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GOVERNMENT CONTRACTS: SUBCONTRACTORS AND PRIVITY

John W. Whelan* and George H. Gnoss**

Introduction

The subject of subcontractors under Government contracts is not a novel one in a law review article; there have been several good articles.¹ It is not the purpose of this paper to review all the ground so ably discussed in these articles, but rather to attempt a general statement of the position of the subcontractor and to suggest that it is equitable for him to be allowed direct remedial recourse against the Government. The function of the subcontractor is suggested by his name: he does part of the work, furnishes materials or labor, or does other things necessary to enable the prime contractor to fulfill his obligation to the Government. I think the reader will accept without proof that federal subcontractors are important to the general economy whether as employers of labor or distributors of funds. In the technical legal phraseology adopted from judicial concepts, they do not have "privity" with the federal government, that is they have not made a contract with the Government and thus, absent some special circumstances, they have no

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right or claim against it. Further, from the standpoint of administration, the Government relies on the management abilities of its prime contractor to coordinate and articulate the work of subcontractors who may, in a complex procurement, be arranged in tiers (or perhaps "cascades") for the performance of the task for which the Government has agreed to pay the prime. But, lack of "privity," useful as it may be to the Government as a defense against direct subcontractor claims, does not always provide the subcontractor with a shelter against Government action. Statutes, regulations, and contract terms give the Government rights against subcontractors which, in the case of many subcontracts, make the "wall of privity" rather like a one-way Swiss cheese or perhaps more aptly, like one of those walls used in experimentation with radioactive materials through which the experimenter can act by means of remote-control devices all the while being shielded by the wall from the effects of radiation.

DEFINITION OF THE TERM SUBCONTRACTOR

One of the initial problems met in any discussion of "subcontractors" is the fact that there is no general consistency in the use of the term. This is not, of course, a necessarily bad thing, but the existence of the inconsistency has to be observed. In addition, it has to be stated clearly that the term "subcontractor" is used with relative precision in certain contexts. For example, some statutes specify who, for their purposes, will be deemed a subcontractor. The Subcontractors' Anti-Kickback Act, 41 U.S.C. sections 51-54 (aimed at preventing subcontractors from remitting part of the subcontract price as a condition for getting the subcontract) provides that:

For the purpose of sections 51-54 of this title, the term "subcontractor" is defined as any person, including a corporation, partnership, or business association of any kind, who holds an agreement or purchase order to perform all or any part of the work or to make or to furnish any article or service required for the performance of a negotiated contract or of a subcontract entered into thereunder; . . . .

2. I was once told that one of the Army tank procurements in the early 1950s involved over 3,000 subcontracts and purchase orders. I assume that some of the aerospace procurements of the present day are at least as complex.

Another, and broader, definition of “subcontract” has been issued by the Office of Federal Contract Compliance of the Department of Labor for purposes of the Equal Employment Opportunity Program:

(w) The term “subcontract” means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, which in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed.

Other definitions can be found in statutes or regulations.
In general usage, apart from contract with the United States, the term has a fairly well-accepted meaning when applied to construction contracts. It indicates those who undertake performance of a part of a prime or higher tier subcontract. As so used, it is ordinarily distinguished from those who are classed as "laborers" or "materialmen." Purchase order "vendors" are often put in a separate category; this usage is also common in connection with other contracts. The precise

contract) to perform all or any part of the work, or to make or furnish any materials, required for the performance of any other contract or subcontract, but such term does not include any purchase order or agreement to furnish office supplies;

(2) any contract or arrangement covering the right to use any patented or secret method, formula, or device for the performance of a contract or subcontract; and

(3) any contract or arrangement (other than a contract or arrangement between two contracting parties, one of whom is found by the Board to be a bona fide executive officer, partner, or full-time employee of the other contracting party) under which—

(A) any amount payable is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts; or

(B) any amount payable is determined with reference to the amount of a contract or contracts with a Department or of a subcontract or subcontracts; or

(C) any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts.

Nothing in this subsection shall be construed (i) to affect in any way the validity or construction of provisions in any contract with a Department or any subcontract, heretofore at any time or hereafter made, prohibiting the payment of contingent fees or commissions; or (ii) to restrict in any way the authority of the Board to determine the nature or amount of selling expense under subcontracts as defined in this subsection, as a proper element of the contract price or as a reimbursable item of cost, under a contract with a Department or a subcontract.

Other definitions can be found in Armed Services Procurement Regulation 8-101.24, 32 C.F.R. § 8.101-24; Atomic Energy Commission Procurement Regulation § 9-1.254, 41 C.F.R. § 9-1.254. See also Federal Procurement Regulation § 1-8.101(v), 41 C.F.R. § 1-8.101(v), and National Aeronautics and Space Administration Procurement Regulations § 8.101-23, 41 C.F.R. § 18-8.101-23. Hereinafter, these regulations will be referred to as "ASPR", "AECPR", "FPR", and "NSAPR" respectively. ASPR is found in 32 C.F.R., the FPR in Chapter 1, AECPR in Chapter 9, and NASAPR in Chapter 18 of 41 C.F.R.


7. An interesting example of construction usage can be found in Wells-Stewart Construction Co. v. Martin Marietta Corporation 101 Ariz. 554, 422 P.2d 119 (1968) where the court in discussing the rights of a subcontractor's materialman under a construction contractor's bond, remarked:

Appellants argue that Martin is a "materialman of a materialman," and
scope of the term is also important under section 2 of the Miller Act, relating to the rights of materialmen, persons furnishing labor and contractors with subcontractors under construction contract payment bonds.\(^8\)

In other areas of contracting, the term "subcontractor" is quite broad and seems to sweep in purchase order vendors, suppliers, providers of services, and others.\(^9\) It is in this broad sense that the term ordinarily is used in this article, except in those cases where a more restricted or technical meaning is indicated.

**The "Wall of Privity" as a Judicial Concept**

We tend, probably rightly, to equate rights under a contract with rights to judicial enforcement of the contract or with some of the valuable promises in it. It is normally said that the parties to a contract and those in privity may enforce it.\(^1^0\) "Privity" does not now mean, as apparently it once may have, that a plaintiff to sue must have paid consideration for the defendant's promise which he seeks to enforce. The third party beneficiary cases seem adequately to have exploded that notion.\(^1^1\)

The term "Arizona Pete" does not refer to a desert badman, but instead to the Arizona Petroleum and Asphalt Co.\(^1^2\)

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\(^{9}\) See 17 C.J.S. Contracts § 1 (1963).

\(^{10}\) 17A C.J.S. Contracts § 518a (1963).
notion. "Privity" might therefore be said to include third party beneficiaries. Then too, "real party in interest" statutes should have some play: presumably they permit people other than signatories to claim enforcement rights under an original contract. Assignees of contract rights have generally recognized rights to sue on the contract. The content of "privity" remains a puzzling thing. As Corbin observes:

The mystery surrounding 'obligation' is the same mystery that surrounds 'privity'; the latter term may be used to mean nothing

11. See, for a discussion, 1 Corbin, Contracts, § 124 (1950). The "third party beneficiary" doctrine was used by a subcontractor against the United States in Maneely v. United States, 68 Ct. Cl. 623 (1929). In that case, the contract with the prime contractor contained the following termination clause:

Abandonment of work, by contracting officer.—If conditions should arise which in the opinion of the contracting officer make it advisable or necessary to cease work under this contract, the contracting officer may abandon the work and terminate this contract. In such case the contracting officer shall assume and become liable for all such obligations, commitments, and unliquidated claims as the contractor may have theretofore, in good faith, undertaken or incurred in connection with said work. . . .

Id. at 625.

This clause was held to constitute a promise for the benefit of the third party subcontractor. A later Government termination clause, evidently intended to restrict the liability of the Government to subcontractors, included the following: (1) it gave the Government the right to terminate the contract, (2) required the prime contractor upon receipt of notice of termination to terminate all subcontracts, (3) required the prime contractor to assign to the Government all its right, title and interest under terminated subcontracts, and (4) required the prime contractor to settle all claims arising out of the termination of subcontracts "with the approval and ratification of the contracting officer to the extent he may require." In Daniel Hamm Drayage Co. v. Willson, 178 F.2d 633 (8th cir, 1949), this language was held to be a contract for the benefit of the subcontractors, the third party beneficiaries, although it is the opinion of the author that the language of the contract was language of assignment and not the traditional third party beneficiary language. Today the standard termination clauses in Government contracts have been changed even more in an attempt to preclude Government liability on a third party beneficiary theory. Consider the following ASPR regulation concerning the termination for convenience clause:

(b) In giving the Government the right to require the assignment of the prime contractor's interest in terminated subcontracts, the termination clauses set forth in Part 7 of this Section also provide that the Government shall have the right, in its discretion, to settle and pay any or all claims arising out of the termination of such subcontracts. This right does not obligate the Government to settle and pay termination claims of subcontractors. As a general rule, the prime contractor is obligated to settle and pay such claims. . . . ASPR 8-209.8.

12. For an example of such a statute, see California Code of Civil Procedure, § 367; (1872) as amended (1880); Va. Code § 8-93.1 (1950).
more than that one person is under an obligation to another. When so used and defined, it leads to the argument most favored of all men, the argument in a circle.\(^3\)

To say that "privity" means only what we say it means probably does involve the logical circle; but that only makes it illogical not necessarily unwise. To make another metaphor, perhaps it is indeed judicious to fill the bottle of privity a little bit at a time as we find something we need to include. Surely, notions of privity have not much embarrassed courts faced with a need to find manufacturers liable for defective products which are injurious to the persons, property, or even economic interests of ultimate consumers or other persons.\(^4\) It seems not unfair to conclude that the United States might, as a buyer of goods, be able to claim the expanded rights of a purchaser, recognized in this sweeping new law of "product liability," without reference to notions of privity.

But it seems to remain clear that, no matter what may happen in the general law by way of adding new content to "privity" or by way of brushing that notion aside on account of the necessities of social and economic organization, the function of privity is important when subcontractors are claiming rights against the Government. Partly, this is due to the idea of sovereign immunity and inferences therefrom that

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13. 4 Corbin, Contracts § 778 (1950). Corbin concludes the paragraph from which the language in the text was quoted by saying: "The mystery of 'privity' remains; but it is no longer of much interest because court action is not much influenced by it." Alas, one might wish this were true in Government contracts cases.

14. The whole law of "products liability" is in a very volatile state. I do not intend to summarize it here. But the very recent developments seem to have begun with the Henningsen case in New Jersey (Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960)); and to have reached a highwater mark in the Santor case in the same state (Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965)) where a manufacturer of a carpet was held liable to the ultimate buyer because the carpet was defective. There was no personal injury or injury to property. This "economic loss" notion has been rejected in at least one state, California, Seeley v. White Motor Co., 45 Cal. Rptr. 17, 403 P.2d 145 (1965). The law of product liability may be regarded as a branch of tort law, see Restatement Torts 2d, § 402 A. (1965), but "privity" of contracts is often clearly disavowed, see Suvada v. White Motor Co., 32 Ill.2d 612, 210 N.E.2d 182 (1965), and the Uniform Commercial Code sets aside privity in certain warranty actions where a person in the family or household of the buyer is injured. U.C.C. § 2-318. We ought to observe that the title to the section describes such a person as a "third party beneficiary" although the last sentence of the section ("a seller may not include or limit the operation of this section.") seems to reveal that the nature of the "third party beneficiary's" rights are statutory, not contractual.
The Tucker Act, for example,\(^\text{16}\) permits suits in the Court of Claims and the U.S. District Courts founded on any "express or implied contract with the United States." This means that subcontractors have no right to bring suit under this Act against the United States for the reason that they have no contract, express or implied, with it.\(^\text{17}\) This seems to amount to "no privity." Quite the most striking case, though it is an old one, is *Merritt v. United States*:\(^\text{18}\) *Merritt* had made a subcontract with Panama Knitting Mills to furnish khaki which the Mills were to furnish to the Government at $3.20 a yard. Whether the Mills were to do anything further to the khaki before turning it over to the Government does not appear. In 1919, the contract between the Government and the Mills was cancelled under an agreement whereby the Government took half the original amount of khaki at the contract rate ($3.20) plus carrying charges. The Mills told Merritt that the Government had compelled a settlement on the basis of $2.50 a yard plus carrying charges and induced him to grant a release on that basis. When the Government heard of this, it made the Mills pay it back the difference between the actual basis of settlement between it and the Mills ($3.20) and what would have been paid if the Mills had settled with the Government at the $2.50 figure. Merritt sued the United States to recover what the Government had received from the Mills. Justice Brandeis declined to allow Merritt to recover:

> Plaintiff cannot recover under the Tucker Act. . . . The petition does not allege any contract, express or implied in fact, by the Government with the plaintiff to pay the latter for the khaki on any basis. Nor does it set forth facts from which such a contract will be implied. The pleader may have intended to sue for money had and received. But no facts are alleged which afford any basis for a claim that the repayment by the mills was exacted by the Government for the benefit of the plaintiff. The Tucker Act does not give a right of action against the United States in

\(^{15}\) See *United States v. Sherwood*, 312 U.S. 584 (1941).


\(^{17}\) See *United States v. Blair*, 321 U.S. 730, 737 (1944); *Nickel v. Pollia*, 179 F.2d 160 (10th Cir. 1950).

\(^{18}\) 267 U.S. 338 (1925).
those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law.\textsuperscript{19}

Clearly, the situation was out of the ordinary.\textsuperscript{20} But the language used gives one a rather clear sense of the claims position of the subcontractor if he attempts to sue the United States in his own right.

But, as our legal experience should have taught us, the mere fact that a litigant cannot do something directly does not really mean that he may not be entitled to have an indirect recourse. Why, for example, if a subcontractor was compelled to do extra work by reason of Government action or inaction should he not ask the prime contractor to sue in its own name? Surely if the sub is entitled to claim damages or the cost of the extra work from the prime, the prime should be entitled, after paying the sub, to present a claim for the appropriate amount to the Government. Or, more simply, the prime might sue the Government at the sub's behest, allowing the sub to have control over the litigation as the real party in interest.\textsuperscript{21} And it is quite feasible that this same thing could be done for a sub-sub-contractor.\textsuperscript{22} This approach, allowing the prime to act as apparent principal but actual agent,—or, as it might be called, the "good shepherd" approach—has been given general approval for many years.\textsuperscript{23} The "good shepherd" approach is also followed in cases of appeals by primes in behalf of subcontractors under the "Disputes" clause in Government contracts.\textsuperscript{24}

\textsuperscript{19} Id. at 340-41.

\textsuperscript{20} Merritt would seem to have had a fraud claim against Panama Knitting Mills (unless, of course, Merritt had been unusually gullible). I have no information on whether the Mills had become insolvent or otherwise useless to Merritt as the object of a lawsuit.

\textsuperscript{21} The "real party in interest" analysis seems to be ruled out in Severin v. United States, 99 Ct. Cl. 435 (1943), cert. denied, 322 U.S. 733 (1944), discussed infra.

\textsuperscript{22} See Livingston v. United States, 101 Ct. Cl. 625 (1944).

\textsuperscript{23} At least since Stout v. United States, 27 Ct. Cl. 385 (1892). See also United States v. Blair, 321 U.S. 730, 737 (1944).

\textsuperscript{24} This is a remedy allowing decision of disputed questions by the Contracting Officer and an appeal from his decision to a Board of Contract Appeals set up within the executive agency which made the contract. The remedy is based on a prime contract clause, called the "Disputes" clause (for the text of the clause, see Art. 12 U.S. Standard Form 32, FPR 1-16.901-32, and also ASPR 7-103.12). Generally speaking, such "Disputes" provisions (under which the Government's Contracting Officer decides which disputes and appeals may be taken to the Government agency) are not authorized for inclusion in subcontracts. See ASPR 23-203(a), quoted infra. However, the Atomic Energy Commission uses such a clause; for text see 10 C.F.R. Chap. 1, part 3, App. A. Except as thus provided, the subcontractor has no right to appeal to the Board of Contract Appeals in his own name. For the Government to be bound to such a clause (i.e., for the Contracting Officer to be bound to decide and the Board...
There are some limitations on this approach, of course. For example, if the prime contractor should refuse to act as shepherd, this presumed responsibility to hear and decide appeals) it must obviously give its consent to the clause in the subcontract. The prime and the sub cannot impose such responsibilities on the prime by their own action, unaided by Government consent. See TRW, Inc., ASBCA No. 11373, 68-2 BCA para. 7099 (1968). That decision also indicates that Government “approval” of a subcontract containing a clause imposing disputes decision responsibilities on the Government Contracting Officer and the contracting agency on appeal, did not give the sub any direct appeal right. But see Federal Telephone and Radio Co., ASBCA 4691, 59-1, BCA para. 2246 (1959).

The “good shepherd” approach is, however, still available. That is, the prime can appeal on behalf of the sub. See the discussion of some of the complicated issues which may arise, in TRW, Inc., ASBCA No. 11373, 66-2 BCA ¶ 5847 (1966), motion for reconsideration denied 66-2 BCA ¶ 5882 (1966). (This case resulted ultimately in the decision in 68-2 BCA para. 7099, cited supra, this note). See also the discussion in Holder Constr. Co. GSBCA No. 1913, 68-1 BCA ¶ 7072 (1968), denying motion for reconsideration of 67-2 BCA ¶ 6397.

Because of its clear policy statement affecting some of the problems just discussed and related problems, there is included the provisions of ASPR 23-203:

REQUIREMENT FOR CONSENT TO SUBCONTRACTS


(a) Consent by the contracting officer to a subcontract does not constitute approval of the terms and conditions of the subcontract. Nevertheless, the contracting officer shall not consent to a provision in the subcontract purporting to give the subcontractor the right to obtain a direct decision of the contracting officer of the right of direct appeal to the Armed Services Board of Contract Appeals. The Government is entitled to the management services of the prime contractor in adjusting disputes between himself and his subcontractors. The contracting officer should act only in disputes arising under the prime contract, and then only with and through the prime contractor, even if a subcontractor is affected by the dispute between the Government and the prime contractor. The contracting officer shall not participate in disputes between a prime contractor and his subcontractors.

(b) However, the contracting officer should not refuse consent to a subcontract, particularly under a cost-reimbursement contract, merely because it contains a clause giving the subcontractor, if he is affected by a dispute arising under the prime contract, an indirect appeal to the Armed Services Board of Contract Appeals through assertion of the prime contractor's right to take such an appeal, or through prosecution of such an appeal by the prime contractor on behalf of the subcontractor. Such a clause must not attempt to obligate the contracting officer or the Board to decide questions which do not arise between the Government and the prime contractor or which are not cognizable under the “Disputes” clause of the prime contract, and must not attempt to obligate the contracting officer to notify or deal directly with the subcontractor. However, such a clause may appropriately provide that the prime contractor and subcontractor shall be equally bound by the contracting officer's or the Board's decision on a dispute.

(c) The prime contractor and his subcontractor may agree to settle dis-
ably would leave the subcontractor without a forum except to the extent that he could sue the prime. Whether the subcontractor by some sort of equitable proceeding could compel the prime to take the appeal or present the claim in its own name is a most interesting question.25 Or, if the prime contractor should act without diligence so that its own position as litigant became time-barred, this presumably would prevent it from shepherding the subcontractor's claim into the appropriate forum.26 There are undoubtedly other occasions where good shepherding will not suffice.27

But the principal exception has been that expressed in the so-called "Severin" rule.28 The general problem is: what effect is to be given to

A similar provision is contained in NASA PR 3-903-5.

25. I know of no authority. However, if the subcontract contained release provisions like some of those mentioned in the quotation from the Simmons case (see the text below), where the prime is liable to the sub for Government-caused damages only when, as and if the prime receives payment from the Government, the subcontractor might well argue that its only adequate remedy would be an order by a State or Federal court directing the prime to sue as "good shepherd" in the Court of Claims or the U.S. District Court under the Tucker Act, 28 U.S.C. §§ 1491, 1326(a) (2) (1964). Petition for such an order and the suit by the prime contractor pursuant to the order might be consolidated in the District Court provided the claim by the prime against the Government did not exceed $10,000, 28 U.S.C. § 1346(a) (2) (1964).

26. See, e.g., Piracci Const. Co., ASBCA No. 10736, 66-1 BCA ¶ 5324 (1966) where the prime failed to take a disputes appeal (see note 24, supra) on behalf of the sub within the thirty-day period provided in the dispute clause. For a cliffhanger, see Dinger Contracting Co., DOT CAB Nos. 67-46, 67-46A, 68-2BCA ¶ 7144 (1968).

27. For example, the prime contractor may forward the subcontractor's claim even though the prime does not believe the subcontractor has a valid claim. This was the case in Main Cornice Works, Inc., ASBCA No. 9856, 65-1 BCA ¶ 4577 (1964), in which the prime contractor presented the subcontractor's claim with the admission that it was merely ministerially forwarding the claim for "the attention it merits." The Board denied the appeal and in doing so said that the attitude of the prime "raises the question whether there is any dispute at all between the appellant and the Government." To avoid the problems associated with the prime contractor acting as shepherd for the subcontractor, a subcontractor may bargain for an arbitration clause in the contract between the prime and the subcontractor. There is, however, no evidence of extensive use of arbitration clauses by prime and subcontractors. 7 CCH GOVERNMENT CONTRACTS REPORTER ¶ 90,060.

language in the agreement between the prime and the subcontractor by which the prime is relieved of liability to the subcontractor for the sort of claim which the subcontractor seeks to press through the prime? Thus, if the Government's conduct has delayed the subcontractor who seeks damages therefor, what effect should be given to a clause in the subcontract like the following:

21st. The Contractor or Subcontractor shall not in any event be held responsible for any loss, damage, detention or delay caused by the Owner or any other Subcontractor upon the building; or delays in transportation, fire, strikes, lockouts, civil or military authority, or by insurrection or riot, or by any other cause beyond the control of Contractor or Subcontractor, or in any event for consequential damages.²

It seems reasonably consistent with the "privity" idea summarized previously to say that the prime must have some basis for suing the Government in order for him to press the sub's claim at all. And if the prime is not liable to the subcontractor, then the prime would seem to have no basis for suing the Government. That at least seems to have been the feeling of the Court of Claims in the Severin cases.²⁹

² In J. L. States, 81 F. Supp. 595 (Ct. Cl. 1949); Continental Illinois National Bank & Trust Co. v. United States, 101 F. Supp. 203 (Ct. Cl. 1952), cert. denied, 343 U.S. 963 (1952); Continental Illinois Nat. Bank & Trust Co. v. United States, 115 F. Supp. 892 (Ct. Cl. 1953). The cases involved construction contracts between the Severins and the Government for various construction projects. The first case, cited above dealt with a post office at Rochester; the second and fourth decisions dealt with a housing project in Indianapolis and the third decision with a housing project in Atlanta. In all of the cases there was contained in subcontracts substantially the same exculpatory clause. All of the cases were concerned, at least in part with subcontractors' claims against the "Owner" in the above clause (that is, the U.S.) for various delays and the like. The subcontractors sought to press the claims through the Severins (or the Bank, as trustees of the Severin estates). For law review coverage, see Hubbard, The Severin Doctrine, 10 MILITARY L. REV. 191 (1960); Penne, Legal Remedies of the Government Subcontractor, 32 SO. CALIF. L. REV. (1958), reprinted in, 1 YEARBOOK OF PROCUREMENT ARTICLES 471 (1966).

²⁹ This clause was taken from the Severin case, 99 Ct. Cl. 435, 440, 443. See also Continental Illinois Nat. Bk. & Tr. Co. v. U.S. 112 Ct. Cl. 563, 564 (1949); 121 Ct. Cl. 203, 233, 244 (1952), cert. den. 343 U.S. 963 (1952); 126 Ct. Cl. 631, 680 (1953).

³⁰ And also in James Stewart and Co. v. United States, 63 F. Supp. 653 (Ct. Cl. 1946). It might be interesting to note that there seems to have been some regret about the first Severin opinion by the Judge who wrote it (Judge Madden). He expressed the feeling that the decision in United States v. Blair, 321 U.S. 730, 737 (1944) was contrary to his own analysis and that on the whole, his original decision ought to be set aside. Continental Illinois Nat. Bank & Trust Co. v. United States, 81 F. Supp. 563 (Ct. Cl. 1949). This feeling probably did not survive denial of certiorari in the
Simmons Company, Inc. v. United States, the court summarized its complicated rulings:

Since our decision in the Severin case, supra, this court has repeatedly delineated the only grounds upon which a prime contractor may sue the Government for damages incurred by one of its subcontractors through the fault of the Government. The decided cases make abundantly clear that a suit of this nature may be maintained only when the prime contractor has reimbursed its subcontractor for the latter's damages or remains liable for such reimbursement in the future. These are the only ways in which the damages of the subcontractor can become, in turn, the damages of the prime contractor, for which recovery may be had against the Government. . . . Thus, when the subcontract contains a clause completely exonerating a prime contractor from liability to its subcontractor for the damage complained of, suit cannot be maintained by the prime contractor against the Government. . . . The same result will follow when the subcontract provides for a complete release of the prime contractor's liability to the subcontractor upon the granting of additional time for the latter's performance, or the acceptance of final payment by the latter. On the other hand, if the subcontract is silent as to the ultimate liability of the prime contractor to the subcontractor for the damages complained of, suit by the former against the Government in behalf of the subcontractor will generally be permitted. . . . Lying between these extremes are those cases involving situations wherein the prime contractor has agreed to reimburse its subcontractor for damages it has suffered at the hands of the Government, but only as and when the former receives payment for them from the Government. This court has expressed the view that such clauses do not preclude suit by the prime contractor in behalf of its subcontractor. . . .


31. 304 F.2d 886, 888-89 (Ct. Cl. 1962) (citations omitted). In the Simmons case the Court held that, absent an exculpatory clause and despite releases executed by the claimant subcontractors, the prime remained liable to them and, hence, could present their claim in its name, against the Government. The general tenor of the releases was that the prime remained liable to the subcontractors at least to the extent it could effect a recovery against the United States. see 158 Ct. Cl. 393, 395-96, and perhaps otherwise, 158 Ct. Cl. 393, 399-400.
rigors of the Severin rule continued in the Blount Brothers cases. Again let the court speak for itself:

As indicated previously, plaintiff rejects the assertion of defendant that the *Severin* doctrine applies to count one of the petition. First, it is plaintiff's position that the exculpatory clause contained in the subcontracts relates solely to delay damages resulting from breaches of the contract. Secondly, according to plaintiff, count one alleges not an action for breach of contract, but rather a claim which comes within the terms of the contract. It follows, under this view, that, with regard to the subject matter of count one, plaintiff has *not* been relieved of liability to its subcontractor. Therefore, plaintiff concludes that the *Severin* rule, which is premised upon the non-liability of the general contractor, does not bar the present action.

The *Severin* doctrine has been discussed in cases involving claims which arose under the respective contracts. . . . However, in each of the cited cases, the prime contractor was permitted to maintain an action on behalf of a subcontractor, since there was no evidence that the prime contractor had been relieved of liability. Thus, in neither case was the court required to construe exculpatory language. . . .

Defendant cites a number of decisions in which a suit for the benefit of a subcontractor was held to be barred because the general contractor had been absolved of liability to the subcontractor. . . In each of these cases, the prime contractor was attempting to assert an action for breach of contract. According to plaintiff, the above cases are not controlling when the claim is one coming within the terms of the prime contract.

We consider the distinction which plaintiff seeks to draw to be valid in this case. As plaintiff points out, the exculpatory clause was intended to insulate the general contractor from the possibility of being (1) liable to the subcontractor for delay caused by the Government, yet (2) unable to recover from the Government. The need for such a protective clause is clear when the contractor's remedy against the Government is an action for breach of contract. On the other hand, the same necessity does not exist when the contract provides that the Government will compensate the contractor for such delay. Thus, we accept the contention of plaintiff that the exculpatory clause did not affect plaintiff's liability to its subcontractor insofar as claims under the *prime contract* were concerned. Therefore, if the present claims
are encompassed by the terms of plaintiff's contract with the Navy, then the *Severin* rule is not a bar.\(^\text{32}\)

The court concluded that the facts of the case indicated that there had been a supplemental agreement (although not the usual formal one) to reimburse the prime contractor (Blount Brothers) for costs incident to a cessation of the work. No doubt other refinements of contract construction will occur;\(^\text{33}\) but the most interesting point about all of this is that such complicated rationalization should be necessary to effectuate what seems to be such a simple right. One also should observe that these decisions may well leave the prime contractor in a very strong bargaining position if there are other outstanding claims between himself and the subcontractor: that is, he may agree to act as good shepherd only to the extent that the other (and possibly completely unrelated) claims are settled to his satisfaction. Certainly, too, much litigation is preceded or accompanied by efforts on the part of the parties to settle without prosecuting the case all the way to judgment; in such a case, the prime who has claims of his own as well as "good shepherd" claims will be less interested, one would presume, in the latter. He may expose himself to suit by the subcontractor, it is true; but it is also true that the expense and delay of such litigation may induce the sub to accept an unsatisfactory settlement.\(^\text{34}\)


The subcontracts involved contained the following exculpatory clause:

> Contractor shall not be liable to the Sub-Contractor for delay to the Sub-Contractor's work by the act, neglect or default of the Owner, or the Architect, or by reason of fire or other casualty, or on account of riots or of strikes, or other combined action of the workmen or others, or on account of any acts of God, or any other cause beyond the Contractor's control; but the Contractor will cooperate with Sub-Contractor to enforce any just claim against the Owner or Architect for delay.

171 Ct. Cl. 478, 483 n. 5 (1965); see 172 Ct. Cl. 1, 3 n. 1 (1965). The first Blount case involved a claim by Blount Brothers for additional work (done by the subcontractor) alleged to be compensable as an equitable adjustment under the terms of the contract. The court said the exculpatory clause quoted above did not deal with such claims and:

> There is no release in this case, and the subcontract is silent as to the ultimate liability of the prime contractor to the Brown Co., Inc. on the claim involved here. There is therefore no bar to this suit by the plaintiff.

171 Ct. Cl. 478, 483-84.


\(^{34}\) Some of the other bargaining wheels and levers are discussed in a sprightly
In one sense, a Government contract can be viewed as a delegation of responsibility to a single person or firm which is supposed to arrange for performance of tasks, furnishing of supplies or construction, and whatever else is involved. It is the contractor's undertaking to perform the contractually delegated function and, unless stipulated to the contrary, he may use such subcontractors, laborers, materialmen, purchase order vendors, etc., as he deems useful and desirable. That is his task and the problems flowing from it are his and not those of the United States except to the extent that he fails to perform the principal contract work or in some other ways fails to comply with his contractual undertaking. That his failures may be brought about by delinquencies of his subcontractors is, it is said in theory, not a concern of the Government which pays to be relieved of such concerns. Legally, this may be true enough, but the economic and commercial consequences of the contractor's actions may have to be borne by the United States in the form of delayed deliveries or performance, increased costs, or defective compliance with contract specifications by the contractor. When legal theory does not follow business fact, the theory can be expected to give a little.

This is illustrated by the following quotation:

The Government buys management from the prime contractor along with goods and services, and places responsibility on him to manage programs to the best of his ability, including placing and administering subcontracts as necessary to assure performance at the lowest overall cost to the Government. Although the Government does not expect to participate in every management decision, it may reserve the right to review the contractor's management efforts, including the proposed make-or-buy program.36

The preceding sentences were taken from the Department of Defense regulations dealing with contractors' "make or buy" programs, that is, programs based on the decision that the contractor shall make an item

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35. See, e.g. ASPR 23-203(a), quoted, note 24, supra, expressing Government detente from disputes between subs and primes because of the management concept.

36. ASPR 3-502.1 (emphasis added).
himself or buy it from a subcontractor. The regulations are elaborate and obviously only find real application in complex procurements. Similar provisions can be found in other regulations. In some cases, notification of the Government or its approval of changes in make or buy programs is required.

In addition to this, the Armed Services Procurement Regulation creates a procedure for contractor procurement system review and approval or "CPSR." This is not applicable to all contractors, but it is applicable to subcontractors' purchasing systems under some circumstances. Without going into the details of this procedure, it should suffice to point out that it is a management surveillance device and obviously can have effects on the ways in which a Government prime contractor handles relationships with his subcontractors and the ways in which proposed subcontractors may operate their own purchasing systems.

Further, one of the important features of administration of cost-type contracts is the determination of allowability of costs claimed by the contractor. The principles applicable to such determination are expressed in regulations. A prime contractor's claimed costs will include subcontractors' charges to him and these can be subjected to testing by the same principles. Auditors can make recommendations as to the allowance or disallowance of costs and thus produce an impact on the cost-type prime contractor's management techniques. The Government has audit rights and rights to examine books and records in con-

37. ASPR 3-901(a).
39. See ASPR 3-902.4; NASA PR 3.902-1(i); FPR § 1-3.902-3.
40. ASPR Sec. XXIII, part 1.
41. Initial or annual reviews are to be made of contractors expected to have sales to the Government during the next twelve months of more than $5,000,000 on other than firm fixed-price contracts or fixed-price contracts with escalation (as to these see ASPR 3-404.2, 3-404.3).
42. See ASPR 23-107.
43. The provisions of ASPR sec. XXIII, part 1 are elaborately implemented in ASPR Supplement No. 1 (Guide for Conducting Contractor Procurement System Review), see 4 CCH GOVT CONTRACTS REPORTER ¶¶ 37,350-37,379.
44. See ASPR Sec. XV; FPR 1-15.
45. See, e.g., the terms of the "Allowable Cost, Fixed-Fee, and Payment" Clause, ASPR 7-203.4, subclause (a).
46. See ASPR 3-809 (c)(1).
connection with many subcontracts and there is some evidence that it has disallowed costs at the subcontract level.

Somewhat different, but having a clear impact on management are the requirements dealing with approvals of subcontracts. The National

47. E.g., for cost-reimbursement contracts, see, e.g., ASPR 7-203.7, subclause (b) (Comptroller General audit rights), ASPR 7-104.41(c) (contracting agency audit rights); for negotiated fixed-price contract, see ASPR 7-104.15 (Comptroller General); for certain fixed-price contracts, see ASPR 7-104.41(a) & (b). ASPR 7-203.7 and 7-104.15 reflect the requirements of 10 U.S.C. § 2313(b) (1964) and are paralleled, pursuant to sec. 304(c), Federal Property and Administrative Services Act, 63 Stat. 395 (1949), as amended, 41 U.S.C. § 254(c) (1964), by provisions of FPR § 1-7.101-10. ASPR 7-104.41 implements the requirements of the "Truth in Negotiation" features of the Armed Services Procurement Act, as added by 76 Star. 528 (1962), 10 U.S.C. § 2306(f) (1964). This note, it should be observed, attempts to cite only a few of the regulatory provisions relating to audit rights which may extend to subcontractors. The provisions cited above rely on contract and subcontract clauses to confer such rights. An interesting decision involving audit rights based on 70A Stat. 132 (1956), 10 U.S.C. § 2313(b) (1964) and the clause included in a prime contract pursuant thereto is Hewlett Packard Co. v. United States, 385 F.2d 1013 (9th Cir. 1967), cert. denied, 390 U.S. 988, (1968).

Direct rights (i.e., without commanding use of a contract clause) to audit in cases of subcontracts under certain cost-type contracts are granted by 70 A Stat. 132 (1956), 10 U.S.C. § 2313(a) (1964).

48. I have little evidence of the extent to which auditors examining cost records of subcontractors actually disallow such costs at that level (i.e. rather than informing the prime that the sub's claimed cost will be disallowed if submitted by the prime). But this must have occurred on some occasion. See Committee Print, Conference Relating to Subcontractors' Claims, Senate Select Committee on Small Business, 88th Cong., 1st Sess. 4-5 (1963). Actually, one might expect, the spoken attitude of a Government auditor toward a sub's claimed cost might be very persuasive to the sub even if no formal pronouncement of disallowance was made.

49. These approval requirements are covered, inter alia, in ASPR Sec. XXIII, part 2; NASA PR 3.903-2. Such approval regulations also include provisions which reflect the statutory subsections requiring advance notification of certain subcontracts under cost and cost-reimbursement prime contracts. 70A Stat. 130 (1956), as amended, 10 U.S.C. § 2306(e) ( ). Federal Property and Administrative Services Act, 63 Stat. 395 (1949), as amended, 41 U.S.C. § 254(b) (1964). 10 U.S.C. § 2306(e) (1964) applies to NASA, 10 U.S.C. § 2303(a)(5) (1964). The requirement of approval is not in direct implementation of the command in the statutory sections. ASPR contains at 7-203.8 a clause for cost-reimbursement contracts. This implements the "notification" requirement of statute set out above and, additionally, requires approvals by the Contracting Officer of subcontracts. The Contracting Officer may also approve specific subcontract provisions under this clause, but this approval does not constitute a determination of allowability of costs unless the CO so states. There follows the text of ASPR 23-201.1 (a) which contains a notification and approval clause for fixed-price contracts. It illustrates the extent of possible control over the prime's management decisions.

23-201.1 Clause Entitled "Subcontracts" for Fixed-Price Contracts.

(a) In fixed-price contracts (other than firm fixed-price or fixed-price with escalation) having an estimated contract price of $1,000,000 or more
Aeronautics and Space Administration has expressed something of the philosophy behind such requirements:

and letter contracts contemplating any type of fixed-price contract, the clause set forth below is required if:

(i) it is anticipated that at least one subcontract may exceed $100,000 or such lower dollar amount as is to be inserted in (b) (ii) and (iii) of the following clause in accordance with (c) below; or

(ii) the work of the prime contractor, or of the plant or division of the prime contractor which will perform the contract, is predominantly for the Government.

SUBCONTRACTS (APR. 1967)

(a) As used in this clause, the term "subcontract" includes purchase orders.

(b) The Contractor shall notify the Contracting Officer reasonably in advance of entering into any subcontract if the Contractor's procurement system has not been approved by the Contracting Officer and if the subcontract:

(i) is to be a cost-reimbursement, time and materials, or labor-hour contract which it is estimated will involve an amount in excess of ten thousand dollars ($10,000) including any fee;

(ii) is proposed to exceed one hundred thousand dollars ($100,000); or

(iii) is one of a number of subcontracts, under this contract, with a single subcontractor for the same or related supplies or services which, in the aggregate, are expected to exceed one hundred thousand dollars ($100,000).

(c) The advance notification required by paragraph (d) above shall include:

(i) a description of the supplies or services to be called for by the subcontract;

(ii) identification of the proposed subcontractor and an explanation of why and how the proposed subcontractor was selected, including the competition obtained;

(iii) the proposed subcontract price, together with the Contractor's cost or price analysis thereof;

(iv) the subcontractor's current, complete, and accurate cost or pricing data and Certificate of Current Cost or Pricing Data, when such data and certificates are required by other provisions of this contract to be obtained from the subcontractor; and

(v) identification of the type of subcontract to be used.

(d) The Contractor shall not enter into any subcontract for which advance notification to the Contracting Officer is required by this clause, without the prior written consent of the Contracting Officer; provided that the Contracting Officer, in his discretion, may ratify in writing any subcontract. Such ratification shall constitute the consent of the Contracting Officer required by this paragraph.

(e) Neither consent by the Contracting Officer to any subcontract or any provisions thereof nor approval of the Contractor's procurement system shall be construed to be a determination of the acceptability of any subcontract price or of any amount paid under any subcontract or to re-
(d) The responsibility for subcontract selection, pricing, and administration rests with the prime contractor. Contracting officers must exercise the degree of review and surveillance necessary to assure that the contractor's responsibilities are being discharged effectively. Consequently, the responsibilities of contracting officers do not end with the consent to subcontracts. When a proposed subcontract is of substantial magnitude, or may reasonably be anticipated to have a significant impact on performance under the prime contract, contracting officers must concern themselves with the effectiveness of subcontract administration. In appropriate circumstances, contracting officers may require, as a condition to consent, the submission of the prime contractor's plan for administration of the subcontract and the proposed method for measuring the efficiency and effectiveness of the subcontractor in the area of cost, quality, and schedule.\(^{50}\)

I have no intention of raising any question about the merits of such approval requirements. Undoubtedly, they reflect the hard necessities of doing business in increasingly complicated technological fields, but I think that such requirements and the others briefly discussed in the preceding paragraphs do give witness to the fact that the "wall of privity" as a management conception has a number of substantial cracks. It is important to note with respect to privity as a judicial concept that while these approval clauses give the Government substantial control over making subcontracts, such control does not create a contractual or "privity" relationship between the Government and the subcontractor.\(^{51}\) The converse, however, may not necessarily be true.\(^{52}\)

**Some Breaches in the "Wall"

It might be convenient to point out some of the ways by which Government policy, procedure, and administration has penetrated the "wall of privity." I make no pretense that the list is complete, but I think it is revealing about the extent to which the word "Government" has come to be an extremely important part of the phrase "Government contracts." What follows does not explain the full impact of any of

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50. NASA PR 3,903-2(d).
52. La Sanska v. United States, 346 F.2d 333 (7th Cir. 1965) (footnotes omitted).
the policy or other requirements involved, it simply points out a major feature and indicates in the footnotes some related details.

The right to examine books, records, papers, etc.

This right is not a new one but it is currently of importance under a number of statutes or regulations. Sometimes a statute confers rights directly on the Government to examine subcontractors records, but in most cases the statute or regulation directs that the Government acquire the right by means of contract and ("flow-down") subcontract clauses.


Regulations: E.g., (a) regulations under E.O. 11246, 30 Fed. Reg. 12935, (1965), requiring a central clause relating to Equal Employment Opportunities, stipulate that the clause shall feature a "flow-down" provision for subcontracts requiring access to books, records, etc. 41 C.F.R. § 60-1.4(a) (5) and (7), 33 Fed. Reg. 7804, 7805 (1968); (b) regulations issued to carry out (although not to implement an express command of the "Truth in Negotiations" provisions added to the Armed Services Procurement Act by 76 Stat. 528 (1962), 10 U.S.C. § 2306(f) require contract and subcontract provisions giving the Government access to books and records. See ASPR 7-104.41. (c) Similar requirements to those just mentioned (in connection with "Truth in Negotiations") were added by administrative promulgation (i.e., without statute) to FPR, see FPR 1-3.814-2.

Since this article was written, Congress has reinforced the contractual acquisition of audit rights by an amendment to 10 U.S.C. § 2306(f), supra, which gives the contracting agency the right (independent of contractual authorization) to inspect contractors' and subcontractors' records. See Public Law 90-512 (1968).


56. E.g., the "Examination of Records" Act; the Equal Employment Opportunities Regulation, supra note 54.
Regulation of the conditions of labor under Government contracts and subcontracts

There are several statutes which pertain to wages, or wages and hours, or other rights of labor under Government contracts and subcontracts. Each statute and implementing regulation should be considered individually to determine the scope of its application: e.g., (i) the Contract Work Hours Standards Act,\(^5\) (ii) the Davis-Bacon Act,\(^6\) (iii) the Service Contract Act of 1965.\(^8\) As to whether the Walsh-Healey Public Contracts Act\(^6\) may be applicable in the cases of some subcontracts, see interpretations of the Department of Labor.\(^6\)

Debarment

One of the more rigorous methods by which the Government is able to police enforcement of certain of the public policy and other standards applicable to Government contracts is by “debarring” contractors. In general, this means that the person or firm debarred may not be awarded contracts for a specified period. Some statutes authorize such debarment for violation of their provisions, other debarments are authorized by regulation.\(^6\) Debarment does not extend to subcontracts, but it should be noted that the regulations provide:

Where a listed concern is proposed as subcontractor, the contracting officer should decline to consent to subcontracting with such concern in any instance in which consent is required of the Government before the subcontract is placed (see 7-203.8) un-


\(^6\) 46 Stat. 1494 (1931), as amended, 40 U.S.C. §§ 276a-5 (1964); ASPR 18-703.1; FPR § 1-12.403-1.

\(^7\) 79 Stat. 1035-36 (1965), 41 U.S.C. §§ 351-57 (1964); ASPR XII, part 10; FPR § 1-12.9.

\(^8\) 41 U.S.C. §§ 35-45 (1964); ASPR Sec. XII, part 6; FPR § 1-12.6.

\(^9\) See FPR § 1-12.602-3.

\(^6\) A full discussion is beyond the scope of this article. But debarment is authorized by the Davis-Bacon Act 46 Stat. 1494 (1931), as amended, 40 U.S.C. § 276a-2(a) (1964), the Walsh-Healey Public Contracts Act § 3, 49 Stat. 2037 (1936), as amended, 41 U.S.C. § 37 (1964), the Buy-American Act, 47 Stat. 1520 (1933), as amended, 41 U.S.C. § 10b(b) (1964) and others. Administrative debarment is based on final conviction of certain offenses or on violation of contract provisions. These subjects (including the subject of “ineligibility” and “suspension”) may be found set out in ASPR Sec. I, part 6, and FPR § 1-1.6.
less the Secretary or his authorized representative determines such placement to be in the best interest of the Government.63

Pricing control

I have included under this heading a group of diverse provisions dealing with controlling some of the profit aspects of Government contracts. I have by no means attempted to list all the devices that exist. Perhaps the best-known statute in this field (at least among the general public) is the Renegotiation Act of 1951.64 This Act applies to many defense contractors and subcontractors65 and operates to eliminate excessive profits from their total defense receipts and accruals from performance during each year or other fiscal period.66 In cases where the Renegotiation Act is not applicable,67 profits of contractors and subcontractors on certain aircraft procurement and on contracts for construction of naval vessels are subject to recapture in accordance with the terms of the Vinson-Trammel Act of 1934.68 Somewhat similar to the Vinson-Trammel Act are the provisions of section 505(b) of the Merchant Marine Act of 1936,69 applicable to contracts and subcontracts for the construction of merchant ships.

Perhaps the most noted pricing-control act (at least in terms of the frequency and heat of current discussion) is the section of the Hebert

63. ASPR 1-603(c). See also FPR § 1-1.603(f). “Approvals” and “consent” are discussed in the text, supra.


65. Sec. 102(a), 50 U.S.C. App. § 1212(a) (1964).

66. The act is administered by a Renegotiation Board, which is independent of the contracting agencies, sec. 107, 50 U.S.C. App. § 1217 (1964). Under the Act, individual contracts are not “repriced;” instead, the Act eliminates excessive profits from defense business receipts and accruals. In order to be subject to the Act in a given year, receipts and accruals have to exceed the statutory floor (currently $1,000,000 for most subcontractors, sec. 105[f], 50 U.S.C. App. § 1215[f]).

67. See sec. 102(e), 50 U.S.C. App. § 1212(e) (1964). The Renegotiation Act is not permanent, and should it expire, the Vinson-Trammel Act would be fully applicable, in accordance with its terms, to aircraft and naval vessel procurement. Even during the period while the Renegotiation Act is effective, some contracts and subcontracts may not come within its reach (see, e.g., sec. 106, Renegotiation Act, 50 U.S.C. App. § 1216 (1964) and, hence, may fall within Vinson-Trammel.


Act, or "Public Law 87-653," which deals with recovery of amounts by which contract or subcontract prices were increased due to non-current, inaccurate, or incomplete cost data which were furnished by the contractor or subcontractor and which served as a basis for the contract or subcontract price, or the price of certain contract or subcontract modifications. This is widely known as the "Truth in Negotiations" section and requires contractors and subcontractors to certify the currency, accuracy, and completeness of cost data. No attempt will be made here to do other than mention this section. It is rather elaborately implemented by clauses and regulations.

Certain economic policies

The Government to some extent attempts to effectuate economic policies through contracts and subcontracts. Particularly worthy of mention are the small business policy and the labor surplus area policy. In addition, some economic policies affecting subcontracts have foreign policy overtones, e.g., the Buy-American Act which gives preference to the use of American products, materials, etc., and the policy relating to purchases from Communist areas.

70. 76 Stat. 528 (1962); the Act amended several portions of the Armed Services Procurement Act, 10 U.S.C. § 2301-14 (1964).

71. Subsection (e), adding 10 U.S.C. 2306(f) (1964). This section is applicable only to agencies contracting under the Armed Services Procurement Act, that is, the Defense Department, the Coast Guard and the National Aeronautics, and Space Administration, see 10 U.S.C. § 2303(a) (1964). Although the Act does not require this, the Federal Procurement Regulation extends the "Truth in Negotiation" policy to the "civilian" agencies. See 29 Fed. Reg. 10102 (July 24, 1964), and FPR §§ 1-3.807, 1-3.814. This raises an interesting point: if the regulations are promulgated without the "benefit of statute," so to speak, presumably they can be easily altered by the executive authority which issued them, without any Congressional approval being necessary.

72. See ASPR 3-807, 7-104.29, 7-104.41, and, particularly 7-104-42; see also Item V Defense Procurement Circular No. 57 (1967); FPR § 1-3.807; FPR § 1-3.814.

73. Sec. 8(d) Small Business Act, 15 U.S.C. § 637(d) directs the Small Business Administration, the Secretary of Defense and the Administrator of General Services to establish and maintain a small business subcontracting program. See ASPR 1-707; FPR § 1-1.710.

74. ASPR 1-805 (see Item VI, Defense Procurement Circular No. 57 [1967]) and FPR § 1-1.805 encourage the placement of subcontracts with firms which will perform in labor surplus areas.


76. See ASPR sec. VI, part 4.
Security requirements

The need for such requirements is obvious. But it is worth pointing out that they extend down into the tiers of subcontractors, vendors, and the others.\textsuperscript{77}

Contract operation and administration

The clauses and regulations relating to this field are far too numerous to mention in complete detail. For purposes of this brief summary reference to a very few of the most important will suffice.

Change Orders. One of the most important rights the Government reserves to itself is the right to issue change orders which (without consent on the contractor's part) allow the Government to make changes in contract performance.\textsuperscript{78} Without specifying details, it is obvious that

\textsuperscript{77} The contract clause for Department of Defense is found at ASPR 7-104.12. This clause requires prime contracts to insert similar provisions in subcontracts. Important with respect to carrying out the clause are DD form 441 (DoD Security Agreement), 1 CCH Gov't Contracts Reporter, para. 923.50 and the DoD Industrial Security Manual, DoD 5220.22-M, 1 CCH Gov't Contracts Reporter, para. 905, \textit{et seq}. In general, the problem dealt with in these provisions in the safeguarding of military classified information. The \textit{Industrial Security Manual}, \textit{supra} \textsection 53; 1 CCH Gov't Contracts Reporter \textsection 915 makes clear that it is applicable to "subcontractors, vendors, or suppliers of prime contractors" and para. 54, 1 CCH Gov't Contracts Reporter \textsection 915.05, makes clear that the Manual applies to sub-subcontractors.

\textsuperscript{78} The standard "Changes" clause for fixed price supply contracts is in Art. 2, U.S. Standard Form 32, FPR 1-16.901-32; and for fixed price construction contracts in Art. 3, U.S. Standard Form 23A, 41 C.F.R. 1-16.901-23A. There are a variety of other clauses, appropriate for different types of contracts, e.g. ASPR 7-203.2 for cost-reimbursement supply contracts. For convenience of the readers the first-mentioned clause is reproduced:

2. \textbf{Changes}

The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: (i) Drawings, designs or specifications, where the 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. If any such change causes an increase or decrease in the 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, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change. \textit{Provided, however}, that the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior
the issuance of a change by the Government to the prime may bring about the issuance of corresponding changes to subcontractors, and this may be true whether or not the subcontractors grant to prime this right. In most cases, the right will be granted in subcontracts, but it should be apparent that, even if the prime had failed to obtain an appropriate subcontract clause, he may still be faced with the necessity of effecting the change vis-a-vis his subcontractor. Consequently, the issuance of change orders will affect subcontractors (and very possibly these effects will be felt through many tiers). Subcontractors will also be interested in the right (granted the prime contractor under "Changes" clauses) to obtain an "equitable adjustment" in the price to reflect the cost of the change. Effective assertion of the right to an equitable adjustment by the prime may be the most practical recourse of the subcontractor for payment for his own increased costs,—witness the previous "good shepherd" discussion.

Termination for Default. Another of the rights the Government reserves is the right to terminate the contract when the contractor has been delinquent in performance as defined in the clause. This will have an inevitable effect on the business of the subcontractor. In addition, under the clause, the subcontractor's conduct may have the effect of excusing the prime from the impact of the default termination or imposing on him duties to pay excess costs or actual damages as provided in the clause. Clearly, if the Government, in accord with the authority to final payment under this contract. Where the cost of property made obsolete or excess as a result of a change is included in the Contractor's claim for adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of such property. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

Somewhat related rights are provided in construction contracts when the "Suspension of Work" clause, FPR § 1-7.601-4, is used.

79. See the provisions of the clause, supra note 78.

80. The provisions of the clause for fixed-price supply contracts are reproduced from FPR § 1-8.707. Other clauses may be found in FPR § 1-8.708 to 1-8.710. See also ASPR 8-707-8-711. See the governing regulations at FPR § 1-8.6 and ASPR sec. VIII, art. 11, part 6. Default clauses are also found in Art. 11, U.S. Standard Form 32, FPR § 1-16.901-32; and Art. 5, U.S. Standard Form 23A, FPR § 1-16.901-23A. The clause is FPR § 1-8.707 reads:

§ 1-8.707 Default clause for fixed-price supply contracts.

The following clause is applicable as prescribed in § 1-8.700-2(b)(1):

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in the clause, terminates the prime contractor for default, the Government is not responsible (privity!) for the effects on the subcontractor.

**Default**

(a) The Government may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:

(i) If the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(ii) If the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

(b) In the event the Government terminates this contract in whole or in part, as provided in paragraph (a) of this clause, the Government may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated, and the Contractor shall be liable to the Government for any excess costs for such similar supplies or services: Provided, That the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.

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

(d) If this contract is terminated as provided in paragraph (a) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Govern-
Termination for Convenience. The right to terminate prime contracts for the convenience of the Government (i.e., simply on the ground that the Government has no further advantage in the contract) can be effected pursuant to provisions inserted in the majority of Government contracts of substantial dollar value.\(^8\) In return for the right to terminate for convenience the Government agrees to pay the prime contractor a fair price in settlement. This will include the costs of settling subcontract claims, but, in this respect, the regulations\(^8\) must be consulted in order to determine the bases for settlement which the Government will accept in dealing with the prime. Settlement is based on the premise that the subcontractor has no contractual rights against the Government.\(^8\)

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81. No attempt will be made to reproduce these lengthy contract provisions here. The reader is referred to FPR §§ 1-8.701 to 1-8.704-1; ASPR 8-701-8-704.1. The regulations contain suggested termination for convenience clauses which the prime contractor may insert in his subcontracts, FPR § 1-8.706, ASPR 8-706.

82. FPR § 1-8.208; ASPR 8-209.

83. See FPR § 1-8.208-1; ASPR 8-209.
Inspection. Another of the important rights the Government reserves to itself is the right to inspect contract performance while it is ongoing as well as when it is complete.84 Inspections may be able to be made at subcontractors' plants or facilities under the standard clauses.85 With respect to inspections at subcontractors' places of business or at the subcontractor "level", ASPR carefully provides:

Government procurement quality assurance actions at the subcontract level do not relieve the contractor of any of his responsibilities under the contract and do not establish any contractual relationship between the Government and the subcontractor. . . .86

The National Aeronautics and Space Administration Procurement Regulation provides in the same foresighted spirit:

All oral and written statements and contract provisions relating to the inspection of subcontracted supplies shall be so worded as not to (i) affect the contractual relationship between the prime contractor and the Government or between the prime contractor and the subcontractor, (ii) establish a contractual relationship between the Government and the subcontractor, or (iii) constitute a waiver of the Government's right to inspect or reject supplies.87

Rights in Inventions and Technical Data

It would be very far, indeed, beyond the limited scope of this paper to cover the difficult subject of rights in inventions under Government

84. See Art. 5, U.S. Standard Form 32 (fixed price supply contracts); FPR § 1-16.901-32; ASPR 7-103.5; Art. 10, U.S. Standard Form 23A (fixed price construction contracts); FPR § 1-16.901-23A; ASPR 7-602.11. Other clauses, for different contract types, exist, see, e.g., ASPR 7-203.5 for cost-reimbursement supply contracts.

85. All the clauses seem to recognize this right although Art. 5, U.S. Standard Form 32, supra note 84, and ASPR 7-203.5, supra note 84, do so more clearly than the other provisions. The implementing regulation, ASPR 14-103.1, suggests that inspections at subcontractors' plants are not to be the rule. To conduct such inspections might raise problems in privity and discreet contract administrators will avoid such problems, where feasible. See ASPR 14-407. ASPR 14-408 seems to suggest that inspection approval stamps can be impressed at the subcontract level. Although the regulation is careful to specify, ASPR 14-408(c), that such stamp of approval does not constitute acceptance, one is inclined to speculate about the psychological effect of a "complete inspection approval" stamp, ASPR 14-408(a)(ii), which is intended to identify contract or subcontract items which satisfy all contract quality requirements.


86. ASPR 14-407.1.

87. NASA PR 14.108.
prime and subcontracts. Suffice it to say that under many research and development type primes, the contractor is obligated to include in R&D type subcontracts the provisions of patent rights clauses. These provisions may obligate the subcontractor to give the Government right, title, and interest to inventions. Where the Government is paying for the research and development work this is clearly fair. Rights in technical data (writings, drawings, recordings which contain e.g., manufacturing information which a contractor or subcontractor might well want to keep from his competitors) also may be able to be required from subcontractors pursuant to clauses prime contractors may be under an obligation to include in their subcontracts. This may be entirely fair, of course, particularly where the Government contracts for and pays for the acquisition of the data. The ASPR clause also attempts to protect the subcontractor against the possible business disadvantage latent in making disclosures of data to primes or higher tier subs who may later compete with that subcontractor.

"Flow-down" provisions

No discussion of subcontracts could omit mention of this subject. I do not intend to detail the clauses involved, but only to note the technique. That is really quite simple. The Government may require the prime contractor to accept certain clauses in his contract and these clauses may call for the insertion by the prime contractor in his subcontracts of like provisions. This sort of thing obviously may be extended down through the tiers of subcontractors. Such provisions are said to "flow-down" and the poetry of the metaphor is apt.

Some of the Subcontractor's Remedial Possibilities

It should be emphasized at the beginning of this discussion that what has been said previously, and what will be said below, does not reflect

89. See, e.g., ASPR 9-203(b) subclause (g).
90. Id.
91. The National Security Industrial Association compiled a detailed study of "flow-down" provisions in the early 1960's. Readers might want to obtain this or a later edition. A revised edition is being prepared at this time.
one important situation, i.e., where the prime contractor is in bankruptcy or reorganization. Adjudication of bankruptcy under the federal statutes calls for different procedures for determination of rights and liabilities and discharge of claims than those to which we have been referring. That separate topic is therefore put aside for purposes of this article.

Fairness requires the observation that the Government has provided several different avenues along which the subcontractor may proceed for relief. These include the availability of payment bonds under the Miller Act, the \textit{ex gratia} relief available indirectly in some cases under “Public Law 85-804,” the availability of appellate “Disputes” hearing before the Board of Contract Appeals of the Atomic Energy Commission, and the availability of direct settlement with the Government to World War II subcontractors under the Contract Settlement Act. Subcontractors have also been able to look to the just compensation remedy in the Fifth Amendment where the Government has taken property of the sub (or property against which the sub has a security right) out of the hands of the prime.

Each of these offers (or has offered) some advantages, but none of them, as they presently exist, offer a really sufficient solution for the subcontractor who is interested in being paid for Government-caused delays, changes, or other money claims arising out of the contract or connected with it. This is the same subcontractor, it must be remembered, who is subjected to manifold Government regulations and clauses and who meets the rock-hardness of the wall of privity when he attempts directly to assault the citadel of the Treasury.

For example: the Miller Act requires a payment bond but the amount of the bond may not be sufficient to cover a subcontractor’s claim (whether taken by itself or in conjunction with other existing claims); a given subcontractor may not be covered by the bond; the bond’s

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95. \textit{See} § 7(d) of the Act, 58 Stat. 655 (1944), 41 U.S.C. § 107(d) (1964). The Act would not apply to present day contracts, but only to “war” contracts, § 3(a), (b), 58 Stat. 650 (1944), 41 U.S.C. § 103(a) (b) (1964).
96. U.S. Const., amend. 5.
98. Putting it in very general terms, the Act would seem to apply only to first tier subcontractors, suppliers, vendors and materialmen, and to subcontractors, sup-
coverage may not be such as to extend to the particular type of claim presented by the subcontractor.99 In other words, the Miller Act payment bond may not be an adequate remedy in a specific case. And, it ought to be pointed out, the Act relates to contracts "for the construction, alteration, or repair of any public building or public work of the United States." The general practice is to require payment bonds under the act only in connection with construction contracts.100 This would leave substantially unaffected the massive array of subcontractors under supply contracts, service contracts, and research and development contracts.101

Public Law 85-804102 confers authority to grant extraordinary contractual relief (by way of amendments of contracts without consideration, correction of mistakes, formalization of informal contractual commitments, and other actions) in order to facilitate the national defense. The Act speaks only in terms of contracts and does not mention subcontracts, but indirect relief is available to subcontractors under the Act.103 That is, the prime contract may be amended in order to furnish relief to a subcontractor. And, as Donald Jansen points out, there is no reason why the Act would not permit the Government to make a contract directly with the subcontractor to afford such relief.104 It is important to recognize that there are many conditions on relief, one

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99. Where costs incurred during delays (caused by the Government) were not able to be compensated under the terms of the prime and subcontract, see United States v. Rice, 317 U.S. 61 (1942); McDaniel v. Ashton-Mardian Co., 357 F.2d 511 (9th Cir. 1966).

100. See ASPR 10-104.1(a); FPR 1-10.105-2. Authority to grant waivers (applicable to cost-type construction contracts and to many types of contracts able to be called "supply" contracts) from the Act was delegated by 55 Stat. 147 (1941), as amended, by 69 Stat. 83 (1955) to the Secretaries of the Army, Navy, Air Force and Treasury (presumably with respect to the Coast Guard).


104. Id.
of the most notable being that relief is within the discretion of the
Government and, in general, cannot be compelled.\textsuperscript{105}

It is pertinent to observe that remedies have been suggested. For
example, a statute proposing an amendment to the Small Business Act
which would permit some subcontractors to sue the United States di-
rectly has been drafted.\textsuperscript{106} No comment or extended analysis of this

\textsuperscript{105} See Bolinders Co. v. United States, 153 F. Supp. 381 (Ct. Cl. 1957), cert. de-
nied, 355 U.S. 953 (1958). This decision was reached under Title II, First War Powers
Act, sec. 201, 55 Stat. 839, but the same conclusion would have to be reached, in my
opinion, under Public Law 85-804. See Jansen, \textit{supra} note 103, at 1014.

\textsuperscript{106} The following is taken from H.R. Rep. No. 2341, 89th Cong., 2d Sess. 159-60
(1966):

\textbf{PROPOSED LEGISLATION ON SUBCONTRACTOR'S RIGHT TO SUE THE GOVERNMENT}

\textit{A BILL To amend the Small Business Act}

\textbf{Be it enacted by the Senate and House of Representatives of the United
States of America in Congress assembled, That subsection 8(d) of the
Small Business Act (75 Stat. 646) is amended by adding at the end thereof
a new paragraph reading as follows:

5(a) Every subcontractor or supplier under a prime contract subject
to the small business subcontracting program promulgated pursuant to
this subsection, other than a contract subject to the provisions of the Act
of August 24, 1935 (49 Stat. 793), who has not been paid in full for the
services rendered or supplies furnished for the performance of the said
prime contract may, after the expiration of a period of thirty days from
the date payment became due for the said services or supplies, file suit
against the United States of America for the amount unpaid at the time
of institution of such suit: \textit{Provided, however}, That not less than thirty
days prior to the institution of such suit the subcontractor or supplier shall
serve upon the Attorney General of the United States, and upon the head
of the department or agency with which the said prime contract was made,
written notice of intent to bring such suit. This notice shall set forth the
basis for and amount of the claim and identify the Government contract
pursuant to which the subcontract was performed or supplies furnished.

(b) The court in which suit under this paragraph is brought shall, upon
the application of the United States of America, join all parties necessary to
adjudicate all matters in controversy in such suit. If judgment is entered
against the United States of America, the court shall also adjudicate the
right of the United States of America to reimbursement from any of the
parties so joined.

(c) Nothing contained in this paragraph shall be construed as affecting
the subcontractor's or supplier's right to sue the party with whom the
subcontractor or supplier is in privity of contract.

(d) Every suit instituted under this paragraph shall be brought in the
United States district court for the district in which the subcontractor or
supplier maintains its principal place of business, irrespective of the amount
in controversy, or in the United States Court of Claims.

(e) Upon receipt of such notice of intent to sue, the United States Gov-
proposal is attempted here, but it might be noted that the proposed statute would put the subcontractor in a better position than a prime contractor inasmuch as the subcontractor could sue the Government in a United States District Court no matter what the amount of his sub-contract claim, whereas prime contractors may not sue the United States in federal District Court unless the amount claimed exceeds $10,000. Then too, the proposal restricts the benefits of the new right to sue to subcontractors and suppliers under primes subject to the small business subcontracting program\(^\text{108}\) and eliminates subcontracts subject to the Miller Act.\(^\text{109}\) It is hard to perceive a valid reason why other subcontractors are to be excluded.

Another proposal has been made, this time by a judge sitting in a case involving a non-federal subcontractor's claim. In *Tully & DiNapoli Inc. v. State,*\(^\text{110}\) Judge Del Giorno of the New York State Court of Claims held that a subcontractor might not be joined as a party claimant (mainly because of the "Wall of Privity") and suggested that modern

\[(f)\] In any event, the Government's liability to the subcontractor shall not exceed the amount due and unpaid to the prime contractor at the time of the service of the notice of intent to sue and in the event there is more than one such notice served, the payments by the Government to the extent of the sum due the prime contractor shall be paid out in the order of the date of service of such notices and if the dates are the same then equally between those of even date of service.

\[(g)\] Whenever the subcontractor's claim is based upon a written order for a change or addition to the original contract or subcontract, it may be prosecuted by the subcontractor in his own right, even though the prime contractor has made no claim therefor, subject, however, to the same limitations set forth in subdivision (f) hereof.


\(^{108}\) See sec. (a) of the proposal; the small business subcontracting program is prescribed by sec. 8(d) of the Small Business Act, as added by 15 U.S.C. § 637(d) (1964).

\(^{109}\) See sec. (a) of the proposal; the Miller Act is found in 49 Stat. 793-94 (1935), as amended, 40 U.S.C. §§ 270a-270e(1964).

day concepts might point out another result except that the right to sue the State had not been granted to subcontractors. The Judge also suggested that a statute might be prepared and, if necessary, an amendment to the State constitution be proposed to the Constitutional Convention then about to convene. His suggestion included some details about the language of the statute. 111

I think another possibility exists. For present purposes only a general outline need be given, but I think this will be helpful to the reader in evaluating the availability of remedies to cure the situation of subcontractors. One of the traditional remedies of the equity court was the bill of interpleader. Stated very generally, this was a procedure whereby a fund-holder or stake-holder was able to bring before the court adverse claimants to the fund he held and compel them to litigate for the purpose of establishing their rights in the fund. There were several technical requirements112 and, to relieve against these, equity courts permitted what were called "bills in the nature of bills of interpleader." 113 There is a Federal Interpleader Act making a liberalized

111. Judge Del Giorno's suggestion was (272 N.Y.S. 2d 667, 672):
We would also suggest to all parties involved herein, including the State, that they work towards a change in the Statute which, in a general way, would state: "Provided that a subcontractor or subcontractors on a public contract have been approved by the State, such subcontractor or subcontractors may join with the contractor in a claim which may be filed against the State, in which he shall specify the nature of his claim, extra work, labor and/or delays imputed to the fault, laxity or interference of the State with the contract work which resulted in damages to him for which he demands judgment. In the event of any dispute arising at the trial as to any items of the claim between the contractor and subcontractor, such issue may be determined by the Court of Claims. In the event of the failure of the contractor to proceed with the filing of his claim or the trial thereof after it is filed, the Court, upon good cause shown, may order the parties to try the subcontractors' claim upon which judgment may be entered in favor of the subcontractor or subcontractors claimants. Thereafter, the contractor may not be heard to complain regarding the result of said trial."

112. For a general discussion of interpleader, see 48 C.J.S. Interpleader (1963); 4 Pomeroy, Equity Jurisprudence § 1320-29 (5th ed). James, Civil Procedure, § 10.21 (1965), states that there were four traditional limitations imposed on the use of interpleader: (1) The same thing, debt or duty must be claimed by all the parties against whom relief is demanded, (2) all their adverse titles or claims must be derived from a common source, (3) the stakeholder, or the person seeking interpleader relief must not claim any interest in the subject matter; and (4) the stakeholder must not have incurred independent liability to the claimants.

113. For a discussion, see 48 C.J.S. Interpleader § 7; McClintock, Equity, § 189 (2d ed. 1948).
procedure available in the federal courts,114 this is supplemented by Rule 22 of the Federal Rules.116 The remedy is a broad and useful one, but it would appear it depends on initiation by a plaintiff seeking to have established rights in a fund he holds or by a defendant who desires to effect an interpleader by way of cross-claim or counterclaim.116

It would seem apparent that the total liability of the Government under a contract would be able to be treated, in analogy, as like the fund involved in interpleader proceedings. The comparison is not exact, however, because, of course, the Government's total liability may be in many respects contingent or speculative until there is court disposition or decision by a Board of Contract Appeals of questions of liability under contract clauses or court determination of liability for damages for breach of contract by the Government. The contract price may not be the ceiling; under the "Changes" clause, for example, an equitable adjustment may result in an increase of the originally stated fixed-price.117 But, while the exact amount may not be able to be stated in a given case, the Government's total liability under the contract is able to be ascertained by proper proceedings among all the claimants (including prime and subcontractors). This is a conceptual "fund," of course, but its amount can be determined in accordance with legal principles and/or contract provisions already known. Under existing interpleader procedures, however, it might be concluded that the Government would have to initiate any proceedings relating to the fund in court. It does not appear that Boards of Contract Appeals would have any standing to act, by way of interpleader.

Needed, therefore, would be statutory authority to meet some of the problems suggested above. Fortunately, there is helpful statutory "precedent", so to speak. Ancient usage in the civil code countries is the foundation for what the Louisiana Code of Civil Procedure118 terms

116. As to the defendant, see Fed. R. Civ. P. 22(1).
117. E.g., art. 2, U.S. Standard Form 32, FPR § 1-16.901-32, mentioned in the text, supra, allows change orders to be issued and requires an equitable adjustment in price to be made to reflect any increase in lost of performance. This equitable adjustment will normally be agreed upon and reflected in a supplemental agreement to the contract. If an agreement cannot be reached, the matter may have to be taken to the Board of Contract Appeals and, possibly, to the Court of Claims for ultimate disposition.
"concursus proceedings." These proceedings very much resemble interpleader. But the most important point to note is the fact that the Louisiana legislature has extended concursus by statute to proceedings involving public contracts:

§ 2243. Petitions by authorities against claimants, contractors and surety; preferential payment of claimants

If at the expiration of the forty-five days any filed and recorded claims are unpaid, the governing authority shall file a petition in the proper court of the parish where the work was done, citing all claimants and the contractor, subcontractor, and surety on the bond and asserting whatever claims it has against any of them, and shall require the claimants to assert their claims. If the governing authority fails to file the proceeding any claimant may do so.

All the claims shall be tried in concursus and the claims of the claimants shall be paid in preference to the claims of the governing authority.119

Art. 4651. Definition

A concursus proceeding is one in which two or more persons having competing or conflicting claims to money, property, or mortgages or privileges on property are impleaded and required to assert their respective claims contradictorily against all other parties to the proceeding.

Art. 4652. Claimants who may be impleaded

Persons having competing or conflicting claims may be impleaded in a concursus proceeding even though the person against whom the claims are asserted denies liability in whole or in part to any or all of the claimants, and whether or not their claims, or the titles on which the claims depend, have a common origin, or are identical or independent of each other.

No claimant may be impleaded in a concursus proceeding whose claim has been prosecuted to judgment. No person claiming damages for wrongful death or for physical injuries may be impleaded in a concursus proceeding, except by a casualty insurer which admits liability for the full amount of the insurance coverage, and has deposited this sum into the registry of the court.

Art. 4656. Each defendant both plaintiff and defendant; no responsive pleadings to answer; no default required

Each defendant in a concursus proceeding is considered as being both a plaintiff and a defendant with respect to all other parties. No exceptions or responsive pleadings may be filed to the answer of a defendant, and every fact alleged therein is considered as denied or avoided by effect of law as to all other parties. If a defendant fails to answer, issue need not be joined by default.

Modifications to fit the federal juridical milieu would obviously have to be made, but the heart of the statute, the use of the concursus proceeding for joinder of the parties, and the authorization for a claimant other than the Government to file the proceeding, could be retained. Legislative authority to entertain such proceedings could be extended to the Boards of Contract Appeals and the federal courts.

The three proposals in the preceding several paragraphs do two things: they indicate the need for some remedial steps concerning the claims position of the subcontractor and they make suggestions for appropriate action. I will leave it to the reader to make his own valuation; my own indicates that legislation along the lines suggested by the Louisiana statutes referred to above would be most promising.