵ were terminated and settled under the act.⁹⁶ In addition, the

89. 126 Ct. Cl. 100, 113 F. Supp. 446 (1953). Technically, the proceeding is a suit *de novo*, not an appeal. 41 U.S.C.A. § 113(d)(2).

90. *Id.* at 107, 113 F. Supp. at 449.

91. The court said that under Article 12(f): “. . . the contractor was entitled to such an adjustment as of right, and was not merely dependent upon the grace of the contracting officer as to whether he should receive it or not.” *Id.* at 107, 113 F. Supp. at 449. But this implied criticism of the Appeal Board’s ruling misconstrues the latter. The Appeal Board had held: (i) Article 12(f) gave the contractor no right to price revision for completed items; (ii) the price revision clause (Article 33) did provide for such price revision, if the contractor met certain conditions (which he had not) and the contracting agency granted it; (iii) if the contracting agency refused such price revision, the contractor’s only remedy under the contract was to treat the contract as terminated for convenience; (iv) in that event, the termination for convenience clause (Uniform Termination Article) made no provision for price revision as to completed items. This neat, almost geometric, argument may sound a little too pat, but after all, it is what the contract said, and the Court of Claims should have paid some attention to it.

92. *Id.* at 108, 113 F. Supp. at 449.

93. In the subsequent proceedings in this case, the Court of Claims reiterated its position that it had decided the claim under the equitable adjustment clause of the Uniform Termination Article, and not under the price revision clause of the contract. 132 F. Supp. at 469.

94. Office of Contract Settlement, *A History of War Contract Terminations and Settlements* 13 (1947).

95. See Malman, *Policies and Procedures for the Termination of War Contracts*, 10 *Law & Contemp. Prob.* 449, 458 (1944).

96. Office of Contract Settlement, *A History of War Contract Terminations and Settlements* 1 (1947).

article was used in five times as many other contracts, dollar-wise, which never were terminated.⁹⁷ It should not be lightly assumed that these hundreds of thousands of contractors did not understand what the article meant. It is all the more regrettable that the Court of Claims, the court charged with expert knowledge of Government contracts, should have given the clause a dubious interpretation.

In its opinion the court made this observation:

"The documents out of which the plaintiff's rights must be culled are verbose and complicated Government writings. It was not remarkable that the plaintiff's representative asked the Government's Chief of Terminations what they meant, and relied upon his answer."⁹⁸

There is reason to believe that the court was referring, not so much to the Uniform Termination Article, as to the Notice of Termination (which *was* ineptly worded), the No-Cost Settlement Agreement, and various accompanying memoranda exchanged by the parties. But this language has been seized upon in later cases as a general indictment of the wording of Government contracts.⁹⁹

The precise point is now academic, because the regulations and contract clauses currently promulgated by the Department of Defense make it clear that the equitable adjustment here referred to applies only to the continued portion of a partially terminated contract, and not to completed items.¹⁰⁰ This is at the expense of adding another line to a contract clause which already takes up four printed pages in the regulations. Perhaps this is as good an illustration as any of the reason Government contracts seem continually to become more, rather than less, complicated.

C. *The Partial Payments Clause and the Lennox Metal Case*

The case of *United States v. Lennox Metal Mfg. Co.*¹⁰¹ involved the standard Army Partial Payments Clause, which read, in pertinent part, as follows:

"Partial payments, which are hereby defined as payments prior to delivery, on work in progress for the Government under this contract, may be made upon the following terms and conditions.

"(a) The Contracting Officer may, from time to time, authorize partial payments to the Contractor upon property acquired or produced by it for the performance of this contract: *Provided*, that such partial payments shall not exceed 75 percent of the cost to the Contractor of the property upon which payment is made, which cost

97. *Ibid.*

98. 126 Ct. Cl. at 107, 113 F. Supp. at 449.

99. See, e.g., *United States v. Lennox Metal Mfg. Co.*, 225 F.2d 302, 315 (2d Cir. 1955).

100. ASPR §§ 8-206, 8-701(i).

101. 131 F. Supp. 717 (E.D.N.Y. 1954), *aff'd*, 225 F.2d 302 (2d Cir. 1955), noted in 41 Va. L. Rev. 1112 (1955).

shall be determined from evidence submitted by the Contractor and which must be such as is satisfactory to the Contracting Officer. . . .

"(b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and nondurable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production: *Provided*, that nothing herein shall deprive the Contractor of any further partial or final payments due or to become due hereunder; or relieve the Contractor or the Government of any of their respective rights or obligations under this contract.

"(c) In making payment for the supplies furnished hereunder, there shall be deducted from the contract price therefor a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained."¹⁰²

The facts in the *Lennox* case were complicated and to some extent controversial. The following, however, may be taken as more or less undisputed:

As of April 25, 1951, Lennox and the Army entered into a contract for the manufacture of 887,500 metal ammunition boxes at a unit price of \$1.449, the total price being \$1,285,987.50. Initial deliveries were to be made by July 31, 1951, final deliveries by February 29, 1952. This contract did not contain a partial payments clause.

Between August and November 1951 the Government issued a series of change orders, making certain changes in the specifications and in the method of packing. These changes delayed production and on January 31, 1952, the parties signed a supplemental agreement extending the initial delivery date to February 1952, and excusing prior delays.

In February, 1952, Lennox requested a partial payment, and submitted a statement covering \$437,285.39 of costs incurred. A representative of the Army told Lennox that it could receive a payment of 75% of its costs incurred, if the contract was amended to authorize partial payments. On March 3, 1952, a supplemental agreement was executed to include in the contract the partial payments clause set forth above. A consideration of \$3,279.64 (1% of 75% of the costs incurred) was charged for this amendment.

Lennox requested a partial payment of \$327,964.04, or 75% of its costs incurred to date. The Army authorized \$156,183.91. This amount, less \$3,279.64, was paid to Lennox on March 7, 1952.

The Army made further partial payments of \$56,786.08 on June 2, 1952, and of \$80,244.24 on July 24, 1952. This made a total paid, against

102. 32 C.F.R. § 596.150-1, 16 Fed. Reg. 4042 (1951). (The regulation now in effect uses the term "progress payments," distinguishing these from "partial payments," now used in a different sense. 32 C.F.R. § 596.150-1 (1954). But the older form read "partial payments.")

the original request of \$327,964.04, of \$293,214.23, less \$3,279.64, a net amount of \$289,934.59.

In August, 1952, the Army issued another change order, which delayed production further. Lennox spent, or incurred obligations for, about \$120,000 to comply with this change order.

On August 31, 1952, Lennox requested another partial payment of \$235,427. It notified the Army that production could not be resumed until another partial payment was made. A representative of the Army said that a partial payment would be forthcoming.

In October, 1952, the Chief of the New York Ordnance District sent out a production team and a fiscal team to determine if Lennox could complete the contract on time, indicating that if the reports were favorable the contract would be continued. The teams reported that Lennox could perform, if it had the requisite financing, and that a progress payment plan to insure this had been worked out.

Lennox met its required delivery schedules in February, 1952. It made no deliveries in March, 1952. April deliveries fell short of scheduled requirements, but in May Lennox partially caught up. In June and July, 1952, a steel strike occurred, and the monthly schedule of deliveries was reduced, but Lennox failed to meet these reduced schedules. In September, Lennox delivered only 3636 of the 50,000 boxes scheduled for that month. It delivered another 252 boxes in October, as against a delivery schedule of 50,000.

On October 20, 1952, the Contracting Officer notified Lennox of his intention to terminate the contract for default, and he did so terminate it on October 31, 1952. By that time, Lennox had delivered a total of 141,676 boxes out of the 887,500 called for by the contract.

The Government then sued: (a) for possession of the property acquired by the contractor, title to which had allegedly vested in the Government under the partial payments clause, and (b) to recoup a balance of \$149,118.38, representing the partial payments previously made of \$289,934.59, less credits of \$140,816.21 for boxes actually delivered. Lennox counterclaimed for \$656,729.39, plus interest, for damages for breach of contract, and for amounts alleged to have been wrongfully withheld.

The trial court denied any relief to the Government, and held that it lacked jurisdiction to pass on Lennox's counterclaim. (Lennox is now suing in the Court of Claims for \$235,000.) The court made the following findings of fact (in addition to those set forth above) and conclusions of law, which were disputed by the Government:¹⁰³

103. Appellant's Appendix, pp. 55a-70a, *United States v. Lennox Metal Mfg. Co.*, 225 F.2d 302 (2d Cir. 1955).

(i) That lack of production up to March 1952 was entirely the fault of the Army; that production from March to June 1952 was substantially in accord with the delivery schedules; that delays in production after June 1952 were caused by the steel strike and by the Army's failure to make partial payments as promised.

(ii) That Lennox made an honest effort to comply with the last change order, that it incurred good costs of about \$120,000 in connection therewith, and that its request for a partial payment thereon was sound and should have been honored; that the Army did not give Lennox a proper opportunity to re-tool as required by this change order.

(iii) That the Government violated its agreement to make partial payments and arbitrarily refused to recognize the terms thereof, and therefore breached its contract.

(iv) That the termination for default was a breach of contract by the Government.

Some collateral facts and circumstances have been omitted from the above outline, but it is believed that it constitutes an adequate summary of the essential facts involved. The record as a whole tells a sorry story, all too familiar, of repeated and harassing change orders issued by the Government, coupled with promises to insure adequate financing which never should have been made, counterbalanced however by delayed and unsatisfactory performance by the contractor.

Assessing the blame in a situation like this is not easy. To the writer, it seems that the Army had some justification for losing patience with a contractor who had repeatedly failed to meet his delivery schedules and was demanding that the Government finance him as the price for performing his contract. But accepting the court's finding that the contractor was not in default, and that, therefore, the termination for default was unjustified,¹⁰⁴ it does not follow that the Government breached its contract. Under the standard default clause (art. 11(e) of the *Lennox* contract), as construed by the Armed Services Board of Contract Appeals,¹⁰⁵ the effect of this is to convert a termination for default into a termination for convenience. This greatly increases the contractor's rights, but it has never been held to result in a forfeiture of the Government's rights.

The Court of Appeals affirmed the District Court. Before considering the opinion of the Court of Appeals in detail, it might be well to state the actual result of the trial court's decision, something which is obscured

104. The Armed Services Board of Contract Appeals has held that it is bound by this determination. *Lennox Metal Mfg. Co.*, ASBCA No. 2453 (1955), Dept. of the Army Cir. 715-50-25 (Procurement Legal Service), p. 2, Jan. 11, 1956.

105. See Joy, *The Disputes Clause in Government Contracts: A Survey of Court and Administrative Decisions*, 25 *Fordham L. Rev.* 11, 34 (1956).

in the lengthy opinions of both the trial and appellate courts. The Government had paid to the contractor, out of public funds, \$289,934.59. In return, it had received deliveries valued at \$205,288.52. The Government, that is to say the public treasury, was out of pocket at least \$84,646.07.¹⁰⁶ For this the Government received nothing, neither a recoupment in cash nor any of the property against which its partial payments had been made. And yet the appellate court held that the contractor had not been unjustly enriched,¹⁰⁷ and the trial court held that it lacked jurisdiction to award the contractor damages on its counterclaim.¹⁰⁸ Obviously, the contractor either was enriched, unjustly or otherwise, or was receiving a pro tanto recovery on its claim for damages.

Moreover, both courts ignored the governing statute. Section 529, Title 31, United States Code, prohibits any payments under contracts for the delivery of articles of any description, for the use of the United States, in excess of the value of articles delivered previously to such payment.¹⁰⁹ In the light of this statute, the Army regulation and contract clause strictly limited partial payments to 75% of the cost of the material used by the contractor in performing the contract, and provided for the vesting of title to such property in the Government.¹¹⁰ These requirements, based on statute, obviously limited the discretion and authority of the Contracting Officer, regardless of the promises or repre-

106. This is a minimum figure. Actually, the Government claimed \$149,118.38 for unrecovered partial payments. The difference of \$64,472.31 is partially accounted for by the \$3,279.64 consideration charged for the amendment and by \$36,862.65 asserted by the Government as liquidated damages but denied by the court. The writer is unable to reconcile the remaining figure of \$24,330.02 from information available in the briefs and opinions. But it seems significant that the District Court, in its findings, found as a fact that the Government had made partial payments of \$293,214.23 and recouped therefrom \$144,095.85. Finding of Fact No. 36, Appellant's Appendix, p. 66a. This left an unrecovered balance of \$149,118.38, the precise amount claimed by the Government.

107. 225 F.2d at 318.

108. For a persuasive argument that the federal courts should be granted jurisdiction to decide such counterclaims, see Whelan, *A Government Contractor's Remedies: Claims and Counterclaims*, 42 Va. L. Rev. 301 (1956). Some courts have assumed such jurisdiction even under present law. See, e.g., *United States v. Finn*, 127 F. Supp. 158 (S.D. Cal. 1954), noted in 55 Colum. L. Rev. 930 (1955).

109. 31 U.S.C.A. § 529. The comparable Navy statute is 34 U.S.C.A. § 582, giving the Government a lien upon the article contracted for in the event of partial payments. In *Thomson Machine Works Co. v. Lake Tahoe Marine Supply Co.*, 135 F. Supp. 913 (N.D. Cal. 1955), the court upheld such a lien against a subcontractor's lien claim, in proceedings in bankruptcy, stating that the intent of Congress was: "to give the fullest protection to the government for progress payments made by it." *Supra* at 916.

110. 32 C.F.R. § 596.150-1, 16 Fed. Reg. 4042 (1951). The current regulation is somewhat more liberal than that in effect when the Lennox contract was placed. 32 C.F.R. § 596.150-1(b) (1954).

sentations he may have made.¹¹¹ But more than this: by denying the Government any relief, the trial and appellate courts frustrated the purpose of the statute, and permitted an unlawful advance of public funds, for which the Government received no return.

The opinion of the Court of Appeals,¹¹² affirming the District Court, is a curious one. Two members of the court, Judges Medina and Hincks, while agreeing with the trial court that the evidence did not show a breach of contract by Lennox, were not prepared to hold that the Government had violated a legal obligation in failing to make partial payments in the full amount requested. But they did think that such failure was an arbitrary exercise of discretion. This, coupled with the termination for default, when no default existed, constituted inequitable conduct on the part of the Government which deprived it of its right to enforce its equitable lien on the contractor's property.¹¹³ And, since Lennox had not breached its contract, the Government was not entitled to damages.

Granted the finding of the trial court that Lennox was not in default, there would be merit in this approach *if* the Government was seeking either damages for breach or to enforce an equitable lien. Actually, it was seeking neither.¹¹⁴ It was asking for: 1. recoupment of partial payments previously made and unliquidated by contract deliveries, and 2. recovery of *its* property (not the contractor's), title to which had vested in the Government under the express provisions of the contract.

Now something can be said for the proposition that the Government should not be allowed both remedies. The writer personally believes that the title which the Government obtains in a progress payment situation should be regarded as merely a security title¹¹⁵ (although until the *Len-*

111. It is settled law that a Government agent may not exceed his actual authority, and that the doctrines of apparent authority and estoppel may not be invoked against the Government. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947). The strict application of this principle has been criticized, and rightly so. See Berger, *Estoppel Against the Government*, 21 U. Chi. L. Rev. 680 (1954); Stelzenmuller, *Formation of Government Contracts—Application of Common Law Principles*, 40 Cornell L.Q. 238, 248-55 (1955); Pasley, *Formation of Government Contracts—Application of Common Law Principles—A Reply*, 40 Cornell L.Q. 518, 531-33 (1955). But no one contends that a Government agent should be allowed to exceed the clear bounds of his statutory authority, or violate an express statutory mandate. See Stelzenmuller, *op. cit. supra* at 254.

112. 225 F.2d 302 (2d Cir. 1955).

113. *Id.* at 317-18.

114. The Government's briefs on appeal made this very clear.

115. A conveyance, absolute in form, given to secure a debt will often be construed as an equitable mortgage. Walsh, *Mortgages* 34-42 (1934); Osborne, *Mortgages* §§ 76, 77 (1951). Confirmation of this view may be found in the following: (a) In a fixed-price contract, the risk of loss remains on the contractor; that is, if the property is destroyed, he still has to manufacture the goods required at his own expense; by contrast, the Government ordinarily assumes the risk of loss on property which it really owns; (b) The con-

nox case the courts have uniformly held that it is a true legal title).¹¹⁶ The situation is really analogous to that of a mortgage. Absent fraud or illegality, a mortgagor who seeks relief from his mortgage, or a debtor who seeks to have a deed absolute declared a mortgage, must do equity by paying the mortgage debt.¹¹⁷ By refusing to give the Government the benefit of its security, or to allow it to recoup the unliquidated balance of its partial payment, the trial and appellate courts ignored this basic principle.

Judges Medina and Hincks thought that the Government was seeking to enforce a penalty. This might have been true if the Government was allowed to recover both the property in full and the unliquidated balance of the partial payment. But to deny the Government any recovery is really to enforce a penalty against *it*, and to impose a forfeiture of taxpayers' funds, to the extent of the unliquidated partial payment.

The really interesting part of the Court of Appeals opinion is the special concurring opinion of Judge Frank. Judge Frank concurred in the opinion of Judges Medina and Hincks as an alternative basis of affirmance, but proceeded to set forth his own, somewhat different, views at length.

Judge Frank agreed with the trial court that the Government *had* breached its obligation under the Partial Payments clause, and had therefore wrongfully terminated the contract and could not ground its action on the title provision of that clause.¹¹⁸ He reached this conclusion by

tractor is not required to comply with the provisions of the "Manual for Control of Government Property in Possession of Contractors" (ASPR, Appendix B, § 104.2); (c) The contract clause provides that upon liquidation of all progress payments or completion of deliveries under the contract, title to all property not previously delivered to the Government or incorporated in the supplies delivered under the contract shall revert in the contractor. 32 C.F.R. § 596.150-1(c), subsection (d) (1954). On the effect of such a provision, see Walsh, *Mortgages* 40-41 (1934).

On the other hand, it can be argued that the governing statute prohibits partial payments unless the Government obtains legal title and at least constructive possession. 31 U.S.C.A. § 529. See 20 Ops. Att'y Gen. 746 (1894). The Navy statute is satisfied, however, by the creation of a lien. 34 U.S.C.A. § 582.

116. *United States v. Ansonia Brass and Copper Co.*, 218 U.S. 452 (1910); *United States v. Davies (In re Read-York, Inc.)*, 152 F.2d 313 (7th Cir. 1945); *Douglas Aircraft Co. v. Byram*, 57 Cal. App. 2d 311, 134 P.2d 15 (1943).

117. *Kinney v. Smith*, 58 Ore. 158, 113 Pac. 854 (1911); *Walsh*, *Equity* 283, n.8 (1930); *McClintock*, *Equity* § 25, n.34 (2d ed. 1948); *Buckingham v. Corning*, 91 N.Y. 525 (1883).

118. 225 F.2d at 307, 316. Although Judge Frank stated that the title provisions of the partial payments clause did not entitle the Government to assert that title when the contractor was not in default and the Government was, there is nothing in the clause to support him. Title, whether regarded as legal title or a security title, vests (and under the governing statute, 31 U.S.C.A. § 529, must vest) in the Government immediately upon the making of a partial payment. It is not affected in any way by a subsequent default,

interpreting the word "may" as really meaning "shall." In other words, the clause was intended to mean, "The Contracting Officer *shall* . . . make partial payments to the Contractor . . ." and if the contract did not say this, it should be reformed accordingly. This conclusion is supported by the following arguments:

(i) Evidence before the trial court showed that it was the general practice of the government to pay 75% of allowable substantial costs whenever the contractor was a good risk;

(ii) It must, therefore, be taken as established that the Department of the Army had administratively approved an interpretation of the clause as leaving no discretion in the Contracting Officer when the contractor was not in default or a bad risk;

(iii) In the light of the negotiations, the parties knew and intended this meaning.

Now testimony of one or two Army officers concerning "common practice," and that it is "well known" that the Army will do thus and so, is a weak reed on which to support a conclusion of a departmental interpretation that "left no room for . . . discretion." As a matter of actual fact, this is not and never was the Army's interpretation of the clause. After the *Lennox* opinion came down, the Judge Advocate General of the Army gave an official opinion that the "court's understanding and interpretation of the contract clauses entitled 'Progress Payments' (APP 7-150.1), 'Default' (ASPR 7-103.11), and 'Termination for Convenience of the Government' (ASPR 8-701) are not in conformity with the generally accepted interpretations of those clauses by other courts, administrative agencies, and this office."¹¹⁹

In further support of his interpretation, Judge Frank used the *reductio ad absurdum* argument. For, he said, if the word "may" is construed as wholly permissive, then (a) *Lennox* paid \$3,2000 for a clause which would yield nothing unless the Contracting Officer, governed by mere whim, chose to make a payment, and (b) upon payment of only \$50, title to thousands of dollars worth of property would vest in the Government.¹²⁰

As is often the case with the *reductio ad absurdum* argument, so here it is based on extreme assumptions, divorced from realities. As a matter of actual fact, the Contracting Officer did authorize partial payments, and substantial payments were made: \$293,214.23 (less \$3,279.64) as

on either side, or by a termination. Both Judge Frank and the trial judge seem to have confused the title provisions of the partial payments clause with the title provisions of the default clause and the termination for convenience clause.

119. JAGT 1955/10001, 7 Dec. 1955 (Dep't of the Army Cir. 715-50-25, Procurement Legal Service, 11 Jan. 1956, par. II, p. 1).

120. 225 F.2d at 309.

against \$327,964.04 originally requested. While nothing was paid against the second request of \$235,427, the Government's briefs pointed out that this request was not supported by property "acquired or produced . . . for the performance of the contract," as required by the statute, regulation, and contract clause, but by engineering and development costs and unfilled orders for new equipment.¹²¹ The trial court's finding that Lennox request "included good incurred costs of more than \$120,000"¹²² was not sufficient. "Good incurred costs" are not the equivalent of "property acquired or produced."

Moreover, the second part of the argument becomes irrelevant if the writer's view is adopted that the Government's title under a partial payment clause should be regarded as essentially a security title.

The writer concedes that the word "may" should not be construed as vesting complete and uncontrolled discretion in the Contracting Officer to grant or withhold partial payments at his mere whim. Like any other discretionary power, the authority to grant or withhold partial payments should be exercised reasonably. But there was no real showing that the Contracting Officer had arbitrarily or unreasonably withheld partial payments. The unrecouped balance of such payments was \$149,118.38. Defendant stated in its brief that the property involved was worth \$200,000.¹²³ \$149,118.38 is almost exactly 75% of \$200,000. It looks very much as though the contracting officer had extended the maximum amount of credit which the governing regulation permitted.¹²⁴ If so, there was no abuse of discretion.

Judge Frank vents his real scorn on those simple souls, like the writer, who think that a Government contract means what it says, and should be construed otherwise only where ambiguous on its face. Such a view, he tells us, is a "vestigial remain of a notion prevailing in 'primitive law.'"¹²⁵ Judge Frank proclaims (as most of us already suspected) that "words are but clumsy 'vehicles' of expression, and the isolation of words from their context is the mark of an inexperienced interpreter."¹²⁶ With astonishing erudition, he ranges from Aristotle through the Roman jurists to the modern philosophers, citing on the way Euclid, Duns Scotus, Lucas De Penna, Schopenhauer, Spinoza, Goethe, Hegel, Bergson, Wig-

121. Brief for Plaintiff-Appellant, pp. 13-14; Reply Brief for Plaintiff-Appellant, pp. 6-8.

122. Finding No. 15 Appellant's Appendix, pp. 60a-60b; 131 F. Supp. at 728.

123. Appellees' Brief, p. 7.

124. Perhaps the unrecouped balance should be reduced by the \$36,862.65 claim for liquidated damages. Even so, the Government would have advanced more than 50% of the value of the property.

125. 225 F.2d at 310.

126. *Id.* at 311.

more, Corbin, and Hyman Kaplan.¹²⁷ In the words of Humpty-Dumpty: "There's glory for you!"¹²⁸

It will be recalled that Humpty-Dumpty proceeded to give his own definition of glory: "I meant 'there's a nice knock-down argument for you!'" When Alice objected, "But 'glory' doesn't mean 'a nice knock-down argument,'" Humpty-Dumpty gave his famous answer, "When I use a word, it means just what I choose it to mean—neither more nor less."

The point is, though, that a Government Contracting Officer is not in the position of Humpty-Dumpty. He lacks authority to make a word in a standard contract form mean what he wants it to mean. He is bound by statute, regulation, and the accepted interpretation of such forms.¹²⁹ No amount of negotiation or "communication" between the parties can change this simple fact. In considering only these, and ignoring the statute and regulation, and accepting casual testimony of a few witnesses as proof of an accepted Army interpretation, Judge Frank has done just what he has warned us against, namely, isolating words from their over-all context.

Before being carried away by Judge Frank's learning on the subject of contract interpretation, the reader might well ponder the words of another great judge, Cardozo, when faced with a similar problem:

"If this was the meaning, there is no expression of it in the writing. . . . The words are not without an office and a value when their natural meaning is ascribed to them."¹³⁰

Common sense, despised though it may be by many philosophers, tells us that the natural meaning of "may" is not "shall," and that if the Army had meant "shall" they would have said "shall."

If Judge Frank's views are recognized as law, the Government will be faced with a serious situation. For every time a contract contains a partial payments clause, the contractor, as long as he is not in default and is not a bad risk, can demand that the Government finance him, as he goes along, up to 75% of all his "good costs incurred," without regard to the value of the security he may be able to give. And once started on this course, the Government would not dare stop for fear of losing all prior unrecovered payments and the security therefor. Polonius' prediction would be fulfilled that "loan oft loses both itself and friend." Fortunately for the taxpayer, this is not Department of Defense policy.¹³¹ Nor,

127. *Id.* at 310-15.

128. Lewis Carroll, *Through the Looking Glass*, c. VI.

129. See notes 111, 119 *supra*.

130. *Susquehanna S.S. Co. v. Anderson Co.*, 239 N.Y. 285, 289, 146 N.E. 381, 382 (1925).

131. See Dep't of Defense Contract Financing Policy, especially pars. 31.3(a) and (d); 32 C.F.R., Part 82, Appendix 1 (1954); 1A C.C.H. Gov't Contracts Rep. ¶ 24,812. See also 32 C.F.R. § 82.24 (1954).

under the view of the majority of the Court of Appeals, is it the law that the Government is obligated to make such partial payments.¹³²

A fair disposition of the *Lennox* case, which would have done full justice to the parties and no serious violence to the contract language, and at the same time have given the contractor the benefit of all doubts, would have been: (a) to allow the Government to realize on its security (i.e. the property in question) to the extent of its unrecouped partial payments, without any allowance for liquidated damages, *Lennox* to have the benefit of any surplus; and (b) to treat the contract as terminated for convenience, giving *Lennox* reimbursement for all its costs on the terminated portion of the contract, plus a fair profit on work done. By asking for more than this, the Government succeeded in obtaining nothing, is still defending a suit in the Court of Claims, and is faced in the future with a strongly worded precedent against it.

IV. CONCLUSION

A Government contract is a complex document. Nevertheless it can be understood, and its fair intentment ascertained, if it is read in the light of: (a) the plain meaning of the language used; (b) the governing statutes and regulations; and (c) so far as relevant, the actual procedures followed in placing, administering, and settling such contracts. On occasion, the plain meaning has been distorted, the statutes and regulations overlooked, and the administrative procedures ignored or misunderstood. In these cases, the courts have often been led astray by counsel, whether by Government counsel seeking to give an unwarranted extension to the finality aspects of the *Wunderlich* case,¹³³ or by counsel for the contractors claiming that language used had a meaning never intended. In all such situations the courts, and the bar generally, would do well to heed the following words of Mr. Justice Frankfurter. He was speaking of a federal statute, not related to procurement, but his thesis is equally relevant here:

"The Holding Company Act of 1935 is a reticulated statute, not a hodgepodge. To observe its explicit provisions is to respect the purpose of Congress and the care with which it was formulated."¹³⁴

The same may fairly be said of Government procurement statutes, regulations, and contract forms.

132. The authorities relied on by the defendant, and cited by the District Court, to the effect that such an obligation exists, all involved contracts which provided that: "payments will be made . . . as the work progresses," or language to that effect. *Canal Co. v. Gordon*, 73 U.S. (6 Wall.) 561 (1867); *Brooklyn & Queens Screen Mfg. Co. v. United States*, 97 Ct. Cl. 532 (1942); *Overstreet v. United States*, 55 Ct. Cl. 154 (1920); 9 *Williston, Contracts* § 206 (rev. ed. 1945).

133. See *supra*, pp. 224-25, and note 75 *supra*.

134. *Securities and Exchange Commission v. Drexel & Co.*, 348 U.S. 341, 350 (1955).