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UNCLE SAM'S RIGHT TO DAMAGES
FOR DELAY IN THE WONDERLAND
OF GOVERNMENT CONTRACTING

James A. Lande*

INTRODUCTION

If Humpty Dumpty happened to wander into the wonderland of Government contracting, he might feel quite at home in the topsy-turvy terrain. In this strange land he would probably be told that the Government is like any ordinary individual when making a contract, yet he could readily observe a vast difference between Government and commercial contracts. Furthermore, contractors appear to recover much money in claims against the Government, but one hears of little activity by the Government to recover its claims against contractors. In the eyes of the law, under contract principles, both parties are equal. However, while contractors obtain substantial sums for delay caused by the Government, the Government does not seem to recoup its losses due to tardy performance by the contractor. Does "delay" mean one thing when the contractor uses the word in pressing a claim against the Government, but take on quite a different meaning when the parties are reversed?

"When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."
"The question is," said Alice, "whether you can make words mean so many different things."
"The question is," said Humpty Dumpty, "which is to be master—that's all."2

A sensitive ear so rarely hears of the Government collecting damages against a contractor for late delivery or delayed contract performance that one might wonder whether the Government even has the right to collect at all. Or is it that those who are responsible

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2 L. Carroll, "Through the Looking Glass" 106 (Peter Pauper ed. 1967).
for Government policy⁹ would rather the Government refrain from exercising rights it might really have? Perhaps the true question concerning the Government's entitlement to "delay damages" is not what those words may mean in the law, but, as Humpty Dumpty perceived, who is the master in using them.

The purpose of this article is to explore what the Government might and should do to recover damages for delay caused by a contractor despite Government acceptance of such delayed performance. Part I explores the Government's common law right to such damages. Part II sets forth various procedural remedies available to the Government should it seek redress for delayed contractor performance. Part III identifies recoverable damages. Finally, Part IV raises considerations of public policy.

PART I
THE GOVERNMENT'S COMMON LAW RIGHT TO DAMAGES FOR DELAY

One of the marvels in the land of Government contracting is the fact that many times the Government cannot, for practical reasons, exercise one of its most potent contract rights, i.e., the unilateral right to terminate a contract for default in performance. As the Government's posture is weakened by continued contractor delay in performance, the Government often becomes fearful that it will suffer still further if it terminates the contract. There is no doubt that the Government could terminate for failure of the contractor either to deliver on time, or to make sufficient progress in the prosecution of the work so as to endanger performance of the contract.⁴ Yet often, when the Government is buying products or services not readily reprocurable from another source, or when it is trying to meet a tight timetable, it really does not dare to terminate the contract. The added loss of time in reprocurement from another

³ In our tradition Government policy is made by the elected representatives of the people, i.e., the Chief Executive and members of Congress. With respect to military procurement, however, some see a remarkable reversal of the American political and economic system. We find the Armed Services or the corporations that supply them making the decisions and instructing the Congress and the public, states John Kenneth Galbraith, well-known political economist. "The public accepts whatever is so decided and pays the bill. This is an age when the young are being instructed . . . to respect constitutional process and seek change within the framework of the established political order. And we find the assumed guardians of that order . . . calmly turning it upside down themselves." Galbraith, How to Control the Military, HARPER'S MAGAZINE, June, 1969, at 38.

⁴ This contractual right is provided in the standard form default clause of Government contracts. See, e.g., ASPR 7-103.11; FPR 1-7.101-11; NASA PR 7.103-11, 8.707—supply contracts. ASPR 8-709; FPR 1-8.709-1—construction contracts. NASA PR 7.302-9, 8.710—fixed-price research and development contracts.
source would simply compound the already unacceptable delay. Naturally the defaulting contractor is quite well aware of the Government's predicament; he knows that often it is in the best interests of the Government not to terminate the contract for default.

In such circumstances the Government reluctantly but usually accepts the contractor's delayed performance, despite the sometimes heavy damages it incurs as a consequence. In the wonderland of Government contracting it appears that such damages are rarely recouped. Does this mean, one might innocently inquire, that the Government lacks the legal right to recover delay damages?

A. The Rule at Common Law

At common law a vendor who promises to deliver goods on a specified date and fails to do so breaches a condition of his contract. If he delivers at a later date, and the vendee elects to accept delivery, of course the vendee is bound to pay for the goods or otherwise proceed with his own further performance, since he has waived his right to treat the breach of the condition of prompt performance as a discharge of the contract. However, as pointed out by Professor Corbin, the election to accept late delivery does not discharge the vendee's right to damages for the vendor's breach. When sued for payment, or for damages for his own failure of performance, the vendee has a basis for recoupment or counterclaim. The rule is well stated by Williston:

At common law, it is the general rule that a vendee may accept the goods and bring an action for damages he may have actually suffered in consequence of late delivery; he does not, by accepting late delivery, waive any claim he may have for damages arising from the delay.

Most courts are in accord. Although some decisions view acceptance of performance after the time fixed therefor as constituting a waiver of damages (in the absence of an express reservation to the contrary), the vast majority hold that such acceptance standing alone, and without more, does not constitute an effective waiver.

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6 3A Corbin, Contracts § 766 (1960).
5 5 Williston, Contracts § 704, at 379 (3d ed. 1961). Accord, § 856, at 231; Restatement of Contracts § 411, comment a (1932).
7 Robberson Steel Co. v. Harrell, 177 F.2d 12, 16 (10th Cir. 1949). Citing decisions from a number of jurisdictions, the court summarized the law on this point:

Some courts hold that unless there is an express reservation of the right to sue, acceptance of performance after the time fixed is to be treated as a waiver of damages. But the prevailing rule of wide acceptance with which we find ourselves in accord is that while acceptance of performance after breach may operate as a waiver of the right to treat the contract as terminated by the breach, such acceptance standing alone and without more does not constitute an effective waiver of the right of action for damages caused by the breach.
The rationale for the majority view is that the party not in default is often forced through necessity to take what he can get under his contract when he can get it. Therefore he has no intention of waiving his right to damages when he accepts performance after breach.\(^8\)

Of course it is possible for a buyer to accept delayed performance as full satisfaction of the seller's obligation, "but some evidence other than mere acceptance of the goods is necessary to warrant this conclusion."\(^9\) Indeed, a clearly manifested intention to waive the right to accrued damages and consideration therefor are required before a court will find an effective waiver at common law.\(^10\)

**B. Common Law Applied to Government Contracts**

It is well established that the law applicable to Government contracts is federal law,\(^11\) which embodies principles of common law.\(^12\) Although there is a paucity of authority that passes directly upon the issue of whether the Government can recover common law damages for delayed contractor performance accepted by the Government, those decisions in point clearly hold that the Government has the legal right to do so. This area of the law has been explored in depth by the Comptroller General of the United States, whose determinations are binding upon the Executive Branch.\(^13\) His decisions are particularly pertinent because they deal explicitly with issues involved under the terms of a Government contract.

In 16 **COMP. GEN.** 277 (1936), the contractor had failed to deliver needed supplies by the date specified. The Government could have terminated the contract and reprocured the supplies elsewhere, charging the contractor for the excess costs occasioned thereby. It chose, however, to accept delayed delivery and as a result incurred added costs. The Comptroller General was called upon to decide whether these costs could be recovered from the contractor. He held that the Government was not required to exercise its option to

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\(^8\) Frankfurt-Barnett Co. v. William Prym Co., 237 F. 21, 28 (2d Cir. 1916).


\(^10\) Robberson Steel Co. v. Harrell, 177 F.2d 12, 16 (10th Cir. 1949).

In **Smith v. Minneapolis Threshing Machine Co.**, 89 Okla. 156, 214 P. 178 (1923), the court stated that a waiver, to be operative, must be supported by an agreement founded upon valuable consideration. A contract of release of alleged damages was found to be supported by consideration where an extension of time of payment under a promissory note was given. See also Kolker v. United States, 40 F. Supp. 972, 973 (D. Md. 1941) (Government found not to have waived its right to damages).


\(^12\) Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); Rumley v. United States, 285 F.2d 773 (Ct. Cl. 1961); Kolker v. United States, 40 F. Supp. 972, 973 (D. Md. 1941).

terminate, but could, in the alternative, permit the contractor to complete delivery after the contract completion date, and charge the contractor with actual damages incurred by the Government incident to the delay.

This determination did not rest upon any specific clause in the contract relating to delay damages, for the contract did not provide for the assessment of either liquidated or actual damages. Instead the Comptroller General drew upon and applied principles of the common law. Citing decisions of the United States Supreme Court, the Court of Claims, as well as prior Comptroller General decisions, he stated:

It has been held that where, as in this case, no specific provision is made in the contract for either liquidated or actual damages upon failure of the contractor to complete performance within the specified time, the contractor is liable for resultant damages under the common law in the event of delays in performance, and properly is chargeable with all the expenses incurred by the Government on account of the contractor's delays in performance.14

The Comptroller General found the contractor to be at fault in failing to deliver the supplies on time. Accordingly the contractor was held chargeable for expenditures by the Government for salaries and subsistence of its employees while engaged in inspecting the supplies after the date fixed by the contract for its completion.15

The opinion set forth in 35 Comp. Gen. 288 (1955) represents an extension of the applicability to Government contracts of common law principles concerning delay damages. The Comptroller General not only applied the foregoing doctrine, but further probed issues relating to damages and waiver. The contractor had failed to supply the United States Treasury with certain embossed plates within the time fixed by the contract. The Government did not exercise its right to terminate the contract for default, but instead, at extra cost, embossed and punched sufficient plates to meet its immediate needs. Subsequently the Government accepted delinquent

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14 16 Comp. Gen. 277, 279 (1936) (emphasis added).
15 Id. Accord, 8 Comp Gen. 455, 457 (1929). "It appearing from the facts in this case that the delayed performance is attributable solely to the contractor's own fault, and as, under the decisions cited, contractors upon breaching their contracts with the Government are chargeable with all actual damages caused thereby, the contractor must be held responsible for all added expenditures occasioned the Government by the failure to complete the contract work according to the agreement. Accordingly, the amounts paid by the Government for meals for its employees and for salaries and other expenses of its employees while engaged in inspecting and superintending the contract work after the date fixed by the contract for its completion, were properly charged to the contractor."
deliveries from the contractor, but the disbursing officer deducted from payment otherwise due the contractor the extra costs incurred by the Government. The contract contained no provision for the assessment of liquidated damages, and no provision for excess costs except in the event of termination for default.

As in 16 COMP. GEN. 227, the Comptroller General again held that the option to terminate for default was not the exclusive remedy available to the Government for delay in contractor performance. He made specific reference in this instance to the language of the contract's "default" clause which contained an express declaration that the remedies therein specified were not exclusive, but were in addition to any other remedies provided by law. Such a provision is currently incorporated in Government contracts.\(^1\)

In submitting a reclaim voucher the contractor contended that the deduction constituted an arbitrary charge representing a "liquidated damage" penalty not contained in the contract. However, the Comptroller General treated the Government's extra costs as damages which could properly be collected on account of the contractor's delay in performance, and therefore denied the claim. His determination was based upon the following common law doctrine:

> It is well established that a party who is injured by another's breach of contract is entitled to recover from the latter such damages as are the direct, natural, and proximate result of the breach, or which, in the ordinary course of events, would likely result from the breach and which reasonably could be said to have been foreseen, contemplated, or expected by the parties at the time they executed the contract as a natural result thereof.\(^2\)

The Comptroller General found that when the agreement was executed it could be readily foreseen that the Government would suffer actual damages if the prescribed delivery schedules were not met.

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\(^1\) The usual form of supply contract is S.F. 32 (June, 1964 ed.) which contains the following provision in para. (f) of the Default clause: "The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract."

\(^2\) Contractual provisions for assessing liquidated damages or actual damages due to delayed contractor performance may be found in Government contracts, and may present issues related to (but not identical with) those under discussion. Concerning liquidated damages, see Maryland Gas Co. v. United States, 93 Ct. Cl. 247 (1941); Frank Wolfe Mfg. Co., ASBCA No. 1709, 6 Contr. Cas. Fed. § 61858 (1955); American Surety Co. v. United States, 136 F.2d 437 (9th Cir. 1943). See also, Cuneo, Waiver of the Due Date in Government Contracts, 43 VA. L. REV. 1, 24-28 (1957).

For cases involving Government contracts which expressly provide for Government recovery of damages due to contractor delay, see Nalle v. United States, 51 Ct. Cl. 43 (1916); New Jersey Foundry & Machine Co. v. United States, 44 Ct. Cl. 570 (1909).
The amount deducted from payment otherwise due the contractor was found to be a cost which the Government necessarily incurred as a direct and immediate consequence of the contractor's failure to deliver on time. Therefore "the deduction of that sum from amounts otherwise due the contractor was correct and proper, notwithstanding the fact that delayed performance by the contractor subsequently was accepted."10

In view of the earlier discussion concerning waiver,20 it is rather significant to observe the Comptroller General's application of the following rule to a Government contract:

It is well settled that acceptance of delayed performance under a contract is not inconsistent with the right to demand damages for delay, and hence is not in and of itself a waiver.21

In citing authorities for this principle the Comptroller General drew upon federal and state decisions, the Uniform Sales Act, and Williston on Contracts. Furthermore, he expressly disapproved his earlier contrary statement to the effect that acceptance of delayed performance constitutes waiver.22

Today 35 COMP. GEN. 228 (1955) is in full force and effect, and decisions by the Comptroller General since 1955 have consistently followed and applied its rationale.23 In addition, the same approach to Government contracts has been adopted by the Armed Services Board of Contract Appeals,24 the Department of Transportation Contract Appeals Board,25 the Interior Board of Contract Appeals,26 the U.S. Court of Claims,27 and federal district courts28 and circuit courts of appeals.29 Accordingly the conclusion is inescapable that the Government has the right to recover common law damages caused by a contractor's delay in performance accepted by the Government.

19 Id. at 230.
20 See text accompanying notes 6 through 8, supra.
22 The decision overruled on this point is 29 COMP. GEN. 57 (1949).
23 See the following Comptroller General decisions: B-131875, May 27, 1957; B-154170, June 12, 1964; and B-164070, June 7, 1968.
27 See Camden Iron Works v. United States, 50 Ct. Cl. 191 (1915), overruling 15 COMP. DEC. 282 on other grounds, but sustaining same on the point involved.
29 See American Surety Co. v. United States, 136 F.2d 437, 439 (9th Cir. 1943).
A. Set-Off

To recoup its losses caused by contractor delay, the Government can utilize various procedures, including set-off. Immediate recovery can be obtained when the Government exercises its right of set-off. The Government has the power to withhold from any payment due the contractor the amount of its outstanding claims for delay damages. This remedy is no different from the right at common law that every creditor has to deduct amounts due him from amounts due his debtor. If the debtor happens to have two contracts with the Government, one of which he has breached, "[i]t would be folly to require the Government to pay under the one contract what it must eventually recover for a breach of the other." This is a common law right that exists apart from statutory authority, and it is well established that the right applies to the Government as well as to any other creditor.

In addition to the Government's common law right of set-off, the Comptroller General has been vested with statutory set-off authority: he is required to set off any indebtedness owed to the United States by a person who seeks payment of a judgment obtained against the United States. Although the statute speaks of indebtedness, it has been interpreted to authorize the Comptroller General to set off claims of the Government against the judgment

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31 16 COMP. GEN. 962, 963-64 (1937); 7 COMP. GEN. 576, 580 (1928).
32 31 U.S.C. § 227 (1964) provides in part:

When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debts thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment.
creditor. It would thus seem clear that the Comptroller General could withhold the amount claimed by the Government as damages occasioned by a contractor's delay in performance if the contractor sought to enforce payment of a judgment against the United States.

Furthermore Congress has clothed the Comptroller General, as head of the General Accounting Office, with plenary powers to settle claims by or against the Government. This authority is derived primarily from his statutory responsibility as the supervisor of public accounts and expenditures. Undoubtedly the Comptroller General's "settlement powers" include the right to offset opposing claims and to strike a balance between the debts and credits of the Government with respect to a contractor whose delay in performance has resulted in added costs to the Government.

Although binding upon the Executive Branch, the Comptroller General's determination with respect to contract claims and counterclaims is always subject to review by the Court of Claims.

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33 See United States v. Isthmian Steamship Co., 359 U.S. 314, 324 (1959), wherein Chief Justice Warren cited 31 U.S.C. § 227 as authority for the following statement: The Government is authorized to withhold payment of Isthmian's judgment in this case [a judgment against the United States] to the extent the Government has claims outstanding against Isthmian. (emphasis supplied.)

34 31 U.S.C. § 71 (1964) prescribes that: "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

35 28 COMP. GEN. 543, 545, 546 (1949); accord, United States v. American Surety Co. of New York, 158 F.2d 12 (5th Cir. 1946).

36 In United States v. Munsey Trust Co., 332 U.S. 234, 239-40 (1947), the Supreme Court stated:

[F]ederal statute gives jurisdiction to the Court of Claims to hear and determine "All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the government in said court . . ." Judicial Code § 145, 28 U.S.C. § 250(2). This power given
In short the right of set-off affords the Government swift redress, without the initial delays and expense of litigation, to recoup its losses caused by contractor delay.

B. Settlement

Considering the set-off power of the Comptroller General, the contractor may be receptive to negotiating a realistic settlement with the Government. Although the Comptroller General's Office could make a settlement with the contractor, it will decline to do so if the contractor disputes the facts on which the Government's claim rests. For the General Accounting Office has no prescribed procedure for resolution of factual disputes; the Comptroller General has always recognized that "where the facts are in dispute or are otherwise so uncertain as to require the taking of testimony, examination and cross-examination of witnesses, and the weighing of conflicting evidence it is impracticable for the accounting officers to determine with accuracy the true merits of such claims . . . ." Accordingly his Office refuses to undertake settlement where there are substantial factual disputes or uncertainties.

However, the contractor can negotiate a compromise settlement with the contracting officer, who is the executive officer of the Government charged with administering the contract. Under the Federal Claims Collection Act of 1966, the head of an agency or his designee could compromise a Government claim for delay damages against a contractor, and cause collection action on any such claim to be terminated; provided, however, that the claim does not exceed $20,000. It may be noted that in the absence of compromise the Joint Regulations issued under this act by the Comptroller General and Attorney General call for aggressive agency collection action, including collection by offset, which "will be undertaken administratively on claims which are liquidated or certain in amount in every instance in which this is feasible. . . . Appropriate use should be made of the cooperative efforts of other agencies in effecting collec-

to the Court of Claims to strike a balance between the debts and credits of the government, by logical implication gives power to the Comptroller General to do the same, subject to review by that court.


37 21 Comp. Gen. 244 (1941).
tions by offset, including utilization of the Army Holdup List, and all agencies are enjoined to cooperate in this endeavor."

Beyond the express statutory authority of the Federal Claims Collection Act there is some question as to whether a contracting agency of the Government has "inherent authority" outside the terms of the contract to settle claims for breach of the contract's provisions. The Comptroller General has stated that contracting agencies do not have inherent authority to settle breach of contract claims. However, the Court of Claims reaches a contrary conclusion. The Supreme Court has recognized but failed to rule directly upon this issue.

If the Government does not manage to settle or compromise the claim, and the contractor institutes suit against the United States, then he can negotiate the matter with the Attorney General, who is vested with authority to settle claims in litigation.

C. Board of Contract Appeals

If the contracting officer withholds funds to cover the Government's claim for delay damages, can the contractor seek administrative instead of judicial redress by appealing the contracting officer's decision to the appropriate Board of Contract Appeals? Although in the past the Armed Services Board of Contract Appeals has asserted jurisdiction to adjudicate the merits of such a Government claim,
even in the absence of a contractual provision for delay damages,\textsuperscript{46} this view has been questioned in recent decisions of other Boards.\textsuperscript{47} However, even if the Board asserted jurisdiction and found for the contractor, the legality of that determination would be subject to review by the Comptroller General.\textsuperscript{48} 

The recent case of \textit{GMC Truck \& Coach Division General Motors Corporation}\textsuperscript{49} is directly in point. The contractor had agreed to deliver trucks on a certain date, but breached the contract by failing to do so. The Government accepted delayed delivery, and the contracting officer decided to withhold from the price otherwise payable the amount of extra project costs incurred by the Government as a result of delayed delivery. The contract contained no provision for the assessment of damages. The contractor appealed the contracting officer's decision to the Department of Transportation Contract Appeals Board. However, the Board held that it was without jurisdiction to adjudicate the matter on its merits. It reasoned that since the Government's delay damage claim was based upon breach of contract, it did not arise "under the contract" as that term of art has been applied to confer jurisdiction under the Disputes clause of the contract.

Nevertheless, the Board recognized the withholding as warranted by the Government's common law right of set-off. It held that it was proper for the contracting officer to withhold a reasonable amount to cover what ultimately might be agreed or determined by competent judicial authority to have been the amount of the unliquidated breach of contract damages due the Government. In short, "the appellant breached the contract by delivering the trucks late. A withholding is therefore warranted . . . as set-off to abide appellant's ultimate liability."\textsuperscript{50} 

\textsuperscript{46} Parkside Clothes, Inc., ASBCA No. 4148, 60-2 BCA ¶ 2760 at 14,140 (1960); Houston-Fearless Corp., ASBCA No. 9160, 1964 BCA ¶ 4159 (1964); Urban Construction Corp., ASBCA No. 10059, 65-1 BCA ¶ 4866 (1965).

"It is interesting to note," one commentator states, "that there is a little-known line of Board cases holding that the Board has jurisdiction to review for correctness unilateral determinations by the contracting officer of damages due the Government for contractor breach." Lane, \textit{Administrative Resolution of Government Breaches—The Case For An All-Breach Clause}, 28 \textit{Fed. Bar. J.} 199,227 n.107 (1968).


The Court of Claims agrees that the Comptroller General has the right to review decisions of the Appeals Boards with respect to issues of law. Langenfelder & Son, Inc. v. United States, 341 F.2d 600, 608 (Cl. Cl. 1965).

\textsuperscript{49} DOT CAB No. 67-16, 68-2 BCA ¶ 7114 (1968).

\textsuperscript{50} \textit{Id.} at 32,959.
Another recent case in point, *McGraw-Edison Company,* applied the same logic to a Government counterclaim for common law damages approaching one million dollars. The contractor had sold transformers to the Bonneville Power Administration but failed to deliver them on the date specified by contract. In fact, there was a twenty-two month delay in delivery; nevertheless the Government accepted the transformers. The contracting officer found that the contractor's delay was not excusable, and that the amount of consequential damages suffered by the Government exceeded $900,000. As a result the $449,098 balance of the purchase price claimed due by the contractor was withheld from payment, and the certifying officer requested the Comptroller General to advise whether a voucher in any amount could be properly certified for payment until such time as the amount recoverable from the contractor was finally determined.

The Comptroller General noted the certifying officer's concern that the Government's claim was not liquidated in the sense of being for an amount certain, agreed to by the contractor or supported by final administrative decision or legal judgment. Nevertheless the Comptroller General instructed the certifying officer to continue to withhold from the balance due under the contract such amount as might be necessary to cover the Government's reasonable estimate of damages resulting from the delay. "In this connection," noted the Comptroller General, "we believe the Government's actual loss which would result from delay in delivery of the transformers is the kind of damage which was reasonably foreseeable and should be considered to have been contemplated by the parties."

The Comptroller General took into account the fact that the contractor was appealing the contracting officer's decision which held the delay not excusable, and which established the basis for withholding funds otherwise due the contractor. Nonetheless, the Comptroller General concluded that there was "no compelling reason in the record for the taking of administrative action not in consonance with the contracting officer's decision until such time as that decision is actually overruled or modified by the Department of Interior Board of Contract Appeals or a court of competent jurisdiction." Accordingly the withholding was continued and no further payment made of amounts otherwise due the contractor.

When the contractor appealed the contracting officer's decision

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52 Comp. Gen. B-164070 at 3 (June 7, 1968).
53 Id.
54 Id.
to the Department of Interior Board of Contract Appeals, Government counsel argued that the Government's claim for damages attributable to delayed deliveries was beyond the reach of the Board's jurisdiction. The Board reviewed prior decisions in this area, giving recognition to the *ratio decidendi* of the GMC case. However, this appeal differed from GMC in that this contractor was pressing claims against the Government, as well as asserting that its delay in delivery was excusable. In this context the Government's claim for damages resulting from the delay could be characterized as a counterclaim. Undoubtedly the Board had jurisdiction to determine the issue of excusable delay, and if it determined that the contractor's delay was excusable, then of course the Government's claim based upon such delay could fail. As stated by the Board, "a determination favorable to the appellant on the excusable delay claim could directly affect the Government's claim for common law damages. In short, there are questions of fact common to the several claims."

Accordingly, the Board concluded that the question of its jurisdiction over the Government's claim for common law damages could best be determined on the basis of a complete administrative record. Therefore it held the ultimate issue of jurisdiction in abeyance pending a hearing. The Board pointed out that if following the hearing "we conclude that we are without jurisdiction in the matter, the complete record will be available for use in any subsequent court proceedings which may ensue."

In addition to its value in any subsequent judicial proceedings, the Board's record could also prove invaluable to the Comptroller General in settlement of the Government's claim. Whereas previously he may have declined to make settlement because of a substantial unresolved factual dispute, the Comptroller General might reconsider settlement on the basis of the Board's written record setting forth all the facts.

Finally, if the contractor decides to bring suit in the Court of Claims (either on a theory of breach of contract by the Government, or as an appeal from an adverse decision by the Board of Contract Appeals), the Government can counterclaim and obtain judgment against the contractor for the amount of common law damages the Government incurred under the very contract sued

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55 "The GMC Case is also notable for the fact that despite the presence of specific contractual provisions establishing delivery obligations on the part of the contractor and payment obligations on the part of the Government, the Transportation Board found that it had no authority under the contract to decide the dispute on the merits." McGraw-Edison Co., IBCA No. 699-2-68, 68-2 BCA ¶ 7335 at 34,114 (1968) (footnotes omitted) (emphasis added).

56 Id. at 34,115.

57 Id. at 34,116.
upon, and/or under another contract between the parties.\textsuperscript{58} Of course, where necessary, the Government itself can institute suit against the contractor.

One may conclude that if the Government adopts an affirmative policy to recoup its losses caused by contractor delay in delivery, rather effective procedures are at hand to assure collection of the damages due.

\textbf{PART III}

\textbf{WHAT DAMAGES CAN THE GOVERNMENT RECOVER?}

\textbf{A. Requisites for Recovery}

Just as a private party, the United States is entitled to recover damages established according to common law principles.\textsuperscript{60} Several requisites may be briefly summarized:

First. The damage to the Government must be the direct, natural and proximate (rather than remote) result of the contractor's delay in performance.\textsuperscript{60}

Second. At the time the contract was executed it could reasonably be foreseen that if scheduled performance were delayed the Government would suffer the kind of damages it did actually suffer.\textsuperscript{61}

Third. The measure of damages is the difference between the contract price and the reasonable cost of the Government's obtaining performance after the contractor's breach.\textsuperscript{62} Thus the Government is entitled to recover excess costs incurred as the result of the contractor's delay in performance.\textsuperscript{63}

Fourth. The amount of damages must be proven with reason-

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\textsuperscript{58} Rumley v. United States, 285 F.2d 773 (Ct. Cl. 1961).
\textsuperscript{59} See discussion above, Part I B, and text accompanying note 14, \textit{supra}.
\textsuperscript{60} See text accompanying note 18, \textit{supra}; 11 WILLISTON, \textit{CONTRACTS} § 1344 (3d ed. 1968).
\textsuperscript{61} 5 CORBIN, \textit{CONTRACTS} § 1006 et seq. (1964). \textit{Accord}, RESTATEMENT OF \textit{CONTRACTS}, \textit{Foreseeability of Harm as a Requisite for Recovery} § 330 (1964) which reads:

\textit{In awarding damages, compensation is given only for those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it; otherwise, it must be shown specifically that the defendant had reason to know the facts and to foresee the injury.}

\textsuperscript{63} 35 COMP. GEN. 228 (1955); 16 COMP. GEN. 277 (1936); 8 COMP. GEN. 455 (1929); Nalle v. United States, 51 Ct. Cl. 43 (1916); Comp. Gen. B-131875 (May 27, 1957); Comp. Gen. B-154170 (June 12, 1964); Comp. Gen. B-164070 (June 7, 1968).
able certainty. However, "there are various modifications of the rule of certainty. They enable the courts, while holding up a high standard of certainty as an ideal, to avoid harsh applications of it. Among them are: (a) If the fact of damage is proved with certainty, the extent or amount may be left to reasonable inference. (b) Where the defendant's wrong has caused the difficulty of proof of damage, he cannot complain of the resultant uncertainty. (c) Mere difficulty in ascertaining the amount of damage is not fatal. (d) Mathematical precision in fixing the exact amount is not required. (e) If the best evidence of the damage of which the situation admits is furnished, this is sufficient." 64

B. Items Includable

Examples of the kinds of damages recoverable include the following:

1. Direct costs, such as:
   a. Extra cost of obtaining item(s) contracted for from another source during period of delay in performance. 66
   b. Additional inspection costs during delay period. 66
   c. Added cost of Government supervision. 67
   d. Extra transportation expenses. 68
   e. Rental of substitute facilities or equipment. 69
   f. Generally, additional expense for labor and materials in

64 McCormick, Damages § 27 (1935).
65 30 Comp. Gen. 191 (1950) (as a result of the contractor's delay in performance it became necessary for the Government to purchase electric energy); 35 Comp. Gen. 228 (1955) (see discussion pp. 6-8 supra).
66 16 Comp. Gen. 277 (1936); 8 Comp. Gen. 455, 457 (1929); Samuel B. Harper, Jr., ASBCA No. 4959, 59-1 BCA ¶ 2186 (1959); J. W. Bateson, Inc., ASBCA No. 5300, 59-2 BCA ¶ 2281 (1959); Urban Constr. Corp., ASBCA No. 10059, 65-1 BCA ¶ 4866 (1965); Modern Indus. Bank v. United States, 101 Ct. Cl. 808 (1944). But see Nalle v. United States, 51 Ct. Cl. 43 (1916) (inspection expense must be in excess of that which would have been incurred had the contract been performed within the contract period).
67 See cases cited note 66, supra.
69 John M. Whelan & Sons v. United States, 68 Ct. Cl. 601, 613 (1942) (rental of substitute Army officers' quarters); Schmoll v. United States, 63 F. Supp. 753, 756 (Ct. Cl. 1946). (The proper measure of damages for delay in construction of building is the reasonable rental value of the building on which construction was delayed, but in the case of a building that has no rental value on the market, such as a post office, rental for temporary quarters may be considered in determining damages.); 18 Comp. Gen. 483 (1938) (Where the contractor failed to deliver furniture on time, and it became necessary for the Government to maintain an office in its old quarters as well as rent the new quarters for which the furniture was being procured, the Government's additional rental expenses were properly chargeable to the contractor.)
providing "expedients and improvisations" during the delay period.

2. Indirect costs, such as:
   a. Overhead expenses.
   b. Administrative expenses.

3. Under certain circumstances:
   a. Loss of profits.
   b. Interest.

C. Recovering "Impact Damages"

However, the real "impact damages" cannot be so simply pinpointed. For instance, consider the mounting multiple injury the Government suffers when one Government contractor's delay prevents another's timely performance, and this delays a third contractor, who in turn delays a fourth, etc. The chain reaction effect that an individual contractor's delay can have upon a Government project involving many contracts and substantial sums may be immense. Truly this "total impact" could not be foreseen by the contractor who did not know the scope and special circumstances of the project. In fairness he cannot be held liable for any ensuing damages beyond those reasonably and generally foreseeable.

On the other hand, if he knew of the special circumstances of the Government project at the time the contract was let, the contractor might be legally responsible for the damages that arise due to the presence of those special circumstances and as a result of his

71 30 COMP. GEN. 191, 193 (1950) ("expedients and improvisations" to make maximum use of existing facilities); John M. Whelan & Sons v. United States, 98 Ct. Cl. 601 (1942) (extra labor to protect work during period of delay).


73 Id.

74 Comp. Gen. B-164070, June 7, 1968 (where a contractor delayed in delivering transformers, the measure of damages applicable was the Bonneville Power Administration's loss of profits from the sale of power which would have been generated but for the absence of the transformers).

75 In Schwartzbaugh Mfg. Co. v. United States, 289 F.2d 81, 84 (6th Cir. 1961), the court held that the government was entitled to recover interest on a claim against the contractor commencing on the date of demand for payment by the contracting officer, notwithstanding the fact that the contractor was entitled to follow the disputes procedure. The court stated that the fact that neither the contract nor any statute then provided for interest to be charged on a determined overpayment by the government to plaintiff does not detract from the government's right to collect interest on money overpaid to and withheld from it by the contractor. The court observed: "That interest may be recovered on money due the government even in unilaterally determined liability is well recognized."

In addition, "Where, by reason of the defendant's delay in performing his contract, the plaintiff's property has been compelled to remain idle, interest on the value of the property may afford a proper measure of damages." 25 C.J.S. Damages § 77 at 866 (1966).
delayed performance. In essence this is *Hadley v. Baxendale* applied to the space age:76

Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.

Full discussion of the extent and limit of this doctrine as applied to today's sophisticated aerospace Government projects and vast military procurements is beyond the scope of this article. However, it may be observed that this is a relatively undeveloped area of the law, and undoubtedly the courts will establish limits beyond which the contractor will not be charged with consequential damages grossly disproportionate to the contract price. A particular contract may be of such comparatively minor character as to give rise to the inquiry whether the contractor, for his delay in performance or breach causing delay, must suffer damages of a magnitude corresponding to the value of the completion of the entire project.

Nevertheless, the Government might lay the groundwork for collecting full delay damages by simply informing the contractor before he enters into his contract of the special circumstances surrounding the contract and the project of which it is a part. Thus the contractor would be told the scope and nature of the total project, the role his contract plays in it, and what the consequences would probably be with respect to related contracts and the project itself if he fails to perform on time, or otherwise breaches his contract.

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76 The famous English case of Hadley v. Baxendale, 9 Exch. 345 (1854) has been quoted with approval by the United States Supreme Court, in Primrose v. Western Union Tel. Co., 154 U.S. 1, 29-30 (1894) as follows:

*Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—i.e. according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.* (Emphasis supplied to show the context of the quotation in the text.)
This information could be spelled out either in the invitation for bids or in the request for proposals issued by the Government. As a result all potential contractors would be equally advised and would be in a position to bid or negotiate accordingly. At the same time the criteria established by Hadley v. Baxendale for assessment of damages due to special circumstances might be met. Thus, by the simple medium of appropriate and timely communication, the Government could improve its chances to collect the special damages it suffers from delayed performance by an individual contractor.

D. Strict Liability

Another newly emerging approach for Government recovery of damages caused by a supplier rests upon the expanding doctrine of products liability. Even where not directly related to damages arising from delayed contract performance, this rapidly evolving area of the law should be considered in assessing the Government's rights and remedies for faulty contractor or subcontractor performance. Today a growing number of jurisdictions impose strict liability upon a manufacturer whose product causes personal injury or property damage to the ultimate consumer. Under this theory liability does not depend upon due care, nor does it have the attributes of a warranty. The strict liability of a manufacturer and his retailer are established when the plaintiff proves the following: that he was injured, while using the product in a way it was intended to be used, as a result of a defect in the product, of which plaintiff was not aware, and which made the product unsafe for its

77 W. Prosser, Torts § 97 (3d ed. 1964).
78 Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791 (1966). One of the more recent decisions among this growing trend is Ulmer v. Ford Mtr. Co., 75 Wash. 2d —, 452 P.2d 729 (1969).
79 Faced with the various legal obstacles of implied warranty and contract law, Ulmer v. Ford Mtr. Co., 75 Wash. 2d —, 452 P.2d 729, 733 (1969), adopted the approach of strict liability in tort, free from the contractual implications of warranty. In doing so the court recognized that "warranty implied in law" is a legal fiction to rationalize the now well recognized obligation of producers of goods. The court quoted Dean Prosser as follows: "[A]ll the trouble lay with the one word 'warranty,' which had been from the outset only a rather transparent device to accomplish the desired result of strict liability. No one disputed that the 'warranty' was a matter of strict liability. No one denied that where there was no privity, liability to the consumer could not sound in contract and must be a matter of tort. Why not, then, talk of the strict liability in tort, a thing familiar enough in the law of animals, abnormally dangerous activities, nuisance, workmen's compensation, libel, misrepresentation, and respondent superior, and discard the word 'warranty' with all its contractual implications?" Accordingly the court discarded the fiction of warranty and adopted the doctrine of strict liability, as expressed in Restatement (Second) of Torts § 402(A) (1965). See note 82, infra.
This doctrine of strict liability has been applied by courts to physical harm to property as well as physical harm to the person, and has been adopted by the Second Restatement of Torts. If the user or consumer whose property suffers physical harm happens to be the United States Government, likely it could recover under this doctrine against the subcontractor who manufactured the defective item and the prime contractor who sold it to the Government.

Thus under several legal theories the Government might recover from the contractor, upon proper proof, many items of damages.

PART IV
CONSIDERATIONS OF PUBLIC POLICY

Clearly the Government has the common law right, perhaps well unpublicized, to recover damages for a contractor's delay in performance. Potent procedures are available to enforce this right, and the damages recoverable can be considerable. Furthermore, "[i]t is unquestionably true that an official of the Government is not authorized to give away or remit a claim due the Government.

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82 Restatement (Second) of Torts § 402(A) (1965) states: Special Liability of Seller of Product For Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

83 J. Henry Glazer, Esq., Chief Counsel, Ames Research Center, National Aeronautics and Space Administration, has successfully applied this doctrine in negotiating settlements favorable to the United States.
This rule is grounded in a sound public policy and is not to be weakened.484

Yet it seems the Government seldom vigorously presses claims for delay damages. In the wonderland of Government contracting, if the Government's common law right to damages is largely ignored (through ignorance or otherwise), what should be done as a matter of public policy?

A. Arguments Against a Policy of Recovery

Many would argue that as a matter of public policy Uncle Sam should not be permitted to recover delay damages. In research and development contracts, for instance, delivery dates perforce are often nothing more than educated guesses which may later prove unrealistic. The parties recognize this when entering into the contract, and do not intend the delivery date to be rigidly enforced. To do so would stifle the flow of research and development, it may be said, to the serious detriment of the public interest. Other types of Government contracts, it can be argued, also contain delivery dates which are not realistic, for various reasons, and therefore should not be strictly enforced.

Some would contend that delay damages are more appropriately provided for by a liquidated damages clause, as set forth by the Armed Services Procurement Regulations for use in fixed price supply contracts and fixed price construction contracts.85 However, damages for delay are not normally feasible in other types of Government contracts, such as cost reimbursement and price redeterminable contracts, since the contractor will incur additional costs to avoid paying damages and these would be passed on to the Government.

It might be argued that the Government has an unfair advantage in pressing its claims for delay damages because of the various procedures available to it for doing so, particularly set-off.

84 Pacific Hardware Co. v. United States, 49 Ct. Cl. 327, 335 (1914).
85 ASPR 18-113 requires in the case of fixed price construction contracts a liquidated damages clause in contracts in excess of $25,000. With regard to fixed price supply contracts ASPR 1-310 provides for the inclusion of liquidated damages provisions in those cases where both (1) time of delivery or performance is such an important factor in the award of the contract that the Government may reasonably expect to suffer damages if the delivery or performance is delinquent, and (2) the extent or amount of such damages would be difficult or impossible of ascertainment or proof.

It can be argued that the use of liquidated damages provisions should be expanded in fixed price contracts because usually time is of the essence and the full extent or amount of damages suffered by the Government due to contractor delay is often difficult to prove.
Most commercial buyers are not in a position to exercise their common law right of set-off, and some fear Government misuse of its rights of set-off.

Others might say that it would be unconscionable for the Government to saddle a contractor with the risk of large consequential damages, especially with respect to research and development contracts and contracts of relatively small dollar value. Instead the Government would better serve the public interest by assuming the risk of delay and acting as a self-insurer.

As a practical matter, some would contend, the Government might economically "cut off its nose to spite its face." In pressing claims for delay damages the Government might become faced with embittered contractors who refuse to do business with the Government. Other contractors might demand greatly increased prices to cover the contingency of loss in delay damages, and as a result the Government might be forced to pay far more for a needed item than its true worth. Indeed, if recovery of delay damages were vigorously pursued, the Government could put out of business the very firms upon whom it relies to supply its needs.

An analogous situation is presented under Government contract warranty clauses and provisions of the Uniform Commercial Code for consequential damages which "proximately" result from a breach

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86 See Hearings on S. 3097 Before the Comm. on Banking & Currency, 90th Cong., 2d Sess., at 28-34 (1968) (Company refused to accept an order for equipment for a new submarine, despite priority rating under the Defense Production Act. Because of contractor recalcitrance, the Navy was forced to accept reduced rights in contract).

87 Where the Government includes a liquidated damage provision in the contract, there is reason to believe that bidders raise their price significantly to cover the contingency of loss:

"Occasionally government procurement agencies have insisted that liquidated damages clauses be inserted in contracts, especially for fixed-price construction contracts. Such clauses provide a specific dollar penalty for each day by which deliveries fall behind scheduled dates. An unusual example of their application to advanced weapons work occurred in connection with the Minuteman ICBM program, when the Army Corps of Engineers Missile Construction Office proposed to penalize Minuteman base contractors $2,000 for each day of completion date slippage on each launcher control facility. But perhaps partly because of the liquidated damages requirement, the lowest firm fixed-price bid received was 55% higher than government estimates of what the work should have cost. As a result, new bids were solicited on the basis of cost reimbursement and fixed-price incentive relationships, and apparently the liquidated damages provisions were eliminated" (emphasis added). F. Scherer, THE WEAPONS ACQUISITION PROCESS: ECONOMIC INCENTIVES 308 (1964) [hereinafter referred to as Scherer].

88 ASPR 1-324.10; NASA PR 1.324-10 (warranty clause for fixed-price construction contracts).

89 UNIFORM COMMERCIAL CODE § 2-715. Although the Code provision is cast in terms of "injury . . . proximately resulting from any breach of warranty . . . ." the term "proximately" is not defined.
of warranty. The question, of course, is how far will this kind of liability be extended? Put realistically, "[i]s an electronic manufacturer liable for the full cost of an aircraft if his equipment (for example, navigation equipment) fails and causes the aircraft to crash?" Many would probably agree with the Air Force view that the contractor's responsibility for damages should be reasonably limited:

We have always been of the firm view that the soundness of our Air Force depends . . . on the soundness of our aerospace industry. There has never been and does not now exist any desire on the part of the Air Force to cause severe financial loss to a Government contractor as a result of the enforcement of a warranty. We believe in meaningful warranties by our contractors but also that they must be reasonable. By reasonable we do not mean holding the contractor responsible for secondary or tertiary damage as a result of defective performance by the contractor.

Finally, it might be argued that there are alternative methods of assuring timely performance which are more palatable and thus more efficacious. In negotiated contracts, for instance, incentive and award fee provisions can effectively motivate the contractor to meet scheduled delivery dates by depriving him of potential profit if he fails to do so; or, as seen from "the other side of the coin," incentive formulas reward him with greater profit for avoiding delay.

B. Why Public Policy Requires Government Recovery of Delay Damages

Whether the foregoing arguments are persuasive may depend upon one's point of view concerning the role and function of Government contracts. However, in the broader perspective, public policy should be seen as serving the interests of the taxpayer. For him the arguments above may amount to nothing more than a rationalization of a prevalent permissiveness in administering Government contracts.

It is evident that the Government has been lax, at the taxpayer's expense, in enforcing some significant rights. For instance,

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90 Dick & Smith, Warranties and Their Use in DOD Contracting: A Brief Guide to Some Legal & Practical Aspects, 10 AF JAG L. Rev. 4, 15 (1968) [hereinafter referred to as Dick & Smith].

91 Remarks made by General Thomas P. Gerrity, Commander, AFLC, to the Dayton Chapter of the National Security Industrial Ass'n (January 25, 1968), as quoted in Dick & Smith, supra, at 15 n.97.

one of its few rights "with teeth" is the Government's right to terminate a contract for default. "In practice, however, government procurement agencies resort to termination for default only on relatively small contracts and when contractor performance has been flagrantly unsatisfactory." When termination is called for, most contracts are terminated for the convenience of the Government, thus assuring a contractor of profits he would lose if the contract were terminated for default. A House of Representatives committee concluded that: "Apparently the default clauses of the armed services procurement regulations are a 'dead letter' as far as large aircraft contracts of the Navy are concerned. . . . the leniency manifested toward the large corporate contractor is often lacking in respect to the small contractor, who is more readily considered as expendable by the military services." When termination is called for, most contracts are terminated for the convenience of the Government, thus assuring a contractor of profits he would lose if the contract were terminated for default. A House of Representatives committee concluded that: "Apparently the default clauses of the armed services procurement regulations are a 'dead letter' as far as large aircraft contracts of the Navy are concerned. . . . the leniency manifested toward the large corporate contractor is often lacking in respect to the small contractor, who is more readily considered as expendable by the military services." When the contractor delays in performance, the Government can be greatly harmed unless it adopts an affirmative policy to recoup its losses. Beyond the irreparable loss in time, the Government can suffer substantial loss in dollars—not only for specific items of additional cost, detailed above, but also for the consequential "impact damages." Where a Government project involves a number of interdependent contracts adversely affected by one contractor's delay, the total impact can be devastating. Yet the Government is left practically without recourse if it does not even attempt to recover those losses which can be measured in delay damages. For too often the Government's right to terminate—its only other major alternative—is an empty one:

Some critical procurements are not susceptible to termination action. It would gain the Government nothing to terminate a sole source procurement. In other cases, it would sorely handicap the Government to terminate a procurement vitally needed where time will not allow reprocurement action. The Government is practically compelled to accept late deliveries in these two instances. Fairness dictates that the Government should be free to accept late deliveries and seek redress in damages, without having to resort to termination of the contract. When one realizes that over half of the Defense Department's negotiated procurements are sole-source, then redress in damages must

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93 Scherer, supra at 307.
94 Id.
95 Supra pp. 17-18.
96 See above discussion of "impact damages," Part III C, supra pp. 18-20.
98 Hearings on Economics of Military Procurement Before the Subcomm. on Economy in Govt. of the Joint Econ. Comm., 90th Cong., 2d Sess., pt. 2 at 9 (1968). Vice Admiral H. G. Rickover, United States Navy, testified as follows: "Currently,
be recognized as the only realistic remedy the Government has in a vast number of cases!

Furthermore, even where termination for default might be in its best interests, the Government may find it has lost this right. By allowing the delivery schedule to slip and by condoning late performance, the Government can be said to have elected to permit the contractor to continue performance, and thus to have waived its right to default the contractor for failure to complete the work in accordance with the terms of the contract. The law recognizes a limited period of time during which the Government can exercise forbearance, i.e., an interval after passage of the delivery date, within which the contracting officer can give due consideration to whether or not the Government should terminate the contract for default. The right to terminate for default will be deemed to have been waived, however, when the Government delays for an unreasonable period of time before attempting to exercise it. Notwithstanding waiver of its right to terminate for default, the Government's claim for damages based on tardy performance survives. Indeed, in such circumstances the only real remedy left to the Government may be the recovery of damages due to contractor delay.

Government procurement regulations contemplate the recovery of damages in lieu of termination for default, and that "the contracting officer, on the basis of legal advice, shall take appropriate action to assert the Government's claim for such damage." Indeed, as a matter of law, the proper Government official is required to assert a valid Government claim.108

only about 11 percent of defense procurement is formally advertised—all the rest is negotiated. . . . In negotiated procurements competition is limited. Over half the Defense Department's negotiated procurements are sole source."

These figures are confirmed by the testimony of Mr. Elmer B. Staats, United States Comptroller General, before the same Committee, on November 11, 1968.


100 Cuneo, Waiver of the Date Due in Government Contracts, 43 Va. L. Rev. 1, 423-28 (1957). See also text accompanying notes 6-8 and 21-29, supra.

101 ASPR 8-602.7; NASA PR 8.602-7. NASA PR 8.650-7 states that: "If, after due consideration, the contracting officer determines that termination is not in the best interest of the Government although the contractor is in default, the contracting officer may permit the contractor to continue the work, and the contractor and his sureties shall be liable to the Government for . . . any actual damages occasioned by the failure of the contractor to complete the work in accordance with the terms of the contract" (emphasis added).

102 NASA PR 8.602-7(b). To the same effect, see ASPR 8-602.7(b).

108 Pacific Hardware Co. v. United States, 49 Ct. Cl. 327, 335 (1914); Bausch
As a matter of policy, how can a responsible Government afford not to seek recovery of its losses caused by contractor delay in delivery? In numerous cases, especially where the default remedy is not invoked (for one reason or another), it may be said that there is no other truly meaningful way to protect the taxpayer's investment under the contract.

Undoubtedly the Government owes its citizens as taxpayers the fiduciary duty of care to prevent or recoup loss of their funds:

The entire military establishment has the responsibility to handle tax funds as a public trust—and drive hard bargains with the manufacturers.104

No one can deny the fact that the American public is entitled to have its business done economically and prudently. The taxpayer's investment should be no less protected from loss than that of any private investor who would expect his corporation to sue for damages when wronged by another.

Why should a Government contractor be placed, at taxpayer expense, in a more favored position than a non-Government contractor who in private commercial transactions can rightly expect to suffer the legal consequences of failure to live up to his bargain to deliver on time? Indeed, there is no showing that the common law rule providing for damages is an unjust rule. In the interest of justice the rule should be applied evenhandedly, and the taxpayer, as represented by the Government, should be afforded protection under it.

Much of the argumentation against the Government's enforcing its common law right to delay damages is bottomed, it can be said, upon a fear of alienating or financially embarrassing the community of Government contractors. However, one may question whether the dire consequences predicted would in reality occur in any but a very small percentage of instances. If the Government adopted a general policy of asserting its right to delay damages, the parties would attach more significance to delivery dates. The contractor would be highly motivated to negotiate a reasonable time for performance; Government representatives would be pressed to view delivery dates realistically; and thus the contract would likely be written according to a reasonable delivery schedule.

& Lomb Optical Co. v. United States, 78 Ct. Cl. 584, 607 (1934); 16 Comp. Gen. 918, 920 (1937).

104 This statement was made by Senator Harry F. Byrd, Jr., at a hearing of the Senate Armed Services Committee probing the $2 billion cost overrun and its concealment by the Air Force in connection with the C-5A transport contract with Lockheed Aircraft Corporation. San Francisco Chronicle, May 2, 1969, at 18.
Although industry might strongly object to an affirmative Government policy to recoup losses caused by contractor delay, one might hazard the guess that under such a policy industry would manage to survive, and even perform future Government contracts in a more timely fashion. Perhaps Vice Admiral H. G. Rickover's recent testimony before Congress is in point:

Industry would very much like to nationalize its losses and privatize its gains . . . They need no assistance from Government officials. Rather, Government officials should be concerned with protecting the Government and the people . . .

. . . .
You will remember that in 1913, Woodrow Wilson said . . .
"It is of serious interest to the country that the people at large should have no lobby and be voiceless in these matters, while great bodies of astute men seek to create an artificial opinion and to overcome the interests of the public for their private profit."

. . . .
The situation today is no different. Congress must remain ever alert to protect the public from pressure groups that would act counter to the public interest.

CONCLUSION

Although cursory, the above considerations point up the public interest in an affirmative Government policy to recover damages caused by contractor delay. At the same time it appears clear that such a policy may not be appropriate for certain research and development contracts, or certain contracts whose delay in performance could result in grossly disproportionate consequential damages. In such instances the Government might assume the risk of loss and act as a self-insurer. Thus, with narrow exceptions for such circumstances, an affirmative policy for recovery should be adopted in the taxpayer's interest.

Of course one may view the whole matter of Government contracting rather cynically, and conclude that under today's condi-

105 Hearings on Economics of Military Procurement Before the Subcomm. on Economy in Govt. of the Joint Econ. Comm., 90th Cong., 2d Sess., pt. 2 at 71 (1968).
106 Id. at 4. Admiral Rickover presented three cardinal points:
First, the laws and regulations concerning defense procurement are toothless, loose, and outmoded. They contain many loopholes that industry is able to exploit. Defense procurement rules need drastic overhaul and tightening.
Second, in procurement matters, the Department of Defense is too much influenced by the industry viewpoint. Procurement rules are interpreted to benefit industry rather than to protect the American public.
Third, Congress will have to take the initiative in correcting deficiencies in defense procurement. Neither the Department of Defense, the Department of Commerce, nor the General Accounting Office will do it. It should not be left to a self-interested defense industry to decide what is the best for the American people.
tions of negotiated and sole-source procurement, remedies of the Government against a large or needed contractor who fails to perform as agreed may be largely illusory. The contracting parties may be seen as allies (not adversaries) in a cooperative endeavor of self-perpetuation. To suggest that the Government assert an affirmative policy to recover delay damages can be dismissed as a mild form of heresy. As perceived by the well-known economist, John Kenneth Galbraith, military procurement is:

... in the language of labor relations, a sweetheart deal between those who sell to the Government and those who buy. Once competitive bidding created an adversary relationship between buyer and seller sustained by the fact that, with numerous sellers, any special relationship with any one must necessarily provoke cries of favoritism. But modern weapons are bought overwhelmingly by negotiation and in most cases from a single source of supply. (In the fiscal year ending in 1968, General Accounting Office figures show that 57.9 per cent of the $43 billion in defense contracts awarded in that year was by negotiation with a single source of supply. Of the remainder 30.6 per cent was awarded by negotiation where alternative sources of supply had an opportunity to participate and only 11.5 per cent was open to advertised competitive bidding). Under these circumstances the tendency to any adversary relationship between the Services and their suppliers is minimal. Indeed, where there are only one or two sources of supply for a weapons system, the interest of the Services in sustaining a source of supply will be no less than that of the firm in question in being sustained.107

Nevertheless, for the American taxpayer who must pay the bill, it is of prime importance to seek out "excessive profits, high costs, poor technical performance, favoritism, delay, and other abuses of power," as recently noted with respect to military procurement.108 He has a substantial pocketbook interest in proper performance of Government contracts, and recovery of losses caused by contractor delay.

The voice of the taxpayer, however, may be but faintly heard in the wonderland of Government contracting. It seems most often he merely serves the Government’s interest. Perhaps the time has come for the Government to recognize that it must serve the American taxpayer’s interest. “The question is,” said Humpty Dumpty, “which is to be master—that’s all.”

107 Galbraith, How to Control the Military, HARPER’S MAGAZINE, June, 1969, at 37 (footnote omitted).
108 Id. at 44, 45 (emphasis added).