

1979

Rewarding Thin Capitalization: Interest Recovery Disallowed on Equity Invested to Finance Government Contract Changes

Amy Crean Corn

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Amy C. Corn, *Rewarding Thin Capitalization: Interest Recovery Disallowed on Equity Invested to Finance Government Contract Changes*, 28 Cath. U. L. Rev. 349 (1979).

Available at: <https://scholarship.law.edu/lawreview/vol28/iss2/6>

This Notes is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

NOTE

REWARDING THIN CAPITALIZATION: INTEREST RECOVERY DISALLOWED ON EQUITY INVESTED TO FINANCE GOVERNMENT CONTRACT CHANGES

In the field of government contracting, the Armed Services Procurement Regulations (ASPR) and the Federal Procurement Regulations (FPR) set forth the rules and standard contract clauses by which contractors and the federal government must abide in their dealings with each other.¹ Within these regulations, the standard changes clause² allows the Government to request certain changes in the contractor's performance without causing a

1. See, e.g., Armed Services Procurement Regulations (ASPR) § 7, 32 C.F.R. §§ 7-000 to 7-2003.72 (1976); Federal Procurement Regulations (FPR) § 1-7, 41 C.F.R. §§ 1-7.000 to 1-7.703-25 (1977). Although ASPR and FPR embody substantially similar provisions, ASPR is generally the more progressive of the two, incorporating changes that usually appear later in FPR. Applicable provisions of the regulations are implied in any contract when their presence is mandated, even if the prescribed clauses are not expressly in the contract. *G.L. Christian & Assocs. v. United States*, 312 F.2d 418 (Ct. Cl.), *cert. denied*, 375 U.S. 954 (1963). See Shedd, *The Christian Doctrine, Force and Effect of Law, and Effect of Illegality of Government Contracts*, 9 PUB. CONT. L.J. 1 (1977). Government contracts are administered under the procurement regulations and policies in effect at the time the contracts are made. Thus, a contract disputed today will be governed by regulations in effect at the time of its making, even if that time was decades earlier. See generally Comment, *A Question of Interest: The Government Contractor v. The United States*, 23 AM. U.L. REV. 433 (1973).

2. ASPR § 7-203.2, 32 C.F.R. § 7-203.2 (1976) which provides as follows:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes, within the general scope of this contract, in any one or more of the following: (i) drawings, designs, or specifications, where supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery.

(b) If any such change causes an increase or decrease in the estimated cost of, or the time required for, the performance of any part of the work under this contract, whether changed or not changed by any such order, or otherwise affects any other provision of this contract, an equitable adjustment shall be made Any claim by the Contractor for adjustment under this clause must be asserted within thirty (30) days from the date of receipt by the Contractor of the notification of change

breach,³ as long as these changes were "fairly and reasonably within the contemplation of the parties when the contract was entered into."⁴ Examples of frequently encountered government-caused alterations which come within the general scope of the contract include substitutions of building materials,⁵ additions to the amount of work to be performed,⁶ and government delays in supplying the contractor with specifications or materials necessary for performance.⁷

When a government-caused change within the scope of the contract results in an increase or decrease in the contractor's costs, the contract price is adjusted accordingly through a device called an equitable adjustment.⁸

3. See generally R. NASH, *GOVERNMENT CONTRACT CHANGES* (1975).

4. *Freund v. United States*, 260 U.S. 60, 63 (1922). Cardinal changes, on the other hand, are those which involve a substantial deviation from the original bargain made by the contracting parties, and are not authorized by the standard changes clause. *Aragona Constr. Co. v. United States*, 165 Ct. Cl. 382 (1964). A cardinal change is tantamount to an "alteration of the contract itself, a thing that could only be consummated with the consent of both parties to the contract." *General Contracting & Constr. Co. v. United States*, 84 Ct. Cl. 570, 580 (1937).

5. *Aragona Constr. Co. v. United States*, 165 Ct. Cl. 382 (1964); *Bruce Constr. Corp. v. United States*, 324 F.2d 516 (Ct. Cl. 1963).

6. *Bennett v. United States*, 371 F.2d 859 (Ct. Cl. 1967). *Bennett* involved a contract for the construction of a river levee which required excavation to be performed by the contractor. The contractor and the contracting officer disagreed in their interpretations of the amount of excavation required by the contract, the Government demanding more than the contractor thought necessary. The contractor performed to the Government's satisfaction, under protest and later filed for an equitable adjustment in the contract price. The court held that the contractor's interpretation of the contract specifications was reasonable, and allowed recovery for the added work.

7. *Ingalls Shipbuilding Div., Litton Sys., Inc., ASBCA No. 17717*, 76-1 BCA ¶ 11,851 (1976). When the Government caused the late delivery of hull steel necessary to build the nuclear attack submarines for which it had contracted, the contractor was compelled to qualify additional pipewelders and to subcontract structural assembly work because its schedule of shifting these workers from one contract to another had been disrupted. Since the government-caused delays were not worked into the progress payment schedule, the contractor was forced to invest its own equity capital to cover the additional costs until it could be compensated through an equitable adjustment.

8. In *Bruce Constr. Corp. v. United States*, 324 F.2d 516 (Ct. Cl. 1963), equitable adjustments were described as "corrective measures utilized to keep a contractor whole when the Government modifies a contract." *Id.* at 518. *Cf.* *United States v. Callahan Walker Constr. Co.*, 317 U.S. 56 (1942) (what is fair and equitable is a question of fact). The equitable adjustment in any given case is composed of:

(1) the calculation of the proper amount of costs directly attributable to the *work added* by the change order; (2) the deduction of the proper amount of costs directly attributable to the *work eliminated* by the change order; and (3) the application of *overhead and profit* to costs directly attributable to the change.

R. NASH, *supra* note 3, at 352-53 (1975) (emphasis in original). The burden of proof is on the contractor to show that the change has increased the cost of performance, but the Government bears the burden of proving that the change decreased the cost. *Id.* at 437-38. Within thirty days after a change order is received, the contractor must request an equitable adjustment if it is necessary. ASPR § 7-203.2, 32 C.F.R. § 7-203.2 (1976); 41 C.F.R. § 1-

Although most equitable adjustment claims are settled expeditiously without hearings before the Board of Contract Appeals, cases which do require protracted mediation may present a financial hardship for the contractor whose costs have increased, since the contractor is required to continue performance diligently pending settlement of the dispute.⁹ The contractor is compelled either to invest its own equity capital in the performance of the change or to borrow the needed capital from a lending institution. In either case, the contractor must pay for the use of the money, whether through loss of return on potential investments ("imputed" interest) or through payment of interest to a lender.¹⁰

The contractor that attempts to recover such interest expense from the Government faces several obstacles. Not only has sovereign immunity historically barred recovery from the Government when it would ordinarily be permitted against private parties, but the allowance of interest against

7.102-2 (1977). The contracting officer (the individual representing the Government in its dealings with the private contractor) makes a decision regarding the contractor's equitable adjustment claim. If the contractor is not satisfied with that decision, it may bring its case before the appropriate Board of Contract Appeals (Board). The Board hearing the case is determined by the agency under which the contract was originally let. If the contract is with the Department of Defense, for example, the appropriate Board is the Armed Services Board of Contract Appeals (ASBCA); if the Department of Agriculture is the federal agency involved, the appropriate Board is the Department of Agriculture Board of Contract Appeals (AGBCA), and so on.

Pursuant to the standard disputes clause (ASPR §§ 7-103.12, 7-203.2, 32 C.F.R. §§ 7-103.12, 7-203.2 (1976); 41 C.F.R. § 1-7.102.12 (1977)), the Board may decide questions of fact arising under the contract. *See* *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966).

The Wunderlich Act, 41 U.S.C. §§ 321, 322 (1976), provides for judicial review of decisions made by the Board. Cases may be appealed to the Court of Claims or to a federal district court, if the amount in controversy is less than \$10,000. *See* 28 U.S.C. §§ 1346, 1491 (1976). Such cases generally are appealed to the Court of Claims. In any event, the appellate court is bound by the factual record of the Board if the issue involves a government-caused change within the general scope of the contract (*see* text accompanying notes 5-7 *supra*), but the court may decide issues of fact when the case involves a cardinal change (*see* note 4 *supra*). The Board's conclusions of law are not binding on the Court of Claims. *United States v. Carlo Bianchi & Co.*, 373 U.S. 709 (1963).

9. ASPR § 7-103.12, 32 C.F.R. § 7-103.12(a) (1976); 41 C.F.R. § 1-7.102-12 (1977) (disputes clause). For a discussion of situations giving rise to the contractor's lawful abandonment of performance, *see* Vacketta & Wheeler, *A Government Contractor's Right to Abandon Performance*, 65 GEO. L.J. 27 (1976).

10. Both "imputed" interest on the contractor's capital utilized in financing the change and interest accruing on actual borrowings are referred to as interest *in* a claim, as distinguished from interest *on* a claim (interest on the principal amount ultimately awarded by the Board, from the time that the claim first accrued). Interest *on* a claim may be recovered pursuant to the mandatory government contract clause, ASPR § 7-104.82, 32 C.F.R. § 7-104.82(a) (1976), which provides that the Government must pay interest on the amount awarded the contractor pursuant to a claim raised under the disputes clause. *See* note 9 *supra*. Recovery of interest *in* a claim, however, is much more difficult, particularly in the case of imputed interest. *See* text accompanying notes 11 & 12 *infra*.

the Government is statutorily confined to situations in which there exists a specific provision for interest recovery, either in an applicable statute or in the contract itself.¹¹ Recovery of interest on actual borrowings for the performance of changes has been allowed as an additional cost factor, subject to stringent standards of proof.¹² Theoretically, the cost to the contractor is the same, whether through payment of interest to a bank or through the loss of interest on its own capital. The contractor that finances the increased cost with its own equity capital, however, has traditionally faced an impossible challenge in attempting to recover interest that it might have earned had the money been otherwise invested.

The Board of Contract Appeals recently recognized the apparent inequity in permitting recovery for interest on actual borrowings while denying such recovery for imputed interest on capital invested by the contractor. In 1976, three cases before the Board raised the question of whether a contractor could recover the imputed interest on invested equity capital when the capital was used to finance government-caused changes. The Board held in each case that the interest expense was recoverable, regardless of whether debt or equity capital was used to finance the changes.¹³ Scarcely

11. "Interest on a claim against the United States shall be allowed in a judgment of the Court of Claims only under a contract or Act of Congress expressly providing for payment thereof." 28 U.S.C. § 2516(a) (1976). Though specifically directed to the Court of Claims, this rule is observed by all judicial bodies. *United States v. Seaboard Air Line Ry.*, 280 F. 349 (4th Cir. 1922), *rev'd on other grounds*, 261 U.S. 299 (1923). Though embodying the sovereign immunity doctrine in its policy, the applicability of this section to interest in equitable adjustments has been questioned. *See Bell v. United States*, 404 F.2d 975 (Ct. Cl. 1968); *Tuason Constr. Co.*, ASBCA No. 5106, 59-1 BCA ¶ 2266 (1959). Nevertheless, the Court of Claims has espoused such an application. *See, e.g., J.D. Hedin Constr. Co. v. United States*, 456 F.2d 1315 (Ct. Cl. 1972); *Ramsey v. United States*, 101 F. Supp. 353 (Ct. Cl. 1951), *cert. denied*, 343 U.S. 977 (1952). Interest on government delays in payment when the contract provides for progress payments has historically been denied, absent express contractual or statutory provision to the contrary. *See Komatsu Mfg. Co. v. United States*, 132 Ct. Cl. 314 (1955); *Ramsey v. United States*, 101 F. Supp. 353 (Ct. Cl. 1951), *cert. denied*, 343 U.S. 977 (1952); *Myerle v. United States*, 33 Ct. Cl. 1 (1897). One reason given for this proscription is "public convenience," which in turn springs from the sovereign immunity doctrine. *Ramsey v. United States*, 101 F. Supp. at 356.

12. *See, e.g., Bell v. United States*, 404 F.2d 975 (Ct. Cl. 1968); *Drexel Dynamics Corp.*, ASBCA Nos. 9502, 9617, 9793 & 10608, 67-2 BCA ¶ 6410 (1967); *Lake Union Drydock Co.*, ASBCA No. 3073, 59-1 BCA ¶ 2229 (1959); *accord, Sun Elec. Corp.*, ASBCA No. 13031, 70-2 BCA ¶ 8371 (1970). Progress toward an equitable standard of interest recovery has been sporadic. *Compare Bell v. United States*, 404 F.2d 975 (Ct. Cl. 1968) (landmark decision permitting the recovery of interest on money borrowed to perform government-caused changes) *with Drexel Dynamics Corp.*, ASBCA Nos. 9502, 9617, 9793 & 10608, 67-2 BCA ¶ 6410 (1967) *and Lake Union Drydock Co.*, ASBCA No. 3073, 59-1 BCA ¶ 2229 (1959) (Board level pre-*Bell* exceptions to the rule prohibiting recovery of interest on borrowings to perform government-caused changes). *Cf. G.M. Mfg. Co.*, ASBCA No. 5345, 60-1 BCA ¶ 2576 (1960) (interest disallowed in circumstances similar to those in *Bell*).

13. *Fischbach & Moore Int'l Corp.*, ASBCA No. 18146, 77-1 BCA ¶ 12,300 (1976); *New*

a year later, however, in *Framlau Corp. v. United States*,¹⁴ the Court of Claims strongly indicated that it would decline to follow these recent Board decisions. Basing its decision solely on a near-sighted apprehension that the value of the use of equity capital is too difficult to ascertain,¹⁵ the court indicated that it would once again refuse to allow interest recovery on the contractor's invested capital.

The artificial distinction between debt and equity capital can mean a difference of millions of dollars for government contractors.¹⁶ Thus, *Framlau* portends significant hardship for those contractors which must finance increased costs with their own equity capital. In reverting to the inequitable differentiation between actual borrowings and capital investment, *Framlau* curtails the Board's progress toward a realistic and just recovery policy.

I. EMERGENCE OF INTEREST RECOVERY

Until as recently as 1955, recovery of interest against the Government was permitted only in the narrow circumstances set forth by statute¹⁷ or in claims involving a government action which constituted a "taking" under the Government's eminent domain power.¹⁸ In *Wichita Engineering*

York Shipbuilding Co., ASBCA No. 16164, 76-2 BCA ¶ 11,979 (1976); Ingalls Shipbuilding Div., Litton Sys., Inc., ASBCA No. 17717, 76-1 BCA ¶ 11,851 (1976). See notes 37-63 and accompanying text *infra*.

14. 568 F.2d 687 (Ct. Cl. 1977). See notes 64-69 and accompanying text *infra*.

15. See text accompanying note 69 *infra*.

16. In New York Shipbuilding Co., ASBCA No. 16164, 76-2 BCA ¶ 11,979 (1976), the Armed Services Board of Contract Appeals awarded the contractor in excess of four million dollars in the form of an added profit factor to compensate it for increased use of equity capital. 76-2 BCA at 57,449; see generally text accompanying notes 45-59 *infra*.

17. 28 U.S.C. § 2516(a) (1976). See note 11 *supra*.

18. *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947). Cf. *Mar-Pak Corp.*, 203 Ct. Cl. 718 (1973) (fifth amendment "taking" standard continues to be used as one method of interest recovery). If a "taking" is found, the contractor must be made whole through "just compensation." This concept includes the payment of interest from the date of the "taking" to the date the principal is paid. 329 U.S. at 588.

Prior to 1955, the only other indication that interest against the Government might be allowed appeared in *W. Horace Williams Co.*, BCA Nos. 86 & 212, 1 Cont. Cas. Fed. 348, 354 (1943). There, the Board of Contract Appeals announced that interest paid on lost debt or equity capital "may be considered as a factor in calculating the equitable adjustment to be made in the fixed fee." 1 Cont. Cas. Fed. at 354. Citing no authority for this then-novel principle, the Board limited its application to borrowings or additional capital specifically used for the performance of the increased work, and excluded interest on "increased actual over estimated costs." *Id.* This 1943 decision did not, however, represent an advance in interest recovery. The Board expressly noted that interest was not recoverable as such, but indicated that interest paid on borrowings might influence the Board toward a more favorable award to the contractor in other, allowable areas of recovery, such as profit. See New York Shipbuilding Co., ASBCA No. 16164, 76-2 BCA at 57,431-32.

Board cases draw important distinctions among the various forms of recovery of interest

Co.,¹⁹ the Armed Services Board of Contract Appeals permitted recovery of interest on actual borrowings as a General and Administrative cost²⁰ in a price redetermination contract²¹ when the contractor was able to prove that the interest expense was reasonable, necessary, and allocable to the performance of the contract.²² The decision was based upon a Department of Defense policy which provided for the recovery of interest on borrowings as part of a fixed price redeterminable contract.²³ The interest in *Wichita*, however, was incurred on borrowings necessary to finance performance of the original contract terms, and no government-caused changes in performance were involved.

A 1959 revision in the Armed Services Procurement Regulations appeared to blunt any effect *Wichita* might have had on future case law by prohibiting recovery of interest in fixed price contracts.²⁴ With few exceptions,²⁵ then, interest recovery was not permitted for financing govern-

in equitable adjustments. Interest is not recoverable in the form of damages for a government delay in payment. *J.D. Hedin Constr. Co. v. United States*, 456 F.2d 1315 (Ct. Cl. 1972); *Ramsey v. United States*, 101 F. Supp. 353 (Ct. Cl. 1951); *Myerle v. United States*, 33 Ct. Cl. 1 (1897). It may be recoverable as a direct contract cost, *Roscoe-Ajax Constr. Co.*, ASBCA No. 12110, 71-1 BCA ¶ 8828 (1971), or as an overhead expense, *Lavoie Labs., Inc.*, ASBCA No. 3796, 59-1, BCA ¶ 2071 (1959); *Wichita Eng'r Co.*, ASBCA No. 2522, 6 Cont. Cas. Fed. ¶ 61,804 (1955). Finally, interest prohibitions may be circumvented by allowing recovery of extra profit rather than actual interest as in *New York Shipbuilding*.

19. ASBCA No. 2522, 6 Cont. Cas. Fed. ¶ 61,804 (1955).

20. In the field of government contracting, overhead costs are commonly referred to as General and Administrative expenses or "G & A." See, e.g., ASPR § 15-203(c), 32 C.F.R. § 15-203(c) (1976). In *Wichita*, interest expense on actual borrowings was incurred when the time necessary to repair 1,000 cargo trucks increased from four months to eight months.

21. Price redetermination contracts contain a provision allowing the revision of the stated contract price during the course of performance. This device is employed when the actual cost of performance cannot be determined in advance; the Government and the contractor agree to revise prices in a single contract such that an equitable result is reached. The price may be either increased or decreased, with the purpose of the redetermination provision being to increase efficiency and reduce costs. See 2 J. MCBRIDE & I. WACHTEL, GOVERNMENT CONTRACTS § 20.10 (1975).

22. *Wichita Eng'r Co.*, ASBCA No. 2522, 6 Cont. Cas. Fed. ¶ 61,804 (1955).

23. The policy upon which *Wichita* relied was a recent revision in the Armed Services Procurement Regulations. Since the ASPR proscription of recovery of interest on money borrowed to finance performance did not apply to fixed price redetermination contracts, interest was allowable. See J. CIBINIC, COST DETERMINATION 98 (George Washington University Monograph No. 8, 1964).

24. See ASPR § 15-205.17, 25 Fed. Reg. 14298 (1960) (current version at 32 C.F.R. § 15-205.17 (1977)). Interest could no longer be recovered as part of General and Administrative expense as it had been in *Wichita* and its progeny. E.g., *Gibbs Shipyards, Inc.*, ASBCA No. 9998, 67-2 BCA ¶ 6458 (1967); *Lavoie Labs., Inc.*, ASBCA No. 3796, 59-1 BCA ¶ 2071 (1959). *Gibbs* followed *Wichita* because the contract in dispute had been entered into prior to the 1959 ASPR revision and was thus subject to pre-1959 ASPR policy. See note 1 *supra*.

25. See *Drexel Dynamics Corp.*, ASBCA Nos. 9502, 9617, 9793 & 10608, 67-2 BCA ¶ 6410 (1967); *Lake Union Drydock Co.*, ASBCA No. 3073, 59-1 BCA ¶ 2229 (1959) (pre-*Bell*

ment-mandated changes until the Court of Claims' 1968 decision in *Bell v. United States*.²⁶ *Bell* involved a contract for the manufacture of parachutes for the Department of Defense. Although the contractor produced the parachutes in compliance with government specifications, several lots were rejected because they failed a government ballistic test, the passing of which was not a prerequisite to acceptance under the terms of the contract. Pending resolution of the ensuing performance difficulties, the Government ordered a production slowdown, costing the contractor added interest expense on the \$450,000 it had borrowed to finance the project. The contractor subsequently filed a claim for an equitable adjustment because of the added expense involved in this constructive change.

In allowing the claim, the court in *Bell* apparently ignored the 1959 ASPR revision prohibiting interest recovery in fixed price contracts.²⁷ Instead, it extended the old policy allowing interest in equitable adjustment claims under fixed price redetermination contracts²⁸ to include interest expense incurred on actual borrowings to perform government-caused changes. The court also dismissed the statutory prohibition against recovery of interest²⁹ as a bar to its decision, holding that the statute applied only to breach claims (*i.e.*, claims for delay in payment).³⁰ Given this limitation, the statute would no longer bar recovery of interest on borrowings to finance changes.³¹ Failure to establish the necessary elements of proof set forth in *Wichita*,³² however, could continue to bar this type of interest recovery.³³ After *Bell*, the contractor had to segregate the interest expense incurred as a result of government-caused changes from the added interest

exceptions allowing recovery of interest on actual borrowings). *Cf.* *Hardeman-Monier-Hutcherson*, ASBCA No. 13188, 68-2 BCA ¶ 7400 (1968), where the Board held that interest on actual borrowings necessitated by government-caused delays was recoverable as part of General and Administrative expense, rather than as a cost, when proof of allocability was insufficient.

26. 404 F.2d 975 (Ct. Cl. 1968).

27. *See* text accompanying note 25 *supra*. The 1959 revision was apparently not recognized as binding by the Board. *See* Comment, *supra* note 1, at 437 n.13.

28. *See* text accompanying note 23 *supra*.

29. *See* note 11 and accompanying text *supra*.

30. Reasoning that the claim in *Bell* was not based upon a delay in payment (a breach claim), but rather upon a government-caused change compensable under the changes clause (*see* note 2 *supra*), the Board focused on the purpose and scope of that clause. The Board found that since the extra interest expense was incurred as a direct result of the government-caused change, it was "an increased cost of contract performance attributable to the change," and was thus compensable under the changes clause. 404 F.2d at 984.

31. Among the Board decisions following in the wake of *Bell* are: *Keco Indus., Inc.*, ASBCA No. 16645, 72-1 BCA ¶ 9470 (1972); *Roscoe-Ajax Constr. Co.*, ASBCA No. 12110, 71-1 BCA ¶ 8828 (1971); *Oxford Corp.*, ASBCA Nos. 12298 & 12299, 69-2 BCA ¶ 7871 (1969).

32. *See* note 22 and accompanying text *supra*.

33. *LTV Electrosys., Inc.*, ASBCA No. 14832, 75-1 BCA ¶ 11,310 (1975); *Edgar M.*

expense resulting from nonrecoverable changes in performance, such as inclement weather³⁴ or contractor-management problems.³⁵

The *Bell* inroads to interest recovery on changes notwithstanding, recovery of imputed interest on investment of equity capital continued to be denied.³⁶ Nearly a decade later, however, three cases came before the Board of Contract Appeals which briefly altered interest recovery policy. This triad of cases developed the proposition that a contractor investing its own capital to perform government-mandated changes has the right to recover a return on its investment. *Ingalls Shipbuilding Division, Litton Systems, Inc.*,³⁷ the first of these cases, involved a contract for the construction of government submarines. The Government extended the time for contractor performance, disrupted the contractor's work and payment schedule, and caused other delays by delivering necessary materials either late or out of sequence. Progress payments were withheld during the period of the time extension. The Board held that the contractor was entitled to recover the interest it could have earned had the payments been made at the originally scheduled time because this added cost to the contractor resulted from a government action.³⁸ The Board commented as follows:

[w]hether the amount involved would have been used to reduce borrowings for the costs of performing this contract or whether it would have been used for other purposes unconnected with this contract is immaterial. The loss of use of the money was a detriment to appellant regardless of what that use would probably have been.³⁹

Contrasting *Ingalls* with a 1947 case involving a government delay in payment,⁴⁰ the Board noted a crucial difference. In the earlier case, the Board found that the Government's taking of hotel properties was not a "taking" under its eminent domain power. Therefore, the subsequent failure to pay the full amount due at the time designated for payment constituted a breach. The issue accordingly became whether there was a specific contractual or statutory provision allowing payment of interest on the amount owed.⁴¹ In *Ingalls*, however, the Board expressly found that the

Williams, Gen. Contractor, ASBCA Nos. 16058, 16237, 16305, 16306, 16381 & 16617, 72-2 BCA ¶ 9734 (1972); Sun Elec. Corp., ASBCA No. 13031, 70-2 BCA ¶ 8371 (1970).

34. Phillips Constr. Co., ASBCA Nos. 5831, 6052 & 6074, 70-1 BCA ¶ 8248 (1970).

35. Midlands Community Action Agency, Inc., GSBCE No. LD-17, 73-1 BCA ¶ 9790 (1972); Manuel M. Lioudas, ASBCA No. 12829, 71-2 BCA ¶ 9015 (1971).

36. See, e.g., Oxford Corp., ASBCA Nos. 12298 & 12299, 69-2 BCA ¶ 7871 (1969).

37. ASBCA No. 17717, 76-1 BCA ¶ 11,851 (1976).

38. *Id.* at 56,778.

39. *Id.*

40. United States v. Thayer-West Point Hotel Co., 329 U.S. 585 (1947).

41. 329 U.S. at 588-89. See notes 11 & 18 *supra*.

Government's extended performance schedule was not a breach, but rather that the payment delays were specifically authorized by the contract. Since the claim in *Ingalls* was not prompted by a government breach, the contractor was not barred by the statutory prohibition on interest recovery.⁴² The Board determined that the claim involved government-caused change and allowed recovery of imputed interest on the added capital necessary to continue performance.⁴³

The Board also had no difficulty in assigning a rate of return on the contractor's invested capital. Since the contractor had incurred actual borrowings as well as investing its own equity capital, the Board used the interest rates paid on the borrowed capital as the proper rate to be recovered as imputed interest on invested capital.⁴⁴

Ingalls paved the way for the most far-reaching of the triad of 1976 Board decisions, *New York Shipbuilding Co.*⁴⁵ Drawing upon *Ingalls*, and citing scraps of dicta and cases allowing compensation for actual borrowings made,⁴⁶ the Board held that "[t]he contractor who invests private capital in a contract must be compensated fairly for the loss of the *opportunity* to invest that money elsewhere."⁴⁷ The case involved seven fixed price contracts to be financed by the Government, but due to government-

42. See *Ingalls Shipbuilding Div., Litton Sys., Inc.*, ASBCA No. 17717, 76-1 BCA ¶ 11,851 at 56,778 (1976); text accompanying notes 29-30 *supra*.

43. See ASBCA No. 17717, 76-1 BCA ¶ 11,851 at 56,776-78.

44. *Id.* The Board permitted recovery of imputed interest as a separate cost item in the equitable adjustment. Although ASPR § 15-713.7, 32 C.F.R. § 15-713.7 (1976) forbids recovery of interest as a cost, this principle was not made applicable to fixed price contracts until May 15, 1970, when Defense Procurement Circular (DPC) 79 was issued. The ASPR cost principles (ASPR § 15, 32 C.F.R. § 15 (1976)), therefore, do not apply to contracts entered into prior to the issuance of DPC 79. See note 1 *supra*. The *Ingalls* contract falls within this category.

45. ASBCA No. 16164, 76-2 BCA ¶ 11,979 (1976).

46. *Keco Indus., Inc.*, ASBCA Nos. 15184 & 15547, 72-2 BCA ¶ 9576 (1972) (to equalize the treatment of investing and borrowing contractors, the former should receive a higher profit because it will not be able to recover imputed interest); *Oxford Corp.*, ASBCA Nos. 12298 & 12299, 69-2 BCA ¶ 7871 (1969) (since imputed interest is not recoverable, contractor should be allowed a profit sufficiently high to produce an equitable result); *Drexel Dynamics Corp.*, ASBCA Nos. 9502, 9617, 9793 & 10608, 67-2 BCA ¶ 6531 (1967) (pre-*Bell* exception allowing recovery of interest on actual borrowings); *Walter Motor Truck Co.*, ASBCA No. 8054, 66-1 BCA ¶ 5365, at 25,173 (1966) ("The borrower should get no more than the contractor who employs [sic] his own capital."); *H.K. Ferguson Co.*, ASBCA No. 2826, 57-1 BCA ¶ 1293 (1957) (recognition of the increased cost of using money over a longer period of time); *W. Horace Williams Co.*, BCA Nos. 86 & 212, 1 Cont. Cas. Fed. 348 (1943) (imputed interest may be considered in computing an equitable adjustment to be made to a fixed fee).

47. *New York Shipbuilding Co.*, ASBCA No. 16164, 76-2 BCA ¶ 11,979, at 57,428 (1976) (emphasis in original).

caused constructive changes and delays in pricing, the contractor was compelled to invest its own capital in order to continue performance.

Reasoning that the equity capital would otherwise have been invested in conservative, interest-bearing accounts, the Board held that the contractor was entitled to "some fair return for the use of private capital on government work, over and above his direct contribution to the work itself."⁴⁸ The Board distinguished lost interest on investment from the traditionally proscribed award of lost anticipated profit by characterizing the former as a loss of opportunity to invest and by highlighting the inequity of paying the same price to two contractors, one of which receives progress payments while the other invests its own money.⁴⁹

Although the Board's careful analysis of the equities in *New York Shipbuilding* was framed in terms of interest recovery, the award was ultimately made in the form of an added profit factor.⁵⁰ Citing a Department of Defense statement of policy on profit,⁵¹ the Board emphasized the Government's desire to "reward contractors who provide their own facilities and financing" through the element of profit.⁵² The Board repeatedly stressed the need to give the contractor a fair return on its investment when equity capital was used to finance government-caused changes, and it used profit in the equitable adjustment as the vehicle to reach the desired result:

By allowing compensation for the use of private capital, not automatically as a cost, but rather in profit . . . , we are doing essentially the same thing that parties do when they negotiate a profit in initial contract pricing that includes a fair return for the use of whatever private capital the contractor will invest in the contract work.⁵³

The Board relied on fragmentary dicta to support its statement that profit is the usual means of compensation for use of equity capital,⁵⁴ and reasoned that the profit award was consistent with Department of Defense policy.⁵⁵ Although the contractor had requested an award of imputed in-

48. *Id.*

49. *Id.* at 57,427-28.

50. *Id.* at 57,435-38. Equitable adjustments are broken down into costs and profit. Costs include direct labor, equipment, and overhead, while the profit award consists of profit on the *additional* expenses incurred as a result of the government-caused change. See R. NASH, *supra* note 3, at 352.

51. ASPR § 3-808.1, 32 C.F.R. § 3-808.1 (1976).

52. New York Shipbuilding Co., ASBCA No. 16164, 76-2 BCA ¶ 11,979, at 57,430 (1976) (quoting ASPR § 3-808.1(b)(iv), 32 C.F.R. § 3-808.1(b)(iv) (1977)).

53. New York Shipbuilding Co., ASBCA No. 16164, 76-2 BCA ¶ 11,979, at 57,435. The Board expressly declined to address the issue of recoverability of interest as a cost, stating that it need not be decided in order to settle the claim at hand. *Id.* at 57,438.

54. *Id.* at 57,434. See, e.g., cases cited note 46 *supra*.

55. See authority cited note 51 *supra*.

terest in the form of profit as an alternative argument, its major argument was that imputed interest should be awarded as a cost.⁵⁶ The Board, however, declined to decide the issue of imputed interest on that ground, characterizing it as a difficult and controversial question.⁵⁷ Noting that under *Bell*, the statutory prohibition against the recovery of interest from the Government applied only to breach claims and not to interest on borrowings to finance changes,⁵⁸ the Board had no difficulty in bypassing the traditional bar to interest recovery since a breach claim was not involved.⁵⁹

Less than six months later, the Board decided *Fischbach & Moore International Corp.*⁶⁰ In *Fischbach*, the contractor was denied interest recovery on actual borrowings because it failed to prove that its borrowings were made specifically to finance government-caused changes. Nevertheless, the contractor was awarded an additional profit factor since it used its own equity capital to finance the cost of performance delays. Citing *New York Shipbuilding* as precedent, and reiterating the contractor's entitlement to compensation for the use of its capital,⁶¹ the Board allowed recovery in the form of additional profit although proper allocation had not been shown.⁶² Sufficient evidence was found on which to base a reasonable estimate of the principal amount recoverable, and the Board awarded a six percent return on this amount.⁶³ Thus, not only was the contractor awarded a return on its investment, but the award was made in the absence of the proof traditionally required for recovery.

56. To support this claim, the contractor met the *Bell* standard of proof, see text accompanying notes 37-38 *supra*, by segregating its investments to finance government-caused changes from its other, nonrecoverable, equity investments. See ASPR § 15-703.1(a), 32 C.F.R. § 15-703.1(a) (1976).

57. *New York Shipbuilding Co.*, ASBCA No. 16164, 76-2 BCA ¶ 11,979 at 57,438, 57,457 (1976).

58. See text accompanying notes 29 & 30 *supra*.

59. See *New York Shipbuilding Co.*, ASBCA No. 16164, 76-2 BCA ¶ 11,979, at 57,440. See generally note 11 and accompanying text *supra*.

60. ASBCA No. 18146, 77-1 BCA ¶ 12,300 (1976).

61. *Id.* at 59,248.

62. *Id.*

63. *Id.* at 59,248-49. In arriving at this determination, the Board relied on the "jury verdict" method.

This term reflects the fact that frequently . . . courts and boards must weight the probative value of the various estimates that are placed into evidence and arrive at a judgment as to the amount of the equitable adjustment that should be given in view of the conflicting testimony and proof that has been introduced. In performing this task of weighting the evidence, they see themselves functioning in the role of a jury arriving at a verdict, and this does appear to be a relatively accurate reflection of the process that occurs.

R. NASH, *supra* note 3, at 441. The six percent award was derived from a reasonable estimate, based on all the surrounding circumstances of the contract, as viewed by the Board.

II. IMPUTED INTEREST DISALLOWED

The triad of decisions permitting interest recovery on capital used to finance government-caused changes had reigned for only one year when the Court of Claims denounced it in *Framlau Corp. v. United States*.⁶⁴ *Framlau* involved a contract for the construction of a Naval Reserve Training Center. Due to delays in posting performance bonds, strikes, inclement weather, and disputes over the meaning of certain language in the contract, the cost of performance increased substantially. The contractor sought an equitable adjustment, including delay costs and interest on borrowings for changed work.

Since the borrowings were made to finance both contractor and government-caused expense, the contractor was required to segregate the borrowings for each.⁶⁵ This it failed to do, and the Board of Contract Appeals denied the interest claim.⁶⁶ On motion for summary judgment in the Court of Claims, the contractor, realizing it had failed to meet its burden of proof before the Board, urged that the triad rule be espoused and the *Bell* standard abandoned.⁶⁷ In effect, the contractor asked the court to extend the doctrine of the three Board decisions by allowing recovery of interest regardless of whether imputed or actual, without the necessity of allocating those borrowings specifically used for government-caused changes.⁶⁸ Although *Framlau's* argument of last resort was tenuous at best, the Court of Claims seized the opportunity to comment on the triad holdings and reasoning. The court expressly declined to abandon the *Bell* standard of proof for recovery of interest on actual borrowings. Furthermore, rather than extend the triad doctrine as *Framlau* requested, the court completely rejected the reasoning upon which the Board cases were based, and instead reached the following conclusion:

It may be argued that differing treatment of debt and equity capital follows an artificial distinction and that it rewards thin capitalization, but we . . . believe that the distinction is supported by reason in that the cost to the contractor of borrowing capital is clearly determinable, while the value to him of the use of equity capital is not so readily ascertainable.⁶⁹

Thus, the *Framlau* court disapproved the Board decisions allowing recov-

64. 568 F.2d 687 (Ct. Cl. 1977).

65. *Framlau Corp.*, ASBCA No. 14666, 72-1 BCA ¶ 9279 (1972) (citing *Phillips Constr. Co.*, ASBCA Nos. 5831, 6052 & 6074, 70-1 BCA ¶ 8248 (1970)).

66. *Framlau Corp.*, ASBCA No. 14666, 72-1 BCA ¶ 9279 at 43,005.

67. 568 F.2d at 694; see text accompanying notes 34-35 *supra*.

68. The contractor's argument here was apparently based on the Board's liberal treatment of the interest issue, particularly *Fischbach & Moore's* "jury verdict" approach to recovery without detailed and complete proof. See note 63 and accompanying text *supra*.

69. 568 F.2d at 694-95.

ery of imputed interest even though the case at issue did not present that specific issue for adjudication. In one paragraph, the Court of Claims toppled the three lengthy Board decisions and discarded the thoughtful logic upon which the Board based equal treatment of borrower and investor.

III. IMPUTED INTEREST: IS IT CALCULABLE?

The basic source of disagreement between the Court of Claims and the Board centers on the problem of calculating the value of capital which the contractor is compelled to invest to finance government-caused changes. The court in *Framlau* flatly stated that it is not "readily ascertainable."⁷⁰ The Board in *New York Shipbuilding*, however, proclaimed that recovery would be a "fair return" on the investment instead of actual lost earnings, since a claim for lost earnings would too closely resemble anticipatory profit which is traditionally proscribed.⁷¹

In its search for precedent to support the equal treatment of borrower and investor, the Board in *New York Shipbuilding* found several cases which discussed the value of the use of money.⁷² In *Ingalls*, the Board recognized that "money is readily susceptible of use to make money," and that "the marketplace attributes a value to the use of money . . . regardless of whether it could be proved that that money would otherwise necessarily have earned a return elsewhere."⁷³ Similarly, in a 1974 decision the Board stated that "money is a valuable commodity. Obtaining its use for any purpose costs something and in recent years that cost has been high."⁷⁴ Other cases suggested that borrowing and investing contractors should receive the same recovery, but they lacked any valid precedent on which to base this notion.⁷⁵

70. See text accompanying note 69 *supra*.

71. *New York Shipbuilding Co.*, ASBCA No. 16164, 76-2 BCA ¶ 11,979, at 57,427 (1976).

72. *Ingalls Shipbuilding Div., Litton Sys., Inc.*, ASBCA No. 17717, 76-1 BCA ¶ 11,851 (1976); *Aerojet-Gen. Corp.*, ASBCA No. 17171, 74-2 BCA ¶ 10,863 (1974); *Drexel Dynamics Corp.*, ASBCA Nos. 9502, 9617, 9793 & 10608, 67-2 BCA ¶ 6410 (1967).

73. *New York Shipbuilding Co.*, ASBCA No. 16164, 76-2 BCA ¶ 11,979, at 57,428 (1976) (quoting *Ingalls Shipbuilding Div., Litton Sys., Inc.*, ASBCA No. 17717, 76-1 BCA ¶ 11,851 at 56,778 (1976)).

74. *Aerojet-Gen. Corp.*, ASBCA No. 17171, 74-2 BCA ¶ 10,863, at 51,683 (1974), quoted in *New York Shipbuilding Co.*, ASBCA No. 16164, 76-2 BCA ¶ 11,979, at 57,423-24 (1976).

75. *Walter Motor Truck Co.*, ASBCA No. 8054, 66-1 BCA ¶ 5365 (1966), involved a fixed price redeterminable contract, and discussed the expense elements to be considered in arriving at a revised price. In *New York Shipbuilding*, the Board extracted *Walter Motor's* statement that an investing contractor should not be penalized because it did not borrow. The Board in *New York Shipbuilding* also pointed to the fleeting reference in *W. Horace Williams Co.*, BCA Nos. 86 & 212, 1 Cont. Cas. Fed. 348 (1943) to the interest issue. In that case, the Board indicated the additional capital needed for changes should be considered as a factor in calculating the equitable adjustment regardless of whether borrowed or invested.

In *New York Shipbuilding*, the Board indicated that a recovery for loss of use of equity capital would have to be conservative because any investment involves some risk, however small.⁷⁶ In the actual computation, the Board noted that both the contractor and the Government had based their figures on the rate of return realized on the contractor's actual investments during the time period in question, although the Government arrived at a lower figure. The Board relegated actual investments to a minor evidentiary role which would not be considered automatically in other situations; nevertheless, the Board accepted the investments as the basis of its computation because both parties had used them and because the results achieved by each party were conservative.⁷⁷ By resolving the computation issue in this manner, the Board failed to present a means of calculation which could be used in future cases involving imputed interest. The problem reflects the very core of the *Framlau* court's dissatisfaction with the triad reasoning.⁷⁸ Thus, because the calculation adopted by the Board in *New York Shipbuilding* was somewhat arbitrary and could not be relied on in future cases,⁷⁹ the case perpetuated the more liberal trend toward recovery of imputed interest begun by *Ingalls*, while permitting recovery on investments without offering a concrete method of calculation.

In contrast, *Ingalls* fixed the rate of return on invested capital as the rate paid on borrowings.⁸⁰ This method is obviously not suitable for universal usage, however, because the contractor will not always have borrowings that may be looked to for a rate of return on equity capital. *Fischbach & Moore's* "jury verdict" approach⁸¹ leaves even more room for uncertainty because no specific formula was used to compute the award for imputed interest. Rather, the result depended on the Board's discretion in light of all the facts in the case. Thus, the triad left the *Framlau* court with grave doubts regarding the method for calculating the value of lost opportunity to invest equity capital.

After *Fischbach & Moore*, it is unclear precisely how specific the proofs for recovery of imputed interest must be. This issue also troubled the Court of Claims because such proofs guarantee that the contractor will not receive a windfall. When the contractor must show that actual borrowings⁸² for performance of contract changes were necessary and reasonable,

76. *New York Shipbuilding Co.*, ASBCA No. 16164, 76-2 BCA ¶ 11,979, at 57,427 (1976).

77. *Id.* at 57,448.

78. See text accompanying note 69 *supra*.

79. See text accompanying note 77 *supra*.

80. See text accompanying note 44 *supra*.

81. See note 63 *supra*.

82. In *New York Shipbuilding Co.*, ASBCA No. 16164, 76-2 BCA ¶ 11,979, at 57,434

it is effectively required to calculate the interest and to show that money was not spent unnecessarily. In *Framlau*, the Court of Claims rejected the Board triad because the leeway the Board was willing to extend the contractor appeared to promote an insufficient check on the amount of recovery.

Notwithstanding its spontaneous treatment of the subject in *Framlau*, the Court of Claims appears hesitant to analyze carefully the equities involved in the separate treatment accorded borrowing contractors and investing contractors. This conclusion is suggested by the limited nature of the discussion in *Framlau*, as well as by the court's treatment of the issue in a decision handed down on the same day, *Singer Co., Librascope Division v. United States*.⁸³ In *Singer*, the contractor sought, as part of the equitable adjustment, a recovery of its interest expense incurred through borrowings made necessary by government-caused changes.⁸⁴ The corporate structure of the contractor was such that it borrowed from another level within the corporation, which in turn borrowed generally from lending institutions to finance its operations. The contractor was required to show that the short-term borrowing needs of the corporation increased over the amount usually borrowed to finance its normal corporate operations.⁸⁵ Failing to meet this burden at the trial level, the contractor was denied interest recovery.⁸⁶

Before a three-judge appeals panel in the Court of Claims, the contrac-

(1976), the Board cited LTV Electrosys., Inc., ASBCA No. 14832, 75-1 BCA ¶ 11,310 (1975) as authority for the requirement that loans be necessary and allocable to the contract in order to recover interest expense. Luzon Stevedoring Corp., ASBCA No. 11650, 68-2 BCA ¶ 7193 (1968), set forth a scheme for determining whether the interest rates paid were reasonable. The Board suggested that the following be considered: "(1) the nature of the risk, (2) the terms (time period) of the various loan transactions, (3) rates paid by other borrowers on comparable time loans having a risk potential similar to that of appellant, and (4) the state of the economy within which the loan or loans were made." *Id.* at 33,386.

83. 568 F.2d 695 (Ct. Cl. 1977). It should be noted that both cases were heard before Senior Judge Laramore.

84. The contractor alleged that the Government ordered numerous changes in the plans and specifications for the production of a data processing subsystem, causing the contractor increased expense and raising the amount of borrowings it would normally need to make. *Id.* at 698, 718.

85. *Id.* at 718. See *Aerojet-Gen. Corp.*, ASBCA No. 17171, 74-2 BCA ¶ 10,863, at 57,689 (1974).

86. 568 F.2d at 720. The contractor argued that the case was "on all fours" with *Aerojet-Gen. Corp.*, ASBCA No. 17171, 74-2 BCA ¶ 10,863 (1974). In *Aerojet*, the Government wrongfully withheld progress payments due the contractor for its production of missile motors. Although the contractor, whose corporate borrowing scheme was the same as that of *Singer*, failed to establish a direct relationship between specific borrowings and the amount of the withheld progress payments, recovery of interest was allowed on the actual increase over regular borrowings. The *Singer* court distinguished *Aerojet*, however, indicating that in *Aerojet*, the contractor offered "specific and detailed evidence showing in positive fashion

tor, using essentially the same tactic as the contractor in *Framlau*, argued that the triad doctrine eliminated the necessity of proving allocation of actual borrowings to specific changes mandated by the Government.⁸⁷ In affirming *per curiam* the ruling of the trial judge, the panel declined to address the imputed interest problem treated in *New York Shipbuilding* because it had not been presented before the Board of Contract Appeals. The court characterized the triad issue as "not without its difficulties . . . in view of the ancient doctrine disallowing interest against the Government"⁸⁸ Nonetheless, it declined to offer further comment on the subject and concluded that the *Singer* decision rested on the contractor's failure to properly allocate its borrowings.⁸⁹ The court acknowledged that *Framlau* established a precedent regarding imputed interest recovery, and noted that the court had "grapple[d]" with the problem in that case.⁹⁰ Since *Framlau*'s brief treatment of the three Board decisions, however, could scarcely be characterized as a thorough analysis of the equities involved in the denial of imputed interest, *Singer*'s disposal of the issue is a curious one. In a display of reluctance to confront the problem, the *Singer* court chose to sidestep the issue, instead indicating that the *Framlau* decision is definitive.

If the dictum in *Framlau* is indeed followed, then, the Government will continue to discriminate against self-financed contractors. Those able to afford to forego bank loans for government-caused changes will suffer at the equitable adjustment stage. The Court of Claims conceded that the distinction between debt and equity capital is an artificial one which "rewards thin capitalization,"⁹¹ but found these arguments inadequate to outweigh the statutory bar and the absence of a concrete formula for computing lost interest on capital.⁹² The contractor receives no incentive to avoid debt when financing government-caused changes.

Interest expense is a real cost to the contractor whether equity capital or a loan is used to finance changes.⁹³ If the Court of Claims had carefully

that, as a consequence of the Government's action, the corporation's short term borrowing needs were increased." 568 F.2d at 720.

87. 568 F.2d at 698.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 695.

92. *Id.* The statutory prohibition was applicable here because the claim was for a government payment delay, characterized in *Bell* as a "breach claim." See text accompanying note 30 *supra*.

93. See *Aerojet-Gen. Corp.*, ASBCA No. 17171, 74-2 BCA ¶ 10,863, at 51,683 (1974). Normally, the contractor uses available funds to perform other contracts. Where these funds are tied up in government changes, however, the contractor is unable to undertake other projects because its capital base has been reduced. *Id.* at 51,685.

analyzed the practical effect of the double standard of interest recovery, a possible solution to the computation problem might have been suggested. The *Singer* court's tacit approval of *Framlau*'s rationale indicates a hesitancy to confront the issue and establishes *Framlau* as a "stopgap" device which avoids further analysis.

The computation solution, however, is not necessarily as elusive as the court has characterized it. An examination of an area in which interest is recoverable may shed some light on the matter. The court might consider the rate of interest it customarily allows in cases involving interest *on* a claim, *i.e.*, interest recoverable on the *principal* amount of the award ultimately allowed against the Government.⁹⁴ The Armed Services Procurement Regulations refer to recovery of this interest at a statutory rate, periodically updated by Congress.⁹⁵ The award of interest on a claim serves the same purpose as an award of imputed interest on invested equity capital because both compensate the contractor for the use of its money. Awards of interest on a claim take into account the interest the contractor could have earned had there been no delay from the time the principal award accrued and the time it was received by the contractor. Analytically, the deprivation of use of money suffered by the contractor pending settlement of its claim does not differ significantly from investment of equity capital to finance government-mandated changes. In both situations, the contractor is unable to use capital which it would have had but for the acts of the Government. In the case of invested equity capital, the contractor should be able to recover the interest that might have been earned on that capital for the same reasons that interest is allowed on the principal amount of a claim.

The Court of Claims' reluctance to award imputed interest is also influenced by an apparent fear that without more stringent safeguards, the contractor may receive a windfall. Although the Board's use of the "jury verdict" method⁹⁶ in the absence of specific proofs should serve as a fair and reasonable means of arriving at an equitable figure, a more conservative approach could be adopted if the Court of Claims is uncomfortable with more than a limited amount of discretion vested in the triers of fact at the Board level. Recovery of imputed interest could be limited to instances in which the contractor can prove that its investments in government-caused changes were reasonable, necessary, and specifically allocable

94. See note 10 *supra*.

95. ASPR § 7-104.82, 32 C.F.R. § 7-104.82 (1976) (referring to Pub. L. No. 92-41, 85 Stat. 97 (July 1, 1971)).

96. See note 63 *supra*.

to the changes. Thus, adoption of a simple and logical system of recovery can avoid the egregious inequity suffered by the self-financing contractor.

IV. CONCLUSION

In the evolution of government contract law, the restrictions on interest allowance gradually have become more relaxed. The most recent development in this area, however, curtails the Board's progress toward more equitable treatment of the contractor who invests its own money in government-caused changes.

Both the Court of Claims and the Board of Contract Appeals recognize that the issue is a sensitive one. Finding that unequal awards for debt and equity capital are inherently unfair, the Board sought to support its award of imputed interest with fragmentary evidence. The cases it cited illustrate the Board's dissatisfaction with the double standard of recovery. No precedent, however, directly supports the result reached by the Board in its most recent attempts to resolve the problem. In contrast, the Court of Claims tightened the reins on recovery of imputed interest because an adequate method of computation had not been demonstrated.

The basic dilemma may have received only a temporary resolution. The court in *Singer* gingerly espoused the *Framlau* rejection of imputed interest allowance. Moreover, no cases to date have followed in its wake to analyze the equities of the double standard of recovery. Should the Board offer an acceptable standard for computing imputed interest and tighten the standards of proof required for recovery, the Court of Claims may abandon its restrictive policy and equalize the treatment of borrowing and investing contractors.

Amy Crean Corn