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TERMINATIONS IN FEDERAL GOVERNMENT CONTRACTS

PAUL H. GANTT* AND JAMES A. COHEN**

FOREWORD

At the outset, it should be noted, this article will reflect a noticeable general trend in the field of Federal Government contracting and procurement. There are only a handful of opinions of the Supreme Court of the United States and of the Court of Claims dealing with termination and there are only a few, but very helpful, opinions by the Comptroller General. On the other hand, there are literally hundreds of decisions of the Armed Services Board of Contract Appeals on this subject. No precise statistics are available, but the writers estimate that about 8% of all opinions issued by the ASBCA concern terminations. These decisions deal with almost every aspect of termination problems and of the applicable regulations.

There is another phenomenon which can be best described by the experience of Mr. Gantt in the Department of the Interior. During his sixteen years of service with that Department, not more than five terminations for default were issued in that Department. Until Mr. Gantt negotiated complicated multi-million dollar contracts for the Bureau of Mines, the Geological Survey, and the Office of Saline Water, no contract was ever written to include a termination for convenience clause.

As Chairman of the Interior Board of Contract Appeals, Mr. Gantt participated in about 300 contract appeals. Only two of those appeals concerned terminations. In one, the appeal of *Foster Wheeler Corporation*,¹ the contract was terminated for default in 1953 and had been pending before the Interior Board of Contract Appeals since 1955. The appeal was disposed of in 1959, when Mr. Gantt, as hearing

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The opinions expressed by the writers express only their own views, and do not represent the views of the Atomic Energy Commission.

1. IBCA-61, 67 I.D. 22, 60-1 BCA 2481 (1960).

official at the prehearing conference, dictated a tentative opinion in the record.²

The long pendency of this termination action shows the effect of the absence of contract administration experience in the field. It is our hope that this article may provide some guidance to both contractors and contracting officers when they are faced with a termination situation.

James A. Cohen

TERMINATION TECHNIQUES AND PROCEDURES

In 1875, the Supreme Court decided *United States v. Corliss Steam Engine Co.*,³ a case dealing with the termination of Government contracts. The Court held that the authority of the United States Government to enter into contracts carried with it the power to cancel such contracts when cancellation was determined to be in the best interests of the Government.⁴ Since *Corliss*, the termination techniques and provisions have developed until at the present time both the Federal Procurement Regulations⁵ (FPR) and the Armed Services Procurement Regulations⁶ (ASPR), as well as many of the supplementing and implementing regulations of other agencies,⁷ provide comprehensive guidance for the use of termination provisions and the administration of

2. 67 I.D. 23. This opinion was approved by the Comptroller General in Dec. Comp. Gen. B-119159 (June 20, 1960) and therefore represents a valuable tool for the many Government agencies which do not include termination for convenience clauses in their contracts. The views expressed in *Foster Wheeler* were subsequently included in the FPRs in § 1-8.201(c).

3. 91 U.S. 321 (1875). This case involved the validity of a settlement entered into between the Secretary of the Navy and a contractor. Although this case makes it clear that the Government has a right to terminate a contract, it does not concern itself with the rights and obligations of the parties once the termination has been achieved.

4. Absent a statutory or contractual right, the authorities are in agreement that the Government would be liable for a breach of contract to the same extent as any other contracting party. See, CUNEO, *GOVERNMENT CONTRACTS HANDBOOK* 112 (1962). Cf. *United States v. Behan*, 110 U.S. 338 (1884) in which the Government ordered the stoppage of work due to no fault of the contractor and the court awarded the contractor damages.

5. FPR 1-8, 41 C.F.R. Part 1-8.

6. ASPR Section VIII, 32 C.F.R. Chapter 1, Part 8.

7. See, Atomic Energy Commission Procurement Regulations, 41 C.F.R. Part 9-8, Department of Agriculture Procurement Regulations, 41 C.F.R. Part 4-8, National Aeronautics and Space Administration Procurement Regulations, 32 C.F.R. Part 18-8. (However, many of the agencies have not issued implementing regulations in the termination area). See, Federal Aviation Agency Procurement Regulations, 41 C.F.R. Chapter 2; General Services Administration Procurement Regulations, 41 C.F.R. Chapter 5; Department of the Interior Procurement Regulations, 41 C.F.R. Chapter 14.

termination procedures. Since both of the writers are most familiar with the FPRs they have been used as the primary reference with the knowledge that there are some differences, although generally not of a substantive nature, between the FPRs and the ASPRs.

The purpose of termination provisions is to eliminate some of the uncertainties which would arise upon the termination of a contract. As a tool of administrative convenience serving to facilitate termination and settlement of contractual obligations, they are invaluable; However, as is the case with all contract articles, they do not solve all of the problems.

Termination provisions of Government contracts come in two varieties, i.e. "Termination for Default" and "Termination for Convenience." Of course, appropriate modifications of each are used depending on the type of contract, such as supply contract, construction contract, and research and development contract and the method of payment, i.e., fixed price or cost type.

While the invocation of the termination for default procedures assumes the failure of performance by the contractor, the use of termination for convenience procedures assumes no grounds for default exist, but that for good reason the Government desires to terminate, in whole or in part, the contractual relationship. Of course the choice of termination for default or termination for convenience will materially affect the duties and obligations of both parties. Under a default termination, although the Government is liable for supplies which have been delivered and accepted, the Government will not be liable for the contractor's cost of undelivered work.⁸ In addition, the Government has the right to repayment of advance payments or progress payments⁹; and, by specific provision in the default clause, the contractor will be liable for the costs of repurchasing "similar" articles¹⁰ and further may be liable for damages for breach of contract.¹¹

If the contractor can persuade the contracting officer to issue a termination for convenience, it is certainly in his best interest to do so. Under this provision, the contractor will be entitled to recover performance costs plus profit on work performed. Although the settlement under the termination for convenience article may approach the contract price, it cannot exceed it.¹²

8. See, FPR 1-8.602-2.

9. *Ibid.*

10. See paragraph (b) of the standard clause.

11. *Rumley v. United States*, 285 F.2d 773 (Ct. Cl. 1961).

12. See FPR 1-8.308.

TERMINATION FOR DEFAULT

The standard termination for default clause for Fixed-Price Supply Contracts is set out in ASPR 8-707 and FPR 1-8.707. The procedures to be followed where there is a default termination of a fixed-price contract are provided for in ASPR 8-602 and FPR 1-8.602. In any fixed-price construction contract estimated to exceed \$10,000 the default clause set forth in ASPR 8-709 and FPR 1-8.709-1 is required to be used.¹³ When the amount of the contract is estimated not to exceed \$10,000, the clause set forth in ASPR 8-709 and FPR 1-8.709-2 is used.¹⁴ The FPR section providing procedures for default termination of fixed-price construction contracts is 1-8.603 and the similar ASPR provision is ASPR 8-602 which provides procedures for both construction and supply contracts. Although the discussion of default termination has been divided into two major sections, i.e., Fixed-Price Supply Contracts and Fixed-Price Construction Contracts, many of the principles applicable to each are similar or identical; therefore, many of the cases discussed in the first portion of the article may have been decided under the construction contract clause.

FIXED-PRICE SUPPLY CONTRACTS: THE RIGHT TO TERMINATE

The standard termination for default clause found in fixed-price supply contracts provides that the Government "may" terminate the contract for (1) failure of the contractor to deliver or perform the services within the time specified in the contract,¹⁵ (2) failure to perform

13. FPR 1-8.700-2(b)(4). For the purpose of this article discussion of the standard form construction default clause will be limited to the clause set out in this section.

14. FPR 1-8.700-2(b)(5).

15. See, subparagraph (a)(i) of the standard clause. There is some disagreement among the termination experts as to whether or not the default clause makes time of the essence. For example see Coons, Whelan, *Default Termination of Defense Department Fixed-Price Supply Contracts*, 32 NOTRE DAME LAW. 189 (1957), in which it is stated on p. 191:

First of all, the provision permitting default termination for the slightest delay beyond the specified delivery time obviously makes time "of the essence" in all contracts, even where timely delivery seems of little importance. Thus the contractor is held to a higher standard of performance as regards time than in the usual private contract where, absent any express provision, the apparent urgency of the need for the goods would govern the materiality of the delays in delivery.

This statement is contrasted with the following statement in Risik, *Defaults In Federal Government Contracts*, 14 FED. B.J. 339 (1954) at p. 348: "In contracts for supplies or services, the current view is that time is not of the essence unless it is apparent from all the facts and circumstances that time is a material factor." We are inclined to agree with the Coons-Whelan views.

any of the other provisions of the contract,¹⁶ or (3) failure to make progress so as to endanger performance in accordance with the contract terms.¹⁷

When a contractor is in default, the default clause vests in the Government the discretion as to whether to terminate the contract.¹⁸ In determining whether the contract should be terminated for default, the contracting officer is required to take the following factors into consideration:

1. The provisions of the contract and applicable laws and regulations;
2. The specific failure of the contractor and the excuses, if any, made by the contractor for such failure;
3. The availability of the supplies or services from other sources;
4. The urgency of the need for the supplies or services and the period of time which would be required to obtain the supplies or services from other sources as compared with the time in which delivery could be obtained from the delinquent contractor;
5. The degree of essentiality of the contractor in the Government procurement program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts;
6. The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments;
7. The availability of funds to finance repurchase costs which may prove to be uncollectible from the defaulted contractor, and the availability of funds to finance termination costs if the default is determined to be excusable; and

16. See subparagraph (a) (ii) of the standard clause. FPR 1-8.602-3(b) in discussing subparagraph (a) (ii) uses as an example of a failure to perform any other provision of the contract the failure to furnish a required performance bond. There is some question as to whether the default clause substantially alters the common law right permitting termination by an injured party only where the other party committed a material breach. Compare Coons and Whelan, *supra* note 15 at 217 with Risik, *supra* note 15 at 346-49 and Cuneo, *Waiver of the Due Date in Government Contracts*, 43 VA. L. REV. 1, 17-18 (1957).

17. See subparagraph (a) (ii) of the standard clause. This provision brings into play the whole area of anticipatory breach.

18. R. M. Cantrell & Sons, ASBCA No. 7680, 1962 BCA 3320 (1962). In this case the Armed Services Board, citing Thermo Nuclear Wire Industries, ASBCA No. 6026, 61-1 BCA 2889 (1960), and El-Tronics, ASBCA Nos. 5501, 5511 and 5512, 60-2 BCA 2712 (1960), stated that it could decide whether under the facts the contract gave the Government the legal right to terminate the contract for default, but that the Board could not decide whether or not such right should have been exercised.

8. Any other pertinent facts and circumstances.¹⁹

Additionally, the alternatives to a default termination should be taken into consideration. These are set out in the FPRs²⁰ as, (1) continuance of contract performance either through the contractor or his surety or guarantor under a revised delivery schedule, (2) continuance of contract performance through a subcontractor or other acceptable third party provided the rights of the Government are adequately preserved, and (3) a no-cost termination if the supplies are no longer needed and the contractor is not liable to the Government for damages.²¹

If the contracting officer determines that a default termination is the proper course of action and the default was due to a failure to meet the delivery schedule,²² the contracting officer should issue a termination notice informing the contractor that his right to proceed with contract performance is terminated.²³

The Government has a reasonable time from the delivery date within

19. FPR 1-8.602-3(c). See ASPR 8-602.3 which provides for a consideration of essentially the same factors with the exception of (7) which is not included in the ASPR.

20. FPR 1-8.602-4.

21. FPR 1-8.602-7 discusses the damages which the contractor might be liable for.

22. The Government does not have to wait until the last delivery date has passed but can terminate a contract for default when a contractor fails to meet any one of a scheduled series of delivery dates. *Delmar Mills, Inc.*, ASBCA No. 6138, 61-1 BCA 2910 (1961).

23. FPR 1-8.602-3(d) sets out in detail the contents of the notice of termination for default as follows:

- (1) Set forth the contract number and date;
- (2) Describe the acts or omissions constituting the default;
- (3) State that the contractor's right to proceed further with performance of the contract (or a specified portion of the contract) is terminated;
- (4) If the contracting officer has not determined whether the failure to perform is excusable, state that the supplies or services terminated may be procured against the contractor's account, and that the contractor may be held liable for any excess costs;
- (5) If the contracting officer has determined that the failure to perform is not excusable, state that the notice of termination constitutes such decision and state that the contractor will be held liable for any excess costs, and also state that the contractor has the right to appeal such decision under the Disputes clause;
- (6) State that the Government reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs; and
- (7) State that the notice constitutes a decision that the contractor is in default as specified and that the contractor has the right to appeal under the Disputes clause.

which to issue a notice of termination.²⁴ When the Government fails to issue a notice of termination the facts occurring after the passage of the delivery date will have to be examined in order to determine whether there has been a waiver of the delivery date.²⁵ Probably the most prevalent act of waiver is acceptance of delivery after the delivery date.²⁶ Requests by the Government for the contractor to continue performance,²⁷ and requests for the contractor to take other action after the delivery date²⁸ also have been held to constitute a waiver. If a waiver has taken place, a new delivery schedule must be established and must be reasonable under the facts.²⁹ When the Government establishes a new delivery date, the Government must notify the contractor of such date.³⁰

Where the decision to terminate the contract is based on a failure to perform other contract provisions or a failure to make progress, the

24. 43 Comp. Gen. 1 (1963). In this decision the Comptroller General stated at p. 4:

There seems to be no doubt that the Government has a reasonable length of time, usually referred to as 'forebearance', after a contractor's failure to make timely delivery, within which to make up its mind whether or not to terminate for default. The contractor's actions after the date deliveries are delinquent, such as the purchase of additional tooling or materials, continued production, or partial deliveries, may, if known to the Government, operate to shorten the time which will be considered a reasonable forbearance period, but it seems to us that in the absence of affirmative action by the Government which can be construed as encouragement to the contractor to continue its efforts to deliver, this can be their only effect.

See *Midwest Engineering*, ASBCA No. 5390, 1962 BCA 3640 (1962) in which a 56-day period of forbearance was held not to constitute a waiver.

25. See *Associated Aircraft*, ASBCA No. 7255, 1963 BCA 3739 (1963) (Acceptance Inspection); *Industrial Chamberheat*, ASBCA No. 6128, 61-1 BCA 2883 (1961). (Acceptance of Samples); *Goodrich Co.*, ASBCA No. 2760, 58-1 BCA 1624 (1958).

26. *Industrial Chamberheat Laboratories*, ASBCA No. 6182, 61-1 BCA 2883 (1960); *Engineering Enterprise, Inc.*, ASBCA No. 5527, 60-1 BCA 2647 (1960); *Nutt Mfg. Co.*, ASBCA No. 3594, 57-2 BCA 1480 (1957).

27. See *Fleet Services Specialties Co.*, ASBCA No. 2461, 58-2 BCA 1850 (1958).

28. *Clad International Corp.*, ASBCA No. 4813, 59-2 BCA 2385 (1959); *Resolute Paper Products Corp.*, ASBCA No. 3670, 57-2 BCA 1432 (1957).

29. See *L. W. Foster Sportswear Co., Inc.*, ASBCA No. 5754, 1962 BCA 3364 (1962). *Lumen, Inc.*, ASBCA No. 6431, 61-2 BCA 3210 (1961); *Caskel Forge, Inc.*, ASBCA No. 6205, 60-2 BCA 2718 (1960).

30. In *Lumen, Inc.*, ASBCA No. 6431, 61-2 BCA 3210 (1961) the Armed Services Board quoted the following rule:

The rule is well settled that, where time of performance is waived, 'neither party can thereafter rescind the contract on account of such delay without notice to the other, requiring performance within a reasonable time, to be specified in the notice or the contract would be abrogated'.

default clause requires a notice from the contracting officer specifying such failure and a minimum of 10 days in which the contractor may "cure" the failure. The contract clause does not require that the notice be in writing if the minimum period of 10 days is given to cure the defective performance, but does require that the granting of a period longer than 10 days be in writing. However, it has been held that the cure notice must be in writing.³¹

Although the cure notice may appear to be a rather innocuous requirement, the contents of such a notice may spell out the difference between a valid default termination and one that is invalid.³² For example, where the notice is issued and the defect cured, the notice will not remain as the basis for default where new reasons arise.³³ In addition, where the notice does not set forth the defects with some degree of specificity, it may be considered to be inadequate to support the default termination.³⁴

A contractor will not be permitted to take advantage of a failure to issue a "cure" notice where the contractor has knowingly delivered

31. *Fitzhenry-Guptill Co.*, ASBCA 1885 (1956). Although FPR 1-8.602-3 does not specifically require that the notice be in writing it does appear to contemplate a writing.

32. See *General Products Co., Inc.*, ASBCA No. 6522, 61-1 BCA 3003 (1961); *Facs Products, Inc.*, ASBCA No. 3336, 57-1 BCA 1215 (1957). FPR 1-8.602-3(b) provides that the 10-day notice shall set forth all the contract provisions the contractor failed to meet, or a summary of the findings which demonstrate that the contractor has failed to make acceptable progress. If previous correspondence is relied on it should be specifically referenced in the cure notice. In addition the cure notice should state that the contract may be terminated if the defect is not cured within 10 days or such longer period as the contracting officer allows, inform the contractor of his contractual liabilities in the event of a default termination, request an explanation from the contractor, state that failure to provide an explanation may be treated as if no explanation exists and invite the contractor to discuss the matter at a conference.

33. *Crown-Lee Corp.*, ASBCA No. 7644, 1962 BCA 3540 (1962).

34. See *Valley Contractors*, ASBCA No. 9547, 1964 BCA 4071 in which the following cure notice was held to be inadequate:

It is requested that you submit to the undersigned Contracting Officer within ten (10) days from the date of receipt hereof any facts or circumstances which you believe excuse your failure to perform. You are further notified that the Government considers your failure to make progress toward completion a condition that is endangering performance of the remainder of the contract in accordance with its terms. Therefore, unless such condition is cured within ten (10) days after receipt hereof the Government may terminate subject contract in its entirety for default under General Provision No. 7 (Default). Your attention is invited to the respective rights of the contractor and the Government under General Provision No. 7 (Default), and the liabilities that may be invoked in the event a decision is made to terminate for default of the contractor.

Compare with *Midwest Engineering and Construction Co., Inc.*, ASBCA No. 5801, 1962 BCA 3289 (1962) in which the Board held the following cure notice was adequate to

nonconforming units in an attempt to meet a delivery schedule.³⁵ Furthermore, where there has been a repudiation of the contract no cure notice is required.³⁶

The determination of whether or not the contractor has failed to make progress so as to endanger performance of the contract is essentially a factual one. The determination of actual failure to perform at one extreme and anticipatory repudiation at the other extreme is relatively easy to make.³⁷ The "in-between" situation presents a more difficult problem. This is true because of the absence of a specific standard of progress by which performance can be measured.³⁸ Once a proper

sustain the appeal:

It is apparent from the status of the preproduction testing that you are failing to make such progress under this contract as will enable you to deliver 25 Generator Sets during the month of April 1959, as required by the contract. If you do not within ten (10) days after receipt of this warning notice cure such failure. . .

35. Shallcross Mfg. Co., ASBCA No. 8726, 65-1 BCA 4594 (1964). In this case the contractor was required to deliver certain units over a period of time. The contractor delivered most of the units required by the first delivery date. Prior to the second delivery date the contract was terminated for default. The contractor argued that since he had not received a cure notice "under the second branch of the 'default' clause the termination was ineffective." After pointing out that the contractor knew at the time of delivery, without disclosing the fact, that all the units did not conform to specifications, the Board rather tersely rejected the contractor's argument that it was entitled to a cure notice.

36. Warren Haddock, ASBCA No. 7742, 1962 BCA 33470 (1962). See Speidel, *Default For Failure to Make Progress*, The Government Contractor Briefing Papers No. 64-5 (Oct. 1964).

37. Emphasis is placed on the word "relatively" since any determination involving disagreeing parties can be difficult. For a good discussion of anticipatory repudiation see Dec. Comp. Gen. B-146361 (Sept. 29, 1961) affirmed 41 Comp. Gen. 382 (1961). In affirming its earlier decision the Comptroller General stated:

Under the prevailing legal authorities, a positive statement by the promisor to the promisee that the promisor cannot perform, is sufficient to constitute an anticipatory repudiation which is a total breach of contract It is unnecessary that the promisor in such case state that he is unwilling to perform for he makes it clear that he in fact will not perform.

See also Northeastern Engineering, Inc., ASBCA No. 6504, 61-2 BCA 3108 (1961) in which the Armed Services Board converted an improper default termination into a termination for convenience where the contractor notified the contracting officer that delivery would be delayed beyond the contract delivery date because of testing delay. In rejecting this notification as anticipatory repudiation the Board stated that "there must be a definite and unequivocal manifestation of intention on the part of the repudiator that he will not render the promised performance when the time fixed for it in the contract arrives. See generally Fairbanks & Speidel, *Anticipatory Repudiation—Contracting Officers Dilemma*, 6 MIL. L. REV. 129 (1959).

38. In Manhattan Lighting Equipment Co., Inc., ASBCA No. 5113, 60-1 BCA 2646 (1960) the Government attempted to prove a standard of required work progress by reference to previous procurements of the same item. The Board in rejecting the con-

standard of progress is ascertained it must then be determined whether contract performance has been endangered.³⁹ Therefore, the factual situation becomes particularly acute.⁴⁰

EXCUSABLE DELAY

Paragraph (c) of the default clause excuses the contractor from liability for 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." Examples of acts which may be included within such causes are then set forth in the contract;⁴¹ however, these causes are not all-inclusive.⁴²

At one time there was some question as to whether a contractor suffering from one of the enumerated causes was required to show that the cause was beyond its control and without its fault or negligence. This problem was laid to rest by the Supreme Court in *United States v.*

tention of the Government, apparently for lack of proof stated:

The Government has attempted to prove a standard of progress by reference to its procurement of the same item on prior occasions. The contracts in all of such cases except one provided for delivery after longer periods, of varying length, after the date of contract than the period of 90 days between the date of the subject contract and the specified delivery date of 19 March 1958. Even if Appellant were chargeable with knowledge of the facts concerning the other procurements, a proposition which the Government's evidence does not establish, they would not prove a standard of progress in the absence of evidence, missing here, that the longer periods are inherently attributable to necessity and not to the election of the parties to stipulate the longer periods for other reasons.

39. See Government Contracts Practice, p. 470 (1964).

40. See Manhattan Lighting Equipment Co., Inc., ASBCA No. 5113, 60-1 BCA 2646 (1960) in which default termination was held improper and General Products Co. ASBCA No. 6522, 61-1 BCA 3003 (1961) in which the default termination was sustained.

41. The second sentence of paragraph (c) provides:

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.

42. The clause makes it very clear that the enumerated causes are only examples. See Risik, *supra* note 15, at 351 where it is stated:

Despite the plain words of the default clauses there is some inevitable confusion as to whether the list of excusable clauses [sic] is all inclusive. . . . Excusable causes are not limited to those specifically mentioned in the contract clause.

In addition the excuse for nonperformance need not be of the same kind or class of excuse as those enumerated. Seaboard & W. Airlines, Inc., ASBCA No. 4650 (1958); *But see* Austin Co. v. U.S., 314 F.2d 518 (Ct. Cl. 1963).

*Brooks-Callaway Co.*⁴³ In addition, administrative action has eliminated the need for court interpretation by following the enumerated causes with the statement "but in every case the failure to perform must be beyond the control and without the fault or negligence of the contractor."

Acts of the Government which may excuse the contractor's failure to perform include a multitude of "sins." For example, failure of the Government to make required payments to the contractor,⁴⁴ delays in the issuance of approvals,⁴⁵ improper inspection,⁴⁶ defective or late Government furnished material,⁴⁷—all will serve to excuse the contractor's failure to perform.

Among the other enumerated causes of failure to perform, the one based on the weather is one of those most frequently litigated.⁴⁸ The term "unusually severe weather" as used in the default article does not

43. 318 U. S. 120 (1943). Although the court here was concerned with the interpretation of the standard form of default article used in construction contracts which in addition to requiring the excusable delay to be beyond the control and without the fault or negligence of the contractor, required it to be unforeseeable. The court concluded that the enumerated excusable causes were required to be unforeseeable and beyond the control and without the fault or negligence of the contractor. The court pointed out the absurd results which could arise were another rule to apply as follows:

If fire is always an excuse, a contractor is free to use inflammable materials in a tinder-box factory and escape any damages for delay due to a resulting fire. Any contractor could shut his eyes to the extremist probability that any of the listed events might occur, submit a low bid, and then take his own good time to furnish the work free of the compulsion of mounting damages, thus making the time fixed for completion practically meaningless and depriving the Government of all recompense for the delay.

44. See *United States Services Corp.*, ASBCA No. 8291, 1963 BCA 3703 (1963); *Q.V.S., Inc.*, ASBCA No. 3722, 58-2 BCA 2007 (1958); *George E. Martin & Co.*, ASBCA No. 3117, 56-2 BCA 1150 (1956). In *Douglas Corp.*, ASBCA No. 3349, 58-1 BCA 1727 (1958) the Armed Services Board considered the failure of the Government to make payment under one contract an excuse for the contractor's failure to proceed under other contracts. However where there is a bona fide disagreement as to right to payment or amount due the failure of the Government to make payment will not be considered an excusable cause. *Precision Tool Co., Inc.*, ASBCA No. 5048, 60-2 BCA 2739 (1960); *Aircraftmen Co.*, ASBCA No. 3592, 58-1 BCA 1667 (1958).

45. *Remsel Industries, Inc.*, ASBCA No. 5899, 61-1 BCA 2909 (1960); *Blanchard Construction Co.*, ASBCA No. 4457, 59-1 BCA 2146 (1959).

46. *United States v. Adams*, 160 F. Supp. 143 (W.D. Ark. 1958); *Roy K. Hubbard*, ASBCA No. 5892, 60-2 BCA 2740 (1960).

47. *Schutter Industries Co.*, ASBCA No. 3867, 59-2 BCA 2390 (1959); *Douglas Corp.*, ASBCA No. 3349, 58-1 BCA 1727 (1958); *Maxwell Coil Co.*, ASBCA No. 3852, 58-1 BCA 1749 (1958).

48. An entire briefing paper was devoted solely to "weather" and its effect on contract performance. See *Crowell, Dees, The Weather*, *The Government Contractor Briefing Papers*, No. 65-4 (Aug. 1965).

include all weather which prevents performance.⁴⁹ Rather, emphasis should be placed on the word "unusually" which contemplates something which is not reasonably to be expected.⁵⁰

Failure of performance caused by the default of a subcontractor will relieve the prime contractor from liability for excess costs if the default of the subcontractor "arises out of causes beyond the control of both the contractor and subcontractor, and without the fault or negligence of either of them."⁵¹ The quoted portion of the default clause was added as the result of a difference in decisions rendered by the Comptroller General and the Armed Services Board of Contract Appeals. The Armed Services Board, in *John Andresen & Co., Inc.*,⁵² held that a contractor's failure to perform was excusable if it resulted solely from delay caused by its subcontractor, even though the subcontractor might have been at fault. The Comptroller General in a 1959 decision⁵³ rejected the Andresen doctrine and held that under the Default article in both the Government's Standard Form 32, fixed-price supply contract (Nov. 1949 Ed.) and the comparable article in the Standard Form 23A fixed-price construction contract, the prime contractor could be excused for delays caused by a subcontractor's failure to perform only if the subcontractor in addition to the prime contractor was free from fault.⁵⁴

In order for the default of the subcontractor to excuse the prime contractor from the assessment of excess costs, the default clause imposes

49. Lee Moulding Construction Co., IBCA 153, 61-1 BCA 2977 (1961); Montgomery Construction Corp., ASBCA No. 5000, 59-1 BCA 2211 (1959).

50. 14 Comp. Gen. 431 (1934); J. W. Merz, IBCA 64, 59-1 BCA 2086 (1959).

51. See Alert Products, Inc., ASBCA No. 5620, 59-2 BCA 2422 (1959) which was the first case involving failure of performance due to actions of a subcontractor under this language.

52. ASBCA No. 633 (1950).

53. Dec. Comp. Gen. B-140166 (Oct. 30, 1959). In earlier decisions the Comptroller General had followed *Andresen*. See Dec. Comp. Gen. B-120505 (June 19, 1956) and B-134892 (Feb. 7, 1958). However on March 5, 1958 the Court of Claims in *Whitlock Corporation v. United States*, 159 F. Supp. 602 (Ct. Cl. 1958), *cert. den.*, 358 U.S. 815 (1958) held that prime's default could be excused only if the default of the subcontractor was beyond its fault or negligence. In its 1959 decision the Comptroller General said he could find no reason for not following *Whitlock*.

54. Under the revised contract language the Armed Services Board of Contract Appeals has abandoned the Andresen doctrine. See Alert Products, Inc., ASBCA No. 5620, 59-2 BCA 2422 (1959). In *Federal Television Corp.*, ASBCA No. 9836, 1964 BCA 4392 the Board held that the default clause excuses the prime only when the default is without the fault or negligence of both the prime contractor and the subcontractor and the clause contains no exception for situations involving a sole source subcontractor (the drawing furnished by the Government did not supply sufficient data to permit manufacture by any source other than the subcontractor).

the additional condition that the supplies or services to be furnished by the subcontractor were not "obtainable from other sources in sufficient time to permit the contractor to meet the required delivery schedule." This condition is not imposed by the contract language where no subcontractor is involved. However, it would seem reasonable to require a contractor who is unable to provide the supplies or services to procure them in the open market where it is possible and where the delivery schedule would permit.⁵⁵

REPURCHASE

Paragraph (b) of the standard clause permits the Government to procure supplies or services "similar" to those terminated and assess liability for such supplies or services against the contractor. The clause further provides that the repurchase may be on such terms and in such manner as the Contracting Officer deems appropriate.⁵⁶ However, this does not relieve the Government from the duty to mitigate damages.⁵⁷ For example, the Government is not free to purchase from a higher bidder where lower bidders are known.⁵⁸ Even where there is an urgent need for the supplies the Government may restrict its selection of bidders.⁵⁹

The repurchased supplies must be as similar and as practical as those terminated in quality, unit and specifications.⁶⁰ However, they do not have to be identical.⁶¹ Also repurchase must be made within a reasonable time after termination.⁶²

55. See *A. M. Loveman Lumber & Box Co.*, ASBCA No. 3029 (March 26, 1956).

56. The repurchase may be by formal advertising, negotiation or a combination thereof, whichever the Contracting Officer deems to be in the best interest of the Government and whichever protects the interest of the defaulted contractor. *Standard Engineering and Manufacturing Co.*, ASBCA No. 3733, 57-2 BCA 1477 (1957), recon. den., 57-2 BCA 1568 (1957), *But See* FPR 1-8.602-6 which requires the use of formal advertising except where there is good reason to negotiate.

57. *Bar-Ray Products, Inc.*, ASBCA No. 3065, 57-2 BCA 1502 (1957).

58. *Manhattan Lighting Equipment Co., Inc.*, ASBCA No. 7419, 61-2 BCA 3223 (1961); *Firth Machine & Tool Inc.*, ASBCA No. 4600, 59-2 BCA 2295 (1959).

59. *Lester Bros. v. United States*, 151 Ct. Cl. 536 (1960); *H & H Manufacturing Co.*, ASBCA No. 4353, 60-1 BCA 2621 (1960).

60. *Naples Food Products Co.*, ASBCA No. 8191, 1963, BCA 3932 (1963) (canned turkey not similar to canned chicken); *Lome Electronics*, ASBCA No. 9642, 1963 BCA 3833 (1963) (telemetry equipment with relaxed specifications no longer requiring solid state components—not similar); *Midwest Engineering*, ASBCA No. 5390, 1962 BCA 3460 (1962) (110 minor changes in basic specifications—repurchase was similar).

61. *Associated Traders, Inc. v. United States*, 169 F. Supp. 502 (Ct. Cl. 1959); *Superior Fuse*, ASBCA No. 7756, 1963 BCA 3639 (1963).

62. *Rumley v. United States*, 285 F.2d 773 (Ct. Cl. 1961) (6 months held to be unreasonable); *Consolidated Airborne*, ASBCA No. 5498, 61-1 BCA 2933 (1961) (5 months held to be reasonable); *Standard Engineering and Manufacturing Co.*, ASBCA No.

The excess costs for which the defaulted contractor may be liable are usually fixed as of the time the repurchase contract is made.⁶³ The defaulted contractor is not liable for additional costs resulting from the default of the repurchase contractor and a second repurchase at a higher price, but is entitled to a reduction of the costs assessed against him by the difference in the amounts of the two repurchase contracts if the amount of the second repurchase contract is less than the first.⁶⁴

In addition to the right to repurchase at the expense of the defaulted contractor the default clause reserves to the Government all other "rights and remedies provided by law or under this contract."⁶⁵ If no repurchase is made the Government is entitled to the difference between the contract price and the market value at the time of breach.⁶⁶ This is true even though the Government has lost its right of reprocurement because of its tardiness in making the reprocurement.⁶⁷

ERRONEOUS TERMINATION

If after the notice of termination has been issued it is determined that the contractor was not in default or that the default was excusable, and the contract contains a termination for convenience clause the rights and obligations of the parties must be determined in accordance with that clause. If after the notice of default is issued it is determined that the contractor was not in default and there is no termination for convenience provision in the contract, paragraph (e) provides that the contract shall be equitably adjusted to compensate for the termination and the contract modified accordingly. Prior to 1962 the default clause did not provide for a conversion to a termination for convenience when it was found that the contractor was not in default, nor did it provide for an equitable adjustment where the contract did not contain a termination for convenience clause. Under these circumstances the Court of Claims in *Klein v. United States*⁶⁸ held that a termination for 3733, 57-2 BCA 1477 (1957), *recon. den.*, 57-2 BCA 1568 (1957) (2-1/2 months unreasonable during period of rising prices).

63. 22 Comp. Gen. 1035 (1943).

64. Dec. Comp. Gen. B-108570 (May 20, 1963). For a general discussion see Cuneo, *Government Contracts Handbook* 115 (1962).

65. Paragraph (f) of the default clause.

66. 34 Comp. Gen. 347 (1955).

67. *Rumley v. United States*, *supra* note 62.

68. The clause under which the court rendered its interpretation reads as follows: (e) If, after notice of termination of this contract under the provisions of paragraph (a) of this clause, it is determined that the failure to perform this contract is due to causes beyond the control and without the fault of [sic] negligence of the Contractor pursuant to the provisions of paragraph (b) of this clause, such Notice of Default shall be deemed to have been issued pursuant to the

default was not converted to a termination for convenience where the Government erroneously terminated the contract for default. The court reaffirmed its decision in *Klein in Goldwasser v. United States*.⁶⁹ In this case the court found that the Government had entered into a requirements contract which obligated the Government to purchase its needs from the contractor. The Armed Services Board of Contract Appeals had so held in a previous proceeding before it and had concluded that the refusal of the Government to purchase its needs from the contractor constituted a termination for convenience. The Court rejected this approach stating that the sole ground for the Government's failure to purchase from the contractor under the requirements contract was the Government's determination that the contractor had defaulted. If this were true the court stated that the contractor would not be entitled to damages. However, the court continued, if the contractor was not in default the contractor would be entitled to damages "and not merely a convenience-termination settlement."

On the same day the court handed down its decision in *Goldwasser* the court decided *John Reiner & Company v. United States*.⁷⁰ In this case the contracting officer cancelled the contract after the Comptroller General had ruled that the award of the contract was improper and the contract should be cancelled. The contractor brought suit for breach of contract. The court found that the contracting officer did not purport to terminate the contract under the termination for convenience clause, nor did the contracting officer follow the procedures established by the clause. However, the Court held the contractor's recovery was limited by the clause. The court stated that the Government had a valid ground to invoke the termination for convenience clause and that the "justifiable cause controls the case and 'operate[s] to curtail the damages recoverable' . . ." ⁷¹

clause of this contract entitled 'Termination for Convenience of the Government' and the rights and obligations of the parties hereto shall in such event be governed by such clause.

The court stated that the quoted paragraph applied only when the failure to perform was found to be excusable. Therefore the court found that the erroneous termination for default was a breach of contract and awarded damages to the contractor.

As the result of the *Klein* case the standard form of termination for default clause was changed to its present form.

69. 325 F.2d 722 (Ct. Cl. 1963).

70. 325 F.2d 438 (Ct. Cl. 1963).

71. *Id.* at 443. The court in *Reiner* distinguished the *Goldwasser* situation as follows: The only *holding* of the Court (on this point) is that, once the Government wrongfully terminates for default where there has been no default, it cannot

FIXED-PRICE CONSTRUCTION CONTRACTS

The right to terminate a fixed-price construction contract is conditioned upon (1) contractor's refusal or failure to prosecute the work with such diligence as will insure its completion within the time specified in the contract, or (2) contractor's failure to complete work within the time specified in the contract. In either event the Government may⁷² by written notice⁷³ terminate the contractor's right to proceed. Unlike subparagraph (a) (ii) of the supply termination for default clause no cure notice is required under the default clause of the fixed-price construction contract.

Whether or not termination is invoked, the contractor will be held liable for damages for failure to complete performance within the time specified in the contract. If the contract contains a liquidated damages provision and if the Government terminates the contract for default,

thereafter seek to avoid liability by invoking a convenience termination. That holding the court accepts and reaffirms today in *Goldwasser v. United States* . . .

72. As in fixed-price supply article the decision as to whether to terminate the contract is left to the discretion of the Government. The factors to be taken into consideration in making the determination are set out in FPR 1-8.603-3(a) as follows:

- (1) The provisions of the contract and applicable laws and regulations;
- (2) The specific failure of the contractor and excuses, if any, made by the contractor for such failure;
- (3) The period of time which would be required for the Government or another contractor to complete the work as compared to the time required for completion by the delinquent contractor;
- (4) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments;
- (5) The availability of funds to finance the increased cost to complete, to the extent that such costs may not be covered by surety protection, and the availability of funds to finance termination costs should it subsequently be determined that the delay was excusable; and
- (6) Any other pertinent facts and circumstances.

73. The contents of the written notice are prescribed by FPR 1-8.603-3(c) as follows:

- (1) Set forth the contract number and date;
- (2) Describe the act or omissions, and the extent of the resultant delay, constituting the default;
- (3) State that the contractor's right to proceed further with performance of the contract (or of a specific portion of the contract) is terminated;
- (4) State that the Government may cause the contract to be completed and that the contractor will be held liable for any increased costs;
- (5) State that the Government reserves all rights and remedies provided by law or under the contract, in addition to charging increased costs;
- (6) State that the notice constitutes a decision, pursuant to the Disputes clause, that the contractor is in default as specified and that the contracting officer has determined that the delay is not excusable; and
- (7) State that the contractor has the right to appeal as specified in the Disputes clause.

paragraph (b) of the standard clause specifies the resulting damages as consisting of the liquidated damages until such reasonable time as may be required for final completion of the work in addition to any increased costs occasioned the Government in completion of the work. Where the termination for default clause is not invoked, contractor is liable under paragraph (c) for the stated liquidated damages until the work is completed or accepted.⁷⁴

Paragraph (d) of the clause provides that the contract shall not be terminated nor the contractor charged with damages if the delay in the completion of the work was due to unforeseeable⁷⁵ causes beyond the control and without the fault or negligence of the contractor, and if the contractor within 10 days from the beginning of the delay notifies the contracting officer in writing of the causes of the delay. As in the supply contract default clause, specific examples of excusable delay are set forth.⁷⁶ Defaults of subcontractors must arise from unforeseeable causes beyond the control of, and without the fault or negligence of, both the prime contractor and subcontractor.

74. It is to be noted that when contractor is permitted to complete performance he is liable for liquidated damages up to the time the work is completed. When contractor is not permitted to complete performance paragraph (b) makes contractor liable for liquidated damages for such *reasonable* time as is required for completion. The remedies provided in the construction contract should be compared with those provided in the supply contract. In both the construction and supply contracts the specific remedies provided in the default articles are in addition to the rights and remedies provided by law or under the contract.

75. The requirement that the clause be unforeseeable is not included in the supply contract clause. There is some question as to whether it imposes any additional restriction on the contractor. See for example Coons, Whelan, *Default Termination of Defense Department Fixed-Price Supply Contracts*, 32 NOTRE DAME LAW. 189, 199-200 (1957), where it is stated:

There is no specific requirement of unforeseeability of delay in the current standard "default" article used in defense supply contracts. However, in effect, the tests are identical, for, if the contractor is late in delivering due to delays which, although beyond his control, are foreseeable, the delinquency is considered to arise from his own "fault or negligence". If the delays were foreseeable, they should have been provided for when the contractor made his delivery commitments, and failure to so provide is negligence.

76. The specific acts which will excuse failure of performance as stated in the default clause are:

... acts of God, acts of the public enemy, acts of the government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers. ...

Although the phrase "including but not restricted to", prefaces the specific acts there is no language following the acts similar to that contained in the supply contract clause. See note 41 *supra*.

As in the supply contract clause, the construction contract clause provides for the conversion of a default termination into a convenience termination if the contract contains a termination for convenience article and it is determined that the contractor was not in default or that the delay was excusable. If no termination for convenience clause is contained in the contract, the contract is to be equitably adjusted and the contract modified accordingly.⁷⁷

TERMINATION FOR CONVENIENCE

The standard termination for convenience clauses, like the standard termination for default articles, are set out in the FPRs.⁷⁸ The policies and procedures relating to termination for convenience are set out in FPR §§ 1-8.2 to 1.8.5.

Termination for convenience clauses uniformly reserve to the Government the right to terminate the contract when it is determined that such action would be in the best interest of the Government.⁷⁹ The determination as to whether the Government's interest⁸⁰ would best be served by terminating the contract is a matter within the discretion of the contracting agency.⁸¹ The consent of the contractor is unnecessary for a valid termination for convenience.⁸²

Even without a termination for convenience clause in the contract, the Government may terminate the contract for convenience when the

77. In *G. L. Christian & Associates v. United States*, 312 F.2d 418 (Ct. Cl. 1963), the Government improperly terminated the contract for default and the contract contained no termination for convenience clause. The Court of Claims held that since ASPR required the inclusion of the termination for convenience clause in the contract the clause was incorporated in the contract by operation of law. For a discussion of *Christian* see Cibinic, *Contract by Regulation*, 32 Geo. Wash. L. Rev. 111 (1963).

78. See FPR §§ 1-8.701 to 1-8.706. Instructions for the use of the termination for convenience clause are found in FPR 1-8.700-2(a).

79. Termination for convenience clauses have been held to be valid and terminations thereunder do not constitute a breach of contract. *Duesenberg Motors Corp. v. United States*, 260 U.S. 115 (1922); *Davis Motor Car Co. v. United States*, 60 Ct. Cl. 68 (1924) affirmed 271 U.S. 96 (1926).

80. What constitutes the best interests of the Government has been stated to cover a host of variable and unspecified situations including the direction of the Comptroller General. *John Reiner & Company v. United States*, 325 F.2d 438 (1963).

81. See 19 Comp. Gen. 826 (1939); 40 Ops. Atty. Gen. 225 (1942). In discussing the right to terminate a contract for the convenience of the Government, the Court of Claims in *John Reiner & Company v. United States*, 325 F.2d 438 (Ct. Cl. 1963) stated: Under such an all-inclusive clause, the Government has the right to terminate 'at will' . . . and in the absence of bad faith or clear abuse of discretion the contracting officer's election to terminate is conclusive.

82. See *Commonwealth Engineering Co. v. United States*, 180 F. Supp. 396 (Ct. Cl. 1960).

public interest so requires.⁸³ However, such a termination would be considered a breach of contract and would subject the Government to damages in excess of those recoverable under the termination for convenience clause.⁸⁴

After the determination is made to terminate the contract, a notice of termination is sent to the contractor.⁸⁵ The notice of termination is required to be in writing and contain (1) a statement that the contract is being terminated, (2) the effective date of the termination, (3) the extent of termination and (4) any special instructions.⁸⁶ Upon receipt of the notice of termination the contractor must comply with the terms of the notice and the requirement of the contract clause.⁸⁷ The notice and the contract clause generally require that the contractor stop work and discontinue placing subcontracts, terminate existing subcontracts, advise the contracting officer of any special circumstances preventing the stoppage of work, submit a request for an equitable adjustment for continued portions if a partial termination is involved, take action to protect and preserve Government property, notify the Government of legal proceedings against the contractor by subcontractors arising out of the termination, settle all liabilities and claims arising out of termination of subcontracts, submit a settlement proposal and dispose of termination inventory as directed or authorized.

The responsibilities of the contracting officer do not end with the

83. See 29 Comp. Gen. 36 (1949); 18 Comp. Gen. 826 (1939). *Foster Wheeler Corporation*, IBCA-61, 60-1 BCA 2481 (1960). The 1939 decision of the Comptroller General is a landmark decision and the language contained therein is worth noting:

It has been held that when the public interest requires such action, a contracting officer may terminate a contract which he was authorized to make and that he may, by supplemental agreement, agree with a contractor upon the compensation to be paid for work already performed, etc., provided the amount agreed is proper and just and the contractor will accept such amount in full and final settlement of all rights incident to or arising out of the original and supplemental contracts. See *United States v. Corliss Steam-Engine Co.*, 91 U.S. 321; 14 Comp. Gen. 589; 15 id. 134; 21 id. 134; 26 id. 170; and Comp. Gen. 526. The determination as to whether the public interest requires such termination is a matter for administrative decision and does not rest with this office which is concerned primarily with the availability of the appropriation for any expenditure resulting from the termination.

84. *G. L. Christian & Associates v. United States*, 312 F.2d 418 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 954 (1963), in which it was stated that anticipatory damages could be recovered if the action was for breach of contract, but could not be recovered under the termination for convenience clause.

85. FPR 1-8.202.

86. *Ibid.* FPR 1-8.801 contains suggested formats of notices of termination for convenience.

87. FPR 1-8.204.

issuance of the termination notice.⁸⁸ The contracting officer must direct the action of the contractor, examine settlement proposals, negotiate and enter into a settlement agreement, and to the extent the parties are unable to agree on a settlement, render a contracting officer's decision on settlement. The FPRs⁸⁹ require the contracting officer to seek assistance from specially qualified personnel so that such personnel may assist in dealings with the contractor, render legal and accounting advice, and review and dispose of the termination inventory.

The contracting officer is required to hold a conference with the contractor in order to develop a definite program for effecting settlement.⁹⁰ The topics to be discussed at this meeting are enumerated in the FPRs⁹¹ and cover the entire termination procedure including a tentative time schedule for negotiation of a settlement.

Comprehensive regulations, which relate to the settlement with the prime contractor and also to the settlement of subcontractor claims are provided for the negotiation of the settlement agreements.⁹² First comes the settlement proposal⁹³ which must be submitted to the agency audit office by the contracting officer if it amounts to \$2,500 or more.⁹⁴ Subcontractor settlement proposals are to be referred to the audit office if they amount to \$25,000 or more or if the contracting officer considers an accounting review desirable.⁹⁵

When a settlement agreement (or determination if the parties are unable to agree) exceeds a certain amount,⁹⁶ or the contracting officer or the head of the procuring activity desires review, the contracting officer shall submit each settlement agreement or determination to a Settlement Review Board. The function of the Settlement Review Board is to determine the overall reasonableness of the settlement agree-

88. See FRP 1-8.205.

89. FPR 1-8.205(b).

90. FPR 1-8.205(c).

91. *Ibid.*

92. See FPR 1-8.207 through 1-8.213, 1-8.3, 1-8.4. For a thorough discussion of termination settlements see Gubin, *Termination Settlements*, Government Contractor Briefing Papers No. 63-3 (July 1963).

93. The settlement proposal must be submitted within one year after the effective date of the termination, FPR 1-8.307(a). The settlement proposal is required to cover all elements of the contractor's claim. There are two bases for settlement proposals. They are the inventory basis (FPR 1-8.307-2(b)) and the total cost basis (FPR 1-8.307-2(c)). The preferred basis is the inventory basis but the total cost basis will be acceptable if the contractor's costs are so recorded as to make it impossible to use the inventory basis.

94. FPR 1-8.207(a).

95. FPR 1-8.207(b).

96. FPR 1-8.211-2(a) (1) and (2) (\$50,000 or more).

ment or determination from the standpoint of protecting the Government's interest.⁹⁷

Partial payments to the contractor may be made prior to settlement at any time after submission of interim or final settlement proposals.⁹⁸ The extent to which partial payment shall be made is within the discretion of the contracting officer.

The disposition of termination inventory is provided for in detail in FPR 1-8.5. Subject to the Government's right to acquire the termination inventory, it is to be disposed of in the manner most favorable to the Government. Such disposal may include purchase or retention by the prime contractor or subcontractor at cost, return to suppliers, utilization, donation, sale or destruction or abandonment.

The final step in the termination process is the final settlement agreement. The primary objective⁹⁹ is to negotiate a settlement by agreement which provides fair compensation for the contractor for the work done and the preparations made for the termination of the contract including a reasonable allowance for profit. In order to attain this objective both parties must keep in mind that various methods for arriving at fair compensation may be appropriate and that the "application of standards of business judgment as distinguished from strict accounting principles, is the heart of a settlement."¹⁰⁰

In evaluating cost information in the negotiation of a termination settlement, the principles in Part 1-15 (Cost Principles) or the corresponding agency regulations should be consulted.¹⁰¹

Although profit¹⁰² is to be allowed on work performed, no anticipatory profits are includable in a termination settlement.¹⁰³ Also no profit will be allowed if the contractor would have incurred a loss had the

97. FPR 1-8.211-3. The Board will give written notification to the Contracting Officer of its decision. Failure to render a decision within 30 days after submission of all information required by the regulations operates as an approval by the Board. FPR 1-8.211-4.

98. FPR 1-8.212-1.

99. FPR 1-8.301(b).

100. FPR 1-8.301(a).

101. FPR 1-8.302. Specific costs which have been discussed in decided cases under the Armed Services Procurement Regulations are: Q.V.S. Inc., ASBCA No. 7513, 1963 BCA 3699 (legal fees); General Steel Tank Co., ASBCA No. 7245, 61-2 BCA 3098 (G&A); Serge A. Birn, ASBCA No. 6872, 61-1 BCA 3019 (salaries); Transcendental Aircraft Corp., ASBCA No. 5823, 61-1 BCA 2952 (storage); Atlas Can Co., ASBCA No. 3381, 60-1 BCA 2651 (Work in Progress); Typo Machine Co., ASBCA No. 4473, 59-1 BCA 2136 (accounting); Nolan Bros., Inc., ASBCA No. 4378, 58-2 BCA 1910 (standby).

102. The factors to be considered in the negotiation of profit are enumerated in FPR 1-8.303(b). Profit in settlements by determination is discussed in FPR 1-8.303(c).

103. FPR 1-8.303(a).

entire contract been completed.¹⁰⁴

CONCLUSION

As can be seen from this discussion, termination actions are not simple matters. They present complex problems which, when not solved by negotiation between the parties, require resolution by a Board or possibly a court. The continuing improvements being made in the termination regulations and clauses will help to reduce the problems encountered. However, as indicated previously, the field of termination will never be without its problems.

A BIBLIOGRAPHICAL NOTE ON TERMINATION

A research of bibliographical materials on termination shows a surprising dearth of law review articles in a field of such importance. Fortunately, during the past six years there have been several books published which filled the void. Cuneo's *Government Contracts Handbook* was published in 1962 and devotes pages 112-126 to Default Termination and pages 127-143 to Termination for the Convenience of the Government. Similar coverage is given by Paul in his 1964 ALI-ABA Practice Text on *United States Government Contracts & Subcontracts*, pp. 448-529. In the California Practice Handbook No. 22 on *Government Contracts Practice* (1964) Walter F. Pettit writes on Termination: Default, pp. 461-510, and Albert Green and E. K. Gubin on Termination: Convenience, pp. 513-572. Volume 4 of the *Cyclopedic Guide to Law, Administration and Procedure on Government Contracts* (1966) by John C. McBride and Isadore H. Wachtel contains Chapter 30, "Termination For Convenience Of the Government" and Chapter 31, "Breach of Contract." Another good tool is the *Defense Contract Termination Guide* of the Electronic Industries Association (1964).

There are two Government publications *par excellence*: *Navy Contract Law* (Second Edition, 1959), pp. 233-279 and 1961 *Supplement*, pp. 67-71 (Government Printing Office) and Department of The Army Pamphlet 27-153, *Procurement Law*, (Headquarters, Department of The Army; May 1961), pp. 371-431.

Of the 26 articles published from 1952 until now, Risik's is undoubtedly the best one. Speidel's papers come up to his usually high standards. In addition to Gubin's articles, he has also prepared for use in a *Concentrated Course in Government Contracts* (given by the Uni-

104. FPR 1-8.304.

versity of San Francisco, the Marshall-Wythe School of Law of the College of William and Mary, and the Department of Agriculture Graduate School) *Outlines on Termination* which are designed for 3, 6 or 8 hour class presentations and instructions. With his usual generosity, he has allowed the writers to use his outlines. The writers have heavily profited by this use. Coons-Whelan's article is encyclopedic in nature and a very practical work of two legal scholars. A listing of articles which appeared in law reviews from 1952 until January 1, 1966 follows:

- Geller, *Procurement by Regulation or by Contract?* [G. L. Christian & Associates v. U.S., 320 F.2d 345 (Ct. Cl. 1963), 20 N.Y.U. Intra. L. Rev. 102. (Jan. 1965)]
- Gallagher, *How to Reduce Certain Assets of the Contractor to the Possession of the Surety after Default or Termination of the Contract*, ABA Sec. Ins. N. & C. L. (1964), 64.
- Speidel, *Default For Failure To Make Progress*, Briefing Papers #64-5, Federal Publications, Inc. (October 1964)
- Troll, Chilcott, Rokosz, *The Legal Effect of Repurchase Prior to Default Termination*, 6 Air Force JAG Bull. 30 (May-June 1964)
- Alpert, *Innovation of Termination-for-Convenience Clause to Limit Contractor's Recovery for Breach of Contract*, [Reiner v. U.S., 325 F.2d 438 (Ct. Cl. 1963), 32 Geo. Wash. L. Rev. 898 (April 1964)]
- Canter, *Defense Contractor's Peril*, 37 So. Cal. L. Rev. 452 (1964)
- Keeffe, *Christian Government Contracts* [G. L. Christian & Associates v. U.S., supra], 49 A.B.A.J. 1225 (Dec. 1963)
- Cibinic, *Contract by Regulation* [G. L. Christian & Associates v. U.S. supra] 32 Geo. Wash. L. Rev. 111 (Oct. 1963)
- Eaton, *Government Contracts: Procurement Regulations Take on Force of Law*, [G. L. Christian & Associates, v. U.S., supra], 4 Santa Clara Lawyer 96 (Fall 1963)
- James, *Termination for Default and for Convenience of the Government*, 5 Boston Coll. Ind. & Comm. L. Rev. 65 (Fall 1963)
- Taptich, Sears, Comment [on Christian, supra], 51 Geo. L.J. 842 (Summer 1963)
- Gubin, *Termination Settlements*, Briefing Papers, #63-3, Federal Publications, Inc. (July 1963)
- Speidel, *Financial Inability and the Default Termination of Defense Supply Contracts: A Small Business Study* 44 Minn. L. Rev. 1055 (1960)
- Van Cleve, "Similarity" and the Assessment of Excess Costs Under the Government Default Clause, Mil. L. Rev. (April 1, 1960), 147

- Coons, Whelan, *Default Termination of Defense Department Fixed Price Supply Contracts*, 32 Notre Dame Law. 189 (March 1957)
- Olverson, *Termination of Subcontracts*, 16 Fed. B.J. 313 (July-Sept. 1956)
- Risik, *Defaults in Federal Government Contracts*, 14 Fed. B.J. 339 (Oct.-Dec. 1954)
- Dounis, Forman, *Historical Significance of Termination of Contracts for the Convenience of the Government*, 14 Fed. B.J. 191 (July-Sept. 1954)
- Lazure, *The Defense Department Termination Clause: Impact on Contractors: A Problem in Contractual Differential Calculus*, 14 Fed. B.J. 213 (July-Sept. 1954)
- Olverson, *Some Current Problems in Contract Terminations*, 14 Fed. B.J. 230 (July-Sept. 1954)
- Cruden, *Financing Terminated Defense Contracts*, 14 Fed. B.J. 240 (July-Sept. 1954)
- Ondrick, *Termination Procedures: Whither or Wither*, 14 Fed. B.J. 247 (July-Sept. 1954)
- Hardee, Covington, *Termination of Military Contracts*, 32 Texas L. Rev. 172 (December 1953)
- Hall, *Current Defense Contract Termination Rules Compared to WWII Procedures*, 95 J. Accy. 440 (April 1953)
- Gubin, *Current Termination Methods and Procedures*, 13 Fed. B.J. 189 (April-June 1953)
- Wienshink, Feldman, *Current Challenge of Military Contract Termination*, 66 Harv. L. Rev. 47 (November 1952)