1959

Delays, Suspensions and Available Remedies under Government Contracts

John W. Gaskins

Follow this and additional works at: https://scholarship.law.umn.edu/mlr
Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
Delays, Suspensions
and Available Remedies
Under Government Contracts

In this article, Mr. Gaskins undertakes a detailed analysis of numerous decisions of the Court of Claims and the United States Supreme Court relating to delays in the performance of government contracts. He focuses primarily on those delays attributable to the government, for which the contractor may seek damages, and concludes that existing law often does not afford the contractor adequate relief. He suggests that adoption of a uniform suspension of work clause would eliminate many of the legal pitfalls that currently exist in the increasingly important field of government procurement.

John W. Gaskins *

Delays in the performance of government contracts probably have accounted for more losses and a greater percentage of business failures among government contractors than any other single complication that can arise in this highly specialized field of activity. A government contractor must be content with a relatively narrow margin of profit in order to remain competitive, must hazard large amounts of capital to be in a position to perform on time, and must agree to pay substantial sums of liquidated damages if he delays completion; but with it all, he finds that in most instances the success of his undertaking depends as much upon the degree of cooperation and assistance which he receives from the government as it does upon his own activity. This is so for a variety of reasons. Few government contracts which involve substantial sums of money are ever completed in strict accordance with their original technical requirements and drawings. Instead, changes and revisions in the work are usually ordered by the government during performance of the contract. Preservation or destruction of a proper working sequence may depend upon the manner in which changes are ordered; inconsiderate action by the government in this regard

* Member of District of Columbia Bar.
may make an otherwise satisfactory contractual arrangement unprofitable, or even disastrous, for the contractor. Furthermore, governmental delays in procuring the site and in supplying materials which it contracted to provide, and delays caused by the activities, or inactivities, of third parties who entered into direct contracts with the government which can affect the contractor's performance, may intervene to his detriment. The prevention of these, and delays of a similar nature, requires a high degree of coordination between the activities of the government and the contractor, and genuine cooperation between the two if the contract is to be a success.

To simplify this discussion, delays under government contracts will be placed in two general categories. First, there are those for which the contractor may be said to be responsible, and which entitle the government either to terminate the contract for default, or to permit the contract to continue subject to the deduction from monies earned of a stipulated amount per day for liquidated damages. Second, there are delays which may result from acts by the government which hinder the contractor in the fulfillment of his contract obligation and result in additional costs for which he may make claim against the government. These two types of delays will be considered separately in this Article.

I. DELAYS CAUSED BY CONTRACTOR WHICH MAY RESULT IN TERMINATION OR LIQUIDATED DAMAGES

While government contracts do not recite that time is of the essence, such an understanding is implicit in their terms. Almost all contain a time limitation for performance, and provide for the payment of liquidated damages for each day of delay beyond the stipulated contract time, as extended by the government for cause. The "damages-delay" clauses of such contracts provide that where "the contractor refuses or fails to prosecute the work . . . with such diligence as will insure its completion within the time specified . . . , the government may . . . terminate [the contractor's] right to proceed . . . [and] may take over the work and prosecute the same to completion." In such circumstances, the agreed-upon liquidated damages are to be paid, and if liquidated damages are not fixed in the contract, actual damages occasioned by the delay are recoverable. In some instances, the right is reserved in the con-

2. Ibid. The full text of clause 5 is as follows:

5. Termination for Default—Damages for Delay—Time Extensions.
(a) If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the
tract to recover both. Where the government elects to terminate the contract, as distinguished from terminating the contractor's right to proceed, it forfeits whatever privilege it may have possessed to assess liquidated damages.\textsuperscript{3}

The standard form contract provides that the contractor's right to proceed shall not be terminated, nor liquidated or actual damages charged, for delays due to unforeseeable causes without the fault

\[\text{time specified in this contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the Contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby, and for liquidated damages for delay, as fixed in the specifications or accompanying papers, until such reasonable time as may be required for the final completion of the work, or if liquidated damages are not so fixed, any actual damages occasioned by such delay. If the Contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor.}\]

(b) If the Government does not terminate the right of the Contractor to proceed, as provided in paragraph (a) hereof, the Contractor shall continue the work, in which event he and his sureties shall be liable to the Government, in the amount set forth in the specifications or accompanying papers, for fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted, or if liquidated damages are not so fixed, any actual damages occasioned by such delay.

(c) The right of the Contractor to proceed shall not be terminated, as provided in paragraph (a) hereof, nor the Contractor charged with liquidated or actual damages, as provided in paragraph (b) hereof because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to, acts of God, or 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, and unusually severe weather, or delays of subcontractors or suppliers due to such causes: \textit{Provided}, That the Contractor shall within 10 days from the beginning of any such delay, unless the Contracting Officer shall grant a further period of time prior to the date of final settlement of the contract, notify the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal as provided in Clause 6 hereof.

or negligence of the contractor. A number of specific examples of delay falling within this category are described in the contract. Such delays include those caused by acts of God, the public enemy, the government, or another contractor in the performance of a contract with the government; unusual occurrences; and "delays of subcontractors or suppliers due to such causes." 

While the general rule applicable to liquidated damages for delay under government contracts is that the parties may agree to include a provision for the same in lieu of actual damages, but not by way of penalty, these provisions are not favored if actual damages are not known to have been sustained, and will be enforced only if the government has complied with all the requirements of the contract which were prerequisite to enforcement. If it appears that both parties to the contract may have contributed to the delay, the Court of Claims is ostensibly reluctant to apportion the delay between the parties, and it has tended to find that the provision for liquidated damages has been waived. However, in one case where material delays have already been apportioned by the contracting officer, and liquidated damages assessed on the basis of such apportionment, the Court of Claims upheld the finality of such apportionment. It is clear that where the cause of delay is principally ascribable to some act or failure to act by the government, the court will not assess liquidated damages, and will hold that the time limit of the contract has been waived.

4. "Unusual occurrences" includes fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather. Construction Contract, Standard Form 23A, cl. 5(c).
5. Ibid.
8. Austin Eng'r Co. v. United States, 97 Ct. Cl. 68, 79 (1942); McGlone v. United States, 96 Ct. Cl. 507, 540 (1942); H. W. Zweig Co. v. United States, 92 Ct. Cl. 472, 481 (1941); Schmoll v. United States, 91 Ct. Cl. 1, 28 (1940); Wharton Green & Co. v. United States, 86 Ct. Cl. 100, 108 (1937), cert. denied, 303 U.S. 661 (1938); Monks v. United States, 79 Ct. Cl. 302, 338 (1934); Sun Shipbuilding Co. v. United States, 76 Ct. Cl. 154, 188 (1932); Bethlehem Steel Co. v. United States, 75 Ct. Cl. 845, 866–67 (1932); Carroll v. United States, 68 Ct. Cl. 500, 508 (1929); Standard Steel Car Co. v. United States, 67 Ct. Cl. 445, 475–76 (1929); Camden Iron Works v. United States, 51 Ct. Cl. 9, 17–18 (1915).
10. United States v. United Eng'r & Contracting Co., 234 U.S. 236, 242 (1914); Langevin v. United States, 100 Ct. Cl. 15, 39 (1943); Austin Eng'r Co. v. United States, 97 Ct. Cl. 68, 79 (1942); Hirsch v. United States, 94 Ct. Cl. 602, 634 (1941); Schmoll v. United States, 91 Ct. Cl. 1, 28 (1940); Graybar Elec. Co. v. United States, 90 Ct. Cl. 232, 246 (1940); MacDonald Eng'r Co. v. United States, 88 Ct. Cl. 473, 483–84 (1939); Wharton Green & Co. v. United States, 86 Ct. Cl. 100, 107 (1937), cert. denied, 303 U.S. 661 (1938); Camp Sales Corp. v. United States,
If an excusable delay is encountered by a contractor, he must give written notice of the delay to the government within ten days after the beginning of the delay, in this manner setting in motion the administrative processes which may lead to a time extension for the purpose of preventing assessment of liquidated damages.\textsuperscript{11} The contracting officer is then required to ascertain the facts and the extent of the delay, and to extend the contract time when in his judgment the facts justify such an extension.\textsuperscript{12} His findings are subject to review by the head of the department, if a written appeal is made within thirty days after their issuance. If the contractor does not appeal, the contracting officer's findings on the cause and extent of the delay are final. If an appeal is taken which results in affirmation of the findings of the contracting officer, the administrative determination thus arrived at on appeal is final, and any delay attributable to the contractor as a result of such findings will be reckoned in liquidated damages and deducted from monies otherwise earned by him.\textsuperscript{13} The finality which, by the terms of the contract, attaches to an appellate decision of the head of the department regarding the extent of a delay is subject to the right of the Court of Claims to set it aside if it was arrived at fraudulently, capriciously, or arbitrarily; was so grossly erroneous as necessarily to imply bad faith; or was not supported by substantial evidence.\textsuperscript{14}

While some decisions have questioned the legal necessity of giving the government notice of delay where it was responsible for the delay and presumably possessed knowledge of it,\textsuperscript{15} there is also authority for the proposition that the failure to give such notice pre-

\textsuperscript{11} 77 Ct. Cl. 659, 664–65 (1933); Christensen Constr. Co. v. United States, 72 Ct. Cl. 500, 517 (1931); Newcomb v. United States, 68 Ct. Cl. 246, 250 (1929); Greeley Iron Works v. United States, 66 Ct. Cl. 328, 333 (1928); Ittner v. United States, 43 Ct. Cl. 336, 351 (1908).

\textsuperscript{12} See note 2 supra.

\textsuperscript{13} Ibid.

\textsuperscript{14} Clause 5(c) of the Construction Contract, Standard Form, supra note 2, when read with appeal clause 6, as follows:

6. Disputes.

\textit{[A]}ny dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer. \ldots\; Within 30 days from the date of receipt of such [decision] the Contractor may appeal \ldots\; to the head of the department, and the decision of the head of the department or his duly authorized representatives for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, \textcolor{red}{[}or not supported by substantial evidence\textcolor{red}{]}, be final and conclusive: \textit{Provided}, that, if no such appeal to the head of the department is taken, the decision of the Contracting Officer shall be final and conclusive. \ldots


\textsuperscript{15} Hirsch v. United States, 94 Ct. Cl. 602, 632 (1941); Carroll v. United States, 76 Ct. Cl. 103, 130 (1932) (concurring opinion); 8 DECS. COMP. GEN. 536 (1929).
cludes the contractor from recovering liquidated damages assessed against him by the government. In such circumstances, prudent advice would call for giving written notice within ten days after the commencement of the delay. It is worth noting in this connection that the contractor’s oversight in giving a written notice may be excused, and the contract requirement for such notice waived, if the contracting officer or head of the department undertakes consideration of a request for a time extension on its merits, and raises no objection to the absence of the written notice.

II. DELAYS CAUSED BY THE GOVERNMENT FOR WHICH DAMAGES MAY BE SOUGHT BY THE CONTRACTOR

The right of a government contractor to recover increased costs or damages resulting from a delay caused by the government arises out of a breach by the government of its implied obligation to do nothing which hinders, burdens or delays performance of the contract, or makes such performance more expensive. This implied obligation goes beyond abstention by the government from an act of interference. It requires government personnel to actively cooperate so as to permit the contractor to fulfill his obligations in a timely manner.

19. In Monks v. United States, a case involving building construction under a contract with the Navy, the court expounded this principle as follows: The contract work that plaintiff was engaged in necessitated some degree of cooperation upon the part of the public works officer. This meant not merely the performance by the public works officer of those obligations specifically enumerated in the contract, together with abstention from all interference with plaintiff’s work, but required enough activity on his part to at least make possible the advancement of the work at the agreed rate.
79 Ct. Cl. 302, 308 (1934). Many years later the doctrine was reaffirmed in Khem Corp. v. United States, where the government had delayed supplying a portion of
Government contracts seldom contain a fixed time within which the government must accomplish an antecedent act essential to the contractor's performance. The rule which has been applied in these circumstances is that performance by the government must take place within a reasonable time, or sufficiently far in advance to enable the contractor to complete his contract in accordance with its terms. This principle probably has found its widest application in those situations where progress under the contract had been dependent upon the making of prompt decisions by the government with respect to the technical requirements of performance.

More specifically, delays compensable in damages usually involve the belated supplying by the government of necessary plans and drawings, models, and other construction details. While some projects have involved an astonishingly large number of drawings which must be prepared by the government and supplied to the contractor after commencement of the work, the court has refused to accept the magnitude of the task of preparing such drawings as any excuse for failure to make them available promptly to the contractor. Other examples of compensable acts by the government involve an assembly which was to be installed in bombs. The court said:

The law considers a promise such as plaintiff's to be subject to a "constructive condition of cooperation." . . . The promisor's undertaking normally gives rise to an implied complementary obligation on the part of the promisee: he must not only not hinder his promisor's performance, he must do whatever is necessary to enable him to perform. . . . The implied obligation is as binding as if it were spelled out.


21. Hirsch v. United States, 94 Ct. Cl. 602, 627 (1941); Baruch Corp. v. United States, 92 Ct. Cl. 571, 587–88 (1941); Callahan Constr. Co. v. United States, 91 Ct. Cl. 538, 628–31 (1940); Plato v. United States, 86 Ct. Cl. 665, 666 (1938); Levering & Garrigues Co. v. United States, 71 Ct. Cl. 739, 753 (1931); see American Bridge Co. v. United States, 73 Ct. Cl. 344, 367 (1931).


are delays in furnishing and preparing the site, in staking out and locating the work, in making available an inspector, and in supplying corrections for a faulty design, as well as delay attendant upon a faulty or defective foundation itself, and delay due to misrepresentation of subsurface conditions. Similarly, delays which have resulted from too active participation or intervention by the government in the operations of the contractor have been recognized as compensable, as well as the interference caused by an arbitrary or deliberately obstructive attitude on the part of government officials toward the work.

The greatest number of controversies arise out of delays resulting from changes ordered by the government, or from belated delivery by the government of materials which the contractor was required to use in performance of the work and which the government had agreed to supply. A lesser number of controversies also arise out of failure of the government to make available in a timely manner the site upon which construction work is to be performed. Since differing rules apply to delays from these three causes, they will be separately considered.

A. Delays Arising From Changes

It is possible that the ordering of changes in the work may delay completion of the work for either of two reasons. First, the interval of time elapsing between the date when a contractor is advised by the government that a change will be forthcoming and the time when the government supplies him with the required technical details may be unreasonably long. If the contractor were obliged to hold up his operations until he received the required details, this loss of time could be reflected in the final completion of the entire

24. Hirsch v. United States, 94 Ct. Cl. 602, 629 (1941); Edward E. Gillen Co. v. United States, 88 Ct. Cl. 347, 368 (1939); Phoenix Bridge Co. v. United States, 85 Ct. Cl. 603, 610 (1937); Carroll v. United States, 76 Ct. Cl. 103, 118 (1932); American Bridge Co. v. United States, 72 Ct. Cl. 344, 358-60 (1931).
25. Hirsch v. United States, 94 Ct. Cl. 602, 629 (1941); M. Cain Co. v. United States, 79 Ct. Cl. 290, 298 (1934); Carroll v. United States, 76 Ct. Cl. 103, 117 (1933); Pope v. United States, 75 Ct. Cl. 436, 450 (1932), cert. denied, 288 U.S. 610 (1933).
28. Baruch Corp. v. United States, 98 Ct. Cl. 107, 122 (1941); Sobel v. United States, 88 Ct. Cl. 149, 165 (1938); Rust Eng'r Co. v. United States, 86 Ct. Cl. 461, 475 (1938).
project and could result in the encountering of costs that would not have been incurred if the change had been ordered with promptness and dispatch. Second, a change may increase the volume of work to be performed, and cause the time of completion to be unduly prolonged, or it may disorganize a predetermined sequence of operations and involve revision of work already accomplished. In either event, the change may bring about a greater expense to the contractor than the amount allowable under the change order, which usually covers only the cost of labor and materials, equipment allowance, percentage for overhead, and percentage for profit for the physical change itself. In the first situation involving delayed issuance of a change order, the right to recover the additional cost is clear, while in the second, the increased cost of the delay might not be recoverable.

No consideration of this subject would be complete without mentioning the decision of the Supreme Court in United States v. Rice. While this decision dealt primarily with the implied obligation of the government to make a site available to a contractor, its impact on the subject of delay resulting from changes is unmistakable and clear. Prior to 1942, when the Rice case was decided, it had been generally recognized that since the government had bargained in the contract for the right to make changes, its exercise of that right would not subject it to liability for consequential damages resulting from the added time necessary to perform the changed work. However, the government could be held liable for an abuse of its right to make changes, such as for an unreasonable delay in providing the contractor with the details of a change, its delay interfering with performance of the contractor's work.

United States v. Rice arose out of a contract with the United States to install certain equipment in buildings which were being erected by the government through another contractor. The building contractor encountered subsurface conditions more difficult than either he or the government had anticipated, which necessitated changing the site of the work and the nature of the foundation to be installed. The plaintiff was accordingly delayed in the installation of its equipment, and sought to recover the increased cost resulting from the delay. The Supreme Court held that the government had reserved the right to make changes which might interrupt the work, and asserted that therefore the parties never contemplated that delay incident to changes would subject the govern-

32. B-W Construction Co. v. United States, 97 Ct. Cl. 92, 114 (1942); Snare & Triest Co. v. United States, 75 Ct. Cl. 326, 349–50 (1932), cert. denied, 289 U.S. 742 (1933).
ment to damages. Instead, it held that the contractor was entitled only to a "'compensating extension of time.'"\(^{34}\) This decision, which gave no recognition of any obligation of the government to refrain from delaying a contractor unreasonably, and which limited the relief obtainable to an extension of time for performance, contravened a long line of precedents which had held that granting an extension of time to a contractor would not relieve the government of liability for damages resulting from its delays.\(^{35}\)

It was evident to the Court of Claims that if government contracts were interpreted in such a manner that delays on the part of the government could be compensated for by a time extension only, contractors would include in their bids an amount to compensate them for the possible losses they might sustain due to government changes, losses for which they could not recover under the rule of the *Rice* case. Consequently, in *Rogers v. United States*,\(^{36}\) decided soon after the *Rice* case, the Court of Claims construed the implications of the *Rice* case narrowly. The *Rogers* case involved work which was dependent upon the government's removal of railroad tracks situated on the work site. This work was to be done by a third-party contractor, whose performance was delayed by extensive changes which the government made in his work. As a defense, the government relied on the *Rice* case, but the court rejected this defense, saying:

> We do not construe the *Rice* case as holding that affirmative wrongful action or failure of the defendant to discharge its obligations under the contract could be cured by simply waiving liquidated damages. The liquidated damages clause is placed in the contract for the protection of the defendant. If it were held that the simple waiver of such a penalty clause were all the relief that could be secured by plaintiffs, regardless of the added expense of labor, bonds, interest, rental of machinery and other costs, and regardless of how long a delay might be occasioned by the defendant, then the plaintiffs would have no protection from wrongful acts or from negligent failure of the defendant to perform its obligations under the contract. We do not think the officials of the defendant should be permitted to "kick the contractor all over the lot" and escape responsibility by merely waiving the right to collect liquidated damages, regardless of what the additional costs to him might be. If such a construction were made, it would certainly cost the defendant heavily in the form of higher bids in all future contracts. Neither the language of the

---

34. 317 U.S. at 66.
35. George A. Fuller Co. v. United States, 108 Ct. Cl. 70, 97, 69 F. Supp. 409, 413 (1947); Sobel v. United States, 88 Ct. Cl. 149, 165 (1938); Plato v. United States, 86 Ct. Cl. 665, 678 (1938); Karno-Smith Co. v. United States, 84 Ct. Cl. 110, 123 (1936); Newport News Shipbuilding Co. v. United States, 79 Ct. Cl. 1, 24 (1934); Levering & Garrigues Co. v. United States, 73 Ct. Cl. 566, 577 (1932); Steel Products Eng'g Co. v. United States, 71 Ct. Cl. 457, 470 (1931).
36. 99 Ct. Cl. 593 (1943).
opinion nor the issue involved in the Rice case justifies any such construction.\textsuperscript{37}

Following the Rogers case, the Court of Claims continued to hold that while the government was not liable for the additional time required to perform the work as changed, it would be held liable for unreasonable delay in ordering the desired change.\textsuperscript{38}

Ten years later the Supreme Court denied certiorari in Continental Illinois Nat'l Bank \textit{v.} United States,\textsuperscript{39} a case in which the merit of the rule established by the Court of Claims was challenged on appeal. The \textit{Continental Illinois} case involved a situation in which the government had consumed 175 days in issuing a change for the design of a boiler house. The Court of Claims had allowed recovery for breach of contract, holding:

The right reserved in the contract to make changes in the work does not mean that the Government can take as much time as it pleases to consider such changes, regardless of consequences to the other party to the contract.\textsuperscript{40}

Thus, the rule still stands that a contractor may recover damages for delay caused by the government's unreasonable delay in ordering changes, but not for delay resulting from having to make the changes.

At this point a practical consideration is in order. When a contractor has undergone an expensive delay preceding the issuance of definite instructions from the government about how he should proceed with a change (for which he desires reimbursement), and after performance of the changed work he is tendered a written change order providing reimbursement for labor and material and

\begin{quote}
\textsuperscript{37} Id. at 411.

The possibility of changes and delays necessarily incident thereto was in the contemplation of the parties, or should have been. Defendant reserved, by articles 3 and 4 of the contract, the right to make changes, and by article 5 of the contract the right to order extra work. For any necessary delays resulting from the exercise by the Government of some reserved right there is no liability. Stafford \textit{v.} United States, 109 Ct. Cl. 479, 74 F. Supp. 155; Parish \textit{v.} United States, 120 Ct. Cl. 100, 95 F. Supp. 347, and numerous other cases.

There is, however, an implied obligation on the part of the United States not to cause unreasonable delay in making permitted changes in the contract, for the breach of which plaintiff is entitled to recover whatever damages it has suffered thereby.

\textsuperscript{40} Id. at 243, 101 F. Supp. at 757.
minor allowances for overhead and profit, he should neither sign the change order nor accept the money tendered without an understanding from the contracting officer that by so doing he will not prejudice his right to seek reimbursement for the delay. The Court of Claims has construed the effect of a contractor’s accepting a change order in two ways, depending on the facts of each case. Generally, acceptance of the change order will operate to waive the claim for damages for delay. However, where the facts indicate that the amount paid by the government under the change order obviously was intended to cover only the cost of the extra work itself, and included nothing for the delay preceding the issuance of the change order, the court will not bar a claim for delay. In the present state of the law, prudent advice would clearly call for an express reservation of rights before acceptance of the change order.

B. Delay Arising From Belated Furnishing of Materials by the Government

The law relating to delay by the government in supplying materials needed for performance of the contract has undergone a curious development in recent years, with far less satisfactory results from a contractor’s point of view than those obtained in connection with the delayed issuance of changes. This development must be attributed to the 1946 decision of the Supreme Court in United States v. Howard P. Foley Co.

Prior to the Foley decision, the obligation of the government to supply materials which it had contracted to furnish was no differ-

41. Coath & Goss, Inc. v. United States, 101 Ct. Cl. 653, 661 (1944); Seeds v. United States, 92 Ct. Cl. 97, 108-12 (1940), cert. denied, 312 U.S. 697 (1941); Schmoll v. United States, 91 Ct. Cl. 1, 29-30 (1940); Snare & Triest Co. v. United States, 75 Ct. Cl. 326, 352-53 (1932), cert. denied, 289 U.S. 742 (1933).

In the Snare & Triest case, the court uses confusing terminology. For example, on page 353 it says:

There was not any "waiver" of the rights of the plaintiff in the supplemental agreement, or in the mere fact that a supplemental agreement was entered into, as contended by the defendant, but there was a merger of all the rights of the plaintiff under the contract as originally drawn up, into the contract as it stood after the amendment was agreed to. Certainly when so construed there can be no recovery for delay incident to the changes in plans. The plans, as changed, were the subject matter of the contract as amended, and the work specified in the plans as changed has been fully paid for at the contract price. Therefore, even though the court finds no "waiver," it reaches the same result by use of the word "merger."

42. Herbert M. Baruch Corp. v. United States, 92 Ct. Cl. 571, 587-588 (1941); Stapleton Constr. Co. v. United States, 92 Ct. Cl. 551, 569 (1940); Rust Eng'r Co. v. United States, 86 Ct. Cl. 461, 475 (1938); American Bridge Co. v. United States, 72 Ct. Cl. 344, 367 (1931).

43. 329 U.S. 64 (1946).
ent from that imposed upon it to perform any other act which it had agreed to perform as part of its contract responsibilities. As presently enforced, however, the government's liability for failure to supply materials appears to depend upon whether it has been guilty of tort-like conduct, that is, whether it has been negligent in its efforts to carry out its contract commitment and has failed to exercise due diligence in that regard.

The Foley case did not involve a failure to supply materials, but instead it related to the government's obligation to supply a site. The respondent, an electrical contractor, had been delayed in the installation of his equipment at an airport because the builder of the airport had encountered changed subsurface conditions which necessitated a design change under the contract. The Supreme Court emphasized that there was no express covenant that the runways would be available at any particular time, and that the contract contemplated the possibility that delay might result from making changes. In the course of its opinion, the Court observed:

> It is suggested that the obligation of respondent to complete the job in 120 days can be inverted into a promise by the Government not to cause performance to be delayed beyond that time by its negligence. But even if this provision standing alone could be stretched to mean that the Government obligated itself to exercise the highest degree of diligence and the utmost good faith in efforts to make the runways promptly available, the facts of this case would show no breach of such an undertaking.

It is difficult to conclude that by the above statement the Court intended that liability of the government for the nonfulfillment of a contract commitment to supply materials would thereafter be measured by the degree of diligence with which the government carried out the commitment, but such is the law today in the absence of a contract warranty that the material will be made available by a prescribed date.

Daum v. United States, decided in 1951, appears to be the first case in which the Court of Claims combined a situation where delay was to be anticipated with the proposition advanced in the Foley case concerning diligence. In the Daum case, the government delayed in furnishing certain steel required for the construction of hangars. This delay was due to the operation of a system of priorities that controlled the production and delivery of steel. The Court of Claims exonerated the government from liability, because it believed that the parties were mutually aware of the uncertainty of obtaining the steel, and because the government had done its best to obtain the same. In the words of the court:

44. E.g., Donnell-Zane Co. v. United States, 75 Ct. Cl. 368, 374-75 (1932).
45. 329 U.S. at 66-67.
46. 120 Ct. Cl. 192 (1951).
The parties were well aware that there might be delays, as evidenced by the fact that the customary liquidated damages clause was stricken from this contract. Nor does the evidence show that the Government did not exert its best efforts to obtain the steel it was to furnish. Its failure to do so was not due to a lack of diligence on its part. Under this state of facts, we must hold that the decision of the Supreme Court in United States v. Howard P. Foley, Inc., 329 U.S. 64, is controlling, and that plaintiff's petition must be dismissed.47

The next pertinent decision rendered by the Court of Claims was in Otis Williams & Co. v. United States, a case involving facts similar to those of the Daum case. Citing the Foley case, the court concluded that the government was relieved from liability, because it had been more than ordinarily diligent in undertaking to obtain steel.48 In the next relevant case, Barling v. United States,49 although the court mentioned that steel was difficult to obtain at that time, its decision did not turn upon the assumption that both parties had anticipated delay from this condition (which was the principal thrust of the Foley decision); instead, the court set down the doctrine that since the government had not known that it would be unable to furnish the materials, and had promptly placed an order for them with a supplier, it had not breached its contractual obligation to supply such materials. The court said:

There is nothing in the record to indicate that defendant knew or should have known that it would be unable to furnish reinforcing steel to the contractor in time for the work to proceed in an orderly manner and to be completed within the contract period. Nor can we, in the circumstances of this case, attach significance to the fact that notice to proceed was given at a time when the Government did not have on hand or on order the materials it had agreed to furnish.

Finally, there is no evidence that the defendant was in any way at fault in failing to exert its best efforts to obtain the steel it had agreed to furnish. On the contrary, we have found that it exercised great diligence in an effort to secure steel for the plaintiff as needed, and that its inability to do so was not attributable to any fault or negligence on its part. It was very difficult to obtain steel in 1946, and the record shows that defendant did all that it could to prevent costly delays to plaintiff in this regard.

With regard to the delay occasioned by a lack of cement, our findings show even more clearly that no blame can attach to defendant. Orders were relayed to the cement manufacturer sufficiently far in advance to have permitted timely delivery, and defendant cannot be held liable here because the manufacturer failed to make prompt delivery.

It is clear, under these facts and circumstances, that defendant has in no wise breached its contractual obligations.50

47. Id. at 221.
48. 120 Ct. Cl. 249, 273–74 (1951).
50. Id. at 88–39, 111 F. Supp. at 880, citing the Foley, Daum and Williams cases. However, in the later case of Peter Kiewit Sons' Co. v. United States, 138 Ct. Cl.
The practical difficulty in contract procedure of substituting a diligent attempt to perform for actual performance itself is of course manifest, and why the degree of assiduousness with which the attempt to perform an unqualified commitment, however difficult of accomplishment, should be a factor in gauging performance is not clear. Clauses in government contracts which call for materials to be supplied by the government are also drafted solely by the government, and the terms of these provisions are not the result of negotiation between the parties. By their inclusion, it is generally intended that bidders should prepare their bids on the assumption that the required materials will in fact be available when they are needed to accomplish performance of the contract. The impracticality of bidding a firm price based upon the degree of diligence which one of the interested parties will exercise in attempting to obtain or produce the required materials is evident.

However, the obligation upon the government to diligently attempt to supply material, although wholly intangible as a basis for entering into a contract, is not something that can be easily dispensed with, even by including in the contract exculpatory language reciting that the government shall not be liable for delay for failure to supply the materials. Provisions of this character have not been enforced because the act of contracting for immunity from the harmful consequence of a negligent act is said to raise a serious question of public policy. In addition, the Court of Claims has observed that such clauses would encourage bidders to include contingencies in their bids to cover the additional cost which might be incurred if government officials, relying upon the immunity given them, were to act negligently in attempting to provide the materials. These principles were announced by the Court of Claims in *Ozark Dam Constructors v. United States*, where the government had contracted to supply thousands of barrels of cement needed for the construction of a dam. The contract recited, however, that the government would not be liable for any expense caused the contractor by delayed deliveries of cement, and provided only for the granting of an extension of time. For almost a year prior to the time that it occurred, employees of the railroad over which deliveries of the cement were to be made to the dam had threatened to strike, and when the strike took place the needed cement could not be delivered to the dam site. In the interim, the

668, 674-75 (1957), the Court of Claims held that failure on the part of the government, when it required plaintiff to start work, to take into account the difficulties which the government's supplier of steel penstocks was having in producing the same, constituted a breach of the implied obligation not to delay plaintiff.

government had made no arrangements to deliver the cement by alternative means if the strike occurred. Holding that the contract provision exonerating the government from liability for delayed delivery of cement would not protect it under the circumstances, the court said:

A contract for immunity from the harmful consequences of one's own negligence always presents a serious question of public policy. That question seems to us to be particularly serious when, as in this case, if the Government got such an immunity, it bought it by requiring bidders on a public contract to increase their bids to cover the contingency of damages caused to them by the negligence of the Government's agents. Why the Government would want to buy and pay for such an immunity is hard to imagine. If it does, by such a provision in the contract, get the coveted privilege, it will win an occasional battle, but lose the war.

We do not say that a provision for non-liability such as was inserted in the instant contract may not be effective with regard to some kinds or degrees of negligence. We do say that the Government's position that the provision must be taken literally, so that the Government is not liable for the consequences of any conduct whatever of its representatives, is wrong.

We look then at the facts of the instant case. Progress on an enormous project, requiring tens of thousands of barrels of cement, is in jeopardy because of a threatened strike on the railroad which is to carry the cement. At least from the time in July when the strike had been called and was only averted at the last minute by the President's appointment of an Emergency Board, it was apparent that there was a strong possibility of a strike when the statutory waiting period would expire in September. Yet no steps were taken to avoid, by having the cement delivered by other means, the delay and damage to the plaintiffs which would certainly result if the job were closed down by the threatened strike. The possible consequences were so serious, and the action necessary to prevent those consequences was so slight, that the neglect was almost willful. It showed a complete lack of consideration for the interests of the plaintiffs. If the plaintiffs really included in their bid an amount to cover the contingency of such inconsiderate conduct on the part of the Government's representatives, the Government was buying and the public was paying for things that were worth less than nothing.

Our conclusion is that the non-liability provision in the contract, when fairly interpreted in the light of public policy, and of the rational intention of the parties, did not provide for immunity from liability in circumstances such as are recited in the plaintiffs' petition. 52

Therefore, at least the requirement of diligence by the government, ironically growing out of the Foley case, apparently cannot be avoided, even by an express provision in the contract.

C. Government Delay in Providing a Site Upon Which To Work

Where the government engages a contractor to erect an improvement upon a predetermined site within a specified time, gives the

52. Id. at 359–60, 127 F. Supp. at 190–91.
contractor notice to proceed with the work, and then either fails to make the site available to him or does so only belatedly, one would suppose that the government had breached its contract and could be required to respond in damages. However, one opposing the granting of relief could argue, on the basis of certain decisions of the Supreme Court, that the standard provisions of the government contract relating to the right to make changes and the right to assess liquidated damages preclude the government from liability for such delay. The development of the law on this subject can be traced by a brief consideration of three landmark cases decided by the Supreme Court.

In 1926 the Supreme Court decided *H. E. Crook Co. v. United States*, where the plaintiff agreed to install heating systems in a building to be constructed by another contractor. The contract, in addition to containing the usual clauses relating to the right to make changes, also embodied provisions which gave the government the right to interrupt the work, with the further stipulation that delays caused by the government would be considered unavoidable. Although the contract also contained a provision setting forth tentative dates for the completion of the buildings upon which the plaintiff was to work, at the time the contract was entered into, the buildings were nearly one year behind in their progress. The contract price was stated to include all expenses of every nature connected with the work to be done. In light of the stringent provisions of this agreement, the Supreme Court held that the tone of the instrument precluded the belief that the government was willing to subject itself to damages for delay, and that it could not reasonably be expected that the government would bind itself to a fixed deadline for the work to reach completion. The decision was a hard one for government contractors, but was clearly justified from the contract language in that case, which was much less favorable to the contractors than that found in present-day government contracts.

The *Crook* decision, however, did not abrogate the right of a contractor to recover damages for delay by the government in making available a site upon which to work. Two years later, the Court of Claims decided *M. H. McCloskey, Jr. v. United States*, where the plaintiff was permitted to recover, the court saying in regard to the *Crook* case:

The case was affirmed, but it was on the ground of peculiar provisions in the contract. This court and the Supreme Court have repeatedly held that a contractor may recover the damages he has incurred by reason of delay wrongfully caused by the Government.  

---

53. 270 U.S. 4 (1926).
54. 66 Ct. Cl. 105, 128–29 (1928).
Other cases followed upholding this view. In 1939 and 1940, the Court of Claims permitted recovery in the cases of *MacDonald Eng'r Co. v. United States*,\(^{55}\) and *Schmoll v. United States*,\(^{56}\) at which time it positively reaffirmed the views it had expressed in the *McCloskey* case.

However, in 1942 the Supreme Court decided *United States v. Rice*,\(^{57}\) in which the government, after instructing the respondent to proceed with the installation of equipment in a building, was exonerated from any liability when it became necessary to relocate the site of the building. The decision of the Court was based upon its earlier decision in the *Crook* case and its implied assumption that the provisions of the standard form contract in the *Rice* case differed in no material respects from the illiberal provisions of the contract in the *Crook* case.\(^{58}\)

Four years later, the Supreme Court decided *United States v. Howard P. Foley Co.*,\(^{59}\) which, as previously related, involved a contract to install lighting on the runways of an airport. The government, after giving the contractor notice to proceed, was unable to permit him to proceed, because of subsurface difficulties encountered by another party contracting with the government. The Su-

---

55. 88 Ct. Cl. 473, 484-85 (1939).
56. 91 Ct. Cl. 1, 27 (1940).
57. 317 U.S. 61 (1942). For previous discussion of this case, see text accompanying notes 31–37 supra.
58. Id. at 64–65. The Supreme Court said:

The Government contends, as it did in the *Crook* case, supra, that the change in specifications resulting in delay was not a breach of the contract, but in accordance with its terms; that the extent of its obligation for permitted changes was fixed by the contract; and that for delay the Government was required to do no more than grant an extension of time. . . .

We agree with this view. We do not think the terms of the contract bound the Government to have the contemplated structure ready for respondent at a fixed time. Provisions of the contract showed that the dates were tentative and subject to modification by the Government. The contractor was absolved from payment of prescribed liquidated damages for delay, if it resulted from a number of causes, including "acts of Government" and "unusually severe weather." The Government reserved the right to make changes which might interrupt the work, and even to suspend any portion of the construction if it were deemed necessary. Respondent was required to adjust its work to that of the general contractor, so that delay by the general contractor would necessarily delay respondent's work. Under these circumstances it seems appropriate to repeat what was said in the *Crook* case, that "When such a situation was displayed by the contract it was not to be expected that the Government should bind itself to a fixed time for the work to come to an end, and there is not a word in the instrument by which it did so, unless an undertaking contrary to what seems to us the implication is implied." *Crook Co. v. United States*, supra, 6. Decisions of this Court prior to the *Crook* case also make it clear that contracts such as this do not bind the Government to have the property ready for work by a contractor at a particular time. *Wells Bros. Co. v. United States*, 254 U.S. 83, 86; *Chouteau v. United States*, supra; cf. *United States v. Smith*, 94 U.S. 214, 217.
59. 329 U.S. 64 (1946). For previous discussion of this case, see text accompanying notes 34–47 supra.
Supreme Court refused to find a warranty and exonerated the government from liability on the same basis as advanced in the *Crook* and *Rice* cases. Again, as in the *Rice* case, the Court apparently did not consider it significant that the contract provisions were not extraordinarily stringent, contrary to those in the *Crook* case. Three Justices dissented upon the ground that the government could not avoid liability on this basis after it instructed the contractor to proceed with the work.

It seems inequitable that after ordering a contractor to proceed with work, the government should not be required to pay compensation for its inability to make available to the contractor a site upon which he could perform the agreed work, simply because the standard form of contract contained general provisions relating to time extensions, liquidated damages, and the right to make changes. The Court of Claims, since the decision of the Supreme Court in the *Foley* case, has indicated that it believes that the government must not be negligent "in making the work . . . available to a contractor," this expression being found in that court's decision in *Peter Kiewit Sons' Co. v. United States*, where it said:

60. *Id.* at 67–69. The language of the Court was as follows:

We can find no such warranty if we are to be consistent with our *Crook* and *Rice* decisions, *supra*. The pertinent provisions in the instant contract are, in every respect here material, substantially the same as those which were held in the former cases to impose no obligation on the Government to pay damages for delay. Here, as in the former cases, there are several contract provisions which showed that the parties not only anticipated that the Government might not finish its work as originally planned, but also provided in advance to protect the contractor from the consequences of such governmental delay, should it occur. The contract reserved a governmental right to make changes in the work which might cause interruption and delay, required respondent to coordinate his work with the other work being done on the site, and clearly contemplated that he would take up his work on the runway sections as they were intermittently completed and paved. Article 9 of the contract, entitled "Delays—Damages," set out a procedure to govern both parties in case of respondent's delay in completion, whether such delay was caused by respondent, the Government, or other causes. If delay were caused by respondent, the Government would terminate the contract, take over the work, and hold respondent and its sureties liable. Or, in the alternative, the Government could collect liquidated damages. If, on the other hand, delay were due to "acts of the Government" or other specified events, including "unforeseeable causes," procedure was outlined for extending the time in which respondent was required to complete its contract, and relieving him from the penalties of contract termination or liquidated damages.

In the *Crook* and *Rice* cases we held that the Government could not be held liable for delay in making its work available to contractors unless the terms of the contract imposed such liability. Those contracts, practically identical with the one here, were held to impose none. . . . The question on which all these cases turn is: Did the Government obligate itself to pay damages to a contractor solely because of delay in making the work available? We hold again that it did not for the reasons elaborated in the *Crook* and *Rice* decisions.

61. *Id.* at 69. The dissenters were Justices Reed, Frankfurter, and Jackson.
Generally the Government is not liable for delays in making the work or material available to a contractor, *United States v. Rice*, 317 U.S. 61; *United States v. Foley Co.*, 329 U.S. 64. However, where the Government or its authorized representatives are guilty of some act of negligence or willful misconduct which delays the contractor's performance, the Government is liable for the resulting damages. . . . This is so because there is in every Government contract, as in all contracts, an implied obligation on the part of the Government not to willfully or negligently interfere with the performance of his contract. . . . When the contract does not specify particular dates upon which delivery of the material is to be made, the implied obligation just referred to is an obligation not to willfully or negligently fail to furnish the materials in time to be installed in the ordinary and economical course of the performance of the contract. . . . If the Government exerts every effort to supply the contractor with the necessary materials on time, it cannot be held that it has willfully or negligently interfered with performance, *Otis Williams & Co. v. United States*, 120 C. Cls. 249; *W. E. Barling v. United States*, 126 C. Cls. 34.62

Although the *Kiewit* case involved a delay in delivery of materials, it seems probable that the doctrine there followed will be applied in cases of site delays too.

### III. Recovery of Damages

#### A. Claims for Damages for Delay Need Not Be Administratively Presented for Consideration

Since claims for *unliquidated* damages based on breach of contract are beyond the jurisdiction of administrative officers to pay, there is no requirement that they be administratively presented for consideration in advance of suit.63 If they are presented, an administrative decision or finding of fact made with respect to them is not final under the disputes clause of government contracts, which empowers the head of the department to determine with finality disputed questions of fact arising under the contract.64 Similarly, a decision made by the contracting officer, or on appeal, by the head of the department, concerning the amount of additional time

that should be granted to a contractor for purposes of remitting *liquidated* damages because of some delay caused by the government, would not be final under the disputes clause as a determination of the period for which the government might have to respond in damages to the contractor for that delay. This is so because the contract does not empower the government to fix the extent of its own unreasonable delays for the purpose of determining *unliquidated* damages in favor of the contractor. 65

**B. Types of Damages Recoverable for Delays**

In the discussion that follows relating to the liability of the government to pay damages to a contractor for losses experienced as a result of the government’s delays, it must be clearly understood that the delays referred to are those resulting from acts or failure to act on the part of the government *in its contracting capacity* rather than in its sovereign capacity. The government occupies the unique position of being both a contracting party and a sovereign. As a contracting party, the government theoretically enjoys no special benefit under the law, and its contract commitments are judged by the same principles as those which ordinarily apply between contracting parties in private industry. 66 In its sovereign capacity, however, it is not accountable for its acts and is not liable in damages for delay. 67 Delays of this latter sort which have been most frequently experienced have been those arising from the difficulty in obtaining materials due to allocation and priority systems put into effect by the government during periods of national emergency. 68


67. E.g., Horowitz v. United States, 267 U.S. 458, 461 (1925); Barnes v. United States, 123 Ct. Cl. 101, 124-25, 105 F. Supp. 817, 820 (1952); Ottinger v. United States, 118 Ct. Cl. 282, 284, 88 F. Supp. 881, 882 (1950) (dictum); Clemmer Constr. Co. v. United States, 108 Ct. Cl. 718, 721-22, 71 F. Supp. 917, 919 (1947). In the *Ottinger* case, however, the government was nevertheless held liable, the court saying:

We think that when agents of the Government, without justification in statute, executive order, administrative discretion or otherwise, engage in conduct which is a violation of an express or implied provision of a Government contract the mantle of sovereignty does not give the Government immunity from suit.

Ottinger v. United States, supra at 285.

Damages sustained by a contractor as a result of delay on the part of the government will not be denied in the Court of Claims on the ground that they are not susceptible of indisputable accuracy. The test instead requires that the damages be calculated upon a reasonable basis and, under all of the circumstances, reasonably reflect the approximate injury. In arriving at its determination, the Court of Claims will even draw inferences from the evidence as a whole to reach a conclusion in the nature of a jury verdict. And the court has not been unwilling to apportion damages, where it is possible to do so in a manner which permits the recovery of monies due to losses resulting from delays caused by the government, and at the same time exclude those attributable to delays resulting from causes for which the government was not responsible.

While it is not uncommon for contractors, when seeking relief before the Court of Claims, to include the claims of their subcontractors arising out of the same delays for which the government was responsible, the claim of the subcontractor may be defeated if the subcontract contains exculpatory language which would protect the general contractor from responsibility to the subcontractor because of the government's delays. If no exculpatory clause exists, the privity between the general contractor and the United States has been regarded as sufficient to provide standing for a subcontractor in the Court of Claims.
C. Types of Costs Recoverable for Delays

The costs allowable for proven delay are many and varied, and only the more common types allowed will be mentioned. One common type, found in almost all cases involving delay, is the added expense of home or general office overhead. Such expense is allocable to a particular contract in the ratio that the value of that contract bears to the total value of all contracts performed in the same period. Increased field office overhead is also frequently recovered, as is the cost of job supervision, including the salaries of the superintendent and other straight-time employees. The cost of maintaining an organization on the job, such as holding men idle in daily expectation that the required materials will arrive, is a proper element of damages, and reasonable equipment ownership expense for idle time (presently based upon fifty percent of rental value) is also allowed. The cost of storing, protecting, and maintaining tools and equipment during the delays is recoverable.


77. Hirsch v. United States, 94 Ct. Cl. 602, 635 (1941); Herbert M. Baruch Corp. v. United States, 93 Ct. Cl. 107, 119 (1941); Herbert M. Baruch Corp. v. United States, 92 Ct. Cl. 571, 579 (1941); G. Schwartz & Co. v. United States, 89 Ct. Cl. 82, 88 (1939); MacDonald Eng'r Co. v. United States, 88 Ct. Cl. 473, 480 (1939); Sobel v. United States, 88 Ct. Cl. 149, 166 (1938); Plato v. United States, 86 Ct. Cl. 665, 675 (1938); Carroll v. United States, 76 Ct. Cl. 103, 129 (1932); Pope v. United States, 76 Ct. Cl. 64, 100 (1933), cert. denied, 303 U.S. 654 (1938); Pope v. United States, 75 Ct. Cl. 486, 444-45 (1932), cert. denied, 288 U.S. 610 (1933); Levering & Garrigues Co. v. United States, 73 Ct. Cl. 566, 577 (1932).


80. Herbert M. Baruch Corp. v. United States, 92 Ct. Cl. 571, 579 (1941); Joplin v. United States, 89 Ct. Cl. 345, 361-62 (1939); Edward E. Gillen Co. v. United States, 88 Ct. Cl. 347, 356 (1939); American Bridge Co. v. United States, 72 Ct. Cl. 344, 363-64 (1931).
Advances in the price of materials, as well as wage increases, are also compensable, as are all forms of insurance and additional bond premiums.

If the delay has resulted in inefficiency and increased cost through inability to follow a definite plan of the work, that increased cost is recoverable. Likewise, the increased cost of performing work during adverse weather conditions that normally would not have been experienced, including even temporary heat, has been held to be recoverable.

IV. Suspension of Work Clause

Contractors performing construction work for the Army, Air Force, Coast Guard, or the Atomic Energy Commission, when delayed by an act of the government, have a great advantage over contractors engaged in similar work for the Navy, the Veterans Administration, and numerous other government agencies, because the first group has taken affirmative action to assure contractors of compensation for delays caused by the government.

The relief extended has taken the form of a suspension of work clause, in which the contracting officer is given the right to suspend all or any part of the work for the convenience of the government. The clause recites that if the suspension lasts an unreasonable length of time, causes the contractor additional expense, and is not necessitated by any fault or negligence of the contractor, the stipulated contract price shall be increased to compensate for such delay.

81. Langevin v. United States, 100 Ct. Cl. 15, 37 (1943); Stapleton Constr. Co. v. United States, 92 Ct. Cl. 551, 557-59 (1940); Rust Eng'r Co. v. United States, 88 Ct. Cl. 461, 468 (1938); Carroll v. United States, 76 Ct. Cl. 103, 129 (1932); Donnell-Zane Co. v. United States, 75 Ct. Cl. 368, 372 (1932); Levering & Garrigues Co. v. United States, 71 Ct. Cl. 789, 757-58 (1931); Steel Prods. Eng'r Co. v. United States, 71 Ct. Cl. 457, 471 (1931).

82. Stapleton Constr. Co. v. United States, 92 Ct. Cl. 551, 560 (1940); G. Schwartz & Co. v. United States, 89 Ct. Cl. 82, 88 (1939); American Bridge Co. v. United States, 72 Ct. Cl. 344, 363 (1931); see Herbert M. Baruch Corp. v. United States, 93 Ct. Cl. 107, 119 (1941).

83. Langevin v. United States, 100 Ct. Cl. 15, 37 (1943); Edward E. Gillen Co. v. United States, 88 Ct. Cl. 347, 356 (1939); Donnell-Zane Co. v. United States, 75 Ct. Cl. 368, 372 (1932).


85. The suspension of work clause as included in specifications of the United States Army Corps of Engineers provides:
While the language used could be construed to mean that the relief would not be forthcoming in the absence of some affirmative order of suspension, the clause has not been so construed by the administrative boards that have been called upon to consider its application. Instead, the position has been asserted that where an act of the government caused delay, an obligation was imposed upon the contracting officer to issue the order of suspension, and if he failed to do so, the Board would regard "that as done which should have been done.” For instance, in Guerin Bros. the Army Board of Contract Appeals86 said:

We hold that where an action by the Government through its authorized representatives in the performance of the contract "unreasonably delays the progress of the work and causes additional expense or loss to the Contractors" it becomes the duty of the contracting officer, under contracts identical with that now under consideration, to provide for such delays by a suspension order as contemplated by paragraph GC-12, supra, and we shall in this case treat that as done which should have been done if and when the facts so warrant.87

The clause is recognized as creating an exception to the limitations imposed by the Crook, Rice, and Foley decisions of the Supreme Court.88

Although it has been repeatedly held that claims for damages

GC-11. The Contracting Officer may order the contractor to suspend all or any part of the work for such period of time as may be determined by him to be necessary or desirable for the convenience of the Government. Unless such suspension unreasonably delays the progress of the work and causes additional expense or loss to the contractor, no increase in contract price will be allowed. In the case of suspension of all or any part of the work for an unreasonable length of time causing additional expense, not due to the fault or negligence of the contractor, the Contracting Officer shall make an equitable adjustment in the contract price and modify the contract accordingly. An equitable extension of time for the completion of the work in the event of any such suspension will be allowed the contractor; provided, however, that the suspension was not due to the fault or negligence of the contractor.

86. Note that the Army Board of Contract Appeals is the forerunner of the Armed Services Board of Contract Appeals.


88. In Basich Bros. Constr. Co., Army B.C.A. No. 1592 (1949), which involved a delay by the government in supplying cement, the Board allowed the recovery of delay costs under a suspension of work clause, saying:

The Government cites and quotes from the cases of H. E. Crook Company, Inc. v. United States, 270 U.S. 4; United States v. Howard P. Foley Company, Inc., 329 U.S. 64, 4 CCF 60, 193; J. J. Kelly Company v. United States, 4 CCF 60, 215; Realty and Finance Corporation of Virginia, 7 Comp. Gen. 645 (1928), and United States v. Rice Construction Company, 317 U.S. 61, 1 CCF 396. These cases construe the "Delays-Damages" article common to all of them adversely to the claimant. These authorities would no doubt be controlling in the case involved here, which contains the same “Delays-Damages” article but for the Article GC-12 (suspension of work clause) which is contained in the appellant’s contract and was not contained in the cases cited by and relied on by the Government. . . .
based on delay are beyond the jurisdiction of the contracting officer to pay, and need not even be submitted to him for consideration,\textsuperscript{89} the legality of including in a contract a suspension clause which requires the contracting officer to make compensation for delay has been upheld.\textsuperscript{90}

The suspension clause applies to construction contracts only of the departments or agencies referred to above, and to the procurement contracts of none. The fact that it is found in the construction contracts of the Army, as administered by the Corps of Engineers, and not in the construction contracts of the Navy, as administered by the Bureau of Yards and Docks, is one of the oddities so often faced by a contractor doing business with the government; it is rendered even more paradoxical by the statement of a former Chief of the Bureau of Yards and Docks, that the financial risk which a contractor undergoes through interruption or suspension of his work by the government should be eliminated.\textsuperscript{91}

In 1956 the President directed that a comprehensive review be made of government procurement policies and procedures. There was accordingly created within the General Services Administration a Task Force for Review of Government Procurement Policies and Procedures, and a study group was appointed to consider and draft a uniform suspension of work clause. The American Bar Association and the Bar Association of the District of Columbia, having passed resolutions calling for the adoption of a uniform suspension clause, sent representatives to appear before the study group. After hearings, which extended over three months, the study group, on April 30, 1958, was able to agree upon the language of such a clause.\textsuperscript{92}

\footnotesize

89. See notes 59-61 supra.
90. 36 Decs. Comp. Gen. 302-03 (1956), holding: There is no legal objection to the inclusion in Government contracts of a provision permitting changes and suspensions by the Government and providing for additional payment therefor. . . . Further, we have held that a contract may be modified to provide for additional compensation to the contractor as reimbursement for increased costs resulting from delays caused by the Government.
91. Rear Admiral J. R. Perry, Chief, Bureau of Yards and Docks, in an address to the Associated General Contractors of America at New Orleans, March 1955: [T]here is at present no clause or provision in our contracts for price adjustment in the event of unforeseen Government interruption or suspension. This lack of an avenue of relief for the contractor in the event of such possible occurrences imposes upon him a risk which I believe we in Government are obliged to eliminate.
92. This agreement was no inconsiderable accomplishment in view of the divergent views of the various departments, as explained in the memorandum accompanying the recommendation, which was prepared by Paul H. Gantt, chairman of the study group:
This is a historical report. For the first time since 1921 a group of Government procurement and construction experts recommends a uniform, mandatory "Suspension of the Work" clause. This also represents a spectacular reversal in policy attitude. It may be recalled that Government-wide efforts to draft a uniform clause completely floundered in 1950.
The clause as drafted by the study group is presently being circulated among the departments and agencies which are engaged in construction work and, if and when it is approved, will be embodied in a General Services Administration regulation.

As presently drafted, the suspension clause will be mandatory in all construction contracts in excess of $10,000. By its terms, it will cover any act of delay on the part of the government, including direct acts of suspension as well as delays resulting from changes and changed conditions. If no time is prescribed in the contract for the performance of an act by the government, the obligation of the government concerning time of performance will be gauged in the light of what would have been reasonable under the circumstances. Under the proposed clause, no claim would be allowed for any costs incurred thirty days before written notice to the government of the action or failure to act which was causing delay, unless a claim in an amount stated was asserted as soon as practicable after the delay.93

It is particularly important that the proposed clause expressly states that any dispute concerning a question of fact arising under the same shall be subject to the disputes clause. Thus, the contracting officer is given the right to determine the amount of the adjustment, subject to appeal to the head of the department. The action of the head of the department is, in turn, subject to review by the

93. Price Adjustment for Suspension, Delay, or Interruption of the Work.

The contracting officer may order the contractor in writing to suspend all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government. If the performance of all or any part of the work is suspended, delayed, or interrupted for an unreasonable period of time, without the fault or negligence of the contractor, by an act of the contracting officer in the administration of the contract (including, but not limited to, an order to suspend, or an interruption, delay or suspension incident to changes or changed conditions) or by any failure of the Government in the administration of the contract to do any act required by this contract within the time specified in the contract or, if no time is specified, within a reasonable time, an adjustment shall be made by the contracting officer for any increase in the cost of performance of the contract (excluding profit) necessarily caused by such suspension, delay, or interruption, and the contract shall be modified in writing accordingly. No adjustment shall be made to the extent that performance by the contractor would have been prevented by other causes even if the Government's obligations under the contract had been met in a timely manner. No claim under this clause shall be allowed (i) for any costs incurred more than thirty days before the contractor notifies the contracting officer in writing of the action or failure to act involved, and (ii) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption but not later than the date of final settlement of the contract. Any dispute concerning a question of fact arising under this clause shall be subject to the Disputes clause.
Court of Claims under the same conditions as previously related.\textsuperscript{94} Unless the notice, claim, decision of the contracting officer, appeal to the head of the department and decision by the head of the department in a disputed case all occur in the manner provided for in the contract, the contractor will have failed to exhaust his administrative remedy, and the Court of Claims would be powerless to extend relief.

The fate of the proposed uniform suspension clause, presently undergoing consideration, is of course unknown; but it is this writer's opinion that this clause, or one closely following it, will probably be adopted in the near future. It should serve to eliminate many of the legal difficulties which prevail today where governmental delay is necessarily predicated upon breach of contract. In addition to providing a contractor with an expeditious remedy, it should also result in long-range savings to the government through the submission of lower bids which will no longer have to take into account the hazards attendant upon governmental delays in the performance of contracts.

\textsuperscript{94} See note 14 \textit{supra}.