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LIQUIDATED DAMAGES IN GOVERNMENT CONTRACTS: A COMMENT ON DEFENSES

by

Walter F. Pettit* and
Gerald K. Gleason**

THE FEDERAL government frequently includes in its contracts a provision for liquidated damages.¹ Such provisions are most often used in construction-type contracts—for example, contracts for facilities, dams, flood-control projects, and shipbuilding.² However, liquidated damages provisions may also be found in supply and service contracts,³ and occasionally even in research and development contracts.⁴ In addition, prime contractors with the Government often include liquidated damages provisions in their subcontracts, and in most if not all instances such provisions will be governed by the principles applicable to those in prime contracts with the Government.⁵

Most simply stated, liquidated damages are “amounts fixed, settled and agreed upon in advance to avoid litigation as to damages actually sustained; they may exceed or fall short of the actual damages sustained, but the sum thus fixed and determined [in advance] binds the parties to such agreement.”⁶ Provision for such damages is especially appropriate where it will be difficult, if not impossible, to prove the amount of actual damages if a breach occurs.⁷

The principal purpose of a liquidated damages provision is to induce the contractor to complete the work on time. This is particularly true in government contracts, where time is usually of the essence. Although

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¹ See generally 5 J. McBRIDE & I. WACHTEL, *GOVERNMENT CONTRACTS* §§ 34.10-150 (1971); R. NASH & J. CIBINIC, *FEDERAL PROCUREMENT LAW* 688-89 (2d ed. 1969); Gant & Breslauer, *Liquidated Damages in Federal Government Contracts*, 47 B.U.L. REV. 71 (1967).

² A liquidated damages clause must be included in all military construction contracts in excess of \$25,000, except cost-plus-fixed-fee contracts or those where the contractor cannot control the pace of the work. See ARMED SERVICES PROCUREMENT REGULATION [hereinafter cited as ASPR] 18-113 (1971) (ASPR are contained with identical section numbers in title 32, *Code of Federal Regulations* (1971)). In non-defense procurement, the use of liquidated damages provisions is discretionary. See FEDERAL PROCUREMENT REGULATIONS [hereinafter cited as FPR] 1-1.315, 1-18.110 (1971) (FPR are contained with identical section numbers in title 41, *Code of Federal Regulations* (1971)).

³ See ASPR 1-310, 7-105.5; FPR 1-1.315-3(a).

⁴ See ASPR 7-304.7.

⁵ In general, the same principles should apply in determining the rights of the parties under a liquidated damages provision of a subcontract as those described herein with respect to the rights of the Government and the prime contractor under such a provision in a prime contract. It has been said, for example, that the principles applied in determining the enforceability of such provisions in government contracts are simply those of general contract law. See, e.g., *Priebe & Sons v. United States*, 322 U.S. 407, 411 (1947). As to some issues, of course, state law may vary from one jurisdiction to another. As to issues not ordinarily encountered in general contract law (for example, the operation of “excusable delay” provisions), a court will probably apply the law applicable to federal government contracts. See, e.g., *United States v. Taylor*, 333 F.2d 633 (5th Cir. 1964); *American Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 292 F.2d 640 (9th Cir. 1961).

⁶ *Pacific Hardware & Steel Co. v. United States*, 48 Ct. Cl. 399, 406 (1913).

⁷ E.g., *Priebe & Sons v. United States*, 332 U.S. 407, 411-12 (1947).

liquidated damages are intended to compensate the Government for actual damages that may incur and to provide a simple method of fixing the amount of liability, the Government is manifestly more interested in obtaining timely performance than in collecting damages.

Although there are valid purposes to be served by the use of a liquidated damages provision, it must be recognized that recovery of damages under such a provision is often uncertain. Four significant defenses or arguments are available to a government contractor who wishes to resist the imposition of such damages.⁸ The number of cases in which one or more of the defenses is available raises the question whether provisions for liquidated damages in government contracts have any practical value. Despite the uncertainties and other problems discussed below, it appears reasonable to conclude that such provisions retain substantial utility for their intended purposes; *i.e.*, to induce contractors to complete their work on time, and to provide a simple method of fixing the amount of liability for late completion.

This Article will discuss the four defenses or arguments mentioned above; consider remission of liquidated damages by the Comptroller General of the United States, a remedy that may be available if all else fails; and evaluate the usefulness of liquidated damages provisions in view of the problems considered herein. The four defenses or arguments, one or more of which may apply according to the circumstances, are:

(1) The provision for liquidated damages is invalid and unenforceable by reason of being a penalty and not a reasonable forecast of just compensation for delay.

(2) The facility or item to be furnished was "substantially complete" on the date of delivery, and liquidated damages cannot thereafter be collected.

⁸ One other possible defense is a failure of the Government to mitigate liquidated damages. See ASPR 1-310 (c), which provides:

The law imposes the duty upon a party injured by another to mitigate the damages which result from such wrongful action. Therefore, where a liquidated damages provision is included in a contract and a basis for termination for default exists, appropriate action should be taken expeditiously by the Government to obtain performance by the contractor or to terminate the contract. If delivery or performance is desired after termination for default, efforts must be made to obtain either delivery or performance elsewhere within a reasonable time. For these reasons, particularly close administration over contracts containing liquidated damages provisions is imperative.

See also FPR 1-1.315-2(d), 1-18.110(c). However, as long as a contractor continues to perform, even though he is delinquent, the Government is not required to terminate for the purpose of mitigating damages. In other words, the defense of failure to mitigate liquidated damages would only be available, in all probability, in cases where the contractor has abandoned the contract or repudiated its obligations thereunder. See *United States v. Russell Elec. Co.*, 250 F. Supp. 2 (S.D.N.Y. 1965); COMP. GEN. DEC. B-160994 (Sept. 14, 1967) (unpublished).

Waiver of the due date, a defense often raised when a contractor is terminated for default, is not available as a defense to an assessment of liquidated damages. *Instruments for Indus., Inc.*, ASBCA No. 10543, 65-2 CCH Bd. Cont. App. Dec. [hereinafter cited as BCA] ¶ 5097 (1965), *motion to reconsider denied*, 70-1 BCA ¶ 8246 (1970); *Gramm Trailer Corp.*, ASBCA Nos. 5847, 5933, 6203, 61-2 BCA ¶ 3208 (1961). If, however, after the Government has waived the due date it establishes a new delivery date, unilaterally or by agreement with the contractor, then liquidated damages will only be applied from and after the new date. COMP. GEN. DEC. B-170149 (Aug. 11, 1970) (unpublished).

(3) The delivery schedule must be extended, and liquidated damages accordingly reduced, because all or part of the contractor's delay was excusable under the principles set forth in the default article of the contract.

(4) Both the Government and the contractor caused delay in performance of the contract, and because the delays caused by each cannot be reasonably apportioned, the clause cannot be applied.

I. LIQUIDATED DAMAGES AS A PENALTY

Under general law liquidated damages provisions must meet two criteria if they are to be valid and enforceable: (1) The actual damages that would accrue to the Government in the event of delay (or other breach) would be "incapable or very difficult of accurate estimation"; and (2) the amount fixed is a "reasonable forecast" of just compensation for such delay or breach.⁹ Consequently, most liquidated damages clauses will contain self-serving statements to the effect that these criteria have been met. Such statements, of course, will not insure the validity of a liquidated damages provision if in fact it does not meet the prescribed standards.¹⁰ Thus if the contractor can show that the amount of liquidated damages fixed by such a clause was not a reasonable forecast of actual damages, the provision will be regarded as a penalty and unenforceable.

Interestingly, it is sometimes to the advantage of the Government (or prime contractor) to argue that a liquidated damages provision is invalid and unenforceable. Thus, where the Government has incurred actual damages greatly exceeding the liquidated amount and the actual damages are reasonably susceptible of proof, the Government may attempt to escape the effect of its own clause by arguing that it is a penalty.¹¹ Otherwise, it seems clear that the Government would be bound by the clause and could recover only the liquidated amount, regardless of the magnitude of its actual damages.¹²

⁹ RESTATEMENT OF CONTRACTS § 339 (1932). In general, the criteria for determining the validity of liquidated damages provisions in government contracts are those of general contract law. See, e.g., *Priebe & Sons v. United States*, 332 U.S. 407, 411 (1947); *Southwest Eng'r Co. v. United States*, 341 F.2d 998, 1001 (8th Cir. 1965); *Gantt & Breslauer*, *supra* note 1, at 72. See also ASPR 1-310; FPR 1-1.315-2.

¹⁰ See, e.g., *Priebe & Sons v. United States*, 332 U.S. 407 (1947); *Marathon Battery Co., ASBCA No. 9464*, 1964 BCA ¶ 4337 (1964). Similarly, the use of the word "penalty" in the clause will not invalidate a liquidated damages provision if it is otherwise acceptable. *United States v. Bethlehem Steel Co.*, 205 U.S. 105, 120 (1907).

¹¹ Although it may seem anomalous for the author of a clause to argue its invalidity, the facts of a particular case may lend some support to such an argument. For example, a government procuring office might claim that it had adopted a liquidated damages rate calculated by another agency for similar procurements and that, in the circumstances of the particular procurement at issue, the rate did not represent a reasonable forecast of actual damages that would be suffered for late delivery. In such a case, of course, the Government would probably be estopped to deny the validity of the clause, whatever the circumstances of its origin within the Government.

¹² That a valid provision for liquidated damages fixes the maximum liability for delays (or for other breaches within its scope) appears to be well established for government contracts as well as in the general law. See *Stone, Sand & Gravel Co. v. United States*, 234 U.S. 270 (1914) (government contract); *Southwest Eng'r Co.*, 341 F.2d 998 (8th Cir. 1965) (dictum) (government contract); *Trans World Airlines, Inc. v. The Travelers Indemnity Co.*, 262 F.2d 321 (8th Cir. 1959); *Ely v. Wickham*, 158 F.2d 233 (10th Cir. 1946); *Detroit Edison Co. v. Wyatt Coal Co.*, 1 F.2d 788, 789 (4th Cir. 1924); *Jewett, Bigelow & Brooks v. Detroit Edison Co.*, 274 F. 30

When one of the parties challenges the validity of a liquidated damages clause, however, the burden of showing that it is a penalty may be difficult to sustain. Although such clauses were viewed with some disapproval by courts in earlier times, they are now much more widely accepted,¹³ and the liquidated amount fixed by the parties is sometimes presumed to be reasonable.¹⁴ Moreover, when the Government (or prime contractor) argues the invalidity of its own clause, a court or board is likely to view the argument with some skepticism. In any event, the validity of a liquidated damages provision (*i.e.*, the reasonableness of the amount fixed therein) is determined as of the date of contract formation and not subsequently, when the extent of actual damages, if any, is known.¹⁵

Provisions for liquidated damages have been found to be reasonable despite great discrepancies between the actual and liquidated amounts. For example, the fact that actual damages far exceed¹⁶ or fall far short¹⁷ of the liquidated amount will not invalidate an otherwise proper provision. By the same token, a clause will be upheld and enforced although it makes no provision for a limit or ceiling on liquidated damages.¹⁸ This is so even where the total liquidated damages exceed the contract price¹⁹—as long as the amount or rate fixed in the clause was reasonable as of the time of contract formation. On the other hand, a penalty will be found if at the time of entering into the contract the Government could not reasonably have foreseen that actual damages would be suffered for late delivery or other breach.²⁰ For instance, if time is not of the essence (*e.g.*,

(6th Cir.), *cert. denied*, 257 U.S. 641 (1921); *Chicago Life Ins. Co. v. Tiernan*, 263 F. 325 (8th Cir. 1920); *Davis v. Alpha Portland Cement Co.*, 142 F. 74 (3d Cir. 1906); *Byron Jackson Co. v. United States*, 35 F. Supp. 665 (S.D. Cal. 1940) (dictum) (government contract); *Sorenson v. United States*, 51 Ct. Cl. 69 (1916) (government contract); *Pacific Hardware & Steel Co. v. United States*, 48 Ct. Cl. 399 (1913) (dictum) (government contract); *Suburban Magnesium Foundry, Inc.*, ASBCA No. 11237, 67-2 BCA ¶ 6666 (1967) (by implication); *5 A. CORBIN, CONTRACTS* §§ 1061, 1063 (1964); 22 AM. JUR. 2D *Damages* § 235 (1968); 25 C.J.S. *Damages* § 116 (1965).

However, when a contract is terminated for default under a standard default clause, a contractor may be held liable for excess costs of reprocurring the contract items in addition to his liability, if any, for liquidated damages. *See, e.g.*, ASPR 7-105.5. In general, such costs are measured by the difference between the original contract price and the price paid for the same or similar items on reprourement. *E. CROWELL & W. JOHNSON, EXCESS PROCUREMENT COSTS*, Briefing Paper No. 67-6 (Federal Publications, Inc. 1967).

¹³ *See, e.g.*, *Priebe & Sons v. United States*, 332 U.S. 407, 411-12 (1947); *Sun Printing & Publishing Ass'n v. Moore*, 183 U.S. 642, 660-67 (1902); *Southwest Eng'r Co. v. United States*, 341 F.2d 998, 1001 (8th Cir. 1965).

¹⁴ *Parker-Schram Co.*, IBCA No. 96, 59-1 BCA ¶ 2127 (1959); 28 COMP. GEN. 435, 437 (1949).

¹⁵ *Priebe & Sons v. United States*, 332 U.S. 407 (1947); *Suburban Magnesium Foundry, Inc.*, ASBCA No. 11237, 67-2 BCA ¶ 6666 (1967).

¹⁶ *See* note 12 *supra*, and accompanying text.

¹⁷ *United States v. Walkof*, 144 F.2d 75 (2d Cir. 1944) (actual damages \$21,56; liquidated \$21,000; assessment upheld).

¹⁸ *Suburban Magnesium Foundry, Inc.*, ASBCA No. 11237, 67-2 BCA ¶ 6666 (1967); 35 COMP. GEN. 484 (1956); 32 COMP. GEN. 67 (1952). *But see* ASPR 1-310(b).

¹⁹ *Parker Schram Co.*, IBCA No. 96, 59-1 BCA ¶ 2127 (1959); COMP. GEN. DEC. B-170219 (Mar. 19, 1971) (unpublished); 32 COMP. GEN. 67 (1952); 28 COMP. GEN. 425 (1949). However, the Comptroller General has statutory authority to remit all or part of a liquidated damages assessment on equitable grounds. *See* notes 58-62 *infra*, and accompanying text. In at least one case, the Comptroller General indicated that a reduction of liquidated damages to the extent the amount exceeded the contract price would be approved under this procedure. COMP. GEN. DEC. B-170219 (Mar. 19, 1971) (unpublished).

²⁰ *Priebe & Sons v. United States*, 332 U.S. 407 (1947); 35 COMP. GEN. 43 (1955). Where damages may reasonably be foreseen for delays during one period of time but not for those during

in some research and development contracts), the Government could not ordinarily expect to be damaged by late delivery.

Some decisions might be taken to suggest that a liquidated damages provision will not be enforced when it is found, in effect, that no actual damages have been suffered. In some cases, for example, in which it was found that time was not of the essence at the date of completion or termination, the Government was not permitted to recover liquidated damages for delays in delivery.²¹ In other cases, wherein the Government chose not to reprocure contract items after terminating for default, it has been held that the Government could not recover liquidated damages as to such items.²² These cases, however, did not appear to concern the *validity* of the liquidated damages provisions per se. Rather, they dealt with such questions as whether the provisions had been "annulled" (or the Government's rights thereunder "forfeited") as a result of concurrent fault; whether the right to recover liquidated damages is "waived" when a delivery schedule is waived without establishing a new schedule; and whether the Government is entitled to recover liquidated damages for items it has, in effect, decided it does not wish to procure. Such questions should be distinguished, of course, from the question whether actual damages could reasonably be foreseen as of the time of contract formation. If such damages could be foreseen and were reasonably provided for as of the time of contract formation, a liquidated damages provision will ordinarily be upheld and enforced even though it appears, on hindsight, that no actual damages have been suffered.²³

Liquidated damages provisions are most vulnerable, of course, when they appear on their face to bear no reasonable relationship to the actual damages that may be suffered.²⁴ Thus, a clause is unlikely to be upheld where it calls for a lump-sum assessment that does not vary with the number of items delivered on time or the length of delay²⁵ or with the type or extent of a defect,²⁶ or where the clause provides damages for intermediate late deliveries prior to final delivery.²⁷ In the latter situation

another, a liquidated damages clause may be held invalid as applied to the latter period, even though it would have been valid as applied to the other period. *H.I. Homa Co., ENG BCA No. PCC-10, 68-1 BCA ¶ 6978 (1968)* (clause invalid as applied to pre-installation delays). See also Note, *Principles Applicable to Remission of Liquidated Damages Are Discussed*, 12 *Gov't CONTRACTOR* ¶ 375 (1970) (selective enforcement of liquidated damages clause consistent with UNIFORM COMMERCIAL CODE § 2-302).

²¹ See *United States v. United Eng'r & Contracting Co.*, 234 U.S. 236 (1914); *Wall Street Luggage Mfg. Co., ASBCA Nos. 2953, 3510, 56-2 BCA ¶ 1147 (1956)*.

²² See, e.g., *Manart Textile Co. v. United States*, 77 F. Supp. 924 (Ct. Cl. 1948); *Suburban Magnesium Foundry, Inc., ASBCA No. 11237, 67-2 BCA ¶ 6666 (1967)*; *Designatronics, Inc., ASBCA No. 10149, 65-1 BCA ¶ 4812 (1965)*.

²³ E.g., *United States v. Bethlehem Steel Co.*, 205 U.S. 105 (1907); *Southwest Eng'r Co. v. United States*, 341 F.2d 998 (8th Cir.), *cert. denied*, 382 U.S. 819 (1965); *United States v. Le Roy Dyal Co.*, 186 F.2d 460 (3d Cir. 1950), *cert. denied*, 341 U.S. 926 (1951); *D & D Aero Spraying, Inc., AGBCA No. 248, 70-1 BCA ¶ 8355 (1970)*; 36 *COMP. GEN.* 143 (1956).

²⁴ E.g., 16 *COMP. GEN.* 344 (1936).

²⁵ E.g., *Graybar Elec. Co., IBCA No. 773-4-69, 70-1 BCA ¶ 8121 (1970)*; *Standard Coil Prods. Co., ASBCA No. 4878, 59-1 BCA ¶ 2105 (1959)*. In *Graybar* a liquidated damages clause was held invalid because it made no allowance for timely, partial deliveries; the same clause might have been upheld had the contractor failed to make any deliveries on time. See Note, *supra* note 20.

²⁶ *Marathon Battery Co., ASBCA No. 9464, 1964 BCA ¶ 4337 (1964)*.

²⁷ *Schouten Constr. Co., FAACAP No. 65-20, 65-1 BCA ¶ 4803 (1965)*; 35 *COMP. GEN.* 43 (1955).

the Government may be unable to show that actual damages could have been expected to occur until after the date for final delivery.²⁸

A contractor might also seek to have the liquidated damages clause set aside on the ground that actual damages were in fact not difficult of ascertainment.²⁹ Here again the burden of proof is on the contractor, and the courts will not readily set aside the judgment made by the parties at the time they entered into the contract.

Even if the validity of a liquidated damages clause is established, the contractor may still escape the imposition of liquidated damages by asserting one or more of the other defenses discussed herein: substantial completion, excusable delay, and concurrent delay.

II. SUBSTANTIAL COMPLETION

The defense of substantial completion is especially pertinent to construction contracts. A building or facility is deemed substantially complete if it can be used or occupied *for its intended purposes*—despite the fact that some items remain uncompleted.³⁰ Expressed in another way, substantial completion occurs on the date “the Government was first afforded the opportunity to possess and enjoy the substance, but not necessarily every aspect of the benefit for which it contracted.”³¹

In a typical situation, where substantial completion is found, there are a number of so-called “punch list” items to be completed: removal, repair, or replacement of damaged equipment; finishing of exterior walls or surfaces; minor painting; final grading and seeding; etc. Usually minor items of this nature do not prevent the Government from beneficially using or occupying a building or facility. If, in fact, they do not, liquidated damages terminate.³²

Of particular importance is the requirement that the facility be usable for the purpose intended by the parties. In *Electronic & Missile Facilities, Inc.*³³ the contractor was called upon to construct technical buildings and

²⁸ The opposite may be true if the Government needs the items as components of a system being produced on a fixed timetable by another contractor. In such a case, of course, late intermediate deliveries might disrupt production of the total system.

²⁹ RESTATEMENT OF CONTRACTS § 339 (1932). The greater the difficulty in ascertaining damages, the more likely liquidated damages will be upheld. 5 J. McBRIDE & I. WACHTEL, *supra* note 1, § 34.10[1].

³⁰ Percentage of completion is not a conclusive factor in finding substantial completion. See *Electronic & Missile Facilities, Inc.*, ASBCA No. 10077, 66-1 BCA ¶ 5493 (1966); Paul A. Teegarden, IBCA No. 419-1-64, 65-2 BCA ¶ 5011 (1965) (substantial completion found even though asphalt plant only 92% complete); Sun Constr. Corp., IBCA No. 208, 61-1 BCA ¶ 2926 (1961) (substantial completion denied because only 50% of the building, based on total cost of performance, was usable).

³¹ *Ray Martin Co.*, VACAB No. 333 (1961), 4 GOV'T CONTRACTOR ¶ 139 (1962).

³² For cases finding substantial completion, see *Continental Illinois Nat'l Bank & Trust Co. v. United States*, 115 F. Supp. 892, 896-97 (Ct. Cl. 1953); J & B Constr. Co., IBCA No. 668-9-67, 69-1 BCA ¶ 7469 (1969) (date on which parties agreed swimming pool substantially complete could not be repudiated); George E. Jensen, Contractor, Inc., VACAB No. 606, 67-2 BCA ¶ 6506 (1964) (boiler system, when fueled by oil, could only be operated manually; held substantially complete even though specifications required automatic capability); T.J. Crooks, Jr., CGBCA No. T-206, 66-2 BCA ¶ 5775 (1966); Paul A. Teegarden, IBCA No. 419-1-64, 65-2 BCA ¶ 5011 (1965); Elmer A. Roman, IBCA No. 57, 57-1 BCA ¶ 1320 (1957).

³³ ASBCA No. 10077, 66-1 BCA ¶ 5493 (1966). For other decisions holding that there was no substantial completion where facilities were not usable for their intended purposes, see *Ransom*

power plants for a communications relay center. The buildings "were intended for the use of delicate radio equipment which was sensitive to atmospheric conditions and which could not be used or even permitted to remain in unconditioned air." The contractor urged the Board to find substantial completion upon its showing that the buildings were ninety-nine per cent complete. The Board, however, declined to do so because the air conditioning system was not operative and the buildings could not, therefore, be used for their intended purpose.

The basis for denying liquidated damages, once a showing of substantial completion is made, is an assumption that after the contract is substantially complete, the Government will not incur actual damages or, at most, will incur only de minimis damages. If, at the time the contract is executed, it is foreseeable that actual damages will not be incurred after substantial completion, then the assessment of damages for that period of time would, of course, be a penalty and therefore unenforceable.³⁴

In supply contracts, the doctrine of substantial completion has only limited application. Ordinarily the Government cannot *beneficially use* supply items until such time as they are 100 per cent complete and in conformity with the specifications.³⁵ In an unusual case, however, where parking meters were required to pass actual, in-service performance tests, and where the District of Columbia used the meters for a period of time even though they were defective, the Comptroller General agreed that liquidated damages should not be assessed while the meters were in service.³⁶

III. EXCUSABLE DELAY

Without doubt, the most common defense to liquidated damages is excusable delay. If proven, such delay will extend the delivery schedule by the number of days of delay determined to be excusable, and thereby reduce or eliminate the liquidated damages that would otherwise be assessable.

Enterprises, Inc., VACAB No. 836, 69-2 BCA ¶ 7908 (1969) (call system for nurses essential in construction of a nursing care unit in Veterans Administration hospital); C.Y. Jolly Co., GSBCA No. 2270, 67-2 BCA ¶ 6424 (1967); Fisher Constr. Co., ASBCA No. 7264, 1962 BCA ¶ 3497, at 17,854 (1962) (magazine not substantially complete "with a deficiency in the air conditioning system and without the explosion proof motor and thermostat").

³⁴ See Marathon Battery Co., ASBCA No. 9464, 1964 BCA ¶ 4337 (1964) (stating that liquidated damages should vary with the extent of the breach).

³⁵ See Southwest Welding & Mfg. Div., Yuba Consol. Indus., Inc., IBCA No. 281, 1962 BCA ¶ 3564, at 18,062 (1962) (substantial completion "does not fit a situation where delivery of an item intact is required"). *But see* comment in 11 Gov't CONTRACTOR ¶ 208 (1969), wherein it is suggested that the substantial-completion doctrine may be applicable to supply contracts, citing Radiation Technology, Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966) (doctrine of substantial performance recognized with respect to supply contracts as a defense to termination for default in some circumstances) (dictum); Nanofast, Inc., ASBCA No. 12545, 69-1 BCA ¶ 7566 (1969); ITT Federal Laboratories, ASBCA Nos. 11129, 11399, 69-1 BCA ¶ 7423 (1968) (dictum). Where supply items cannot be used for their intended purposes during the period of time they are found to be substantially complete, however, *quaere* whether the doctrine will be applied in reduction of liquidated damages.

³⁶ COMP. GEN. DEC. B-153365 (Feb. 6, 1964) (unpublished), 6 Gov't CONTRACTOR ¶ 108 (1964).

This defense is based upon the following two clauses incorporated in the standard default article for military supply contracts:

(c) Except with respect to defaults of subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

.....
 (f) If the Contractor fails to deliver the supplies or perform the services within the time specified in this contract, or any extension thereof, the actual damage to the Government for the delay will be difficult or impossible to determine. Therefore in lieu of actual damages the Contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay the amount set forth elsewhere in this contract. Alternatively, the Government may terminate this contract in whole or in part as provided in paragraph (a) of this clause [for non-delivery], and in that event the Contractor shall be liable, in addition to the excess costs provided in paragraph (b) above, for such liquidated damages accruing until such time as the Government may reasonably obtain delivery or performance of similar supplies and services. The Contractor shall not be charged with liquidated damages when the delay arises out of causes beyond the control and without the fault or negligence of the Contractor, as defined in paragraph (c) above, and in such event, subject to the "Disputes" clause, the Contracting Officer shall ascertain the facts and extent of the delay and shall extend the time for performance of the contract when in his judgment the findings of fact justify an extension.³⁷

In effect, these clauses recognize three types of delays:³⁸ (1) delays caused by the Government, acting in either its contractual³⁹ or its sover-

³⁷ ASPR 8-707, the standard default article for military fixed-price supply contracts, contains paragraph (c), cited herein; ASPR 7-105.5 includes the standard liquidated damages clause, which, when used, is incorporated as paragraph (f) in the default article. For use of liquidated damages in military construction contracts, see ASPR 18-113. Similar principles apply in non-defense procurement. See FPR 1-1.315-3.

³⁸ See Pettit, *Termination: Default*, in *GOVERNMENT CONTRACTS PRACTICE* 461, 479-93 (California Continuing Education of the Bar 1964), which discusses the three types of excusable delay referred to herein, but in connection with terminations for default. There appears to be no reason, however, to distinguish excusable delay as pertinent to default terminations from excusable delay in liquidated damages cases. In both situations, the same clause is involved.

³⁹ See, e.g., *Compudyne Corp.*, ASBCA No. 12606, 69-1 BCA ¶ 7679 (1969) (defective plans and specifications and government delay in making progress payments); *Sun Shipbuilding & Drydock Co.*, ASBCA No. 11300, 68-1 BCA ¶ 7054 (1968) (delay in delivery of government-furnished machinery and materials forced contractor to reschedule the sequence of its operations); *C.C. Gailbraith & Son*, DOT CAB No. 67-45, 68-1 BCA ¶ 6894 (1968) (failure on part of Government to approve drawings within a reasonable time); *Acme Missiles & Constr. Corp.*, ASBCA No. 11794, 68-1 BCA ¶ 6734 (1967) (delay caused by operation of priorities system); *Schweigert, Inc.*, GSBCA No. 2155, 67-1 BCA ¶ 6121 (1967) (government delay in approval of technical data prohibited the contractor from ordering required materials); *National Painting Co.*, ASBCA

eign⁴⁰ capacity, such delays being excusable; (2) delays beyond the control and without the fault or negligence of the contractor (and not caused by the Government), such as delays caused by strikes, unusually severe weather, floods, fires, and so forth, such delays being excusable;⁴¹ and (3) delays attributable to the contractor, such as delays caused by lack of proper equipment, "know-how," or adequate financing, and delays of sub-contractors, suppliers, or labor, all such delays being inexcusable.⁴² It is not enough, however, for a contractor to prove that there was an act of the Government, or a fire, strike, flood, or similar occurrence (in other words, one of the so-called "enumerated causes" of delay) that delayed his performance. He must further prove that the disruption was beyond his control and without his fault or negligence.⁴³

The basis for computing the number of days of excusable delay should also be considered. For example, if the contract calls for the Government to deliver materials or equipment to the contractor within thirty days after the notice to proceed, and the Government fails to make the delivery until ninety days after such notice, will the contractor be granted sixty days of excusable delay or only that number of days of delay that he was actually delayed? It is conceivable, of course, that the contractor would not have been ready for the materials or equipment, even if they

No. 9715, 65-2 BCA ¶ 4925 (1965) (reduction of liquidated damages denied because contractor failed to prove government interference or actual delay caused by late progress payments); Wyle Maddox, IBCA No. 248, 61-2 BCA ¶ 3243 (1961) (delay in issuing change order); R.G. Brown, Jr. & Co., IBCA No. 241, 61-2 BCA ¶ 3230 (1961) (Government ordered extra work).

⁴⁰ The clause itself provides that delays caused by the Government acting in its sovereign capacity are excusable. See generally *Empire Gas Eng'r Co.*, ASBCA No. 7190, 1962 BCA ¶ 3323 (1962) (discussion as to what constitutes a sovereign act); *Gibson Mfg. Corp.*, ASBCA No. 1556, 6 CCH Cont. Cas. F. ¶ 61781 (1955) (distinguishing between excusable delay and recovery of costs for sovereign acts).

⁴¹ See, e.g., *Wertheimer Constr. Corp. v. United States*, 186 Ct. Cl. 836 (1969) (delay caused by another government contractor and by vandalism); *Aerokits, Inc.*, ASBCA No. 12324, 68-1 BCA ¶ 6917 (1968) (delay caused by second-tier subcontractor and by supplier who was without fault); *Laureano Bros.*, ASBCA No. 8700, 65-2 BCA ¶ 4884 (1965) (unusually severe weather; unjustified detention of imported construction materials by Philippine government, where contract was performed); *Allied Contractors, Inc.*, IBCA No. 265, 1962 BCA ¶ 3501, *motion to reconsider denied*, 1962 BCA ¶ 3591 (1962) (weather more severe than usually encountered or reasonably expected in the locality at the particular time of year, and strike inexcusable as causing no actual delay); *Fisher Constr. Co.*, ASBCA No. 7264, 1962 BCA ¶ 3497 (1962) (sole source delay where contractor relied on oral assurances given prior to submission of bid).

⁴² *Whitener & Skillman*, ASBCA No. 11729, 68-1 BCA ¶ 6999 (1968) (contractor failed to show labor shortage involved abnormal circumstances that could not have been anticipated); *Aerokits, Inc.*, ASBCA No. 12324, 68-1 BCA ¶ 6917 (1968) (contractor not excused even though sole source was designated by the Government); *Old Dominion Corp.*, ASBCA Nos. 11553, 11554, 67-1 BCA ¶ 6347 (1967) (loss of 3 experienced and 19 other employees during performance not basis for extension of delivery schedule); *Ford Eng'r & Constr. Co.*, ASBCA No. 10802, 66-1 BCA ¶ 5449 (1966) (lack of know-how); *Volta Elec. Co.*, NASA BCA No. 39, 1963 BCA ¶ 3871 (1963) (contractor's failure to timely order supplies caused delay rather than Government's failure to promptly furnish priority rating).

⁴³ *United States v. Brooks-Calloway Co.*, 318 U.S. 120, 123 (1943) (reversing Court of Claims and quoting the dissent below: "[N]ot every fire or quarantine or strike or freight embargo should be an excuse for delay under the proviso."); *COMP. GEN. DEC. B-141269* (Dec. 28, 1959) (unpublished) (in construction contracts, strike must be unforeseeable although this is not a requirement in supply contracts); *Ship Refractory Work Corp.*, ASBCA No. 5429, 61-1 BCA ¶ 2958 (1961) (heavy rain caused failure of transformers used to supply electric power during performance; contractor not excused because he should have used outdoor-type transformers); *James Leffel & Co.*, IBCA No. 205, 59-2 BCA ¶ 2357, at 10,801 (1959) ("While strikes were among the enumerated causes of delay, they are not excusable *per se*"; default article for *supply* contracts was involved).

had been delivered on time, because of internal delays or delays of sub-contractors or suppliers. Likewise, it is always possible that the Government's delay of sixty days so disrupted the contractor's performance that he was actually delayed ninety or 100 days instead of sixty days. Almost invariably courts and boards apply the test of *actual delay* rather than the duration of the cause of the delay (e.g., government act, strikes, floods, etc.)—whether the actual delay is lesser or greater than the duration of the disruption.⁴⁴ In other words, the *impact* of the delay on performance is determined, and the delivery schedule is extended accordingly. It has been held that the contractor (as the party seeking to show excusable delay) has the burden of proving the extent of the actual delay.⁴⁵

IV. CONCURRENT DELAY

Where both parties to a contract have contributed to delay, special problems are often encountered in the recovery of liquidated damages. In general, there are four types of situations that should be distinguished in any analysis of "concurrent delay":

- (1) Where both parties have "delayed" performance in some sense, but the work was nonetheless completed on time (because there was "slack" in the delivery schedule, for example, or because the contractor made up for delays through extra shifts);
- (2) Where performance was late, but the extent to which each party contributed to the lateness can be satisfactorily determined from the record;
- (3) Where performance was late, but the delays caused by the parties were so "intertwined" that it is difficult to ascertain how much of the lateness was caused by each (ordinarily a problem of *proof*); and
- (4) Where performance was late, but the delay attributable to each party would have been sufficient, standing alone, to cause all or part of the late performance (a problem of *concurrent causes*).

In the first two types of situations, there is ordinarily no problem. Where performance is not late, of course, there can be no recovery for liquidated damages, although the contractor might be entitled to recovery for the government-caused delay.⁴⁶ In the second type of situation, where re-

⁴⁴ See, e.g., *Montgomery-Macri Co. & Western Line Constr. Co.*, IBCA Nos. 59, 72, 1963 BCA ¶ 3819, at 19,055 (1963) (contractor delayed into bad weather season; granted extension in excess of Government's delay); *Witzig Constr. Co.*, IBCA No. 92, 60-2 BCA ¶ 2700 (1960) (affirming contracting officer's time extension twice as long as government delay); *Wynn Enterprises, Inc.*, ASBCA No. 3028, 57-1 BCA ¶ 1301 (1957) (contractor only entitled to extension in accordance with actual delay).

⁴⁵ See, e.g., *George Rosen & Son*, VACAB No. 429, 65-2 BCA ¶ 4936, at 23,324 (1965) ("[W]ell-settled that the Appellant . . . has the burden of establishing by a preponderance of the evidence not only the existence of an excusable cause of delay but also the extent to which completion of the contract work as a whole was delayed."). However, it has been held in another context that mathematical precision is not necessary in proof of delays. *C.H. Leavell & Co.*, GSBICA No. 2901, 70-2 BCA ¶ 8437 (1970) (evidence supported "jury verdict" determination of delays by Board).

⁴⁶ Completion of the work on time would not necessarily preclude recovery for government delays under a suspension-of-work clause. *Barton & Sons*, ASBCA Nos. 9477, 9764, 65-2 BCA

sponsibility for late performance can be satisfactorily apportioned, the contractor is ordinarily granted extensions of time for the government-caused delay and must pay liquidated damages for the remainder.⁴⁷

Problems arise, however, in the third and fourth types of situations, perhaps mainly from a failure to distinguish them from each other and from the other types of situations.⁴⁸ As explained more fully below, liquidated damages provisions are sometimes regarded as "annulled" where delays are "concurrent" or "intertwined," so that a contractor may be able to avoid liability for liquidated damages if he can show that the Government contributed to late performance. Conversely, where the Government (or prime contractor) wishes to escape the effect of a liquidated damages clause in an attempt to recover actual damages in excess of the liquidated amount, it may seek to invoke this rule.⁴⁹

§ 4874 (1965) (dictum). However, if a contractor contributed to delays and a board or court was unable (or refused) to apportion the delays, recovery might be barred. C.H. Leavell & Co., POD BCA No. 168, 68-2 BCA § 7082, at 32,792 (1968). On the other hand, recovery might be allowed, under the so-called "acceleration" doctrine, for increased costs of performance caused by efforts to meet the contract schedule in the face of government delays. See generally 3 J. McBRIDE & I. WACHTEL, *supra* note 1, § 26.70.

⁴⁷ See text accompanying notes 44-45 *supra*.

⁴⁸ Inexact usage of the term "concurrent delay" may have contributed to confusion in this area. The broadest usage encompasses all four types of situations outlined in the text; *i.e.*, it includes any situation in which *both parties to a contract have "delayed" performance in some sense*, whether or not the work was finished on time and whether or not the delay of each party contributed to actual lateness of performance. (As noted in the text, a contractor may be able to complete performance on time despite delays of either party; and government delays may have no actual effect on a contractor's progress.) A somewhat more restricted usage refers to situations in which *both parties have in fact contributed to actual lateness of performance*, whether or not the extent of delay caused by each can be satisfactorily determined from the record, and whether or not the delay of either party would have been sufficient, standing alone, to cause the late performance. Another usage refers to situations in which *delays caused by the parties were simultaneous (or overlapping) in time*, whether or not the delay of each party in fact contributed to late performance.

The phrase might best be used to refer to the fourth type of situation referred to in the text; *i.e.*, where *delay caused by each party, standing alone, would have been sufficient to cause all or part of the late performance*, whether or not the delays were simultaneous or overlapping. In other words, this usage would be limited to the problem of *concurrent causation*, where either party can argue that its own fault should be disregarded because the other's fault was sufficient to cause the injury. Conceptually, the problem in such situations is not one of apportioning the delays but of deciding whether either party (or, in liquidated damages cases, the Government) should be permitted affirmative recovery. See, *e.g.*, Tuller Constr. Co. v. United States, 118 Ct. Cl. 509 (1951); Acme Missiles & Constr. Corp., ASBCA No. 11794, 68-1 BCA § 6734, at 31,188 (1967) (recovery for government-caused delays precluded where delays attributable to contractor, standing alone, would have held up performance).

In the context of liability for negligence, of course, a plaintiff who has contributed to his own injury cannot recover damages in jurisdictions following the doctrine of contributory negligence. See, *e.g.*, W. PROSSER, THE LAW OF TORTS § 64 (3d ed. 1964); 65A C.J.S. Negligence § 130 (1966). In situations involving contract provisions for liquidated damages, the Court of Claims and the Armed Services Board of Contract Appeals reach a similar result by declaring that the provision is "annulled" where delays are "concurrent" or "intertwined." See notes 52-54 *infra*, and accompanying text. However, where there are concurrent delays in the narrow sense discussed above, it may be argued that denial of recovery on the basis of excusable delay is more defensible than invocation of the "annulment" doctrine. See note 55 *infra*.

⁴⁹ Courts and boards appear to have invoked the "annulment" rule only in cases where the Government sought to *rely* on the provision for liquidated damages, which is in its interest where actual damages would be difficult to prove or where such damages are less than the liquidated amount. See note 52 *infra*. In such cases, to "annul" the provision simply deprives the Government of an artificial measure of damages, and, according to dicta in some decisions, leaves it free to recover such actual damages as it may be able to prove. See note 53 *infra*. It would seem inequitable to permit recovery of actual damages in cases where the Government seeks to *avoid* the liquidated damages provision by contending, in effect, that the provision should be "annulled" by reason of its own fault. See note 55 *infra*. However, where actual damages greatly exceed the liquidated

The rule, however, appears to vary with the forum and with the circumstances of the particular case. Thus, where delays of both parties to a contract have contributed to late performance, a number of federal cases indicate that the delays may or should be apportioned for the purpose of assessing liquidated damages.⁵⁰ Indeed, the Comptroller General and several boards of contract appeals have held or stated that inclusion of an "excusable delay" provision in the contract inferentially *requires* apportionment of delays for the purpose of assessing liquidated damages.⁵¹

In contrast, the Court of Claims and the Armed Services Board of Contract Appeals (ASBCA) have often stated that delays will *not* be apportioned where they are "concurrent" or "intertwined," and that in such cases the entire liquidated damages provisions will be "annulled."⁵² If this occurs, the Government may be permitted to recover such actual damages as it can prove.⁵³ As a practical matter, however, the Government is likely to recover nothing in such situations.⁵⁴

The so-called "annulment" doctrine appears to be both misleading and unnecessary.⁵⁵ In practice, however, the Court of Claims and the ASBCA

amount, the Government might raise this argument, among others, in an attempt to avoid the effect of the provision. *Cf.* note 11 *supra*.

⁵⁰ *See, e.g.*, *Robinson v. United States*, 261 U.S. 486 (1923); *Southwest Eng'r Co. v. United States*, 341 F.2d 998 (8th Cir. 1965); *Carnegie Steel Co. v. United States*, 49 Ct. Cl. 403 (1914), *aff'd*, 240 U.S. 156 (1916); *Charles H. Berry, DOT CAB No. 67-47, 69-2 BCA ¶ 7775* (1969); *D & E Constr. Co., VACAB No. 561, 67-2 BCA ¶ 6558* (1967); *Dean Constr. Co., GSBACA No. 1201, 65-2 BCA ¶ 5253* (1965); *Chas. I. Cunningham Co., IBCA No. 60, 57-2 BCA ¶ 1541* (1957); 34 COMP. GEN. 230 (1954).

⁵¹ *D & E Constr. Co., VACAB No. 561, 67-2 BCA ¶ 6558* (1967); *Chas. I. Cunningham Co., IBCA No. 60, 57-2 BCA ¶ 1541* (1957); 34 COMP. GEN. 230, 234 (1954).

⁵² *See, e.g.*, *Acme Process Equip. Co. v. United States*, 347 F.2d 509, 535 (Ct. Cl. 1965); *Sun Shipbuilding & Drydock Co., ASBCA No. 11300, 68-1 BCA ¶ 7054, at 32,610* (1968) (dictum); *Hardeman-Monier-Hutcherson, ASBCA No. 11869, 67-2 BCA ¶ 6522* (1967); *cf. Benbow Plumbing & Heating Co., ASBCA No. 13233, 69-1 BCA ¶ 7565* (1969). The "annulment" rule appears to have arisen from an earlier and more general reluctance of courts to allow recovery for breaches where the evidence is insufficient to apportion the fault. *See Hargrave v. United States*, 130 F. Supp. 598, 603 (Ct. Cl. 1955), and cases cited therein.

⁵³ *Acme Process Equip. Co. v. United States*, 347 F.2d 509, 535 (Ct. Cl. 1965) (dictum).

⁵⁴ *See Coath & Goss, Inc. v. United States*, 101 Ct. Cl. 702, 714-15 (1944) ("Where both parties contribute to a delay neither can recover damage, unless there is in the proof a clear apportionment of the delay and the expense attributable to each party."); *Hardeman-Monier-Hutcherson, ASBCA No. 11869, 67-2 BCA ¶ 6522* (1967) (combination of causes made apportionment of delays difficult). Actual damages will usually be difficult to prove where it was thought at the outset that such damages would be difficult, if not impossible, to measure (the ostensible reason for using a liquidated damages provision). The problem of proof becomes even more difficult if the delays of the parties were so "intertwined" as to justify "annulment" of the liquidated damages provision. In other words, if the Government could have proved its actual damages with sufficient clarity to recover under the rule of *Coath & Goss, Inc., supra*, it probably would have been possible to apportion delays under the liquidated damages clause. Where the provision is "annulled" because the Government's delay, standing alone, would have been sufficient to cause the late performance, analysis in terms of excusable delay suggests that the Government should be unable to recover actual damages in any event, because (the contractor having been entitled to a time extension) performance was not in fact late. *See note 55 infra*.

⁵⁵ As noted in the text, the doctrine appears to be invoked only where government-caused delay accounts for all of the lateness of performance or where it is difficult from the record to allocate responsibility for delay between the parties. *See note 56 infra*, and accompanying text. Where delay caused by the Government, standing alone, would have been sufficient to account for all of the lateness in performance, for example, it is unnecessary to hold that the liquidated damages provision has been "annulled" in order to deny recovery of liquidated damages by the Government. The same result may be reached by simply finding that the contractor was entitled to an extension of time for excusable delay, and that performance would not have been "late" had such an extension been granted. *See, e.g., Acme Missiles & Constr. Corp., ASBCA No. 11794, 68-1 BCA ¶ 6734, at 31,187* (1967) (liquidated damages eliminated through extensions of time).

appear to apply the doctrine much more narrowly than broad language in their decisions would suggest. Thus, it appears that a liquidated damages clause will be "annulled" only where (1) it is extremely difficult (as a matter of evidence and proof) to allocate responsibility for delay between the parties, or (2) the government-caused delay accounts for all or most of the actual lateness.⁵⁶ If neither condition pertains, the Court of Claims and the ASBCA ordinarily allocate the delay between the parties (or let stand allocations by the contracting officer) and permit recovery of liquidated damages for the part not attributable to the Government or otherwise excused.⁵⁷

In the case of mutual delays so "intertwined" that the extent of delay attributable to each party cannot be satisfactorily ascertained, recovery could be denied on the ground that the Government (the party seeking affirmative relief) has not carried its burden of showing the extent of lateness, if any, for which it is entitled to recover. Cf. *Coath & Goss, Inc. v. United States*, 101 Ct. Cl. 702, 714 (1944); *Benbow Plumbing & Heating Co.*, ASBCA No. 13233, 69-1 BCA ¶ 7565 (1969); *Hardeman-Monier-Hutcherson*, ASBCA No. 11869, 67-2 BCA ¶ 6522, at 30,312 (1967); *Tobe Deutschmann Laboratories, NASA* BCA No. 73, 66-1 BCA ¶ 5413, at 25,418 (1966); *Ramsley Silk & Woolens, Inc.*, ASBCA No. 10035, 65-2 BCA ¶ 5107, at 24,056 (1965). *Contra*, *Aerokits, Inc.*, ASBCA No. 12324, 68-2 BCA ¶ 7088, at 32,829 (1968) (on motion for reconsideration); *George Rosen & Son, VACAB* No. 429, 65-2 BCA ¶ 4936, at 23,324 (1965).

It is difficult to see any advantage in holding that a liquidated damages clause has been "annulled" in either situation, except that it leaves open the question whether the Government may recover such actual damages as it may prove. See note 53 *supra*. The latter possibility is seldom meaningful in the ordinary case (see note 54 *supra*), but it could be troublesome if the Government attempted to avoid the liquidated damages clause in order to recover actual damages exceeding the liquidated amount (see note 49 *supra*). As to that situation, broad holdings that a liquidated damages provision is "annulled" by "concurrent delay" tend to confuse the issue, and, if followed, might permit the Government to avoid such a provision (by failing to introduce evidence permitting apportionment of delays) and thus profit by its own fault (contributing to the delay).

⁵⁶ See, e.g., *United States v. United Eng'r & Contracting Co.*, 234 U.S. 236 (1914) (affirming Court of Claims; late performance under original contract attributable to government delays); *Acme Process Equip. Co. v. United States*, 347 F.2d 509, 535 (Ct. Cl. 1965) (delays apparently difficult to apportion); *Sutton Constr. Co.*, ASBCA No. 12322, 68-2 BCA ¶ 7250 (1968) (responsibility for delay apparently difficult to apportion); *Sun Shipbuilding & Drydock Co.*, ASBCA No. 11300, 68-1 BCA ¶ 7054, at 32,610 (1968); *Hardeman-Monier-Hutcherson*, ASBCA No. 11869, 67-2 BCA ¶ 6522 (1967) (delays difficult to apportion). See also *Hargrave v. United States*, 130 F. Supp. 598, 603 (Ct. Cl. 1955) (recovery in cases of concurrent fault will be denied "unless there is in the proof a clear apportionment of the loss and the expense attributable to each party").

Consistent with this view is a recently decided case, *Benbow Plumbing & Heating Co.*, ASBCA No. 13233, 69-1 BCA ¶ 7565 (1969), in which the ASBCA found that the parties had been equally negligent as to one cause of delay. As to that delay, the Board denied recovery of liquidated damages by the Government, stating the rule it applied as follows: "[W]here a period of delay is caused by both parties to the contract, and it is *not possible from the evidence* to apportion to each party a specific number of days of delay therein for which that party is separately responsible, so as to set off a balance between them, then to *this extent* liquidated damages may not be deducted or assessed." *Id.* at 35,042 (emphasis added). Several elements of this formulation are noteworthy. First, the Board found it unnecessary to state that the liquidated damages provision was "annulled" and left open the possibility of recovery under the provision for delays as to which of the parties' responsibility could be apportioned from the evidence. Second, the Board's statement of the rule suggests that delays may or should be apportioned where it is possible to do so.

⁵⁷ See, e.g., *United Found'n Corp. v. United States*, 158 Ct. Cl. 41, 52-53 (1962); *Robinson v. United States*, 57 Ct. Cl. 7 (1921), *aff'd*, 261 U.S. 486 (1923); *Carnegie Steel Co. v. United States*, 49 Ct. Cl. 403 (1914), *aff'd*, 240 U.S. 156 (1916); *Optimum Designs, Inc.*, ASBCA No. 13370, 69-1 BCA ¶ 7681 (1969) (liquidated damages assessment reduced by 7 days for government-caused delay, notwithstanding other delay attributable to contractor); *Kingston Bituminous Prods. Co.*, ASBCA Nos. 9964, 10902, 67-2 BCA ¶ 6638 (1967) (contractor granted extensions for government delays, as well as other excusable delays, reducing liquidated damages assessment from about \$23,000 to less than \$1,000); *Hardeman-Monier-Hutcherson*, ASBCA No. 11785, 67-1 BCA ¶ 6210 (1967) (time for performance extended by almost 5 months for government-caused delays); *Calblasco, Inc.*, ASBCA No. 11454, 66-1 BCA ¶ 5643 (1966). See also *Benbow Plumbing & Heating Co.*, ASBCA No. 13233, 69-1 BCA ¶ 7565 (1969) (by implication).

In summary, "concurrent delay" is an argument that can be advanced by the contractor in an attempt to avoid liquidated damages when both parties are responsible for some delay. Despite the problems discussed above, liquidated damages will usually be reduced or eliminated, via the "annulment" doctrine or otherwise, where part or all of the lateness of performance is attributable to government delay.

V. REMISSION

Where a liquidated damages provision is valid, and where the contractor has no legal defense to the imposition of such damages, he might seek to have all or part of the liquidated damages remitted on equitable grounds.⁵⁸ Under statutory authorization the Comptroller General has the discretion to remit liquidated damages.⁵⁹ To obtain relief the contractor must have exhausted all his administrative remedies⁶⁰ and must have obtained an affirmative recommendation for relief from the head of the appropriate procuring activity.⁶¹ Experience to date suggests that where a recommendation is obtained, relief will ordinarily be granted.⁶²

VI. CONCLUSION

Although contractors have been able to avoid liability for liquidated damages in many cases by invoking one or more of the defenses and arguments discussed above, it appears that provisions for liquidated damages remain useful and effective in view of the Government's principal purposes; *i.e.*, to induce timely performance and to provide a simple method of fixing the amount of liability for late performance. As a practical matter, a contractor is unlikely to ignore a liquidated damages provision during performance simply because there is some question of its validity or because his liability under the provision might be reduced in subsequent proceedings. Such questions typically arise *after* completion of performance, when the contractor's attorney is asked to challenge an assessment of liquidated damages. Thus to the extent that a particular

⁵⁸ See generally Gantt & Breslauer, *supra* note 1, at 82-83.

⁵⁹ 41 U.S.C. § 256(a) (1964); 10 U.S.C. § 2312 (1964). This discretionary form of relief is limited to remission of liquidated damages. Thus, the Comptroller General has no authority, for example, to reduce the amount of excess costs of procurement assessed against a defaulting contractor, nor to modify an agreement reducing the price of a contract in exchange for a time extension. COMP. GEN. DEC. B-170806 (Nov. 10, 1970) (unpublished); COMP. GEN. DEC. B-170766 (Nov. 9, 1970) (unpublished).

⁶⁰ COMP. GEN. DEC. B-152201 (Sept. 26, 1963) (unpublished); COMP. GEN. DEC. B-150121 (Nov. 13, 1962) (unpublished).

⁶¹ COMP. GEN. DEC. B-145410 (Oct. 19, 1962) (unpublished); COMP. GEN. DEC. B-148595 (June 14, 1962) (unpublished); COMP. GEN. DEC. B-143781 (Mar. 8, 1962) (unpublished). A procuring activity may attempt to exact concessions (for example, an agreement not to pursue outstanding claims) in exchange for a favorable recommendation, and the Comptroller General appears to approve such practices. See COMP. GEN. DEC. B-170219 (Mar. 19, 1971) (unpublished); COMP. GEN. DEC. B-169904 (Aug. 4, 1970) (unpublished).

⁶² See Gantt & Breslauer, *supra* note 1, at 82-83, wherein it is stated: "After eliminating those cases where no affirmative recommendation was given by the appropriate agency head, it was found that of forty-one requests only three were denied by the Comptroller General." This statement, supported by a tabulation of pertinent rulings, is particularly interesting since the Comptroller General has often stated that the equities must be very strong before relief will be granted. 36 COMP. GEN. 143 (1956); 34 COMP. GEN. 251 (1954); 32 COMP. GEN. 67 (1952).

contractor can be motivated to perform on time through the use of liquidated damages, defenses that may be available to him later should not undermine this objective.

From the point of view of industry the various doctrines that have been discussed provide, in effect, a set of controls on the use of liquidated damages provisions, with the result that inequities will be avoided in most situations. The "penalty" doctrine, for example, should deter contracting officers from the use of unreasonable provisions, and it is a means of relieving contractors from the effect of such provisions when they are in fact used. The other doctrines, in general, protect contractors from being penalized for delays that are beyond their control or in situations where the Government has had the benefit of substantial completion. Finally, the power of the Comptroller General to remit liquidated damages on equitable grounds provides a remedy in the occasional case where application of legal principles produces an unduly harsh result.

In short, the practice of using liquidated damages provisions has much to recommend it in the context of government procurement. A point of practical significance, however, should be mentioned. When the Government does *not* provide for liquidated damages in its contracts, it often does not seek to recover actual damages for late performance. When it does so, of course, recovery will be limited to the amount that can be proved.

Where there is a provision for liquidated damages, however, assessment of such damages is virtually automatic; and, without a ceiling or limitation on liquidated damages, an otherwise reasonable rate may result in grossly disproportionate liability. Thus, the contractor who has agreed to a provision that seemed fair at the time of contract award may find that he has made a disastrous bargain. For this reason, it is wise—where possible—to seek a limitation of liability for liquidated damages.⁶³

⁶³ Such a limitation is authorized for military contracts by ASPR 1-310(b). Although there is no corresponding provision for non-defense contracts, inclusion of a ceiling on liability, if otherwise reasonable, would seem permissible under FPR 1-1.315-2(c).

In formally advertised procurement, a request for a ceiling on liability, if made as part of a contractor's bid, would ordinarily disqualify the bid. See ASPR 2-301; FPR 1-2.301. Prior to submitting a bid, however, a contractor might seek to have the solicitation amended to provide for such a ceiling. See ASPR 2-208; FPR 1-2.207. In negotiated procurement, such requests may properly be made during negotiation.