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The Government Contract: Its Burdens and Benefits

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Conclusion

The new statute constitutes a significant improvement over the M'Naghten Rule. The emphasis is now to be placed on the defendant's "substantial capacity to know or appreciate" and not merely upon the presence or absence of knowledge. The new law appears to provide an appreciably broader basis for psychiatric testimony in criminal trials, and hence, a more penetrating psychological insight into the defendant's mental stability will be permissible. Although the testifying psychiatrists may be expected to differ on the specifics in their analyses, it is the jury which will render the ultimate decision. Thus, the new statute appears to substantially conform to the intent of the drafters of the Model Penal Code, who sought to give the jury a larger role in criminal cases where the defense of insanity is invoked.[37]

THE GOVERNMENT CONTRACT: ITS BURDENS AND BENEFITS

Introduction

In this age of ever-expanding governmental activity, it is incumbent upon the general practitioner to be acquainted in some degree with the highly specialized field of government contracts. By "government" contracts are meant contracts for goods or services entered into between private parties and a governmental agency. Although the general rules of contract law apply to both "private" contracts and "government" contracts,[1] due to its superior bargaining position, the government is able to impose conditions which enable it, ex parte, to modify the terms and obligations of the original agreement. This comment will deal with the government's ability to so modify its contracts through a "changes clause," and with the effects of this clause upon the government and the private contractor.

The "Changes Clause"

Present in every government contract is the so-called "changes clause." This clause is inserted by the government, through its agent, the government contracting officer, and enables it to unilater-

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[37] MODEL PENAL CODE § 4.01, comment (Tent. Draft No. 4, 1955).

[1] See, *e.g.*, Tenney Eng'r, Inc., ASBCA No. 7352, 1962 BCA ¶ 3471 (accord and satisfaction), 1 CCH GOV'T CONT. REP. ¶ 6790.185 (1965); Tankersley Constr. Co., ASBCA No. 2363 (1956), 6 CCF ¶ 61,938 (parol evidence rule), 1 CCH GOV'T CONT. REP. ¶ 6790.71 (1965).

ally make necessary alterations in the terms of the contract, during the performance thereof. One such clause states:

> The Contracting Officer may, at any time, by written order, and without notice to sureties, make changes in the drawings and/or specifications of this contract if within its general scope. If such changes cause an increase or decrease in the Contractor's cost of, or time required for, performance of the contract, an equitable adjustment shall be made and the contract be modified in writing accordingly. . . . If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 [Disputes Clause] of these General Provisions; but nothing provided in this clause shall excuse the Contractor from proceeding with the prosecution of the work as changed. Except as otherwise provided in this contract, no charge for any extra work or material will be allowed.[2]

The "changes clause" thus assures that the execution of the contract will fully adhere to the government's goals.

If a modification or "change," is effected by the government, and if it results in any increased cost to the private contractor, the contracting officer may be authorized to make an equitable adjustment to assure each party the fruits of his original bargain. Thus, the private contractor may receive his anticipated economic gain, notwithstanding the government's exercise of the right to modify the contract unilaterally.

In order for the private contractor to recover directly from the contracting officer for any additional obligations and expenses which the government imposes upon him, his claim must be based upon an express provision in the original contract.[3] If, in an interpretation of the "changes clause," as tempered by other provisions in the contract, the additionally imposed burdens fall within the context of those modifications which the government may reasonably [4] request, the contracting officer is empowered to equitably adjust the claim. Claims which are not cognizable under an express term of the contract are considered to be "unliquidated"; they involve general breach of contract claims against the United States and are considered to be beyond the settlement powers of the con-

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[2] See, *e.g., Standard Form* 23A, para. 3, of United States Government Construction Contract, General Services Administration, Fed. Proc. Reg. (41 C.F.R.) 1-16,401 (April, 1961 ed.). See also 1 CCH Gov't Cont. Rep. ¶ 6790 at 6337 (1965).

[3] United States v. Callahan Walker Constr. Co., 317 U.S. 56 (1942); Silberblatt & Lasker, Inc. v. United States, 101 Ct. Cl. 54 (1944); Van Pelt v. United States, 82 Ct. Cl. 671 (1936).

[4] In one case involving a contract for the extension and remodeling of a post office, at a cost of $2,050,000, sixty-two changes ordered during the performance of the contract were held not unreasonable. Magoba Constr. Co. v. United States, 99 Ct. Cl. 662 (1943).

tracting officer.[5] In such cases, the claimant is relegated to a formal suit in the Court of Claims, with all its attendant difficulties.

Informal adjustment of the claim with the contracting officer is obviously a preferable course of action for the private contractor. It is highly important, therefore, that he be certain that the interpretation of the "changes clause" in his original agreement will be adequately expansive so that all damages incurred as a result of governmental modification will fall within the ambit of the settlement powers of the contracting officer.

The "changes clause," as utilized in the various standard government contracts cannot be, itself, the subject of negotiation. However, specific references to performance contained in other clauses of the contract provide the substance and meaning of the "changes clause"—and these specific clauses are negotiable. If the Atomic Energy Commission, for example, were to accept a bid for the construction of a new atomic project, the contract which would be executed by the parties would contain many standard forms and sections among which would be the "changes clause." But until the negotiators had decided upon the specific technical methods to be utilized in constructing the project, the general terms of the "changes clause" would have very little meaning. Thus, it is vital that the private contractor, during the initial contract negotiations, enumerate in the broadest terms feasible the multitude of problems which may arise during the course of performance. If the plans and specifications are too vague, it is incumbent upon the private contractor to have them clarified. If this is not done before the contract is signed, the government may demand that the private party perform what he may quite reasonably insist is a *change* for which an adjustment should be made, but which the government may claim to be merely performance within the terms of the original contract.[6] However, if possible modifications have been anticipated and enumerated, the private contractor may well contend that a reading of the "changes clause," as interpreted by reference to the contract as a whole, entitles him to an adjustment for what is, in fact, governmental "change." Foresight of this nature can fulfill the necessity that an adjustment be based on an express provision of the contract, and can avoid the task of a formal suit against the government.

Constructive Changes

In order to promote the equitable disposition of contract disputes, the courts and the various appeals boards within the adminis-

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[5] Cramp v. United States, 216 U.S. 494 (1910); Powers v. United States, 18 Ct. Cl. 263 (1883).

[6] See Great Lakes Constr. Co. v. United States, 95 Ct. Cl. 479 (1942).

trative agencies [7] have frequently *deemed* that certain governmental activities are "changes" within the "changes clause," and that the private contractor is therefore entitled to an equitable adjustment. These so-called "constructive changes" are vehicles utilized to compensate a private contractor for a permissible, unilateral governmental act for which an award is deemed just. They allow the government to insist upon performance while granting the private contractor compensation for which, under the strict letter of the law, the "changes clause," as interpreted by reference to the contract as a whole, may provide no basis.[8] "Constructive changes" are utilized by the courts and the appeals boards to alleviate the harsh results that might follow from the government's refusal to grant an equitable adjustment, and they are deemed to exist in five general situations:

1. *Interpretations of Inspectors*—If a government inspector enforces a standard of quality which is not called for by the original specifications, the extra work imposed upon the private contractor may be *deemed a change* which brings the equitable machinery of the "changes clause" into full operation. In *Jarvis Manufacturing Co.*,[9] a government inspector insisted upon closer tolerances than were set forth in the contract specifications. It was held that the government's order was a "change" which would entitle the private contractor to equitable relief.

2. *Erroneous Interpretations by the Contracting Officer*—If the government contracting officer makes an error in interpreting the specifications, his interpretation may be considered a "constructive change" so as to bring it within the "changes clause." [10] It is common for this aspect of the doctrine of "constructive change" to be applied in situations where the contracting officer has interpreted a performance specification in such a way as to entitle the government to more than has been actually contracted for. In *Stokes Corp.*,[11] it was held that a private contractor was entitled to re-

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[7] Within the large administrative agencies, there are appeals boards which have quasi-administrative and quasi-judicial power to resolve disputes based upon the express terms of the contract. If a dispute should arise as to the contracting officer's determination of a dispute which he is empowered to equitably adjust, the appeals boards will review the case. The decisions of the various appeals boards form a vital and integral part of the area involving government contracts. The decisions of these appeals boards provide an essential guide to the understanding of the complex group of rules and regulations which comprise the area of government contract law.

[8] See, *e.g.*, RIBAKOFF, EQUITABLE ADJUSTMENTS UNDER GOVERNMENT CONTRACTS 35-36 (1961).

[9] ASBCA No. 1723 (1954); see also Lillard's, ASBCA No. 6630, 61-1 BCA ¶ 3053 (1961).

[10] Noonan Constr. Co., ASBCA No. 8320, 1963 BCA ¶ 3638; Logeman Co., ASBCA No. 5692, 61-2 BCA ¶ 3232 (1961).

[11] ASBCA No. 6532, 1963 BCA ¶ 3944.

cover where the government contracting officer took a broad view of a performance specification which was written in a general manner, and which would have necessitated much experimenting on the part of the private contractor before he could possibly adhere to the government's new order.

3. *Failure to Issue a Change*—In many cases, the administrative appeals boards have applied the doctrine of "constructive change" where the specifications which the government mandated in its bid and contract were defective, and where the contracting officer *should have* issued a change. The theory is that the boards will do what the contracting officer should have done.[12] In cases where expense has been incurred by a contractor because a change order was not issued, the contract has been deemed "changed," and the corresponding right to an equitable adjustment has been enforced.[13] In other cases, a "constructive change" has been imposed where the initial specifications have been found impossible to perform.[14]

4. *Failure to Cooperate*—The Court of Claims has held that the failure to cooperate with a private contractor is an act which entitles him to an equitable adjustment under the "changes clause." [15] Such a holding would seem to follow the general rule that the duty of cooperation between contracting parties is present in every contract.[16]

5. *Acceleration*—The doctrine of "constructive change" has been applied to situations where the government contracting officer has refused to pardon an excusable delay, and has ordered the private contractor to continue under the original work or delivery schedule. Thus, in *Keco Indus., Inc.*,[17] the board found that the refusal to grant a time extension when the original performance schedule proved incorrect was an acceleration which entitled the private contractor to an equitable adjustment. Expedition of the contractual date for performance has also been considered a "change." In *Corona Felt Mills Inc.*,[18] a contract was awarded appellant to furnish cloth materials for use in the manufacture of military uniforms.

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[12] Spencer Explosives, Inc., ASBCA No. 4800, 60-2 BCA ¶ 2795 (1960); J. W. Hurst & Son Awnings, Inc., ASBCA No. 4167, 59-1 BCA ¶ 2095 (1959).

[13] See, *e.g.*, Regent Mfg. Co., ASBCA No. 5397, 61-1 BCA ¶ 2956 (1961).

[14] L & O Research and Dev. Corp., ASBCA No. 5013, 59-1 BCA ¶ 2107 (1959).

[15] Edwards Eng'r Corp., No. 218-59, Ct. Cl. (April 5, 1963).

[16] For a good example of this duty of cooperation see UNIFORM COMMERCIAL CODE § 2-311(3), and UNIFORM LAWS COMMENT under this section.

[17] ASBCA No. 8900, 1963 BCA ¶ 3891.

[18] ASBCA No. 1007 (1953), ASBCA No. 2294, 6 CCF ¶ 61,680 (1954).

The contractual specifications provided that the material would be delivered in increments pursuant to a stated delivery schedule. Due to the advent of the Korean War, the Air Force desired earlier delivery than it had contracted for, and accordingly, directed that the contractor expedite his performance. The government contracting officer allowed an additional 5¢ per yard on the original contract price as an adjustment for the accelerated delivery, and the Armed Services Board of Contract Appeals affirmed the equitable adjustment which it considered reasonable.

One of the major difficulties involved with "constructive acceleration" is the determination of whether the government contracting officer has actually issued an order to accelerate. For example, in *T. C. Bateson Constr. Co.*,[19] it was found that statements made by the contracting officer that work should continue, and that consideration would be given later for delays, was not an acceleration order since the officer did not insist upon compliance with his request. It has been held that no acceleration exists when there is an absence of evidence of any direct action by the government in requesting an acceleration.[20] Thus, in *Edward R. Marden Corp.*,[21] where the government contracting officer did not refuse to allow for excusable delays, but merely held his decision in abeyance for a period of eight months until the work had been completed, it was held that there was no acceleration.

In an equitable adjustment the contractor is entitled to recover not only the cost of overtime paid to his employees, but also other costs attributable to the demand for acceleration.[22] The costs attributable to the acceleration order are generally determined by reference to the so-called "total cost basis of settlement," *i.e.*, the difference between the reasonable costs of performing the work as bid, and the reasonable cost of performance as affected by the acceleration directive.[23] In general, the standard for evaluating an adjustment under a government contract is the factual determination of what is fair and equitable in the particular case.[24]

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[19] ASBCA No. 6128, 60-2 BCA ¶ 2757 (1960). See also Lewis Constr. Co., ASBCA No. 5509, 60-2 BCA ¶ 2732 (1960).

[20] Olin Mathieson Chem. Corp., ASBCA No. 7605, 1963 BCA ¶ 3983. Compare Hyde Constr. Co., ASBCA No. 8393, 1963 BCA ¶ 3911, where the board found that a request to speed up was the same as an order to do so.

[21] ASBCA No. 8934, 1963 BCA ¶ 3938.

[22] Conn Structors, ASBCA No. 5195, 60-1 BCA ¶ 2627 (1960); J. W. Bateson Co., ASBCA No. 6069, 1962 BCA ¶ 3529.

[23] See, *e.g.*, U.S. COMPTROLLER GEN. REP. TO CONGRESS, REVIEW OF THE ADMINISTRATION OF CONSTRUCTION OF CERTAIN LAUNCH FACILITIES FOR THE ATLAS AND TITAN INTERCONTINENTAL BALLISTIC MISSILES AT SELECT AIR FORCE BASES (Gov't Printing Office 1963). See also Farnsworth and Chambers Co., ASBCA No. 7130, 1962 BCA ¶ 3499; Ensign-Bickford Co., ASBCA No. 6214, 60-2 BCA ¶ 2817 (1960).

[24] United States v. Callahan Walker Constr. Co., 317 U.S. 56 (1942).

Conclusion

The field of government contracting is a highly important and specialized area. It is imperative that the private contractor be aware of the government's superior bargaining position and of its ability to unilaterally modify the terms of a contract pursuant to the "changes clause," a provision which it has virtually mandated. He must be certain, therefore, that at the time of the execution of the contract, he has adequately provided a basis for the equitable settlement of any possible disputes. An informal equitable adjustment will be made where damage occurs from a "change" which is cognizable under an express provision of the contract. In addition, certain actions, or the lack thereof, on the part of the government have been deemed "changes" which will entitle the private contractor to an adjustment. In general, ordinary rules of reasonableness and equity have been utilized to determine the merits of each case upon its individual factual context.