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ARTICLE 2 OF THE U.C.C. AND GOVERNMENT PROCUREMENT: SELECTED AREAS OF DISCUSSION

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I. INTRODUCTION

Article 2 of the Uniform Commercial Code¹ deals with the sale of goods, replacing, in most jurisdictions, the Uniform Sales Act. The purpose of Article 2 is to bring sales law closer to the needs and practices of businessmen. While many of the Sales Act rules have been retained, they have been modernized and improved to conform more closely to existing commercial practices.² Article 2 represents an attempt to solve sales problems realistically. It is designed to facilitate commercial transactions, attaching legal consequences to business practices rather than forcing businessmen to adapt their practices to meet legal concepts.³ Consequently, it has been observed that Article 2 will probably effect a greater change in existing law than any other article of the Code, with the exception of Article 9, dealing with secured transactions.⁴

In contrast, the body of government-contract law⁵ has been marked

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The views expressed herein are the author's and not those of any organization.

¹ Today, the Code has been enacted in fifty-one jurisdictions—all the states, except Louisiana; the District of Columbia; and the Virgin Islands. All citations are to the 1962 Official Text.

² Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 U. Ill. L.F. 321, 327-28.

³ W. Hawkland, *Sales and Bulk Sales (Under the Uniform Commercial Code)* 1-2 (1958).

⁴ Hogan, *The Highways and Some of the Byways in the Sales and Bulk Sales Articles of the Uniform Commercial Code*, 48 Cornell L.Q. 1 (1962).

⁵ Frequently in this article reference will be made to the procurement regulations of

by the contract of adhesion.⁶ Such contracts, also used in the area of insurance and financing agreements, are usually preprinted standard forms prepared by the dominant party and may be designed to fit a variety of situations. The dominated party must usually accept the standard form without bargaining over terms. For example, a contractor will be forced to accept all the terms and conditions called for by the Government in its boilerplate because of his unequal bargaining power. He has little chance to vary contract terms to meet his own particular circumstances.

This article will examine the emergence of the Code as an important segment of the body of government-contract law. The impact of the Code in the area of subcontracts will be discussed from the point of view that, although the Code has received wide acceptance, there may be cases in which the Code rules would be rejected by courts. We will compare the rules with respect to firm offers under the Code and government-contract law. Such a comparison will provide a clear-cut example of the federal rule being in general accord with the Code principle. Conversely, the rules with respect to formation of contracts will be compared because they illustrate a situation in which the Code rule may not permit fulfillment of government policies with respect to the consummation of contracts. Next, we will examine the decisions of the Boards of Contract Appeals (hereinafter referred to as the Board) which have applied or discussed the implied warranty provisions of the Code. This area, in its present state of development, brings home the point that contract terms must be construed carefully to determine the rights and obligations of the parties *before* the Code is used. Finally, we will discuss the principles which this author feels ought most properly to be applied in those cases in which the Code conflicts with government-procurement regulations.

The correct analysis for determining rights and obligations in government contracts begins with an examination of the contract's provisions. Generally, the Government's rights under its contracts are exclusive and not cumulative. "The cardinal rule is that *the contract means exactly what it says*."⁷ The application of the Code to government contracts must proceed from the base established by the contract

the federal government. Two sets of procurement regulations are involved: First, the Federal Procurement Regulation (FPR), 41 C.F.R. Chapter 1 (1967), applying to all procurement by federal agencies; second, the Armed Services Procurement Regulation (ASPR), 32 C.F.R. Chapter 1 (1967), governing purchases by the Department of Defense. Since many of their important provisions are identical, we will often refer to only one of them.

⁶ Pasley, *The Interpretation of Government Contracts: A Plea for Better Understanding*, 25 *Fordham L. Rev.* 211, 214 (1956); see 41 C.F.R. § 1-1.009 (1967) (FPR); 32 C.F.R. § 1.109 (1967) (ASPR).

⁷ Pasley, *supra* note 6, at 216.

itself. The Code, when used, becomes a source of the federal law of contracts only in the light and circumstances of each case. The underlying theme of this article is that, in a government contract, the contract provisions are of paramount importance in determining the rights and duties of the parties.

II. THE CODE AS A SOURCE OF THE FEDERAL LAW OF CONTRACTS

As a general rule, the legal effect of a government contract is governed by federal rather than state law.⁸ Ordinarily, federal law is applied whenever an essential federal interest is involved;⁹ rights and obligations of the United States on commercial paper are so governed;¹⁰ and the operation of state tax upon federal property in hands of government contractors also presents a question of federal law.¹¹ So too, the departure in procurement cases from the rule of *Erie R.R. v. Tompkins*¹² is justified by the principle that the settled procurement policies of the federal government may not be limited or defeated by state law. This uniform application of an independent federal common law is said to protect federal contracts from the vagaries and uncertainties of state law.¹³

The substance of this federal law is commonly derived from federal statutes and regulations, but in the absence of a controlling statute, it is the court's duty to fashion the governing rule of law.¹⁴ This fashioning is ordinarily done from the raw material of state court decisions or from the common law of contracts.¹⁵ When the federal interest involved in a particular controversy is relatively unimportant, state law may be applied.¹⁶ Thus, while there is no federal Uniform Sales Act and no federal Uniform Commercial Code, the Sales Act has been regarded as a source of principles for use in deciding government contracts cases in the past,¹⁷ and more recently, the Code has

⁸ *United States v. Lennox Metal Mfg. Co.*, 225 F.2d 302, 307 (2d Cir. 1955); *United States v. Jones*, 176 F.2d 278, 281 (9th Cir. 1949). See also Pofcher, *The Choice of Law, State or Federal in Cases Involving Government Contracts*, 12 La. L. Rev. 37 (1951); Note, *Colum. L. Rev.* 991 (1953); Note, 59 *Harv. L. Rev.* 966 (1946).

⁹ *United States v. 93.970 Acres*, 360 U.S. 328 (1959); *Holmberg v. Armbrrecht*, 327 U.S. 392 (1946).

¹⁰ *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

¹¹ *United States v. County of Allegheny*, 322 U.S. 174 (1944).

¹² 304 U.S. 64 (1938).

¹³ *United States v. County of Allegheny*, 322 U.S. at 183.

¹⁴ *United States v. Standard Oil Co.*, 322 U.S. 301, 305 (1947).

¹⁵ See, e.g., *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947).

¹⁶ *United States v. Bradley-Dodson Co.*, 281 F.2d 676, 681 (8th Cir. 1960); *United States v. H. R. Henderson & Co.*, 126 F. Supp. 626, 637-38 (W.D. Ark. 1955). See also *United States v. Yazell*, 382 U.S. 341 (1966), an action to recover on a note issued in favor of the Small Business Administration. The Court held that the capacity of a married woman to contract with the federal government was controlled by state law, despite the conflict with the national program to assist small business.

¹⁷ *Whitin Mach. Works v. United States*, 175 F.2d 504, 507 (1st Cir. 1949); *Cudahy*

become a primary source of federal contract law. An examination of recent decisions of the Boards of Contract Appeals indicates their readiness to adopt the Code as the basis for some of their decisions. Thus, section 2-317 has been cited in support of cumulation of warranties;¹⁸ sections 2-602, -606, -607 have been decisive on the question of whether goods have been accepted;¹⁹ section 2-202 has been used to support admission in evidence of prior negotiations;²⁰ section 2-315 has been cited on implied warranty of fitness and section 2-316(3) to negate warranty;²¹ the courts have used the section 2-309 definition of a reasonable time; and section 2-311 has been cited for options respecting performance.²²

The Court of Claims and the Armed Services Board of Contract Appeals have ruled that: "As always, the federal contract law we apply should take account of the best in modern decision and discussion."²³ Since the Code in many respects represents that "best," it has become an important element in the field of government contracts. In the language of Judge Friendly:

We find persuasive the defendant's suggestion of looking to the Uniform Commercial Code as a source for the "federal" law of sales. The Code has been adopted by Congress for the District of Columbia, 77 Stat. 630 (1963), has been enacted in over forty states, and thus is well on its way to becoming a truly national law of commerce, which, as Judge L. Hand said of the Negotiable Instruments Law, is "more complete and more certain, than any other which can conceivably be drawn from those sources of 'general law' to which we were accustomed to resort in the days of *Swift v. Tyson*." *New York, N. H. & H. R. Co. v. Reconstruction Finance Corp.*, 180 F.2d 241, 244 (2 Cir. 1950). When the states have gone so far in achieving the desirable goal of a uniform law governing commercial transactions, it would be

Packing Co. v. United States, 75 F. Supp. 239 (Ct. Cl. 1948); *United States v. Hamden Co-op. Creamery Co.*, 185 F. Supp. 541, 547 (E.D.N.Y. 1960); *J.R. Simplot Co.*, 59-1 CCH Bd. Cont. App. Dec. 9059 (ASBCA), modified on rehearing, 59-2 CCH Bd. Cont. App. Dec. 10,413.

¹⁸ *General Elec. Co.*, 65-2 CCH Bd. Cont. App. Dec. 23,454, 23,457-58 (IBCA).

¹⁹ *Mazur Bros. & Jaffe Fish Co.*, 65-2 CCH Bd. Cont. App. Dec. 23,303, 23,305 (VACAB).

²⁰ *Carpenter Steel Co.*, 65-1 CCH Bd. Cont. App. Dec. 22,942, 22,944 (AECBCA).

²¹ *Reeves Soundcraft Corp.*, 1964 CCH Bd. Cont. App. Dec. 20,869, 20,871 (ASBCA).

²² *Goodyear Tire & Rubber Co.*, 1964 CCH Bd. Cont. App. Dec. 21,240, 21,245 (ASBCA).

²³ *Padbloc Co. v. United States*, 161 Ct. Cl. 369, 377 (1963); accord, *Reeves Soundcraft Corp.*, 1964 CCH Bd. Cont. App. Dec. at 20,870.

a distinct disservice to insist on a different one for the segment of commerce, important but still small in relation to the total, consisting of transactions with the United States.²⁴

The Code has wider application in a dispute between a government prime contractor and its subcontractor than in one between the Government and its contractor. In the former situation, state law, including any conflict of law rules, is usually applicable. It is not unreasonable to presume that these two private parties made their contract in contemplation that local law would govern, although the contract ultimately involved the furnishing of supplies or services to the United States. Some commentators have suggested that this rule is based upon the absence of privity of contract between the government and the subcontractor,²⁵ but a more plausible rationale is the absence of that direct federal interest which would require the application of federal law. Nevertheless, a growing number of cases evidence a tendency to apply federal law to the relations between a government prime contractor and its subcontractor.²⁶

Two cases have followed that trend where the prime contracts were affected with the national security. In *American Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*,²⁷ a subcontractor under a government contract brought suit against the prime contractor to recover additional compensation for extra work he had had to perform as a result of a defect in the specifications provided him by the contractor. Even though this case was based upon diversity of citizenship, the application of federal law was upheld on appeal and the prime contractor prevailed. The court characterized the contract as a "government contract"—one whose interpretation must be uniform through the entire country. In *United States v. R.H. Taylor*,²⁸ the court decided in favor of the prime contractor, interpreting the "disputes" article in the contract before it on the basis of federal law. "[I]t is

²⁴ *United States v. Wegematic Corp.*, 360 F.2d 674, 676 (2d Cir. 1966). The court sustained the Government's case for damages by applying § 2-615, "Excuse by Failure of Presupposed Conditions," against a supplier who failed to deliver a computer to the Government pursuant to the terms of a government contract. See also *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966), where § 2-615 was applied to a non-sales case.

²⁵ Pasley, *supra* note 6, at 218. See Steele, Choice of Law, State or Federal, in *Government Subcontracts*, 16 Fed. B.J. 202 (1956).

²⁶ Cases have applied the antitrust laws. See, e.g., *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173 (1942). The effect of a release has been held to be a federal question governed by the Securities Exchange Act of 1934. *Stella v. Kaiser*, 221 F.2d 115 (2d Cir. 1955). And the federal contingent fee policy expressed in Exec. Order No. 9001, 6 Fed. Reg. 6787 (1941), has been used as a basis for ascertaining the federal law in the subcontract area. *Browne v. R & R Eng'r Co.*, 264 F.2d 219 (3d Cir. 1959).

²⁷ 292 F.2d 640, 643 (9th Cir. 1961).

²⁸ 333 F.2d 633, 636-37, *aff'd on rehearing*, 336 F.2d 149 (5th Cir. 1964).

clear that federal law will control contracts between private parties if there is sufficient federal interest."²⁹

These cases have been criticized on the ground that the federal interest—avoidance of increased costs to the Government, resulting from subcontractor suits involving the application of diverse state laws—was tenuous.³⁰ It is, however, the cases' effect which is mischievous, for these decisions and the recent cases which have cited and applied the Code as a source of federal law seem to establish the basis for conflicting results. Whenever a Code rule is different from a federal common law rule, these cases seem to authorize a court to choose at random which it will apply. As a practical matter, it would seem that in subcontract litigation the question of whether to apply state or federal law is academic. If the courts desire a uniform rule that goal is more easily attained by application of the Code than through a case-by-case fashioning of a "uniform federal rule." It would follow that from the acceptance of the Code by the states and its subsequent acceptance as a source of federal law that the question should be solved. Therefore, if the Code is to be rejected in a particular case, the courts should search for or insist upon a clear standard for determining what federal interest requires the rejection. Thus, a court may reject the Code rule in subcontract litigation and follow *American Pipe* and *Taylor*, if it determines that the national security or some strong federal procurement policy requires a different result. The ground that the Government does have more than a mere financial interest in a government subcontract seems to justify such a step.

American Pipe and *Taylor* dealt with the so-called "changes"³¹ and "disputes"³² clauses. It is perfectly natural, in view of the numerous interpretations placed on these decisions by the courts in cases between the federal government and its prime contractors, that in subcontractor litigation, where the contract clauses required by law or regulation are involved, the federal rule which varies from the Code may be followed as an exception to the generally accepted Code provisions. In other words, in subcontract litigation the expectation of the parties that the Code will be applied ought to be fulfilled unless some paramount federal interest would be thwarted. When clauses prescribed by federal statute or regulation are involved, the federal rules should apply. So too, where a clear federal interest relating to the national security is present, we would expect the federal policy to be applied by the court. In all other cases, however, failure to apply the Code defeats the twin goals of uniformity and stability of contract.

²⁹ Id. at 638.

³⁰ Note, 75 Harv. L. Rev. 1656 (1962).

³¹ 41 C.F.R. § 1-7.101-2 (1967) (FPR); 32 C.F.R. § 7.103-2 (1967) (ASPR).

³² 41 C.F.R. § 1-7.101-12 (1967) (FPR); 32 C.F.R. § 7.103-12 (1967) (ASPR).

III. CONFLICTS BETWEEN THE CODE AND FEDERAL CONTRACT LAW

A. *Formation of Contract*

1. *Offer and Acceptance.* Traditionally, the offeror has complete control of his offer. It is for him to determine the nature and extent of the resultant power of acceptance. He can prescribe the mode of acceptance, and a large number of cases show that an attempt by the offeree to accept in some manner other than the prescribed one is inoperative as an acceptance. Where the offer has been ambiguous, the risk of disappointment has been unfairly placed on the offeree, rather than on the offeror who caused the trouble.³³

The Code adopts the rule that:

- (1) Unless otherwise unambiguously indicated by the language or circumstances
 - (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;³⁴

There are some federal cases, decided since the enactment of the Code, that seem to follow the Code rule. In *Escote Mfg. Co. v. United States*,³⁵ a bid on a sale of surplus property was to be accepted within ten days by the United States. The Government orally notified the bidder within ten days that his bid had been accepted, but the contracting officer neglected to sign the required form before mailing it. The bidder claimed no contract had been formed and brought suit to recover the bid deposit. The Government counterclaimed for damages, alleging a breach of contract. The court found a contract had been formed.³⁶ It said: "Consequently, an oral contract in this instance would be just as binding on the plaintiff as well as the Government as though it were in writing."³⁷

In another case,³⁸ an invitation for bids stated that the successful bidder would be required to execute the standard-form construction contract. The plaintiff was the low bidder and was authorized by letter from the contracting officer to start work. Later the project was cancelled without the execution of the required forms. The court found a valid contract. While a standard form had been prescribed, neither

³³ W. Hawkland, *supra* note 3, at 5-6.

³⁴ U.C.C. § 2-206.

³⁵ 169 F. Supp. 483 (Ct. Cl. 1959).

³⁶ *Accord, Ship Constr. & Trading Co. v. United States*, 91 Ct. Cl. 419, 456 (1940).

³⁷ 169 F. Supp. at 488.

³⁸ *North Am. Iron & Steel Co. v. United States*, 130 F. Supp. 723 (E.D.N.Y. 1955). See also *Penn-Ohio Steel Corp. v. United States*, 354 F.2d 254 (Ct. Cl. 1965), where the court held that an oral agreement approved by the Assistant Secretary of the Navy as to a lease modification was binding on the Government and that breach of the oral agreement rendered the Government liable for damages.

the invitation for bids nor the governing regulations stated that a contract on any other form would be invalid.

These cases appear to apply the Code principle of recognizing an acceptance by any method reasonable under the circumstances. It may be argued, however, that the fact that the Armed Services Procurement Regulations (ASPR) require certain forms means that it is the Government's intent to create a contract only if the prescribed form is actually executed by the parties, and all other prescribed formalities for contract review and approval have been met. This contention would reject the Code standard as applied in the two cases discussed above.

In the absence of special circumstances, the contracting officer lacks the authority to vary the prescribed form. He is bound by statute, regulation, and the accepted interpretation of such forms. ASPR 1-102 provides that the regulations shall apply to all purchases and contracts made by the Department of Defense within or outside the United States for procurement of supplies or services which obligate appropriated funds.³⁹ While the two preceding cases provide a basis for stating that the contracting officer has the authority to enter into a contract not authorized by ASPR, another case⁴⁰ would require an opposite conclusion, and by implication reject the Code rule. In that case an oral agreement was invalidated on the ground that the General Services Administration had an established policy of contracting only on integrated forms which were to be completed by the plaintiff and submitted to the agency for approval and execution. Indeed, ASPR provisions indicate throughout that the Government's intent is to require acceptance in the manner contained in the regulation, and not

³⁹ 32 C.F.R. § 1.102 (1967) (ASPR). It is settled law that a government agent may not exceed his actual authority, and that the doctrines of apparent authority and estoppel may not be invoked against the Government. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947). *Contra*, *George H. White Constr. Co. v. United States*, 140 F. Supp. 560 (Ct. Cl. 1956); see *McIntire*, *Authority of Government Officers: Estoppel and Apparent Authority*, 25 Geo. Wash. L. Rev. 162 (1957).

⁴⁰ *Banking & Trading Corp. v. Floete*, 257 F.2d 765 (2d Cir. 1958). In commenting on *Penn-Ohio Steel Corp. v. United States*, 354 F.2d 254 (Ct. Cl. 1965), it has been noted that:

While this case suggests a trap which may befall a contracting officer who gives verbal orders, it may not be as powerful a tool as the normal contractor might like. First, proof problems may present an impossible burden on the contractor who is seeking to support a "contract" agreed upon in private by only a few individuals. Second, no agreement may be found to exist when a contractor has been put on notice that only written instructions will be authoritative and binding as against the government. Government contracting officers are normally very cautious in this regard and very few are likely to make such a mistake. The *Penn-Ohio* decision, while important, probably doesn't have real significance in the normal contract between government and contractor. When unusual contractual or administrative arrangements exist, the impact of the decision will be greater.

Braemer, *Recent Developments in Government Contract Law*, 22 Bus. Law. 1057, 1063-64 (1967).

to allow the easy contract-formation method of the Code. If this is so, then the use of section 2-206 as a source of federal law may be only a remote possibility.

Section 2-207, which deals with additional terms, could meet a similar fate. Section 2-207 was drafted to solve the problem of the mirror-image rule which required the acceptance to mirror the terms of the offer. This problem arose from the use of conflicting purchase-order and acknowledgment forms by buyers and sellers. Although the forms conflicted, the parties generally felt they were bound by their agreement.⁴¹

The Code's attack on this problem is to set up the rule that a definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance, even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. While section 2-207 was written to correct problems arising out of an exchange of forms, such exchanges are uncommon in government contracts, for a contractor merely fills out forms supplied by the Government. Contractors do, however, submit covering letters with their executed documents and these letters may evidence an understanding of additional terms. If section 2-207 is applied to such a situation, there is a contract. The other side of the coin is that under general contract law the contractor would be considered to have made a counteroffer because the Government's intent was to be bound by the terms of its offer or not at all.

Section 2-207(2) teaches us that the additional terms are to be construed as proposals for addition to the contract. Between merchants such additional terms automatically become part of the contract, unless the offer limits acceptance to its terms, the offeror gives notification of rejection of them within a reasonable time, or the additional terms materially alter the offer.

In order for the additional terms to become automatically part of the contract, the Government must be considered a merchant, defined in section 2-104 as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved. . . ." In the absence of any cases, one can only guess whether the Government is a merchant under this definition. In the first place, the Government is not generally considered to be a "person."⁴² As to the Government's having some particular knowledge or skill, while it might be said to have

⁴¹ Hogan, *supra* note 4, at 44.

⁴² See, e.g., *United States v. United Mine Workers*, 330 U.S. 258, 275 (1947).

the knowledge of all its agents, it seems in reality to be more like a consumer than a merchant. It thus seems safe to say that the draftsman of the Code could not have intended to include the Government.

But even if the Government were a merchant, the fact that it makes its contracts only through the use of prescribed forms can be considered the essential equivalent of an express limitation, for the purpose of section 2-207 is to avoid imposing upon anyone a contract to which he did not assent. Its probable effect will be to prevent welching on deals which, once made, later turn out to be undesirable. On this basis, section 2-207 may find its place in the federal common law in situations where either the Government or the contractor try to avoid an agreement on the ground that the government-contract formalities were not perfectly observed.

2. *The Firm Offer Problem.* In the case of private contracts, an offer not supported by legal consideration may be withdrawn or modified before the acceptance is mailed.⁴³ The Government, however, between the opening of bids and the award, is allowed the time set forth in the bid, or if none is stated, a reasonable time after opening, in which to accept or reject. During that period a bid may not be withdrawn or modified.⁴⁴ This doctrine is based upon a rule of policy that all officers of the Government are required to give careful consideration to bids submitted to them and they ought to have a reasonable time for it. In addition, it has been said that if bids could be withdrawn at will after opening, frauds could be perpetrated against the United States.⁴⁵

In comparing government-contract rules and the rules of the Code relating to firm offers, we find an area where the Code's rule, in principle, is in agreement with a federal rule of long standing. A commonly used federal standard-form bid contains a clause which provides:

In compliance with the above, the undersigned offers and agrees, if this offer is accepted within _____ calendar days (60 calendar days unless a different period is inserted by the offeror) from the date for receipt of offers specified above, to furnish any or all items upon which prices are offered, at the price set opposite each item, delivered at the designated point(s), within the time specified in the Schedule.⁴⁶

In unsolicited proposals or in proposals submitted to the Govern-

⁴³ 1 A. Corbin, *Contracts* § 146 (1963). Cf. *Franklin A. Snow Co. v. Commonwealth*, 303 Mass. 511, 22 N.E.2d 599 (1939).

⁴⁴ *Scott v. United States*, 44 Ct. Cl. 524 (1909).

⁴⁵ *Refining Associates Inc. v. United States*, 109 F. Supp. 259 (Ct. Cl. 1953).

⁴⁶ Standard Form 33, *Solicitation, Offer, and Award*, 41 C.F.R. § 1-16.901-33 (1967) (FPR).

ment on other forms, the contractor will often provide that his bid is firm for a limited period of time. Section 2-205 recognizes that businessmen frequently make offers which they intend to remain irrevocable for a limited period. The recognition of firm offers is not surprising, since firm offers are almost universally relied upon by merchants because of ordinary business ethics.⁴⁷

Under section 2-205, if a merchant makes an offer qualifying as a firm offer, he cannot revoke it for lack of consideration during the time stated in the offer, or, if no period is stated, for a reasonable time, but in no event may the period of irrevocability exceed three months. By way of contrast, in government procurement the offeror need not be a merchant, although to qualify for award he must be a responsive and responsible bidder.⁴⁸ His offer is irrevocable for the time stated in the writing, or if none, a reasonable time. There is no three-month expiration period like the one established by section 2-205, although in practice the acceptance of bids takes place within 15 to 60 days from day of opening. This is one significant difference between the Code and the federal rule.

Section 2-205 also provides that a firm offer contained in a form supplied by the offeree must be separately signed by the offeror. The obvious intent of this provision is to guard the offeror against "boilerplate" firm offers that he does not want to make and thus, to protect him against inadvertently binding himself. Government procurement is usually accomplished on forms supplied by the offeree government, but federal law does not require that the firm-offer clause in the contract be separately signed by the offeror. This is another point of departure between the two rules.

The Government's use of the firm offer in negotiated procurements, however, is open to question. In formal advertising the Government is bound by law to either accept the most favorable responsive bid by a responsible supplier, or reject all bids and start over again.⁴⁹ In negotiated contracts, however, the Government is free to deal with one who is not the low bidder.⁵⁰ Therefore, there is a question of mutuality of obligation, raised by the fact that the Government is free to negotiate with one or more of the bidders, while their offers remain irrevocable.⁵¹

In the subcontracting area, where the form of the contract is not governed by regulation, it may be necessary for counsel to draft a

⁴⁷ E.g., Project, A Comparison of California Sales Law and Article Two of the Uniform Commercial Code, 10 U.C.L.A.L. Rev. 1087 (1963).

⁴⁸ See 41 C.F.R. § 1-2.103(c) (1967) (FPR); 32 C.F.R. § 2.103(d) (FPR).

⁴⁹ 10 U.S.C. § 2305 (1964).

⁵⁰ 10 U.S.C. § 2304 (1964).

⁵¹ Pasley, Formation of Government Contracts—Application of Common Law Principles—A Reply, 40 Cornell L.Q. 518, 520-24 (1955).

firm offer.⁵² For example, a prime contractor will want to receive irrevocable offers from his subcontractors upon which to base his own bid to the federal government. He will, therefore, need to draft offers which incorporate a firm-offer provision to be used by the subcontractors.

If the subcontractor is not a merchant or if the offer is not one for the purchase or sale of goods, section 2-205 does not apply and the matter is probably governed by the general rules of the contract. But if the offer is within 2-205, the prime contractor must determine how long he wants the offer kept open. This will depend upon the nature of the goods, the nature of the market, and the expectations of the customers.

Many other problems may attend a firm offer. It may be important to specify the manner of acceptance, for the offeree might select a manner that takes more time than the offeror expects. Perhaps it ought to clearly provide what happens if the cut-off date arrives and the offeree has not accepted. It should clearly specify that the offer then terminates or will continue to remain open, subject to revocation. Finally, the clause should specify any contingencies, the happening of which may revoke the offer, for the offeror's supply or price might be subject to war, weather, or labor difficulties.

But in contracting directly with the Government, a bidder has no opportunity to protect himself. This is clearly shown by the case of *Refining Associates, Inc. v. United States*.⁵³ There, a bidder submitted its bid for a procurement of oil lubricants using a government form which contained language prohibiting the withdrawal of bids after opening. After opening, the bidder nevertheless attempted to withdraw because of a strike. The Government accepted the bid, and the court held the offeror's revocation ineffective to prevent formation of a valid contract. The court noted that the strike had begun one month before the bid was submitted and that there was no evidence of its interference with performance.

Under the Code, the result would be no different. But under the Code, the bidder would have been able to qualify his offer. With respect to the government forms, a qualified firm offer would undoubtedly be unresponsive. Thus, although the federal and Code rules on firm offers are parallel, they are not without conflicts.

B. Warranties

1. *In General.* The Uniform Commercial Code has not altered many of the traditional notions of liability arising from warranties.

⁵² For a discussion of various forms of firm offers, see 1 California Continuing Education of the Bar, California Commercial Code §§ 3.17-22 (1966).

⁵³ 109 F. Supp. 259 (Ct. Cl. 1953).

It is, in fact, extremely doubtful whether any provision of the warranty sections of the Code does not find its basis in cases decided under the Sales Act. The Code continues to classify warranties under two headings, expressed and implied. Perhaps the most radical change is the reclassification of the warranties of description and sample as express warranties. Yet it is merely a reclassification and the import of it is likely to be slight, for the legal effect of making an express warranty is the same as that of giving an implied warranty. The Code retains the warranty of fitness for a particular purpose with few changes. While the Uniform Sales Act required that the buyer make known to the seller, expressly or by implication, a particular purpose for which he wanted the goods, the Code requires only that the seller have reason to know of the particular purpose.⁵⁴ The heart of this warranty is still reliance by the buyer on the seller's skill or judgment in selecting the goods, but one troublesome provision of the Sales Act has been eliminated: the exception that there was no warranty of fitness for a particular purpose where the sale was of "a specified article under its patent or trade name. . . ."⁵⁵

The wording of the Code section on the warranty of merchantability is considerably different from that of the former Sales Act, but it is doubtful whether any significant substantive change has been effected. Under the old law, the warranty of merchantability attached only to sales "by description." This was largely ignored by the courts and the limitation has been eliminated by the Code. The Sales Act provided that the warranty of merchantability arose when goods were purchased from a seller "who deals in goods of that description (whether he be the grower or manufacturer or not). . . ."⁵⁶ Under the Code, the warranty is imposed when the seller is a merchant. Unlike the Uniform Sales Act, the Code's statutory language gives some guide as to what is "merchantable," but the enumeration is far from exhaustive.⁵⁷

2. *Disclaimer of Warranties.* The most interesting questions raised by the Code and by recent government-procurement cases involve the modification or limitation of a seller's warranties by disclaimer clauses. In the pre-Code law the courts developed several important limitations upon warranty liability. One of the most significant of these restrictions was the recognition of the contractual disclaimer under which the seller sought to escape some or all of his warranty obligations.⁵⁸

⁵⁴ Compare Uniform Sales Act § 15(1), with U.C.C. § 2-315.

⁵⁵ Uniform Sales Act § 15(4).

⁵⁶ Uniform Sales Act § 15(2).

⁵⁷ U.C.C. § 2-314(2).

⁵⁸ Uniform Sales Act § 71; see also *Shafer v. Reo Motors, Inc.*, 205 F.2d 685 (3d Cir. 1953), where a disclaimer clause covering all obligations or liabilities precluded negligence liability.

The Code makes a substantial alteration in the prior law, ruling that the disclaimer is inoperative if it is inconsistent with any express warranty.⁵⁹ Although a court is directed to construe the two provisions as consistent with each other whenever reasonable, where such a construction is not reasonable, then the disclaimer will apparently be inoperative.⁶⁰

With respect to government procurement, the standard "Inspection" clause for fixed-price contracts provides: "Except as otherwise provided in this contract, acceptance shall be *conclusive* except as regards latent defects, fraud, or such gross mistakes as amount to fraud."⁶¹ (Emphasis added.) In the absence of a warranty clause in the contract itself any warranty that would otherwise survive acceptance is precluded from doing so by the use of the word "conclusive." The reason for the rule is that government purchases usually involve items of special manufacture, which are fabricated pursuant to government specifications, and the only warranty implicitly given by the contractor to the Government is his promise that the items conform to the Government's specifications.⁶² Thus, despite the fact the Code is considered a source of federal law, the word "conclusive" in the standard "Inspection" clause operates as a limitation on warranty liability.

The Armed Services Board of Contract Appeals has recently held that acceptance under the standard "Inspection" clause eliminates the possibility of any government recovery for breach of warranty under the Code. In *Republic Aviation Corp.*,⁶³ the Air Force found that some three hundred F-105D aircraft, 21 of which had been accepted by the Government, did not meet the contract requirements for adequate spacing between tubing and wiring. This caused chafing of tubing and wiring while the aircraft was in flight, and threatened flight safety. As to the 21 accepted aircraft, the Air Force contended that the contractor was obligated to correct the chafing condition at its own expense even though the Government had accepted. The Government alleged that the contractor had given an oral promise that the spacing would prove adequate under flight conditions and that any deficiencies would be remedied by quality control. This promise, it was argued, together with the contract specification for prevention of chafing constituted a warranty entitling the Government to recover under the Code.

The Board rejected these contentions, saying:

⁵⁹ U.C.C. § 2-316(1).

⁶⁰ See *Alaska Pac. Salmon Co. v. Reynolds Metals Co.*, 163 F.2d 643 (2d Cir. 1947).

⁶¹ 41 C.F.R. § 1-7.101-5(d) (1967) (FPR); 32 C.F.R. § 7.103-5(a)(d) (1967) (ASPR).

⁶² 46 Am. Jur. Sales § 352 (1943).

⁶³ 66-1 CCH Bd. Cont. App. Dec. 25,679 (ASBCA).

There is no contention that latent defects, fraud or gross mistake amounting to fraud, are involved here. Acceptance was conclusive, therefore, unless it was "otherwise provided in this contract." There is no written warranty or any other provision in the contract which provides "otherwise." The Government does refer to the contract specifications regarding prevention of chafing *but these are not warranties* which survive acceptance. Oral warranties outside the contract likewise are not covered by this exception.

The decision in *REEVES* does not support the Government's position. The contract involved there . . . did not contain the standard Inspection article found in this case. In the absence of express provisions in that simple purchase order, the Uniform Commercial Code was applied. Our decision in this case is controlled by the Inspection article. The sections of the Uniform Commercial Code cited are therefore not applicable. We conclude that the Air Force's direction under Contract 40838 to modify the 21 accepted aircraft, was a change to that contract.⁶⁴ (Emphasis added.)

The *Republic Aviation* decision is noteworthy for two reasons. First, it confirms the time-honored interpretation of the word "conclusive" so as to preclude the operation against the contractor of any implied warranty after the Government has accepted. Second, it rejects the Code provisions dealing with implied warranties because they are considered to be inconsistent with the contract. The point is that the word "conclusive" in the standard "Inspection" article was held to be an express disclaimer of implied warranties under the facts of the *Republic Aviation* case, thus barring the Government's remedies for breach of warranty.

3. *Cumulation of Warranties.* Numerous decisions recognize and apply the rule of cumulation of remedies.⁶⁵ Code section 2-317, in part, provides for this rule of construction in these words:

Warranties whether express or implied shall be construed as consistent with each other, and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant.

⁶⁴ Id. at 25,694. In *Reeves Soundcraft*, 1964 CCH Bd. Cont. App. Dec. 20,869 (ASBCA), the Board applied the implied warranty provisions of the Code, holding on the merits that there was no implied warranty in favor of the Government. The case is not considered controlling, since the contract form involved was DOD Form 1270, which is not used for most government purchases, and which does not contain the standard "Inspection" clause found in *Republic Aviation*. See Borden, *Government Contract Warranties Under the New ASPR Provisions*, 25 Fed. B.J. 248, 249 (1965).

⁶⁵ Annot., 164 A.L.R. 1321, 1325, 1334 (1964).

In two cases, *Federal Pac. Elec. Co.*⁶⁶ and *General Elec. Co.*,⁶⁷ the Board of Contract Appeals has perhaps too quickly applied this rule in holding contractors liable for latent defects. The contracts in both cases contained the following provisions: (1) the standard "Inspection" article, which declares final acceptance to be conclusive, except for latent defects, fraud, or gross mistakes amounting to fraud; (2) a clause indicating that acceptance of material or components does not relieve the contractor of responsibility for meeting specification requirements; and (3) a guarantee clause, which authorizes repair or replacement of equipment which fails in operation within one year from date of completion of installation due to defects in design, material or workmanship, notwithstanding that final acceptance and payment may have been made.⁶⁸ In *Federal Pacific* a circuit

⁶⁶ 1964 CCH Bd. Cont. App. Dec. 21,582 (IBCA).

⁶⁷ 65-2 CCH Bd. Cont. App. Dec. 23,454 (IBCA).

⁶⁸ The contract was executed on Standard Form 33 (Revised June 1955) and incorporated the General Provisions of Standard Form 32 (November 1949 Edition), which included a standard Inspection clause (Clause 5). Paragraph (d) of that clause reads as follows:

"(d) The inspection and test by the Government of any supplies or lots thereof does not relieve the contractor from any responsibility regarding defects or other failures to meet the contract requirements which may be discovered prior to final acceptance. EXCEPT AS OTHERWISE PROVIDED IN THIS CONTRACT, FINAL ACCEPTANCE SHALL BE CONCLUSIVE EXCEPT AS REGARDS LATENT DEFECTS, FRAUD, OR SUCH GROSS MISTAKE AS AMOUNTS TO FRAUD." (Emphasis supplied).

The Supplementary General Provisions contained a clause relating to responsibility for the equipment following acceptance, which reads as follows:

"108. ACCEPTANCE DOES NOT RELIEVE CONTRACTOR OF RESPONSIBILITY. The acceptance of material or equipment or parts thereof or waiving of inspection will in no way relieve the contractor of responsibility for furnishing material or equipment or parts thereof meeting the requirements of these specifications."

The Supplementary General Provisions also included a clause which required, among other things, that all materials should be free from defects. It reads as follows:

"109. MATERIAL AND WORKMANSHIP. Material and workmanship shall be of the type and grade most suitable for the application and as far as practicable shall conform, unless otherwise specified, to the latest applicable standards, specifications, recommended practices, and procedures of such standardizing bodies as the Federal Specifications Board, ASTM, AIEE, ASME, NEMA, and ASA. All materials shall be of recent manufacture, unused and free from defects." . . .

The Guarantee Clause of the Supplemental General Provisions provided, in pertinent part, that:

"112. CONTRACTOR'S GUARANTEE. A. The contractor guarantees that equipment furnished under the contract meets all the requirements of these specifications.

"B. The Contractor hereby agrees to repair or replace any equipment or part thereof which fails in operation during normal and proper use within one year from date of completion of installation due to defects in design, material or workmanship, notwithstanding that final acceptance and payment, may have been consummated; Provided, however, that in each case the contracting officer shall have promptly forwarded written notice of such failure to the Contractor

breaker failed. The Board found that the defect had been caused by an improperly laminated insulator column. The Government's claim arose subsequent to inspection, acceptance and expiration of the agreed guaranty period set forth in the contract. The contractor was held liable for the cost of repairing not only the defective component but all damaged portions of the item. In *General Electric*, a defect in an auto-transformer was not discovered for more than three years while the contract itself limited the contractor's liability for latent defects to one year. The contractor was nevertheless held liable.

Since the first and third provisions of the contracts enumerated above conflict to some extent, the cases clearly depend upon a holding that the warranties will be construed as consistent with each other. The standard "Inspection" clause contained the traditional phrase, "Except as otherwise provided in this contract, final acceptance shall be conclusive except as regards latent defects. . . ." The phrase "Except as otherwise provided in this contract" is the draftsman's signal to look elsewhere in the contract for any modification to the provision.⁶⁹ The contract in *Federal Pacific* and *General Electric* does provide otherwise with respect to the conclusiveness of acceptance in the "guarantee" clause which limits the warranty to twelve months. The two clauses should be read together because they are similar provisions. Since the "guarantee" clause does not contain a phrase such as "Notwithstanding any other provision of this contract," the draftsman probably intended that the Government, in consideration of the broad and specific remedies contained in the "guarantee" clause, was willing

and Provided Further, that in case installation is delayed for more than six (6) months after the date of preliminary acceptance at destination by conditions beyond the control of the contractor, this guarantee shall remain in full force and effect for a period of eighteen (18) months from date of preliminary acceptance at destination regardless of the date of completion of installation. All replacements of equipment or parts thereof as a result of failures after final acceptance shall be made promptly and free of charge f.o.b. destination. The cost of installing these replacements after final acceptance shall be borne by the Government."

Id. at 23,454-55. See also *Federal Pac. Elec. Co.*, 1964 CCH Bd. Cont. App. Dec. 21,582 (IBCA).

⁶⁹ Cf. *McGrath & Co.*, 58-1 CCH Bd. Cont. App. Dec. 5818 (ASBCA), holding that the Government has no rights under the general law of warranty unless specifically reserved by a warranty clause:

We think it to be clear that when the words "Except as otherwise provided in this contract" in the Inspection article are read together with the words "Notwithstanding the provisions of the clause of this contract entitled 'Inspection'" in the Guaranty article, the conclusiveness that would otherwise attach to the "final acceptance" does not attach in view of the Guaranty article. Because of the Guaranty article the "final acceptance" is not conclusive when, at the time of delivery and without the knowledge of the Government, the articles accepted did not conform to the requirements of the contract and/or were not free from defects in material and workmanship.

Id. at 5825.

to limit its undefined rights under the "inspection" clause. The wording of the contract provision entitled "Acceptance Does not Relieve Contractor of Responsibility"⁷⁰ does not contradict this reasoning because it obviously was intended to govern acceptance effected during the progress of the work. This provision applies to equipment and material whereas the provision in the standard "Inspection" clause deals with *final* acceptance. From this analysis, it should be clear that the Government included the "guarantee" provision in the contract, not to cumulate its remedies, but to obtain a more specific statement of its warranty rights. Had the Board relied more upon the contract and federal procurement policy than upon the Code, it would have been conscious of the unique nature of a government contract and would not have adopted the Code rule.

Another factor which the Board should have appreciated in deciding this question is that in bidding on the job the contractors probably did not have notice of the Government's extensive warranty rights. If they had, they would have raised their prices to provide for contingencies, and this would work to the eventual disadvantage of the Government. There is no question that the cost to the Government for the inclusion of a warranty clause in a contract is a most important factor. The result of these decisions will be a general rise in government-procurement costs.

IV. SUGGESTIONS FOR THE RESOLUTION OF CONFLICTS BETWEEN THE CODE AND PRIOR LAW

We have pointed out that the Code has been used to some extent in government-procurement cases and have concluded that the number of cases in which it will be applied will continually increase. But this leaves unanswered the question of what ought to be done in those cases where the Code and federal contract law would bring about conflicting results. Basically, government contract law and the legal principles contained in the Code represent two different types of legal machinery. The Code is built around layman's arrangements. On the other hand, the government contract is not only a formal document calling for the furnishing of supplies and services, but also a vehicle for the implementation of public or administrative policies.⁷¹ A consequence of this dichotomy is that implementation of the Code in government-procurement cases may tend to be an unsettling influence in a multi-faceted and dynamic field of law. There are, however, some

⁷⁰ Supra note 68.

⁷¹ It is clear that the procurement power has become a powerful mechanism for enforcement of many public policies. See Miller, *Administration by Contract: A New Concern for the Administrative Lawyer*, 36 N.Y.U.L. Rev. 957 (1961); Hannah, *Government by Procurement*, 18 Bus. Law. 997 (1963); Stone, *Contract by Regulation*, 29 Law & Contemp. Prob. 32 (1964).

basic considerations which, if kept in mind, will guide the courts in avoiding conflicts between the Code and government-contract law, so that the Code may receive optimum use in this important field.

Conflict can frequently be avoided by carefully construing the contract *before* looking to the Code. To construe any contract is to interpret the contract terms to conform to the intention of the parties. The purpose of the transaction is ordinarily found in the plain meaning of the contract, liberally and realistically construed to achieve the contractual goals. This is especially true when a government contract is being construed; the provisions of a government contract are all there for a purpose, and every sentence, virtually every word, has some legal significance.⁷² This is, of course, the most general and basic of contract rules, but it remains the fundamental rule which must be constantly kept in mind.

A second basic consideration is the purpose of procurement itself. Every procurement contract is intended to get the goods to the user when and where he needs them to fulfill his changing and growing needs. Any uncertainty as to the meaning or possible interpretation of the words of the contract will have a tendency to cause uncertainty as to the rights and duties of the parties and this will, in certain cases, cause a lag in the constant flow of goods so necessary to the Government's efficient operation. It is clear that the purpose of procurement will best be served by the application of rules of law which will be a source of certainty in future transactions.

A neat example of a case which recognizes this is the recent case of *United States v. Wegematic Corp.*⁷³ The United States had requested bids for a computer. Wegematic, in response to the bid, submitted a detailed proposal, characterizing the machine as "a truly revolutionary system utilizing all of the latest technical advances."

⁷² In *United States v. Bethlehem Steel Co.*, 9 CCH Cont. Cas. F. ¶ 72,181 (4th Cir. 1963), the court was asked to construe a government contract under which the contractor had obtained an option to purchase certain facilities, less depreciation on each item. The court held that the facilities, but not the land, were subject to depreciation. Judge Michie set the tone for handling this type of problem by the following statement:

This case essentially involves the problem of the lawyer who drafts a contract and, in the beginning, provides that, when used in the contract, the word "black" shall mean "white" and vice versa. Of course the law will accord him the same privilege that Humpty-Dumpty claimed in "Alice in Wonderland" [sic: Through the Looking Glass] when he said: "When I use a word it means just what I choose it to mean—neither more nor less." But suppose our lawyer forgets his definition and later, obviously quite accidentally, uses white as meaning white or black as meaning black in the ordinary sense. What do we do then? Well, if we can be sure that he is using the word in its ordinary sense, we think that we must forget his definition and construe the word to mean what we are sure he intended it to mean. And this we think we should do here.

Id. at 62,484.

⁷³ 360 F.2d 674 (2d Cir. 1966).

Delivery was to be made within nine months after the date the contract was received. Subsequently, Wegematic encountered problems in performance of the machine which caused it to default on its contract. Wegematic's defense, on appeal, was that delivery was made impossible by basic engineering difficulties, and that the practical impossibility of completing the contract excused its defaults in performance. While the court found the Government's legal authorities not to be controlling, it did hold under Code section 2-615 that the risk should fall on Wegematic rather than the Government, owing to the fact that Wegematic had promoted the machine.

The case represents a recognition of the nature of procurement because it regards the transaction itself as controlling the manner in which the risks should be allocated, and it establishes a uniform rule with respect to the federal law of sales by applying section 2-615. In doing so, the court meets the necessity for uniformity and certainty in government-procurement transactions. It does so in another way by holding the seller to his promise and as a result of a breach of that promise by making him liable in damages, rather than granting him an option to compel the Government to pay if the gamble should pan out.

The third basic factor which must be considered in procurement contracts is the absence of any real negotiations, a fact which sets government contracts apart from other types of agreements. Moreover, it is clear that, even when there is negotiation, the bargaining power of the Government far outweighs that of the contractor. If this power were left uncurbed, the result would be to place far too much power in the hands of individual bureaucrats, for strict interpretation of all clauses would place the power of the federal government behind their every act. Thus, it seems to be necessary that in all cases, that rule will be preferred which will be a deterrent to an abuse of authority and which will deter inequitable government action or inaction. The board or the court which construes the contract must impose a rule of fairness on the parties' dispute. This rule appears in several forms. It may be applied where the Government's conduct is unconscionable. Thus, the Court of Claims has found, "an implied provision of every contract [is] . . . that neither party . . . will do anything to prevent performance thereof by the other party or that will hinder or delay him in its performance."⁷⁴ There is also an implied duty to furnish to the contractor information that is unknown to the contractor and material to the written bargain of the parties. The rule has been applied where undisclosed pricing information indicated that the negotiated price should have been higher or where the Government had

⁷⁴ *George A. Fuller Co. v. United States*, 69 F. Supp. 409, 411 (Ct. Cl. 1947).

withheld vital technical information.⁷⁵ The principles of estoppel have been invoked where the contractor was induced to sign a contract on the representations of the lawyers of the contracting officer with respect to the meaning of the contract.⁷⁶ Refusals to enforce penalty provisions have their roots in the same precepts.⁷⁷ Equitable principles may also be used to mitigate abuses of authority or unduly harsh application of legal rules.

Finally, it must be remembered that government contracts carry with them programs which have wide-ranging consequences with respect to our society and economy. Whenever one of the procurement regulations is construed, the importance of the policy which underlies it must be assessed and given great weight in determining the rights and obligations of the contracting parties. Implicit in every such regulation are the conflicting factors of government efficiency and public confidence in the fairness of government-contract policies. These factors may require results which would not normally occur in a commercial contract case.

A dramatic example of this is the case of *G. L. Christian & Associates v. United States*,⁷⁸ in which a contract was made for the construction of a Capehart Housing Project for the Federal Housing Administration. ASPR required that the contracting officer put a termination clause in the contract providing an equitable amount to be paid for the termination of the contract, but precluding the payment of damages for the contractors' loss of anticipated profits. The clause was not included in the contract and the contractor argued that the omitted clause did not control the amount it could recover because of the Government's termination action. The Court of Claims read the termination clause required by ASPR 8-703 into the *Christian* contract even though it was not there. The decision may be rationalized on the ground that the public policy inherent in the Government's termination regulation precludes a contractor from recovering anticipatory profits upon the contract's termination, even though the contract is silent on the amount of recovery. In reality, the court designed a rule to preclude an overexpenditure of public funds.

*Paul v. United States*⁷⁹ is another illustration of the paramount importance that is given to the public policy underlying the procurement regulations. In this case, the Supreme Court relied on the Armed

⁷⁵ *Helene Curtis Indus. Inc. v. United States*, 312 F.2d 774, 778 (Ct. Cl. 1963); *Snyder-Lynch Motors, Inc. v. United States*, 292 F.2d 907 (Ct. Cl. 1961).

⁷⁶ *George H. Whike Constr. Co. v. United States*, 140 F. Supp. 560 (Ct. Cl. 1956).

⁷⁷ *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947); *United States v. United Eng'r & Contracting Co.*, 234 U.S. 236 (1914).

⁷⁸ 312 F.2d 418, rehearing denied, 320 F.2d 345 (Ct. Cl.), cert. denied, 375 U.S. 954 (1963).

⁷⁹ 371 U.S. 245 (1963).

Services Procurement Regulation for competitive procurement to hold invalid California's minimum price regulation as applied to milk sold to military installations. The Court distinguished *Penn Dairies, Inc. v. Milk Control Comm'n*⁸⁰ in which Chief Justice Stone had stated that federal procurement legislation disclosed no purpose to override non-discriminatory state milk marketing regulations. In *Paul*, Justice Douglas, speaking for the Court, held that ASPR having the force of law commands that purchases of the armed services be made on a competitive basis.

The courts and the Board will undoubtedly continue to look to the Code as a source of federal law because it represents the best of modern authority. Whether they will do so where the Code conflicts with prior doctrines is, as yet, an unresolved question. We have suggested three basic principles which should keep such conflicts to a minimum: (1) Because of the nature of procurement the rule of law which will be a source of certainty in future transactions should be preferred; (2) Because the Government has an overriding bargaining power the rule which will best deter abuse of authority and inequitable government action or inaction should be preferred; (3) Because government contracts serve important social ends the rule which will best effectuate those ends should be preferred. To a large extent these are competing principles. They are advanced as guides, since choices must be made. The contract and the surrounding facts will ultimately determine which choice will be made.

⁸⁰ 318 U.S. 261 (1943).