EXTRAORDINARY RELIEF FOR WAR CONTRACTORS

By Robert Kramer†

"There is in a large class of cases coming before us from the Court of Claims a constant and ever recurring attempt to apply to contracts made by the Government, and to give to its actions under such contracts, a construction and an effect quite different from those which courts of justice are accustomed to apply to contracts between individuals. There arises in the mind of parties and counsel interested for the individual against the United States a sense of the power and resources of this great government, prompting appeals to its magnanimity and generosity, to abstract ideas of equity, coloring even the closest legal argument. These are addressed in vain to this court. Their proper theater is the halls of Congress.

"It would be very dangerous, indeed, to the best interests of the government—it would probably lead to the speedy abolition of the Court of Claims itself—if, adopting the views so eloquently urged by counsel, that court, or this, should depart from the plain rule laid down above, and render decrees on the crude notions of the judges of what is or would be morally right between the government and the individual." ¹

So great were the social and economic changes in the sixty-nine years following this statement, that the Supreme Court in 1942, in United States v. Bethlehem Steel Corporation,² had occasion to set forth that the Government, like individuals contracting with it, could obtain in court no changes in its contracts on mere moral grounds.³

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¹. Smoot's Case, 15 Wall. 36, 42-6, 21 L. Ed. 107, 110 (U. S. 1873).
³. The majority opinion of Mr. Justice Black quotes in part from the language of the decision in Smoot’s Case, set forth at the beginning of this article. Id. at 309 n. 12. In Muschany v. United States, 323 U. S. —, —, —, — 65 Sup. Ct. 442, 447, 451, 449-450, 89 L. Ed. (Adv. Ops.) 492, 498, 502, 500 (1945), the Government had agreed to pay a fixed percentage of the purchase price (regardless of the amount of such price) to an individual for all land options secured by him which the Government accepted. The Court held that such options were binding when once accepted by the Government, characterizing them as "highly profitable but not unconscionable." Evidence indicated that on two parcels on which the prices were $127 and $165 per acre respectively, the value was probably about $24 and $34 per acre respectively. Id. at —, —, 65 Sup. Ct. at 447, 453, 89 L. Ed. (Adv. Ops.) at 498, 505. The opinion states: "It is a matter of public importance that good faith contracts of the United States should not be lightly invalidated." Id. at —, —, 65 Sup. Ct. at 451, 89 L. Ed. (Adv. Ops.) at 502. The opinion admits that the "arrangement may have been improvident from the
More interesting, perhaps, than this equal treatment of the Government and its contractors, is this complete reversal in the position of the parties to the contract asking for relief on grounds of moral right. Such a complete change-about was not, of course, unheralded. Prior decisions of the court had indicated that the bargaining position of individuals contracting with the Government was as powerful, if not more powerful, than the Government's. But the opinions in the Bethlehem case contain the most explicit recognitions of this fact. Mr. Justice Frankfurter in his dissenting opinion in this case not only sharply attacks the common concept of the Government as a giant bargainer, but also, with peculiar application to present conditions, states: "During wartime the bargaining position of Government contracting officers is inherently weak, no matter how conscientious they may be. . . . It is not difficult in these days to appreciate the position of negotiators for the Government in time of war and to realize how much the pressures of war deprive them of equality of bargaining power in situations where bargaining with private contractors is the only practicable means of securing necessary war supplies." It is hardly surprising that Congress, during the present war emergency, should have endeavored to strengthen the bargaining power of government officers.

point of view of the Government. But that question goes to the quality of management by its procurement officers. The fact that the procurement system is improvident obviously does not make it illegal. Illegality does not emerge from inadequate supervision of prices. . . ." Id. at ——, 65 Sup. Ct. at 449-450, 89 L. Ed. (Adv. Ops.) at 500. Mr. Justice Black dissented vigorously in this case. Under certain circumstances, however, exorbitant prices in government contracts will not be enforced. Hume v. United States, 132 U. S. 406, 10 Sup. Ct. 134, 33 L. Ed. 393 (1889) (government agents, due to unilateral error, signed contract containing prices about 350 percent above normal); Beard's Case, 3 Ct. Cl. 122 (1867) (prices 300 to 900 percent above normal in war contract found exorbitant and disallowed; suspicion but no proof of fraudulent collusion with government agents); cf. Burke & James, Inc. v. United States, 63 Ct. Cl. 36 (1927) (enforcement of bonus for saving provision in cost contract refused, where no proof of special efforts by contractor to make savings, where contractor solely responsible for estimate of cost, and where actual cost only ½ estimated cost).

4. "Men who take million-dollar contracts for Government buildings are neither unsophisticated nor careless. Inexperience and inattention are more likely to be found in other parties to such contracts than the contractors. . . ." Wells Bros. Co. v. United States, 254 U. S. 83, 87, 41 Sup. Ct. 34, 35, 65 L. Ed. 148, 151 (1920).

5. "Even in the case of lump sum contracts with the Government, it is generally recognized that the real risk of loss is negligible. It is usual in this kind of contract to set prices high enough to cover, or otherwise specifically to provide against, unforeseen contingencies. And where loss does occur contrary to the expectation of both parties, Congress often passes special bills making the contractors whole." United States v. Bethlehem Steel Corp., 315 U. S. 289, 293 n. 2, 62 Sup. Ct. 581, 86 L. Ed. 855, 860 (1942); cf. Fain and Watt, War Procurement—A New Pattern in Contracts (1944), 44 Col. L. Rev. 127.

6. "The United States with all its might and majesty never makes a contract. To speak of a contract by the United States is to employ an abstraction. We must not allow it to become a blinding abstraction. Contracts are not made by 150 million Americans but by some official on their behalf." United States v. Bethlehem Steel Corp., 315 U. S. 289, 330, 62 Sup. Ct. 581, 86 L. Ed. 855, 879 (1942).

7. Id. at 336, 62 Sup. Ct. at 604, 86 L. Ed. at 882.
Mandatory orders, plant commandeering and seizures,\(^8\) renegotiation of prices\(^9\) and royalties,\(^10\) requisitions,\(^11\) and price revision powers,\(^12\) have, among others, been placed in the armory of such officers.

Yet, by no means have the interests of individuals contracting with the Government been overlooked by Congress. Powerful arguments can be made for such a course of action. There is the principle that the bargaining position of the government officer is stronger if he possesses the authority, in his discretion, to offer relief to conscientious, deserving contractors on general equitable grounds. This viewpoint gains added weight in wartime by the belief that then such relief may often be vitally in the interest of the Government itself if the authority is used to facilitate the prosecution of the war by insuring timely deliveries, increasing or insuring production, obtaining the maximum use of all available facilities, and securing lower prices by eliminating contingency allowances in quotations. Then, too, there is the traditional belief that the bargaining position of the private contractor is weak in comparison with that of a contracting agency of the sovereign government, especially a government possessed of extraordinary wartime powers, such as those previously referred to. Support is given this argument by the fact that individuals contracting with the Government do frequently lose certain legal rights available between private persons, such as reliance upon apparent authority of agents, damages for laches or negligence of such agents, and non-liability in the case of mistakes of law by the other party.\(^13\) There is, finally, the feeling that government contractors are held to higher standards of dealing, best summed up in Mr. Justice Holmes' oft-quoted


\(^13\) "Because the national interest is represented not by the power of the nation but by an individual professing to exercise authority of vast consequence to the nation, action by Government officials is often not binding against the Government in situations where private parties would be bound." Frankfurter, J., dissenting in United States v. Bethlehem Steel Corp., 315 U. S. 289, 330-1, 62 Sup. Ct. 581, 601, 86 L. Ed. 855, 879 (1942). Cj.: "While agents for private principals may waive or modify provisions in contracts which circumstances have rendered harsh, provisions in government contracts cannot be so alleviated." Frankfurter, J., dissenting in United States v. Blair, 321 U. S. 730, 738, 64 Sup. Ct. 820, 824, 88 L. Ed. 1039, 1045 (1944).
remark: "Men must turn square corners when they deal with the Government." 14

Whatever the reason, in this war as in past wars and emergencies,15 in addition to scores of bills for relief in individual cases only, legislative relief has been provided for large groups of government contractors. The two measures most important are Title II of the First War Powers Act 16 and Section 17 of the Contract Settlement Act of 1944.17 The two Acts differ widely in methods and philosophy. The War Powers Act confers no rights as such on contractors; its powers are granted only to government officers and are designed to aid the Government by facilitating the prosecution of the war; relief to contractors is incidental to the accomplishment of this purpose, and is given as a pure matter of grace in the discretion of such officers, when they can administratively determine that the action involved will facilitate the prosecution of the war.18 The Contract Settlement Act, at least insofar as Section 17 is concerned, is a relief measure for contractors, conferring certain absolute rights on them for their benefit and protection.

Title II 19 of the First War Powers Act provides:

"The President may authorize any department or agency of the Government exercising functions in connection with the prose-
ication of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war: Provided, That nothing herein shall be construed to authorize the use of the cost-plus-a-percentage-of-cost system of contracting: Provided further, That nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits: Provided further, That all acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be incompatible with the public interest.”

Executive Order No. 9001 of the President purportedly delegates certain authority under the Act to the War and Navy Departments and the United States Maritime Commission, with the power of further delegation (including the power of redelegation) within each of these agencies. Section I of Title I of this Order follows.


21. The authority of this Executive Order has been extended to the war activities of the following agencies: (a) the Treasury Department, the Department of Agriculture, the Federal Works Agency, the National Advisory Council for Aeronautics, the Panama Canal, and the Government Printing Office: Executive Order No. 9023, 7 Fed. Reg. 302 (1942), and Executive Order No. 9259, 7 Fed. Reg. 9265 (1942); (b) the Department of Interior: Executive Order No. 9055, 7 Fed. Reg. 964 (1942); (c) the Tennessee Valley Authority: Executive Order No. 9058, 7 Fed. Reg. 983 (1942); (d) the Veterans Administration, the Civil Aeronautics Administration, National Housing Agency, Coordinator of Inter-American Affairs, Federal Communications Commission: Executive Order No. 9116, 7 Fed. Reg. 2527 (1942); (e) Office of Scientific Research and Development: Executive Order No. 9219, 7 Fed. Reg. 6391 (1942); (f) Federal Prison Industries: Executive Order No. 9221, 7 Fed. Reg. 6425 (1942); (g) Board of Economic Warfare: Executive Order No. 9233, 7 Fed. Reg. 6703 (1942); (h) Office of Strategic Services, United States Joint Chiefs of Staff: Executive Order No. 9241, 7 Fed. Reg. 7185 (1942); (i) Immigration and Naturalization Service, Department of Justice: Executive Order No. 9253, 7 Fed. Reg. 8081 (1942); (j) Department of Commerce: Executive Order No. 9264, 7 Fed. Reg. 9105 (1942); (k) Office of War Mobilization and Reconversion, Surplus Property Board, and Re-training and Reemployment Administration: Executive Order No. 9319, 10 Fed. Reg. 1661 (1945).

22. The wording of the Act clearly contemplates delegation of authority by the President, subject to regulations: “The President may authorize any department or agency ... in accordance with regulations prescribed by the President ... to enter into contracts. ...” The debates in Congress recognized that there would be extensive delegation and redelegation of authority under the Act. 87 Cong. Rec. 6856 (1941) (Fish); id. at 9860 (Hancock); id. at 9840 (Barkley and Vandenberg); id. at 9843 (Vandenberg).
closely the wording of the Act. The President, "deeming that such action will facilitate the prosecution of the war," authorizes the agencies "within the limits of the amounts appropriated therefor, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made, and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts." Section 2 of Title I of the Order contains a broad definition of the kinds of agreements covered thereby, including those of "all kinds . . . for all types and kinds of things and services necessary, appropriate or convenient for the prosecution of the war. . . ." Section 4 of Title I states that "Advertising, competitive bidding, and bid, payment, performance or other bonds or other forms of security need not be required." Title II of the Order, pursuant to the Act, prescribes regulations for the exercise of the authority conferred. The first section relates to the records to be kept and public inspection thereof. The following sections state that cost-plus-a-percentage-of-cost contracts are not authorized; provide for advance payments; prohibit racial discrimination; make all assignments of claims subject to the Assignment of Claims Act of 1940; make mandatory the use of the warranty against contingent fees; limit profits and fixed fees in accordance with existing laws or appropriations, and, in the absence of such laws, limit fixed fees to seven percent of the estimated cost; and provide that the absence of advertising shall not exempt any contract from the Walsh-Healey Act, the Davis-Bacon Act, the Copeland Act, and the Eight Hour Law.

The foregoing provisions of the Executive Order clearly fall within the scope of the Act. Section 3 of Title I of the Order does set forth

23. As amended by Executive Order No. 9296, 8 Fed. Reg. 1429 (1943), effective as of December 27, 1941.
24. In accordance with the last proviso of Title II of the Act.
25. In accordance with the first proviso of Title II of the Act.
28. See, for example, the article in Section 323 of the Procurement Regulations of the War Department (hereinafter cited as P.R.).
29. In accordance with the second proviso of Title II of the Act.
certain powers not specifically mentioned as such in the Act itself. Under this Section the agencies "may by agreement modify or amend or settle claims under contracts heretofore or hereafter made . . . and may enter into agreements with contractors and/or obligors, modifying or releasing accrued obligations of any sort, including accrued liquidated damages or liability under surety or other bonds" whenever in their "judgment . . . the prosecution of the war is thereby facilitated. Amendments and modifications of contracts may be made with or without consideration and may be utilized to accomplish the same things as any original contract could have accomplished here-under, irrespective of the time or circumstances of the making of or the form of the contract amended or modified . . . and irrespective of rights which may have accrued under the contract, or the amendments or modifications thereof."

The argument could certainly be made that the language of Title II of the Act is so plain in meaning and broad in scope—"to enter into contracts and into amendments or modifications of contracts . . . without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts"—that there can be no doubt that Executive Order No. 9001 is authorized by the Act. The Congressional history of the Act need not then be studied.\(^3\) Irrespective of this point, since several opinions dealing with the Act and the Order have stressed such history,\(^3\) it cannot be ignored.

The reports of the House and Senate Judiciary Committees on the Act\(^3\) are virtually identical. Both assert that the chief objective was to speed up procurement of war material, and that therefore the President was empowered to authorize agencies to enter into contracts with a maximum of speed. Reference was made to the assistance that would be granted small contractors by the relaxation of requirements for bonds and competitive bids, as well as by the permission to make progress and advance payments. Four specific powers granted the President were listed: (a) To enter into contracts without competitive bidding; (b) to enter into contracts without performance bonds; (c) to make progress payments; and (d) "to amend or modify contracts."\(^3\) Both reports state that these four powers are only "among other things"\(^3\) authorized by the bill. Each report contains an iden-


\(^3\)5. See 40 Ops. ATT'Y GEN. No. 53 (1942); 21 DEC. COMP. GEN. 835, 1019 (1942).


\(^3\)8. Ibid.
tical collection of statutes, described as a “substantially complete list of statutes involved.” This list contains merely statutes relating to bids, bonds, and advance or progress payments.

The chief phrase in these reports supporting the broad language of the Executive Order is the reference to the power to amend or modify contracts. The same language appears in the Act. The reports contain no further indication of the scope of this phrase. In view of the emphasis in the report on bids, bonds, and progress or advance payments, an argument seems justified that the objects of this phrase were (a) to permit amendment of existing contracts to allow progress or advance payments thereunder, and (b) to permit amendment of contracts, especially contracts entered into by competitive bidding prior to the Act, without further advertising or additional bonds. Except for this unexplained reference to the power to amend contracts, and except for the fact that the powers and statutes referred to are only “among other things” and “substantially complete,” there is no indication in these reports that the Act covers the broad language of the Executive Order.

The debate in the House stressed the objectives, statutes, and powers referred to in these reports. Several Committee members did refer to Title II of the bill as new, “far-reaching,” the “vital part,” giving “great power,” and taking “the lid off entirely.” Such language seems, perhaps, extravagant if the bill merely dispensed with bids and bonds and permitted advance and partial payments, and

43. 87 Cong. Rec. 9856 (1941) (Fish); id. at 9859 (Sumners); id. at 9860 (Hancock); id. at 9862 (Gwynne); id. at 9864 (Walter).
44. Id. at 9856 (Michener); id. at 9859 (Sumners and Springer).
45. Id. at 9860 (Hancock).
46. Id. at 9856 (Michener).
47. Id. at 9864 (Springer).
48. Id. at 9862 (Gwynne).
amendments of contracts for such purposes, since to a large extent the war agencies already possessed such powers, as the Committee reports pointed out. Yet the complete context of such remarks strongly suggests in most cases that to the speakers the bill was vital and new, and took the "lid off entirely" because it did this and no more. Only one committeeman went further; he stated that the bill relaxed not only bid and bond requirements but also "various other things that are prohibited by general law." What these "other things" were he did not indicate. If the bill did confer such powers as those contained in the Executive Order, there is but the merest hint of them in the House debate. With one possible exception, the Committee members were either unaware of this aspect of the bill or did not choose to discuss this matter before the House.

The debate in the Senate is far more revealing. Two Senators, Taft and Vandenberg, neither a member of the Committee reporting the bill, expressed strong personal views about the sweeping nature of its authority. Taft stated that the "language is so clear that there can be . . . not the slightest doubt that this does change the contract laws as well as merely the procedure of making contracts." He was even of the opinion, that without the present proviso, the bill authorized removal of all statutory restrictions on profits under contracts. Senator Vandenberg stated that Title II was "a complete, blanket authority to the President . . . to authorize any department to do anything it pleases in respect to war contracts. . . . and at any price." One Committee member indicated substantial agreement with such views. The Committee Chairman, Senator Van Nuys, and the majority leader, Senator Barkley, although they rejected Senator Taft's views on the removal of statutory profit limitations, did accept his amendment (the present proviso) on this matter and also indicated that the power to amend and modify contracts was to be given broad scope, far beyond that previously suggested in this article in regard to bids, bonds, and advance payments in connection with contract amendments. It seems clear that the senators who par-

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50. For example, the phrase about taking the "lid off entirely" was used in connection with a reference to the removal of requirements for bids and bonds. 87 Cong. Rec. 9862 (1941) (Gwynne).
51. Id. at 9860 (Hancock).
52. Id. at 9839.
53. Ibid.
54. Id. at 9842.
55. Id. at 9839 (Danaher).
56. "Title II is new. Indeed it goes beyond the powers granted to President Wilson." Id. at 9838 (Van Nuys). "Under the present law there is a very definite limitation on the power of the Government to modify or limit contracts as they are being performed or as the exigencies may require. . . ." Id. at 9838 (Barkley). "... the
ticipated in this debate all regarded the bill as conferring powers as broad as those set forth in the Executive Order.

II

Both the War and the Navy Departments have issued regulations concerning the powers conferred upon them by the Act and Executive Order. The policy of the Navy is set forth in a directive of July 7, 1943, as amended.\textsuperscript{57} This directive places restrictions on amendments of contracts where performance by the contractor has been completed. Amendments of uncompleted contracts may be made without consideration to facilitate the prosecution of the war. Such amendments can be made freely if no upward price revisions are involved, as in the case of extensions of time without waiver of damages. Amendments involving waiver of damages or upward revisions of prices may not be made unless there is involved more than $100, and a substantial amount in the light of the contract or all the war contracts of the producer. Where a unilateral error or mistake of the contractor is involved which is not apparent on the face of the bid or contract, such amendments may be made only if necessary to prevent actual impairment of the contractor's production. Mutual errors may be corrected by amendments where the written contract does not express the true agreement.

One point is emphasized: precise rules covering all possible cases cannot be formulated for determining whether individual situations warrant a finding that the giving of relief will facilitate the prosecution of the war. On the contrary, each case or type of case must be evaluated upon the basis of its special facts. Two general considerations, however, are important in making this evaluation: the prevention of impairment of productive ability of essential producers of war materials to the extent necessary; and fair and honest treatment to obtain the wholehearted cooperation of contractors by relieving them from loss (not mere diminution of anticipated profit) due to government actions. On the other hand, despite any risk of inducing lack of cooperation, generosity to careless contractors is not considered facilitation of the prosecution of the war.

The policy of the War Department is, in general, similar to that of the Navy and is set forth in its Procurement Regulations. It is

\textsuperscript{57} C. C. H. War Law Serv., I Government Contracts, ¶ 1059.50.
EXTRAORDINARY RELIEF FOR WAR CONTRACTORS

recognized that rigid categories cannot be prescribed which will adequately cover all fact situations that will arise. The determination in each case or type of case as to whether a finding is justified that the relief sought will facilitate the prosecution of the war must be made as a matter of sound judgment upon the basis of the special facts of that case. However, there can be formulated policies as to the matters to be considered in general and the types of circumstances where relief may be appropriate.

In the case of unilateral errors, corrections are permitted where the error consists of failure to set forth in good faith in a bid or contract what the contractor intended to include therein. The error need not, however, be apparent on the face of the bid or contract. Corrections of mutual mistakes are authorized either where the written agreement does not express the true agreement between the parties in accordance with their negotiations, or where there was a mutual error as to a material fact. Diminished profits as well as losses may be recovered in appropriate mistake cases.

Amendments may also be made, if fairness so requires, to give relief for losses or diminished profits caused by acts of the Government increasing the cost or difficulty of performance, whether such acts are directed primarily at the contractor by the Government as a contractor, or the acts are taken by the Government in its sovereign capacity and not so directed. Relief may also be granted in cases of actual or threatened losses impairing productive capacity or efficiency of contractors whose continued operation as an efficient source of supply is important for the war. Here relief is limited to the amount necessary to avoid impairment insofar as important for the war. Special circumstances of war or enemy action materially affecting conditions of performance may warrant relief if the price contains no "contingency reserves adequate to meet such events. Amendments may be made to include in contracts new clauses designed to eliminate administrative difficulties, simplify procurement, expedite audits or

58. See P. R. 1252 (c) and 1252 (d).
59. See P. R. 308 (b) and 1252 (d) (1).
60. Ibid.
61. Ibid.
62. See P. R. 1252 (d) (2).
63. Ibid. A mere increase in the ceiling price by the Office of Price Administration is no ground in and and of itself for an amendment increasing the contract price. Ibid.
64. See P. R. 1252 (d) (4).
65. Ibid.
66. See P. R. 1252 (d) (3).
production, or save time or expense. Extensions of time for performance may be granted even after defaults, and liquidated or other damages may be waived. In certain cases similar relief may be granted to subcontractors of cost-plus-a-fixed-fee contractors.

The War Department Procurement Regulations restrict relief after: (1) final administrative determination of the final amount due the contractor either by approval of a final voucher or by communication of such approval to the contractor; (2) completion of performance by the contractor and final payment by the Government; and (3) reference of the matter to the General Accounting Office.

Granting relief under the Act in appropriate cases to meet changed conditions when the prosecution of the war will be facilitated, will, according to the War Department Procurement Regulations, assist in: (a) obtaining close prices without excessive allowances for contingencies against unforeseen risks, and (b) insuring maximum cooperation and production by assuring contractors of fair treatment. Such action, it is believed, will materially reduce the costs of procurement as a whole and substantially increase the efficiency of production. Thus, the cost of the war will be reduced, inflation controlled, and manpower and materials saved.

III

Congress, of course, has the power to give away government property and to provide for payments to contractors and other persons based purely on grounds of moral or general equitable rights. In fact, such payments are not to be treated as mere gratuities.

67. See P. R. 1252 (d) (5); and the clauses and authority for the use thereof, set forth in: P. R. 248 (b) (adjustments in terms and prices of subcontracts under cost-plus-a-fixed-fee government contracts); P. R. 369 (releases of claims by cost-plus-a-fixed-fee contractors prior to final payment); and P. R. 363 and 7-306 (disposition of property under cost-plus-a-fixed-fee contracts); cf. P. R. 306.5 (changing cost-plus-a-fixed-fee contract to a fixed price one).

68. See P. R. 308c.
69. See P. R. 308c, 379-380.
70. See P. R. 248 (b).
71. See P. R. 308f, 1252 (e).
72. The Under Secretary of War has not delegated authority to amend contracts to grant relief after completion of performance and final payment under the contract or a series of contracts between the government and the same contractor for substantially similar goods. See P. R. 107 (e), 107 (g).

73. See P. R. 308g.
74. See P. R. 237, 1252 (b). In the case of subcontractors, relief is granted to obtain closer prices by them, to encourage the maximum use of all available facilities through subcontracting, to continue or increase their production or obtain timely deliveries, or to accord with sound business practices and fair and equitable dealing. See P. R. 248 (b).

But at least one commentator has questioned whether the Act and the Executive Order do actually authorize all of the actions taken thereunder by the War and Navy Departments. Such doubts are based primarily upon certain statements frequently made about the authority of government officers to amend or modify its contracts in the absence of such powers as have been conferred by the Act.

Government officers clearly have some power to amend or modify government contracts, apart from any limitations based upon requirements for bids and bonds, but the extent of this power is not always certain. Inasmuch as the Government is not bound by the acts of its officers unless they in fact possessed authority so to act, irrespective of what their authority may have appeared to be to those dealing in good faith with them, the question of what authority such officers actually have to modify contracts is of vital concern to all contractors.

Before considering this question in regard to amendments under the First War Powers Act, it is necessary for a thorough understanding of the problem to review briefly in this and the subsequent section the past opinions of the Comptroller General, the Attorney General, and the courts in situations not involving this Act. Referring to the principle that no official of the Government has the authority, without the express or implied authorization of Congress, to give away or release rights or property of the government, where the First War Powers Act was not involved, has followed the most rigorous standards in ruling upon the validity of amend-

78. See II Bus. Control Coord., §§ H1, H9.
80. See note 42 supra.
81. The Ship Construction & Trading Co., Inc. v. United States, 91 Ct. Cl. 419 (1940), cert. denied, 312 U. S. 699, 61 Sup. Ct. 737, 85 L. Ed. 1133 (1941); Wilber Nat'l Bank v. United States, 204 U. S. 120, 55 Sup. Ct. 362, 79 L. Ed. 708 (1935); Intercoast Oil Co. v. United States, 270 U. S. 65, 46 Sup. Ct. 219, 70 L. Ed. 473 (1926); Utah Power & Light Co. v. United States, 243 U. S. 369, 37 Sup. Ct. 387, 61 L. Ed. 791 (1917); Hawkins v. United States, 96 U. S. 689, 24 L. Ed. 607 (1877); Hart v. United States, 95 U. S. 316, 24 L. Ed. 479 (1877); Whiteside v. United States, 93 U. S. 247, 23 L. Ed. 882 (1876); Filor v. United States, 9 Wall. 45, 19 L. Ed. 549 (U. S. 1870); see Nott, J., dissenting in Salomon's Case, 7 Ct. Cl. 483, 491 (1871), rev'd, 19 Wall. 17, 22 L. Ed. 46 (U. S. 1873): "... there is this difference between individuals and the Government; ... the former are liable to the 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." See also note 13 supra.
82. See Royal Indemnity Co. v. United States, 313 U. S. 289, 294, 61 Sup. Ct. 995, 996-7, 85 L. Ed. 1361, 1365 (1941); Burke & James, Inc. v. United States, 63 Ct. Cl. 36, 56-7 (1927); The Pacific Hardware & Steel Co. v. United States, 49 Ct. Cl. 327, 335 (1924).
83. The decisions of the Comptroller of the Treasury, the predecessor of the Comptroller General, are cited in regard to the latter's functions since the Supreme Court has stated that the powers of the two officers on such matters are the same. See Globe Indemnity Co. v. United States, 291 U. S. 476, 480, 54 Sup. Ct. 499, 500, 78 L. Ed. 924, 927 (1934).
ments to government contracts or the waiver of rights of the Government thereunder.

He has, of course, recognized amendments to correct mutual mistakes where the written agreement did not accurately reflect the true bargain between the parties or where there was an error relating to a basic fact. He has also permitted rescission or other relief for unilateral errors by the contractor in not setting forth in the bid or contract what he intended, but only in those instances when the error was so apparent on the face of the document that the government officer should have been or was aware of it. In all cases of such errors, with a few exceptions, he has insisted that his office, not the government contracting agency, should grant the relief by amendment of the contract.

The Comptroller has approved of extensions of time for performance by the contractor only where no rights of the Government to damages were waived or when the Government received additional consideration of some kind. He has denied the power of any other government officer to waive accrued damages. His office will disapprove price increases or similar contract amendments beneficial to a contractor in any way either when based upon no consideration at all, or when designed to relieve a contractor from greatly increased costs of performance occasioned by acts of the Government in its sovereign capacity, or by the outbreak of war or other unanticipated events. Thus, although it has been both asserted and denied that govern-

86. See citations in note 84 supra.
88. 8 Comp. Dec. 185 (1901).
89. 17 Comp. Gen. 354 (1937); 16 Comp. Gen. 918 (1937); 14 Dec. Comp. Gen. 468 (1934); 13 Comp. Dec. 322 (1906); 11 Comp. Dec. 113 (1904); 8 Comp. Dec. 104 (1901); 7 Comp. Dec. 92 (1900).
ment officers have power to modify a contract and waive government rights thereunder in the interest of fair dealing on grounds consisting solely of general moral and equitable consideration in order to prevent severe hardships to contractors, the Comptroller General without question has disapproved any such agreement. Furthermore, he has even held invalid amendments which were based upon consideration for the Government which was clearly adequate at law. In part, he appears to argue that amendments may not be prejudicial to the interests of the Government or must be beneficial thereto in all cases, and therefore the consideration for the Government must be not merely adequate in law, but something more—valuable or substantial consideration. In part he seems to argue that the phrase "in the interest of the Government" covers cases where there is consideration for the Government but none to the contractor, and that whenever the amendment is not thus clearly in the interest of the Government, there must be consideration to the Government which is not merely legal but also valuable and substantial. In any event, different standards are applied to the amendment of government contracts than to the amendment of those between private persons.

Although the Comptroller General at first indicated that the decision of the government contracting agency on whether an amendment to its contract was in the interest of the Government would not be questioned by his office, as a matter of fact he has extensively reviewed all such amendments and often disallowed them upon the basis of highly doubtful rulings that no extra work or new and adequate consideration for the Government was involved. It is evident that the execution of the amendment by the head of a depart-


98. There are two possible interpretations: (1) there must be either valuable consideration or an amendment in the interest of the Government; (2) the amendment must both be in the interest of the Government and provide valuable consideration to the Government. The result is the same, irrespective of which view is taken, because it is impossible to conceive a case where the Comptroller would hold an amendment in the interest of the Government unless the Government receives what he finds is valuable consideration; and, conversely, whenever he finds such valuable consideration, there is no doubt that the amendment is in the interest of the Government.

99. 4 Comp. Dec. 38 (1897); 2 Comp. Dec. 635 (1896); 2 Comp. Dec. 242 (1895).


101. Cf. 26 Comp. Dec. 328 (1919); citations in notes 135, 137 infra.
ment or other officer with general contracting powers is given little or no weight by the Comptroller General.

Such is the position of the Comptroller General where the First War Powers Act is not involved. Under such circumstances, the Attorney General has adopted a more lenient view. He has reiterated the statement that government officers may modify contracts only if not prejudicial to the Government’s interests. Therefore, he has ruled that they cannot waive damages, release a contractor from his obligations because of unexpected hardships encountered by him, including those due to war, or modify a contract solely for the contractor’s benefit. But he has rendered opinions that in certain cases relief may be given by such officers on moral or equitable grounds in cases of hardships due to acts of the Government in its sovereign capacity, as for increased costs of performance occasioned by a new tariff act or compliance with the National Industrial Recovery Act.

IV

In considering decisions of the courts on this matter, when the Act is not involved, several points must be kept in mind in order to avoid confusion. For one thing, it is doubtful if decisions involving tax and criminal matters and the public domain are applicable to

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102. 36 Ops. Att’y Gen. 462 (1931); 21 Ops. Att’y Gen. 207 (1895); 18 Ops. Att’y Gen. 101 (1885). Thus, an extension of time may be granted where the contractor is not at fault and the Government has suffered no damage. 12 Ops. Att’y Gen. 112 (1867).

103. 2 Ops. Att’y Gen. 480 (1831).

104. 15 Ops. Att’y Gen. 481 (1878); 9 Ops. Att’y Gen. 81 (1857).

105. 30 Ops. Att’y Gen. 301 (1914).

106. 21 Ops. Att’y Gen. 115 (1895); 17 Ops. Att’y Gen. 368 (1882).


The opinion of the Attorney-General emphasizes that an act of the Government increased the costs of the contractor, so that there was a moral and equitable ground for relief. Deming’s Case, 1 Ct. Cl. 190 (1865), refusing relief under similar circumstances, is distinguished on the ground that there performance was completed prior to requesting relief, while here the portion of the contract on which relief was to be given by way of cancellation without cost to either party was wholly executory. Cf. note 187 infra. A later opinion of the Attorney-General, refusing relief for increased costs due to the outbreak of war, referred to the former opinion as “doubtful.” 30 Ops. Att’y Gen. 301, 303 (1914); cf. 33 Ops. Att’y Gen. 69 (1921) (contract for sale of government-owned bacon may be rescinded by War Department where after sale Government seized bacon while unsuccessfully prosecuting buyer as food hoarder, and value of bacon declined during trial). No contracting officer, of course, had agreed to any relief in Deming’s Case, supra.

108. 37 Ops. Att’y Gen. 253 (1933). The opinion does not distinguish between the case where the contractor by law had to comply with the code, and the case where no law required such compliance. The first situation resembles the tariff case. The second situation involves consideration adequate at law for amendment of the contract to provide for code compliance. Congress granted relief later in these cases. 48 Stat. 974 (1934), 41 U. S. C. A. §§ 28-31; 52 Stat. 1197 (1938), 41 U. S. C. A. § 28 n.

109. Cf., for example, Hart v. United States, 95 U. S. 316, 24 L. Ed. 479 (1877) (illegal agreement between government agent and whisky owner concerning use of whisky without payment of tax held not to release surety on whisky owner’s bond); United States v. Beebe, 180 U. S. 343, 21 Sup. Ct. 371, 45 L. Ed. 563 (1901) (compromise judgment in favor of Government made by local government attorney is
contracts for procurement or sale of war supplies and buildings. Very different principles may be involved in connection with dealings between the Government and individuals in regard to taxes and crimes than in regard to contracts on other matters.\textsuperscript{110} In the second place, in many cases an amendment is held void because the wrong government officer executed it—one who lacked authority, possessed by a superior.\textsuperscript{111} Such cases do not hold that the amendment is beyond the authority of another officer, one with more general contracting powers.\textsuperscript{112} In other cases there is no written amendment and no basis

\textit{Non-exhaustive list of cited cases:}

- Utah Power & Light Co. v. United States, 243 U. S. 389, 37 Sup. Ct. 387, 61 L. Ed. 791 (1917) (oral agreement for free use of public domain is void);
- Royal Indemnity Co. v. United States, 313 U. S. 289, 61 Sup. Ct. 995, 85 L. Ed. 1361 (1941) (surrender of surety bond of taxpayer by Collector of Internal Revenue is void);
- Bausch & Lomb Optical Co. v. United States, 78 Ct. Cl. 584 (1934), cert. denied, 292 U. S. 645, 54 Sup. Ct. 779, 78 L. Ed. 1496 (1934). The \textit{Bausch} case involved a general directive of the Secretary of the Navy purporting to amend all contracts to require contractors to establish such extra guards at their plants as the Secretary might require. The directive stated that reimbursement would be made by adjustments in contract prices in each case to cover any increased costs occasioned by compliance with any such order.

\textit{Point of interest:}

In almost every case cited in notes \textit{81} and \textit{109} supra it is evident that another government officer had authority to take the action in question. Cf. Interocan Oil Co. v. United States, 270 U. S. 65, 46 Sup. Ct. 219, 70 L. Ed. 473 (1926); Bausch & Lomb Optical Co. v. United States, 78 Ct. Cl. 584 (1934), cert. denied, 292 U. S. 645, 54 Sup. Ct. 779, 78 L. Ed. 1496 (1934). The \textit{Bausch} case involved a general directive of the Secretary of the Navy purporting to amend all contracts to require contractors to establish such extra guards at their plants as the Secretary might require. The directive stated that reimbursement would be made by adjustments in contract prices in each case to cover any increased costs occasioned by compliance with any such order. Plaintiff complied with an order increasing guards, given not by the Secretary but by the local navy officers. None of its contracts actually were amended to increase the prices, except one where the amendment was executed after performance had been fully completed. Recovery for extra guard costs was denied plaintiff. The decision does not deny the power and authority of the Secretary to amend the contracts to provide for extra compensation for additional guards ordered by him or his representatives. The decision denied recovery solely on the ground that neither the Secretary nor any officers designated by him for such purposes had ordered the additional guards, and therefore, under the terms of the contract, as amended by the directive, no recovery could be had for increased costs for guards. Cf. citations in notes \textit{190}, \textit{191} infra. A decision of the Comptroller of the Treasury denying recovery in a like case is based partly on this ground, and partly on the ground that the mere directive of the Secretary did not, by itself, amend the contracts. 26 Comp. Dec. 641 (1920) (cost-plus contract).

The court in the \textit{Bausch} case held the one amendment increasing the price actually made by a contracting officer void because it was executed after completion of performance and there was no showing that the Secretary had ever approved either the amendment or the original order for additional guards. Cf. note \textit{187} infra.

\textit{Further points:}

112. This point is illustrated by cases involving sales of government-owned property. In United States v. American Sales Corp., 27 F. (2d) 389 (S. D. Texas 1928), aff'd, 32 F. (2d) 141 (C. C. A. 5th, 1929), cert. denied, 280 U. S. 574, 50 Sup. Ct. 29, 74 L. Ed. 625 (1929), a reduction in the price of goods sold by the Government, after completion of the sale, because of certain hardship to the buyer was held void when made by the local agent of the War Department. But in American Stores Co. v. United States, 68 Ct. Cl. 128 (1929), where the Secretary of War approved such action under somewhat similar circumstances (after the sale had been made, the War Department made a general reduction in prices for similar items), the reduction was found valid. The court, overruling the Comptroller General (\textit{id.} at 135), expressly distinguished this decision on the ground that there the local agent had not been given such authority by the Secretary of War. \textit{Id.} at 137. The decision emphasized that this amendment, even if not based upon consideration in the legal sense, was in the interest of the Government, because failure by the Government to conduct sales in this fair and equitable manner would discourage many prospective buyers. Cf. Levinson v. United States, 258 U. S. 198, 42 Sup. Ct. 275, 66 L. Ed. 663 (1922) (sale by Secretary of Navy to other than highest bidder is valid). But cf. 19 Dec. Comp. Gen. 48 (1939).
for implying any amendment in fact; often no government officer has even sanctioned any relief for the contractor. Lacking any such agreement or even sanction by a government officer, the contractor, of course, may be denied the relief sought.\textsuperscript{113} Finally, in another group of cases not only is there no adequate legal consideration to the Government, but it is difficult to find even any ground of real hardship or moral or equitable right to support the agreement. It is hardly surprising if the courts, although willing to make every effort to support amendments for which adequate reasons in fair dealing exist, will not sanction amendments which appear to be based solely on the desire of the contractor to increase its profits or prevent their diminution.\textsuperscript{114}

The courts, like the Comptroller General, have allowed reformation of contracts where there is a mutual mistake so that the written agreement fails to express the true bargain.\textsuperscript{115} In such cases of a mutual mistake about a material fact, relief is also given the contractor to the extent of the increased cost of his performance.\textsuperscript{116} In cases of unilateral error by a contractor where the bid or contract does not reflect his true intent, the courts have allowed relief where the error in the bid or contract was so apparent as to put the Government upon notice. Some decisions have also allowed relief where the error was not so apparent, particularly where notice of the error was given prior to

\textsuperscript{113} In none of the cases cited in notes 118 and 128 infra had any government officer agreed to grant the relief sought.

\textsuperscript{114} For example, during World War I the Government made fixed price contracts for garments under which it furnished the cloth to manufacturers. The contract stipulated the maximum amount of cloth that could be used per garment by the contractor. Later, the contracts were amended to provide for payment of a bonus to the contractor upon the basis of the amount of cloth less than the stipulated maximum amount used per garment by the contractor. It could be argued that since the contractor was originally obligated to use its best efforts to use as little cloth as possible, there was no consideration for the amendment. In the first case to reach the Court of Claims, recovery was denied because of lack of proof as to the amount of the saving in cloth. J. J. Preis & Co. v. United States, 58 Ct. Cl. 8r (1923). A strong dictum stated that the amendment was void for lack of consideration. \textit{Id.} at 86. But in every subsequent case recovery was allowed where there was proof of actual saving and of extra efforts by the contractor which were induced by the bonus agreement. Cohen, Endel & Co. v. United States, 60 Ct. Cl. 513 (1925); F. Jacobson & Sons v. United States, 61 Ct. Cl. 420 (1926); Kling Bros. & Co., Inc. v. United States, 89 Ct. Cl. 329 (1939); cf. 25 \textit{Comp. Dec.} 148 (1918) (recovery denied where bonus amendment was untimely or improperly executed).

\textsuperscript{115} Ackerlind v. United States, 240 U. S. 531, 36 Sup. Ct. 438, 60 L. Ed. 783 (1916); Emery v. United States, 13 F. (2d) 658 (D. Conn. 1926); Austin Co. v. United States, 64 Ct. Cl. 504 (1928); Heid Bros. v. United States, 63 Ct. Cl. 392 (1927); West Lueckburg Steel Co. v. United States, 61 Ct. Cl. 294 (1925); Snellenburg Clothing Co. v. United States, 60 Ct. Cl. 592 (1925); Morgan v. United States, 58 Ct. Cl. 650 (1924); Hygienic Fibre Co. v. United States, 59 Ct. Cl. 598 (1924); Poole Engineering & Machine Co. v. United States, 58 Ct. Cl. 9 (1923); cf. Vulcanite Portland Cement Co. v. United States, 74 Ct. Cl. 602 (1932). See Williston, Contracts (Rev. ed. 1936) §§ 1547-8; Restatement, Contracts (1932) § 504.

to change of position by the Government.\(^{117}\) Other cases have denied relief for an error under such circumstances, but in none of these cases had any government contracting officer approved an amendment for the relief.\(^{118}\)

Thus, quite apart from the extraordinary powers granted by the First War Powers Act, action taken thereunder in mistake cases finds sanction in many court decisions. In fact, insofar as mutual mistakes are concerned, the only change under the Act is purely a procedural one—the contracting agency instead of the Comptroller General\(^{119}\) amends the contract.\(^2\)

The Navy Department usually follows the more conservative court decisions in regard to unilateral errors, requiring the error to be apparent on the face of the contract,\(^{121}\) and only makes the procedural change as in the case of mistakes. The War Department generally limits relief for unilateral errors to the amount of the next lowest bid,\(^{122}\) as before the Act,\(^{123}\) but does extend relief to types of cases\(^{124}\) similar to, or sometimes beyond, those where the more liberal court decisions took such action. The tendency of the courts to grant relief in such cases places the War Department’s action on them in a favorable light.\(^{125}\)

\(^{117}\) Moffett, Hodgkins & Clarke Co. v. Rochester, 178 U. S. 373, 20 Sup. Ct. 957, 44 L. Ed. 1103 (1909) (bidder allowed to rescind for error in bid prior to change of position by city, despite law forbidding withdrawal of bid); Kemp v. United States, 38 F. Supp. 588 (D. Md. 1941) (overruling Comptroller General and allowing rescission after acceptance for substantial clerical error in bid); Alta Electric & Mechanical Co., Inc., 90 Ct. Cl. 468 (1940) (overruling Comptroller General and allowing rescission prior to acceptance); cf. Shepard v. United States, 95 Ct. Cl. 407 (1942) (two inconsistent prices in bid, lower of which erroneous but accepted by Government; error discovered after delivery; recovery allowed up to amount of next lowest bid); Rappoli Co., Inc. v. United States, 98 Ct. Cl. 499 (1943) (allowing relief where notice of error given prior to execution of contract but company signed uncorrected contract relying upon promise of government officials that error would be corrected later). In all the above cases the error was so substantial that it could be argued the Government should have noticed it. Cf. Restatement, Contracts (1932) § 505. However, the Comptroller General had ruled otherwise in the Kemp and Alta cases. As to relief to the Government for an error by its officers, cf. Hume v. United States, 132 U. S. 406, 10 Sup. Ct. 134, 33 L. Ed. 393 (1889).


\(^{119}\) See citations in note 84 supra.

\(^{120}\) See P. R. 308b and 1252 (d) (1).

\(^{121}\) See p. 366 supra.

\(^{122}\) See P. R. 308b.

\(^{123}\) See citations in note 85 supra.

\(^{124}\) See P. R. 308b.

\(^{125}\) See notes 117, 118 supra.
When acts of the Government as the other contracting party have been primarily directed against the contractor, the courts have granted recovery to the contractor for the extra costs thereby caused. Such acts, of course, amount frequently to a breach of contract by the Government for which the contractor may obtain damages. But when the acts of the Government increasing costs of performance have been taken in its sovereign capacity, the courts have refused relief; in all such cases, however, no government contracting officer had sanctioned relief. Under the Act, in these cases where there will be such sanction and also clear evidence of hardship to the contractor, it would appear that the amendment will be upheld whether involving contractual or sovereign acts of the Government.

Courts, of course, have upheld amendments involving consideration to the Government in the form of additional work by the contractor. In addition, decisions have found valid amendments adding new articles to contracts at the request of the Government, even where such articles are not of monetary value to the Government. Similar cases under the Act should give no trouble. In fact, the courts have without fail found valid amendments giving the Government contractors.


2. Cf. notes 107, 108 infra.

3. See P. R. 1252 (d) (2).


5. Marlin-Rockwell Corp. v. United States, 80 Ct. Cl. 394 (1935) (new clause provided for compulsory arbitration of all wage disputes by the Government, with contract price to be adjusted if Government award increased wages); cf. 20 DEC. COMB. GEN. 245 (1940).

6. See note 67 supra.


8. E. W. Bliss Co. v. United States, 275 U. S. 509, 48 Sup. Ct. 136, 72 L. Ed. 399 (1927), reversing the contrary ruling of the Court of Claims, 61 Ct. Cl. 777 (1926). Accord: Electric Boat Co. v. United States, 66 Ct. Cl. 333 (1928); New York Shipbuilding Co. v. United States, 65 Ct. Cl. 457 (1928); cf. James Shewan & Sons, Inc. v. United States, 73 Ct. Cl. 40 (1932); 20 DEC. COMB. GEN. 245 (1940). But cf. 20 DEC. COMB. GEN. 418, 448 (1941). Relief will be denied if the wage increase is a voluntary one made without any promise of reimbursement by the Government: 25 COMP. DEC. 759 (1919); or if the wage increase is required by law. Cf. 20 DEC. COMB. GEN. 448 (1941). In the Bliss case, the contractor had no labor difficulties at the time and gave the wage increase only after repeated requests and assurance of reimbursement.
or where there is a compromise of a claim by the contractor for damages against the Government due to delays caused by it. Extensions of time by government officers have been held binding by courts, irrespective of the lack of consideration for such action or the waiver of damages thereby. Similar action under the Act would appear valid in the light of such decisions of the courts. In other cases the courts have shown a very strong tendency to give relief in cases of hardship or mistake, basing such action on highly questionable "mutual mistakes" of fact, debatable findings that certain work done is outside the scope of the original contract, or the giving up of a very doubtful claim against the Government. This tendency suggests that relief accorded in similar cases under the Act for unexpected hardships caused by the war or acts of the enemy, and for the prevention of the impairment of productive ability of an essential producer of vital war supplies, will be upheld by the courts.

from government officials. In the Electric Boat and New York Shipbuilding cases, the wage increases apparently were not required by law, but were necessary to avoid strikes, obtain adequate labor, etc.; in all instances (sometimes at the request of the contractor), government contracting officials promised reimbursement therefor, although not until after wages had actually been raised in several instances.


139. See P. R. 3086.


141. Of course, relief is denied, at least in the absence of any agreement to the contrary by a government officer, where the bargain makes it fair that one of the parties bear the risk involved, as in cases, such as contracts for experimental work, where it is plain that the hardships met by the contractor should have been and probably were foreseen by the parties originally and the risk thereof deliberately placed on the contractor. Cf. Carnegie Steel Co. v. United States, 240 U. S. 156, 36 Sup. Ct. 342, 60 L. Ed. 576 (1916); Brawley v. United States, 96 U. S. 168, 24 L. Ed. 622 (1878); Steel Products Engineering Co. v. United States, 78 Ct. Cl. 410 (1933).

142. In Vulcanite Portland Cement Co. v. United States, 74 Ct. Cl. 692 (1932), a supplemental agreement increasing the price was held void for lack of consideration, but recovery in the amount of the price increase was allowed by means of modification of the written contract in accordance with a previous "collateral agreement" reflecting the true bargain of the parties. In Wilcox v. United States, 56 Ct. Cl. 224 (1921), overruling, 24 Comp. Dec. 407 (1918), the supplemental agreement increasing the price was held void for lack of consideration because it was executed after completion of performance, but recovery was still allowed for the increase in price on the ground, among others, of a mutual mistake concerning a basic fact. Cf. note 187 infra.

143. See note 114 supra.

144. See citations in note 135 supra.

145. See P. R. 1252 (d) (3).

146. See P. R. 1252 (d) (4).

147. Although the authorities are divided as to whether an agreement to pay increased compensation to a contractor to prevent his wrongful refusal to perform his contract is valid, there is a strong tendency to uphold such agreements where the contractor's costs have increased due to unexpected hardships. See 1 WILLISTON, CON-
Other statutes 148 which have expressly given government officers the power to amend or modify contracts have not been construed by the courts on this question.149 Such statutes, moreover, did not contain the broad phrases of the Act granting the power to modify or amend "without regard to the provisions of law."

Action taken under the Act will in all cases be evidenced by a written agreement made by government officers exercising powers expressly delegated to them under the Act by their superior,150 will involve procurement or sale of war supplies and services, and will not be a gratuity but will involve actual benefit to the Government by facilitation of the prosecution of the war as well as, in most cases, strong moral or equitable grounds for relief for contractors from hardships.151 The strong tendency of the courts to uphold relief under such circumstances in the absence of the Act,152 leaves little doubt as to their decisions under the Act.

V

Although the courts have not yet ruled on this question, the Attorney General has held that Executive Order No. 9001 and the

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149. The Comptroller of the Treasury ruled that such a statute gave no additional power to a government officer. 26 Comp. Dec. 641 (1920). The Comptroller General, however, approved an amendment under such a statute where, according to his decision, the amendment would otherwise have been void. 20 Dec. Comp. Gen. 245 (1940). The amendment involved an agreement to pay time and one-half for overtime, where no law required such payment. The agreement would have been valid therefore even without the statute relied upon by the Comptroller General. See note 136 supra.

150. See, for example, the delegations of authority in the War Department under Executive Order No. 9001, set forth in: P. R. 107 (b) (2), 107 (e) (1) (2), 107 (f), 107 (g), 107 (h), 107 (i).


152. In Yale & Towne Mfg. Co. v. United States, 67 Ct. Cl. 618 (1929), an amendment eliminating a ceiling limit on the total amount payable under a cost-plus-a-percentage-of-cost contract was held void where no consideration was given for the government for such action. The total amount involved under the contract was less than $4000, and the contractor apparently suffered a loss of about $1000, not including profit. The court evidently felt that the contractor had not suffered any great hardship, and that there was no moral or equitable ground shown to support the amendment. In addition, the amendment was made after all the work was completed. Cf. note 187 infra.
delegation of authority thereunder within the War Department is valid. He also expressly approved the action of the War Department in several cases, including one where liquidated damages were waived without consideration to the Government other than prevention of impairment of production of important war supplies by an essential supplier.

The Comptroller General initially indicated a disposition to place a narrow and restricted interpretation on the scope of the powers granted by the Act. His opinions held that the Act did not authorize disregard of various statutory restrictions on the purchase of American made goods by the Navy Department, and on the purchase of typewriters, automobiles, and printing, by cost-plus-a-fixed-fee contractors. Although he did not object to oral or informal contracts under the Act, he did insist that evidence of them be filed in his office. Nor would he permit the Act to be used to alter travel regulations for government employees.

Insofar as amendments of contracts are concerned, his decisions cast little if any doubt on the exercise by government officers of powers given by the Act and recognize the war exigencies which it is designed to meet. The General Accounting Office will continue to audit payments under contracts and to determine whether they have been properly made under the terms of the contract and amendments thereto, but the power of other government officers under the Act to settle even claims by agreements made with their contractors modifying or amending contracts to facilitate the prosecution of the war, is recognized. Another opinion gives general approval to the Navy Department Directive on the exercise of the Act's powers, and does not question the right of the Department to amend contracts by increasing prices, without consideration other than the facilitation of the prosecution of the war by preventing substantial losses to the contractor to insure

154. Ibid.
159. Advertising for bids and acceptance of the lowest bid is no longer mandatory under the Act. See 22 Dec. Comp. Gen. 1018-9 (1943); cf. note 41 supra.
160. Dec. Comp. Gen. B24215, Sept. 2, 1942, which states, in part, that agreements settling "claims under contracts, may not be regarded as having the effect of transferring to such agencies any of the functions of this office respecting the settlement of claims and accounts generally or as affording the administrative action of such agencies on contract claims any degree of finality or conclusiveness not otherwise prescribed by law, except where, pursuant to the Executive Order, settlement is made 'by agreement' with the contractor having the effect of an amendment or modification of the contract in particular cases where it is judged that the prosecution of the war will be thereby facilitated and such agreements are made 'a matter of public record.' . . ." (Italics supplied.)
continuation of deliveries and maintain the contractor as a source of future supply. The Comptroller General has recognized that in appropriate situations relief under the Act may be given to subcontractors of cost-plus-a-fixed-fee prime contractors of the War Department. In his ruling he indicated that he did not question the power of the War Department to amend contracts without consideration to facilitate the prosecution of the war by increasing prices, extending time limits, or relinquishing rights of the Government.

VI

Certain problems occur due to the necessity of a finding in cases of relief under the Act that the action taken facilitates the prosecution of the war. The Attorney General has ruled that such findings by an administrative officer of the War Department are final and not subject to review elsewhere. Although the Comptroller General has disavowed any intention of passing independent judgment upon whether amendments or modifications of contracts under the Act will actually facilitate the prosecution of the war, he has indicated that in special cases he may submit questions to or request explanations from the contracting agencies.

Is such a finding valid when performance under the contract in question has been terminated by the Government or completed by the contractor? Insofar as that contract is concerned, its performance will not be aided by such relief. But if the contractor has other contracts involving war supplies, especially supplies similar to those of the terminated or completed contract, or is about to receive such contracts, relief may well be required for proper performance of such other contracts, and therefore necessary to facilitate the prosecution of the war.

war. Nor would even the fact that final payment had been made by the Government prior to such relief preclude this finding under such circumstances. As an administrative matter, however, relief in such cases may be granted sparingly.

As already noted, relief to subcontractors is possible under the Act, for undoubtedly in many cases the production of such subcontractors is needed to facilitate the prosecution of the war. It has been suggested that the principle of "de minimis" applies, in that if the amount in question is too small from a monetary standpoint, no finding is justified that the relief will facilitate the prosecution of the war. Of course, the size of the contractor is important here. In any event, the rule should not be an absolute one, for circumstances may arise where even a small sum is essential for the continuance of production. Relief under the Act would not appear to constitute cost-plus-a-percentage-of-cost contracting. From the standpoint of the contractor, both the amount and the actual receipt of relief are a matter of grace, of which he is never certain in advance of performance. He always has incurred risks of nonpayment; in addition, in many cases he may not even be made whole, let alone receive any profits.

The argument can be made that the proviso of Title I of the Act forbidding any reorganization under this title of the Executive Branches which would affect the functions of the General Accounting

166. See the decision of the Judge Advocate General of the Army (1943) 2 Bull. J. A. G. 363, § 2256. P. R. 1252 (e) stresses the need for giving relief at the earliest possible time. In fact, as already noted, there is some tendency in the courts to invalidate amendments made after completion of performance. Cf. notes 107, 111, 142, 147, supra and 187 infra.

167. See note 72 supra.


169. The Navy Directive of July 7, 1943, C. C. H. War Law Serv., I, Government Contracts, ¶ 1059.50, states that in cases where less than $100 is involved, or where the amount involved is not substantial in relation to the contract or all the war contracts of the contractor, relief will not be granted under the Act. The War Department has no such requirements in its Procurement Regulations; presumably the War Department allows relief in such cases as mistakes, irrespective of the smallness of the amount involved. See P. R. 368b, 1252 (d) (1).

170. The first proviso of Title II of the Act states that this form of contract is not authorized thereunder. As to what constitutes such a contract, and whether recovery of costs on a quantum meruit basis will be allowed in the case of such a contract, cf. 21 Dec. Comp. Gen. 800 (1942) (recovery allowed prime contractor on such a contract); 21 Dec. Comp. Gen. 858 (1942) (recovery denied prime cost-plus-a-fixed-fee contractor for a sub-cost-plus-a-percentage contract made by him); 23 Dec. Comp. Gen. 410 (1943) (ceiling limit on total payments); Dec. Comp. Gen. B36764, June 10, 1944 (lump sum payment for certain costs in cost-plus-a-fixed-fee contract held valid).

171. P. R. 1252 (d) (4) limits relief where given to prevent impairment of production to the amount necessary to prevent such impairment in so far as important to the war effort.

limits the exercise of powers conferred by Title II of the Act. The debate in Congress expressly recognized the independence of each of the first three titles of the Act, and it would therefore seem evident that the provisos of each title are limited to that title. A like argument can be made that much of the relief given under Title II is in violation of the prior statutory provision conferring on the General Accounting Office exclusive jurisdiction over all claims by or against the Government. Insofar as the contractor is concerned, he has no claim against the Government under the Act. He can request relief, but such relief is a matter of grace as far as he is concerned and rests on an administrative determination from which he has no appeal. The definition of claim by the Comptroller General emphasizes this point. Nor does the fact that the contractor could or even does make a claim under another statute or some provision of his contract covering the same subject matter as his request for relief under the Act, change this situation. As a matter of good administrative practice in order to avoid duplication of effort and overlapping functions, contractors may be denied relief under the Act if they have filed claims elsewhere covering the same subject matter, but certainly a denial of the request for relief does not invalidate the claim. Insofar as the Government is concerned, action under the Act may settle claims of the Government, but here the short answer is that the power to amend contracts under the Act may be exercised irrespective of any "provisions of law relating to the . . . performance, amendment or modification of contracts."

VII

Turning to the Contract Settlement Act of 1944, Section 17 provides:

"(a) Where any person has arranged to furnish or furnished to a contracting agency or to a war contractor any materials,

174. See the remarks of Senator Vandenberg, 87 Cong. Rec. 9842 (1941); and the discussion id. at 9845-6.
177. See 4 Dec. Comp. Gen. 404-5 (1924) defining claim, in this connection, as: "legal demands;" "assertion of liability to the party making it to pay a sum of money;" and "everything which may be recovered by suit." Cf. Saligman v. United States, 56 F. Supp. 505 (E. D. Pa. 1944) (court denied reformation of a contract for unilateral mistake but expressly stated that such action was without prejudice to any relief available to the contractor from officials of the procurement agency under the First War Powers Act).
178. See P. R. 308g restricting relief whenever the matter has been previously referred to the General Accounting Office.
services, or facilities related to the prosecution of the war, without a formal contract, relying in good faith upon the apparent authority of an officer or agent of a contracting agency, written or oral instructions, or any other request to proceed from a contracting agency, the contracting agency shall pay such person fair compensation therefor.

“(b) Whenever any formal or technical defect or omission in any prime contract, or in any grant of authority to an officer or agent of a contracting agency who ordered any materials, services, and facilities might invalidate the contract or commitment, the contracting agency (1) shall not take advantage of such defect or omission; (2) shall amend, confirm, or ratify such contract or commitment without consideration in order to cure such defect or omission; and (3) shall make a fair settlement of any obligation thereby created or incurred by such agency, whether expressed or implied, in fact or in law, or in the nature of an implied or quasi contract.

“(c) Where a contracting agency fails to settle by agreement any claim asserted under this section, the dispute shall be subject to the provisions of section 13 of this Act.

“(d) The Director shall require each contracting agency to formalize all such obligations and commitments within such period as the Director deems appropriate.”

Prior to this Act, it was settled that, in general, oral, informal, defective, or implied-in-fact contracts which by statute or regulation should have been written, embodied in one document, or signed and sealed in a certain manner, were, while executory, enforceable or voidable at the option of the Government only. No recovery was allowed contractors for the executory portions of such contracts. Contractors could recover for the work done thereunder, upon the basis of quantum meruit. An implied-in-fact contract had to be proved. Recovery was not permitted against the Government on contracts implied at law, quasi contracts (other than those implied in fact) or any other type of contract based purely on general equitable considera-

183. United States v. R. P. Andrews & Co., 207 U. S. 229, 28 Sup. Ct. 100, 52 L. Ed. 185 (1905); St. Louis Hay & Grain Co. v. United States, 191 U. S. 159, 24 Sup. Ct. 47, 48 L. Ed. 130 (1905); Clark v. United States, 95 U. S. 539, 24 L. Ed. 518 (1877); Brooke's Case, 2 Ct. Cl. 180 (1866); Burchiel's Case, 4 Ct. Cl. 549 (1868); Adam's Case, 7 Ct. Cl. 437 (1871); L. Schepp Co. v. United States, 61 Ct. Cl. 219 (1925). The amount of recovery is the value of the work done (Schepp case, supra), not to exceed the contract price (St. Louis Hay & Grain case, supra); in absence of other evidence, the value is the contract price (Clark case, supra).
The contract had to be made for legal purposes and by an officer of the Government having actual, not merely apparent, authority to contract. At least prior to or at the time of delivery or completion of performance, a contracting officer could ratify the orders or agreements of non-contracting officers and thus bind the Government; the validity of ratification subsequent to this time was more doubtful.

Unless changed by provisions in the contract, the same rules applied to oral or informal orders for extra work or modifications or changes in the work under a properly executed contract. Most government contracts contain clauses stipulating that such orders must be given in writing, must contain certain data, must come from a certain officer, must (in some cases) be approved in writing by a superior officer, and will not entitle the contractor to extra compensation unless he presents a claim therefor within a designated time. Such provisions, in general, must be strictly complied with. Recovery even for completed work is denied if the required approval of the superior has not been obtained, if the stipulated officer has not given the order.


185. United States v. Jones, 121 U. S. 89, 7 Sup. Ct. 850, 30 L. Ed. 861 (1887); The Curtis Case, 2 Ct. Cl. 144 (1865).

186. See citations in note 81 supra.

187. Hirsch v. United States, 94 Ct. Cl. 602 (1941); Moran Bros. Co. v. United States, 39 Ct. Cl. 486 (1904); Camp's Case, 15 Ct. Cl. 409 (1879), aff'd, 113 U. S. 643, 5 Sup. Ct. 687, 26 L. Ed. 1081 (1885); Ford's Case, 17 Ct. Cl. 60 (1881); Waters' Case, 4 Ct. Cl. 380 (1868); The Fremont Contract Cases, 2 Ct. Cl. 1 (1865), aff'd, by equally divided court, 19 L. Ed. 391 (1869); cf. Miller v. United States, 65 Ct. Cl. 506 (1938); Dywe & Co. v. United States, 65 Ct. Cl. 612 (1928); Shofstall Hay & Grain Co. v. United States, 65 Ct. Cl. 653 (1928). In Globe Indemnity Co. v. United States, 102 Ct. Cl. — (May 1, 1944), the court refused relief where there was no ratification, but condemned the government officer for not ratifying. Id. at —. In the Hirsch case, supra, the court upheld the ratification although it was made after completion of the work. But the Comptroller of the Treasury took the view that ratification after completion of work was void for lack of consideration, because it constituted a waiver of damages for noncompliance with the contract specifications. 17 Comp. Dec. 387 (1910); cf. 25 Comp. Dec. 398 (1918). Some court decisions may give support to his view. Cf. notes 107, 111, 142, 147, 152 supra.

188. Moran Bros. v. United States, 39 Ct. Cl. 406 (1904); Wilson & Goss v. United States, 23 Ct. Cl. 77 (1888); Cooper's Case, 8 Ct. Cl. 199 (1872); Kingsbury Case, 7 Ct. Cl. 13 (1863).

189. See, for example, the articles set forth in P. R. 1301.2, 1301.3, 1301.7, 1302.3, 1302.4, 1302.5, 1304.18 and 1316.13.


or if the claim for compensation is not properly presented in time.\textsuperscript{193} To a certain extent such provisions may be waived by the proper officer,\textsuperscript{193} and an oral order or approval of the stipulated officer may be sufficient even if the contract specifies writing.\textsuperscript{194} Some of these clauses, because of their wording, may not cover additional or extra work not reasonably within the contemplation of the parties originally.\textsuperscript{195} They do not usually cover extra work caused by breaches of

United States, 94 Ct. Cl. 120 (1941); J. & J. W. Stolts Ass'n v. United States, 66 Ct. Cl. 1 (1928); P. H. McLaughlin & Co. v. United States, 36 Ct. Cl. 138 (1901), 37 Ct. Cl. 150 (1902); 17 Comp. Dec. 387 (1910); 26 Comp. Dec. 1000 (1920); cf. Murray v. United States, 67 Ct. Cl. 663 (1929) (extension of time).

192. The Court of Claims has ruled that if the proper officer of the Government issues a written order for extra work but arbitrarily refuses to fix a price therefor, as required by the contract, recovery will be allowed. Davis v. United States, 82 Ct. Cl. 334 (1936). The same result was reached by this Court where the proper officer arbitrarily refused to issue a written order, as the contract required, although the contractor did not appeal the refusal in the manner provided in the contract. Griffiths v. United States, 77 Ct. Cl. 542 (1933). Or where the officer insisted that the work was not extra work and so would not issue a written order for it. Fleisher Engineering & Construction Co. v. United States, 98 Ct. Cl. 139 (1943). The Supreme Court, however, has recently stated that the contractor in all such cases must appeal the decision of the officer to his superior in the manner set forth in the contract, or relief will be denied. United States v. Blair, 321 U. S. 730, 64 Sup. Ct. 825, 88 L. Ed. 1039 (1944).


194. The Court of Claims at first allowed recovery, as did another lower federal court. Haliday v. United States, 33 Ct. Cl. 453 (1898); Ford v. United States, 17 Ct. Cl. 60 (1881); Grant & Co.'s Case, 5 Ct. Cl. 71 (1869); Venable Construction Co. v. United States, 114 Fed. 763 (N. D. Ga. 1902); cf. Barlow v. United States, 184 U. S. 123, 22 Sup. Ct. 468, 46 L. Ed. 463 (1902). In the case of Plumley v. United States, 225 U. S. 545, 33 Sup. Ct. 139, 57 L. Ed. 342 (1913), where the facts showed a total failure of the superior officer to approve the change, despite a contract requirement for such approval, the Supreme Court in a dictum also indicated that oral orders were insufficient when the contract required written ones. Id. at 547-8, 33 Sup. Ct. at 140, 57 L. Ed. at 344-5. Thereafter the Court of Claims, citing the Plumley case, denied recovery. James McHugh Sons, Inc. v. United States, 99 Ct. Cl. 414 (1943); Fleisher v. United States, 95 Ct. Cl. 143 (1943); Wisconsin Bridge and Iron Co. v. United States, 97 Ct. Cl. 165 (1942); Samford v. United States, 78 Ct. Cl. 572 (1933); Suburban Contracting Co. v. United States, 76 Ct. Cl. 533 (1932); Pope v. United States, 76 Ct. Cl. 64 (1932); Lovell v. United States, 61 Ct. Cl. 750 (1926); Kilmer v. United States, 48 Ct. Cl. 180 (1913); cf. Samford & Brooks Co. v. United States, 267 U. S. 455, 45 Sup. Ct. 341, 69 L. Ed. 734 (1925); 26 Comp. Dec. 1000 (1920); 1 Dec. Comp. Gen. 321 (1921); see Note (1930) 66 A. L. R. 649. But cf. United States v. L. P. & J. A. Smith, 256 U. S. 11, 41 Sup. Ct. 413, 65 L. Ed. 808 (1921). A recent case of the Court of Claims indicates that recovery may be allowed in certain cases, where the Government has benefited by the work, and there is no reason to doubt the validity of the oral order, or to believe the officer giving the order did not expect it to increase the cost of the work. W. H. Armstrong & Co. v. United States, 98 Ct. Cl. 519 (1943) (divided court). A written receipt has been held to be a sufficient written order. James McHugh Sons, Inc. v. United States, 99 Ct. Cl. 414 (1943).

contract by the Government, such as delays or misrepresentation or concealment of material facts.

Section 17 of the Contract Settlement Act makes drastic changes in the above principles. As in the case of the Dent Act of

196. Ripley v. United States, 233 U. S. 695, 32 Sup. Ct. 352, 56 L. Ed. 614 (1912); Barlow v. United States, 184 U. S. 123, 22 Sup. Ct. 468, 46 L. Ed. 463 (1902); United States v. Mueller, 113 U. S. 153, 5 Sup. Ct. 380, 28 L. Ed. 946 (1885); United States v. Smith, 94 U. S. 214, 24 L. Ed. 115 (1877); Great Lakes Construction Co. v. United States, 96 Ct. 378 (1942); Kenney v. United States, 95 Ct. Cl. 512 (1942); Herbert M. Baruch Corp., Inc. v. United States, 92 Ct. Cl. 571, 93 Ct. Cl. 107 (1941); Stapleton Construction Co., Inc. v. United States, 92 Ct. Cl. 551 (1940); Newport News Shipbuilding & Drydock Co. v. United States, 79 Ct. Cl. 1 (1934); McClintic-Marshall Co. v. United States, 59 Ct. Cl. 817 (1924); Miller v. United States, 49 Ct. Cl. 276 (1914); Owen v. United States, 44 Ct. Cl. 440 (1916); The Snare & Priest Co. v. United States, 43 Ct. Cl. 364 (1908); Cotton v. United States, 38 Ct. Cl. 356 (1903); Kelly & Kelly v. United States, 31 Ct. Cl. 361 (1906); see Note (1938) 17 A. L. R. 65. Of course, no recovery may be had if the delays are not a breach of contract: as where delays result from changes in the work ordered by the Government pursuant to the contract; or where the contract expressly excludes any relief for delays other than an extension of time. United States v. Rice, 317 U. S. 61, 63 Sup. Ct. 120, 87 L. Ed. 53 (1942); H. E. Crook Co., Inc. v. United States, 270 U. S. 4, 46 Sup. Ct. 184, 70 L. Ed. 438 (1926); Wood v. United States, 258 U. S. 120, 42 Sup. Ct. 209, 66 L. Ed. 495 (1922); Wells Bros. Co. v. United States, 254 U. S. 83, 41 Sup. Ct. 34, 65 L. Ed. 148 (1920); Chouteau v. United States, 95 U. S. 61, 24 L. Ed. 371 (1877); The Merchants' Loan & Trust Co. v. United States, 40 Ct. Cl. 117 (1904).

197. United States v. Atlantic Dredging Co., 253 U. S. 1, 40 Sup. Ct. 423, 64 L. Ed. 735 (1920); United States v. Spearin, 248 U. S. 132, 39 Sup. Ct. 59, 63 L. Ed. 166 (1918); Christie v. United States, 237 U. S. 234, 35 Sup. Ct. 565, 59 L. Ed. 933 (1915); United States v. United Engineering & Construction Co., 234 U. S. 236, 34 Sup. Ct. 843, 58 L. Ed. 1294 (1914); Hollerbach v. United States, 233 U. S. 155, 34 Sup. Ct. 553, 58 L. Ed. 808 (1914); United States v. Gibbons, Jr., 109 U. S. 200, 3 Sup. Ct. 117, 27 L. Ed. 905 (1883); Ruff v. United States, 96 Ct. Cl. 148 (1942); Lukens Dredging & Contracting Co. v. United States, 90 Ct. Cl. 184 (1940); Karna-Smith Co. v. United States, 84 Ct. Cl. 110 (1936); Sexton v. United States, 82 Ct. Cl. 550 (1930); The M. A. Long Co. v. United States, 79 Ct. Cl. 556 (1934); Levering & Garrison Co. v. United States, 73 Ct. Cl. 508 (1932); Dunbar & Sullivan Dredging Co. v. United States, 65 Ct. Cl. 507 (1932); Harris Bros. Co. v. United States, 64 Ct. Cl. 445 (1926); Sheridan-Kirk Contract Co. v. United States, 53 Ct. Cl. 82 (1917); appeal dismissed, 249 U. S. 620, 39 Sup. Ct. 385, 63 L. Ed. 895 (1919); Gearing v. United States, 48 Ct. Cl. 12 (1912); cf. United States v. L. P. & J. A. Smith, 256 U. S. 11, 42 Sup. Ct. 413, 65 L. Ed. 808 (1921); see Note (1932) 76 A. L. R. 268. Of course, recovery is denied if there is no misrepresentation by the Government. MacArthur Bros. Co. v. United States, 258 U. S. 6, 42 Sup. Ct. 225, 66 L. Ed. 433 (1922); George F. Pawling & Co. v. United States, 62 Ct. Cl. 123 (1926), cert. denied, 273 U. S. 705, 47 Sup. Ct. 68, 71 L. Ed. 849 (1926); Cassidy & Gallagher, Inc. v. United States, 95 Ct. Cl. 504 (1942). Contract clauses which provide for the procedure to be followed in the event conditions are not as represented, are binding and must be adhered to by contractors. United States v. Rice, 317 U. S. 51, 63 Sup. Ct. 120, 87 L. Ed. 53 (1942); cf. Herbert M. Baruch Corp., Inc. v. United States, 92 Ct. Cl. 571, 93 Ct. Cl. 107 (1941); Stapleton Construction Co., Inc. v. United States, 92 Ct. Cl. 551 (1940); Sobel v. United States, 88 Ct. Cl. 149 (1938); The Rust Engineering Co. v. United States, 86 Ct. Cl. 461 (1938). A contract clause denying any additional compensation for such misrepresentations by government officials is valid and will be enforced. Southern Surety Co. v. United States, 75 Ct. Cl. 47 (1932).
World War I, implied-in-fact contracts by actual contracting officers of the Government are validated, even if executory. But, unlike the Dent Act, Section 17 abrogates both the principle that the Government is not liable on other quasi-contracts or contracts implied in law, and also the principle that the Government is bound only to the extent of the actual, not the apparent, authority of its officers. Certain problems may occur in this connection.

Under specified circumstances subcontractors as well as prime contractors are protected by Section 17, provided that they worked for a government contracting agency or a war contractor. Protec-

199. 40 Stat. 1272 (1919), as amended by 42 Stat. 322 (1921), 45 Stat. 1166 (1929), 49 Stat. 1355 (1936), 49 Stat. 2040 (1936), 50 U. S. C. A. § 801n. The Dent Act was the subject of extended debate in Congress prior to passage, whereas there was little or no discussion in Congress of Section 17 of the Contract Settlement Act of 1944. See 57 Cong. Rec. 1132-50, 1183-1214, 2123-46, 2202-14, 2338-50 (1919). Of course the Dent Act was discussed in Congress after termination of all hostilities, which may account for a more critical Congressional attitude.

200. Under the Dent Act, recovery was denied unless a contract implied in fact, made by an officer of the Government with actual authority so to contract, was proved. Chesapeake & Potomac Telephone Co. v. United States, 261 U. S. 385, 50 Sup. Ct. 343, 74 L. Ed. 621 (1930); Jacob Reed's Sons v. United States, 273 U. S. 200, 47 Sup. Ct. 339, 71 L. Ed. 608 (1927); Baltimore & Ohio R. R. v. United States, 261 U. S. 385, 43 Sup. Ct. 384, 67 L. Ed. 711 (1923); Baltimore & Ohio R. R. v. United States, 261 U. S. 542, 43 Sup. Ct. 425, 67 L. Ed. 816 (1923); Rosenfield v. United States, 70 Ct. Cl. 639 (1930); Kendall v. United States, 70 Ct. Cl. 90 (1930); Goetz v. United States, 66 Ct. Cl. 17 (1928); Roettinger v. United States, 63 Ct. Cl. 315 (1927); St. Louis Tin & Sheet Metal Working Co. v. United States, 62 Ct. Cl. 277 (1926); Teeter-Hartley Motor Corp. v. United States, 62 Ct. Cl. 271 (1926); American Rolling Mill Co. v. United States, 61 Ct. Cl. 882 (1926); Rock Run Mills v. United States, 61 Ct. Cl. 660 (1926); A. C. Lawrence Leather Co. v. United States, 61 Ct. Cl. 304 (1925); Donner Steel Co. v. United States, 61 Ct. Cl. 209 (1925), cert. denied, 270 U. S. 643, 46 Sup. Ct. 210, 70 L. Ed. 777 (1926); Industrial Engineering Co. v. United States, 60 Ct. Cl. 519 (1925), aff'd, 273 U. S. 659, 47 Sup. Ct. 345, 71 L. Ed. 827 (1927); Wright Engineering Co. v. United States, 59 Ct. Cl. 59 (1923), cert. denied, 274 U. S. 738, 47 Sup. Ct. 574, 71 L. Ed. 1316 (1927); Burney Axe Co. v. United States, 60 Ct. Cl. 409 (1925); Peerless Insulated Wire and Cable Co. v. United States, 60 Ct. Cl. 409 (1925); Roessler v. United States, 60 Ct. Cl. 405 (1925); Rome Brass & Copper Co. v. United States, 60 Ct. Cl. 280 (1925); Nixon v. United States, 59 Ct. Cl. 684 (1924); Booton v. United States, 59 Ct. Cl. 566 (1924); United Gas & Electric Engineering Corp. v. United States, 59 Ct. Cl. 176 (1924), aff'd, 269 U. S. 535, 46 Sup. Ct. 100, 70 L. Ed. 399 (1925); Morgan Engineering Co. v. United States, 58 Ct. Cl. 373 (1923); cf. 34 Ops. Att'y Gen. 55 (1923).

201. See citations in note 184 supra.

202. See citations in note 81 supra.

203. Thus, protection would be granted in such types of cases as the following provided that the proper government agency or officer, as required by the Act, promised direct payment by the Government to the subcontractor therefor: (a) A subcontractor makes deliveries to a prime contractor who has previously defaulted on payments to the subcontractor. Cf. Industrial Engineering Co. v. United States, 60 Ct. Cl. 766 (1925), aff'd, 273 U. S. 659, 47 Sup. Ct. 345, 71 L. Ed. 827 (1927); Teeter-Hartley Motor Corp. v. United States, 62 Ct. Cl. 271 (1926). (b) The claimant builds a plant for a power company, which supplies current to a prime war contractor. Cf. United Gas & Electric Corp. v. United States, 59 Ct. Cl. 176 (1924), aff'd, 269 U. S. 535, 46 Sup. Ct. 100, 70 L. Ed. 399 (1925). (c) The claimant processes materials and delivers them to a prime government contractor. Cf. Rome Brass & Copper Co. v. United States, 60 Ct. Cl. 280 (1925); Roessler v. United States, 60 Ct. Cl. 405 (1925). Recovery was denied under the Dent Act in all the cited cases for the reasons stated in note 200 supra. It would seem that a mere request by the Government to the subcontractor to take such action should not be sufficient unless the request expressly or by implication promises payment therefor by the Government to the subcontractor rather than by the prime contractor, but the language of Section 17 is susceptible of a contrary interpretation.
tion is given whether the claimant has only "arranged to furnish," or actually "has furnished" supplies; the relief extends to "fair compensation," which presumably includes profit, for "materials, services, or facilities," so long as they relate to the prosecution of the war. Section 3 (g) of the Contract Settlement Act defines "contracting agency" as any government agency authorized to make contracts under Title II of the First War Powers Act and also the Smaller War Plants Corporation, the War Production Board, and the Reconstruction Finance Corporation and corporations organized under the Reconstruction Finance Corporation Act. What about the status of orders from one government agency, in charge of allocation of raw materials, to producers to make deliveries upon the basis of contracts to be placed by another government agency? Or the orders of an industry-appointed committee working with and at the request of the Government, to producers in regard to deliveries to prime government contractors?

What constitutes reliance in good faith upon the apparent authority of an officer or agent? Generally, only government officers formally and technically designated by their agency as contracting officers have contracting powers. Must the claimant show reason-

204. In the case of statutes providing for payment of just compensation in the event of termination of contracts, just compensation has been held not to include anticipated profits, but profit is allowed for articles completed prior to termination. Russell Motor Car Co. v. United States, 261 U. S. 514, 43 Sup. Ct. 428, 67 L. Ed. 778 (1923); De Laval Steam Turbine Co. v. United States, 284 U. S. 61, 52 Sup. Ct. 78, 76 L. Ed. 168 (1931); Meyer Scale & Hardware Co. v. United States, 57 Ct. Cl. 26 (1922). The Dent Act expressly barred recovery for anticipated profits, but not profit on completed work. Section 6 (d) (1) of the Contract Settlement Act of 1944, however, even permits a reasonable allowance for profit on work done and preparations made for the terminated portion of the contract; and therefore it seems clear that fair compensation under Section 17 certainly would include profit on completed work. The War Department has so ruled. See P. R. 308h (i).

205. For example, recovery could be allowed, if, upon the basis of a promise by the proper government agency or officer under Section 17 and with the knowledge of the Government, a lease was renewed, cf. Burney Axe v. United States, 60 Ct. Cl. 493 (1925); a plant was expanded or converted to war work, cf. Jacob Reed's Sons v. United States, 273 U. S. 200, 47 Sup. Ct. 339, 71 L. Ed. 608 (1927); Roetttinger v. United States, 63 Ct. Cl. 315 (1927); Goetz v. United States, 66 Ct. Cl. 17 (1928); Rosenfield v. United States, 70 Ct. Cl. 639 (1930); materials were ordered, cf. Rock Run Mills v. United States, 61 Ct. Cl. 606 (1926); or other expenditures in preparation for the promised work were made, cf. Wright v. United States, 60 Ct. Cl. 519 (1925); cert. denied, 274 U. S. 736, 47 Sup. Ct. 736, 71 L. Ed. 1316 (1927); St. Louis Tin & Sheet Metal Working Co. v. United States, 62 Ct. Cl. 277 (1926). On the other hand, the mere expense of preparing a bid or offer, even if in response to a request of the Government therefor, would not seem covered by Section 17, unless the Government had requested further action. Cf. Martin v. United States, 61 Ct. Cl. 430 (1926). Also, expenses expressly excluded or not expressly or impliedly included by the request or instructions of the Government to proceed, should not be paid under Section 17. Cf. American Rolling Mill Co. v. United States, 61 Ct. Cl. 882 (1926); Morgan Engineering Co. v. United States, 58 Ct. Cl. 373 (1923).


208. See P. R. 302 (c), for example.
EXTRAORDINARY RELIEF FOR WAR CONTRACTORS

able grounds for believing the officer with whom he dealt had formally been so designated, or merely that he was ignorant of the requirement for such designation and believed, under the circumstances, that the officer had contracting powers? What constitutes reliance in good faith, and what constitutes a sufficient request or instructions to proceed? In the case of written or oral instructions or other requests to proceed from a contracting agency, must the officer giving them have actual or only apparent authority so to do? This point may be immaterial, since if there is only apparent authority, liability may result under the immediately preceding phrase of Section 17. What is a formal or technical defect or omission in any grant of authority to any officer or agent of a contracting agency who orders the supplies? Does this include a complete failure to designate him formally as a contracting officer, and, if so, under all circumstances, or only when he had apparent authority?

The elaborate contract clauses previously noted in regard to changes in work or extra work are seriously affected by Section 17. If the officer ordering the change or extra work is not one designated to do so by the contract, is such lack of designation a formal or technical defect or omission in the grant of authority to him? If so, is this true under all circumstances, or only when he has apparent author-

209. Due to the fact that contracting officers are usually designated, not by name, but by the title of their office, and that during war there are frequent reorganizations of departments, it may be very difficult to determine whether a given individual is a contracting officer at a stated time. Cf. United States v. Swift & Co., 270 U. S. 124, 46 Sup. Ct. 308, 70 L. Ed. 497 (1926).

210. Cf. United States v. A. Bentley & Sons Co., 16 F. (2d) 895 (C. C. A. 6th, 1927) (court held individual who performed duties of the duly designated representative of a contracting officer under a contract, should be treated as having the authority of such a representative even if not technically appointed as such by the contracting officer).

211. A mere voluntary pledge, made pursuant to the request of the Government for such a pledge, to devote a plant to war work, would seem insufficient. Cf. Peerless Insulated Wire and Cable Co. v. United States, 60 Ct. Cl. 409 (1925). But what about a suggestion by a government officer, without any reference to payment, that the work be done? Cf. Baltimore & Ohio R. R. v. United States, 261 U. S. 592, 43 Sup. Ct. 425, 67 L. Ed. 816 (1923). Should the circumstances not be such that a promise to pay by the Government can be inferred? Cf. A. C. Lawrence Leather Co. v. United States, 61 Ct. Cl. 304 (1925) (notification to war contractor that he might convert to civilian work is not a promise to pay cost of such conversion); see note 203 supra.

Certainly a mere volunteer or one who had no reason to expect payment should not recover. Cf. McKenzie Construction Co. v. United States, 64 Ct. Cl. 645 (1928) (no recovery under Dent Act where government officer ordering additional work under contract refused contractor's request for price increase and supplemental agreement therefor). Could a company, after executing a valid formal contract, recover on a prior alleged defective "oral contract" for the same project made with an officer having only apparent authority to contract, on the basis of reformation for mutual mistake? Cf. Western Cartridge Co. v. United States, 61 Ct. Cl. 482 (1926).

212. If the officer in question promises extraordinary relief (which he lacks authority to grant), such as an amendment of the contract without consideration under the First War Powers Act? Cf. Chesapeake & Potomac Telephone Co. v. United States, 281 U. S. 385, 50 Sup. Ct. 343, 74 L. Ed. 921 (1930); P. R. 308-h, 4 (r) (b).

213. See note 189 supra.
ity? 214 The failure of a superior officer to give approval if required by the contract would not seem such defect or omission. What about oral orders, when the contract requires written ones? This would appear to be a technical defect or omission, but it may not strictly fall under Section 17, since it is not either a defect in a grant of authority to an officer, or a defect or omission in the original contract, but only in an amendment or change thereto.

Undoubtedly, the conditions of procurement in wartime, with emphasis on speed coupled with frequent reorganizations and confusion in government agencies, 215 make necessary relief such as that provided in Section 17 to prevent harsh results to many deserving war contractors. Prior to the enactment of Section 17 relief in similar circumstances was given in individual cases as a matter of grace in the discretion of the contracting agency, under Title II of the First War Powers Act, provided that the circumstances warranted a finding that the prosecution of the war would be facilitated by such action. 216 Such procedure, in effect, amounted to ratification, which the courts had shown a strong tendency to uphold. 217 This method was, however, limited by the requirement of determining that the prosecution of the war was facilitated, and therefore might not cover certain deserving cases, now falling within Section 17, where the producer was no longer engaged in war work, or where relief was sought only after termination of the war.

214. See note 210 supra.
215. See note 209 supra.
216. See, for example, (1943) 2 BULL. J. A. G. 363, § 2256.
217. See note 187 supra.