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GOVERNMENT CONTRACTS

Lecture

by

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GOVERNMENT CONTRACTS.

A. INTRODUCTORY

1. Importance of a knowledge of Rules and Principles.

The United States is a party to more contracts than any other contractor on earth. As it is preeminent because of the number of its contracts so also is it preeminent because of the diversity and extent of its contractual relationships. Every citizen should know the rules and principles which govern Government contracts. In such knowledge he assures himself intelligent appraisal of the efficiency of the business side of government. The Government officer or agent has the citizen's concern in such rules and principles and beyond this he has the concern which attends the solemn obligation of conserving public interests.

It is not at all desirable that he should be a lawyer but he should possess the equipment of the average business man who enters business contracts prudently and carefully, with a sure knowledge of the obligations he has, by his acts, assumed, and with assurance as to the rights he has acquired. Such a man, as an agent for another, conserves the rights of his principal and respects the rights of third parties.

Thus the agent of the Government, equipped like the business man to enter into simple contracts with assurance and understanding, safeguards the interests of the United States and avoids litigation.

The rules and principles we shall here consider are to be found in constitutional provisions, in statutory enactments, and in judicial interpretations of constitutional and statutory law.

NOTE Inasmuch as the time available for consideration of our subject is limited we shall throughout refer to the Secretary of War as the contracting agency of the United States. It may be here indicated that to the other executive departments the same general restrictive statutes apply. In this brief discussion, however, minor variations with respect to statutory limitations will not be indicated.

B. THE UNITED STATES AS A CONTRACTOR.

1. In General, Like Rules and Principles Govern the United States as a Contractor and Citizen - Contractors.

a. If it (the United States) comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the laws that govern individuals there (Cook v. U.S., 91 U.S. 389, 398, U.S. v. Bestwick, 94 U.S. 53; Snoot's Case, 15 Wall. 36), and it has no immunity which permits it to recede from this obligation (a contract with an individual or corporation) for so far as concerns the particular transaction it divests itself of its sovereign character and takes that of an ordinary citizen. (Parcell Envelope Co. v. U.S., 47 Ct. Cls. 1, citing U.S. v. N.A.C. Co., 74 Fed. 145, Southern Pac. R. Co. v. U.S., 28 Ct. Cls. 77).

b. The United States in its political capacity may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the departments to which those powers are intrusted, enter into contracts not prohibited by law and appropriate to the just exercise of those powers; no legislative authorization is required, such power being incident to the general right of sovereignty. (Dugan v. U.S., 3 Wheat. 172, U.S. v. Tingcy, 5 Pct. 114, U.S. v. Bradley, 10 id. 343, U.S. v. Linn, 15 id. 290, Cotton v. U.S., 11 How. 229, Fowler v. U.S., 3 Ct. Cls. 43; Allen v. U.S. id. 91.)

2. Certain Laws and Principles Specially Applicable to Government Contracts.

a. Statute of Limitations. The Statute of Limitations is not applicable in suits brought by the United States unless Congress in a given case has clearly manifested an intention that it shall be. (U.S. v. Nashville, Chattanooga & St. Louis Ry. Co., 118 U.S. 120).

b. Mistake of Law The Government may recover back money paid under mistake of law. (Wisconsin Central R.R. Co. v. U.S., 164 U.S. 190). But when a settlement in a compromise agreement is made upon a full knowledge of all the facts, without concealment, misrepresentation, or fraud (no mistake of law involved) it must be equally binding upon the Government as upon

the contractor, at least such a settlement cannot be disregarded by the Government without restoring to the contractor the property surrendered as a condition of its execution. (U.S. v. Corliss Steam Engine Co., 91 U.S. 321).

c. Estoppel. Estoppel may be defined as "a preclusion, in law, which prevents a man from denying a fact, in consequence of his own previous act, allegation, or denial of a contrary tenor". (Steph. Pl. 239). At common law there was no estoppel against the sovereign and this rule is applied in some states. (State v. Williams, 94 N.C. 891). Estoppel by record and by deed have been applied against the state in various cases; but the weight of authority is against the estoppel of the state, in pais. (Harv. L. Rev. 126). The state is not estopped from denying the validity of a contract made without authority because the contractor has in good faith performed services under it, since he must at his peril know the authority of those who seem to act for the state. (Mullan v. state, 114 Cal. 578). Negligents and omissions of public officers will not operate as estoppel against the state (Ann. Case, 1914 A 229) nor is the state estopped by the unauthorized acts of its officers. (State v. Jahrens, 117 La. 286). But in Walker v. U S, 139 Fed. 409, it was held that acts of officers of the United States authorized to shape its conduct as to the transaction, may ~~work~~ an estoppel against the Government, and in St. v. of Mich. v Jackson L. & S. R. Co Fed. Rep. 69, 116, the U.S. Circuit Court of Appeals held that while the state may not be held responsible for the acts of its agents when done in excess of his powers, yet where a course of action has been pursued with the knowledge and acquiescence of the state, in which no question of morals is involved, for a long time, the state will be estopped from denying the agent's authority.

d. OSTENSIBLE AUTHORITY. There is this difference between individuals (as principals) and the Government - that the former are liable to an extent of the power that they have apparently given to their agents, while the Government is liable only to the extent of the power it has actually given to its officers. (Salomon v. U.S., 7 Ct. Cls. 491). The Government is not bound by the act of its agent, unless it clearly ap-

peers that he acted within the scope of his authority, or was employed as a public agent to do, or was held out as having authority to do, such act. (Whiteside v. U.S., 93 U.S. 247, Lee v. Munroe, 7 Cranch. 366; Filer v. U.S., 9 Wall. 45).

c. Question of Good Faith. The courts have repeatedly held that gross inadequacy of consideration is presumptive evidence of fraud. (20 Mich. L. Rev. 104). The Supreme Court has so ruled in a case in which a contract would commit the agents of the Government to an agreement "such as a man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other". (Hume v. U.S., 132 U.S. 406). This case, however, does not lend color to the theory that the court would apply a different rule to public than to private contracts, though the Court of Claims has taken a reasonable and not inconsistent position in Beard v. U.S., 3 Ct. Cls. 122, 129, viz. "a court, whenever there are circumstances to excite suspicion, will look narrowly into the case and hold the party who seeks to enforce such a contract to fuller explanation and stricter proof of fairness than would be required between two individuals, sui juris, and each acting on his own behalf". (See also U.S. v. Carter, 217 U.S. 286, 310).

f. Extension of the Statute of Frauds. So far as the War, Navy, and Interior Departments are concerned, contracts, with certain exceptions, must be in writing and signed by the contracting parties. (See R.S. 3744, as amended by the Act of June 15, 1917, 40 Stat. 198).

g. Public Competition. It is the public policy of the United States to require all Government Contracts, with certain statutory exceptions, to be based on public competition. This policy is adapted to two ends, first, to secure the best quality at the lowest price; and second, to assure equality of opportunity to all who seek to render services or furnish supplies to the United States. (See R.S. 3709).

h. Suits against the Government. In a private contract both parties have adequate and complementary legal or equitable remedies in the event of dispute

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arising out of, or breach of, contract. In a Government contract, the citizen has only such judicial redress against the United States as Congress has specifically given him and such redress must be sought in precisely the manner and form directed by statute.

C. AGENTS OF THE GOVERNMENT.

1. Congress has Definitely Indicated the Powers of Government Agents.

a. While the United States has the right, subject to self-imposed restrictions and limitations, to make a valid and binding contract, yet Congress has safeguarded the interests of the Government by enacting sundry statutes - directory, mandatory, or prohibitory - for the guidance and direction of the agents of the Government. Certain instructions governing the carrying out by government agents of these statutory provisions are contained in regulations issued by the President as the executive head of the Government, or by the Secretary of War on his behalf. These instructions, however, must follow, but not contravene, legislative enactments.

b. The United States must act through agents. When it has contracted, through its authorized agents, with one of its citizens (the term here including partnerships and corporations) to do or not to do a particular thing, the law implies that it (the Government) has so agreed and this agreement becomes a government contract.

2. The President.

a. The Executive Power shall be vested in a President of the United States of America. (Art. II, sec. 1, Const).

b. The President's power is limited by the legislation of Congress. (U.S. v. Cerliss, 91 U.S. 321).

c. The President, as Commander-in-Chief of the Army and Navy, is vested with wide administrative and executive powers, and unless the exercise thereof is made judicial by express provision of statute, or is such by clear implication, may be delegated to the head of a department to act for him and in his stead. When the duty imposed upon the President is judicial in character, it may not be delegated away. (Locks v. United States, 277 Fed. 594).

d. The President and subordinate executive officers, whether military or civil, possess a limited power to establish regulations, provided these be in execution of, and supplemental to, the statutes and statute regulations, but not to repeal or contradict existing statutes or statute regulations, nor to make provisions of a legislative nature. (Opinions of the Attorney General).

3. The Secretary of War.

a. Shall conduct the business of the Department in such manner as the President shall direct. (R.S. 216).

b. Is the regularly constituted organ of the President for the administration of the Military Establishment of the Nation. (U.S. v. Eliason (1842) 16 Pet. 291, 301).

c. His orders, in the business of the Department are presumed to have been issued in the manner directed by the President. (In re Billings (1888) 23 Ct. Cls. 166, 176, Truitt v. U.S., (1903) 38 Ct. Cls. 398; Wilcox v. Jackson (1839) 13 Pet. 498, 512).

d. All purchases and contracts for supplies or services for the military service shall be made under his direction. (R.S. 3714).

e. Whether he makes the contracts himself, or confers the authority upon others, it is his duty to see that they are properly and faithfully executed, and if he becomes satisfied that contracts which he has made himself are being fraudulently executed, or those made by others were made in disregard of the rights of the Government, or with the intent to defraud it, or are being unfaithfully executed, it is his duty to interpose, arrest the execution, and adopt effectual measures to protect the Government against the dishonesty of subordinates. (U.S. v. Adams, 7 Wall. 463, 477, Parish v. U.S., 8 Wall. 489).

f. Regulations made by him, conformable to statute, may be amended or waived in their application to particular cases; but waiver must be specific and must not take away or abridge rights, duties, and obligations defined by statute. (Doc. Comp. 304-305).

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g. His written promise is not a binding obligation upon the Government where there was no authority in law for the making of such a promise. (Stansbury v. U.S., 8 Wall. 33).

h. He may extend the time for the execution of a contract when the interests of the Government are not thereby prejudiced, and particularly when its non-completion within the time limited is not due to the negligence of the contractor. (2 Comp. Dec. 242, Salmon v. U.S. 19 Wall. 17, U.S. v. Carliss Steam Engine Co., 91 U.S. 321, 18 Op. Atty. Gen. 101, 2 Comp. Dec. 635).

i. "He has no general or unlimited power to bind the Government by indorsing or accepting negotiable paper" and an acceptance given by him "to contractors, upon whose contract no payments have become due is either an advance upon the contract, or a loan of the public credit to the contractors, both of which transactions are prohibited by express acts of Congress and are illegal. The illegality of the transaction goes to the very foundation of the Secretary's authority. He cannot be the agent of the United States to do that which the laws of the United States expressly forbid." (The Floyd Acceptance, 7 Wall. (1868) 666).

4. The Assistant Secretary of War.

Under direction of the Secretary of War, is charged with the supervision of the procurement of all military supplies; and chiefs of branches charged with procurement of supplies are required to report direct to him. (Act of June 4, 1920, 41 Stat. 764-765).

5. Powers and Limitations of Government Agents.

a. Secretaries of War, Navy and Interior shall furnish every officer, appointed with authority to make contracts, with a printed ledger of instructions and also with printed blank contract forms. (P.S. 3747).

b. The Government is liable only to the extent of the power it has actually given to its officers. (Salomon v. U.S., 7 Ct. Cls. (1871) 491).

c. The Government has no officer who is a general agent. (Slavens v. U.S., 196 U.S. 229).

d. Contractor Must Assure Himself of Agent's Authority. Every officer of the Government, from the President down to the most subordinate agent, holds office under the law with prescribed duties and limited authority, and in every instance the person entering into a contract with the Government must look to the statute under which it is made, and see for himself that his contract comes within the terms of the law. (Floyd Acceptances, 7 Wall. 666, Filer v. United States, 9 Wall, 45, Whiteside v. U.S. 132 U.S. 406, Reoside v. United States (Fromont Case) 2 Ct. Cls. 1; Henderson v. United States, 4 Ct. Cls. 75; Garman v. United States, 34 Ct. Cls. 237; Lind v. United States, 49 Ct. Cls. 635).

e. The Government is not bound by the act of its agent, unless it clearly appears that he acted within the scope of his authority, or was employed as a public agent to do, or was held out as having authority to do, such act. (Whiteside v. U.S., 93 U.S. 247; Lee v. Munroe, 7 Cranch 366, Filer v. U.S., 9 Wall, 45).

f. Government Contracts Bind United States and not Agent Personally. Where a public agent acts in the line of his duty and by legal authority, his contracts made on account of the Government are public and not personal. They insure to the benefit of and are obligatory on the Government, not the officer. (Hodgin v. Dexter, 1 Cranch 345, 363, Parks v. Ross, 11 How. 362).

g. Implication of Authority. Although a public officer may not bind the Government by contract unless authorized by law, such authority may be implied from the language of a statute imposing certain special duties upon him. (Rives et.al. v. United States, 28 Ct. Cls. (1893) 249).

h. When an executive regulation directs officers of one class to make a contract on behalf of the United States, it confers no authority to make it upon officers of a different class, although employed about the same government business. (Headnote, Camp v. United States, 113 U.S. (1885) 648).

i. The United States are not to be held responsible for the acts and declarations of persons in charge of the construction of the work in the making of contracts, either as express contracts or by the implication of law, in violation of the authority of their superior officers. (Sprague v. U.S., 37 Ct. Cls. (1902) 447).

j. Implied obligation Invalid where Express Contract Illegal. An officer of the Government has no power to bind the Government by the acceptance of property where the purchase would be illegal. On the contrary, such property could not be deemed to be received to the use of the United States. (Rocside v. United States, 2 Ct. Cls. (1886) 1).

k. "This court has always regarded the Government as somewhat in the character of a ward, and its officers in the character of its guardian, and it has never given effect to a contract where it appeared that the contractor directly or indirectly, by direct briberies or corrupt influences, sought to impair the good faith of the guardian." (Garman, Adm. v. U.S., 34 Ct. Cls. (1899) 237).

l. Fraud and Bribery. Congress has passed various laws relating to fraud and self-interest in the making of Government contracts. These statutes on the one hand forbid an officer or agent of the Government who might have a pecuniary interest in a proposed contract to solicit or induce the making of such a contract by another officer or agent, and on the other hand, they provide that no one pecuniarily interested in a business enterprise shall represent the Government contracts with that enterprise. These statutes also make punishable the receiving of a bribe or pecuniary advantage by a Government agent as also the giving of such bribe or pecuniary advantage to such agent. So important have the courts regarded these statutes that they have modified, somewhat, to the advantage of the Government, certain common-law rules of evidence respecting allegations of fraud.

m. Disabilities affecting Right to Contract with the Government. Congress has prohibited agents or officers of the Government from making any contract with one who is a member of Congress. Certain statutory

exceptions have been made to this provision. The most important of which is that which permits the making of a contract with a corporation for its general benefit, even though a member or members of Congress may be interested in the corporation.

n. Forgery and Bribery. Congress has also passed various laws relating to forgery and bribery, thus assuring to the Government the fair and honest service of its agent.

o. Government Contract with an Officer or Agent of the United States. At this point it may be noted that while an officer or agent of the Government is forbidden to make any contract or place any order with a firm or corporation in which he may have a pecuniary interest or from inducing or advising another officer or agent to make a contract or place an order with such a firm or corporation, yet there is no legal objection to an officer or employee of the Government entering into contractual relations with the Government or owning an interest in a firm or corporation which enters into contracts with the Government.

D. GENERAL LIMITATIONS GOVERNING GOVERNMENT CONTRACTS.

1. Statutory Provisions.

Congress has passed certain general statutes which limit and define the contractual powers of Government Agents. The most important of these are.

a. The prohibition against the acceptance of voluntary service "except in case of sudden emergency involving the loss of human life or the destruction of property". (R.S. 3679, as amended by Act of Feb. 27, 1906, 34 Stat. 49).

b. The provision that no contract or purchase shall be made "unless the same is authorized by law or is under an appropriation adequate to its fulfillment" with certain restricted exceptions in the War and Navy Departments. (R.S. 3732, as modified by Act of June 12, 1906, 34 Stat. 255).

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c. The prohibition against expenditures in excess of appropriations or the involvement of the Government in obligations for future payment of money in excess of such appropriations "unless such contract or obligation is authorized by law". (R.S. 3679, as amended by Act of Feb. 27, 1906, 34 Stat. 49).

NOTE: To be "authorized by law" * * * a contract must appear to have been made either in pursuance of express authority given by statute, or of authority necessarily inferable from some duty imposed upon or from some power given to the person assuming to contract on behalf of the Government. (15 Op. Atty. Gen. 236).

d. The prohibition against the use of contingent funds except upon the written orders of the head of the proper executive department. (R.S. 3683).

e. The provision that Congress must make appropriations in specific terms or specifically authorize a contract to be executed. (Act of June 30, 1906, 34 Stat. 764). No authority can be given by inference. (18 Op. Atty. Gen. 176).

f. The provision that, with certain statutory exceptions, appropriations are restricted to the fiscal year indicated. (Act of Aug. 24, 1912, 37 Stat. 487, as modified by Act of March 3, 1919, 40 Stat. 1309).

g. The requirement that -

"All balances of appropriations contained in the annual appropriation bills and made specifically for the service of any fiscal year, and remaining unexpended at the expiration of such fiscal year, shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year; and balances not needed for such purposes shall be carried to the surplus fund. This Section, however, shall not apply to appropriations known as permanent or indefinite appropriations. (R.S. 3690).

h. The prohibition against the making of contracts for stationary or other supplies for a longer term than one year from the time the contract is made. (R.S. 3735). (To this prohibition there are certain exceptions in the Post Office Department).

i. The provision relating to reports to Congress respecting the use of appropriations. (R.S. 228).

j. The provision that: All sums appropriated for the various branches of expenditures in the public service shall be applied solely to the objects for which they are respectively made, and for no others. (R.S. 3678).

k. The prohibition against advance payments. (R.S. 3648).

NOTE: Statutory exception: Newspapers, magazines, and periodicals. Exceptions by interpretation, Payment for goods bought f.o.b. shipping point and partial payments under manufacturing contracts. (Op. J. A.G. 76-700 (1917); (Comp. Gen. 143).

In partial payment Government becomes owner of part paid for. (20 Op. Atty. Gen. 746).

l. The provision that no payment for services or supplies under a contract shall exceed value of the services rendered or the supplies furnished. (R.S. 3648).

m. Certain statutory restrictions applicable only to the District of Columbia. The most burdensome of these in time of war or threatened war, i. e., those which relate to the renting or leasing or requisitioning of buildings for military purposes, have now been modified. (See Act of July 8, 1918, 40 Stat. 826 and Act of July 9, 1918, 40 Stat. 861).

n. The prohibition against the employment of laborers and mechanics for more than eight hours in one day. To this prohibition there are certain important statutory exceptions. In time of national emergency the President is authorized to suspend the provisions of the law to the Government's benefit. (Act of Aug. 1, 1892, 27 Stat. 340, as amended by Act of March 3, 1913, 37 Stat. 726).

o. The prohibition against the use of convict labor. (This is an executive restriction under date of May 18, 1905, based on a public policy set forth by Congress with reference to the hiring out of Federal prisoners to private contractors - Act of Feb. 23, 1887, 24 Stat. 411).

p. The provisions respecting hours of labor for employees other than those covered in the "Eight-Hour Law". - (See Act of March 3, 1893, 27 Stat. 715 and Act of March 15, 1898, 30 Stat. 316-317).

q. The provisions of the statutes relating to the "civil service". (The necessities of war-time activity would ~~seem~~ urge some modification of civil-service requirements upon proclamation of the President in time of national emergency).

r. The prohibition against the assignment of Government contracts. (R.S. 3737).

Under this head it may be noted.

(1) Statute is for the protection of the United States. (Hogness v. Chulberg (1915), 224 Fed. 28, 139, C.C.A. 492, and for its sole benefit. (Tinker & Scott v. U.S. Fidelity and Guaranty Co., 169 Fed. 211, 212.)

(2) It is intended to secure to the United States the personal attention and services of the contractor (Francis v. U.S. (1875) 11 Ct. Cls. 638), and assure the integrity of bidding. (19 Op. Atty. Gen. 187).

(3) It bars action by assignor as well as assignee. (Wanless v. U.S. (1870) 6 Ct. Cls. 123).

(4) Government cannot set up an attempted assignment to bar recovery under an executed contract. (Dougherty v. U.S. (1883) 18 Ct. Cls. 496).

(5) An officer of the Government can not authorize an assignment in advance. (19 Op. Atty. Gen. 186).

(6) Government may recognize or repudiate an assignment. (Dulancy v. Scudder, 94 Fed. 6, 10, Federal Mfg. & Ptg. Co. v. U.S., 41 Ct. Cls. 318; 5 Op. Atty. Gen. (1821) 738, 15 id. (1877) 236; 16 id. (1879) 278).

(7) If a surety advances money, agreement to share profits is not an assignment. (Bowe v. U.S., 42 Fed. 761; Anderson et al. v. Blair, 80 So. 31).

(8) Any substantial transfer is within the prohibition. (Francis v. U.S., 11 Ct. Cls. 638).

(9) Subletting of a part of a contract is not an assignment. (White v. McNulty, 49 N.Y.S. 903, 26 App. Div. 173, judgment affirmed, 58 N.E. 1094, 164 N.Y. 582).

(10) There is a distinction between the assignment of a covenant contract and an assignment of money due under a contract. The former is void, and passes no title, legal or equitable, the latter passes title to the money due, as though it were the sale of a chattel. (Chateau v. U.S., 9 Ct. Cls. 155). (See also R.S. 3477).

(11) An honest combination of capital is not an assignment. (Field v. U.S., 16 Ct. Cls. 434).

(12) A corporation formed to carry out a contract is not an assignee. (U.S. v. Axman, 152 Fed. 816, 821).

(13) An essential requirement is that contractor retain personal responsibility, though he perform by ordinary business methods. (Manning v. Elliott, 9 App. D.C., 71; Stout, Hall & Bangs v. U.S., 27 Ct. Cls. 385).

(14) Contract for material is not an assignment. (U.S. v. Farley, 91 Fed. 474).

(15) The Government is liable to the assignee of a patent. (Federal Mfg. & Ptg. Co. v. U.S., 42 Ct. Cls. 479).

E. PUBLIC COMPETITION.

1. Introductory Statement.

a. One of the most important statutes relating to contracts ever enacted by Congress is that now known as R.S. 3709. Under it contracts for practically everything furnished to the Government, except personal services must be made upon advertisement. This statute was originally passed upon the outbreak of the Civil War.

2. Statutory Provisions.

a. All purchases and contracts for supplies or services in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same when the public exigencies do not require the immediate delivery of the articles or performance of the service. * * (R.S. 3709).

b. Similar specific statutes have been passed relating to the several executive departments, to particular branches in the several departments, and to such particular contracts as those relating to purchase of horses, steel, and means of transportation, to the construction and repair of

buildings, and to public cartage. Certain general as well as certain special exempting statutes have also been enacted.

3. Judicial Interpretations.

The trend of judicial interpretation may be indicated briefly

a. "In the absence of any exigency, in fact, or any declared by the Secretary, or any that can be judicially inferred, we think that portion of the section which requires advertisement is mandatory, and a contract made in violation of it is void." (Schneider v. U.S., 19 Ct. Cls. 547, 551).

b. A contract for "personal service" is one by which the individual contracted with, renders his personal service to the Government through its agents, thus himself becoming the servant of the Government. (15 Op. Atty. Gen. 235).

c. Where discretion is vested in an officer or board of officers to declare an emergency, and a contract is made in which this discretion is exercised, the validity of the contract can not be made to depend on the degree of wisdom or skill which may have accompanied the exercise of the discretion. (Speed's Case, 8 Wall. 77, 83).

d. Decision of officer in command is conclusive unless it is shown that the emergency was not real, or that the transaction was not one of good faith and the result of necessity. (Stevens v. U.S., 2 Ct. Cls. 95).

e. An exigency exists when from any cause that is necessary for the good of the public service the article should be procured or the service performed without any delay. (Reeside v. U.S., 2 Ct. Cls. 1, 51).

f. A declaration of emergency must be in writing; an oral declaration is invalid. (Cobb et al. v. U.S., 18 Ct. Cls. 514, 536).

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g. Open market purchase should be made with the care a prudent business man would exercise. (Child v. U.S., 4 Ct. Cls. 176), and such purchase should be made at the place where articles of the description are usually bought and sold, and in the mode in which such purchases are ordinarily made between individual and individual. (2 Op. Atty. Gen. 257).

h. A military emergency, an emergency which arises in the field or in time of war, cannot be measured by precise rules, but may continue equally imminent over a period of months. (Thompson v. U.S., 9 Ct. Cls. 187). (See also Mowry's Case, 2 Ct. Cls. 68).

i. Reasonable publicity satisfies requirements. (3 Comp. Gen. 862).

j. An officer, who has failed to comply with requirements, cannot make a consequently invalid contract voidable upon the Government by permitting performance thereof to proceed to any extent. (15 Op. Atty. Gen. 539).

F. BIDS AND BIDDING.

1. Purpose of Securing Bids.

a. The laws with respect to proposals and bids have been designed to assure the United States the benefit of competition among those desiring to furnish it supplies or render services to it. Congress having assured competition has provided for the integrity of bids in R.S. 3737. This statute forbids the transfer of any contract or order or interest therein. Thus a bidder is prevented from making several bids, one by himself and others by his friends and employees, to be consummated later by assignment to the real bidder for whom they all acted. Also the statute prevents the bidding for, and obtaining of, contracts for mere speculation by contractors who have neither the intention nor ability to perform them but hope to sell such contracts at a profit to bona fide bidders or contractors.

b. "These statutory provisions provide a uniform system for the purchase of supplies. They embrace all the requirements to secure their object. They contemplate the advertising for proposals by competitive bidders, a fair and impartial opening and comparison of the bids, and an award by competent authorities."

2. Separate Proposals Required.

With exception of certain river and harbor improvements, the statutes require the Secretary of War to invite separate proposals and make separate contracts "for each work, and also for each class of material and labor for each work". (R.S. 3717, and Act of Sept. 19, 1890, 26 Stat. 452 and Act of July 25, 1912, 37 Stat. 233).

3. Rules and Principles Governing Bids and Bidding.

a. Secretary of War to prescribe rules and regulations respecting bids. (Act of Apr. 10, 1878, 20 Stat. 36, as amended by Act of March 3, 1883, 22 Stat. 487, 488).

b. Sufficient time should be allowed for submission of bids to assure competition. (Act of July 5, 1884, 23 Stat. 109).

c. In certain instances opportunity to bid must be given to other Government establishments. (Act of June 5, 1920, 41 Stat. 975).

d. In certain cases competition should be limited to locality nearest points where supplies are needed, conditions of cost and quality being equal. (Act of July 5, 1884, 23 Stat. 109).

e. Preference shall be given in certain cases, to articles of domestic production and manufacture, conditions of price and quality being equal; and to the extent of consumption required there by the public service, in certain cases, preference shall be given to "articles of American production and manufacture produced on the Pacific Coast". (R.S. 3716).

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f. Bidders must be given opportunity to be present at opening of bids. (R.S. 3710).

g. The bidder may withdraw his bid before the opening. (Moffett, Hoagkins & Clarke Co. v. City of Rochester, 178 U.S. 373).

h. Formal errors in bids may be waived, providing they affect or alter the bid in no substantial way. (Shealey, p. 178).

i. Correction of substantial unilateral mistake in a contract cannot be made by Government officials and, generally speaking, would not be made by a court of equity. (Shealey, p. 178).

j. Where the mistake is mutual and common to both parties courts of equity will grant relief. (Hearne v. Marine Ins. Co., 20 Wall, 488, 490).

k. Contracting officer has no authority to waive compliance with essential terms of rules and regulations. (20 Op. Atty. Gen. 496.)

l. An irresponsible bidder may be rejected but rejection must rest strictly on statutory grounds, i.e., rejection may not be arbitrary or capricious. (28 Op. Atty. Gen. 384). (Act of July 5, 1884, 23 Stat. 109).

m. Congress may validate contracts illegal because of statutory defects. The most recent exercise of such legislative validation of unenforceable contracts was in the passage of the Dent Act.

n. Legal Effect of Acceptance. There is considerable confusion as to the legal effect of the acceptance of a bid. These general principles can be indicated

(1) If the execution of a formal contract is not required by statute, the acceptance binds both the Government and the contractor. (Garfield v. U.S., 93 U.S. 242, U.S. v. Purcell Envelope Co., 249 U.S. 313).

(2) If a formal contract is not required by statute but the acceptance indicates that a formal contract will be made, the acceptance binds both the Government and the contractor. (Adams v. U.S., 1 Ct. Cls. 192). (See also Schneider v. U.S., 19 Ct. Cls. 547).

(3) If a formal contract is required (under R.S. 3744) the acceptance binds the bidder, although the United States could not be held if it subsequently refused to execute the formal contract. (U.S. v. N.Y. & P.R.S.S. Co., 239 U.S. 88).

(4) If a formal contract is required by statute, or is contemplated though not required, the offer and acceptance indicate the precise terms which can be incorporated in the formal contract. (Milliken Printing Co. v. U.S., 40 Ct. Cls. 81, Garford Motor Truck Co. v. U.S., 58 Ct. Cls. 53, Pierce-Arrow Motor Car Co. v. U.S., 58 Ct. Cls. 582).

c. Written Guaranty to Accompany Bid. The Secretary of War may require every bid to be accompanied by a written guaranty to the effect that the guarantor undertakes that the bidder, if his bid is accepted, will, when required, give bond to furnish the supplies proposed or to perform the service required. (Act of Apr. 10, 1878, 20 Stat. 36, as amended by Act of March 3, 1883, 22 Stat. 487-488).

p. Where bidder binds himself to keep bid open sixty days the Government has no right to accept after sixty days. (Haldane v. U.S., 69 Fed. 819; U.S. v. Carlin Const. Co. and the Ill. Surety Co., U.S.D.C., South Dist. of N.Y., May 1912).

G. REQUISITES AND VALIDITY OF CONTRACTS.

1. Authority of an Officer or Agent to Bind the United States.

The United States, like a corporation, can act only through its officers or agents. The authority

of an officer or agent must be found in some constitutional or statutory provision. See The Floyd Acceptances, 7 Wall, 666, Hogg v U.S. 218 U.S. 328. Unlike the representative of a corporation, an officer or agent can bind the United States by contract to the extent of his actual authority only. The Supreme Court has repeatedly held that the doctrines of ostensible authority and of estoppel are inapplicable to government contracts, on grounds of public policy. However in United States v. Speed, 8 Wall 77, the court held that when a statute confides a discretion to an officer, a person dealing with him in good faith may assume that the discretion has been properly exercised. This principle has been further extended by the Court of Claims in Thompson v. United States, 9 Ct. Cls, 187, to this limit, that where a discretion is vested in a superior officer, while the transaction is with a subordinate, the contractor may assume that the discretion has been exercised properly by the superior and that the subordinate is acting in accordance with the superior's orders without requiring their production.

2. Statutory Limitations on the Authority of Government Agent.

Three important statutory limitations on the powers of Government agents are

- a. Those which require contracts, with certain exceptions, to be made as a result of advertisement.
- b. Those which prohibit the making of a contract binding the Government to pay more than the amount appropriated for the purposes of the contract.
- c. Those which require certain contracts to be reduced to writing and signed by the contracting parties.

3. Common Law Rules.

a. Once an agent or officer's authority to make a particular contract is established and it is determined that there are violated no statutory limitations upon the mode of its exer-

dise, then his acts of offer and acceptance are to be given the same legal effect as are the like acts of the agent of a private person.

b. As the common law rules respecting offer and acceptance apply to Government contracts so do the like rules with reference to consideration, special formality, capacity of parties, reality of consent, and legality of object.

4. "Just Compensation."

a. Of the elements necessary in a contract only one, 'consideration', will be here noted, and discussion of this element will be confined to the adequacy of consideration so far as it related to "just compensation". The Constitution provides that private property shall not be used for public use without "just compensation". Recently the theory has been advanced that any contract which purports to bind the Government to pay more than just compensation for benefits rendered or to be rendered is unenforceable and void to the excess over "just compensation". The theory is since the United States must pay "just compensation" to the involuntary vendor or seller, the converse is implied, namely, that it may not be called upon to pay more than "just compensation" to the voluntary contractor.

"This would seem to be but another way of saying that in government contracts, contrary to the rule applicable in the case of contracts between private individuals, the adequacy of the consideration which the Government received must be inquired into. The proposition, if true, would be startling in its results, for it would mean that all contracts and settlements, even though made in good faith, would be subject to overhauling, since it is admitted that the Government may recover back money paid under mistake of law. (See Wisconsin Central R.R. Co. v. United States, 164, U.S. 190). Moreover, the statute of limitations is not applicable in suits brought against the Government unless Congress in a given case has clearly manifested an intention that it shall be. (See United States v. Nashville, Chattanooga & St. L. Ry. Co., 118 U.S. 120).

"No theory better calculated to destroy confidence in the Government, or to furnish a cheap method of advertisement to the self-seeking politician has yet been suggested. Far better that the Government should occasionally be forced to pay excessive compensation, than that the citizen should be deprived of the incentive and desire to serve its needs from the well grounded fear that he might be compelled to submit to expensive litigation to retain that which rightfully belongs to him.

"Fortunately the decided cases do not give any real support to this theory. In fact, the converse of the proposition is implicit, if it is not expressed in them. * * *

* * * "It may be true, and rightly so, that a court, whenever there are circumstances to excite suspicion, will look narrowly into the case and hold the party who seeks to enforce such a contract to fuller explanations and stricter proof of fairness than would be required between two individuals, *sua juris*, and each acting on his own behalf. * * *

* * * "On the other hand it is equally clear that, in the absence of fraud or misrepresentation involving a breach of warranty, the Government cannot be held liable to the contractor for more than the contract price regardless of the value of the benefits conferred upon it or the cost to the contractor". * * * Grover C. Griswold, Contracts with the United States, Michigan Law Review, June 1924.

b. What is "Just Compensation"?

* * * Broadly stated, just compensation means that price at which a purchaser is willing to buy, although not compelled to buy. In the matter of condemnation of real estate it is not difficult to apply this rule and reach a satisfactory answer, since real estate is largely governed as to its value by local conditions and circumstances, but when attempting to fix just compensation for merchandise or other personal property it is not so easy. For instance, the

By Paymaster General of the Navy holds that just compensation means the market price prevailing at the point of commandeering. This might cause an actual loss to the owner of the property who might have purchased this property for sale in some other section of the country where the price would be much higher. The Supreme Court of the United States has in the case of *Manongahela Nav. Co. v. United States*, 148 U.S. 312 (1893), decided that just compensation is a full and perfect equivalent for the property and not the owner, this decision having been used in a case in which real estate was condemned." Shealey, *Law of Government Contracts*, pages 45-46.

"In the matter of merchandise, strange as it may seem, no true guide exists in federal decisions as to this question during the Civil War, but since then a number of decisions afford some light as to what is meant by just compensation. In the case of *Wilmoth v. Harrison*, 127 Fed. 49, 53, (1904), it has been decided to be that price at which the owner can make himself whole by purchasing in a general market, while in *Marshall v. Clark*, 78 Conn. 9 (1905), in a well considered opinion by Chief Justice Baldwin, it is stated that the ordinary measure of damages for a failure by a vendor of goods to deliver them as agreed is the difference, if any, between the contract price and their higher market price at the time and place agreed upon for delivery. While the case of *Bullard v. Stone*, 67 Cal. Rep. 477 (1885) is founded upon a California statute, yet that statute does not in any way affect the value of a decision as to market price and as a matter of fact business men can probably apply this decision more readily to their own particular cases than most other decisions. The court in this case said. "By the market value was meant the price or sum for which an equivalent could reasonably and fairly be purchased at or near the place where the property should have been delivered, and within a reasonable time after failure to deliver." Generally accepted market quotations, as contained in price lists, newspapers, trade journals, trade circulars, etc., have sometimes been admitted as evidence without

proof of their accuracy (see 12 Am. & Eng. Annotated Cases, 129, note), but always when it has been shown that they have been based upon reliable sources of information. Mr. Vernon Brewing Co. v. Teschner, 108 Md. 157 (1908); Sissons v. Cleveland, etc., R.R. Co., 14 Mich. 489 (1866)." Shoaloy, Law of Government Contracts, pages 46-47.

5. Contracts to be in Writing.

a. Contracts made by the secretaries of War, Navy and Interior must be made in writing and signed at the end thereof. The statute making this requirement mandatory is in effect an extension of the Statute of Frauds. The same line of judicial reasoning applied to the common-law Statute of Frauds has been applied to this statutory extension. In a recent important decision, the United States v. New York and Porto Rico S.S. Co., (239 U.S. 88), the Supreme Court has held that a bidder, in a case where the statute requires formal written contract, becomes bound when his proposal has been accepted and that he cannot subsequently refuse to execute the formal written contract and perform the service, although the United States would not be held if it should subsequently refuse to execute the contract. This decision in legal effect has become a part of the statute. (R.S. 3744, as amended by the Act of June 15, 1917, 40 Stat. 198).

b. To the statutory requirement, just indicated, Congress has made certain exceptions, e.g., in the War Department certain river and harbor contracts and certain contracts that are to be performed within sixty days and that are not in excess of \$500.

c. The statute was designed to prevent frauds and perjuries against the United States and the party who makes a contract with an officer without having it reduced to writing aids in the violation of the law.

d. Contracts to be Signed. The statute also requires the signature of both parties "at the end thereof". A consideration of this requirement raises

questions as to the authority of the signer. On the part of the Government the contract should be signed by the officer who executes or delivers it. In a recent case the Court of Claims validated a "proxy-signed" contract where the delegation of authority was explicitly and expressly indicated in the contract. Despite this decision it is safe to assert that "proxy-signed" contracts are in general open to legal question. On the part of the contractor, the authority to sign should be definitely and explicitly indicated.

6. Contracts Requiring Approval.

A contract which by its terms is made subject to the approval of the head of the department is not a contract until it is so approved (Monroe v. U.S., 184 U.S. 524, Ittner v. U.S., 43 Ct. Cls. 336; Little Falls Knitting Co. v. U.S., 44 id. 1), approval is a condition precedent to the legal effect of the agreement (Darragh v. U.S. 33 id. 377; Monroe & Richardson v. U.S., 35 id. 199; Cathell v. U.S., 46 id. 368, Monroe v. U.S., 184 U.S. 524), and the contractor who begins work before approval does so at his own risk, and such approval need not be in writing (Speed's Case, 8 Wall; 77). But ratification by the responsible officer will render an unauthorized contract effective and valid (Ford v. U.S., 17 Ct. Cls. 60) and failure to ratify until after delivery thereunder has begun operates as a waiver of all the time limits, but leaves the contractor bound to deliver within a reasonable time. (Little Falls Knitting Co., U.S., 44 Ct. Cls. 1, Neel Construction Co. v. U.S., 50 Ct. Cls. 98).

7. Supplemental Contracts.

a. Should be made only in cases where obstacles or unforeseen conditions arise, or when the Government desires to abandon the whole or part of its undertaking; and they should always be made in the interests of the United States. (Op. J.A.G. (1914) 76-400; 8 Compt. Dec. 549).

b. Cannot be made when the requirements of public competition would thereby be illegally avoided. (Op. J.A.G. (1914) 76-400).

c. Require new consideration. (14 Comp. Dec. 253).

d. Are ineffective to bind the Government when made after main contract has been fully performed. (25 Comp. Dec. 764).

e. Should not be made for the purpose of interpreting the meaning of terms of the main contract, such terms are to be interpreted according to accepted rules without regard to such supplemental contract. (25 Comp. Dec. 764).

f. Should not be made for the purpose of correcting a mutual mistake; but such mutual mistake must be submitted to the General Accounting Office proven with convincing evidence and then the written contract will be read in accordance with the real intention of the parties and claims for additional payment will be settled accordingly. (27 Comp. Dec. 109).

g. Where made for the benefit of the Government, cancelling original contract after partial performance, the amount to be paid for cancellation is a valid obligation against the appropriation covering the original contract. (26 Comp. Dec. 170).

h. Where terms thereof depart from the original contract, the supplemental contract being for the accomodation of the Government and prepared by an officer of the Government, construction of ambiguous terms will be to the advantage of the plaintiff. (Sheridan-Kirk Contract Co. v. U.S., 52 Ct. Cls. 407).

8. Alteration of Contract.

a. The United States has the same power through the heads of the executive departments and their officers and agents to alter or modify the terms of a contract that a private individual has. (2 Comp. Dec. 182).

b. The heads of the executive departments may act for themselves in such matters or may specially delegate their authority. Experience having shown that it frequently becomes necessary to make changes or modifications in plans and specifications for

public work after the contract has been signed, it is customary to insert a clause in reference thereto. It might, of course, be said that strictly speaking such a change or modification operates to bring about a departure from what was advertised in the proposal, that thus the bidders are not put upon equal terms and in consequence to a limited extent the beneficial object of advertising is impaired. But in an opinion given to the Secretary of War it was stated by the Attorney-General. "That a modification where the interests of the Government will not be prejudiced or any statutory provisions violated thereby may well be provided for in every contract to which the Government is a party; and that a contract so modified is not such a new contract as must be preceded by an advertisement for proposals from bidders". (21 Op. Atty. Gen. 207, 211).

c. Neither party can make alterations in a contract without the express or implied consent of the other, but if the party required to make the alteration does so without protest and then accepts payments and gives receipts in full in accordance with the terms of the contract so altered without making any complaint, he thereby ratifies the alterations and will be bound thereby. (Martin v. U.S., 5 Ct. Cls. 215; Peck v. U.S., 14 Ct. Cls., 84).

d. If, however, an agreement is not entirely clear in its terms, and an officer of the United States orders the contractor to do work which the court holds could not have been intended under a reasonable interpretation of the contract, the contractor may receive his additional expense even though he made no objection to the added performance. (U.S. v. Gibbons, 109 U.S. (1883) 200).

e. If the contractor refuses his assent to changes ordered, he may recover the increased expense to which he is put in making the alterations. (Dale v. U.S., 14 Ct. Cls. (1878) 414).

f. His consent is presumed - unless he makes objection - if the change ordered is of such a nature that the officer in charge might reasonably suppose no additional expense would be caused; but not presumed where the change would necessarily add to the cost. (Dale v. U.S., 14 Ct. Cls. (1878) 514; Ford v. U.S., 17 Ct. Cls., (1881) 60, 79).

H. CONSTRUCTION AND INTERPRETATION OF GOVERNMENT CONTRACTS.

1. Like Rules Applicable to Public and to Private Contracts.

a. In the construction of contracts the principles and rules applicable to contracts in general are likewise applicable to Government contracts. (Hollerbach v. U.S., 233 U.S. (1914) 165).

b. A contract amended at the request of an officer of the United States and for its benefit, the language being ambiguous, will be interpreted against the interest of the Government in conformity to common-law rule that construction will be more strict against party writing the contract. (Garrison v. U.S., 7 Wall. 688); benefit of doubt will be given to the side that did not prepare the contract. (Otis v. U.S., 20 Ct. Cls. 315; Edgar Thomson Works v. U.S., 34 Ct. Cls. 205, U.S. v. Newport News Shipbuilding Co., 178 Fed. 194, Castner v. Sudduth Coal Co., 282 Fed. 602; U.S. v. Bentley & Sons Co., 293 Fed. 229).

c. Previous and contemporary transactions and facts will be considered to determine intent of parties. (Brawley v. U.S., 96 U.S. (1877) 168; Garrison v. U.S., 7 Wall. 688).

d. Government can claim no more favorable rule of construction and interpretation than a private individual. (Otis v. U.S., 20 Ct. Cls. 315; Edgar Thomson Works v. U.S., 34 Ct. Cls. 205).

e. Where there are two possible constructions one making contract lawful, the other unlawful - the former will be adopted. (Hobbs v. McLean, 117 U.S. 567; U.S. v. Cent. Pac. R.R., 118 U.S. 235).

f. Doubtful expressions will be interpreted against the party using the language. (Chambers v. U.S., 24 Ct. Cls. 387; Simpson v. U.S., 31 Ct. Cls. 217).

g. In conflict between general and specific provisions, latter will prevail. (Erickson v. U.S., 107 Fed. 204).

h. In ambiguity, court will adopt practical construction of parties, according to which work was done, over literal meaning of the contract. (D.C. v. Gallagher, 124 U.S. 505); after an express or tacit agreement as to meaning of terms, both parties are bound thereby. (Morriam v. U. S., 14 Ct. Cls. 289).

i. Contract ambiguity may be explained by correspondence. (Walker v. U.S., 143 Fed. 685).

j. In a clerical error in totals, unit price will control. (15 Comp. Dec. 31).

k. In irreconcilable conflict between essential terms of specifications and the contract, the contract is void for uncertainty. (U.S. v. Ellicot, 253 U.S. 524).

l. In case of ambiguity, prior negotiations may sometimes be referred to. (U.S. v. Bethlehem Steel Co., 205 U.S. 105; Chambers v. U.S., 24 Ct. Cls. 387, 393).

m. Trade usage or custom may be shown to prove meaning of doubtful terms, (Bowers Dredge Co. v. U.S., 211 U.S. 176; 12 Comp. Dec. 420, 705, 14 id. 733; 17 id. 581); but that contracts have been made by the parties in reliance on the long continued custom of government departments as to construction, does not affect the necessity for such custom yielding to the positive language of a statute. (Houghton v. Payne, 194 U.S. 88).

n. Where contract is lost, contents may be shown by proof of existence and terms. (Travers v. U.S., 5 Ct. Cls. 329; 4 Comp. Dec. 82).

o. Specific reference in a contract to other writings, incorporates latter as part of contract. (U.S. v. Maurice, Fed. C.s. 15747, 22 Op. Atty. Gen. 98).

p. In repugnance between written and printed terms, the written terms will prevail. (Thomas v. Taggart 209 U.S. 385; Harper v. Hochstein 278 Fed. 102, Hagen v. Scottish Ins. Co., 189 U.S. 423; Lipschitz v. Napa Fruit Co., 223 Fed. 698).

q. When subject matter concerns interests of the public contracts are to be construed liberally in favor of public (Joy v. St. Louis, 183 U.S. 1), and governmental functions cannot be held to have been stipulated away by doubtful or ambiguous provisions. (Rogers Park Water Co. v. Fergus, 180 U.S. 624).

r. Construction of printed Government contracts should be unvarying. (Yates v. U.S., 15 Ct. Cls. 119).

s. Collateral papers must be expressly incorporated in contract in order to modify provisions of same. (Dec. Comp., May 10, 1921).

t. Contract is governed by the law with a view to which it was made (Pritchard v. Norton, 106 U.S. 124 Tool v. Walker, 111 U.S. 242), and the law where the contract is made - in the absence of express contrary stipulation - and not where action is brought, governs. (Cox v. U.S., 6 Pet. 182; Duncan v. U.S., 7 Pet. 435, Bell v. Bruen, 1 How. 169, Wilcox v. Hunt, 13 Pet. 378; Gaston v. Warner, 272 Fed. 56).

I. DATE OF A CONTRACT.

1. Definitions.

a. If the contract refers to "the day of the date", or "The date" and expresses any date, this day and not that of the actual making is taken. But, if there is in the contract no date, or an impossible date * * * as if a thing is re-

quired to be done "within ten days from the date", and the contract was not made until 20 days from the expressed date, * * * then the day of the actual making will be understood to be meant by the day of the date. The expression "between two days" excludes both. (2 Parsons on Contracts. 664).

2. "After the Date of the Execution of the Contract".

a. Where the contract did not provide that the work was to be completed within 136 days from its date, but "after the date of execution of the contract", it may be averred and shown that an instrument was in fact made, executed, and delivered at a date subsequent to that stated on its face. (Camden Iron Works v. Dist. of Columbia, 181 U.S. 453).

3. Undated Contract.

a. An undated contract speaks from the time of its delivery. (O'Reilly v. Cambridge, 279 Fed. 961).

J. BONDS AND SURETIES.

1. Mandatory Requirement.

a. Congress has made mandatory the furnishing of bond in connection with all contracts for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work. (Act of Aug. 13, 1894, 28 Stat. 278 as amended by Act of Feb. 24, 1905, 33 Stat. 812).

b. The original and primary purpose of the statute was to afford to mechanics and laborers a like remedy in employment on public works which they had through mechanics' liens on private works. The Government had long been in the habit of exacting a bond to protect it in such contracts, so the statute refers to the bond as "the usual penal bond", but extends its protection to mechanics and laborers. In the numerous

cases which have come to the courts involving the statutes respecting bonds the same rules and principles, which have become fixed and definite in the consideration of private bonds, have been applied to these public bonds.

2. What is a Public Work?

Much confusion has arisen in attempts to define a public work. An early interpretation confined the words "public work" to something connected with or let into the ground. Later the Supreme Court held that a battle ship was a public work. Justice Moody has given three elements as entering into public work: 'Permanent existence, structural unit, and capability of being severally regarded as a complete work.' In general, the reasoning of the Supreme Court is that when a work belongs to the representative of the public it is a public work. (See Title Guaranty & Trust Co. v. Crane Co., 219 U.S. 24 and Ellis v. U.S., 206 U.S. 261).

K. IMPLIED CONTRACTS.

1. Definition.

a. Implied contracts arise under circumstances which, according to the ordinary course of dealing and the common understanding of men show a mutual intention to contract (Hertzog v Hertzog, 29 Pa. (1875) 465), while express contracts are those in which a proposition made by one party is met by an acceptance on the part of the other, which corresponds with it entirely and adequately. (Mayer v. U.S. 5 Ct. Cls. (1869) 317).

b. Implied contracts arise from the common understanding of parties in the ordinary course of business whereby mutual intent to contract, without formal words therefor, is shown. When the Government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriated. (U.S. v. Lynah, 188 U.S. 445, U.S. v. Buffalo Pitts Co., 234 U.S. 228, Knapp v. U.S., 47 Ct. Cls. 601).

2. Origin.

a. Implied contracts arise where the Government appropriates private property, or where it in effect, though not physically, appropriates it, e.g., where an owner is deprived of profitable use of his land because of the constant firing of heavy guns over it; or where patents are used without agreement or consent; or where private property is used by, or services rendered to, the United States under an invalid contract or without express contract.

3. Compensation.

a. The Constitution provides that whenever the United States takes private property for public use it shall pay "just compensation". The meaning of "just compensation" has already been discussed.

b. In determining the extent of recovery under an implied contract the courts determine compensation on a quantum meruit or a quantum valebat basis. The Court of Claims has defined these two terms thus:

Quantum meruit: as much as he deserved; measure of value received for work done where there is no contract as to compensation. (Cobb et al v. U.S., 18 Ct. Cls. (1883) 514, 536).

Quantum valebat: as much as its reasonable value, said of something sold and delivered without stipulation as to price. (Livingston v. U.S., 3 Ct. Cls. (1867) 131, 135).

4. Pertinent Decisions Respecting Compensation under Implied Contracts.

To indicate the trend of judicial and administrative authority in the consideration of proper compensation in implied contracts, the following decisions are noted.

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a. It is a well settled principle of law that no one may be forced into a contract. If, however, goods voluntarily furnished are received and used and voluntary services are accepted the recipient cannot later say that he did not agree to pay for them. (Garroll v. U.S., Ct. Cls. (1895) 426).

b. If the objection be made that the sale was invalid for want of previous advertisement, or because no "exigency" existed within the intent of the statute, or for the reason that the goods were not purchased in open market; and if the court should so hold yet still it would appear that the defendants received the claimant's goods, that these were sold in good faith, that they went into the hands of the proper officer of the Government, and were used in the public service, and that from their receipt a public benefit was derived, and these facts being established, there would follow a legal right to recover a just and reasonable price. * * * (Livingston v. U.S., 3 Ct. Cls. (1867) 131, 135).

c. Where alterations or additions are verbally ordered by an officer or agent of the Government authorized to contract, a contract will be implied to the extent of the benefit which the Government has received, notwithstanding a provision in the original contract that such orders must be in writing. (Barlow v. U.S., 5 Ct. Cls. 514, 184 U.S. 123).

d. Where an express contract is void, the person who has delivered his goods to the Government may recover on the implied contract in quantum meruit. (Heathfield v. U.S. (1872) 8 Ct. Cls. 213).

e. Where the proper officers of the Government receive services or property under a contract made by one who was not an authorized agent of the Government, and they use it for a lawful purpose, so that the Government derives a legal benefit therefrom, the contractor may recover the actual value of the property sold or service rendered. (Reeside v. U.S. (1866), 2 Ct. Cls. 1).

extra work. (Durocher v. U.S., 57 Ct. Cls. 521, see also Ferris v. U.S., 28 Ct. Cls. 332; Simpson v. U.S., 31 Ct. Cls. 217; 172 U.S. 372; Sanger & Moody v. U.S., 40 Ct. Cls. 47, Lowman v. U.S., 41 Ct. Cls. 470, E. & I. R. Co. v. U.S., 32 Ct. Cls. 555).

l. Where a contract provides that no allowance shall be made for extra work unless provided for by a written agreement specifying the cost, and an officer directing the work refused to enter into a written agreement and insisted that the work was embraced in the original contract, the contractor's remedy was an appeal to the superior officer if the contract so provides. If the decision of the superior officer is adverse, the contractor is remediless. Having performed the work without requiring the order to be in writing he can not recover for extra work. (Kilmer v. U.S., 48 Ct. Cls. 180).

m. Oral declarations of emergency are invalid. (Cobb et al. v. U.S., 18 Ct. Cls. 514, 536).

n. No officer of the Government has authority to contract for indefinite and uncertain amounts or quantities. (Cobb et al. v. U.S., 18 Ct. Cls. 514, 536).

o. Claimant cannot recover for extra work in excess of that provided for in his contract, when such work is done on his own motion and without defendant's request (Murphy v. U.S., 13 Ct. Cls. 372, Dale v. U.S., 14 Ct. Cls. 514; Phoenix Bridge Co. v. U.S., 38 Ct. Cls. 492), nor for extra work which was never the subject of any agreement, nor authorized by the officer in charge as extras, nor submitted by him to the War Department (Churchyard v. U.S., 100 Fed. 920).

p. The United States will not be liable to an implied obligation assumed by a subordinate in violation of the orders of his superior. (Spreague v. U.S., 37 Ct. Cls. 447).

q. No implied contract can arise where an express contract would be illegal. (*Reccside v. U.S.*, 2 Ct. Cls. 1).

r. The Government may be assumed to have accepted liability.

- (1) Where the object of sale was lawful and proper and Congress had authorized such purchase by general appropriation and it would have been valid if made by the proper agents.
- (2) Where, though purchased by an unauthorized person, not the agent of the Government, it was regularly and properly delivered to the officers charged with receipt of such property and was accounted for by them.
- (3) Where the property entered the actual use of the Government and benefit was received therefrom. (*Reccside v. U.S.*, 2 Ct. Cls. 1; (1866) 32).

s. Torts.

- (1) "The United States is not liable for the wrongful acts of its agents. "It does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subversive of the public interest." (*Gibbons v. U.S.*, 8 Wall. (1868) 269, 274).
- (2) Where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States

against the claim of the wronged and injured party. The agent was agent for no such purpose. His doings were vitiated by the underlying dishonesty, and could confer no rights upon his principal. (U. S. v. State Bank, 96 U.S. 30, 36 (1877), affirming 10 Ct. Cls. (1874) 519).

(3) There is no implied contract on the part of the United States to make good the loss to an individual from the wrongful acts of its officers. (Langford v. U.S., 101 U.S. 341, Tompa v. U.S., 248 U.S. 121, U.S. v. Holland American Lijn, 254 U.S. 148).

(4) No action is maintainable against the United States for agent's tort (injury received by claimant in elevator of government building). (Bogby v. U.S., 188 U.S. 400).

(5) If an officer of the United States takes the property of a private person for public use without compensation he is liable in tort for the trespass, although the Government may also be liable on an implied contract. (O'Reilly de Camara v. Brocke, 135 Fed. 384).

L. DISCHARGE OF CONTRACTS, REMEDIES FOR BREACH OF CONTRACTS.

1. Manner of Discharge.

a. Government contracts, like private contracts, may be discharged by agreement, or by performance, or by operation of law, or by impossibility of performance.

b. The like rules and principles apply in each type of contract—public and private. In the main, like remedies in the event of dispute or of breach are available to the injured party.

c. Because of the limitation of time available for this discussion, two items only of the many which might properly be considered under the heading "Discharge of Contracts and Remedies for Breach of Contracts" will be here indicated, viz. first, the Government's amenability to suit, and second, the responsibility of the Government as contractor for acts of the Government as legislator or administrator.

2. Amenability of the United States to Suit.

a. The United States is not suable of common right. Therefore, a person who institutes suit can do so only by bringing his action in conformity with some positive act of Congress. (U.S. v. Clarke, 8 Pct. (1834) 436, 444). The United States cannot be sued without its consent. (Cunningham v. Macon & B.R. Co., 3 Sup. Ct. (1883) 292). Since a sovereign can be sued only by his own consent, he may prescribe the conditions on which he will be sued. (Treat and Farmers' Loan and Trust Co., 185 Fed. (1911) 185). Right to sue the United States in their own courts is strictly limited by the statutes granting the consent (Tucker Act) which can not be extended by the courts. (Reid Wrecking Co. v. U.S., 202 Fed. (D.C. 1913) 314). Whatever duties the Government may assume, they are not enforceable against it without its consent. (U.S. v. Babcock, 250 U.S. 328).

b. Congress, in 1910, accepted, on behalf of the United States, liability to suit in the event of alleged infringement of patents by the Government. (Act of June 25, 1910, 36 Stat. 851; since amended by the Act of July 1, 1918, 40 Stat. 705). Prior to 1910 owners of inventions were under the necessity of proving an implied promise on the part of the Government, through some authority or direction under which the proper officer of the Government was working, to pay for the use of a patent.

c. Inasmuch as the acceptance of liability in cases arising out of infringement of patents and out of breach of contract is a matter of

grace on the part of the sovereign it follows naturally that the exact procedure set forth by statute must be strictly followed by claimants.

3. Acts of the Government in its Sovereign Capacity.

a. Legislative. The courts have repeatedly held that the United States as a contractor can not be held responsible for the United States as a sovereign or law giver. The Court of Claims has passed upon cases in which the obligations of the contractor have been increased by the passage of tariff acts subsequent to the making of a contract so that the contractor suffered an increased cost in the goods he had agreed to furnish the Government. The court, in these cases, held that the enactment of such a law is not a violation by the Government of its contracts. It must be remembered, of course, that such a law must be a general one affecting all citizens alike. (See *Doming v. U.S.*, 1 Ct. Cls. 190, *Jones & Brown v. U.S.*, id. 383; *Carmick & Ramsey v. U.S.*, 20 Ct. Cls. 126).

b. Executive. In *Wormer v. United States*, 13 Wall. (1871) 25, the Supreme Court held that in contracts affected by the subsequent adoption by the Government of reasonable regulations to prevent fraud the Government could not be held for breach of a contract affected by such regulations. Likewise, in *Smoot's case*, 15 Wall. (1872) 36, the same court held that the subsequent adoption by the United States of a new rule of inspection of supplies does not of itself constitute a breach. If the contractor thinks that the change of inspection constitutes a breach, he must first make a tender under his contract and have acceptance refused before bringing suit.

c. Positive Acts of a Government Officer.

(1) While legislative acts and administrative regulations in conformity thereto which change the status of a contractor have been held by the

courts not to constitute a breach of the contract by the United States, yet, on the other hand, positive acts of government officers have frequently been determined to be breaches.

- (2) Where a party to a contract has done all that he obligated himself to do, he has performed his contract. Where the United States appoints an officer or agent to act for it, it can not escape responsibility for the acts of such an officer or agent within the scope of his authority, or avoid the binding effect of the necessary implications that arise from his acts. If such officer or agent interferes with or prevents the contractor from performing his obligations, to his damage, it is the act of the Government and damages may be recovered for a breach of the contract the same as in the case of an individual. (U.S. v. Smith, 94 U.S. 214; U.S. v. Barlow, 184 U.S. 123).

M. WAR - TIME CONTRACTS

1. Factors Attendant the War-Time Procurement.

a. In considering war-time contracts we must take into account: first, the economic and industrial problems attendant upon war-time procurement; second, the permanent statutory limitations of the contractual powers of Government agents; third, the probable temporary legislation which may be expected in a major war emergency; and fourth, the extensive use by the Government, in war time, of the right of eminent domain, partly along normal lines and partly in unaccustomed channels. We must consider also the unusual activity of the Government in procurement, the general confusion and uncertainty in the life of the Nation; the special emphasis on the implications of the first half of the word "citizen-contractor"; and lastly, the peculiar temptations a Nation's war necessities bring to the unscrupulously, acquisitive citizen.

We are near enough to a great war to make presumptuous an attempt to discuss the foregoing items at length.

2. Present Legislation Applicable to War Necessity.

a. Congress has enacted various statutes modifying, in the event of war or in the imminence of war, peacetime legislative restrictions upon the agency powers of Government agents; and also various statutes enlarging the powers of the President. The most important of these will be indicated.

NOTE. It must be remembered that in war or other national emergency unchallenged calls are made upon a vast reservoir of normally-unused powers inherent in the office of the President. The courts have consistently upheld the doctrine that a nation, like an individual, is justified in exercising all means essential to self-defense. Two presidents particularly, Lincoln and Wilson, have exercised vast powers outside of and beyond constitutional and statutory grants; and such exercise has in the main been unquestioned and unchallenged. In emergencies like to those faced by these two executives it is probable that like calls will be made upon presidential powers. In the consideration of our subject we are confined, however, to express grants of statutory authority.

b. Statutory Provisions.

(1) Authority of the President to place compulsory orders. (Act of June 3, 1916, 39 Stat. 213).

(2) Authority of President to requisition manufacturing plants. (Same Act).

(3) Authority of War and Navy Departments to make contracts for, or purchases of, certain necessities for the current year without specific authorization of Congress or without an appropriation adequate to fulfillment. (Not primarily a war-time provision but important in certain contingencies in the imminence of war). (R.S. 3732, as amended by Act of June 12, 1906, 34 Stat. 255).

(4) Authority of Secretary of War to rent or lease or requisition buildings for military purposes in the District of Columbia. (Act of July 9, 1918, 40 Stat. 861 and Act of July 8, 1918, 40 Stat. 826).

(5) Authority of President to suspend "Eight-Hour Law". (Act of March 4, 1917, 39 Stat. 1192).

(6) Authority to make open-market purchases. (R.S. 3709, Act of March 2, 1901, 31 Stat. 905, Act of June 12, 1906, 34 Stat. 258; and other statutes relating to particular branches in the War Department and to specific items of procurement.

NOTE: These permissory statutes are of restricted application in a long-continued emergency, such as the World War. However, the courts have recognized the possibility of a "military emergency", i.e., "an emergency which arises in the field or in time of war", continuing "equally imminent over a period of many months". (Thompson v. U.S., 9 Ct. Cls. (1873) 187, see also Mowry's Case, 2 Ct. Cls. (1866) 68, and Schneider v. U.S., 19 Ct. Cls. (1884) 547).

On April 12, 1917, the Secretary of War issued an order declaring "that an emergency exists within the meaning of Sec. 3709 R.S., and other statutes which except cases of emergency from the requirement that contracts for and on behalf of the Government shall only be made after advertising, as to all contracts under the War Department for the supply of the War Department and the supply and equipment of the Army and for fortifications and other works of defense; and until further orders such contracts will be made without resort to advertising for bids in the letting of the same," but providing that "where time will permit" there should be consultation with the Munitions Board respecting contemplated purchases. (G.O. 49, April 28, 1917, rescinded by G.O. 119, October 22, 1919).

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So far as ascertainable, the legality of this order never to have been judicially questioned.

There were, during the World War, certain administrative decisions respecting open-market purchases and among these. All purchases of military supplies are now emergency purchases and need not be reported to the Secretary of War (Op. J.A.G. (1917) 400.123, G.O. 49, 1917, does not cover non-military purposes, e.g., rivers and harbors works (Op. J.A.G. (1918) 400.14, and compulsory orders, within the clear intent of Congress, need not be preceded by advertisement nor be in writing and signed by the parties. (Op. J.A.G. (1917) 76-340).

However, Congress apparently did not regard the statutory requirements fully suspended for in several Army appropriation acts, particularly that of June 4, 1918 and that of July 9, 1918, it enacted a substitute. The provision in the latter Act reads. Provided, that where practical so to do, no work is to be done or contract made under or by authority of any provision of this Act on or under a percentage or cost-plus percentage basis, nor shall any contract, where circumstances so permit, be let involving more than \$1000 until at least three responsible competing contractors shall have been notified and considered in connection with such contract and all contracts to be awarded to the lowest responsible bidder, the Government reserving the right to reject any and all bids.

(7) Authority to procure printing and binding from commercial establishments. (Act of May 12, 1917, 40 Stat. 74).

(8) Authority of President to take immediate possession of land, to the extent of the interest to be acquired therein, upon filing of petition for condemnation. (Act of July 2, 1917, 40 Stat. 241, as amended by Act of April 11, 1918, 40 Stat. 519).

(9) Authority of President to erect temporary fortifications, upon written consent of the owner (of land to be used therefor) before examination of land title. (Joint Res. 21, Apr. 11, 1898, 30 Stat. 737).

(10) Authority of the President, through the Secretary of War, to assume control of any system of transportation or systems of transportation or any part thereof. (Act of Aug. 29, 1916, 39 Stat. 645).

3. Preparation of War-Time Contract Forms.

a. Since the World War various agencies have considered desirable contracts for war-time use. There have been prepared, by a board appointed by the Assistant Secretary of War, forms for purchase orders; for fixed price contracts, for adjustable price contracts - compensation depending upon changing costs of material and labor, and for adjusted compensation contracts - adapted to the many uncertain factors involved in large contracts or contracts in which performance extends over a considerable period.

b. The desirability of having prepared, in time of peace, contract forms ready for war procurement is readily apparent. Such forms should be as simple as possible, taking into account the confusion and haste involved in war-time procurement and the inexperience of many temporary procuring officers; but they must provide fully for all contingencies that may attend performance in economic and industrial confusion and must provide fully also for termination in necessity. Theoretically there is no essential difference between peace-time and war-time contracts, but practically there are definite points of dissimilarity. Peace-time contracts are made to conform to future conditions which can be accurately forecast, they are made only with those who expect to gain advantage through them. War-time contracts must provide for unexpected contingencies of all sorts, in them voluntary bargaining gives way, on the part of the patriotic contractor, to the desire to serve the Government irrespective of gain, and, on the part of the unscrupulous contractor, to the desire to profit in the Nation's necessity.

c. We may note here certain provisions which must be incorporated in war-time contracts and certain considerations to which attention must be directed. These are:

(1) Desirability of preparation of the actual contract in time of peace, so far as may be possible.

(2) Inclusion of clauses for determination upon effective date of contract of certain terms which cannot be accurately forecast in advance, as, e.g., terms and rate of payment.

(3) Priority clauses.

(4) Provisions constituting the contractor bailor for Government property.

(5) Provisions for dismissal of undesirable employees.

(6) Clauses relating to administrative determination of disputes, subject always to judicial appeal.

(7) Alternative clauses to become operative in the event of the contractor's failure to perform. For example, first, the placing of Government experts at the disposal of the contractor to assist him, second, the taking over of the plant and operation by the Government for the account of the contractor; and third, procurement elsewhere at cost of contractor.

(8) Clauses providing for assistance to be given to the contractor in securing of raw materials or for the furnishing of raw materials to him in the event that such raw materials would involve him in excessive obligations considering his probable needs in case the contract were terminated.

(9) Clauses (in adjusted contracts) indicating terms and amounts of payment and providing for penalties for excess cost over original estimates or for reward for savings over such estimates.

Experience in the World War and continued studies since will enable us to develop adjusted compensation

contracts that will not invite extravagant performance but will reward industry and skill and efficiency.

Such clauses should be based on the proposition that the contractor is entitled to a fair return. They should be written in recognition of the fact that only through fair and just financial returns to contractors can the Government secure the maximum of efficient service and production in war. So far as human wisdom and skill can determine the bases upon which such clauses must rest profit-making, but not reasonable profits, will be taken out of war contracts.

(10) Provisions for advance payments conditioned upon partial deliveries or partial performance.

(11) Provisions for changes in plans and specifications and necessary readjustments of original estimated cost of contract.

(12) Provision for termination and for manner of settlement in event of termination.

(13) Inspection clauses - a little more strict than in a similar peace time contract.

(14) Provisions for reimbursement to the contractor for facilities and materials which have been included in the contract price and which the United States might wish to purchase.

N. CONCLUSION.

1. Change in Viewpoint of Government Officers.

It is interesting to note in a consideration of Government contracts the development in recent years of a higher conception of the Government's obligations in its contractual relationships with its citizens.

The founders of our Nation enunciated in the Fifth Amendment to the Constitution a new principle with respect to the appropriation or use by the sovereign of

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the property of the citizen. In the governments to which they could look for form and precedent the sovereign and his interests were paramount. Private property which he desired he took as of right. Personal services of his subjects he demanded as well. The new Nation was established upon the principle that sovereignty rests in the people alone. The paramount interest of the sovereign, i.e., the people as a whole in particular property or in particular services was recognized but it was definitely provided that this right could be enforced only when accompanied by "just compensation" and according to definite legal procedure.

From the requirement in the Constitution that the Government must pay "just compensation" was later argued by administrative officials the converse, namely, that irrespective of any contractual obligation it has assumed the Government could never be called upon to pay more than "just compensation". This contention is iniquitous. Fortunately the courts have not generally sustained it.

Too often also in the past the Government has relied on its strength rather than on the inherent justice of its claims in its contention for a determination in its favor of disputes arising out of its contracts.

Now, we are coming to see that the United States, whose contracts are more numerous, more complex and more extensive than those of any other contracting agency on earth, must, in honesty, and justice and in the long run to its own advantage, submit itself to the like rules and principles laid down for its citizens.

The revision of government contract forms, recently undertaken, is one of the first steps in the change - the elimination of unfair clauses and the rephrasing of others so as to give to the contractor just and fair treatment while yet protecting adequately the interests of the Government.

To the officer, to whom the United States has entrusted important powers of agency, this new conception of the Government's position in its business dealings brings a happy opportunity. If he puts himself fully in harmony with this spirit and understands intelligently the rules and principles underlying contractual relationship he can not fail to represent the United States efficiently. Thus also he encourages the citizen to feel that a contract with the Government will be performed by the United States fairly and honestly and that liabilities and rights of both contracting parties will be determined according to the rules and principles adopted by the courts as equitable in private transactions.