Volume 70
Issue 3 *Dickinson Law Review - Volume 70, 1965-1966*

3-1-1966

The Contracting Officer: His Authority to Act and His Duty to Act Independently

Chisman Hanes

Sherwood B. Smith Jr.

THE CONTRACTING OFFICER: HIS AUTHORITY TO ACT AND HIS DUTY TO ACT INDEPENDENTLY

By CHISMAN HANES* and SHERWOOD B. SMITH, JR.**

In the early days of the Republic government contracts were relatively few and contracting officers, who were frequently heads of departments, had not become a distinct class of public servants. Armaments, munitions and ships were produced in government arsenals and shipyards and public contracts did not constitute a significant segment of the economy. The Civil War and World War I, brought major, but temporary, expansions in government contracting. A new build-up in public spending began under the New Deal and the volume of government contracts during World War II dwarfed anything previously imagined. An expanded volume has remained with us.[1] Since 1940, with the proliferation and increased complexity of government purchases, the law of government contracts has grown and been refined into a unique and specialized body of law. Government contracts are made and administered within the framework of supervening statutes, regulations, directives and decisions. Since the enactment of the Armed Services Procurement Act[2] and the Federal Property and Administrative Services Act,[3] "contract by regulation" has received a new and greater impetus.[4]

The contracting officer has, since *Kihlberg v. United States*,[5] become the center of the tension between contract by regulation and freedom of contract. Kihlberg agreed to transport certain government stores and supplies from points on the Kansas Pacific Railway to various posts in several western states. His contract provided that transportation was to be paid according to distance, "the distance to be ascertained and fixed by the chief quartermaster of the district of New Mexico."[6] The Court held that the chief quartermaster, in fixing the distances, "discharged a duty imposed upon him by the mutual assent of the parties."[7] The Court, however, recognized that the provision in question was imposed by the Government, and that Kihlberg had a restricted freedom of contract, noting that "it is not at all certain that the government would

* B.A., 1930, Duke Univ.; LL.B., 1933, Duke Univ. Sch. of Law; member, District of Columbia and North Carolina Bars.

** B.A., 1958, Williams College; LL.B., 1964, Univ. of Virginia; member, District of Columbia and Virginia Bars.

1. See Marcus, *Studies of the Defense Contracting Process*, 29 LAW & CONTEMP. PROB. 19 (1964).

2. 62 Stat. 21-24 (1948), as amended, 10 U.S.C. §§ 2301-14 (1964).

3. 63 Stat. 393 (1949), as amended, 41 U.S.C. §§ 251-260 (1964).

4. See Stone, *Contract by Regulation*, 29 LAW & CONTEMP. PROB. 32 (1964).

5. 97 U.S. 398 (1878).

6. *Id.* at 400.

7. *Id.* at 401.

have given its assent to any contract which did not confer upon one of its officers the authority in question."[8]

The contracting officer is the connecting link between statutes, regulations and directives relating to procurement and the making and administration of specific contracts. It is the contracting officer and his staff who have continuous and direct contact with the government supplier. He acts not only as an agent of one of the contracting parties, but also as an arbiter of disputes between the parties. He daily makes decisions affecting the supplier's operations and economic health which become final. Indeed, comparatively few of the contracting officer's decisions are ever appealed or reviewed by an agency appeal board or a court.

Despite the importance of the contracting officer relatively little has been published specifically about him. This is not surprising, since even though most government contract cases arise because of an action or decision of a contracting officer, they are usually discussed in connection with the substantive law to which they relate and not in terms of the duties and responsibilities of contracting officers.[9] Hence, a brief review of the contracting officer's authority and responsibility appears worthwhile.

Because of the complexity, novelty and variety of purchases by the defense agencies, modern government contract law has been largely evolved in connection with procurement by those agencies. This article, therefore, will give principal attention to statutes, regulations and cases defining the authority and role of the contracting officer within the Defense establishment. The principles derived from these sources are generally applicable to other agencies.

Derivation and Scope of Authority of the Contracting Officer

The contracting officer acts as an agent of the United States pursuant to delegated authority.

> [The United States] being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, appropriate to the just exercise of those powers.[10]

The Constitution does not require that the power to contract always be brought into operation by express legislation. Limitations and exceptions to the general principle, however, "may arise from the distribution of powers in our government, or from the operation of other provisions in our Constitution and laws."[11]

---

8. *Id.* at 401.

9. For a recent discussion of the role and authority of contracting officers, see McBride & Wachtel, Government Contracts §§ 5.10-5.80; California Practice Handbook No. 22, §§ 1.45-1.52, 15.14-15.17 (1964).

10. United States v. Tingey, 30 U.S. (5 Pet.) 115, 128 (1831).

11. 30 U.S. at 128.

Although the power of the United States to contract is not limited to procurement, the great bulk of government contracts provide for procurement of supplies, services or research and development, and the body of law relating to government contracts and contracting officers has been largely developed in connection with procurement. The departments and agencies of the Government engage in procurement pursuant to specific statutory authority or an implied power.[12] Some statutes authorizing procurement give a department or agency authority which is general in nature.[13] Others authorize the procurement of specific categories of supplies or services, sometimes subject to stated conditions.[14] Numerous statutes prescribe conditions and clauses for government contracts generally or for particular types of contracts. Methods and procedures for procurement are prescribed by the Armed Services Procurement Act,[15] which is applicable to the military departments within the Department of Defense, the Coast Guard and the National Aeronautics and Space Administration, and by the Federal Property and Administrative Services Act,[16] which is applicable to the other federal agencies, subject to the controlling authority of the Administrator of General Services.[17]

The Armed Services Procurement Act has been primarily implemented by the Armed Services Procurement Regulation (ASPR)[18] and the procurement provisions of the Federal Property and Administrative Services Act by the Federal Procurement Regulations (FPR).[19] The agencies have issued subordinate implementing regulations.

Primary responsibility for procurement is in the heads of the respective departments and agencies.[20] The heads of the depart-

12. See 30 OPS. ATT'Y GEN. 470, 481-82 (1915).

13. *E.g.*, Dep't of the Army, 64 Stat. 322, 325 (1950), 10 U.S.C. § 4531 (1964); Dep't of the Navy, 61 Stat. 507 (1947), as amended, 10 U.S.C. § 5031 (1964).

14. *E.g.*, Copyrights, patents, and designs, 67 Stat. 350 (1953), 10 U.S.C. § 2386 (1964); Research for Dep't of the Navy, 60 Stat. 780 (1946), 10 U.S.C. § 7522 (1964).

15. 62 Stat. 21-24 (1948), as amended, 10 U.S.C. §§ 2301-14 (1964).

16. 63 Stat. 393 (1949), as amended, 41 U.S.C. §§ 251-260 (1964).

17. 63 Stat. 379 (1949), 5 U.S.C. § 630 (1964).

18. 32 C.F.R. §§ 1.100-1.1405-2 (Supp. 1965). The National Aeronautics and Space Administration has implemented the Act by issuance of the NASA Procurement Regulations (NASAPR) 41 C.F.R. §§ 18-1.1 - 18-54.123 (Supp. 1965).

19. 41 C.F.R. §§ 1-1.00—39-1.110 (Supp. 1965). ASPR and FPR prescribe various provisions for all contracts or specific categories of contracts, which are premised on statutes other than the two procedural acts, *e.g.*, Buy American Act, 47 Stat. 1520 (1933), 41 U.S.C. §§ 10a-10d (1964); Renegotiation Act, 65 Stat. 7 (1951), as amended, 50 U.S.C. App. §§ 1211-1233 (1964).

20. *E.g.*, 64 Stat. 264 (1950), as amended, 10 U.S.C. § 3012 (1964) (Secretary of the Army). These procurement responsibilities are assigned to an assistant secretary. The Secretary of Defense may assign common supply or service activities to one agency. 76 Stat. 517 (1962), 10 U.S.C. § 125 (1964).

ments and agencies and officials at the level of an Assistant Secretary seldom execute or administer contracts. Pursuant to applicable laws and regulations, officers and civilian employees at subordinate levels are appointed contracting officers for the performance of procurement functions. Aside from the general authority to delegate given to the respective secretaries of the military departments, the Armed Services Procurement Act specifically provides that "the head of an agency may delegate, subject to his direction, to any other officer or official of that agency, any power" under the Act, except the power to make certain determinations and decisions concerning the need for negotiated procurement.[21]

Contracting officers may be appointed by an agency head or by a subordinate official to whom the authority to appoint has been delegated.[22] They are usually appointed by the heads of procuring activities or other organizational entities with procurement responsibilities.

Sometimes by the certificate or letter of appointment a monetary limitation is placed upon a contracting officer's authority.[23] With respect to some types of contracts, award approval by higher authority may be required.[24]

Within the scope of his authority, the contracting officer, or his authorized representative, is the exclusive agent of the Government in the making and administration of contracts.[25] In acting as an arbiter between the parties the contracting officer theoretically acts pursuant to a delegation of authority from both parties under the contract.[26] The disputes clause of government contracts,[27] however, is prescribed by the Government, and thus the acceptance of the contracting officer as the "third party" to decide disputed questions of fact is a prerequisite to the making of a contract with the Government.

Inherent Limitations upon the Authority of the Contracting Officer

The derivation and scope of authority of a Government official is of particular importance because the courts and boards gener-

21. 62 Stat. 24 (1948), as amended, 10 U.S.C. § 2311 (1964). The head of an agency may also delegate functions and responsibilities in connection with procurement for another agency. 62 Stat. 25 (1948), as amended, 10 U.S.C. § 2308 (1964).

22. ASPR 1-405, 32 C.F.R. § 1.405 (Supp. 1965).

23. ASPR 1-405.2, 32 C.F.R. § 1.405-2(a) (Supp. 1965). For small purchases "ordering officers" are sometimes appointed. For example, subject to certain exceptions in the Department of the Army, an ordering officer's authority is limited to purchases of 250 dollars or less.

24. See 32 C.F.R. § 1.403 (Supp. 1965). In the Department of the Navy, for example, a business clearance by the Office of Naval Materiel is required for large or unusual contracts.

25. See 32 C.F.R. § 3.801-2 (Supp. 1965).

26. Kihlberg v. United States, 97 U.S. 398 (1878).

27. See 32 C.F.R. § 7.103-12 (Supp. 1965).

ally hold void any exercise of authority not made in accordance with the official's express authority. Generally speaking, Government officers are agents of limited authority.[28] This principle is well illustrated by *Federal Crop Ins. Corp. v. Merrill.*[29] A farmer procured crop insurance from an agent of the Federal Crop Insurance Corporation for a crop of spring wheat that had been reseeded in winter wheat acreage. The agent advised the farmer that the entire crop was insurable. Neither he nor the local agent knew that under a duly-promulgated regulation of the Corporation, published in the *Federal Register*, such wheat acreage was not insurable. The crop was destroyed. The farmer's claim for benefits was denied by the Government because the crop had not been insurable. The farmer recovered in the state court. The Supreme Court reversed, stating:

> Anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rulemaking power. And this is so even though, as here, the agent himself may have been unaware of the limitation upon his authority.[30]

This principle has been applied even when the contracting officer misrepresented his authority.[31]

The principle that Government employees are agents of limited authority has resulted in rules of agency uniquely applicable to Government employees.[32] Thus, it is consistently held that the Government can not be bound by the apparent authority of its agents.[33] Moreover, the Government is not estopped by the action

28. See *e.g.*, Johnson, Drake and Piper, Inc., ASBCA Nos. 9824 & 10,199, 65-2 BCA ¶ 4868 (1965).

29. 332 U.S. 380 (1947).

30. *Id.* at 384. In Gay St. Corp v. United States, 130 Ct. Cl. 341 (1955), the contracting officer negotiated a 21 month lease of property. The applicable agency regulations did not restrict the term for which he had authority to lease. The court held that the Government was not obligated for a term extending beyond the fiscal year, in the absence of express congressional authorization and available appropriation.

31. Nat'l Electronics Labs., Inc. v. United States, 148 Ct. Cl. 308 (1960); Prestex Inc., ASBCA No. 6572, 61-1 BCA ¶ 3937; Manhattan Lighting Equip. Co., ASBCA No. 6533, 61-2 BCA ¶ 3140 (1961).

32. Since the specific rules applicable to Government employees flow from their limited authority and not from any unusual features of the Government contract itself, however, the traditional rules of agency applicable in commercial contracts govern the actions of the contractor's employees. See Trak Electronics Co., ASBCA No. 4941, 65-2 BCA ¶ 4941; Apemco, Inc., ASBCA No. 9952, 65-2 BCA ¶ 5131 (1965).

33. See *e.g.*, Wilber Nat'l Bank v. United States, 294 U.S. 120 (1934); Chalker & Lund Co. v. United States, 123 Ct. Cl. 381 (1952); Ship Constr. Co. v. United States, 91 Ct. Cl. 419 (1940), *But see* George H. Whike Constr. Co. v. United States, 135 Ct. Cl. 126 (1956).

of its agents, nor is it estopped to assert that its agents lack power to bind the government.[34] In *Moran Bros., Inc. v. United States*,[35] however, the Court recognized that the Government may waive its rights:

> Whether the basic rationale be grounded upon estoppel or waiver, a party to a contract may generally dispense with procedural requirements made for its benefit. This court has recognized the authority of the government to waive certain contract provisions, certain agency regulations, and even some statutes.

Government waiver of contract requirement has been upheld in a wide variety of circumstances.[36]

In situations in which strict enforcement of the limited powers of Government agents would work an injustice to contractors, it is not required that the contracting officer adhere to all the details which circumscribe the grant of authority. Thus, while the standard changes clause provides that: "the Contracting Officer may at any time, by a written order, and without notice to sureties, make changes,"[37] it is generally recognized that a contract may be constructively changed by an oral direction or an action of the contracting officer or by a direction from a subordinate which is ratified by the contracting officer.[38] Where the authority of the contracting officer is limited to changes of a particular dollar amount, however, the Board will not permit a constructive change in excess of the amount in question.[39]

There are situations in which a contracting officer's authority may be implied when it is incident to an expressly authorized statutory responsibility.[40] This implied authority, however, is strictly construed.

---

34. In Byrne Organization, Inc. v. United States, 152 Ct. Cl. 578, 587 (1961) it was held:

> It is an established proposition that estoppel cannot be set up against the Government on the basis of an unauthorized representation or act of an officer or employee who is without authority in his individual capacity to bind the Government.

See Generally, McIntire, *Authority of Government Contracting Officers: Estoppel and Apparent Authority*, 25 GEO. WASH. L. REV. 162 (1956).

35. Ct. Cl. No. 167-63 (June 11, 1965) slip op. at p. 5.

36. See *e.g.*, Maizel Labs, Inc., ASBCA No. 8597, 1963 BCA ¶ 3898 (1963) (waiver of non-compliance with specifications). Where the due date of the contract and like situations are involved "election" might be a better term than "waiver." CUNEO, GOVERNMENT CONTRACTS HANDBOOK 121 (1962).

37. ASPR 7-103.2, 32 C.F.R. § 7.103-2 (Supp. 1965).

38. See *e.g.*, Fox Valley Eng'r, Inc. v. United States, 151 Ct. Cl. 228 (1960). See generally Spector, *An Analysis of the Standard "Changes" Article*, 25 FED. B.J. 177, 186 (1965).

39. See Johnson, Drake & Piper, Inc., ASBCA Nos. 9824 & 10,199, 65-2 BCA ¶ 4868 (1965); Hallicrafters Co., ASBCA No. 7097, 1962 BCA ¶ 3618 (1962).

40. Atchison, Topeka & Sante Fe Ry. v. Summerfield, 229 F.2d 777 (D.C. Cir. 1955). This is to be distinguished from the situation in which

THE IDENTIFICATION OF THE RESPONSIBLE CONTRACTING OFFICER

With the increasing complexity in the procurement process, it is sometimes difficult for a contractor to identify the responsible contracting officer authorized to act in a given circumstance. The confusions which may arise from the assignment of specialized duties to particular contracting officers is evident from the most recent revision of the definition of contracting officer:

> *Contracting Officer* means any person who, either by virtue of his position or by appointment in accordance with procedures prescribed by this Regulation, is currently a contracting officer (see 1-400) with the authority to enter into and administer contracts and make determinations and findings with respect thereto, or with any part of such authority. The term also includes the authorized representative of the contracting officer acting within the limits of his authority. NOTE: Recent assignments of contract administration responsibilities have necessitated a separation of duties related to procurement, with some duties normally performed at a purchasing office and some duties normally performed at a contract administration office. For convenience of expression, when requiring performance of specific duties by a contracting officer, this Regulation may refer to a contracting officer (PCO), and to a contracting officer at a contract administration office as an administrative contracting officer (ACO). Additionally, a contracting officer, responsible for the settlement of terminated contracts, may be referred to as the termination contracting officer (TCO). It is recognized that a single contracting officer may be responsible for duties in any or all of these areas, and reference in this Regulation to PCO, ACO, or TCO does not of itself require that duty be performed at a particular office or activity or restrict in any way a contracting office in the performance of any duty properly assigned. For example, a duty specified by this Regulation to be performed by the ACO will be performed by a contracting officer at the purchasing office when contract administration or responsibility for that duty has been retained in the purchasing office.[41]

Confusions and disputes arise not only because contractors are not properly informed of the areas of responsibility of the several contracting officers, but also because the PCO, ACO and TCO are sometimes uncertain of the division of responsibility between them.[42] In *Instrument Associates*,[43] holding that certain termination supplemental agreements did not bar claims for alleged changes in contracts, the Board said:

> Prior to execution of the termination Supplemental

---

the Government has an implied contract right, and in which the contracting officer presumably has express authority to enforce the implied right. See Nikko Kensetsu Co., ASBCA Nos. 5758 & 5955, 61-1 BCA ¶ 2888 (1960).

41. 32 C.F.R. § 1.201-3 (Supp. 1965).
42. See MCBRIDE AND WACHTEL, GOVERNMENT CONTRACTS, § 5.10(2).
43. ASBCA No. 9098, 65-1 BCA ¶ 4857 (1965).

> Agreements, the appellant informed the TCO, ACO and PCO of his dissatisfaction in the contract areas presently in dispute. Their areas of responsibility being unclear to them, none of the three contracting officers inquired as to the appellant's desire to file a formal claim, nor did they advise him of his right to do so despite a Government intention to settle all claims and close the contracts.[44]

The Board also noted that the "evidence given by Government witnesses indicates the general practice in determining responsibilities of the various contracting officers was never really clear to them and that it was changed on various occasions."[45]

When there are several contracting officers in a procurement office, all of whom appear to have authority to execute contracts and amendments, and more than one takes action with respect to a specific contract, confusion and controversy sometimes arises. For efficiency and fairness in the administration of contracts, it is imperative that the several contracting officers be clearly cognizant of the division of responsibility between them, and the contractor be fully advised of the authority of each officer.

Exercise of Authority of the Contracting Officer by his Authorized Representative

If the number and kind of contracting officers is proliferating, so also is the number and kind of inspectors, resident engineers and other subordinate officials who often have the most direct contact with the contractor during performance. Since ASPR defines contracting officer to include his authorized representative, the question frequently arises whether inspectors or other officers are authorized representatives of the contracting officer for given purposes.

When the contract specifically designates representatives of the Government to take certain action, the statements of other subordinate Government officials will not bind the Government.[46] The rationale behind this rule has been said to be that: "[t]he Government is too vast, its operations too varied and intricate, to put it to the risk of losing that which it holds for the nation as a whole because of the oversight of subordinate officials."[47]

---

44. *Id.* at p. 22,987. During the termination settlement negotiations, the contractor was advised that the claims in question were the responsibility of the ACO. He was subsequently advised that responsibility for processing all claims had been assigned to the TCO.

45. ASBCA No. 9098, at p. 22,985.

46. Luxaire Sunbeam Heating & Elec. Co., ASBCA No. 10,300, 65-2 BCA ¶ 4971 (1965). Where a representative is designated in the contract, and is expressly denied authority to direct changes, the contractor will be required to confirm an alleged change order with the contracting officer. Woodcraft Corp. v. United States, 146 Ct. Cl. 101 (1959); Barton & Sons Co., ASBCA Nos. 9477 and 9764, 65-2 BCA ¶ 4874 (1965).

47. Montana Power Co. v. Fed. Power Comm'n, 185 F.2d 491, 497 (D.C. Cir. 1950) *cert. denied* 340 U.S. 947 (1950).

If the contract permits an authorized representative to act for the contracting officer, but is silent as to which Government officers are covered by this term, and the contracting officer has not designated an authorized representative, the general rule is still that the acts of inspectors and other subordinates will not bind the Government because the officer in question has not been designated an authorized representative.[48] This general rule is followed with sufficient regularity to make seeking the confirmation of a subordinate's orders the safest contract management procedure.[49] There are, however, at least three[50] aids to contractors who have followed the orders of subordinates without obtaining confirmation from the contracting officer and who seek compensation for the change ordered by the subordinate officer. The contractor may be able to show that the contracting officer ratified the order of an unauthorized representative.[51] The contractor must show that the contracting officer actually or constructively knew of the order[52] and either approved[53] or failed to disavow the order.[54]

The contractor may alternatively be able to show inability to seek confirmation from the contracting officer.[55] Finally, it appears that the Government has the burden of proving the lack of author-

48. Jefferson Constr. Co. v. United States, 151 Ct. Cl. 75 (1960), affirming Jefferson Constr. Co. ASBCA No. 2249, 57-1 BCA ¶ 1330 (1957); James McHugh Sons, Inc. v. United States, 99 Ct. Cl. 414 (1943); Universal Match Corp., ASBCA No. 4797, 59-2 BCA ¶ 2288 (1959).

49. See, *e.g.*, Moyer Bros. v. United States, 156 Ct. Cl. 120, 139 (1962) (resident engineer). In Premier Elec. Int'l Corp., FAACAP No. 65-14, 65-1 BCA ¶ 4788 (1965), the board stated:

> If the contractor proceeds to make modifications on the strength of oral instructions from a Resident Engineer alone he takes the risk that the Contracting Officer will not ratify the instruction.

Id. at p. 22,723. The contractor has a right to insist upon confirmation from the contracting officer. International Aircraft Serv., Inc., ASBCA No. 8389, 65-1 BCA ¶ 4793 (1965).

50. Further, there are occasional broad statements in Board cases to the effect that adherence to the strict letter of contractual provisions would require overlooking the realities of particular construction situations. See, *e.g.*, Carroll Co., ENG BCA No. 2525, 65-2 BCA ¶ 4966 (1965).

51. R. W. Borrowdale Co., ASBCA No. 9905, 65-1 BCA ¶ 4853 (1965); Lox Equip. Co., ASBCA No. 8985, 1964 BCA ¶ 4463 (1964); W. Southard Jones, Inc., ASBCA No. 6321, 61-2 BCA ¶ 3182 (1961); Barnes Constr. Co., ASBCA No. 5977, 61-2 BCA ¶ 3216 (1961).

52. See Carroll Co., ENG BCA No. 2525, 65-2 BCA ¶ 4966 (1965), *motion for reconsideration denied*, 65-2 BCA ¶ 4997 (1965); Lox Equip. Co., ASBCA No. 8985, 1964 BCA ¶ 4463 (1965); Banton Constr. Co., ASBCA No. 3865, 58-1 BCA ¶ 1801 (1958).

53. Approval need not be formal or in writing. Sloan's Moving & Storage Co., ASBCA No. 10,187, 65-1 BCA ¶ 4685 (1965).

54. Williams v. United States, 130 Ct. Cl. 435 (1955); Lox Equip. Co., ASBCA No. 8985, 1964 BCA ¶ 4463 (1964). The Court of Claims has held that delay of one month in disavowing the acts of unauthorized representatives is not a ratification. Byrne Organization, Inc. v. United States, 152 Ct. Cl. 578 (1961).

55. Barton & Sons Co., ASBCA Nos. 9477 & 9764, 65-2 BCA ¶ 4874 (1965) (epoxy would have spoiled).

ity of a representative who acts on its behalf.[56] The contractor is aided in this regard by a rebuttable presumption "that Government officers act within the scope of their authority."[57] Similarly, when the subordinate has been placed at the location of performance of the contract, the Board has stated: "It would be inane indeed to suppose that the resident engineer was at the site for no purpose. We believe . . . that the resident engineer was the authorized representative of the contracting officer."[58]

A persistent problem in this area is the extent to which the Government may withdraw authority from a subordinate during performance. If the withdrawal of authority is clear, and the contractor is notified of the withdrawal, he cannot later complain if he follows any unauthorized instructions. If the withdrawal of authority is not "clear cut",[59] however, or if the withdrawal is accomplished by an internal directive of which the contractor is not informed,[60] the Government will be bound by the acts of the subordinate officer within the scope of his former authority.

Duty of the Contracting Officer to Act Independently

The majority of cases defining the duty of the contracting officer to act independently have arisen as a result of a decision under the disputes clause during the performance of a contract. This duty, however, begins upon the initiation of the procurement process and pertains to any determination made by the contracting officer in the exercise of his authorized and delegated responsibilities.

This principle is illustrated by *Southern, Waldrip & Harvick Co. v. United States.*[61] The instructions to bidders provided that

56. See *e.g., Framlau Corp.*, IBCA No. 228, 61-2 BCA ¶ 3116 (1961). The Government could conceivably contend, however, that since inspectors have so frequently been held to be without authority to bind the government, R & R Constr. Co., IBCA Nos. 413 & 458, 59, 64, 65-2 BCA ¶ 5109 (1965), the burden should fall on the contractor to show that an inspector was the authorized representative of the contracting officer. See Hammond Pool & Eng'r Co., ASBCA No. 9991, 65-1 BCA ¶ 4721 (1965).

57. Standard Store Equip. Co., ASBCA No. 4348, 58-2 BCA ¶ 1902 (1958). The Board also held that the Government may not prove lack of authority simply by showing that the subordinate had not received a written delegation from the contracting officer.

58. Lillard's, ASBCA No. 6630, 61-1 BCA ¶ 3053 (1961) quoting General Cas. Co. v. United States, 130 Ct. Cl. 520, 533 (1955). See also Clevite Ordnance, Div. of Clevite Corp., ASBCA No. 5859, 1962 BCA ¶ 3330 (1962) (project engineer); Swimerton & Walberg, ASBCA No. 3144, 56-2 BCA ¶ 1038 (1956) (resident engineer).

59. Wilkins Co., FAACAP No. 66-13, 65-2 BCA ¶ 5242 (1965).

60. Wickes Eng'r & Constr. Co., IBCA No. 191, 61-1 BCA ¶ 2872 (1961), on motion for reconsideration, 61-1 BCA ¶ 2915 (1961); Martin Co., ASBCA No. 4381, 60-1 BCA ¶ 2509 (1960). *Cf.*, Cramp Shipbldg. Co. v. United States, 122 Ct.Cl. 72, 98 (1952). Where the contract designates the authorized representatives, a change in designation would seem to require a contract change.

61. 334 F.2d 245 (Ct.Cl. 1964).

questions concerning timely receipt of a bid modification would be decided by the officer awarding the contract. The plaintiff filed a telegraphic bid modification which the contracting officer accepted as timely. The plaintiff's bid, as modified, was the low bid. The next lowest bidder protested that the modification was not timely. After reviewing the facts concerning the filing and receipt of the modification, the contracting officer sent to the Chief of Engineers, his finding that the modification was filed in sufficient time and should be accepted. The Chief of Engineers determined that the bid modification was dispatched too late to be considered and that the amount of the contract should be the original amount bid. After protest by the plaintiff, a contract was entered into with the contracting officer for the original amount, reserving to the plaintiff the right to seek recovery of the additional modified sum.[62] The Court of Claims held that the provision in the instructions to bidders that the contracting officer should determine timeliness of the modification was in effect

> an agreement between the Government and prospective contractors, and agreements such as this which designate a particular Government official to make a certain factual determination must be strictly observed.[63]

The court also concluded "that the Chief of Engineers acted without authority in making an independent determination as to the timeliness of plaintiff's bid modification and in reversing the finding of the contracting officer."[64]

The Disputes Clause

The Armed Services Procurement Regulation prescribes a standard disputes clause for inclusion in contracts. This clause makes the contracting officer the agent of *both* parties for the settlement of disputes under the contract.[65] He must, of course, act within the limits of his authority under statute and regulation, but his duties and responsibilities as arbiter come from the contract itself and from the quasi-judicial functions of his position. The Interior Board has said:

> When a contracting officer makes a decision under [the Disputes] article, he acts in a quasi-judicial capacity,

62. The Armed Services Board of Contract Appeals had dismissed an appeal by the plaintiff for lack of jurisdiction holding that the dispute was not appealable under the disputes clause because it had arisen before the contract was executed.

63. 334 F.2d at 249.

64. *Id.* at 250. See also Sperry Gyroscope Co., ASBCA No. 9700, 1964 BCA ¶ 4514 (1964).

65. The role of the contracting officer in this regard has been described as that of an "impartial third party expert." Int'l Builders of Florida, Inc., FAACAP No. 65-22, 65-1 BCA ¶ 4856 (1965) at p. 22, 982. For a general history of the role of the contracting officer as arbiter and the growth of departmental appellate bodies, see Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 LAW & CONTEMP. PROB. 39 (1964).

> and is bound to observe a high standard of impartiality, whereas an officer who is merely making a recommendation or referral to another is ordinarily free to assume the role of an advocate.[66]

Perhaps because the contracting officer's function in deciding disputes is quasi-judicial, neither the general provisions of ASPR nor the disputes clause itself have traditionally been specific in defining his duties and responsibilities in deciding disputes. In this regard the standard disputes clause states only:

> (a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary.[67]

This clause does not define a "dispute concerning a question of fact," but the word "dispute" connotes that the parties must have taken adversary positions with regard to an issue before the contracting officer renders a decision. The contracting officer may not suddenly impose a "decision" on a given matter upon a contractor when the contractor does not at that time have sufficient knowledge of what his own position will be to take a firm stand.[68] Thus,

66. Gila Constr. Co., IBCA No. 79, 56-2 BCA ¶ 1074 at p. 2618 (1956).

67. 32 C.F.R. § 7.103-2 (Supp. 1965) (Fixed-price supply contracts). A similar clause is prescribed for other types of contracts. The first sentence of the disputes clause recognizes that disputes arising in the administration of a contract may be settled by agreement. Actually, most questions which do arise are settled by agreement without a decision by the contracting officer as arbiter. Agreements thus reached, in the absence of fraud or other special circumstances, are final. Continental Aviation & Eng'r Corp., ASBCA Nos. 9894 & 9938, 65-1 BCA ¶ 4460 (1965) (agreement on overhead rates).

68. Eastern Realty & Constr. Co., ASBCA No. 9473, 1963 BCA ¶ 3964 (1963); see Charles H. Riddle Co., ASBCA No. 1441, 65-2 BCA ¶ 5090 (1965), where the contracting officer ordered extra work and included in the order a statement that the order was a final decision under the disputes clause. The board held that the decision was not in fact a decision under the disputes clause since there was no dispute prior to the "decision." See also Olin-Mathieson Chem. Corp., ASBCA No. 2568, 56-2 BCA ¶ 1011 at p. 2080 (1956), where an informal submission of a claim by the contractor was held not to entitle the contracting officer to make a final decision under the disputes clause.

While a decision to terminate a contract for default is appealable under the disputes clause, 32 C.F.R. § 8.602-3(d) & (g) (Supp. 1965), the authority to terminate for default comes from the termination article, not the disputes clause, Park Moving & Storage Co., ASBCA No. 7798, 1962 BCA ¶ 3469 (1962), and therefore the extent to which the contracting officer must alert the contractor to the likelihood of default and give the contractor the opportunity to dispute the issue is controlled by the termination article.

if a contracting officer terminates a contract for default and at the same time assesses a specific amount of excess costs, the decision as to the excess costs is not final if no dispute exists at that point concerning the excess costs.[69]

THE CONTRACTING OFFICER'S DECISION

The contracting officer is continuously rendering advice and making statements concerning situations that arise during performance. Hence, it has not always been clear what is a final decision which must be appealed within thirty days.[70] A 1960 amendment to ASPR,[71] however, which prescribed certain rules designed to make final decisions more readily identifiable, has put to rest some troublesome questions that existed prior to its issuance. The requisites of a "final decision" have been elaborated in the cases, and contractors should be alert to the Board decisions in this area.

The contracting officer must reduce his decision to writing.[72] The decision must be labeled as a "final decision,"[73] and it must

69. See Eastern Realty & Constr. Co., ASBCA No. 9473, 1963 BCA ¶ 3964 (1963). March Dynamics, Inc., ASBCA No. 9473, 1963 BCA ¶ 3940 (1963); Swivels, Ltd., ASBCA No. 8947, 1963 BCA ¶ 3964 (1963).

70. See, *e.g.*, Tetyak-Young Constr. Co., ASBCA No. 2971, 56-2 BCA ¶ 1053 (1956), where a letter not identified as a final decision under the disputes clause was nevertheless held to be final "since it unequivocally denied appellant's claim and since it precisely set forth the reasons therefore." *Id.* at p. 2489.

71. 32 C.F.R. § 1.314 (Supp. 1965). It has been said, however, that the decision need only be in "substantial" conformity with the requirements of ASPR 1-314. German Land & Timber Co., ASBCA No. 9413, 1963 BCA ¶ 3953 (1963) (dictum). For a discussion of the effect of AFPI requirements before incorporation in ASPR 1-314, see Bostwick-Batterson Co. v. United States, 151 Ct.Cl. 560 (1960); Keystone Coat & Apron Mfg. Corp. v. United States, 150 Ct.Cl. 277 (1960); Frank Gust Decorating Serv., ASBCA No. 7198, 61-2 BCA ¶ 3200 (1961).

72. 32 C.F.R. § 7.103-12 (Supp. 1965) (ASPR Disputes clause). *But see* Bay Hardware, ASBCA No. 7119, 61-2 BCA ¶ 3114 (1961), where the contractor appealed from an oral decision which was clear, and the failure to put it in writing was attributable to the officer.

73. ASPR 1-314(d), 30 Fed. Reg. 14071 (1965), amending 32 C.F.R. § 1.314 (Supp. 1965); United Microwave Co., ASBCA No. 7947, 1963 BCA ¶ 3701 (1963) (a contracting officer's decision must state that it is such); Brown Foundry & Mach. Co., ASBCA No. 9172, 1963 BCA ¶ 4008 (1963). In Edisto Constr. Co., IBCA No. 409, 1963 BCA ¶ 4120, the Interior Board held that it was not sufficient that a separate transmittal letter described the decision as "Findings of Fact." In an unusual decision, Warren Painting Co., ASBCA No. 6511, 61-2 BCA ¶ 3199 (1961), a contracting officer's letter was held to be final, although the letter did not state that it itself was a decision, but rather that an earlier unclear letter was. The letter did address itself to the merits making plain that the denial of the claim was final. Since the wording of the letter is not set forth by the Board, the opinion is difficult to evaluate, *contra*, Charles H. Riddle Co., ASBCA No. 1441, 65-2 BCA ¶ 5090 (1965). See also Sheridan-Murray, ASBCA No. 7615, 1962 BCA ¶ 3604 (1962); Hugh H. Edy Co., ASBCA No. 5039, 1962 BCA ¶ 3379 (1962); Sherry-Richards Co., ASBCA No. 6965, 61-2 BCA ¶

refer to the disputes clause.[74] The decision should advise the contractor of his right of appeal, the procedures for making an appeal, and the time limit in which an appeal must be filed.[75] Finally, the decision must be signed by the contracting officer,[76] although he need not sign in his capacity as contracting officer.[77]

The contracting officer must include in the decision a statement of facts sufficient to enable the contractor to understand both the decision and the basis for it.[78] Normally, all issues in the con-

---

3167 (1961). A decision not described as a final decision under the Disputes clause was nevertheless upheld in MacDonald Constr. Co., IBCA No. 411, 65-1 BCA ¶ 4750 (1965), where the contracting officer included the whole Disputes clause in a letter which was final in tone.

74. United Microwave Co., ASBCA No. 7947, 1963 BCA ¶ 3701 (1963); Brown Foundry & Mach. Co., ASBCA No. 9172, 1963 BCA ¶ 4008 (1963); Production Tool Corp., IBCA No. 262, 61-1 BCA ¶ 3007 (1961); Barkley Pipeline Constr. Co., IBCA No. 264, 61-1 BCA ¶ 3006 (1961); Central Wrecking Corp., IBCA No. 69, 57-1 BCA ¶ 1209 (1957).

75. ASPR 1-314(d), 30 Fed. Reg. 14071 (1965), amending 32 C.F.R. § 1.314 (Supp. 1965). United Microwave Co., ASBCA No. 7947, 1963 BCA ¶ 3701 (1963); Production Tool Corp., IBCA No. 262, 61-1 BCA ¶ 3007 (1961). In Curtiss Wright Corp., ASBCA No. 4103, 60-2 BCA ¶ 2790 (1960), the decision was responsive to contractors statement of position and made findings of fact that appeared to affect the legal position of the parties, but failed to include the usual cautionary language that the contractor had the right to appeal the decision under the disputes clause. The board rejected the Government's position that the appeal was premature stating:

> The omission of the usual cautionary paragraph from the decision did not in this case deprive the appellant of any right. We need not regard the inclusion of such language to be essential to an appealable decision.

Id. at pp. 14303-304.

76. Franklin Clothes, Inc., ASBCA No. 4302, 58-2 BCA ¶ 1957 (1958). A decision has been held valid when signed by one contracting officer for another who had gone on leave without signing his decision. Global Van Lines, ASBCA No. 5714, 60-1 BCA ¶ 2498 (1960).

77. See American Marine Upholstery Co. v. United States, 345 F.2d 577 (Ct.Cl. 1965). The contracting officer made a decision to terminate the contract and signed his name followed by the title "Chief, Household Furnishings Section, National Buying Division." The court held this sufficient since the contractor knew the contracting officer by name.

If, however, there is substantial question whether a written statement by the contracting officer was meant to be a final decision, the fact that the contracting officer signed the statement in some other capacity has been considered relevant. See Radio Corp. of America, ASBCA No. 6733, 1962 BCA ¶ 3466 (1962); Blaw-Knox Co., ASBCA No. 3761, 57-1 BCA ¶ 1226 (1957).

78. ASPR 1-314(b), 30 Fed. Reg. 14071 (1965), amending 32 C.F.R. § 1-314 (Supp. 1965). River Assoc. Inc. CGBCA No. T-166, 65-2 BCA ¶ 5039 (1965). See Spaw Glass, Inc., IBCA No. 281, 61-2 BCA ¶ 3185 (1961); Production Tool Corp., IBCA No. 262, 61-1 BCA ¶ 3007 (1961). In Germane Land and Timber Co., ASBCA No. 9413, 1963 BCA ¶ 3953 (1963), the contracting officer's letter stated that it was a final decision, but failed to state what had been decided. The Board held that the decision lacked the finality requisite for appeal. For the rule as to necessity of making findings of fact under earlier versions of ASPR, see Poloron Prod. Inc., 126 Ct.Cl. 816 (1963).

troversy should be decided at the same time.[79] Moreover, the decision must be responsive to the issues involved, and a decision that fails to address itself to the dispute or purports to decide issues not in dispute is not a final decision under the disputes clause.[80]

Despite these formal requirements for a contracting officer's final decision, contracting officers still sometimes issue ambiguous communications which do not comply with the requirements but which imply a determination concerning the rights of a contractor. While a decision which does not comply with the requirements of the regulations does not become final and binding upon the contractor,[81] where the contractor has elected to appeal under the disputes clause, the appeal board has in a number of cases accepted jurisdiction.[82]

Since the formal requirements for a final decision are primarily for the protection of the contractor, where the contractor elects to appeal from a defective decision, acceptance of jurisdiction by the Board would, in most cases, seem appropriate. If the matter in dispute is defined, and can be determined by the Board, the contractor should not be subjected to the delay of a remand to the contracting officer.[83]

THE DECISION-MAKING PROCESS OF THE CONTRACTING OFFICER

The standard disputes clause does not describe the contracting

79. ASPR 1-314(c), 30 Fed. Reg. 14071 (1965), amending 32 C.F.R. § 1.314 (Supp. 1965); but failure to decide all the issues in dispute will apparently not make a decision as to some issues invalid. See Markowitz Bros. Inc., GSBCA No. 1001, 65-1 BCA ¶ 4659 (1965).

80. Fred A. Arnold, Inc., ASBCA No. 10886, 65-2 BCA ¶ 5151 (1965):

> In the instant case a decision has been rendered but it 'decides' a question that was not in dispute . . . and it includes no decision on the question that is in dispute. . . . Thus no appealable decision on the matter in dispute has yet been rendered.

Id. at pp. 24, 248. See also J. E. Peters, Inc., ASBCA No. 4198, 57-2 BCA ¶ 1375 (1957); General Elec. Co., ASBCA No. 2458, 56-2 BCA ¶ 1093 (1956). It has been held that a contracting officer's failure or refusal to decide a dispute is itself an appealable decision. See *e.g.* Penker Constr. Co. v. United States, 96 Ct.Cl. 1 (1942); Wood of Texas Indus., ASBCA No. 5697, 59-2 BCA ¶ 2464 (1959).

When the contractor has failed to appeal within the allotted time he may not again request a decision on the merits and appeal from the "refusal" to decide the issue. Keystone Coat & Apron Mfg. Corp., ASBCA No. 3236, 56-2 BCA ¶ 1051 (1956); Camel Mfg. Co., ASBCA No. 3454, 3455, 56-2 BCA ¶ 1021 (1956).

81. Bostwick-Batterson Co. v. United States, 151 Ct.Cl. 560 (1960).

82. *E.g.*, United Microwave Co., ASBCA No. 7947, 1963 BCA ¶ 3975 (1963); Tavco Inc., ASBCA No. 10025, 65-1 BCA ¶ 4537 (1965). *But see* Artisan Electronics Corp., ASBCA No. 9122, 1963 BCA ¶ 3975 (1963); McLinn Constr. Co., IBCA No. 369, 1963 BCA ¶ 3798 (1963).

83. There is, however, a risk that acceptance of jurisdiction without remand may tempt contracting officers to be less than careful in the preparation of decisions.

officer's decision-making process. A section in the General Provisions of ASPR,[84] however, provides that before making a decision the contracting officer must review the available facts pertinent to a dispute,[85] obtain any required advice and assistance from legal and other advisers, and consider the necessity for coordination with the contract administration office or purchasing office. The ultimate decision, however, must be that of the contracting officer.[86]

An obvious instance in which the contracting officer fails in his responsibility to render the decision himself is when he asks the Comptroller General to render a decision for him.[87]

The Supreme Court early decided that the Comptroller of the Treasury, predecessor in interest to the Comptroller General, lacked power to disturb a finding of the contracting officer when the contract provided that his decision should govern a particular dispute.[88] Moreover, when the contracting officer has not rendered a decision but instead has referred the dispute to the Comptroller General, the Court of Claims has affirmed the duty of the contracting officer to make the decision himself.[89] The same principle has

84. ASPR 1-314(a), 30 Fed. Reg. 14071 (1965) amending 32 C.F.R. § 1-314 (Supp. 1965).

85. The requirement that the deciding officer must review the available facts before rendering a decision existed prior to the 1960 amendment to ASPR. Morgan v. United States, 298 U.S. 468 (1936) (he who decides must hear), cited with approval as to contracting officers in Climatic Rainwear Co. v. United States, 115 Ct.Cl. 520 (1950). See also Henry Ericsson Co. v. United States, 104 Ct.Cl. 397 (1945); Penker Constr. Co. v. United States, 96 Ct.Cl. 1 (1942).

It has been held that the contracting officer need not conduct a formal hearing or otherwise create a record sufficient for the Board of Contract Appeals to analyze his decision in depth. Malan Constr. Co. v. United States, 217 F. Supp. 955 (S.D.N.Y. 1962), *aff'd* 318 F.2d 709 (2d Cir. 1963).

86. ASPR 1-314(a), 30 Fed. Reg. 14071 (1965) amending 32 C.F.R. § 1-314 (Supp. 1965).

87. The frequent inclination of contracting officers to seek the views of the Comptroller General is understandable but inconsistent with their positions as arbiters. Under the Budget and Accounting Act, 42 Stat. 24 (1921), as amended, 31 U.S.C. §§ 71-134 (1964), the Comptroller General has power to take exception to the accounts of disbursing officers and theoretically could hold them personally liable for those disbursements the Comptroller deems unauthorized. Actually, however, this authority has seldom been exercised in recent years. See generally, Shnitzer, *Changing Concepts in Government Procurement—The Role and Influence of the Comptroller General on Contracting Officer's Operations*, 23 FED. B.J. 90 (1963).

88. United States v. Mason & Hanger Co., 260 U.S. 323 (1922); *accord*, United States v. Northeastern Constr. Co., 260 U.S. 326 (1922); Albina Marine Iron Works, Inc. v. United States, 79 Ct.Cl. 714 (1934). This is not to say that the Comptroller General cannot overrule a decision of the contracting officer if the contractor appeals the decision to the General Accounting Office.

89. United States Cas. Co. v. United States, 67 F. Supp. 950 (1946); Archibald E. Livingston, 101 Ct.Cl. 625 (1944); McHugh Sons Inc. v. United States, 99 Ct.Cl. 625 (1944); H.W. Zweig Co. v. United States, 92 Ct.Cl. 472

been applied when the Comptroller General has exerted pressure on procurement officials to take a certain position, in conflict with a prior position, within their contractual responsibility.[90]

The recent decision in *John Reiner & Co.*[91] is difficult to reconcile with other decisions of the Court of Claims.[92] After a contract had been entered into with Reiner, the Comptroller General, upon protest of another bidder, held that the award was improper and that the contract should be cancelled. When the Comptroller General refused to change his decision, the contracting officer terminated the contract, even though he did not agree with the decision. In the termination notice, he made no reference to the termination-for-convenience article. Reiner sued for breach of contract. The court held that the award to Reiner was lawful, but the action of the contracting officer was a valid termination for convenience. Reiner was allowed to recover on a termination for convenience basis, but not for breach. The court reasoned that the contracting officer could independently terminate the contract for convenience out of respect for the Comptroller General's views as to proper bid procedures even though he did not agree with these views. The court said:

> It would be entirely justifiable for the contracting officer to follow the general policy of acceding to the views of the Accounting Office in this area even though he had another position on the particular issue of legality or propriety. He would not be allowing the Comptroller General to dictate the termination of the contract but, rather, would be using termination as a means of minimizing a conflict with another arm of Government properly concerned with the contractual problem. It cannot be contrary to 'the best interest of the Government'—the controlling standard of the termination clause—to end a contract which the Comptroller General has branded as incorrectly advertised.[93]

The court's conclusion is difficult to justify because of its recognition that the contracting officer did not in fact resort to the con-

(1941). *Accord*, Central Watch Serv., VACAB No. 502, 65-1 BCA ¶ 4786 (1965); DeLong Eng'r. & Constr. Co., ASBCA No. 3396, 56-2 BCA ¶ 1110 (1956).

90. See Leeds & Northrup Co. v. United States, 101 F. Supp. 999 (E.D. Pa. 1951); Graham Mfg. Co. v. United States, 91 F. Supp. 715 (N.D. Cal. 1950); John H. Mathis Co. v. United States, 79 F. Supp. 703 (D.N.J. 1948); Bell Aircraft Corp., WDBCA No. 914, 3 CCF 4684 (1945).

91. 163 Ct.Cl. 381 (1963).

92. See 163 Ct.Cl. at 396 (dissenting opinion of Whitaker, J.).

93. 163 Ct.Cl. at 390-91. It has been held that when the contracting officer does not purport to exercise his contractual authority to terminate, but merely declares that the contract has been voided by the Comptroller General, he has not rendered a decision appealable to the Board. Standard Steel Works, Inc., ASBCA No. 8785, 1963 BCA ¶ 3704. See also Prestex, Inc. ASBCA No. 6572 61-1 BCA ¶ 2937; Model Eng'r. & Mfg., Inc., ASBCA No. 7079, 61-2 BCA ¶ 3131. *But see* Burroughs Corp., ASBCA No. 10065, 65-2 BCA ¶ 5086 (1965).

venience procedure in terminating the contract or determine that the termination was for the best interests of the Government. He terminated a valid contract because of a decision of the Comptroller General with which he did not agree. The court's decision appears to have been influenced by its desire to encourage uniform bid procedures and at the same time to provide compensation to Reiner.

The contracting officer may not abdicate his responsibilities to his superiors, his subordinates or others in his agency.

In a recent case, after noting that findings of fact and a decision may be made by a contracting officer or his authorized representative, the Interior Board, aptly observed:

> In either event, they must represent the judgment of the official who makes them, rather than a determination dictated to him by another not authorized by the terms of the contract. The observance of these precepts is necessary, since the contracting officer in making a decision acts in a quasi-judicial capacity and is bound to observe a high standard of impartiality.[94]

It is firmly established that a contracting officer may not, upon the advice or direction of a superior, render a decision which does not constitute an exercise of his own judgment or which is not in accord with his judgment.[95] Also, neither under the terms of the disputes clause or under the cases does a superior have authority to overrule a decision of a contracting officer.[96]

The contracting officer may, of course, avail himself of required advice and assistance from legal and other advisers and must consider the necessity for coordination with related offices.[97] The mere fact that a contracting officer refers a contractor's claim to another office for its opinion does not of itself establish that he has not exercised an independent judgment.[98] The contracting officer may not let a subordinate or advisory officer make or dictate a decision for him.[99] It has been so held, without further analysis, when the decision was either signed by such other officer[100] or

---

94. Earl B. Bates Nursery, IBCA No. 368, 1963 BCA ¶ 3738 at pp. 18, 666 (1963).

95. So. Waldrip & Harvick Co. v. United States, 334 F.2d 245 (Ct.Cl. 1964); John A. Johnson Contracting Corp. v. United States, 132 Ct.Cl. 645 (1955); Standard Dredging Co. v. United States, 71 Ct.Cl. 218 (1930); Elm Mfg. Co., ASBCA No. 9597, 65-2 BCA ¶ 4990 (1965).

96. See Sperry Gyroscope Co., ASBCA No. 9700, 1964 BCA ¶ 4514 (1964). See generally, McBRIDE & WACHTEL, GOVERNMENT CONTRACTS, § 5.80(3).

97. ASPR 1-314(a), 30 Fed. Reg. 14071 (1965), amending 32 C.F.R. § 1.314 (Supp. 1965).

98. Barringer & Botke, IBCA No. 428-3-64, 65-1 BCA ¶ 4797 (1965).

99. See John A. Johnson Contracting Corp. v. United States, 132 Ct.Cl. 645 (1955).

100. See *e.g.*, Herman Adams, ASBCA Nos. 5321 & 5507, 59-2 BCA ¶ 2454 (1959) (purported decision signed by legal advisor).

stated the opinion of another officer or officers.[101] Both the contractor and the Government acquire vested rights in a contracting officer's decision which cannot be divested or waived by a successor contracting officer.[102]

A contractor may by its conduct waive its claim to a decision by the contracting office administering its contract. For example, in *Kilgore v. United States*,[103] the Court of Claims upheld a decision by a superior of the contracting officer because the contractor had dealt with the superior on performance matters and had failed to object to the authority of the superior when his decision was rendered. Moreover, when a contract defines "contracting officer" in terms of a specific administrative position, a contractor has been held to waive his right to a decision by the person holding that position when he enters into a contract with a subordinate contracting officer.[104]

Because more than one individual may be comprehended in the ASPR[105] and contract definitions of contracting officer, and because of the tendency of the agencies to divide responsibilities between contracting officers on a functional basis, contractors are frequently confused as to the authority of a particular contracting officer. In *Caddo Business Mach.*[106] the contract defined "Contracting Officer" as "the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated contracting officer." The contracting office, however, who executed and administered the contract, did not under Air Force regulations have authority to terminate the contract for default. After the contractor failed to make delivery, the contract was terminated for default by a Termination Contracting Officer at another base. His processing consisted of an office review of the complete contract file, from which he satisfied himself that the contractor's failure to deliver was not due to excusable causes. He apparently had no other connection with the contract or the contractor. The Board upheld his action. While under the terms of the relevant contract and regulations, the Board's action appears to be technically correct, *Caddo* demonstrates that a contractor's business may be disrupted without his having been heard by the officer making the decision, or even knowing who the authoritative officer is until action has been taken.

---

101. Holverson v. United States, 126 F. Supp. 898 (E.D. Wash. 1954). See also Earl B. Bates Nursery, IBCA No. 368, 1963 BCA ¶ 3738 (1963); Graham Co., ASBCA No. 4585, 58-2 BCA ¶ 1998 (1958).

102. P.L.S. Coat & Suit Corp., ASBCA No. 3889, 57-1 BCA ¶ 1239 (1957); Marmon-Harrington Co., ASBCA No. 3116, 56-2 BCA ¶ 1046 (1956). See also Arborio, Inc. v. United States, 110 Ct.Cl. 432 (1963); American Constr. Co., GSBCA No. 1375, 65-1 BCA ¶ 4828 (1965).

103. 121 Ct.Cl. 340 (1952).

104. Sun Shipbuilding Co. v. United States, 76 Ct.Cl. 154 (1932).

105. 32 C.F.R. 1.201-3 (Supp. 1965).

106. ASBCA No. 7952, 1962 BCA ¶ 3450 (1962).

It has been held that a contractor may not object to the transfer of the administration of his contract from one Ordnance District to another.[107] For obvious administrative reasons this has to be so, but the contractor should be immediately advised of the new contracting officer who has responsibility for making decisions under his contract.

FINALITY OF THE CONTRACTING OFFICER'S DECISION IN THE ABSENCE OF APPEAL

By the terms of the disputes clause,[108] decisions of the contracting officer on questions of fact[109] are made final in the absence of appeal. Moreover, since its decision in *Kihlberg v. United States*,[110] the Supreme Court has repeatedly upheld the finality provisions of disputes clauses.[111] In order for a decision to become final, however, it must be the decision of the person designated by the disputes clause to make it, and it must be made in accordance with the procedural requirements of the contract and the applicable regulations.[112] An unappealed contracting officer's decision is final and conclusive as to the Government, as well as the contractor.[113]

Much has been written on the difficulty of separating questions of fact from questions of law.[114] Unless it is clear beyond doubt that only a question of law has emerged from a contracting officer's decision, the prudent contractor should exhaust his administrative remedies under the disputes clause. It should also be noted that the negative standards of Section 1 of the Wunderlich Act[115] do not apply to contracting officers. The framers of the Act apparently felt that it was unnecessary to make these standards applicable to decisions of a contracting officer, because a contractor can deprive such decisions of any finality by simply appealing them.[116]

---

107. Thermo Nuclear Wire Indus., ASBCA No. 6026, 61-1 (BCA) ¶ 2889 (1961).

108. ASPR 7-103.12, 32 C.F.R. 7.103-12 (Supp. 1965).

109. Wunderlich Act § 2, 68 Stat. 81 (1954), 41 U.S.C. § 322 (1964) provides that "[n]o Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

110. 97 U.S. 398 (1878).

111. See *e.g.*, United States v. Blair, 321 U.S. 730 (1944).

112. Climactic Rainwear Co. v. United States, 115 Ct.Cl. 520 (1950).

113. United States v. Mason & Hanger Co., 260 U.S. 323 (1922).

114. See *e.g.*, Birnbaum, *Questions of Law and Fact and the Jurisdiction of ASBCA*, 19 FED. B.J. 120 (1959).

115. 68 Stat. 81 (1954), 41 U.S.C. § 321 (1964). Provision is made for judicial review of an administrative decision which is "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

116. See Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 LAW & CONTEMP. PROB. 39 (1964).

CONCLUSION

In 1955, the Second Hoover Commission recommended that Department of Defense policies should be established "to strengthen the role of contracting officers in the interest of more expeditious and effective buying." This recommendation was premised upon the following commentary:

> Efficiency of the contracting function in all of the military departments can be substantially improved by strengthening the authority of contracting officers. Efficient buying demands good buyers and good buyers must have authority commensurate with their responsibilities. Because the authority of military buyers is limited and diluted, delays, overstaffing, and uncertainties to both government and industry result.
>
> Laws, regulations, administrative practices, and formula rules contract the area for individual thinking, and mistakes and exceptional cases are occasions for generating encroachments on the proper exercise of a contracting officer's free judgment. Paralleling inadequate confidence in the contracting officer is inadequate recognition of his human fallibility: he is somehow not allowed his share of mistakes as others are in their everyday life of decisions. His initiative is weakened by fears of criticism from his own agency, the General Accounting Office, and Members of Congress.
>
> The justification of legal and administrative safeguards is stated in terms of protecting public funds. The emphasis is upon avoiding bad deals, rather than making good ones. Good judgment is impaired and pride of job accomplishment is limited. Second guessing is invited.[117]

In spite of these recommendations there is a continuing proliferation of regulations circumscribing both contracting officers and contractors. Contracting officers are still sometimes second-guessed by their superiors and the General Accounting Office.[118] The independence and responsibility of the contracting officer, however, has been established by the cases and recognized in the regulations.

Recent revisions of ASPR recognize that the contracting officer is a procurement specialist, supported by a team of professional and functional specialists, who is competent to represent the Government and to protect its interests in the negotiation and administration of contracts. In word at least, initiative and innovation by contracting officers has been encouraged, and his personal respon-

117. TASK FORCE ON PROCUREMENT OF THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT ON MILITARY PROCUREMENT 67 (June 1955).

118. Increased respect by the GAO for actions on behalf of the government would result in increased efficiency in the procurement process. Some feel that as a result of congressional concern this is being achieved. See FEDERAL CONTRACTS REPORT No. 93, A-10 (Nov. 29, 1965).

sibility has been made explicit.[119]

While the independence and responsibility of the contracting officer have been established in theory, the recent trend toward fragmentation of his duties between procuring, administration and termination specialists, has diffused responsibility and militated against truly independent action by any one contracting officer. The rationale of the disputes clause is that it provides for independent decisions on questions arising under a contract by an individual who has expert and personal knowledge of the problems arising in the performance of the contract. This rationale is no longer valid when, as in *Caddo Business Mach.*,[120] a contract is terminated by a contracting officer who may be a specialist in terminations, but who has no knowledge of the contract and its performance other than that which he acquires from the perusal of a file.

Specialization in the procurement process is no doubt required for efficiency, but it should be practiced by the contracting officer's subordinates. The contracting officer himself should have an informed and comprehensive knowledge of the total administration of the contract which would enable him to deal fairly with the interrelated problems which arise. Also, the contractor should be assured that there is one responsible individual known to him with whom he can deal on any problem which arises.

If the contracting officer is to act independently and responsibly he must also act fairly. As contracts have been increasingly used by the Government for the attainment of social and economic ends not directly related to the acquisition of supplies and as the volume of contracting officers' decisions has multiplied, increasing concern has been felt for the essential fairness of his decisional process. Basic concepts of administrative law can and should be imported into the procurement process at the contracting officer's level, as well as in rule-making and in reviews by the appeal boards.

Before a contracting officer takes action with serious consequences to the contractor, he should make certain that the contractor has been afforded an opportunity to be heard. At least a memorandum record of any ensuing conference should be made and, a copy should be furnished to the contractor. The contracting officer's decision should be premised not only on findings of fact,

---

119. *E.g.*, ASPR 1-109.1, 32 C.F.R. § 1.109-1 (Supp. 1965) states that ASPR is not intended to stifle the development of new techniques or methods of procurement. Innovations to attain desirable objectives will occasionally necessitate deviations from ASPR, and it is the responsibility of contracting officers to request such deviations whenever they are required in the best interest of the Government. ASPR 3-801.2, 32 C.F.R. § 3.801-2 (Supp. 1965) admonishes the contracting officer to avail himself of the advice of his team of specialists, but is explicit concerning the ultimate responsibility of the contracting officer for the making and administration of contracts; ASPR 1-314, 30 Fed. Reg. 14071 (1965) amending 32 C.F.R. § 1.314 (Supp. 1965) is equally explicit as to his personal and exclusive responsibility.

120. ASBCA No. 7952, 1962 BCA ¶ 3450 (1962).

but also on a statement of the considerations which led him to the decision.[121] Such a procedure would minimize impulsive or intuitive action by the contracting officer and motivate him to act with reasoned deliberation.

The availability of complete administrative review of a contracting officer's decision may sometimes tempt the contracting officer to follow subnormal procedures in the processing of a dispute and to give less than his best attention to his decision. Unless his actions are fully responsible, great harm can result. Contracting officers' decisions are numerous and only a minute fraction of them are ever appealed. For most Government contractors the contracting officer is the only arbiter. Only when the contracting officer, who is the central figure in the procurement process, acts independently, responsibly and fairly, can both the Government and the contractor achieve economy and efficiency.

121. See Leventhal, *Public Contracts and Administrative Law*, 52 A.B.A.J. 35 (1966), wherein it is suggested that termination orders should be premised upon a statement of considerations.

Dickinson Law Review

Published Since 1897