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COMMENT/Government Contracts—An Analysis of Liquidated Damages, Default and Impossibility of Performance

I. INTRODUCTION

THE PURPOSE OF THIS PAPER is to examine two areas in the field of government contracts which may severely affect the government contractor. These areas are: the conditions and circumstances upon which liquidated damages can be assessed against the contractor and the conditions and circumstances upon which his contract is terminated for default. In this examination, stress will be placed upon a common defense that may be available to the contractor in seeking to avoid the imposition of these harsh government remedies—impossibility of performance.

Generally, government contracts comprise a volume and complexity of forms, clauses and variations of contracts. Such contracts satisfy the government's practical needs as well as the promotion of many social and economic policies. These contracts may be classified into the following general categories: research and development, construction, architectural-engineering, and supply of goods and services. Various modes of compensation arrangements are employed: *i.e.*, fixed price, cost reimbursement, and variations of both, including sophisticated formulas for incentive payments.

Since World War II, government contracting has expanded to become a significant factor within the Gross National Product. Federal purchases of goods and services were estimated to be 74.4 billion dollars in 1967.¹ This figure applies mainly to national defense which includes the procurement of weapons systems, facilities, supplies and services. Because of this tremendous impact on the economy and the overwhelming differences in relative bargaining power, the government contractor stands in growing need of clarification and redefinition of the laws and procedures applicable to him. This requirement of uniformity is basic to the prevention of unjust and arbitrary government action.

The procedures, regulations, and rules concerning the administration and interpretation of government contracts amount to a labyrinth of detail. The unwary may be subjected to severe penalties through ignorance or mistake concerning these government regulations which have been given the binding force of law.²

¹ BUREAU OF THE BUDGET, THE BUDGET IN BRIEF—FISCAL YEAR 1967, 15.

² Paul v. United States, 371 U.S. 245 (1963).

In 1875, the Supreme Court stated that if the federal government "comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws that govern individuals there." That statement, however, is no longer true either technically or substantively.

The compelling fact is that, to quote Dean Pound, "the bigness of everything" has left its indelible mark on this subject as well as on virtually everything else. Within the last twenty-five years, with the demands or threats of war on the one hand and the strides of science on the other, the federal government has emerged as the principal buyer, as well as a principal seller, of goods and services; as the principal owner and occupier of land; as one of the principal sources of credit; and, all in all, as the most important single business factor in the entire national economy. And this transition in function of the United States Government has had a corresponding impact on the law applicable to dealings with the Government, with the result that there has now arisen and clearly exists a special body of legal principles with a distinct personality of its own which, in many circles at least, is called "government contract law."

It is relatively new, however, and it is still not sufficiently well understood by contractors or the Bar. Indeed, it is common knowledge in certain government circles, at least, that many contractors make silly but costly mistakes because of ignorance of the applicable rules. These mistakes are not in the interest of the Government or the taxpayer any more than they are in the interest of the contractor himself. They constitute sheer waste.³

Indeed, this body of law has not been a liberal one. The government contract is not the result of mutual bargaining, but rather it is a contract of adhesion containing exculpatory clauses that attempt to free the government from liability.⁴ These transactions have come to be contracts by regulation since the courts have held the contractor bound to mandatory clauses although they are omitted from the contract.⁵ "[T]he government enjoys the unrestricted power to produce its own supplies, to determine with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."⁶ By the application of this body of law, contractors have been held liable for small technicalities and omissions which, in the absence of the sovereign as a party, would not be resolved against the contractor. The doctrine that men must turn "square corners"⁷ when they deal with the government has caused much concern.⁸ The fetish of competition and the strict accountability principle of the Comptroller General have eroded much of the general contract law.

³ U.S. NAVY DEPT. (OFFICE OF GENERAL COUNSEL), PREFACE TO NAVY CONTRACT LAW (2d ed. 1959).

⁴ *American Sanitary Rag Co. v. United States*, 142 Ct. Cl. 293, 161 F. Supp. 414 (1958); Decs. Comp. Gen., B-155678, March 19, 1965.

⁵ *G.L. Christain & Associates v. United States*, 160 Ct. Cl. 1, 312 F.2d 418 (1963).

⁶ *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

⁷ *Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920).

⁸ Leathem, *Defense Procurement—A Complex of Conflicts and Tensions*, 5 B. C. IND. & COM. L. REV. 1 (1963).

II. ADMINISTRATIVE AND JUDICIAL PROCEDURES

Disputes involving the assessment of liquidated damages and termination of the contract for default that do not rest upon contract interpretation are questions of fact.⁹ When such a question arises from performance of the contract, it is resolved by unilateral arbitration. This is facilitated by a procedure recited in the contract clause entitled "Disputes."¹⁰

The contractor must submit his claim in writing to the contracting officer, an official of the government who is arbiter and in many instances may have been an actual party to the contract. The contracting officer is required to investigate the facts upon which the dispute is based. At this stage, many disputes are settled informally since the expense and delay of further adjudication benefits neither party. However, in the absence of a settlement, the contracting officer will issue a written decision entitled "findings of fact."¹¹ In reaching this decision, the government holds the contracting officer to a standard of impartiality.¹² Upon receipt of the "findings of fact," the contractor has thirty days in which to appeal¹³ to the Secretary of the executive agency, otherwise the decision becomes final and conclusive.¹⁴ The Secretary may refer the appeal to a standing board of contract appeal or, in the case of small agencies, hear the appeal himself.

The larger agencies such as the Department of Defense, the General Services Administration, the Interior Department and the Atomic Energy Commission, have set up formal boards to conduct evidentiary hearings on these appeals. The resulting decisions are final and conclusive on questions of fact and have been recently held to preclude a trial *de novo* in the courts.¹⁵ The leading board, the Armed Services Board of Contract Appeal (ASBCA), was created in 1949 to hear these factual disputes for the tri-service military establishment.¹⁶ The ASBCA has jurisdiction on questions of fact arising from the contract.¹⁷ The board cannot reform contracts¹⁸ or settle unliquidated claims.¹⁹ These are matters reserved for the courts and the Comptroller General.²⁰ However, many of these disputes are mixed questions of law and fact

⁹ *Stein Bros. Mfg. Co. v. United States*, 162 Ct. Cl. 802, 337 F.2d 861 (1963); *Climatic Rainwear Co. v. United States*, 115 Ct. Cl. 520, 88 F.Supp. 415 (1950).

¹⁰ ASPR, 32 C.F.R. § 7-103.12 (1966).

¹¹ *Phoenix Bridge Co. v. United States*, 85 Ct. Cl. 603 (1936).

¹² *Penner Install. Corp. v. United States*, 116 Ct. Cl. 550, 89 F. Supp. 545 (1951).

¹³ *Brooks-Calloway Co. v. United States*, 97 Ct. Cl. 689 (1942), *rev'd on other grounds*, 318 U.S. 120 (1943).

¹⁴ ASPR, 32 C.F.R. § 7-103-12 (1966).

¹⁵ *Wunderlich Act*, 68 Stat. 81 (1954), 41 U.S.C. § 321 (1964); *United States v. Utah Constr. & Mining Co.*, 383 U.S. 394 (1966).

¹⁶ ASPR, 32 C.F.R. § 7-103-12 (1966).

¹⁷ *United States v. Grace & Sons*, 383 U.S. 424 (1966).

¹⁸ *Mitre Corp.*, ASBCA Nos. 10021, 10232 & 10233, 66-2 BCA ¶ 6052 (1966).

¹⁹ *Climatic Rainwear Co. v. United States*, *supra* note 9.

²⁰ *Schmoll v. United States*, 105 Ct. Cl. 415, 63 F. Supp. 753 (1946).

in which the ASBCA has been held to have the conclusive power of adjudication.²¹ These evidentiary hearings possess many of the procedural safeguards and requirements of a full-fledged judicial hearing. Witnesses are called, cross examination is available, attorneys are certified, rules of evidence are applicable, a transcript of the record is made available, and the board issues a decision of record.²²

Once a decision is issued by ASBCA, the contractor may appeal to a Federal District Court or the Court of Claims on a question of law under the jurisdiction given the courts by the Tucker Act.²³ The contractor may apply for relief to the Comptroller General who has authority to settle claims against the United States.²⁴ However, the Comptroller General does not grant a hearing; rather he accepts a written appeal and reviews the administrative record, then issues his decision. The Comptroller General considers himself bound by only the decisions of the Supreme Court.²⁵ He considers his rulings prospective as well as adjudicative and therefore binding on the contracting officer's future actions despite contrary court decisions.²⁶ But these decisions do not preclude the contractor from appeal to the courts, who in turn do not consider themselves bound by Comptroller General rulings.²⁷

An extraordinary relief available to contractors when all these remedies are exhausted is an application to Congress for referral to the Court of Claims for an advisory adjudication.²⁸ This procedure is rarely used, however.

III. LIQUIDATED DAMAGES AND DEFAULT

A. General Applications

Liquidated damages are utilized when time of performance is such an important factor, that the government may reasonably expect to suffer damages if performance is delinquent and, that the extent and amount of such damages would be difficult or impossible to ascertain or prove.²⁹ Therefore, liquidated damages should only be included in the contract when, at the time of drafting, there is a reasonable anticipation that damages will be suf-

²¹ ASPR, 32 C.F.R. § 30.1, App. A—Pt. 1, ASBCA Charter § 5 (1966); *United States v. Utah Constr. & Mining Co.*, *supra* note 15.

²² ASPR, 32 C.F.R. § 30.1, App. A—Pt. 2, ASBCA Rules § 1-31 (1966).

²³ 28 U.S.C. 1346 (a) (2) (1964); (contractor must exhaust his administrative remedies before application to the courts). *United States v. J.A. Holpuch Co.*, 328 U.S. 234 (1940).

²⁴ Budget & Accounting Act of 1921, 42 Stat. 20, 31 U.S.C. 1 (1964); (contractor must exhaust his administrative remedies before applying to Comptroller General). Decs. Comp Gen., B-156640, May 20, 1965.

²⁵ 33 Decs. Comp. Gen. 66 (1953).

²⁶ 44 Decs. Comp. Gen. 353 (1964).

²⁷ *B-W Constr. Co. v. United States*, 97 Ct. Cl. 92 (1942).

²⁸ 28 U.S.C. 1492 (1964).

²⁹ ASPR, 32 C.F.R. § 1-310 (a) (1966).

ferred. The liquidation rate should be fixed in reasonable relation to the probable actual damages.³⁰ Though later events may demonstrate minimum actual damage, the liquidated damages have been sustained if the aforementioned principles were considered.³¹ While liquidated damage clauses³² have been judicially sustained,³³ an arbitrary inclusion will render the provision a penalty and, therefore, void under the law.³⁴ Assessment of liquidated damages requires a "findings of fact" by the contracting officer which is appealable under the disputes clause.³⁵ Once assessed, the harsh rule concerning liquidated damages only allows remission of the damages at the discretion of the Comptroller General, upon submission of evidence indicating strong and persuasive equities.³⁶ It is usually not granted if the contractor has an adequate remedy at law.³⁷ Furthermore, any monies withheld from the contractor by the government for liquidated damages do not accrue interest even though the contractor is successful in subsequent claims.³⁸ The contracting officer has no jurisdiction to remit the damages once assessed since the damages are considered a vested property interest of the government.³⁹ The contractors only relief outside of the Comptroller General is to secure a time extension before assessment of damages.⁴⁰ A grant of time extension by the contracting officer is binding unless it is fraudulent, capricious, arbitrary, so grossly erroneous as to imply bad faith, or not supported by substantial evidence.⁴¹

Termination of a contract for default of contract action is administered by a specific contract provision⁴² which results in a decision on questions of fact that can be adjudicated under the disputes clause. Liquidated damages provide an additional remedy to the government for untimely performance, and this remedy has been used as an option with the default clause.⁴³ A con-

³⁰ ASPR, 32 C.F.R. § 1-310 (b) (1966).

³¹ *Southwest Engineering Co. v. United States*, 10 C.C.F. 72, 937, 341 F.2d 998, (8th Cir. 1965), *cert. denied*, 382 U.S. 819 (1965).

³² ASPR, 32 C.F.R. § 7-105.5 (1966).

³³ *Priebe & Sons v. United States*, 332 U.S. 407 (1947); *United States v. Bethlehem Steel Co.*, 205 U.S. 105 (1907).

³⁴ *Kothe v. R.C. Taylor Trust*, 280 U.S. 224 (1929).

³⁵ *Climatic Rainwear Co., v. United States*, *supra* note 9.

³⁶ *Decs. Comp. Gen.*, B-156765 (1965).

³⁷ *Decs. Comp. Gen.*, B-98794 (1950).

³⁸ *Ramsey v. United States*, 121 Ct. Cl. 426, 101 F. Supp. 353 (1951); 17 *Decs. Comp. Gen.* 526 (1937).

³⁹ *Royal Indemnity Co. v. United States*, 313 U.S. 289 (1941); 21 *Op. Atty. Gen.* 28 (1894). However, under recent legislation, P.L. 89-508, 80 Stat. 308 (1966), the Congress has granted the contracting officer authority to settle liquidated damage claims under \$20,000.

⁴⁰ *United States v. Foley Co.*, 379 U.S. 64 (1946); the contractor must request a time extension, 18 *Decs. Comp. Gen.* 232 (1938).

⁴¹ *B-W Constr. Co. v. United States*, *supra* note 27.

⁴² ASPR, 32 C.F.R. § 8-707 (1966). The clause applicable to fixed price supply contracts is cited for convenience. However, clauses applicable to other contract variations are located in other parts of section 8.

⁴³ ASPR, 32 C.F.R. § 7-105.5 (1966).

tractor can be held liable for both the "excess costs" provision of the default clause and liquidated damages for untimely performance.⁴⁴

A contractor can be subjected to termination for default (1) if he fails to perform in a timely and adequate manner, or (2) if he fails to fulfill any other terms and conditions required by the contract. In the first instance, the contracting officer can unilaterally and without notice terminate the contract. Other violations of contract provisions require the contracting officer to issue a ten-day notice or "cure" letter to the contractor requiring him to remedy the violation within that period or default termination will be invoked. However, if the time period is not specified, the contractor has a reasonable time within which he must remedy the violation.

When default violations arise, the contracting officer is faced with certain considerations of surrounding circumstances. The *Armed Services Procurement Regulation* (ASPR) suggests that areas of consideration should include: availability of supplies or services from other sources, urgency of the project, time factors involved in substituted performance, contractor's capability and past performance record, effect of default on the contractor, the contractor's financial arrangement with the government, and an analysis of the failures and excuses relating to the default.⁴⁵ An improper termination for default was first held by the courts to be converted to termination for convenience⁴⁶—relief that does not subject the contractor to excess costs or debarment. Such a termination for convenience also constitutes a waiver of liquidated damages and only allows the government to collect actual damages if the government sustains the burden of proof.⁴⁷ The substitution of termination for convenience for improper default is now part of ASPR.⁴⁸

The default provisions create liability to the contractor for "excess costs" involved in reprocurement by the government.⁴⁹ Although in both excess cost and liquidated damages the government is bound to mitigate the damages by expeditious administration of the contract.⁵⁰

The notice of termination for default must be proper and adequate. It must be in writing and contain (1) identification of the contract by number and date; (2) a description of the contractor's violation; (3) a statement on the nature of the portion terminated; (4) a statement that the government may have the contract completed by another party with the contractor liable

⁴⁴ ASPR, 32 C.F.R. § 7-105.5 (1966); A.C. Rondenelli, an Individual, ASBCA Nos. 9838, 10405, 11310, 11400, 11401 and 11443, 66-1 BCA ¶ 5612 (1966); 31 Decs. Comp. Gen. 428 (1952).

⁴⁵ ASPR, 32 C.F.R. § 8-602.3 (1966).

⁴⁶ *Klien v. United States*, 152 Ct. Cl. 8, 285 F.2d 778 (1961).

⁴⁷ *United States v. Cunningham*, 125 F.2d 28 (D.C. Cir. 1941); 29 Decs. Comp. Gen. 36 (1949).

⁴⁸ ASPR, 32 C.F.R. § 8-707 (e) (1966).

⁴⁹ ASPR, 32 C.F.R. § 8-707 (b) (1966).

⁵⁰ ASPR, 32 C.F.R. § 1-310 (c) (1966); Decs. Comp. Gen., B-150973, (1963).

for any excess costs; (5) reservation by the government of all rights and remedies provided by law or under the contract; (6) a statement that the notice constitutes a decision by the contracting officer that the contractor is in default and delays are not excusable; and (7) a statement that the contractor has the right to appeal pursuant to the disputes clause.⁵¹ The ASBCA has strictly applied these requirements against the government and has held the default improper because of government failure to specify the particular defects of the contractor.⁵² However, the courts have not held the government to precise definitions of the contractor's failure.⁵³

The contractor can be relieved of default if the government waives the performance time.⁵⁴ If the contracting officer fails to issue a timely default notice upon delinquent performance, the contractor is entitled to a re-established reasonable performance time.⁵⁵ If the parties are conducting business with normal relations and delivery is late, default is held to be inapplicable.⁵⁶ However, some courts have held that acceptance of late delivery standing alone is not enough to constitute waiver.⁵⁷ These courts hold that there can be no implied waiver, but that there must be a clear unequivocal action by the government to waive its rights.⁵⁸ They hold that waiver must be voluntary and consideration must be present in relinquishment of the right. This position has been modified somewhat by the election theory, which holds that the government does not give up a right, but rather elects to continue performance in order to avoid litigation incumbent with default.⁵⁹ If the government has re-established a new performance schedule, the contract can be terminated for default if the contractor fails to perform within the new schedule.⁶⁰ In addition, if a contractor who was in default accepts a new performance time, he cannot subsequently assert that the time was unreasonable.⁶¹

It has been suggested that default is not an efficacious remedy because the original contractor can perform more expeditiously and effectively than a substituted contractor despite the difficulties leading to his potential default.⁶² Termination results in administrative delay and possible government liability for an improper default.

⁵¹ ASPR, 32 C.F.R. § 1-310 (c) (1966); 29 Decs. Comp. Gen. 57 (1949).

⁵² Valley Contractors, ASBCA No. 9397, 1964 BCA ¶ 4071 (1964).

⁵³ American Marine Upholstery Co. v. United States, 170 Ct. Cl. 564, 345 F.2d 577 (1965).

⁵⁴ General Elec. Co., ASBCA Nos. 2094 & 2952, 58-1 BCA ¶ 1700 (1958).

⁵⁵ Associate-Aircraft-Tool & Mfg. Co. v. United States, ASBCA No. 7255, 1963 BCA ¶ 3739 (1963).

⁵⁶ C.T.M. Co., ASBCA No. 7332, 65-1 BCA ¶ 4757 (1965).

⁵⁷ United States v. Chichester, 312 F.2d 275 (9th Cir. 1963).

⁵⁸ General Equip. Co., ASBCA No. 6415, 64-1 BCA ¶ 4307 (1964).

⁵⁹ Cuneo, *Waiver of the Due Date in Government Contracts*, 43 VA. L. REV. 1 (1957).

⁶⁰ T.E. Zoda v. United States, 148 Ct. Cl. 49, 180 F. Supp. 419 (1960).

⁶¹ Appeal of Midwest Engin'r & Constr. Co., ASBCA No. 5801, 1962 BCA ¶ 3289 (1962).

⁶² Leathem *supra* note 8.

If the contractor has cause for rescission of the default notice or excusable delays which would mitigate the assessment of liquidated damages, he should file such claims in writing with the contracting officer. Failure to appeal will bar subsequent claims even if an excusable delay is merited.⁶³ While the common law rule held excusable delays to acts of God,⁶⁴ the standards now applied to some extent are substantial equities in favor of the contractor. However, negligence by the contractor will preclude this claim.⁶⁵

B. *Excusable Delay and Nonperformance*

The contractor may be excused from liability if he can establish that delay or nonperformance was beyond his control and without his fault or negligence.⁶⁶ However, there have been uncertainties in the application of the concept of excusability in relation to the exculpatory language of the default clause, particularly in three areas: acts of the government; acts of God; and impossibility of performance.

1. *Governmental Acts*

These acts include those of a sovereign and those of a contractor. These acts have been recognized as an excuse by the exculpatory language of the default clause. But the doctrine of defense of sovereign acts has held the government not liable for acts in its sovereign capacity. In 1925, in *Horowitz v. United States*, the Supreme Court announced this doctrine, holding the government free from liability. "Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants."⁶⁷

Therefore, under this doctrine, a contractor terminated for default could not raise prejudicial acts of the government as a defense. However, the sovereign acts must be public and general without being applied directly upon an individual contractor.⁶⁸ There has been confusion over the application of the doctrine and the courts have refused to apply it in many situations.⁶⁹

The acts of the government as a contractor include all the express and implied conditions by which the government is under obligation.⁷⁰ This includes a duty to provide in a timely manner the personnel financing and materials that have been promised to the contractor in the accomplishment

⁶³ Decs. Comp. Gen., B-160639 (1967).

⁶⁴ *Carnegie Steel Co. v. United States*, 240 U.S. 156 (1916).

⁶⁵ 32 Decs. Comp. Gen. 67 (1952).

⁶⁶ ASPR, 32 C.F.R. 8-707 (c) (1966); *United States v. Utah Constr. & Mining Co.*, *supra* note 15.

⁶⁷ 267 U.S. 458 (1925).

⁶⁸ Speidel, *Implied Duties of Cooperation and the Defense of Sovereign Act in Government Contracts*, 51 GEO. L.J. 516 (1963).

⁶⁹ *United States v. Lennox Metal Mfg. Co.*, 225 F.2d 302 (2d Cir. 1955); *Miller v. United States*, 135 Ct. Cl. 1, 140 F. Supp. 789 (1956).

⁷⁰ Speidel, *supra* note 68.

of his task.⁷¹ This duty also includes the requirement to furnish reasonable specifications that are not defective or inadequate.⁷² "If faulty specifications prevent or delay completion of the contract, the contractor is entitled to recover damages for the defendant's breach of its implied warranty."⁷³

However, the contractor is under an obligation to proceed with the work under the specifications. If the contractor does not perform, a default notice can be issued unless the contracting officer's interpretation is erroneous and places the contractor under the doctrine of impossibility of performance.⁷⁴ Any delay of government-furnished equipment or property will also result in a corresponding time extension.

2. *Acts of God*

The exculpatory language of the default clause provides an excuse for causes beyond the control of the contractor which include such incidents as acts of God or the public enemy, severe weather conditions, strikes, fires, floods, epidemics, quarantine restriction, and freight embargoes.⁷⁵ Severe weather conditions have been held by the ASBCA to be limited to conditions that are unusual to the specific geographic area in which the contract is performed. For example, a monsoon in Thailand will not excuse the contractor who had access to weather records or knowledge of the area. Strikes and labor difficulties are governed by the test of foreseeability and the contractor's availability to alternative sources.⁷⁶ If other sources were available, the contractor is not excused.⁷⁷ Where the contractor has lost the services of a key man whose performance formed an integral part of the project, the contractor may be excused if he has satisfied the test of foreseeability and has exercised reasonable efforts to secure alternative labor.⁷⁸ A presumption is placed on the contractor that he brings adequate capability, knowledge, experience, financial resources, facilities and personnel into performance of the contract.⁷⁹ Reasonable foreseeability and negligence in the loss of these elements will bar any excuse.

3. *Impossibility of Performance*

This is a common law defense that has had growing application in the field of government contracts. Impossibility can be absolute where no one could perform a specified task regardless of the amount of resources applied.⁸⁰ This

⁷¹ Appeal of Woodside Screw Mach. Co., ASBCA No. 6936, 1962 BCA ¶ 3308 (1962).

⁷² Appeal of Union Elec. & Mfg. Co., ASBCA No. 3811, 58-2 BCA ¶ 1966 (1958).

⁷³ *Larurnum Constr. Corp. v. United States*, 163 Ct. Cl. 339, 325 F.2d 451 (1963).

⁷⁴ *Natus Corp. v. United States*, 11 C.C.F. ¶ 80,882, — Ct. Cl. —, 371 F.2d 450 (1967).

⁷⁵ ASPR, 32 C.F.R. § 8-707 (c) (1966).

⁷⁶ 22 Decs. Comp. Gen. 937 (1943).

⁷⁷ *New England Tank Cleaning Co.*, ASBCA No. 10208, 66-1 ¶ 5654 (1966).

⁷⁸ *United States Cas. Co. v. United States*, 197 Ct. Cl. 46, 67 F. Supp. 750 (1946).

⁷⁹ 18 Decs. Comp. Gen. 114 (1938).

⁸⁰ Appeal of Seaview Elec. Co., ASBCA No. 6966, 61-2 BCA ¶ 3151 (1961).

literal impossibility of performance was, up until recent years, the only relief recognized in government contracts.⁸¹ In addition, impossibility can be a situation where economical performance is "not possible within the objectives contemplated by the parties."⁸² This latter case relates to what is defined as legal or practical impossibility of performance.

Legal impossibility has gained wide recognition in the general field of contract law.⁸³ However, its expansion in the field of government contracts has been slow. The early holdings of the government have held the contractor to assumption of the risk by acceptance of a fixed price contract with performance specifications.⁸⁴ There has been a trend away from this restrictive position. Recently, the Court of Claims declared in *Natus Corporation v. United States*:

Removed from the structure of the common law, "impossibility" in its modern context has become a coat of many colors, including among its hues—namely, impossibility predicated upon commercial impracticality.⁸⁵

The court went on to state that impracticality would result when performance could only be accomplished at excessive or unreasonable costs. However, in the instant case the contractor did not recover extra costs because his failure was due not to factual impossibility but due rather to his inability to use the most economical method which would have decreased his profit margin.

The concept of commercial impracticality, long recognized in the general contract law,⁸⁶ is now given full effect in cases of contractors seeking claims for equitable adjustment for excess costs on the grounds of impossibility. However, its application to the contractor seeking avoidance of liquidated damages or default is not clear.⁸⁷

Another aspect of legal impossibility is recognized when a "state-of-the-art" breakthrough is necessary to complete performance under the contract.⁸⁸ In the *Appeal of E. L. Courmand and Company, Inc.*,⁸⁹ the ASBCA held that a contractor who needed such a "state-of-the-art" technological breakthrough to perform his contract was normally excused. The contractor could only be held liable if he fell into an exceptional class which clearly assumed

⁸¹ Aerodex, Inc., ASBCA No. 7121, 1962 BCA ¶ 3492 (1962).

⁸² Appeal of Johnson Elec., Inc., ASBCA No. 6966, 65-1 BCA ¶ 4628 (1964).

⁸³ RESTATEMENT OF CONTRACTS § 454 (1932); UNIFORM COMMERCIAL CODE § 2-615 (1962).

⁸⁴ Aerodex, Inc., *supra* note 81.

⁸⁵ *Natus Corp. v. United States*, *supra* note 74.

⁸⁶ *Supra* note 83.

⁸⁷ Cf. *Koppers Co. v. United States*, Ct. Cl. No. 254-65, January 12, 1967, 11 C.C.F. ¶ 80, 879 (1967); *United States v. Wegematic Corp.*, 360 F.2d 674 (2d Cir. 1966); commentary held defense of practical impossibility to be tenuous at best; see 6 GOVERNMENT CONTRACTOR ¶ 392 (1964).

⁸⁸ *Utah-Manhattan-Sundt*, ASBCA No. 8991, 1963 BCA ¶ 3854 (1963).

⁸⁹ ASBCA No. 2955, 60-2 BCA ¶ 3840 (1940).

the risk of impossibility. To be considered in this class, the contractor must be completely familiar with the risk, and enter into price negotiations with full knowledge of the "state-of-the-art" and risks inherent in the contemplated task. The Board recognized that most contractors will think twice before they knowingly contract for the risk of impossibility. To ascertain this allocation, the Board did not lay down any hard and fast rules, but relied upon the totality of circumstances, *i.e.*, price, delivery time, uniqueness of design approach, and the circumstances of negotiation.

However, the application of this view has been restricted and confused by the assumption of the risk doctrine. Essentially, this doctrine holds the contractor liable despite evidence of impossibility. This concept was expounded by the Court of Claims in *Austin Co. v. United States*.⁹⁰ There the contractor assumed the risk because he drafted modifications to government specifications and this was held sufficient to overcome the impossibility of development and manufacture of a highly sensitive electronic system. The ASBCA immediately followed *Austin*⁹¹ and the Comptroller General even denied relief when the contractor had exceeded the "state-of-the-art."⁹²

Austin did not stop with a restrictive application of the assumption of the risk doctrine. The court held that even if impossibility existed, the exculpatory language of the default clause, "beyond the control and without the fault or negligence of the contractor," applied only to the same kind or class of the particular language that followed "acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods . . . , etc." By adherence to the principle of *ejusdem generis*, the court effectively read out of the contract any protection to the contractor for inherent absolute impossibility of performance. The court held that the words of the default clause would only give a defense to extraneous or supervening circumstances. *Austin* held the contractor to the "square corners" doctrine and dismissed the appeal on a summary judgment.

Since *Austin*, the court has expanded the impossibility concept. But it is uncertain exactly what affect *Austin* still renders over the impossibility defense. Recently, the Court of Claims upheld the contractor's claim for relief under similar circumstances. In *Hol-Gar Mfg. Corp. v. United States*⁹³ the court relieved the contractor of the assumption of the risk and distinguished *Austin* on the grounds that the government drafted the specifications in question, and therefore, was held to an implied warranty that, if followed, the specifications would result in a satisfactory product. The case appears to create two extremities on the issue of liability for assumption of the risk.

⁹⁰ 161 Ct. Cl. 76, 314 F.2d 518, *cert. denied*, 375 U.S. 830 (1963).

⁹¹ *Advance Indus., Inc.*, ASBCA No. 7402, 1963 BCA ¶ 774 (1963); *Consolidated Avionics Corp.*, ASBCA Nos. 6315 and 6433, 1963 BCA ¶ 3888 (1963).

⁹² *Decs. Comp. Gen.*, B-157039 (1966).

⁹³ 175 Ct. Cl. 518, 360 F.2d 634 (1966).

On one hand, the *Austin* doctrine holds the contractor to assumption of the risk because of his participation in the drafting of the specification. On the other hand, *Hol-Gar* would hold the government liable for its participation. Furthermore, the allocation of the risk⁹⁴ asserted in *National Presto Indus., Inc. v. United States*⁹⁵ lies somewhere in the middle. In that case the government participated in technical discussions, actively promoted the work, and furnished government equipment for the process. The court held the risk to be distributed because of the "joint enterprise" nature of the agreement.

Meanwhile, the ASBCA has taken its own course with the application of the *Austin* doctrine. In the *Appeal of Johnson Elec., Inc.*⁹⁶ a contractor appealed a termination for default for failure to perform under a fixed price contract with performance specifications. Instead of directly applying *Austin* or earlier rulings, the Board examined all the circumstances and found that the government's failure to disclose technical information nullified any presumption of assumed risk. The Board then examined the evidence of impossibility.

We can find no fault in the technical competence of the appellant's forces, the approach it made to solution of its design problems, or its canvassing of sources of assistance. Its efforts to perform the contract were far in excess of what it might reasonably have expected from the circumstances existing and made evident to it at time of bidding of the contract. We think appellant has made out a case of practical, legal impossibility of performance of the contract.⁹⁷

Evidently, the Board allowed the fact of the government's superior knowledge to counter-balance the *Austin* statement that relief from impossibility will only be granted if it is supervening and not in existence when the contract was executed.

The defense of impossibility in government contracts has developed a great deal in recent years from its narrow restriction to literal impossibility. However, uncertainties still exist. It appears that the Court of Claims will not grant the contractor relief under the default clause unless he can show evidence of practical impossibility, that it is a supervening clause, and that he did not assume the risk. On the other hand, a contractor who claims an equitable adjustment for extra costs on the grounds of impossibility of performance will not be held to the distinction between inherent and supervening impossibility of performance. Because of the restrictive interpretation given to the default clause, the contractor with the more severe penalty is denied relief in similar circumstances.

The trend in federal procurement is to shift the risk of performance to

⁹⁴ See Nash, *Risk Allocation in Government Contracts*, 34 GEO. WASH. L. REV. 693 (1966).

⁹⁵ 167 Ct. Cl. 749, 338 F.2d 99 (1964), cert. denied, 380 U.S. 962 (1965).

⁹⁶ *Supra* note 82.

⁹⁷ *Ibid.*

the contractor by means of increased use of the fixed price contract. Also, systems responsibility is being shifted to the contractor by means of a device entitled "Total Package Procurement Concept."⁸⁸ Moreover, the entire area of research and development contracting, which is especially susceptible to impossibility of performance, is expanding with the same momentum as our aero-space industries. It appears, therefore, that impossibility of performance will become a more frequent claim against liquidated damages and default. However, the tinsel framework of *Austin* will preclude the full application of the law of impossibility. The rationale of *Natus* which examined the objective reality of nonperformance rather than legal fictions should be applied to liquidated damages and default using the equitable approach announced in *E. L. Courmand* and *Johnson Elec.*⁸⁹ In addition, as the default clause is now interpreted, it stands in need of modification to keep pace with the modern trends in government procurement.

⁸⁸ See Comment, 6 CCH GOV'T. CONT. REP. ¶ 90,042.

⁸⁹ See Comment, 6 CCH GOV'T. CONT. REP. ¶ 90,016.