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MISTAKES AND BAILOUTS OF SUPPLIERS UNDER GOVERNMENT CONTRACTS AND SUBCONTRACTS—A STUDY OF DOCTRINE, PRACTICE AND ADHESIONS†

James T. Ramey and John A. Erlewine**

We are sure that if you wish to do the right thing, you could find the procedure to do it, and if you don't want to do the right thing, you can easily fall back on legal gobble-de-gook.¹

This article will concern itself primarily with a case study on the handling by the Government and a prime contractor of a problem which is particularly sensitive with the Government: mistakes and bailouts. It is written by a practicing Government administrator and a lawyer who have run into the ramifications of problems often enough to know that they require considerably more research and thought than has been given. It is hoped that this exploration of the plight of a Mr. B, an actual case, will help stimulate further consideration of the realities of Government contracting and of the hybrid Government prime contractors.²

Our case study deals with the mistake of Mr. B who is a supplier of a large Government-owned research and development laboratory operated by a private organization under a prime contract with a Government agency. Under the prime contract, the Government has assigned to the prime contractor the operation and management of the Laboratory, including all purchasing and subcontracting of work and services. The Government indeed has encouraged the subcontracting and purchase of equipment, but retains certain controls over this procurement by the prime contractor in terms of approval of subcontract and purchase order actions of a certain type or over a certain amount. The actions of the contract officials of the Government agency in turn are controlled by the General Accounting Office (GAO) which not only audits their books

† The views expressed in this article are obviously solely those of the authors, and should not be attributed to any Government agency.

* See Contributors' Section, Masthead, p. 690, for biographical data.

¹ See p. 639 *infra*.

² It is believed that this type of examination should serve to illuminate some of the basic problems of present day contract law, although this paper does not pretend to provide an exhaustive treatment of the legal problems raised. Perhaps the statement concerning Government war contracts in Kessler and Sharp's new contracts casebook is applicable to Government contracting generally: "The war contract, including statutory and administrative provisions for renegotiation, raises all the questions there are about contract law in a peculiarly instructive form. . . ." Kessler and Sharp, *Contracts: Cases and Materials* 275 (1953).

but reviews and rules upon the legality of their expenditures. But more of that later in part II.

First of all, let us try to look Mr. B's situation in proper perspective, or frame-of-reference as the saying goes. For Mr. B's problem should be viewed against the backdrop of the larger problem faced by the Government, namely of adapting a rigid system of contracting developed in another era to prevent spoils in the award of direct contracts to the present needs of the country for large scale procurement for the peace time and defense requirements of the Government.

In this connection there would appear to be two somewhat contradictory stereotypes concerning Government contracting and purchasing to contend with. On the one hand Government agencies and officials have often been charged with fraud, favoritism, incompetence and other characteristics of the old spoils system of discretionary award of contracts.³ Conversely, the anti-spoils measures taken by the Government to insure honesty and equality in the award of its contracts have led to charges that Government contracts are too standardized and have so much red tape as to take advantage of the contractor.⁴

In recent years, at least three factors have tended to affect the nature, extent and basis of Government contracting. First, despite allegations to the contrary, the competence and ethical standards of Government contracting officials have been steadily improving.⁵ Secondly, the volume and complexity of procurement by and for the Government, particularly through prime contractors, has increased tremendously, especially as a result of World War II, the Korean War, and the general defense build-up and atomic energy effort.⁶ Thirdly, another group of contracting and

³ For an interesting "Government-should-not-be-trusted" approach see Note, "Adaptation of Private Contract Principles to Government Contracting," 27 *Ind. L. Rev.* 279 (1952), wherein it is suggested that the authority of Government employees to enter into contracts should be treated in a manner analogous to the law of infants!

⁴ For a recent article in the anti-bureaucratic vein see F. M. Schultz, "Proposed Changes on Government Contract Disputes Settlement: The Legislative Battle Over the Wunderlich Case," 67 *Harv. L. Rev.* 217, 219 (1953).

⁵ The Department of Defense, AEC, and other agencies have engaged in extensive programs designed to provide guidance and improve the competence of contracting officials. Some good training materials have been prepared and several excellent contract manuals have been issued. See for example: USN, Office of General Counsel, "Navy Contract Law," (1947); USN, Office of Navy Material, "Negotiator's Handbook," (1952); Judge Advocate General School "Government Contracts and Readjustment," Text No. 12 (1945); AEC Reactor Development Division "Contract Manual For Research and Development and Related Services," (revised ed. 1953); Ordnance Corps "Research and Development Procurement Guide," (1953).

⁶ It was estimated that \$38 billion for procurement requirements was requested of Congress for fiscal year 1953. See Foreword by Donald C. Cook to "Symposium on Defense Procurement," 12 *Fed. Bar J.* 231 (1952).

purchasing personnel are assuming an increasing role in the Government procurement picture—those of the Government prime contractor.⁷ These personnel normally have the background and mores of the private purchasing agent and buyer, although some may have undergone a period of service with the Government.

Our case study begins by recounting the actual correspondence in Mr. B.'s complaint with necessary deletions and adumbrations. Next an attempt will be made to outline the applicable legal doctrine and actual practices carried on with respect to the problem with particular emphasis upon the somewhat different approaches taken by private businessmen, Government contractors, and the Government itself. Finally an effort will be made to reconcile doctrine and practice. Throughout the article, an attempt is made to specify some of the practical avenues which might be more fruitful in counselling the likes of Mr. B.

I. THE PROBLEM OF MR. B

Our first contact with Mr. B, the proprietor of B Supply Co., Inc., came through a routine referral by the Washington Staff Division in charge of procurement of the Government agency which enclosed the original of a letter which stated as follows:

Feb. 1953

Dear Sir:

There is a matter in dispute between ourselves and the Laboratory⁸ with regards to their Order X-678.⁹

⁷ Probably the major portion of procurement for the Government is carried on by prime contractors. Practically the entire atomic energy program is carried on by prime cost-type contractors. On AEC contracting generally, see AEC, Ninth Semi-Annual Report (1951). Many parts of the Defense Department's programs are carried on by cost-type contractors, including much of research and development, and ordnance production. Other defense programs involve the use of modified fixed price prime contracts, as with the aviation industry for aircraft and components, a great portion of which in turn is sub-contracted. For a discussion of the current scope of defense procurement and its legal problems see "Symposium on Defense Procurement," *supra* note 5.

⁸ The Laboratory, which shall be nameless, is a typical Government-owned research and development establishment operated by a private organization under a cost-reimbursement contract with the Government. It has more than 1500 employees devoted to the research work and an annual operating budget of more than \$15,000,000. AEC has several establishments of this general nature including Argonne National Laboratory, operated by the University of Chicago; Brookhaven National Laboratory, operated by Associated American Universities; and Oak Ridge National Laboratory, operated by the Carbide & Carbon Chemicals Division of Union Carbide Corp. The National Science Foundation has noted that a significant post-war development has been the support of the operation of research centers by non-profit institutions under contract with the Government. In 1952 the NSF stated there were 24 such centers; 15 operated for the Department of Defense; 8 for AEC; and one for RFC. In addition the Government has financed considerable research and development work by industrial firms at Government owned installations.

⁹ This appeared to be an ordinary "garden variety" type of protest. If Mr. B had

When we originally quoted on the equipment involved, which is a special type of pump, an error was made in identifying the type of motor needed for this job.

As a result, this pump was sold to the Laboratory at a price of \$49.00 under what it should be.¹⁰ It is a standard item and the regular price can be unquestionably corroborated.

We have been serving the Laboratory from time to time and have done our best to render good service.

We presume, that an honest mistake, whether it is made by your own purchasing officials or by a supplier, can be rectified without penalizing the supplier.¹¹

This, as we see it, is only ethical business, and we hesitate to believe that the government would penalize a source of supply for making an honest mistake.¹²

We shall appreciate your comments and advice as to the procedure to initiate to get this mistake rectified, and to recover the amount of \$49.00, which represents a dead loss to ourselves.

Very truly yours,
Mr. B

Upon receipt of the letter, the procurement people at the Laboratory were consulted by the Government contract administrator as to the history of the case. According to them, Mr. B's proposal was the only responsive bid on a somewhat specialized pump, on which competitive bids had been invited from several potential suppliers. The procurement file showed his bid was somewhat in excess of the Laboratory's engineering estimate of cost. The file also showed that Mr. B ran into trouble on delivery, caused by his stated difficulty in locating a suitable motor for the pump.

After getting the contractor's views on the subject, the Government

been well advised he would have found out from the prime contractor the name and location of the appropriate Government office to make his protest. Instead he apparently took the usual course of writing to Washington, possibly in the hope of putting pressure from the top on his claim. In any event, his end-run around the prime contractor and the field operations office got him nowhere, and may have unconsciously affected those who reviewed his claim.

¹⁰ Although Mr. B is concerned with the relatively small amount of \$49, a Government official cannot afford to brush him off even if he were so inclined. Mr. B is a citizen, and is entitled to have his claim properly considered. Besides, Mr. B might use other means of encouraging consideration of his claim, such as writing his Congressman. This would involve even more paperwork than handling the complaint directly. Congressmen seldom intercede for a constituent, but they do request an explanation of the constituent's claim for redress.

¹¹ This presumption will be considered at length in this article.

¹² Mr. B may be right about the practices of private business. See p. 671 *infra*. But he is apparently somewhat naive about the Government. Anybody who has done business with the Government knows how sticky Uncle Sam is about rectifying mistakes. See discussion p. 655 *infra*.

contract administrator referred the question to his legal counsel for review as follows:

To: Counsel Feb. 1953
From: Contract Administrator

The B Supply Co., Inc., has written Washington, concerning Laboratory P.O. X-678. The company is attempting to obtain an additional payment of \$49.00 from the Laboratory for the reason that they made a clerical error in the preparation of their bid which was revealed in an audit approximately 4 months after the date of delivery of the material.

Washington has referred the matter to this office for handling.

The Laboratory has written to the Company on two occasions that the order was placed and accepted in accordance with their quotation, and since the claim is for an error contained in a quotation, there is nothing they can do about the matter.

I concur with the position taken by the Laboratory, particularly so since the time lapse in the matter.¹³

It appears that the Company intends to be persistent about this matter as evidenced by the review of correspondence with the Laboratory and the fact that they wrote to Washington.¹⁴

Before I proceed further, I will appreciate your review of this matter and advice as to whether you concur in the stand taken by the Laboratory.

Counsel, after review of the entire matter, wrote an opinion as follows:

To: Contract Administrator Feb. 1953
From: Counsel

In accordance with the request contained in your memorandum to this office, we have reviewed the information set forth therein and in its attachments.

Based on the information provided, it is our opinion that the conclusion reached by the Laboratory is correct from a legal point of view.¹⁵

After all this review, Mr. B received the following letter from the Government contract administrator:

Dear Mr. B:¹⁶ Feb. 1953

Your letter addressed to our Washington office, concerning Laboratory Purchase Order X-678 has been referred to this office.

¹³ Based on his review of the case and discussion with the Laboratory, the government official in this case proposes to back up his counterpart in the prime contractor's shop. Since one of his main duties is to see that the prime contractor is not very generous with the public moneys, his position is not surprising.

¹⁴ Moreover, the contract administrator believes he may be in for trouble, arising out of the persistence of the contractor. This may account for the completeness and courtesy in his presentation to counsel for review at such an early stage.

¹⁵ This is one of the shortest legal opinions on record. Its brevity may have been caused by the knowledge that someone might try to second guess counsel at a later date. Note that a way was left open for a change of position in case new evidence is discovered. This may be cagey, but new information does have a way of coming up.

¹⁶ This type of letter is known as the "bug" letter, named after the type of form letter

We have carefully studied this case and discussed it with our legal staff and can find no basis upon which an additional payment beyond the amount shown in the purchase order can be made. As you know the purchase order is a contract binding the Laboratory as well as your organization, for a unit identified as a pump with motor to be supplied at a specified lump sum price.

We feel that you will understand the position of this office in according recognition to a binding contractual relationship.¹⁷

Very truly yours,
Contract Administrator

But Mr. B would not take no for an answer:

Dear Sir:

March, 1953

It is clear to us that legalities notwithstanding, it is perfectly obvious that the Government in this instance, received delivery of a piece of equipment whose value is considerably greater than the amount paid.¹⁸ In the course of regular business, such things happen. Mistakes are made. In private business rectification is generally made unless the customer wishes to take advantage of the situation.¹⁹

Such terms as binding, contractual relationship are in our estimation neat evasions of an ethical and moral principle.²⁰

We do not intend to let this matter rest. We shall contact every conceivable channel until we eventually find out why and how an instance of this kind can be passed over by resorting to simple legal phraseology. Again we reiterate that we rendered service to the Government far beyond the extent of business tendered to us.

The Government has millions of dollars to play with. We are a small concern.²¹ We are asking only that the Government do the right thing in this case. We are sure that if you wish to do the right thing, you could find the procedure to do it, and if you don't want to do the right thing, you can easily fall back on legal gobble-de-gook.²²

Very truly yours,
Mr. B

used by a southern railroad to answer complaints about insects found in the soup, bed linens, etc. It says "no" in a very courteous and polite manner. Its true purpose, however, is alleged to have been revealed when an intra-office route slip was inadvertently transmitted by the railway supervisor with the letter to a complainant stating its real intent succinctly as follows: "From Mgr. to Sup.: 'Send the s.o.b. the BUG letter.'"

¹⁷ It will be noted that the position taken is that the Laboratory in effect cannot legally make any additional payment to rectify the mistake. For a discussion of the legal and practical ramifications of this position see pp. 655 and 671 *infra*.

¹⁸ According to the Laboratory, this extra value was not so obvious. Their engineering estimate of cost was below the bid price. It will be noted that Mr. B continually gets the Government and the Laboratory mixed up. This may be due in part to the fact that the purchase order shows that the Government takes title to Laboratory property immediately at purchase.

¹⁹ Mr. B is beginning to repeat himself, but he may be right. See p. 671 *infra*.

²⁰ Mr. B is beginning to get mad, and blame it on the lawyers.

²¹ Mr. B may be laying the basis for going to the Small Business Administration and the Small Business Committees of the Congress. Or maybe it is just a threat.

²² There may be some truth to what he says, as discussed hereinafter.

The Government administrator remained adamant, but suggested an informal discussion, as follows:

Dear Mr. B:

March, 1953

Your letter concerning Laboratory Purchase Order No. X-678 covering the purchase of a pump has been received.

We certainly understand your position in this matter and your feeling that the money involved is very insignificant in relationship to some of the expenditures made by the Government. However, in order to provide for fair administration and prevent abuses in the expenditure of Government funds, whether large or small, legislation has been passed by Congress establishing very strict policies and procedures governing the execution and administration of contracts and purchase orders. The Laboratory, as a Government contractor, is also governed by these policies.²³

We have endeavored to point out the legal and policy considerations by which we are bound. We are sorry if our explanations have seemed unduly legalistic or full of what you term "gobble-de-gook". We should be glad, if you desire, to sit down with you for an informal discussion of our position on this matter.²⁴

Very truly yours,
Contract Administrator

Mr. B is apparently still interested in setting forth his position:

Dear Sir:

March, 1953

I can appreciate all you say in your letter, but we do not arrive at a logical answer.

In this particular instance, there are a few fundamentals which I can outline briefly as follows:

1. The value of the equipment you purchased on this order is certainly obvious and certainly verifiable by reference to current price lists.
2. There is no question whatever, but what the Laboratory would have purchased this equipment if it had been quoted at the correct price. There was a requisite need for the equipment. I am sure that the Project would not have been abandoned calling for the pump, merely because of the price differential which is the root of this controversy.²⁵
3. Since the mistake that was made is perfectly obvious by any standard of viewpoint, and since we are not asking any more money for the equipment than it is actually worth in the open market, any refusal to pay that differential can be construed only as an attempt to wreak a disadvantage on a supplier because of a perfectly understandable error.

²³ It is true that the Government and its contractors are covered by strict *policies* governing the award and administration of contracts. However, there are differences in the application of legal requirements and contracting policies as between the Government and its prime contractors. See pp. 642 and 679 *infra*.

²⁴ This is probably what should have been done in the first place. It would have enabled each party to size up the other, and to explain matters more easily. Perhaps much paper could have been saved.

²⁵ Mr. B apparently would rather write letters than talk. The Laboratory claims that there is doubt on both points 1 and 2. Note that throughout the correspondence Mr. B does not indicate how he can prove the basis of the error, except to state that it is obvious.

The government is not infallible, we are not infallible, and unless business can be conducted on a mutual basis of respect and tolerance for that non-infallibility, and reasonable flexibility applied for the correction of errors, the whole basis of contract and procurement is fallacious and one which suppresses the interest of the supplier.²⁶

Very truly yours,
Mr. B

The Government administrator reiterates his position as follows:

Dear Mr. B:

April, 1953

This is with reference to your letter regarding the pump purchased by the Laboratory. We believe your letter and prior communications by you set forth your position very well. We had hoped that our last letter made our position equally clear. It is our earnest desire to satisfactorily explain our position to you. As mentioned in my letter, we should be glad, at your convenience, to informally discuss the entire matter.

Very truly yours,
Contract Administrator

From this point on the parties, while expressing a desire for informal discussion, parry as to the place and time of meeting. Finally, months afterwards, a definite time and place is set, only to have the case flicker out as set forth in a memorandum to file by the Government contract administrator, as follows:

To: File

August, 1953

From: Contract Administrator

Arrangements were made several days ago with Mr. B of the B Supply Co., Inc., for a meeting at his office to discuss the case of Laboratory Purchase Order X-678. A specified time and place for the meeting was set. Upon arriving at Mr. B's office at the appointed time, the writer was informed that Mr. B would not be in the office that day, as he had to go to a funeral. The name and telephone number of the writer was furnished to Mr. B's secretary.

* * *

The motivations and objectives of Mr. B are obvious; he wants relief from the financial consequences of his contract on the basis of an alleged mistake for which he was responsible—a unilateral mistake. He is not interested in reasons why he cannot be given relief; such reasons he terms "legal gobble-de-gook," thereby showing a surprising command of contemporary "Federalese." Mr. B obviously feels that both the prime contractor and the Government have taken an unreasonable and arbitrary attitude toward his request. They have not acted according to his concept of the modern code of business ethics.

²⁶ This article will attempt to study means of obtaining flexibility to take care of fallible people like Mr. B.

Although apparently Mr. B is too close to the problem to be interested in why the prime contractor decided that it could not grant relief, or why the Government concurred in this decision, it is believed that the legal and policy bases for the contending positions should not only be of help in counseling in similar situations (which will involve more money), but also in understanding some of the underlying principles and problems of Government contracting in present day industrial society. The quest for such information is not an easy one, for it is concerned with an area where judicial and administrative jurisdictions overlap, where legal principles and administrative policies intermix and often blend imperceptibly, and where the day to day actions and decisions at the contracting level may vary substantially from black letter rules of either a legal or an administrative nature. It is an area where familiar legal rules are encountered but the extent of their applicability is in question. Yet, despite any legal uncertainties, the press of urgent Government business requires that decisions, important and routine, be made; and they are made.

Mr. B's problem will be considered from the following standpoints: First, from the jurisdictional standpoint as to where he can get relief, judicial or administrative, formal or informal, and from whom; second, from the doctrinal standpoint involving the law and policies relating to unilateral mistake and to amendments without a legal consideration; third, from the practical standpoint of whether and to what extent mistakes or unprofitable contracts are forgiven or "bailed out" in private business, and implications of such practices for Government procurement; finally, the extent to which legal doctrine and actual practices relating to contractor relief can and should be reconciled in the public interest.

II. AVENUES OF RELIEF AND THEIR SETTING

Since the discussion which follows is premised upon an understanding of the contractual and administrative relationships involved in the illustrative case of Mr. B, a brief review is in order. The contractual instrument was a standard form purchase order issued to Mr. B's corporation by a Federal prime contractor after analysis of Mr. B's bid, which was the only responsive proposal submitted in answer to an invitation for competitive bids. The prime contractor, the Laboratory, is a corporation organized under state law, whose only relation to the Federal Government arises by reason of its contract. The prime cost-reimbursement contract provides that the Laboratory, in its business dealings under the contract, shall not bind nor purport to bind the

Government. The Government is not a party to purchase orders or subcontracts of the Laboratory even though under the terms of the prime contract the approval of the Government is required before certain types of subcontractual arrangements can become effective. Thus the corporation which Mr. B represents is a subcontractor of the Laboratory, another nongovernmental corporation, and has no direct contractual ties with the Government.

If Mr. B were concerned with attempting to obtain relief through the courts, the jurisdictional aspects of the matter might appear to be routine. There are ample jurisdictional bases for filing and maintaining suit against the Laboratory in a state court and thus obtaining a determination of the legal and equitable rights involved under the common law rules applicable to private contracts.

Were there diversity jurisdiction, or other basis for instituting suit in the Federal courts, a number of cases indicate that there too the state common law rules would be applied.²⁷ However, the normal bases for Federal jurisdiction being absent, the Federal courts have declined to take jurisdiction over litigation merely because it was between Government prime contractors and their subcontractors.²⁸ Nor can a subcontractor maintain suit against the Government based on rights arising out of its subcontract,²⁹ except where statutes specifically provide such a right of action.³⁰ The reason usually advanced for this holding is the lack of privity of contract between the Government and the subcontractor.³¹

²⁷ *Rumsey Mfg. Corp. v. U. S. Hoffman Machinery Corp.*, 187 F.2d 927, 932 (2d Cir. 1951); *Continental Casualty Co. v. Shaefer*, 173 F.2d 5 (9th Cir. 1949); cert. denied, 337 U.S. 940, rehearing denied, 338 U.S. 840 (1949); *Blair v. United States*, 147 F.2d 840, 849, modified, 150 F.2d 676 (8th Cir. 1945).

²⁸ See *Brister & Koester Lumber Corp. v. United States*, 116 Ct. Cl. 824, 848 (1950), where the court held in part that:

The fact that the Government, under its contract with the prime contractors, was obligated to make reimbursement to the contractors of any payments they were required to make to plaintiff [the subcontractor] for materials, because it was a "cost-plus" contract, does not establish privity of contract between the plaintiff and the United States. *United States v. Driscoll*, 96 U.S. 421; *Alabama v. King & Boozer, et al.*, 314 U.S. 1, 12, 13.

See also *Cramp Shipbuilding Co. v. United States*, 195 F.2d 848 (3d Cir. 1952), and later decision in same matter, *Harriman Ripley & Co. v. United States and Duffy Construction Co.*, 210 F.2d 163 (3d Cir. 1954).

²⁹ *Warren Brothers Roads Company v. United States*, 123 Ct. Cl. 48, 83 (1952).

³⁰ The Contract Settlement Act of 1944, 58 Stat. 649 (1944), 41 U.S.C. § 100 et seq. (1946), provides a right of action by subcontractors against the Government in certain instances. See *Kal Machine Works v. United States*, 107 Ct. Cl. 202 (1946).

³¹ See *Brister & Koester Lumber Corp. v. United States*, note 28, and cases cited in quotation therefrom.

By reason of the dominant financial interest that the Federal Government has in such subcontracts, it has been urged that the Federal courts should take jurisdiction over subcontracts as well as primes and that the rights in both cases should be determined under the "law of Federal contracts."³² However, to date there appears to be little if any case support for any such proposed extension of Federal court jurisdiction to subcontracts, and the development of a "law of Federal contracts" has received a number of setbacks even as limited to Government prime contracts.³³

In the illustrative case of Mr. B it is probable that the various avenues of judicial relief were never seriously explored due to the small amount of money involved. Logically, Mr. B first sought relief from the Laboratory. As we have seen, relief was denied and Mr. B then turned to the Government. But for this appeal, the matter would have been ended with the Laboratory's rejection of the request. However, had the Laboratory been favorably disposed towards granting relief, the Government would still have been involved. As a cost-type contractor, the Laboratory, in addition to exercising its own business judgment on such matters, must consider any actions involving expenditures from the standpoint of whether the costs will be reimbursed by the Government. Also, an action of this type, because of its novelty, would normally require the approval of the Government. Of course, if the Laboratory desired to pay the \$49 to Mr. B and not claim reimbursement under its prime contract, the Government would have no objection and no approvals would be involved. But assumption of such costs by the prime contractor, although sometimes done, is not a normal course of action and will not be further considered in this article.

Thus the final decision as to whether Mr. B is going to get his money rests with the Government. The official who makes that decision is the contract administrator³⁴ responsible for the prime contract with the Laboratory. For this reason, when Mr. B addressed his complaint to

³² Feldman, "The Subcontractor's Relationship to the Government," 12 Fed. B.J. 299, 308 (1952).

³³ E.g., *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947).

³⁴ The Government employee who represents the United States in matters pertaining to the administration of such prime contracts, is often referred to by a variety of titles including "contracting officer," "contract administrator," and "representative of the Government." Although these various titles may denote different individuals in some cases, for the purposes of this article, the official or officials responsible for the administration of the cost-type prime contract will be referred to as the "contract administrator." In direct fixed price contracts the representative of the Government is usually referred to as the "contract officer."

the Washington Office of the Government agency, he was referred to the field office charged with handling the Laboratory's contract.

The functions, duties and powers of contract administrators of cost-type prime contracts are broad and varied. This article is concerned with the extent and discretionary nature of the authority of contract administrators over actions relating to fixed priced subcontracts, and with the factors which influence or govern the exercise of such authority. It is an area of contract administration which is highly important to the system of cost-type contractor operations.

One of the principal objectives in using cost-type arrangements in contracting for the services of private firms to perform the work of the Government, is to obtain a flexibility and freedom of action normally not possible where Government employees perform their work directly.³⁵ Along with technical and management "know how," such firms bring to the job commercial procurement techniques and practices which often vary substantially from the traditional competitive bid system of the Federal Government. Industrial and manufacturing techniques normally encounter little opposition from existing Government practices. However, such has not been the case regarding procurement and contracting methods, since the Government already possessed substantial experience in such matters, much of which has been formulated in rules of policy and law.

Most contract administrators and their legal and financial advisers are well versed in the law and policies relating to direct Government procurement and contracting. It is not surprising that when faced with approving or disapproving procurement actions of prime contractors, contract administrators have looked for guidance to the Federal doctrines with which they are familiar. The same is true of the various executive departments and agencies which, in formulating policies for the guidance of contract administrators and prime contractors, have patterned regulations after those relating to the direct procurement activities of the Government. Thus, indirectly and perhaps inadvertently, some of the flexibility sought through contractor operations, has been and is being lost. On the other hand, it is fair to say that procurement methods of firms doing business with the Government as prime cost-type contractors have benefited from such Government policies as broad competition and evenhanded dealing with bidders.

³⁵ Such contracts are sometimes referred to as "administrative contracts." In another article entitled "Introduction to the Concept of the 'Administrative Contract' in the Law and Administration of Government Contracts" which is in process of preparation, the authors discuss more fully the functions and problems of such contracts.

Encouraging a conservative approach to the newly found freedom of action made possible by contractor operations, is the prevailing uncertainty as to the extent that Federal law and policies relating to direct procurement, are actually applicable to the operations of cost-type contractors, and to the decisions of contract administrators relating thereto. Many contract administrators have found it easier to play it safe and comply with the rules of Government procurement, rather than to pursue a more aggressive course and permit contractors to employ new procurement methods.

The principal interpreter, exponent and enforcement agency of the law and policies relating to Government procurement, the General Accounting Office (GAO) of the United States, had encouraged strictness and rigidity in Government contracting methods.³⁶ The succession of Comptrollers General who have headed the GAO have charted the activities of that organization by the guiding principle that they and the staff of the GAO are agents of Congress charged with the primary duty of insuring due observance of all limitations and directions imposed by law in the matter of the expenditure of appropriated funds.³⁷ The Federal financial system has been organized to facilitate and insure the execution of this task.

³⁶ The General Accounting Office was established by the Budget and Accounting Act of 1921 which, as amended from time to time, particularly by the Budget and Accounting Procedures Act of 1950, is embodied in Title 31 of the U.S. Code. Section 41 provides that the GAO "shall be independent of the executive departments." Section 44 confers upon the GAO all duties and powers formerly conferred upon the Comptroller of the Treasury and the auditors of the Treasury Department. Section 67 provides for audit by the GAO in accordance with such rules and regulations as may be prescribed by the Comptroller General, of the financial transactions of each executive, legislative and judicial agency. By Section 53 the Comptroller General is directed to "investigate—all matters relating to the receipt, disbursement, and application of public funds" and report to the President and Congress on such matters, including reporting to Congress "every expenditure or contract made by any department or establishment in any year in violation of law." All departments and agencies are required to furnish information to the Comptroller General (§ 54). Section 71 provides that "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, as debtor or creditor, shall be settled and adjusted in the General Accounting Office." This provision has been construed by the GAO, and such construction appears to be generally accepted, to permit settlement and adjustment of unliquidated contract claims by the GAO, although a similarly worded statute of earlier date which placed similar powers in the Treasury Department, had been interpreted as not vesting such authority in the Comptroller of the Treasury. In addition to those mentioned, numerous other duties and responsibilities are assigned to the GAO by 31 U.S.C. §§ 41-134 (1946).

³⁷ For a good brief description of the development and functions of the GAO with references to more exhaustive authorities, see "Government Contracts and Readjustment," *supra* note 5.

The methods established for making funds available to Federal departments and agencies are such as to give the GAO extensive control over the use of appropriated funds. Before such funds can be expended, a bonded certifying officer who is a Government employee personally accountable to the GAO, must certify as to the propriety of and authorization for the payment. Such payments are subject to audit by the GAO and if any are found to be at variance with the authorizing statutes as interpreted by the GAO, exceptions may be taken and the amount charged against the account of the certifying officer. In the case of payments on Government contracts, disallowances may be set off against payments due the contractor or other actions taken to recover them.³⁸

At the request of the heads of Federal departments and agencies, the GAO will provide interpretations of statutes and give opinions concerning the legality and propriety of proposed actions involving expenditure of public funds. The GAO has issued a multitude of decisions over the course of years, many of which have been published for the general guidance of officials charged with conducting the business of the Government. In some areas such decisions have established what might be called "GAO common law", since collectively the decisions comprise a detailed set of rules which are based only indirectly upon the broadly worded statutory provisions.³⁹ The combination of the accountability of financial officers to the GAO, the administrative headaches involved in answering exceptions, and the ever present possibility of disallowance, tends to make officials of the executive branch wary of deviating from the courses of action approved by the decisions of that agency.⁴⁰

³⁸ The general approach of the GAO to auditing of both direct and prime contracts of the Government has been modified in recent years. Less use is made of the traditional item by item audit of vouchers and accounts. Instead, greater emphasis is placed upon the establishment and maintenance of adequate systems of accounting and financial management along the lines carried on by private certified public accountants and the conduct of "comprehensive audits" which have been defined as "analytical and critical examinations of an agency and its activities." See statement prepared by GAO entitled "Purposes and Objectives of Congressional Audits" (April 1954). However, this approach has not made a significant change in the written doctrine of the GAO as set forth in published decisions.

³⁹ In making decisions of the type referred to, the GAO does not propose to "manufacture" law. Most decisions are buttressed with citations of judicially decided cases. However, the GAO has shown no hesitancy in ignoring decisions of the Federal courts when not to its liking. Although GAO decisions frequently cite state court decisions, this appears to be done only because of agreement with the legal reasoning of the cases and not because the GAO regards such cases as being binding upon it.

⁴⁰ Based on the experience of the authors, it would seem that rarely are certifying or disbursing officers actually compelled to bear a financial loss as the result of GAO action concerning Government contracts. Most exceptions taken by the GAO are satisfactorily answered or ultimately cleared up without personally penalizing the employees concerned.

The GAO has maintained an active interest in the procurement practices of Federal prime contractors, even though the jurisdictional basis for the interest is none too clear. In the process of auditing prime contracts, the GAO has often judged subcontract actions and the decisions of contract administrators relating thereto by standards and criteria applicable to direct Government contracts. However, in recent years auditors of the GAO have displayed a more sympathetic and less rigid attitude toward cost-type prime contract administration than was evident earlier.⁴¹

It should also be pointed out that Congress has provided a legislative basis for GAO interest in subcontracts. Most negotiated Government prime contracts now include the so-called "Examination of Records" clause which gives the GAO the right to examine all records of the prime contractor pertaining to the contract and which obligates the prime contractor to include similar provisions in its subcontracts.⁴² The full ramifications of this statutory-contractual right of "examination" are probably not yet known. The legislative history indicates that there was no intention to increase the powers of the GAO thereby, but merely to provide a tool for carrying out existing powers more effectively.⁴³

The same may be said even with respect to contractors. Where payments or reimbursements have been disallowed by the GAO, relief is sometimes obtained through the courts or Congress.

⁴¹ During the hearings before the Independent Offices Subcommittee of the House Appropriations Committee on the 1953 Appropriations Act, the GAO presented a statement concerning fee and overhead provisions in AEC cost contracts. A portion of that statement sets forth what appears to be the current GAO interpretation of its powers and functions with respect to auditing cost-type prime contracts:

. . . Mr. Warren has repeatedly emphasized that the authority of the General Accounting Office to disallow credit in the accounts of disbursing officers and recover back payments under cost-plus-a-fixed-fee contracts does not cover wasteful or extravagant payments if within the provisions of legally executed contracts and approved by the contracting officers. . . . Where expenditures were beyond the scope of the contracts or in violation, or the result of violation of law, they were questioned in the audit of the contracts. Also, the Office has always required a showing that expenditures for which reimbursements were claimed were of a class for which reimbursement was contemplated by the contract and not a class covered by the fixed fee. . . .

Hearings before Independent Offices Subcommittee of Appropriations Committee on H.R. 5690, 82d Cong., 2d Sess. (1953).

⁴² Such a clause was first required by an amendment to the First War Powers Act of 1941, 64 Stat. 1257 (1951), 50 U.S.C. app. § 611 (Supp. 1952). Much broader coverage was obtained by similar amendments of the Armed Services Procurement Act, 65 Stat. 700 (1951), 41 U.S.C. § 153 (Supp. 1953); the Federal Property and Administrative Services Act, 65 Stat. 700 (1951), 41 U.S.C. § 254 (Supp. 1952); and the Atomic Energy Commission appropriations acts starting with 1953, 67 Stat. 187 (1953) and Pub. L. No. 149, 83d Cong., 1st Sess. (1954).

⁴³ See the statement of Representative Hardy, sponsor of the bill amending the Armed Services Procurement Act in the House, 97 Cong. Rec. 13498 (1951).

Presumably then, with respect to subcontracts the GAO can only examine and criticize retrospectively, but cannot interfere with the contractual provisions or disallow costs pertaining thereto for which the prime contractor has been reimbursed unless terms of the prime contract or applicable statutory provision have been violated.

III. SUBSTANTIVE DOCTRINE OF UNILATERAL MISTAKE

Thus far in the consideration of Mr. B's problem, principal emphasis has been placed upon the sources of relief available. Substantive law has been mentioned but not discussed. In the discussions which follow, the general common law rules concerning unilateral mistake will be briefly examined both because subcontractors may seek relief in the courts and to provide a standard of comparison for studying the equivalent rules applicable to direct Government contracts. A more detailed, but not exhaustive, review will then be made of the rules relating to unilateral mistakes in bids and contracts in direct Government procurement.

Unilateral Mistake at Common Law

When judges and commentators attempt to formulate a one-sentence expression of the law of mistake, the product usually takes form somewhat as follows: Relief will not be given on the ground of mistake unless the mistake is "mutual," and the mistake of only one party to a contract does not afford a ground for relief either at law or equity.

While the dangers inherent in such general statements often have been pointed out, they appear to have special significance in the law of mistake.

Cases involving mistake are difficult of classification because of the number and variety of factors to be considered. These factors are found in many combinations. The citation of authorities for a rule stated in general terms is made perilous by this fact. It is equally perilous, and it may be positively harmful, to construct a rule of law, unless it is so limited as to be applicable to a particular combination of many factors. If this combination does not recur, what we really have is merely one precedent, and not a rule.⁴⁴

Some of the many factors to be considered in cases of unilateral mistakes include the following: the nature and importance of the mistake; whether it was caused by the other party purposely or innocently; whether the other party knew or had reason to know of the mistake at the time of execution of the contract; whether the mistake was caused by the negligence of the party seeking relief; when the mistake was

⁴⁴ 3 Corbin, Contracts 354-355 (1951).

discovered and notice given; whether the risk of error had been assumed by the party seeking relief; what remedies are available; and whether either party or a third party has changed his position so that restoration is impossible.⁴⁵

To constitute an affirmative basis for obtaining judicial relief, the mistake in question must be of substantial importance and must be *bona fide* in nature. Courts will not interfere with contracts because of trivial mistakes nor will they intentionally allow judicial processes to be used by a party merely to avoid his obligations under a contract which is not to his advantage.

If the party against whom relief is sought was the cause of the mistake, whether intentionally or inadvertently, the probabilities are high that a court will grant relief to the mistaken party. Also, proof that the party against whom relief is sought, had knowledge of the mistake or had reason to know of it at the time the contract is entered into, constitutes another strong factor in favor of granting judicial relief.

This factor is illustrative of the vigorous growth evident in law of unilateral mistake. The rule as set forth in a number of 19th century cases would limit relief to cases where the mistake was caused by the other party, and makes no mention of knowledge or reason to know as constituting a basis for relief. Yet, in present day law, knowledge by one party of the other's mistake is said to be the equivalent of mutual mistake and thus a proper basis for relief.⁴⁶

Proof of actual knowledge of mistake is usually difficult, so most cases fall under the "reason to know" concept. As a basis for reconciling the numerous cases in which "reason to know" has been considered, some authorities have analyzed this phase of the law in terms of "palpable" and "impalpable" mistake and have sought to develop practical standards for identifying and distinguishing between the two categories.⁴⁷ However, the factors to be considered in determining whether a party should have been aware of the mistake of the other party are so numerous, and the weight accorded them appears to vary so greatly from case to case, that the endeavor does not appear to have been fruitful.

⁴⁵ For an excellent detailed discussion of the factors which are listed and briefly commented on in this article, as well as a thorough and up to date analysis of the law of mistake and trends and developments therein, see 3 Corbin, Contracts, chapt. 27-29. See also M. Sharp, "Promises, Mistake, and Reciprocity," 19 U. of Chi. L. Rev. 286 (1952) for some interesting and incisive comments on unilateral mistake.

⁴⁶ 5 Williston, Contracts 4340 (Williston & Thompson ed. 1937).

⁴⁷ See Lubell, "Unilateral Palpable and Impalpable Mistake in Construction Contracts," 16 Minn. L. Rev. 137 (1932).

If the trouble was the result of negligence on the part of the party both seeking relief and alleging the mistake, many cases wherein relief has been denied cite the plaintiff's negligence as being of controlling importance.⁴⁸ In earlier cases this was the logical result of the prevailing generalization that a man must bear the consequences of his own folly. Recent cases indicate a more charitable attitude towards negligence, and though it may be given as a reason where relief for a unilateral mistake is denied, the presence or absence of negligence no longer appears to be of controlling importance.

Where it appears that in negotiating a contract the parties were aware of uncertainties and consequently one or the other assumed the risk of error as part of the bargain, the principles under discussion afford no basis for relief in the event such mistakes occur. But since assumption of risk is often not clearly indicated in the contract, this factor is not easily applied. For example, in the typical contract for the purchase of marketable commodities, both vendor and purchaser assume the risk of errors in judgment concerning the market and the value of the commodity. Normally courts will not intercede in behalf of either. Yet this cannot be stated as a firm rule, for even in such a contract mistakes may occur as to matters where risk was not assumed and for such mistakes relief may be granted.

The last three factors to be considered are closely interrelated, namely: when was the mistake discovered and notice of it given to the other party; what remedies are available; and whether and to what extent either party or a third party has changed his position in reliance on the original bargain.

Naturally, the sooner a mistake is discovered, the easier it is to rectify. Consequently, relief is more easily obtained with respect to contracts which are still executory than for contracts where performance has been completed.⁴⁹ Diligence on the part of the mistaken party, both in discovering the mistake and in notifying the other party, is usually favorably considered by the courts.

At least three basic remedies are available in cases of mistake: (1) reformation of the contract; (2) rescission of the contract; and (3) refusal of specific performance. Of these remedies it is most difficult to obtain reformation in cases of unilateral mistake. In order for a court to reform a contract, it must be able to ascertain in what respects the

⁴⁸ E.g., *Grymes v. Sanders*, 93 U.S. 55 (1876).

⁴⁹ Williston, *Contracts* § 1580 indicates that relief for unilateral mistake may be obtained only as to contracts which "are wholly executory." But cf. 3 *Corbin, Contracts* §§ 606, 609, 614.

agreement as written differs from the actual intention of the parties. Ofttimes a bidder or a party to a contract can establish the fact that a mistake has been made but cannot prove what his bid or agreement would have been but for the mistake. In such a case, assuming that relief is warranted, a court can not reform the contract but can only rescind it. The remedy of rescission may involve other collateral remedies such as restitution in cases where the contract has been partially or fully performed by one party.

Finally, and perhaps most important of all, is the question of whether and to what extent either party or a third party has changed his position as a consequence of the original agreement. The explanation for a decision to rescind a contract in a relatively weak case for relief, or the denial of relief despite strong factors favoring granting it, may often be found in the practicalities of restoring the parties to the *status quo*.⁵⁰

If it is reasonably practical to do so, courts today appear to favor giving relief in cases even of unilateral mistake, and the fact that such relief may disappoint the expectation of the other party does not appear to be of too much concern. If the party seeking relief can and is willing to restore the other party to his position at the time the agreement was entered into, courts are prone to grant relief. On the other hand, if performance has progressed too far to permit such restoration, the mistaken party will probably have to bear the consequences of his mistake even though had the mistake been discovered earlier, relief might have been given. Thus it is evident that the ability to restore the *status quo* is a variable factor. In some cases relief can and will be granted even after complete performance of a contract, but in the normal situation the difficulties of restoration increase with the progress of performance and become most difficult in the case of completely executed contracts.

An additional matter that warrants mention, even though it is not one of the factors under consideration, is the standard of proof necessary to obtain relief for unilateral mistake. The mere allegation of error is never sufficient to warrant relief. In the normal case, the mistake alleged will contradict or be inconsistent with the terms of a written agreement. Consequently, the standard of proof required is high, although it varies with the particular facts of the case.

As a general observation concerning the common law relating to unilateral mistake, it would appear that the trend is to decide such cases in the most equitable manner, considering all factors involved.

⁵⁰ 3 Corbin, Contracts §§ 606, 608, 609.

General rules are not followed as rules of decision even though they are still cited in support of the decisions reached. It is an area of the law that is in the process of active development. The relative importance of the factors which are considered in the process of decision is shifting, and no one factor alone is consistently determinative of the disposition of a case.

Federal Governmental Doctrine re Unilateral Mistake

Before examining the substantive doctrine of unilateral mistake in Government contracts,⁵¹ particularly as it has been developed by the GAO, it is desirable to consider briefly the general philosophy of that office concerning government contracting. This philosophy is epitomized by the GAO assumption of the role of champion of Revised Statutes Section 3709,⁵² the statute which establishes for Government procurement⁵³ the system of contractor selection on the basis of competitive bids after formal advertising. In the words of the GAO:

The purpose of the statute requiring public contracts to be let to the lowest responsible bidder after advertising is to give all persons equal right to compete for Government contracts, to prevent unjust favoritism, or collusion or fraud in awarding Government contracts, and to secure for the Government the benefits which flow from free and unrestricted competition.⁵⁴

⁵¹ For other discussions of Federal doctrine on unilateral mistake in Government contracts see "Navy Contract Law," supra note 5, 34-38; "Government Contracts and Re-adjustment," supra note 5, 111-120; W. E. Lang, "Procurement by Formal Advertising," 12 Fed. B.J. 244, 249 (1952).

⁵² 41 U.S.C. § 5 (1946).

⁵³ Throughout this article frequent use is made of the term "procurement." In current Government usage this term covers all types of contracting, including construction, production, research and development, as well as the purchasing of supplies and equipment. It encompasses all types of contractual arrangements including contracts, subcontracts and purchase orders. The distinction between contracts and purchase orders is none too clear. Normally a contract or subcontract is more definitive than a purchase order and is usually drafted to fit the requirements of the particular deal. It has been suggested that a purchase order might be described as any contractual document that has not been reviewed by counsel.

In prime contractor procurement the distinction between subcontracts and purchase orders often has important administrative significance. The use of purchase orders usually involves less red tape and is an easier and speedier process. In many organizations subcontracts require review by corporate counsel and the signature of high company officials while purchase orders may be signed by field purchasing agents. The result is that the standardized purchase order forms are often misused to cover complicated contractual arrangements which should be handled by tailor-made subcontracts.

⁵⁴ Comp. Gen. B116, 270 (Aug. 24, 1953). Use of the term "advertising" in connection with Government procurement is somewhat misleading since paid advertisements in newspapers or other periodicals is neither required nor often used. Usually the statutory and administrative requirements of "formal advertising" are satisfied by the sending of invita-

Many GAO decisions emphasize the importance of preserving the integrity of the system of procurement by formal advertising. Rigid compliance with statutory requirements and "GAO common law" rules is insisted upon and departures therefrom by executive officials have often evoked stern censure.

To permit public officers to accept bids not complying in substance with the advertised specifications or to permit bidders to vary their proposals after the bids are opened would soon reduce to a farce the whole procedure of letting public contracts on an open competitive basis. The strict maintenance of such procedure, required by law, is infinitely more in the public interest than obtaining an apparent pecuniary advantage in a particular case by a violation of the rules.⁵⁵

In keeping with this philosophy, the GAO has placed strict limitations upon the power of contracting officers and higher officials of the executive branch, to modify bids or contracts, reserving to the GAO the power to consider requests for relief from mistaken bidders. Having successfully established its position and authority over such matters, the GAO has relented to a limited extent and has authorized the correction of mistakes in bids by Government contracting officers in certain strictly defined situations. Clerical or mathematical errors which are apparent in a bid, if confirmed by the bidder prior to acceptance, may be corrected by the contracting officer without reference to the GAO. Illustrations of the type of errors which contracting officers may correct include a misplaced decimal point,⁵⁶ an error in discount allowable (e.g., 1%—10 days, ½%—20 days, 30%—30 days);⁵⁷ price for delivery "f.o.b. destination" lower than price "f.o.b. factory";⁵⁸ and a discrepancy between unit prices quoted and the extended totals.⁵⁹

It is apparent that under GAO rulings, the authority of contracting officers under peacetime conditions to permit the modification of bids is so limited that in most cases such officers can only submit requests for relief through channels which ultimately lead to the GAO. From GAO decisions, it would appear that the administrative superiors of a contracting officer, including the head of the agency or department in-

tions to bid to a number of logical sources of supply and by posting a copy in some public place such as a post office.

⁵⁵ 17 Comp. Gen. 554, 558 (1938)—requiring rejection of low bid deemed not to comply with specifications and not permitting low bidder to modify bid to comply. Left to administrative officers was the decision of whether to reject all bids or to accept second low bid.

⁵⁶ 17 Comp. Gen. 339 (1937).

⁵⁷ 17 Comp. Gen. 493 (1937).

⁵⁸ 16 Comp. Gen. 999 (1937).

⁵⁹ 18 Comp. Gen. 1003 (1939); 17 Comp. Gen. 841 (1938).

volved, have little if any greater authority than the contracting officer with respect to granting relief to mistaken bidders.

. . . the question as to whether a bid may be changed or withdrawn after the time fixed for opening depends not alone on whether the bidder made a mistake but on the application of certain legal principles to the established facts in the particular case and such questions necessarily are for the determination of this office as involving the legality of the amount to be charged against an appropriation and not by any administrative office.⁶⁰

i. General Rule

The general rule with respect to mistakes in bids and contracts has been stated many times in GAO decisions in the following manner:

. . . when there has been a mistake in the submission of a bid the contractor must bear the consequences thereof. In order to authorize relief on account of a mistake in an accepted bid it must appear that the mistake was mutual or that the error was so apparent that it must be presumed the accepting officer knew of the mistake at the time of acceptance and sought to take advantage thereof.⁶¹

Implementing this general rule are the following corollary legal propositions: Although a bid may be modified or withdrawn at the will of the bidder prior to the time set for the opening of bids,⁶² once they have been opened and before expiration of the period allowed for acceptance, the bidder is without power to modify or withdraw his bid without the

⁶⁰ 17 Comp. Gen. 817, 818 (1938) permitting correction of obvious error by sole bidder but denying request for authority to permit contracting officers to make awards in similar cases without reference to GAO; 17 Comp. Gen. 1077 (1938); 15 Comp. Gen. 744 (1936); and 11 Comp. Gen. 65 (1931). In the decisions cited the heads of the agencies involved requested authority for the contracting officers, not for their superiors, but the GAO stated its rule so as to prohibit either from granting relief. See also 18 Comp. Gen. 22, 23 (1938) and 28 Comp. Gen. 403 (1949). But cf. Dougherty and Ogden v. United States, 102 Ct. Cl. 249, 259 (1944) and Rappoli v. United States, 98 Ct. Cl. 499 (1943), where the Court of Claims indicated disapproval of the procedure of referral of requests for relief to the GAO and asserted that this is the responsibility of the contracting agency involved.

⁶¹ 17 Comp. Gen. 452, 454 (1937). A few of the many GAO decisions to like effect include 27 Comp. Gen. 724, 727 (1948); 27 Comp. Gen. 718, 719 (1948); 26 Comp. Gen. 415, 417 (1946); 18 Comp. Gen. 39, 40 (1938). Court decisions frequently cited by the GAO on the general rule include Saligman et al. v. United States, 56 F. Supp. 505, 507 (E.D. Pa. 1944) and Ogden & Dougherty v. United States, 102 Ct. Cl. 249, 259 (1944), Elliccott Machine Co. v. United States, 44 Ct. Cl. 127 (1909).

⁶² This right is expressly provided for in GSA Standard Form 22, "Instructions to Bidders (Construction Contracts)," CCH Gov't Cont. Rep. ¶ 18, 141; and GSA Standard Form 33, "Invitation, Bid, and Award (Supply Contract)," CCH Gov't Contr. Rep. ¶ 18, 295. Modifications of bids by telephone are not permitted. See 17 Comp. Gen. 961 (1938), where bidder telephoned modification and then wrote confirming letter which was received after bids were opened. The bidder was held to his written bid and the modification was not effective.

consent of the Government.⁶³ Further, even though a bidder, after the time of opening but prior to award, may notify the contracting officer of the existence of a mistake or of his desire to withdraw his bid, the contracting officer may accept the bid and by this action create a binding contract.⁶⁴

The responsibility for the preparation and submission of a bid is solely that of the bidder.⁶⁵ The contracting officer should seek confirmation of a bid prior to award in the event he has reason to suspect that an error has been made, but this duty is to the Government and not to the bidder.⁶⁶ Mere allegation of error even though prior to award is never sufficient to warrant relief.⁶⁷ The burden of proving mistake is upon the bidder and the evidence submitted must be clear, convincing and timely.⁶⁸ The standard of proof will vary depending upon the

⁶³ 31 Comp. Gen. 660, 661 (1952); 31 Comp. Gen. 183, 184 (1951); and 17 Comp. Gen. 554, 559 (1938) re modifications; and 17 Comp. Gen. 536 (1937) re withdrawal of bids after opening. In this the Government rule varies markedly from the common law where the general rule is that an offeror may withdraw his offer at any time prior to acceptance. The Government firm offer rule has the corollary effect of increasing the rigidity of the Federal doctrine on unilateral mistake since it makes the time of opening of bids the equivalent of acceptance of the offer insofar as revocability of a bid is concerned. The firm offer rule has been the subject of considerable recent discussion. It appears to violate basic contractual concepts of the necessity for consideration and mutuality. On the other hand, it appears to fill the needs of procurement by advertising and its ultimate adoption as a rule applicable to private contracting seems likely. Cf. Uniform Commercial Code § 2-205 (Official Draft, Text and Comments ed. 1952).

⁶⁴ Mere allegation by the bidder of error which is not apparent in the bid, without proof, does not prevent the contracting officer from accepting the bid and thus creating a binding contract. See 17 Comp. Gen. 915 (1938) where a bidder was held to his contract despite notice before award. Award of a contract despite notice or awareness of error is usually done only in cases of emergency and even then such awards should not be made in all cases. 18 Comp. Gen. 22, 23 (1938).

⁶⁵ 31 Comp. Gen. 323, 325 (1952), no relief for bidder alleging price change by supplier after bid opening, with statement by GAO that responsibility for preparation and submission of bid "includes ascertaining the exact cost of any supplies to be obtained from its supplier." See also 27 Comp. Gen. 17, 19 (1947) and *Frazier-Davis Construction Company v. United States*, 100 Ct. Cl. 120, 163 (1943). Negligent error by agent is imputable to bidder. 17 Comp. Gen. 1110 (1938).

⁶⁶ See 18 Comp. Gen. 679, 680 (1939) where it is stated:

There is no duty on the part of a contracting officer to request a bidder to verify his bid since the responsibility for the preparation and submission of a bid is upon the bidder. There is no obligation on the part of the Government to have its contracting officers act as guardians for careless bidders (8 Comp. Gen. 397), and the failure of the contracting officer to notice the probability of error and to ask for verification thereof before making award, imposes no duty on the United States after acceptance of the bid and performance of the contract, to pay any amount in addition to the contract price.

To the same effect see: 27 Comp. Gen. 17 (1947); 17 Comp. Gen. 560, 562 (1938); 17 Comp. Gen. 452, 453 (1937).

⁶⁷ See note 64 supra and 31 Comp. Gen. 183, 184 (1951).

⁶⁸ See quote from 17 Comp. Gen. 599, 600, 601 (1938) referenced to note 81 infra. See also 17 Comp. Gen. 926, 928 (1938).

type of relief which is sought; correction of a bid requires proof not only that a mistake has been made, but an unequivocal showing of what the intended bid was, while withdrawal or disregard of a bid may be permitted upon proof of the existence of the mistake only.⁶⁹

Failure or refusal to perform the contract after the bid has been accepted may result in forfeiture of the bid bond⁷⁰ or the charging of the bidder with excess costs occasioned the Government by obtaining performance by a higher bidder.⁷¹

ii. Basis of General Rule

In the course of developing and applying the foregoing rules, on occasion the GAO has articulated some of the objectives towards which the rules are directed. Of principal importance is the fact that mistakes in bids tend to disrupt and delay the orderly conduct of the public business.⁷² The stringent requirements established by GAO doctrine which must be met to obtain relief for mistakes in bids serve to put teeth into the general rule that the bidder "must bear the consequences" of mistakes in his bid.⁷³ The GAO has not been without support for this position. From time to time, in submitting cases to the GAO for decision, various officials of the executive branch have urged an adverse decision for the purpose of "impressing upon all bidders the degree of care required in the preparation of bids. . . ."⁷⁴

Implied if not expressed in most GAO decisions on mistakes in bids is the quest to prevent any attempted misuse of the system of contract awards based on advertised competitive bids. Bid opening time creates

⁶⁹ In 18 Comp. Gen. 142 (1938), bidder alleged and proved an erroneous omission from his bid. GAO permitted disregard of bid but refused to correct bid on ground that precise cost of omitted item was not established. In 31 Comp. Gen. 183, 184 (1951) the GAO stated the rule as follows:

The basic rule is that bids may not be changed after the time fixed for opening. The exception to such rule, which permits correction of a bid, upon sufficient evidence to establish that the bidder actually intended to bid an amount other than that set forth in the bid, where the contracting officer is on notice of probable error prior to acceptance, does not extend to the recalculation or changing of the bid without conclusive proof as to the amount of the bid. See 17 Comp. Gen. 575, 577 [1938].

The decision cited distinguishes between items inadvertently omitted from bid, as being of the type for which relief can be granted, as opposed to cases where the error established could only be corrected by permitting the bidder to recalculate and change his bid to include factors which he did not have in mind when the bid was submitted. The latter type of mistaken bid can only be disregarded, not corrected.

⁷⁰ 17 Comp. Gen. 815, 816 (1938).

⁷¹ 17 Comp. Gen. 915, 917 (1938); 18 Comp. Gen. 28, 29 (1938).

⁷² 8 Comp. Gen. 397, 398 (1929).

⁷³ See general rule note 61 *supra*.

⁷⁴ 17 Comp. Gen. 536 (1937). See also *Massman Construction Co. v. United States*, 102 Ct. Cl. 699, 717 (1945).

a tense psychological situation for the person who finds himself low bidder by many dollars. It is immediately apparent to such a person that there would be a substantial increment to his income and possibly the avoidance of a disastrous loss if by some artifice⁷⁵ he could increase his price and still be awarded the contract. So strong a temptation frequently results in action, a fact of which the GAO is acutely aware.⁷⁶ If contractor relief were to be too readily granted this would encourage the deliberate submission of unreasonably low bids with the expectation on the part of the bidder of obtaining price increases after the award of the contract was assured. Such a practice would tend to undermine the integrity of the advertised bid system and would discriminate against firms submitting honest bids. Consequently, it is clear that for relief to be granted, the mistake must have been *bona fide*.⁷⁷ Improvident bids, whether deliberate or the result of poor judgment, do not qualify for relief.⁷⁸

In the application of the legal principles to the established facts of a particular case, a factor of great importance is the status of the contractual relations at the time when the contracting officer becomes aware of the existence of a mistake. The decision on a request for relief will be materially influenced by whether the mistake was discovered and notice given prior to opening of the bids; after opening but prior to award; after award but prior to execution of a contract or performance; or after partial or complete performance of the contract.

iii. Notification of Mistake After Bid Opening But Prior to Award

In Government procurement by formal advertising bids are publicly opened and announced. Thus, if a bidder has a representative at the

⁷⁵ An ingenious scheme for beating the system is described in "Navy Contract Law," *op. cit. supra* note 5, at 27, as follows:

In one case a crafty bidder had contrived, with a messenger boy for a telegraphic service, the following procedure; while other bids were being opened, this bidder kept walking up and down the hall way in front of the bid room exclaiming, "Where could that messenger boy be with my bid?" Finally, the messenger boy arrived and gave an envelope to the bidder who handed it to the Contracting Officer. This bid was the low bid. Having become suspicious of the actions of this bidder, the Contracting Officer interrogated the messenger boy, who confessed that the delivery by him of one of two envelopes depended upon a prearranged hand signal. Thus the Contracting Officer frustrated the bidder's attempt to secure an unfair advantage over other bidders by the use of this "one if by land, two if by sea" system of signalling.

⁷⁶ . . . after all bids have been opened, as in this case, and bidders have ascertained the amount quoted by other bidders whereby there might be a temptation to revise a bid either upward or downward as might serve the interests of the particular bidder, the permitting of any change in a bid is a matter for most serious consideration. . . .

⁷⁷ 17 Comp. Gen. 926, 928 (1930).

⁷⁷ 17 Comp. Gen. 599, 601 (1938); 17 Comp. Gen. 926, 928 (1938); 18 Comp. Gen. 28, 29 (1938).

⁷⁸ 17 Comp. Gen. 926, 928 (1938).

opening, he can ascertain before award is made how his bid compares with others submitted. If his bid is too far out of line when compared with the others, a bidder would be well advised to carefully recheck the computations making up his proposal. Of course, most mistakes in bids that result in requests for relief are omissions or errors which make the bid lower than was intended. Since normally the Government will accept the low bid, a mistake by a higher bidder usually goes unnoticed. However, on occasion, higher bidders do allege the existence of errors but for which their bid would have been low. The only form of relief which is of immediate value to such a bidder is correction of his bid, but this appears rarely to be allowed in such cases. Despite this fact, a bidder finding himself in such a situation will sometimes seek relief, and even though he is unable to offer sufficient proof to warrant correction of his bid, his action may result in the rejection of all bids with the subsequent readvertisement of the proposed purchase, thus affording him another opportunity to bid.⁷⁹

Where the apparent low bidder seeks relief for a mistake which, if granted, would terminate his status as low bidder,⁸⁰ he must act with diligence, not only advising the contracting officer of the mistake but submitting all available evidence as well. To one such bidder the GAO gave the following advice while denying relief:

It is not sufficient in cases where bids are opened and the amounts of all the bids disclosed, that the low bidder merely allege error in its bid in order to be relieved of furnishing the supplies or materials on which it has bid. In order to obtain relief in such cases there should be an immediate submission of such proof and explanation as to leave no room for doubt that a *bona fide* mistake was made and how it occurred. The mere fact that your bid was some 20 percent or 25 percent lower than the next higher bidder is not of itself sufficient evidence that you made a mistake on your quotation.⁸¹

To be remembered in submitting evidence in support of a request for relief from a mistake in a bid, is the fact that little sympathy will be extended for negligence in the preparation of a bid.⁸² It not only fails to constitute an excuse for a mistake, it may well be the reason given for denying any relief.⁸³ Of course, almost any mistake in a bid which

⁷⁹ See 17 Comp. Gen. 554, 559 (1938) (right of Government to reject all bids).

⁸⁰ The amount of the second low bid constitutes the practical limit to any relief which may be given the low bidder, since seldom if ever, will the GAO permit increase of the low bid above this limit and still award the contract to the original low bidder.

⁸¹ 17 Comp. Gen. 599, 600 (1938).

⁸² See 8 Comp. Gen. 397, 398 (1929).

⁸³ The following decisions are illustrative of conduct on the part of a bidder seeking relief for mistake, which the GAO has held to constitute negligence and for which relief

is not the result of mutual error or the fault of the Government must involve negligence on the part of the bidder to some extent. Since relief is granted in some cases of mistakes in bids, it follows that the mere existence of negligence does not bar relief. Negligence is a matter of degree and in submitting evidence in support of a request for relief, the chances of obtaining a favorable decision are increased if it can be shown that negligence was not a major factor in causing the mistake.

iv. Confirmation of Bids

Often bidders do not attend bid openings and do not review their own proposals once they have been submitted. Even so, a mistake may be brought to the attention of a bidder by the contracting officer in the process of reviewing the bids. Normally, such notice will come in the form of a request for confirmation of the bid; it will not expressly suggest that a mistake has been made. Requesting confirmation of a bid which is suspected to be erroneous is a duty placed upon contracting officers by the Government. It is in keeping with the rule that the Government should not seek to take advantage of a palpably erroneous bid even though it would be to the pecuniary advantage of the Government to do so. Since it is a duty owed only to the Government, failure to seek confirmation creates no rights on the part of the bidder, and in this connection it is often stated that the contracting officer has no duty to act as "guardian of careless bidders."⁸⁴ It should be understood that obtaining relief for an error discovered in reviewing a bid pursuant to a request for confirmation, requires just as strict proof as in the case where the bidder notifies the Government of the existence of an error.⁸⁵ Also, confirmation of a bid at the request of the Government, virtually precludes success in obtaining relief for an error later discovered and alleged by the bidder.⁸⁶

was denied; bidder's failure to familiarize himself with specifications resulting in submissions of lower bid than intended, 17 Comp. Gen. 823 (1938); typographical error in bid price, 17 Comp. Gen. 819 (1938); alleged omission of percentage to cover inspection costs and profit, 17 Comp. Gen. 915 (1938); bid based on untested manufacturing process that proved to be unworkable, 18 Comp. Gen. 942 (1939); erroneous assumptions as to price product could be obtained from supplier, 18 Comp. Gen. 39 (1938); error in bid price due to faulty extension on work sheets, 31 Comp. Gen. 180 (1953); bidder's supplier could not furnish right kind of product, 29 Comp. Gen. 323 (1950).

⁸⁴ See note 66 supra, see also 17 Comp. Gen. 452, 453 (1937); 17 Comp. Gen. 560, 562 (1938).

⁸⁵ See 17 Comp. Gen. 915, 917 (1938); 29 Comp. Gen. 341 (1950).

⁸⁶ See 18 Comp. Gen. 39 (1938); 18 Comp. Gen. 942, 947 (1939); 10 Comp. Gen. 388 (1931); 14 Comp. Gen. 453 (1934); 27 Comp. Gen. 17 (1947); see also *Alabama Shirt & Trouser Co. v. United States*, 121 Ct. Cl. 313 (1952).

Prior to award of the contract, relief may be granted to a mistaken bidder in the form of withdrawal, disregard or correction of the bid. The distinction between withdrawal and disregard of a bid appears to be that the former requires a request emanating from the bidder, while the contracting officer may disregard a bid without any action or request by the bidder. Also, withdrawal may not be wholly lacking in detrimental consequences to the bidder. On occasion withdrawal of the apparent low bid has been permitted where mistake was alleged prior to award, only on condition of forfeiture of the bid security.⁸⁷

v. Notice of Mistake Alleged After Award

Once a bid has been accepted, the chances of obtaining relief are materially diminished. Acceptance of a bid by the contracting officer, creates a binding contract regardless of whether it is contemplated that a written contractual document other than the bid and acceptance, will be executed by the parties. The consummation of the contract fixes the rights and obligations of the parties.⁸⁸

In order to obtain relief after acceptance, the bidder must show that the error was so apparent that it must be presumed the accepting officer knew of the mistake at the time of acceptance and sought to take advantage thereof. The usual remedy in such cases is rescission or cancellation of the contract, although it has been stated in at least one decision that no contract was created because there was no meeting of the minds on the terms of the agreement.⁸⁹

Generalizations concerning what indications of error in a bid are sufficient, in the contemplation of the GAO, to place a contracting officer on notice, appear to be of little value because the holdings in the decisions vary too widely.⁹⁰ Of course, actual knowledge is always sufficient, but is generally difficult of proof. The most common factor indicating error is a wide discrepancy between the prices of the low and next higher bidders. Obviously the wider the variance, the more impelling is the conclusion that the contracting officer knew of the mistake. On the other

⁸⁷ 17 Comp. Gen. 659 (1938).

⁸⁸ 27 Comp. Gen. 718, 719 (1948); 26 Comp. Gen. 415, 416 (1946); 23 Comp. Gen. 596, 599 (1944) and cases cited.

⁸⁹ 18 Comp. Gen. 549, 554 (1938).

⁹⁰ For example see 17 Comp. Gen. 493, 494 (1937) where discount formula of "1%—10 days, ½%—20 days, 30%—30 days" was rightly considered to be such an obvious error that the contracting officer was authorized to correct it without reference to the GAO. But cf. 17 Comp. Gen. 539 (1938) where a bid offering 2% for payment in 30 days and 30% for payment in 20 days was held not to constitute sufficient basis to presume awareness of the error on the part of the contracting officer who accepted the bid. But see suggested solution—don't pay until after 20 days!

hand, the greater the spread among all of the bids submitted, the less likely is the presumption that the contracting officer was aware of a mistake on the part of the low bidder.⁹¹ Mistakes in sole bids may go unnoticed because there is no standard for comparison.⁹² There appears to be less likelihood that notice will be presumed in the case of a bid on the sale of Government property than is the case of bids to sell products to the Government.⁹³

vi. Relief after Execution or Performance of the Contract

Despite the rule that acceptance of a bid is held to consummate the contract, by actions subsequent to acceptance, a bidder may still materially affect his chances for relief from a mistake. The course of action recommended for the bidder who becomes aware of a material mistake after acceptance but prior to performance, is refusal to perform combined with proof of the mistake and request for release from the bid.⁹⁴ The bidder who follows this course of action runs the risk of forfeiting his bid bond and possibly of being assessed additional damages should his request for relief be denied. This risk must be weighed against the certain loss resulting from performance.

For those who fail or choose not to follow the procedure recommended the prospects are even more grim. If it is contemplated that acceptance of the bid will be followed by the execution of a written contract, a bidder who has alleged error and has requested relief will practically assure its denial if he executes a contract before decision on his request

⁹¹ The GAO decisions concerning "reason to know" afford little basis for developing rules for recognizing "apparent" mistakes. The following are some illustrative decisions: In 23 Comp. Gen. 596 (1944), the alleged omission of a \$18,000 item from a bid of \$224,415 was not considered apparent error where there were bids, the highest being \$389,567 and the second low bid was \$42,000 higher than the low bid. In 15 Comp. Gen. 1049 (1936), the alleged omission of \$140,000 from the bid was deemed not to constitute apparent error where there were three bids in the following amounts, \$1,349,000, \$1,522,000 and \$1,577,000. In 17 Comp. Gen. 414 (1936), the low bidder alleged omission of a \$9,875 item from his bid of \$29,000. There were six other bids ranging up to \$59,110 and none lower than \$42,000. Held, error was apparent by reason of discrepancy in the bids. See also 17 Comp. Gen. 517 (1937); 17 Comp. Gen. 815 (1938); 15 Comp. Gen. 746 (1936); 18 Comp. Gen. 942 (1939); 17 Comp. Gen. 575 (1938); 17 Comp. Gen. 659 (1938).

⁹² Often it is possible to compare a bid with the Government's own estimate. E.g., see 17 Comp. Gen. 416 (1937) and *Massman Construction Co. v. United States*, 102 Ct. Cl. 699 (1945). Also, sole bidders are occasionally given special treatment by GAO, see 17 Comp. Gen. 964 (1938).

⁹³ See 17 Comp. Gen. 601 (1938).

⁹⁴ 17 Comp. Gen. 452, 454 (1937); 17 Comp. Gen. 599, 600 (1938); 25 Comp. Gen. 536 (1946). See also *Alta Electric & Mechanical Co., Inc. v. United States*, 90 Ct. Cl. 466, 476 (1940).

for relief is obtained.⁹⁵ The GAO adheres strictly to the rule that the execution of a formal contract with the knowledge of a mistake prevents relief even though the bidder attempts to reserve his rights concerning the mistake.⁹⁶ Performance after allegation of error appears to have the same result.⁹⁷ This is true despite the fact that the contracting officer may have urged the bidder to execute the contract or to perform, advising the bidder that he can file a claim for relief later,⁹⁸ or may have even threatened forfeiture of the bid bond and liability for excess damages, thereby inducing the bidder to perform prior to action on his request for relief.⁹⁹ While the GAO cannot be said to encourage such conduct by contracting officers, the published decisions appear to be devoid of censure for it. The only party to suffer thereby is the bidder who yields to such pressures.

Rarely is relief granted following complete performance of a contract. The GAO often states that it has no authority or that there is no legal basis for granting relief after full performance and final payment. In one decision it is stated that in such a situation there no longer exists a contract which legally may be modified or amended.¹⁰⁰

The foregoing review of doctrine relating to unilateral mistake in Government contracts has been based primarily upon the numerous GAO decisions on the subject. Greater attention has been given to the doctrinal statements concerning unilateral mistake, than to the actual holdings of the decisions or to the corrective action required. Many of the published decisions of the GAO are advisory in nature and relate to proposed actions. Such decisions lend themselves to the articulation of rules and doctrine. In numerous other decisions where past transactions are under consideration, the GAO has merely stated the applicable rules and advised against future violations without requiring corrective action in regard to the particular transaction. Emphasis has been placed on GAO decisions for two reasons: (1) the Federal doctrine has been worked out in greater detail in GAO decisions and applied to a wider range of factual situations, and (2), contract administrators appear to look principally to GAO developed doctrine for guidance concerning problems involving mistake.

⁹⁵ 25 Comp. Gen. 536 (1946) and cases discussed therein.

⁹⁶ 25 Comp. Gen. 536, 539 (1946).

⁹⁷ 17 Comp. Gen. 598 (1938); 17 Comp. Gen. 599, 601 (1938).

⁹⁸ 17 Comp. Gen. 452, 454 (1937); 17 Comp. Gen. 598, 599 (1938); 17 Comp. Gen. 599, 601 (1938); See also *Massman Construction Co. v. United States*, 102 Ct. Cl. 699, 719 (1945).

⁹⁹ 17 Comp. Gen. 834 (1938).

¹⁰⁰ 25 Comp. Gen. 332, 336 (1945).

Of course, the reports of the Federal courts and particularly those of the Court of Claims, include cases on mistake. Frequently such cases are cited in the GAO decisions. Quotations from Court of Claims cases can be found in support of the position of the GAO on most points relating to unilateral mistake. However, examination of the decisions of the Court of Claims, particularly the more recent ones, indicates that the Court takes a more flexible approach to problems of unilateral mistake than does the GAO. The portions of Court of Claims opinions quoted in GAO decisions do not indicate this variance of approach. Also, the GAO rarely cites those Court of Claims decisions in which this more equitable and liberal viewpoint is demonstrated. Awareness of this difference in attitude and approach is important to anyone requesting relief for unilateral mistake from the GAO or from the Court of Claims in the event the GAO should deny relief.

Mr. B and the Substantive Doctrine of Unilateral Mistake

The foregoing review of the substantive law of unilateral mistake under the common law and under Federal governmental contract doctrine, would indicate that Mr. B does not have a very good chance of obtaining relief under either standard. In his correspondence with the Laboratory and the Government Mr. B has only alleged the existence of error, and though he states that the motor in question is a standard component of the pump, the price of which can be easily checked, he has offered no proof of this. Under either common law or Federal governmental doctrines, the standard of proof of existence of the mistake is high.

Furthermore, Mr. B did not allege the error until performance of the contract had been completed by both parties. Under Federal governmental doctrines this would virtually preclude recovery. Under common law cases this would be a substantial factor tending toward denial of relief but would not necessarily preclude relief. Certainly the alleged mistake was not such as to create the presumption that the Laboratory was aware and sought to take advantage of it. The estimate of the Laboratory was lower than the bid of Mr. B and the only other bid was for another type of pump.

As a general observation, it appears that Federal governmental contract doctrines relating to unilateral mistake, follow those of the common law but at a somewhat retarded pace. The Federal doctrines and rules are much more detailed and rigid and do not evidence the flexibility and growth to be seen in the common law. Federal decisions, particularly those of the GAO, continue to place great emphasis on such factors as

negligence of the mistaken party and to deny relief because of it. Greater importance is attached to the contractual status at the time the mistake is alleged. Most important of all, the concept of ability to restore the *status quo* appears to be entirely absent from Federal governmental doctrines. Too often doctrinal maxims appear to be applied with an eye to protecting the immediate interests of the Government. Such doctrines lack the overall consideration of the equities involved which is such an important part of the decisional process in common law courts.

IV. SUBSTANTIVE DOCTRINES OF PRE-EXISTING OBLIGATION AND AMENDMENTS WITHOUT A LEGAL CONSIDERATION

Common Law Doctrine

Since it would appear that the doctrines relating to relief of unilateral mistakes offer little comfort or hope to Mr. B, the question still remains of whether there is any other way that Mr. B can be "bailed out" of his difficulties, and whether under common law or governmental doctrines, any further legal obstacles will be encountered.

Under the common law of private contracts, should one party desire to grant the request of the other for modification of some term of an existing agreement, the change could be made and normally no legal question would be involved. It is only in the event that the relieving party, for one reason or another, later changes his mind and attempts to compel performance in accordance with the terms of the original contract that legal problems are encountered. The question then is whether the modification agreed to is enforceable. In the usual case this turns upon the stated issue of whether there was consideration for the modification of the original contract.

Most acts and forbearances, or promises of future performance, are a sufficient consideration for a promise if they are bargained for by the maker of that promise and are given in exchange for it. One of the most important exceptions consists of those performances that are required of the performer, exactly as rendered by him, by a pre-existing legal duty. The same is true of a promise to render such a performance. The very frequently stated rule is that neither the performance of duty nor the promise to render a performance already required by duty is a sufficient consideration for a return promise.¹⁰¹

The pre-existing duty contemplated by the rule may arise from a variety of factual situations and may include duties owed to persons generally as well as contractual and quasi-contractual duties. This article is concerned with contractual duties and in particular, those

¹⁰¹ 1 Corbin, Contracts 559, 560.

duties which are owing between parties to a contract rather than to a third person. It is with regard to such cases that the rule appears to be most firmly established. Thus, if a contractor is bound by contract to construct a building or to produce supplies for a given price, it is generally held that his performance of that duty is not a sufficient consideration for an additional promise by the other party to pay an increased price therefor or to do anything beyond payment of the original price agreed to. Consequently, where such promises of additional compensation have been made, judicial enforcement will usually be denied.¹⁰²

The objectives and purposes which were instrumental in the initial formulation of the pre-existing duty rule do not appear to be well known. Several possibilities have been suggested including the concept that "duty" should be performed without reward. Also, the purpose may have been to prevent a form of economic coercion such as the situation where a contractor could obtain a contract by deliberately bidding low and then, during performance, take advantage of the other party's need for completion and exact promises of price increases. Neither suggestion appears to be consistently supported by the cases.¹⁰³

Federal Government Doctrine

In Government contract law there are rules which are analogous to the pre-existing duty rule, although they are commonly referred to as pertaining to "modifications or amendments without a legal consideration." These specific rules are based upon an oft-repeated mandate that "In the absence of a statute specifically so providing, no officer of the Government has authority to give away or surrender a right vested in or acquired by the Government under a contract."¹⁰⁴

The rule just quoted does not constitute a flat prohibition of the modification of Government contracts even though such modification may affect rights vested in the Government.¹⁰⁵ A corollary rule provides that "No officer of the Government may modify or waive such a right without a valuable consideration passing to the Government."¹⁰⁶

¹⁰² Restatement, Contracts, § 76, illustration (8) (1933).

¹⁰³ 1 Corbin, Contracts § 171.

¹⁰⁴ 20 Comp. Gen. 703, 710 (1941). This rule has been stated and restated in many different ways, including the following: "agents and officers of the Government have no authority to give away the money or property of the United States, either directly or under the guise of a contract that obligates the Government to pay a claim not otherwise enforceable against it." *Bausch & Lomb Optical Co. v. United States*, 78 Ct. Cl. 584, 607 (1934). See also 27 Comp. Gen. 718, 719 (1948).

¹⁰⁵ See 19 Comp. Gen. 662, 665 (1940) where power of contracting officer to amend contract is expressly recognized.

¹⁰⁶ 19 Comp. Gen. 358, 363 (1939).

Although both pertain to the requirement of consideration, the Federal contracts rule against modifications without a consideration differs from the common law rule of pre-existing duty in several respects. The Federal rule constitutes both a limitation upon the contracting powers of agents of the Government and a basic policy for their guidance. Both aspects of the rule are important.

As a policy it has a pronounced influence upon the thinking and actions of Government administrative officers even concerning matters other than the modification of contracts. With respect to actions involving public funds or property, most officers, consciously or unconsciously, endeavor to assure themselves that the Government derives some specific benefit therefrom.

As a limitation on the authority of contracting agents the rule is also important, because the Federal courts and the GAO are quick to repudiate any unauthorized actions by agents of the Government pertaining to its vested rights, which do not result in a benefit to the Government.¹⁰⁷ Under the strict agency concepts applicable to officers of the Government, rarely are unauthorized actions of its agents held to be binding on the United States.

There are noticeable differences between what the common law will recognize as sufficient consideration to support the creation, modification or release of contractual rights, and the nature of consideration necessary to satisfy the Federal rule against modifications without a legal consideration. Under common law concepts, so long as what is given in return for a promise is "bargained for,"¹⁰⁸ it normally constitutes adequate consideration for the promise. Thus even the traditional peppercorn has been recognized by common law courts to constitute adequate consideration for the release of valuable contract rights. However, decisions and rulings applying the Federal rule against modifications without a legal consideration, require that the consideration moving to the Government be commensurate with the value of the vested rights given up in exchange.¹⁰⁹ Some of the decisions indicate that inadequacy of consideration is equivalent to the lack of consideration; both render

¹⁰⁷ 18 Comp. Gen. 114 (1938).

¹⁰⁸ Restatement, Contracts, § 75.

¹⁰⁹ See 18 Comp. Gen. 114 (1939) where action of contracting officer in agreeing to accept lower quality oysters at a reduced price than as provided in contract, was held void because price valuation was not commensurate with lowered quality of oysters. In Federal contracts the emphasis is upon the *quid pro quo* aspects of consideration with the additional qualification that the end result be in the interest of the Government. See also 19 Comp. Gen. 358, 363 (1939); 5 Comp. Gen. 605, 607 (1926).

the modification voidable at the option of the Government.¹¹⁰

The common law rule of pre-existing duty deals with consideration as a basic ingredient necessary to create an enforceable contractual agreement against either party to a contract.¹¹¹ The Federal rule, however, appears to have, as a primary purpose, assuring that the Government obtains a favorable bargain.¹¹² While modifications of existing contracts entered into by its agents may be voided by the Government unless it received a valuable consideration therefor, the rule does not operate to prevent such agents from modifying contracts to take advantage of the willingness of the other party to sacrifice his contractual rights. Thus it has been repeatedly held that contracting officers are empowered to modify Government contracts to reduce the price to be paid by the Government, if the contractor is agreeable, regardless of whether the contractor receives any consideration for the modification.¹¹³

The rule against modification of Government contracts without a valuable consideration appears to have been developed by the Federal courts, although in recent years it has been more frequently applied by the GAO. Although the rule is not limited to cases involving mistake, it is frequently stated and applied in such cases. Despite the fact that the GAO frequently cites the statement of the rule as set forth in Court of Claims cases, there appears to be a significant difference in the application of this as many other rules, in the decisions of the two tribunals. The GAO doctrinal approach to contractor relief is epitomized in the following statement: "Claims against the United States are for settlement and adjustment on the basis of law and the written record and not on the equities that may be involved."¹¹⁴ This approach provides the GAO with frequent opportunities to cite and apply the rule requiring consideration for the relinquishment of Government contract rights. The Court of Claims, on the other hand, does consider the equities involved as well as the rules of law and appears to apply the latter less rigidly than does the GAO. Not infrequently the Court of Claims decides claims in favor of the contractor after relief has been denied by the GAO.¹¹⁵

¹¹⁰ E.g., see 15 Comp. Gen. 25 (1935); 18 Comp. Gen. 114 (1938) and 5 Comp. Gen. 605 (1926).

¹¹¹ See list of essential elements to create a contract, Restatement, Contracts § 19.

¹¹² E.g., 15 Comp. Gen. 312, 313 (1935).

¹¹³ 19 Comp. Gen. 509 (1939); 15 Comp. Gen. 312, 313 (1935) and 14 Comp. Gen. 59 (1934).

¹¹⁴ 17 Comp. Gen. 279, 280 (1937); see also 18 Comp. Gen. 942, 950 (1939).

¹¹⁵ E.g., *Edmund J. Rappoli Co. v. United States*, 98 Ct. Cl. 499 (1943).

It is probable that the Federal rule concerning modification of contracts was derived originally from the common law rule concerning pre-existing duty. The construction of the rule as a limitation on the authority of Government agents would appear to have been a part of the development of the rigid agency concepts applicable to federal officers, which resulted at least in part from the profound judicial distrust of the possession of discretionary powers by executive officers, which was so frequently expressed in early court opinions.¹¹⁶

As a limitation upon the contracting authority of administrative officers, it is questionable whether the rule continues to be justified. Also, some of the judicial reasoning concerning the contracting authority of Government agents is of doubtful validity. For example, the GAO frequently cites the case of *American Sales Co. v. United States*¹¹⁷ in support of this rule. In that case the Circuit Court of Appeals held void a modification reducing prices in a Government contract for the sale of Government property. The basis for the holding was that the executive department in entering into the contract had exhausted its power over the terms of the contract and could not modify them. This theory of exhaustion of power is contradictory to other expressions of the Supreme Court of the United States¹¹⁸ and even to decisions of the GAO relating to the authority of contracting officers to modify and terminate contracts.¹¹⁹

Although there are several Court of Claims¹²⁰ decisions stating and applying the rule as a limitation on the authority of contracting officers, the case support for it is not as broad and firm as it might appear from the numerous cases cited on the point. An examination of early cases cited in support of the rule reveals that a considerable number are not in point or constitute weak authority for the rule.¹²¹ Frequently cases are referred to where contracts or modifications thereto have been held to

¹¹⁶ There appears to be no statutory basis for the Federal contract doctrine relating to amendments without a legal consideration.

¹¹⁷ 27 F.2d 389, affirmed 32 F.2d 141 (5th Cir. 1929), cert. denied 280 U.S. 574 (1929).

¹¹⁸ *United States v. Corliss Steam Engine Co.*, 91 U.S. 321 (1875).

¹¹⁹ 19 Comp. Gen. 662 (1940); 18 Comp. Gen. 826 (1939).

¹²⁰ *Vulcanite Cement Co. v. United States*, 74 Ct. Cl. 692, 705 (1932) where the rule is stated both as a limitation on authority and is a basic contract rule; *Preis & Co. v. United States*, 58 Ct. Cl. 81 (1923); *Cohen, Endel & Co. v. United States*, 60 Ct. Cl. 513, 518 (1925); *Pacific Hardware & Steel Co. v. United States*, 49 Ct. Cl. 327, 335 (1914); and *Bausch and Lomb Optical Co. v. United States*, 78 Ct. Cl. 584, 607 (1934).

¹²¹ *Brawley v. United States*, 96 U.S. 168 (1878); *Simpson v. United States*, 172 U.S. 372, 379 (1899); *Christie v. United States*, 237 U.S. 234 (1915); *Shipman v. District of Columbia*, 18 Ct. Cl. 291 (1883); *American Water Softener Co. v. United States*, 50 Ct. Cl. 209 (1918), and cases cited in note 115 supra.

be void because of lack of authority of the officer purporting to enter into them. In a number of the cases of this type which have been cited, the officer concerned had no contracting authority whatever or lacked power over the particular contract in question.¹²² Such cases have no bearing upon the question of whether contracting officers who are authorized to enter into a contract in behalf of the United States, lack power to modify it after execution.

Regardless of the necessity for the rule or the soundness of the policies upon which it is based, the prohibition of modification of Government contract rights without a valuable consideration passing to the United States, is very much alive. The following are some illustrative factual situations in connection with which the GAO has considered the application of the rule: Supplemental agreement to existing contract increasing unit price held void even though contracting officer stated that original price was a mutual typographical error;¹²³ retroactive lease agreement increasing rental under existing lease, held void;¹²⁴ modification of fixed price and time and material contracts containing labor escalation clause limited to increases pursuant to mandatory Government orders, to permit reimbursement of voluntary general wage increase would be invalid;¹²⁵ a supplemental agreement adjusting lease rentals to compensate for extra heat furnished, held void for lack of consideration;¹²⁶ and, not permissible to modify contract to give relief where the process of manufacture contemplated by the contractor in preparing his bid proved unworkable.¹²⁷

¹²² A few examples of such cases are: *B. & O. R.R. Co. v. United States*, 261 U.S. 592 (1923) (where Government officer had no contracting authority); *Hawkins v. United States*, 96 U.S. 689 (1877) (where superintendent purportedly authorizing acceptance of more expensive rock had no contracting authority); *Yale & Towne Manufacturing Co. v. United States*, 67 Ct. Cl. 618 (1929) (where officer who attempted to increase the contract price retrospectively had no authority to "take any step in connection with the contract, much less to set it aside and make a new one.")

¹²³ 5 Comp. Gen. 605 (1926).

¹²⁴ 16 Comp. Gen. 463 (1936).

¹²⁵ 25 Comp. Gen. 695 (1946).

¹²⁶ 17 Comp. Gen. 59, 279, 281 (1937).

¹²⁷ 18 Comp. Gen. 942 (1939). Among other holdings within the rule against amendments without a legal consideration are the following: the fact that a contract proves unprofitable, provides no basis for relief, 23 Comp. Gen. 811 (1944); 22 Comp. Gen. 260 (1942); 19 Comp. Gen. 48 (1939); administrative action of reducing price of garbage to be sold to contractor held void, 17 Comp. Gen. 17 (1937); contracting officer held not to have authority to waive liquidated damages accruing, 14 Comp. Gen. 468 (1934), 26 Comp. Gen. 280 (1946); not proper to amend contract for coal to permit contractor to deliver on a Government bill of lading to avoid paying Federal transportation tax, 22 Comp. Gen. 915 (1943); Where low bidder refuses to perform and procurement is readvertised and same company is again low bidder but at a higher price, acceptance of second proposal would constitute a violation of the rule against amendments without a

*Applicability of Governmental Doctrine to Prime Contractors
and Subcontractors*

The applicability of the governmental doctrines of amendment without a legal consideration to subcontracting activities of prime contractors appears to closely parallel the pattern discussed previously with reference to the substantive law of unilateral mistake. Insofar as judicial enforcement is sought for promises of relief, it would appear that the common law rules would apply. However, if the matter does not come into court it is evident that the more rigid Governmental doctrines have a pronounced effect.

V. BUSINESS AND GOVERNMENTAL PRACTICE ON MISTAKES
AND BAILOUTS

Up to this point we have examined the law as it applies to Mr. B's problem, both the common law doctrine as applied to unilateral mistake and the Government doctrine as carried over from direct Government contracts to subcontractor situations. We have seen that under either concept Mr. B would have trouble being made whole in the loss caused by his mistake, especially in relation to the Governmental doctrine. We have also examined whether there are any other legal alternatives outside of the concept of mistake by which a Government prime contractor for good reason could take care of a subcontractor like Mr. B. It has shown that here too there is apparently no peace-time method by which a subcontractor can be made whole, due to the concept of pre-existing legal obligation and the rule against amendments without a legal consideration.

In view of the apparent rigidity of legal doctrine, how then can ordinary private business as well as the Government and its prime contractors make the myriad adjustments necessary to keep an industrial society moving? Is Mr. B correct in his opinion in that normal business practice a fellow would be taken care of, and that if the Government or its prime contractor wanted to, they could also see that the right thing was done? In short is this another case where the law is lagging behind practice? Has experience outdistanced legal doctrine? If so, what should and can be done about it?

Business Practice on Mistakes and Bailouts

The short answer appears to be that in private business transactions, the legal doctrine is ignored. Or more properly, a fellow is taken care of,

valuable consideration passing to the Government, 31 Comp. Gen. 76 (1951) and 27 Comp. Gen. 343 (1947).

if he is a decent fellow and known and expected to be so, and that is that. It is apparently rare where a business organization has a change of heart and attempts to enforce a pre-existing legal obligation once it has given, or agreed to give, a fellow a break.

It is believed that the above practices, collectively known as "bailouts," are widespread in private business.¹²⁸ The extent of the practices go beyond the forgiveness of mistakes in bids and apply to losses of all types incurred in the performance of a contract. Among the types of loss for which suppliers reportedly have been made whole have been unanticipated increases in labor rates and material prices, delays in specified time of delivery, and waiver of guaranty and warranty provisions. Indeed for every type of increased cost and price on Government contracts which the GAO has held invalid as not supported by a legal consideration, at least one instance or practice can probably be cited where a private business concern has permitted the same type of adjustment to be made.

It is also believed that the bailout practice is not confined to suppliers, but also applies throughout the business community where long term contracts are used. Thus to some degree bailout practices are followed wherever fixed obligations are involved, whether by suppliers or purchasers and whether the commodity consists of materials, equipment, buildings and improvements, manufactured articles, or credit, insurance¹²⁹ or other services.

Among the reasons which have been advanced or come to mind for the use of the bailout practice for suppliers are the following:

(1) First, there is the matter of common decency and business morality. Undoubtedly business morality has improved, and many businessmen will not today take advantage of a "legal technicality" where it would cause a hardship to the other fellow whether or not he had an established business relationship with the man.

¹²⁸ The nature and extent of the practice of forgiving mistakes of bidders and otherwise bailing out contractors from losses or other disabilities incurred from complying with fixed obligations in contract performance has apparently never been comprehensively surveyed or analyzed. These observations are based on first hand experience and discussions with a number of private contractors engaged in research and development, production, manufacturing and construction, with particular reference to the purchasing or buying function. Possibly the paucity of written materials is due to the reluctance of private business firms to reveal business practices thought to be of a semi-confidential nature. For a good study of the contrast between doctrine and practice in the related field of offer and acceptance, see Schultz, "The Firm Offer Puzzle: A study of Business Practice in the Construction Industry," 19 U. of Chi. L. Rev. 237 (1952).

¹²⁹ The type of bailout devices and the extent of their use apparently differs from industry to industry, and indeed from company to company. For brief description of practices of insurance companies, see Fuller, *Basic Contract Law* 213, 214 (1951).

(2) Then there is the established policy of keeping vendors and suppliers happy and satisfied with the purchasing company, in order to assure high quality performance over the long pull and adequate supply when things get tight.¹³⁰ Many businesses are willing to pay the extra cost of bailing out a few suppliers in order to gain a reputation for fair dealing and thus help assure long run quality and supply.

(3) Thirdly, the use of the bailout may be considered to be a part of the mechanics of the contract machinery used in the semi-organization of various segments of the present day business economy. Many industries utilize long-term unit-price supply contracts for their operations which are informally and voluntarily adjusted and readjusted from time to time, with respect to price and other factors affecting risk.¹³¹ Where such suppliers provide all or most of their output to a particular industrial or commercial purchaser, they are indeed almost a part of the purchaser's organization.

A further aspect of the bailout as a part of the established business economy is the policy of reciprocity. In some relationships between businesses the purchaser not only buys from the supplier but he also sells finished products and articles to the supplier. Thus here the purchaser not only wants to keep the supplier satisfied as a means of maintaining adequate supply, he also wants to maintain the good will of a regular customer. In some cases, this mutual relationship is formalized by means of reciprocity agreements, whereby each party agrees that all other factors being equal they will buy from each other. Obviously in such cases unanticipated losses would be likely to be adjusted.

(4) Perhaps an equally fundamental reason for the practice of bailouts, particularly those involving the waiver of legal technicalities, has been the widespread use of standard-form purchase orders and contracts. By definition these form contracts are not "agreements" negotiated by the parties and tailored for the particular transaction. Such uniform

¹³⁰ Anyone who has ever had a house or garage built under a lump sum contract, or even had a long term service guarantee on equipment, knows that it isn't the language of the standard form which counts, it is the relationship which is built up with the contractor which really matters: If the contractor or service man knows you are fair and willing to overlook minor flaws and discrepancies he is likely to try to do a good job on the important things; if he finds you are going to insist on your detailed rights, he can find a hundred ways to do you in within the contract. For a common sense business appraisal of contracting see J. R. Zehner, "Contracting for Building Construction," *Purchasing* (1954).

¹³¹ See K. N. Llewellyn, "Common-Law Reform of Consideration: Are There Measures?," 41 *Col. L. Rev.* 863, 867 (1941).

contracts are not adaptable in many instances to the myriad of non standard circumstances encountered even in present day industrial life.¹³² Accordingly it becomes necessary by informal means outside of the standard form purchase order to make some sense out of the transaction by the waiver or adjustment of various requirements set out in the fine print of the purchase order.

Not only are standard form purchase orders widely prevalent, but also their use in many instances is dictated by one of the parties, usually the one having the greater bargaining power. These contracts, known as "contracts of adhesion," not only are of a standard form type but are drawn up so as to serve primarily the interest of its originator.¹³³ Because of business difficulties and litigation involving various provisions of the agreements, many provisions of standard forms have been deliberately drawn up so as to be "tougher" than the contractor intends to be in the normal situation.¹³⁴ Thus the contractor as a matter of "lese majesty" may disregard various requirements of a standard form with regard to a deserving supplier, and attempt to enforce the letter of the form against undeserving heels. It has been the attempts at judicial rewriting of contracts of adhesion which has received considerable attention in legal literature.¹³⁵

It should be noted that there obviously must be and are limits to the extent to which bailouts are practiced generally and in the individual case. The basic purpose of lump sum and unit price contracts is to establish some certainty that whatever is contracted for will be obtained for the price specified, within limits. Internal budgeting and cost controls and external financing are premised on reasonable certainty concerning pricing and other factors affecting the bargain, with some contingencies

¹³² Undoubtedly the use of standard form contracts has resulted in certain economies in business administration. See K. N. Llewellyn, Book Review, 52 Harv. L. Rev. 700 (1938). However, it is believed that, in order to make sense out of the transaction or relationship under the standard form, the parties in many cases go around, over, and under the formal purchase order terms.

¹³³ See F. Kessler, "Contracts of Adhesion," 43 Col. L. Rev. 629 (1943) and articles cited.

¹³⁴ The restricted language on warranty in standard form farm machinery and seed sales contracts are classic examples of attempts to get away from judicial holdings on collateral damages from breach of warranty.

¹³⁵ In a sense when a court rewrites a contract of adhesion to require something different from its literal wording, it is merely doing what the parties to the contract, or others similarly situated had been doing all the time as a matter of practice. In utilizing these informal "tools of intentional and creative misconstruction" the parties to a standard form contract establish no judicial precedents which might be harmful to logical and orderly common law development if caused by judicial misconstruction. A clearer solution would be to write contracts to say what the parties mean and intend.

to cover unforeseen events, including possible bailouts. In mass production supply contracts for manufacturing operations where cost and profit margins are watched closely to within a fraction of a cent, it should be apparent that the contingency set aside for the practice of the bailout must be held within relatively narrow limits.

In less routine transactions there are also limits to the use of bailouts.¹³⁶ For one thing, the extent of the supplier's loss must be taken into account in relation to the financial resources of the purchaser. In many cases the purchaser can only partly bailout a supplier. In other cases, the purchaser may be in such financial difficulties that he can't help the supplier at all. Conversely, the supplier may be in such bad financial shape that it would be considered foolhardy by the purchaser to try to bail him out. Various organizational and psychological factors also may influence the handling of bailouts in the particular case. Thus a new procurement director or efficiency engineer out to make a record for the purchasing division on dollar costs may turn thumbs down on bailouts, especially where no regular course of business has been carried on with the supplier. Similarly rivalries, grudges, and prejudice may play a role.

Governmental Practice on Mistakes and Bailouts

i. Direct Government Contracts

It has been seen that Government doctrine is more stringent than common law doctrine on bailouts. We have also seen that there is a wide divergence between doctrine and practice in private business transactions governed by the common law. Does this same divergence exist between Government doctrine and practice? How about the hybrid prime contractor?

The answer appears to be "no" as applied to the Government directly. There are several reasons for this. First there is no institutional incentive in favor of leniency on contractors in order to maintain good will. Indeed the incentive has always been toward achieving demonstrable money savings for the taxpayer. Secondly, the doctrine of making amendments to contracts only where there is a substantial quid pro quo for the Government is deeply ingrained in the psychology of Federal contracting officials. Thirdly, the Governmental doctrine is relatively well policed by the auditors and attorneys of the Federal agencies, and particularly by the General Accounting Office.

¹³⁶ The authors are indebted to Karl Llewellyn for suggestions on the limitations of the bailout, as well as on the prior discussion on the development of the bailout practice.

However, in administering the doctrine, as with all organizations, considerations of common sense and the instinct for justice in the particular case are permitted to creep into the interstices of the doctrinal structure.¹³⁷ Informal and sometimes formal means of giving a deserving fellow a break within the limits of doctrine have been developed throughout the contract process.¹³⁸

Thus after a careful consideration of the equities of the case, what was originally thought to have been a unilateral mistake may turn out to have been a mutual mistake all the time and therefore susceptible to reformation within accepted doctrine. It is also possible that where a contractor finds himself in a fix with the equities in his favor, a mutuality of consideration may be discovered or developed which would support an amendment to his contract. For example the term of the contract may be extended at the Government's request, an additional report may be required, or any one of a number of other requirements may be specified, short of a peppercorn, which are not included in the scope of work or in the plans and specifications of the original contract.¹³⁹

Similarly a contractor's loss on a fixed price contract may be mitigated if the contracting officer elects to terminate and effect a settlement rather than require complete performance or declare the contractor in default. Such an arrangement in fact saves the Government valuable time and money, by avoiding extended and acrimonious claims and litigation as

¹³⁷ As discussed in note 131 *supra*, the practice of judges in thwarting the language of standard form contracts to give the right result in the particular case has received considerable attention. Less attention has been given to the same practice by the parties to a business contract at an earlier stage of the contract process. Practically no attention has been given to the practice under Government contracts and subcontracts. All of these practices are, or should be considered, a part of the contract process. See generally K. N. Llewellyn, "What Price Contract?," 40 *Yale L.J.* 704 (1931).

¹³⁸ The type of case in which the informal technique may be justified is illustrated as follows: A standard form purchase order was awarded a small business firm for the fabrication of a special type of equipment needed on an urgent defense project. During performance it became apparent that the contractor could not meet his delivery date because of unanticipated technical problems encountered in meeting the performance specifications. Should he have been declared in default for not making delivery on schedule? The next problem encountered was that the contractor began to run into financial problems because of the extended term of the purchase order contract. No provisions for advance or partial payments had been made in the original purchase order or subsequent change orders because nobody thought of them. Should such payments have been refused at the risk of delaying an urgent defense project? For one solution to this type of problem see 20 *Comp. Gen.* 917 (1941).

¹³⁹ Conscientious contract officers are chary on the use of change orders as a means of helping deserving contractors. The abuse of changes and "extras" by some unethical contractors as a means of making a profit on jobs on which they have deliberately underbid at a loss or low profit has made the change order route suspect.

well as minimizes the contractor's loss both in money and reputation by avoiding a declaration of default. But on the face of it the Government is giving up rights and therefore the dangers of complete loss to the Government must be emphasized for the record rather than the partial salvage of the contractor.

It is also possible that a Government contracting officer in considering the equities of a supplier's plight in a loss situation, though not authorized to grant or obtain formal relief, may gloss over minor defects in performance and not take advantage of technical defects in notice and other requirements. Similarly the provisions of existing exculpatory clauses of the contract, such as delays and latent conditions, may be stretched in a deserving case. In this the Government contract officer is acting like his private enterprise brethren, except that the extent of his forgiveness is more limited. Finally there is the matter of a subsequent order or contract. Although Government rules provide that a contractor cannot recoup prior losses, some contractors in a loss situation seem to think a subsequent contract would work to their advantage.

In all of the described types of situations, the familiarity of the contracting officer with the work under the contract, and his fairly broad discretion in controlling the work, often enables him to support his actions in terms that are difficult to controvert. It must be emphasized that the reported practices are exceptional and are not necessarily recommended. They are certainly subject to abuse. But any realistic appraisal of this or any other rigid system of contracting must recognize that informal means of achieving sense in the individual case are bound to be practiced. In the last analysis, the problem of abuse in the particular case will depend upon the general integrity of the contract officers and their advisers and of the Federal system of which they are a part.

ii. Government Prime Contractor Practice

The Government prime contractor is truly in a hybrid situation in relation to the handling of mistakes and bailouts. On the one hand, unless the contractor is wholly devoted to Government business, his contracting and purchasing personnel used on the Government prime contract have a private procurement background and outlook. Accordingly they may be favorably disposed towards bailouts. Moreover the prime cost-type contractor is being financed by Government money rather than his own, and accordingly has no direct monetary incentive on limiting bailouts to the same extent as with his own funds.

On the other hand, the contract actions and amendments to authorize bailouts of subcontractors by the prime contract are subject to the approval or scrutiny of a Government contract officer who is usually imbued with the Governmental doctrine of the necessity of a substantial quid pro quo to support any relief of a subcontractor. As discussed in a prior section, Government auditors are also likely to apply the Governmental doctrine to the prime contractor—subcontractor relationship in the absence of any controlling authority to the contrary.

To further complicate matters, the purchase orders used by the prime contractor are usually his own standard form agreements. To these forms the Governmental requirements, known as "boiler plate," are tacked on as appendices. The resulting document is so lengthy that fine print is utilized extensively in order to maintain the typical form of a purchase order.¹⁴⁰

The purchase order of the typical industrial prime contractor thus becomes a truly formidable contract of adhesion for the subcontractor. For not only does it have the standard forms which the prime contractor has established to protect his private interests and which the subcontractor usually accepts without argument, but it also contains standard provisions required by the Government to protect the public interest.¹⁴¹ Moreover the lubrication which permits the rigid machinery to work in private business is limited by the Governmental doctrine against amendments without a legal consideration as administered by the Government contract administrator and policed by the GAO.¹⁴²

¹⁴⁰ See Note, "Contracts Clauses in Fine Print," 63 Harv. L. Rev. 499 (1950).

¹⁴¹ Sometimes standard subcontract articles which are intended to protect the public interest fail their purpose. Thus various standard articles have been devised to provide for GAO audit or inspection of records of subcontractors, see note 41 supra. In order to protect themselves, the various Federal agencies have insisted that prime contractors also audit cost-type subcontractors. In some cases this would mean that a prime contractor would have access to confidential financial data of an actual or potential competitor, and in many cases a small business at that. Some prime contractors have refused to accept responsibility for such audits, with the result that the audit is conducted by the Federal agency itself.

¹⁴² An example of this problem occurred in relation to the approval of the "changes article" in a standard form fixed-price purchase order of a large industrial prime contractor. The prime contractor insisted on using its regular changes article which authorized an adjustment of price only if there was a "material" change ordered in the work. This language was considerably more restrictive than the usual changes provision which authorizes an adjustment for any ordered change which increases the subcontractor's cost. Perhaps it was adopted to combat abuses in changes discussed in note 134 supra, and in any event it was deliberately intended to give the prime contractor some leverage on suppliers. However, the prime contractor was and is running the risk that any change order for small amounts of work could be challenged as not being "material," and therefore

The resulting situation is bound to be somewhat confusing, particularly with a new prime contractor which has had no experience with operating under Government cost-type contracts. Initially the new prime contractor is likely to follow his regular industrial practice and bailout suppliers on a fairly generous basis, only to find that the Government will not reimburse him for these expenditures. A long period of adjustment follows in which informal ground rules are worked out and possible formal procedures recognizing the practice to a limited degree are timidly considered.

With experienced Government prime contractors, the informal ground rules on mistakes and bailouts tend to be somewhat more liberal than those followed by the Government itself, but considerably more limited than followed in normal industrial practice. Thus where the prime contractor can show that the equities support a subcontractor in distress, a Government contracting officer would be likely to permit the same type of informal practices as described for direct Government contracting. Since requests for relief are more likely to arise with private prime contractors than with the Government because of the prevailing private practice of bailouts, the extent of the practice is probably greater with primes than with the Government directly.

However, as with the case of Mr. B, the bailout is still only practiced or permitted to a limited extent. This raises the question so eloquently posed by Mr. B of whether private practice on bailouts should not be more forthrightly recognized or permitted by the Government under direct or prime contracts. This problem will be considered in our concluding section.

VI. RECONCILING DOCTRINE AND PRACTICE ON MISTAKES AND BAILOUTS

General Policy Considerations

In view of the nature of the general phenomena described in the preceding sections, perhaps a few observations may be appropriate before considering more specifically what ought to be done about reconciling doctrine and practice.

We have seen that business practice is apparently considerably in advance of (or at least at variance with) legal doctrine in sanctioning the curing of mistakes in bids and the bailout of other losses in contract

that any such payment would be a gratuity not authorized by the purchase order. One of the seemingly paradoxical tasks of a conscientious government contract administrator is to talk the prime contractor out of the tough clauses which would be the cause of later bailouts and potential GAO trouble.

performance. In contrast, practice hews close to the line of doctrine in procurement by the Government directly and to a considerable extent by its prime contractors.

We have also noted some of the reasons for this divergence of treatment of the bailout between business and Government. With business the practice of bailouts has evolved to circumvent a legal doctrine built around the literal enforcement of isolated individual bargains with no changes except for a *quid pro quo*. Such a doctrine was later adopted in an age of growing industrial and commercial integration as a means of literal enforcement of standard form contracts of adhesion. As a result of social pressure and improved business morality, the present day bailout has become a means of mitigation of the "legal technicalities" of standard form contracts, as well as a method of informal adjustment of contract terms under established long-term relationships between business organizations.

With Government, the tradition of rigid rules against bailouts had its origin in combating the largesse of spoils politics administered by untrained and oft-times politically appointed contract officers. The positive aspects of this Government tradition and doctrine have been good—of requiring broad competition in procurement where possible, and encouraging vigorous bargaining in negotiated types of transactions. The negative aspects of the doctrine of requiring rigid adherence to black letter rules such as the one against amendments without a legal consideration have hurt individual contractors and sub-contractors in many cases, and have tended to prevent the Government and its prime contractors from making sensible bargains in a number of cases. Moreover, in the larger sense the Government is paying for the rigidity in terms of extra contingencies in contractor's bids, and in the general resentment against Government "red tape" which makes itself felt all the way through the contract process.

It is hoped that, as awareness of the scope and complexity of Government procurement increases, and greater recognition is given to the fact that Government contracting officials are trained career employees rather than knaves or clerks, some of the rigidities of Government contract doctrine may be eliminated or minimized. The increased role of the Government prime contractor in the Government procurement picture should help to bring about an adoption of the more desirable aspects of business and Governmental doctrine and practice.

The following three general suggestions are submitted for consideration in connection with the more specific recommendations on means of reconciling doctrine and practice on bailouts:

1. It would appear desirable that legal doctrine should follow business practice in permitting greater flexibility to make the complex adjustments necessary in contract performance in an industrial economy without undue resort to judicial or administrative fictions. The major problem has been the use of non-bargained standard-form purchase orders and contracts. A long step in the direction of flexibility has been taken in the proposed Uniform Commercial Code which in Section 1-205 expressly incorporates the concepts of prior course of dealing between parties and usage of trade as means of interpreting and supplementing contract terms. Suitable safeguards are provided by requirements of good faith and reasonableness in regard to resort to the standard of commercial practice. The need for greater flexibility is even more paramount in Government contracting and subcontracting. This does not mean that the Government or its prime contractors should be permitted to indulge in bailing out the losses of contractors in the manner or to the degree practiced by private business. It does mean that greater flexibility should be permitted on the smaller "legal technicalities," and on larger matters where the equities are demonstrably on the contractor's side. The concepts of reasonableness and good faith could here take on a positive aspect.

2. There would appear to be a need for more *mutuality* as well as flexibility in the making and enforcement of contractual undertakings of the type discussed. In addition to the rigidities involved in the standard-form contract, there is also the problem of one-sidedness. The party which drafts the purchase-order or subcontract in its interest also is the party which can grant or withhold relief. In practice, the granting of such relief in private business appears to be generally equitably distributed. But there is ample room for abuse of this unilateral power. As stated by Karl Llewellyn:

The problem is seldom one of a practice of tyranny . . . It is rather a problem of legal power which makes tyranny possible at arbitrary will. . . .¹⁴³

The problem of one-sidedness also exists in Government contracting as fully as in private contracting. However there are differences. Of particular importance in Government contracting is equality and consistency of treatment in bidding, award, and performance of contracts. Moreover, as a balance to the one-sidedness of the standard form Government contract and purchase order is the fact that the document and its administration is presumably directed toward furthering the public interest. However, as we have seen, the doctrine adopted to

¹⁴³ K. N. Llewellyn, "What Price Contract?" 40 Yale L.J. 704, 736 (1931).

prevent spoils politics and obtain economy in Government operations has equated the concept of fixed and unalterable bargains with the Government with the "public interest" to the detriment of contractors in particular situations.

In private transactions it has been the traditional role of the common law to try to right this imbalance in particular cases. A partial solution has been the judicial rewrite of one-sided standard form contracts, or adoption of different remedies, such as in tort. More recently the Uniform Commercial Code has proposed a more direct solution in Section 2-302 which authorizes a court to refuse to enforce any contract or clause it finds unconscionable, or it may strike the unconscionable clause and otherwise enforce the contract. The technique adopted in various sections of the Uniform Code of requiring specific written evidence of consent to particular types of standard clauses may have the effect of cancelling such clauses for a great number of transactions. The many contractors who do not take the trouble to sign the acknowledgement copy of the purchase order itself, are not likely to make the effort to initial or otherwise authenticate particular clauses (unless this can be accomplished by a standard form and rubber stamp).

In Government contracting, it has been the contract officers themselves, and the Court of Claims in recent years, which have tried to make the Government contract of adhesion workable and equitable. For example in the Court of Claims a doctrine has emerged whereby a private contractor has a right against the Government for delays caused by the Government. It is hoped that the Court of Claims will continue and expand this common law approach in other ways, and that this doctrine will permeate the GAO in due course.

3. Lastly, it is suggested that greater emphasis should be placed in making the contract document, and the appendages which are made a part of the contract, the focus of the business transaction. As a matter of practice, the parties in many cases write their real contracts in letters of transmittal and other correspondence outside of the rigid standard-form contract. In addition to relying on judges to rewrite standard-form contracts in chambers, or to recognizing a prior course of dealing or trade usage under the proposed Uniform Commercial Code, greater encouragement should be given to the writing of contracts and purchase orders to say what the parties mean and intend. To the extent that the authentication technique of the Uniform Commercial Code encourages actual review and bargaining on particular clauses, the resulting agreement may reflect more of the realities of the particular transaction.

Thus, in addition to the clauses which provide some flexibility in fixed-price contracts such as delays and latent conditions, greater utilization of price escalation within limits, and possible outright recognition of the provision of limited relief in the case of loss, might be considered in private contracts.¹⁴⁴ The agreement might also recognize that at least as between business organizations, the requirements of various provisions might be subject to adjustment by mutual agreement. Similar types of provisions might be considered in Government contracts and sub-contracts.

Where the risks to be encountered are sufficiently great, the trend has been toward the express use of cost-type contracts where the contractor is automatically bailed out of his losses in most cases. This trend has occurred in private business as well as Government. Such contracts are capable of being tailor-made to the particular circumstances of the work and the relationships of the parties. As mentioned previously, this type of contract has been described as an "administrative contract," because of the flexibility of its provisions.

In view of the above considerations, and those discussed in the remainder of this part, it is believed that it would make more sense to tackle the problem of Mr. B, and those similarly situated, initially from the standpoint of the contract document, suitably and more flexibly revised. If such an approach were adopted, the task of contract drafting would once again take on the aspect of a craft.

Reconciling Common Law Doctrine and Business Practice

From the prior discussion it has been seen that the common law on unilateral mistake is still in a process of development. Moreover the development appears to be in the right direction, namely of not penalizing the party who makes the mistake if the other party can be placed in *status quo* without hurting him. In the case of Mr. B neither party could be put back in *status quo* very easily, and in balancing the equities it would appear that the risk and loss were properly placed on Mr. B. It therefore appears that the law on unilateral mistake is not in need of revision, at least to take into account Mr. B's situation.

¹⁴⁴ In this regard, see § 2-615, Uniform Commercial Code, entitled "Excuse by Failure of Presupposed Conditions," under which delay in delivery or non-delivery would not constitute breach of contract if "performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid."

However, it does appear that the common law rule requiring consideration for amendment of pre-existing contractual obligations should be in for some refurbishing. We have seen that in normal business practice Mr. B is right in saying he would be taken care of, unless somebody didn't like him. Common law doctrine however does not sanction such a practice and would not protect Mr. B if someone went back on their promise to bail him out. But there appears to be growing dissatisfaction with the rule. Courts frequently ignore it, refuse to enforce it, or find fictional considerations in order to enforce promises. Indeed dissatisfaction with the rule has developed to the extent that there are active legislative efforts to modify or abolish the rule.¹⁴⁵ Thus, in New York the common law rule has been changed by statute,¹⁴⁶ and the proposed Uniform Commercial Code also does away with the rule.¹⁴⁷

Reconciling Governmental Doctrine and Practice on Direct Contracts

It has been seen that Governmental doctrine and practice as applied to direct Government contracts is pretty rigorous with respect to mistakes and bailouts. Has any great need manifested itself which would require the modification of the rule? In what ways can and should the doctrine be modified?

To all intents and purposes the rule has been modified since Executive Order 9001 was issued during World War II under the First War Powers Act¹⁴⁸ which permitted designated agencies engaged in defense activities to make amendments without a legal consideration. This authority has been continued from time to time after World War II, particularly since the Korean outbreak. However, although the authority may have been exercised to a moderate extent during World War II it has apparently been used very sparingly since that time.¹⁴⁹

¹⁴⁵ See generally P. R. Hays, "Formal Contracts and Consideration: A Legislative Program", 41 Col. L. Rev. 849, 857 (1941); cf. K. N. Llewellyn, *op. cit. supra* note 131.

¹⁴⁶ See N.Y. Personal Property Law § 33 and N.Y. Real Property Law § 282.

¹⁴⁷ See Section 2-209(1) of proposed Uniform Commercial Code (Official Draft, Text and Comments ed. 1952), which provides very simply: "An agreement modifying a contract within this Article needs no consideration to be binding." However, the parties are bound by the general obligation of good faith. See Comment explaining text.

¹⁴⁸ Exec. Order No. 9001, 6 Fed. Reg. 6787 (1941). Issued by the President under the First War Powers Act, 55 Stat. 838 (1941), 50 U.S.C. § 601 et seq. (1946). For a discussion of the background and application of this order to bailout situations, see Fain and Watt "War Procurement—A New Pattern in Contracts," 44 Col. L. Rev. 127, 194 (1944).

¹⁴⁹ For example, although First War Powers Act authority has been extended to the AEC by Executive Orders 10210 and 10216, internal Commission procedures limit its exercise to the General Manager or Deputy General Manager. So little use has been made of the authority that the regulations originally contemplated by the Commission have never been issued.

From the above, it appears that doctrine has triumphed even though the authority to modify the rule substantially has been available to some Federal agencies. In view of this experience, it would seem advisable to confine any changes to liberalizing the present methods of handling mistakes and amendments without a consideration, rather than any drastic authority permitting bailouts as such. Such changes should be made applicable to all Federal Contracting agencies and should aim toward incorporating the common law approach on mistakes, and the Uniform Commercial Code position in regard to amendments without a consideration as applied to the waiver of technicalities.

Such changes could be handled by Executive Order and administrative regulation. However, they would probably be more effective if they evolved from a GAO "common law" approach which would broaden the concept of the "benefit to the Government" necessary to support an amendment to a contract to include consideration of the overall deal for the Government and the general public interest in freedom from technicalities and red tape. Furthermore, it would appear desirable to permit correction of mistakes, within reasonable monetary limits, and resultant contract adjustments to be made at the level of the contracting officer. Just as has been done with regard to the settlement of small tort claims, decentralization of authority to deal with mistakes, would be administratively more economical and less time consuming. Bailouts, as such, should still undergo the rigor of higher authority under E.O. 9001 and its successors, or a special bill in Congress.

Reconciling Governmental Doctrine and Practice on Prime Contracts and Subcontracts

We have now reached the final stage of examining what can and should be done about bailing out Mr. B and other subcontractors under Government prime contracts. By now we should be reconciled that we can't do anything for Mr. B himself. Or are we? At any rate maybe we can do something in the future for those similarly situated.

It might have been thought desirable to authorize prime contractors to bail out "subs" under authority of Executive Order 9001 and its successors. There is legal doubt however whether it does extend to sub-contract actions, or should extend to them. In any event the limited scope and cumbersome procedure adopted by Federal agencies under the Executive Order would not make this approach very helpful.

However, a basis for permitting bailouts by prime contractors in proper cases does exist in the prime contract itself. The prime cost reimbursement or cost-plus-a-fixed-fee type contract contains within its

provisions ample scope and precedent for the handling of bailouts. Such cost-type contracts have an article in subcontracting and purchasing which authorizes the prime to enter into or modify subcontracts and purchase orders subject to approval by the Government of agreements over a stipulated amount or of a certain type. For purposes of guidance of the prime contractor, and as a basis for Government reimbursement, the parties usually develop informal and sometimes formal procurement ground rules. To some extent these rules follow the established practices of the prime contractor, except those practices considered undesirable by the Government, such as "reciprocity."

It is believed that a limited policy permitting the curing of mistakes, and the waiver of legal technicalities and other types of amendments without a legal consideration, could appropriately be included in the approved procurement ground rules of a prime contractor. Such a policy should provide that Government reimbursement of the prime contractor would be subject to conditions along the following lines: (1) the payment must be made in accordance with the regular practice of the prime contractor in its ordinary private work; (2) that payments, over say, \$100, must be approved by the Government contract administrator; (3) that payments of substantial amounts (e.g. over \$500) must be supported by a finding by the business manager of contractor that the expenditure is essential for the Government work, as well as approved by Government contract administrator.

However, as mentioned previously, the problem of handling mistakes and bailouts of subcontractors by prime contractors has been treated rather gingerly wherever it has appeared in written procurement policies, because of the influence of the Governmental doctrine. Many prime contractors and Government contract administrators would rather take their chances with the informal rather than the formal route to redemption.

* * *

It is hoped that after a period of adjustment the influence and effect of the role of the private prime contractor in the Government picture will have a leavening effect upon some of the rigidities of Government contracting doctrine discussed in this paper. Unless sufficient flexibility is permitted such prime contractors, then the primary reason for utilizing the contract method of operation is lost. On the other hand, the private prime contractors can learn a good deal from Government methods in regard to obtaining a broader competitive base of procurement and even-handed treatment of suppliers, even fellows like Mr. B.

With respect to our particular problem concerning the handling of bailouts arising out of contractors mistakes and other miscalculations, the problem of establishing appropriate standards for guidance in deciding particular cases is admittedly difficult.¹⁵⁰ In advocating greater recognition of the need for flexibility, both in common law and governmental contract doctrines, the authors wish to emphasize the necessary corollary requirements of good faith and reasonableness as basic criteria for its exercise. Certainly, courts should not sanction or permit themselves to be used as instruments in enforcing modifications to contracts which have been extorted by economic coercion, i.e., refusal to complete performance in order to compel modification. We believe that courts can detect and prevent such abuses without the assistance of the pre-existing duty rule. It is believed that the abuses of coercion and undue largesse can also be handled by the Government without resort to the rigid rule against amendments without a legal consideration, and that even the immediate pecuniary interests of the Government in the particular case would not suffer thereby. In terms of long run improvement of Government-contractor relationships, substantial benefits should be derived by such a course of action.

The problem of making a decision as to the handling of a bailout in a particular case is not as difficult as the development of standards. The equities in the specific situation are usually quite apparent. In the last analysis, therefore, if sufficient flexibility is permitted, the matter will depend upon the experience, common sense, and integrity of those who are negotiating and administering the contracts.

* * *

It is therefore with real regret that we must take leave of Mr. B and his problem. He tried hard, maybe too hard, but he lost. Or did he?

Addendum

During the process of final completion of this paper, and a good six months after Mr. B's problem was suitably interred, the following instruction was issued by the Government agency under which Mr. B was a subcontractor:

¹⁵⁰ See generally the symposium on consideration in contracts contained in 41 Col. L. Rev. 777-876 (1941); and more particularly: H. C. Havighurst, "Consideration, Ethics, and Administration," 42 Col. L. Rev. 1, 29 (1942) and K. N. Llewellyn, *op. cit. supra* note 131.

Date: January 13, 1954

For: Field Administrators:

Re: Corrections of Contract Mistakes

The expeditious disposal of cases of mistake arising in the course of the procurement activities of the Agency's cost-type contractors which involve small amounts of money will materially assist and further the procurement program of the Agency and will also be sound, economical administration in the interests of the Government.

Accordingly, the following procedure is established:

Any cost-type contractor of any tier may correct a mistake, other than obvious clerical errors which are covered by the Agency Procurement Manual, in connection with a purchase order or other contract awarded or to be awarded under the cost-type contract, if the mistake either:

- (1) is not in excess of \$50.00; or
- (2) is in excess of \$50.00 but less than \$500.00, provided that prior written approval by a duly authorized representative of the Agency has been obtained in each instance

There shall be made a part of the record respecting any contract so corrected a written statement in which the Agency contractor making the correction (a) briefly sets forth the relevant information respecting the mistake, including a copy of the claim of mistake by the claimant and copies of all documents bearing on the mistake, (b) states that it has determined that the mistake was made in good faith, is of the nature which would be corrected under the Agency's contractor's normal practices, and is of such a nature that correction thereof is justified by considerations of fair dealing, having regard to such factors as the degree of care exercised by the claimant and the diligence of the claimant in discovering and asserting the mistake, (c) in the case of a contract awarded after competition, states that the contract price, as corrected, does not exceed the amount of the second lowest bid, and (d) states that the action has been taken by authority of this issuance.

In the case of mistakes in excess of \$50.00 but not in excess of \$500.00, there shall also be attached to the statement referred to above, a written finding by a duly authorized Agency representative that there is adequate evidence to support the assertion of a mistake, and that the proposed correction appears to be fair and reasonable.

From this instruction it appears that Mr. B protested too much and/or too soon ! But on second thought, Miss W please take this memo:

From Contract Administrator to Counsel:

When a certain party calls or writes about a certain problem and calls attention to a certain instruction, tell him . . . tell him . . . tell him we would be glad to talk this whole thing over with him informally. He should be cautioned that while we are sympathetic with his claim he must realize that the Government cannot give away public funds without a commensurate benefit. . . .