

GOVERNMENT CONTRACTS: NATURE, SCOPE AND TYPES

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NATURE AND SCOPE GENERALLY

In theory, the United States steps down from its sovereign position when it contracts with its citizens for property and services. When it does so, it has been said, it must be treated, in general, as are other private contractors under analogous situations.¹ In theory, also, "the United States being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers."² Similarly, the United States enjoys the unrestricted power to produce its own supplies, to determine with whom it will deal and to fix the terms and conditions upon which it will make needed purchases.³

It necessarily follows, therefore, that if the constitutional powers are confided to a department or agency of the government, "that the duty, and of course the right, to make contracts may flow from an act of congress, which does not in terms prescribe this duty; . . . that there is a power to contract in every case where it is necessary to the execution of a public duty."⁴ The actual existence of this right and authority to contract is always open to inquiry, and if found wanting or forbidden by statutes or otherwise, the contract is not binding on the government.⁵ Hence there can never be any apparent authority of a government officer or agent (hereinafter sometimes referred to as "contracting officer") to contract, and private citizens contract with

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This article is limited to the nature and scope of government contracts and the types thereof employed by the military departments and the other agencies subject to the Armed Services Procurement Act or the Federal Procurement Act. No effort has been made to discuss personal service contracts, research and development contracts, contracts for the sale of government property or the special types of contracts and contracting authority of special agencies, government corporations, the Veterans Administration and the Department of Agriculture.

¹ *United States v. Standard Rice Co.*, 323 U.S. 106 (1944); I McBride & Wachtel, *Government Contracts* § 1.20 (1963).

² *United States v. Tingey*, 30 U.S. (5 Pet.) 114, 128 (1831). See also, *Jessup v. United States*, 106 U.S. 147 (1882); *United States v. Maurice*, 26 Fed. Cas. 1211 (No. 15,747) (C.C.D. Va. 1823); *United States v. Salon*, 182 F.2d 110 (7th Cir. 1950); I McBride & Wachtel, *Government Contracts* § 1.10 (1963).

³ *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

⁴ *United States v. Maurice*, *supra* note 2, at 1217; 6 Ops. Att'y Gen. 26 (1853).

⁵ *Whiteside v. United States*, 93 U.S. 247 (1876); *The Floyd Acceptances*, 75 U.S. (7 Wall.) 666 (1868).

them at their peril.⁶ Similarly, no contracting officer has implied authority to amend or modify a contract without consideration, as to do so would not be in the government's interest.⁷

One of the apparent prohibitions against exercise of contracting authority solely on the basis of implied authority is to be found in Article 1, Section 9, of the Constitution. This section prohibits withdrawal of moneys from the Treasury except in consequence of appropriations made by law. However, this section has been construed as a mere limitation and restriction upon the executive officers of the Treasury Department, and does not prevent enactment of legislation by Congress, either specifically or by implication, authorizing the creation of contractual obligations.⁸ Thus, if Congress appropriates funds for a specific object, this constitutes implied authority to contract within the limitation of the appropriation.⁹ On the other hand, if the Constitution or any statute authorizes and requires the president or any officer or agent to create a contractual obligation, the legality is wholly independent of an appropriation and a lawful contractual obligation may result, the payment of which, however, must await an appropriation.¹⁰

Accordingly, it would appear that government officers and agents have, theoretically, a substantial amount of contractual authority by implication, stemming from Congressional designations of Constitutional authority, or from appropriations, in addition to specific contracting authority which may be granted in advance of Congressional appropriations.¹¹ The extent of this implied authority has never been fully developed. Congress has chosen to use a different approach. It would seem, however, that having the implied authority, almost any kind of contract, which was not contrary to the public interest, tainted with fraud or other illegality or prohibited by law, could be used by officers and agents of the United States in the exercise of such implied authority.¹²

⁶ *Pine River Logging Co. v. United States*, 186 U.S. 279 (1902); *Whiteside v. United States*, 93 U.S. 247 (1876); *Filor v. United States*, 76 U.S. (9 Wall.) 45 (1869); *Lee v. Munroe*, 11 U.S. (7 Cranch) 366 (1813). Cf. *Sutton v. United States*, 256 U.S. 575 (1921); *I McBride & Wachtel, Government Contracts* § 5.10(4) (1963).

⁷ *American Sales Corp. v. United States*, 32 F.2d 141 (5th Cir.), cert. denied, 280 U.S. 574 (1929).

⁸ *Reeside v. Walker*, 52 U.S. (11 How.) 271 (1850); *Mitchell v. United States*, 18 Ct. Cl. 281, rev'd, 109 U.S. 146 (1883); 6 Ops. Att'y Gen. 26 (1853).

⁹ *Mitchell v. United States*, supra note 8; 30 Ops. Att'y Gen. 186 (1913); 6 Ops. Att'y Gen. 26 (1853).

¹⁰ *Ibid.*

¹¹ 30 Ops. Att'y Gen. 147 (1913).

¹² E.g., Cost-plus-a-percentage-of-cost contract approved in *United States v. Bethlehem Steel Corp.*, 315 U.S. 289 (1942). Note, however, that 60 Stat. 809 (1946), as amended, 41 U.S.C. § 5 (1958); 10 U.S.C. § 2306 (1958); and 63 Stat. 395 (1949), as amended, 41 U.S.C. § 254(b) (1958) prohibit the use of this type of contract.

However, as government contracting increased during both war and peacetime and as attention was focused on the powers of contracting officers and alleged abuses of such powers, Congress has tended to limit and define the powers of contracting officers. A myriad of legislative enactments has resulted; most of which, prior to 1947, seem to have been enacted without any particular plan or pattern, being designed to deal with or resolve the problems of the moment. Much of the legislation adopted governs the use of contractual provisions, the form of which is specified by the statute.¹³ Many of these, while they require contractual action by the contracting officer, and are mandatory for use in government contracts within the requirements of the statute, represent an effort on the part of Congress to impose upon government contractors moral, social or economic concepts of the time.¹⁴

The earliest of these enactments took the form of limitation on the implied authority of government contracting officers. For example: (1) the prohibition of the purchase of land, except under a law specifically authorizing such purchase;¹⁵ (2) the prohibition against the making of a contract unless authorized by law or under an appropriation adequate to its fulfillment;¹⁶ (3) the requirement that all purchases and contracts for supplies and services be made or entered into only after formal advertising for bids, with an award to the lowest responsible bidder;¹⁷ (4) the prohibition against the making of contracts for stationery or other supplies for a period longer than one year;¹⁸ (5) the prohibition of contracts for the erection, repair, or furnishing of any public building or improvement thereon, in excess of the amount specifically appropriated for the purpose;¹⁹ (6) the

¹³ E.g., 49 Stat. 2036 (1936), as amended, 41 U.S.C. §§ 35-45 (1958), requiring contract representations and warranties in contracts over \$10,000 for manufacturing or furnishing materials, supplies, articles and equipment, that the contractor is a regular manufacturer or dealer, that employees will be paid minimum wages and will not work in excess of specified maximum hours and that sweat-shop conditions will not exist; 60 Stat. 37 (1946), 41 U.S.C. § 51 (1958), prohibiting the payment of fees or kick-backs by subcontractors on negotiated contracts and providing for the recovery thereof; 76 Stat. 357 (1962), 40 U.S.C. § 328 (Supp. IV, 1959-62), requiring the payment of overtime on public works contracts; 10 U.S.C. § 2306 (1958) and 63 Stat. 395 (1949), as amended, 41 U.S.C. § 254 (1958), prohibiting the payment of contingent fees for obtaining contracts except for bona fide employees or established commercial or selling agencies; Rev. Stat. § 3741 (1875), as amended, 41 U.S.C. § 22 (1958), providing for the insertion of the so-called "officials not to benefit" provision in all government contracts; 47 Stat. 1520 (1933), 41 U.S.C. §§ 10(a)-(b) (1958), The Buy American Act, requiring the use of American materials.

¹⁴ Note the social, moral and economic aspects of the required clauses referred to in note 13, *supra*.

¹⁵ Rev. Stat. § 3736 (1875), 41 U.S.C. § 14 (1958).

¹⁶ Rev. Stat. § 3732 (1875), 41 U.S.C. § 11 (1958). Note that this excepts Army, Navy and Air Force contracts for clothing, subsistence, forage, fuel, quarters, transportation or medical and hospital supplies to the extent of the necessities of the current year.

¹⁷ Rev. Stat. § 3709 (1875), as amended, 41 U.S.C. § 5 (1958).

¹⁸ Rev. Stat. § 3735 (1875), 41 U.S.C. § 13 (1958).

¹⁹ Rev. Stat. § 3733 (1875), 41 U.S.C. § 12 (1958).

provision that no appropriation act should be construed to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless so declared in specific terms;²⁰ and (7) the authorization of the use of annual appropriations in the fiscal year involved, the balances to be applied only to the payment of expenses properly incurred during that year or to the fulfillment of contracts properly made during that year.²¹ In 1874, by statute, all unexpended balances of appropriations, even though obligated, were to be carried to the surplus fund and covered into the Treasury after the elapse of two years following the close of the fiscal year for which the funds were appropriated.²² Most of these enactments, as well as other enactments defining or limiting the contracting authority of government officers or agents, contained exceptions, either written into the statute originally or from time to time after enactment, as the various branches of the executive departments sought and were granted exceptions or special statutory treatment.²³ A careful study of the Congressional enactments with reference to government contracting presents a picture of Congress periodically limiting, granting, circumscribing, defining and redefining contract authority. This activity has, of course, increased over the years, and with the establishment of the General Accounting Office in 1921²⁴ which has (1) general powers over claims of and against the United States;²⁵ (2) audit and supervisory functions over the determination of the propriety and legality of the obligation and expenditure of appropriated funds;²⁶ and (3) the duty to report to the Congress, as a part of the legislative branch of the government, concerning the exercise of contracting authority and the expenditure of appropriated funds,²⁷ it is an unusual session of Congress, today, which does not enact at least one piece of legislation with reference to government contracts.²⁸

²⁰ 34 Stat. 764 (1906), 31 U.S.C. § 627 (1958).

²¹ Rev. Stat. § 3690 (1875); 18 Stat. 110 (1874). 63 Stat. 407 (1949), 31 U.S.C. §§ 712(a)-(b) (1958); 63 Stat. 358, 31 U.S.C. § 712(c) (1958); 18 Stat. 418 (1875), 31 U.S.C. § 713(a) (1958) and Rev. Stat. § 3691 (1875), 31 U.S.C. § 715 (1958) provide a system of carrying expended balances to a certified claims fund. The reader should also examine all of Title 31, which provides methods of allocation of appropriations and provides penalties for contracting in excess of appropriations.

²² 18 Stat. 110 (1874).

²³ See note material following applicable sections of 31 U.S.C. and 41 U.S.C., indicating exceptions to be found in other parts of the United States Code. Note particularly the exceptions listed at 41 U.S.C. § 5 (1958) "Cross References."

²⁴ 42 Stat. 63 (1921), 31 U.S.C. §§ 41-60 (1958).

²⁵ Rev. Stat. § 236 (1875), as amended, 31 U.S.C. § 71 (1958).

²⁶ 31 U.S.C. §§ 65-134 (1958).

²⁷ 42 Stat. 25 (1921), 31 U.S.C. § 53 (1958). See also, 45 Stat. 413 (1928), 31 U.S.C. § 236 (1958), which provides for the reporting to Congress of meritorious claims which cannot be adjusted lawfully.

²⁸ E.g., 76 Stat. 357, 40 U.S.C. §§ 328-332 (Supp. IV, 1959-62); Contract Work Hours Standard Act, 10 U.S.C. § 2304 (Supp. IV, 1959-62); 10 U.S.C. § 2306 (Supp. IV, 1959-62).

The formal advertising concept of Section 3709 of the Revised Statutes²⁹ has survived the passage of time. It is today recognized as the cornerstone of government procurement policy,³⁰ although Congress has enacted a number of permanent exceptions. Prior to the adoption of the Armed Services Procurement Act of 1947, Congress had not been persuaded that permanent exceptions to the formal advertising concept were necessary. During World War I, Congress gave the president³¹ extraordinary contracting powers, including the power to negotiate certain contracts. This power was delegated to contracting agencies and numerous contracts were negotiated during World War I. One of the types of negotiated contracts used was the cost-plus-a-percentage-of-cost contract. Under this type of contract, the contractor received all of his costs expended in the performance of the contract plus a percentage of such costs as profit. After World War I had ended, the government attempted to disavow some of these contracts on the ground, *inter alia*, that the profits were unconscionable. In one case it was alleged that the contractor was a war profiteer; the evil lying in the fact that the greater the cost the greater the profit, and that the government had no control over the cost.³² In that case, the Supreme Court in 1942, some 23 years after the end of the war, held that there was no illegality in the contracts, and suggested that if there was an evil in the system it could be prohibited only by Congress.

Congress had anticipated the Court's suggestion. In 1940, in connection with an authorization to the Secretary of War³³ to acquire property for national defense, Congress authorized the use of any kind of contract the Secretary might deem necessary. This statute, however, prohibited the use of the cost-plus-a-percentage-of-cost system of contracting, but, at the same time, specifically authorized the use of the cost-plus-a-fixed-fee contract. This statute was followed on December 18, 1941, with the first War Powers Act.³⁴ Under this Act, the president was authorized to enter into contracts without regard to the provisions of the existing law. The authority was delegated by Executive Order and, as a result, during World War II numerous contracts were negotiated, many new types of contracts were conceived of and used, contracts were amended without consideration other than that of the necessity of the facilitation of the prosecution of the war and the cost-plus-a-fixed-fee system of contracting was fostered and developed.³⁵

²⁹ Supra note 17.

³⁰ 10 U.S.C. § 2304 (Supp. IV, 1959-62); *United States v. Warne*, 190 F. Supp. 645 (N.D. Cal. 1960); I McBride & Wachtel, *Government Contracts* § 9.10 (1963).

³¹ 40 Stat. 182 (1917).

³² *United States v. Bethlehem Steel Corp.*, supra note 12.

³³ 54 Stat. 712 (1940).

³⁴ 55 Stat. 838 (1941).

³⁵ Exec. Order No. 9001, 6 Fed. Reg. 6787 (1941) was issued under the authority of the First War Powers Act. So also was Exec. Order No. 10210, 16 Fed. Reg. 1049

With the close of World War II, Congress held hearings for the purpose of considering government contract problems. These hearings resulted in the passage of the Armed Services Procurement Act of 1947.³⁶ This legislation, it was stated, was enacted for the purpose of a return to normal purchasing procedures through the advertising bid method on the part of the armed services; of review and revision of the exceptions to Section 3709 of the Revised Statutes in light of World War II experience; of making uniform all laws and rules covering purchase procedures for the armed services; of repealing many obsolete and diverse laws; of putting within the framework of one law almost a century's accumulation of statutes and of incorporating new safeguards designed to eliminate abuses.³⁷

In 1956 the Armed Services Procurement Act of 1947 was repealed, and its provisions re-enacted, with some changes, as a part of Title 10 of the United States Code.³⁸ Since that time, the Act has been amended on a number of occasions, some of which have been referred to above.³⁹

Earlier Congress had enacted the Federal Property and Administrative Services Act of 1949.⁴⁰ This statute provided for the organization of the General Services Administration and gave to it certain powers over the management of government property within the United States and the disposition of surplus property, and established a detailed procedure for the purpose of facilitating the procurement of supplies and services by executive departments other than the armed services. The Act was passed by Congress for the express purpose of substantially meeting the recommendations made by the Commission on Organization of the Executive Branch of the Government in its report on the organization and management of federal supply activities, that legislation be enacted to apply the principles of the Armed Services Procurement Act of 1947 to buying by all government agencies.⁴¹

(1951). By 72 Stat. 972 (1958), as amended, 50 U.S.C. §§ 1431-1435 (Supp. IV, 1959-62), Congress enacted the Contract Adjustment Act and extended the First War Powers Act with modifications. The President delegated the powers to defense agencies by Exec. Order No. 10789, 23 Fed. Reg. 8897 (1958). Armed Services Procurement Regulations (ASPR) and Federal Procurement Regulations (FPR) contain implementing regulations.

³⁶ 62 Stat. 21 (1948).

³⁷ S. Rep. No. 571, 80th Cong., 2d Sess. (1947); H. Rep. No. 109, 80th Cong., 2d Sess. (1947).

³⁸ 10 U.S.C. §§ 2301-2314, 2381, 2383 (1958), as amended, 10 U.S.C. §§ 2304, 2306, 2310-2311 (Supp. IV, 1959-62).

³⁹ *Supra* note 28.

⁴⁰ 63 Stat. 377 (1949), 5 U.S.C. §§ 630-630(h), 40 U.S.C. §§ 471-475, 41 U.S.C. §§ 251-260 (1958).

⁴¹ H. Rep. No. 670, 81st Cong., 1st Sess. (1949).

Provisions of the Armed Services Procurement Act⁴² and the Federal Procurement Act⁴³ are similar, excepting as to applicability. The former is applicable to the Departments of the Navy, Army, Air Force and Coast Guard and to the National Aeronautics and Space Administration, and covers the purchase and contract to purchase by such agencies of all services and all property other than land, including contracts for the installation and alteration thereof. The Federal Procurement Act is applicable to purchases and contracts for property or services made by the General Services Administration and by any other executive agency (excepting those covered by the Armed Services Procurement Act) "in conformity with authority to apply such provisions delegated by the Administrator in his discretion."⁴⁴ It is to be noted, however, that the General Services Administrator still retains his authority, subject only to the authority granted to the military agencies by the Armed Services Procurement Act, to prescribe policies and methods of procurement and supply of personal property and non-personal services for all government agencies.⁴⁵ This has been construed to mean that the Administrator may specify standard government forms and clauses and federal specifications and standards. Thus, Section 1-1.004 of the Federal Procurement Regulations, issued by the Administrator of General Services under the Federal Property and Administrative Services Act of 1949, of which the Federal Procurement Act is a part, states that, except for standard government forms and clauses and federal specifications and standards, the regulations are not mandatory on the Department of Defense. It is also to be noted that these two procurement statutes leave unaltered those statutes prescribing contract clauses or provisions to be inserted in specified types of government contracts.⁴⁶

Generally, the Armed Services Procurement Act and the Federal Procurement Act are similar. They provide, generally as follows:

- (1) That a fair proportion of the purchases and contracts made be placed with small business.⁴⁷
- (2) That purchases of and contracts for property and services

⁴² 10 U.S.C. §§ 2301-2314 (1958), as amended, 10 U.S.C. §§ 2304, 2306, 2310-2311 (Supp. IV, 1959-62).

⁴³ 63 Stat. 393 (1949), 41 U.S.C. §§ 251-260 (1958).

⁴⁴ 63 Stat. 393 (1949), 41 U.S.C. § 252 (1958). It must be noted that this delegation is discretionary. It must be assumed, therefore, that unless other special statutory authority can be found in appropriations acts or otherwise, that agencies not having such authority are limited to procurement under 41 U.S.C. §§ 5, 6a, 13 (1958), from which agencies having the authority delegated by the General Services Administration are exempt. See also, 63 Stat. 397 (1949), 41 U.S.C. § 260 (1958).

⁴⁵ 63 Stat. 383 (1949), 40 U.S.C. § 481(a)(1) (1958).

⁴⁶ *Supra* note 13.

⁴⁷ 10 U.S.C. § 2301 (1958); 63 Stat. 393 (1949), 41 U.S.C. § 252(b) (1958).

be made by formal advertising, but that under certain circumstances and conditions such purchases and contracts may be negotiated by the agency head without advertising. These stated circumstances and conditions are itemized in the statute.⁴⁸ In the case of the Armed Services Procurement Act there are seventeen exceptions. In the case of the Federal Procurement Act there are fourteen exceptions. In both statutes the last exception leaves the door open to negotiations otherwise authorized by law.⁴⁹ For the purposes, however, of the Walsh-Healey Act,⁵⁰ the Contract Work-Hour Standards Act⁵¹ and Title 40, Sections 276a to 276a-5, all negotiated contracts are to be treated as if they were made with formal advertising.

(3) Whenever formal advertising is required, the advertisement must be made a sufficient time previous to the purchase or contract and the specifications and invitation must be so prepared as to permit full and free competition.⁵²

(4) The head of an agency in negotiating a contract may use any type of contract which he considers will promote the best interests of the United States, except that the cost-plus-a-percentage-of-cost type of contract may not be used; every negotiated contract must contain a covenant against contingent fees; no cost contract, cost-plus-a-fixed-fee-contract, or incentive contract may be used unless the head of an agency determines that such contract is likely to be less expensive than any other kind of a contract or that it is impracticable to obtain the property or services of the kind or quality required except under such a contract. The fixed-fee in cost-plus-a-fixed-fee contracts is limited to ten per cent of the estimated cost except in experimental, development or research contracts where the limitation is fifteen per cent, and to six per cent of the estimated cost of the work or project in the case of architectural and engineering service contracts for public works. Every cost or cost-plus-a-fixed-fee contract must provide for notice to the agency by the contractor of every proposed cost-plus-a-fixed-fee subcontract, or of every proposed fixed-price subcontract involving more than \$25,000.00 or five per cent of the estimated cost of the prime contract, to be entered into under the prime contract.

⁴⁸ 10 U.S.C. § 2304 (1958); 63 Stat. 393 (1949), 41 U.S.C. 252(c) (1958). The 1962 amendment to 10 U.S.C. § 2304 (1958), as amended, 10 U.S.C. § 2304 (Supp. IV, 1959-62), *supra* note 28, requires formal advertising in *all* cases in which it is feasible and practicable under the existing circumstances and conditions, and the use of negotiation is permitted only if formal advertising is not feasible and practicable *and* if the agency head finds and determines that the circumstances and conditions of one of the 17 exceptions exist and in the manner and form specified by 10 U.S.C. § 2310 (1958), as amended, 10 U.S.C. § 2310 (Supp. IV, 1959-62).

⁴⁹ Congress has thus left the door open to special exceptions.

⁵⁰ 49 Stat. 2305 (1936), 41 U.S.C. §§ 35-45 (1958).

⁵¹ 76 Stat. 357 (1962), 40 U.S.C. §§ 328-332 (1958), as amended, 40 U.S.C. §§ 328-332 (Supp. IV, 1959-62).

⁵² 10 U.S.C. § 2305 (1958); 63 Stat. 395 (1949), 41 U.S.C. § 253 (1958).

Every negotiated contract must contain a provision making the contractor's records with respect to the contract available for audit by the Comptroller General or by his authorized representative for a period of three years after final payment.⁵³

(5) Agency heads may make advance, partial, progress or other payments under contracts for property or services of an amount not in excess of the unpaid contract price upon the furnishing of adequate security.⁵⁴

(6) Agency heads may delegate functions and assign responsibilities relating to procurement.⁵⁵ The responsibility for making certain findings and determinations as to the circumstances justifying the use of negotiation instead of formal advertising and the use of the cost-plus-a-fixed-fee type of contract may be delegated by the agency head, subject to his direction.⁵⁶ Most of the findings and determinations authorized must be in writing, must follow the form prescribed by the statute, must be kept in the agency for six years and a copy must be forwarded to the General Accounting Office with each contract to which it applies.⁵⁷

(7) Upon recommendation of the head of an agency, the Comptroller General may remit all or part, as he considers just and equitable, of any liquidated damages assessed for delay in the performance of a contract that contains a liquidated damages clause.⁵⁸

(8) A prime contractor or any subcontractor is required to submit cost or pricing data in connection with the negotiation of contracts where the price is expected to exceed \$100,000. This cost or pricing data is to be in the form of a Certificate of Current Pricing, and the contract is to contain a clause providing for an adjustment in the contract price, if the certificate proves to be inaccurate, incomplete or noncurrent.⁵⁹

Under the authority granted to agency heads by these statutory provisions, and under the general authority of Section 22 of Title 5,

⁵³ 10 U.S.C. § 2306 (1958), as amended, 10 U.S.C. § 2306 (Supp. IV, 1959-62); 10 U.S.C. § 2313 (1958); 63 Stat. 395 (1949), 41 U.S.C. § 254 (1958). Note that 63 Stat. 395 (1949), 41 U.S.C. § 254 (1958) requires provision for GAO audit; 10 U.S.C. § 2313 (1958) requires provision for both Agency and GAO audit.

⁵⁴ 63 Stat. 388 (1949), 40 U.S.C. § 485 (1958); 10 U.S.C. § 2307 (1958). Note that the latter also permits the insertion in bid solicitations limiting such payments to small business concerns.

⁵⁵ 10 U.S.C. § 2308 (1958); 63 Stat. 396 (1949), 41 U.S.C. § 257(b) (1958).

⁵⁶ 63 Stat. 396 (1949), 41 U.S.C. § 257 (1958), as amended, 10 U.S.C. § 2311 (Supp. IV, 1959-62); 63 Stat. 396 (1949), 41 U.S.C. § 257 (1958).

⁵⁷ 10 U.S.C. § 2310 (1958), as amended, 10 U.S.C. § 2310 (Supp. IV, 1959-62); 63 Stat. 396 (1949), 41 U.S.C. § 257 (1958).

⁵⁸ 10 U.S.C. § 2312 (1958); 64 Stat. 591 (1950), 41 U.S.C. § 256a (1958).

⁵⁹ 10 U.S.C. § 2306(f) (1958), as amended, 10 U.S.C. § 2306(f) (Supp. IV, 1959-62).

United States Code, procurement regulations have been issued. The Department of Defense has issued the Armed Services Procurement Regulations, which are generally known as ASPR. The General Services Administration has issued the Federal Procurement Regulations, which are known as FPR, and supplemental regulations applicable to its procurement activities. The National Aeronautics and Space Administration has issued the NASA Procurement Regulations. In addition, the Defense agencies have issued supplemental regulations. The Navy regulations are known as the Navy Procurement Directives, or NPD. The Army regulations are known as the Army Procurement Procedures, or APP. The Air Force regulations are known as the Air Force Procurement Instructions, or AFPI. The Defense Supply Agency has issued regulations known as the Defense Supply Agency Regulations, or DSPR. Procurement regulations have also been issued by the Atomic Energy Commission, the Federal Aviation Agency, the Veterans Administration, the Department of Agriculture, the Coast Guard and the Corps of Engineers.⁶⁰

The Armed Services Procurement Regulations and the Federal Procurement Regulations set forth in considerable detail the procurement policies and procedures applicable to government contracting within the framework of the basic statutes. They specify general policies, prescribe procurement responsibility and authority, direct types of procurement activity, regulate the types of contracts to be used, specify the contract forms and clauses, including those which are required by statute, by Executive Order, by the General Services Administration and by the regulations, prescribe the form of other contract clauses to be used when applicable, establish principles for the determination of cost and cover other matters such as disputes, renegotiation, foreign purchases, patents, copyrights, bonds, insurance, taxes, labor, government property, inspection and acceptance and extraordinary contract actions. These regulations, covering, as they do, the major portion of government contracting activity, constitute a comprehensive code of government contracting. No contracting officer and no government contractor can enter into, by negotiation or otherwise, nor administer, a government contract without constant reference to these regulations. They probably have the force and effect of law.⁶¹ In any event they control virtually all government contracting activities.

⁶⁰ These regulations are supplemental but also cover special procurement authority and activities.

⁶¹ *G. L. Christian & Associates v. United States*, 312 F.2d 418, motion for rehearing denied, 320 F.2d 345 (Ct. Cl. 1963). This case held that validly issued military procurement regulations (ASPR) have the full force and effect of federal law, even to the extent of overriding inconsistent state legislation, citing *Paul v. United States*, 371 U.S. 245 (1963).

CONTRACTS: NATURE, SCOPE AND TYPES

TYPES OF CONTRACTS

A study or analysis of the types of contracts used by the government within the framework of the Armed Services Procurement Regulations, the Federal Procurement Regulations and the basic statutes can only be made with a full understanding that, regardless of the type of contract used, certain clauses must be inserted in all contracts, either by law or the regulations, and that certain contracts must follow the form specified by FPR and/or ASPR. The following analysis is made without reference to these forms or clauses, but must be read with the realization that in most cases they affect the form of the contract and have an effect upon the terms, conditions and performance thereof.⁶²

FIXED-PRICE CONTRACTS

The firm fixed-price or lump sum contract is a contract under the terms of which the contractor undertakes to furnish designated property or services at a specified price which is not subject to adjustment by reason of variation in the performance costs.⁶³ It is the most preferred type because the contractor accepts full contract cost responsibility and the relationship between cost control and profit is established at the time of the award or execution of the contract.⁶⁴

This type of contract must generally be employed when the formal advertising-bid method of procurement is employed. This is true because the use of any other method would make it generally impossible to determine who was the low bidder within the meaning of the statute.⁶⁵ This type of contract is also preferred whenever negotiation is authorized and a sound estimate of the cost of performance can be made at the time of negotiation.

Because of the fact that the firm fixed-price contract calls for delivery in the future of property or services at a price agreed upon at the time of the award or execution of the contract, contractors tend to protect themselves against contingencies by including in their bids or estimates allowances for such contingencies. For this reason, escalation clauses are sometimes used both in the formally advertised contract

⁶² ASPR, 32 C.F.R. §§ 7.100-7.604.4 (Supp. 1963), as amended by scattered parts of 28 Fed. Reg. (1963), and FPR, 41 C.F.R. §§ 1-7.100-1-7.602-3 (1963) detail the required contract clauses. When dealing with the agencies, the implementing regulations should be examined for special treatment of particular clauses. Clauses which are cross-referenced in the cited section of ASPR and FPR will be found in other sections. E.g., Termination, Proprietary Data, Labor, etc.

⁶³ 10 U.S.C. § 2304(c) (1958) and 63 Stat. 393 (1949), 41 U.S.C. § 252(e) (1958) exempt contracts for the erection, repair or furnishing of public buildings or public improvements. Contracts for those purposes are covered by special statutes and regulations. This discussion does not include the construction contract.

⁶⁴ ASPR, 32 C.F.R. § 3-402(b) (Supp. 1963); FPR, 41 C.F.R. § 1-3.402(b) (1963).

⁶⁵ 10 U.S.C. § 2305(c) (1958). See, Navy Contract Law § 7.3 (2d ed. 1959).

and in the negotiated contract. These escalation clauses are specified by ASPR⁶⁶ to the extent applicable, and by FPR.⁶⁷ Under certain circumstances a different form may be used if these forms do not serve the purpose. In the case of the formally advertised contract, however, the regulations make it clear that the escalation clause shall have a ceiling identical for all bidders so that each bidder is afforded an equal opportunity to bid on the escalation basis. In the case of the negotiated fixed-price contract there need not be such a ceiling and an escalation clause may be used, under the terms of which the price is adjusted during or after performance.

Therefore, within the general description set forth above, fixed-price contracts may provide for payment over and above the fixed price upon the happening of a defined contingency such as increases in taxes or in the cost of labor and materials. These provisions, however, are frequently balanced by corresponding reduction in the price in the event that the contingency reduces the cost of performance. It is to be noted, however, that once these provisions for escalation are used, the contract loses its character as an unequivocal undertaking by the contractor to deliver the property or services called for by the contract at a fixed price.

MAXIMUM FIXED-PRICE CONTRACTS

It becomes obvious under the circumstances described above that there comes a point in price escalation at which the use of the formal advertising-bid procedure is not available because it is impossible to obtain bids on a firm-price basis, even though some escalation is allowed. In those cases, if an exception to the advertising-bid requirement is available, contracting officers frequently employ the Request for Proposal or Request for Quotation method of negotiating a contract. When it becomes apparent that the lowest fixed price obtainable on a negotiation basis is greater than the contracting officer is willing to accept, or that a reasonably accurate estimate of the cost of the performance of the work cannot be made, the "maximum-fixed-price" or "fixed-price-with-redetermination-downward" type of contract is used. This type of contract provides for an initial fixed price which represents only the maximum price which the government may be required to pay, regardless of what the contractor's costs may prove to be. Such contracts provide, however, that if the contractor's cost experience, ordinarily based upon partial performance of the work, indicates that the maximum price is excessive, the government is entitled to a price reduction.

This price reduction or redetermination is ordinarily determinable

⁶⁶ ASPR, 32 C.F.R. § 7.106, 28 Fed. Reg. 2100 (1963).

⁶⁷ FPR, 41 C.F.R. § 1-3.403-2 (1963).

at a stated point in the performance of the work, which, under the regulations, may be after completion of a specified percentage of the work, of a specified number of units or at a specified date. At this point in the contract performance, the contract requires the parties to redetermine the contract price on the basis of actual costs incurred and estimated costs to be incurred in completing the contract.

There are two schools of thought as to the point in performance when price redetermination should take place. The Department of the Navy has always taken the position that redetermination should take place promptly in order that the contractor will not be guaranteed its costs, within the maximum, and thus be able to proceed with little risk and an insured profit. This position also proceeds upon the theory that if price redetermination is made after the contract is completed, it becomes completely retroactive, and, therefore, brings the contract pricing within the realm of the prohibited cost-plus-a-percentage-of-cost contract. The Department of the Army has always taken the position that price redetermination should be deferred as long as possible in order to give the government the maximum benefit of the contractor's actual cost experience.⁶⁸ Subject to the limitations therein set forth, ASPR authorize prospective and retroactive price redetermination.⁶⁹ The retroactive price redetermination clause is, however, limited to procurement for research and development at an estimated cost of \$100,000 or less.⁷⁰ FPR contain no provisions authorizing price redetermination clauses as such, although escalation clauses are authorized.⁷¹

In general, price redetermination is accomplished under the terms of the redetermination article or clause inserted in the contract by negotiation. The contractor is required, after the redetermination stage has been reached, to submit to the contracting officer cost breakdowns, and in the case of prospective price redetermination, estimates of costs expected to be incurred in the completion of the contract. On the basis of this information and any other information available to the parties, an attempt is made to agree upon a redetermined price, it being the intent of the price redetermination article to arrive at a price which is fair and reasonable both to the contractor and to the government. Failure to agree upon a redetermined price is a dispute within the meaning of the Standard Disputes Article inserted in all government

⁶⁸ *National Electronics Labs., Inc. v. United States*, 148 Ct. Cl. 308, 180 F. Supp. 337 (1960). The Court of Claims held that completely retroactive price redetermination did not violate the prohibition against the cost-plus-a-percentage-of-cost type of contracting.

⁶⁹ ASPR, 32 C.F.R. §§ 3.404-6, 3.404-7 (Supp. 1963), as amended, 28 Fed. Reg. 4883 (1963).

⁷⁰ ASPR, 32 C.F.R. § 3.404-7(c) (Supp. 1963), as amended, 28 Fed. Reg. 4883 (1963).

⁷¹ FPR, 41 C.F.R. § 1-3.403-2 (1963).

contracts. The contracting officer is therefore required to make his decision as to the redetermined price in writing, from which decision the contractor may appeal to the head of the agency concerned.

FLEXIBLE FIXED-PRICE CONTRACT

Occasionally, a contractor may not be willing to obligate itself to perform a fixed-price redeterminable contract within a maximum price. The costs may be so uncertain and indefinite that the contractor is not willing to accept the risk of incurring costs in excess of the maximum price. In such cases, if the general fixed-price type of contract is still preferred, the government may, and sometimes does, use a redetermination clause by the terms of which the fixed-price is subject to redetermination at a specified point, either upward or downward, as may be appropriate, upon review of the contractor's actual cost experience and other repricing data. In these contracts, a price ceiling, above the fixed price, is established. The redetermined contract price may not in any event exceed the price ceiling. From a practical standpoint, this contract operates very much as does the maximum-fixed-price contract with the exception that the redetermined price may be greater than the original price specified in the contract. In any event, it seems to be a practicable negotiation vehicle in those cases where there is great uncertainty as to the cost of performance.

While this type of contract is authorized by ASPR,⁷² some agencies frown upon its use.

FIXED-PRICE-INCENTIVE CONTRACTS

From the foregoing it can readily be seen that the availability of various types of contracts is in itself a technique of negotiation. From the standpoint of the government the worst type of contract is one like the cost-plus-a-percentage-of-cost contract, under which the allowance for profit is increased as the cost of performance increases. The best form of contract is the one which gives the contractor the greatest incentive to reduce costs. The firm fixed-price contract gives the contractor such an incentive, but in such a case the government does not share in the resulting saving of cost. The maximum-price contract provides some incentive to reduce costs, since the negotiator may allow a greater sum for profit in the redetermination of the price. However, reducing the base against which profit is customarily measured diminishes the overall profit so that the incentive (if any) to reduce costs in this type of contract is slight. To meet this problem, the fixed-price-incentive contract was devised.⁷³ In the negotiation of a fixed-price contract, price is about the only thing left open and the

⁷² ASPR, 32 C.F.R. § 3.404-6(a) (Supp. 1963).

⁷³ Navy Contract Law (2d ed. 1959).

contracting officer needs negotiating tools to meet the objections of contractors to the acceptance of contract prices fixed so low as to increase the risk of loss. The fixed-price-incentive contract is such a tool.

The fixed-price-incentive contract can only be used when a realistic estimate can be made of the cost of the performance of the contract. Upon the basis of this estimate, a firm target cost is agreed upon to which a reasonable allowance for profit, the target profit, is added. The sum of these two items constitutes the target price. A price ceiling is then determined. The contract provides that if the final cost of performance of the contract is exactly equal to the estimated target cost the contractor shall receive the target profit. If the final cost is less than the target cost, the contractor shares the cost saving on the basis of the previously negotiated percentages of the target cost and target profit. The contractor thereby benefits by receiving a larger profit while the government benefits from a lower total contract price. If the final cost of performance is greater than the target cost, the contractor's profit is reduced by the previously negotiated percentage. If the final cost is equal to the ceiling price, the contractor makes no profit and if it exceeds the ceiling price, the contractor absorbs the loss.

An alternate form of this type of contract is based upon the negotiation of an initial price and a production point of some time prior to delivery or completion of the first item. At the production point a firm target cost, target profit, final profit, the price formula and price ceiling are negotiated. This permits the establishment of some basis for a realistic estimate of the cost of performance prior to the fixing of the target cost, target profit and ceiling price.

Under this type of contract, final cost and profit are determined by negotiation and agreement after completion of the work, and the final contract price is evidenced by supplemental agreement or amendment executed by the parties. If the parties cannot agree upon the final costs, profit and price, the dispute is treated as one within the Standard Disputes Article and is subject to the disputes appeals procedure set forth therein.

COST-REIMBURSEMENT CONTRACT

The cost-reimbursement contract provides for payment to the contractor of those costs which are defined as "allowable" and incurred in the performance of the contract, to the extent prescribed in the contract. This type of contract establishes an estimated total cost for the purposes of obligation of funds and establishing a ceiling which the contractor may not exceed. This ceiling is, of course, subject to amendment from time to time by agreement. These contracts generally

provide that if the contractor exceeds the cost prior to an amendment increasing the total estimated cost, the costs incurred in the interim will be reimbursable as if the ceiling had been increased prior to the incurrence thereof.⁷⁴

This type of contract is used only when the uncertainties involved in the performance of the contract do not permit an estimate of cost with sufficient reasonableness to permit the use of any type of fixed-price contract. Of course, it can be used only in the case of negotiation. By its very nature it cannot be used for the formal advertising-bid contract.

The cost-reimbursement contract is particularly used in the case of procurements involving substantial amounts, as the necessary cost of record keeping on the part of the contractor and the necessary audits of costs on the part of the government make it uneconomical to use it in small contracts. Note also that it can only be used after determination is made that the method of contracting is likely to be less costly than other methods, and that it is impracticable to secure supplies or services of the kind or quality required as provided by statute.⁷⁵

There are four different types of cost-reimbursement contracts. The first of these is the cost contract under which the contractor recovers only allowable costs and receives no fee. The second of these is the cost-sharing contract under which the contractor receives no fee and is reimbursed only for an agreed percentage of his allowable costs. This type of contract is used for procurements which cover production or research projects that are jointly sponsored by the government and the contractor with benefit to the contractor in lieu of full monetary reimbursable costs. Frequently, these contracts are used in jointly sponsored research and development work with non-profit educational institutions or organizations and in cases where the results of the contract may have commercial benefit to a private contractor.

The cost-plus-a-fixed-fee contract is a cost-reimbursable contract which provides for the payment of a fixed fee to the contractor. In this respect, it differs from the prohibited cost-plus-percentage-of-cost contract in that the fee is fixed, definite and certain in amount. It frequently happens in such contracts, however, that there are changes made under the Standard Changes Clause applicable to government contracts which result in an increase in the estimated cost and a corresponding negotiated increase in the fixed fee.

The cost-plus-a-fixed-fee contract avoids the evils of a cost-plus-a-percentage-of-cost contract. The contractor does not benefit by in-

⁷⁴ This type of contract has led to numerous claims by contractors for the recovery of costs incurred in excess of cost ceilings or limitations. See, for example, Thiokol Chem. Corp., A.S.B.C.A. No. 5726, 60-2 B.C.A. ¶ 2852 (1960).

⁷⁵ 10 U.S.C. § 2306 (1958), as amended, 10 U.S.C. §§ 2306(a), (f) (Supp. IV, 1959-62); 63 Stat. 395 (1949), 41 U.S.C. § 254 (1958).

creasing the cost of performing the contract. However, this type of contract offers no encouragement to the contractor to reduce its costs. Because of the dangers that surround the use of this type of contract, contracting officers have attempted to use other devices to encourage contractors to control their costs. It is to be noted, however, that because of the regard with which the advertising-bid method of government procurement is held, the General Accounting Office and Congress tend to review cost-plus-a-fixed-fee contracts carefully and to question the legality as well as the appropriateness of the method used.⁷⁶ In addition, the statutory safeguards requiring the determinations referred to above are indicative of Congressional reluctance to permit the use of this type of contract. It would appear, however, that there are many situations such as those involving the so-called "concept of concurrency" adopted by the Department of the Air Force in connection with the establishment of missile bases, which require the use of this type of contract.

For these reasons, contracting officers have sought methods to improve the cost-reimbursement contract and provide some incentive on the part of the contractor to control cost. The cost-plus-incentive-fee contract is the result of these efforts.

The cost-plus-incentive-fee contract contains provisions for a fee which is adjusted by formula in accordance with the relationship which total allowable costs bear to target costs. A target cost is negotiated initially, together with a target fee, a minimum and maximum fee and a fee adjustment formula. Upon completion of the contract, the fee payable to the contractor is determined in accordance with the formula. The formula provides for increases in the fee above the target fee when total allowable costs are less than target costs, and decreases in the fee below target fee when total allowable costs exceed target costs. These adjustments in fee, however, can never reduce the fee below the minimum or increase the fee above the maximum specified in the contract. ASPR and FPR⁷⁷ provide for the use of this type of contract where a cost-reimbursement contract is found to be necessary (based upon the findings required by the basic statutes), where there is a possibility that its use will result in lower costs to the government and where the formula negotiated provides the contractor with a positive profit incentive for effective cost management and control.

These contracts, providing for reimbursement to the contractor of "allowable" costs, bring into play by their terms the provisions of ASPR and FPR,⁷⁸ both of which, under the title "Cost Principles",

⁷⁶ Decs. Comp. Gen., No. B-120456 (1958) (unpublished).

⁷⁷ ASPR, 32 C.F.R. § 3.405-4 (Supp. 1963); FPR, 41 C.F.R. § 1-3.404-4 (1963).

⁷⁸ ASPR, 32 C.F.R. §§ 15.000-15.603 (Supp. 1963); FPR, 41 C.F.R. §§ 1-15.000-1-15.603 (1963).

define allowable costs. Disputes concerning allowable costs fall within the disputes-appeals procedure of the Standard Disputes Article required to be inserted in government contracts.

TIME AND MATERIAL CONTRACTS

The time and material contract substitutes for fixed-price payment provisions, provisions for the payment of the cost of materials furnished and for payment of all direct labor furnished at fixed hourly, daily or weekly rates. These rates include direct and indirect labor, overhead and profit.⁷⁹

The usual form of the time and material contract provides for payment on the basis of applying the specified or scheduled time rates to the number of direct labor hours performed.⁸⁰ This type of contract is used only where it is not possible at the time of the placing of the contract to estimate the extent or duration of the work or to anticipate costs with any degree of confidence.⁸¹ The regulations caution the contracting officer with reference to the use of the contract, since its nature does not encourage effective management control. He is also warned that it is essential that this type of contract be used only where provision is made for adequate controls including appropriate surveillance by government personnel during performance to give reasonable assurance that inefficient and wasteful methods are not being used. This type of contract does have distinct advantages, however, where the work to be performed under the terms of the contract requires either direct supervision or periodic orders for the performance of specified types of work, such as in the case of the repair, alteration, and maintenance of equipment.

The problems of administering this type of contract, however, involve auditing of labor hours performed and determination that all of the hours charged were reasonable. A problem is also presented in connection with the replacement of parts or materials which are not in accordance with specifications, and the correction of defective or inferior workmanship. The only regulations with respect to contract provisions covering inspection and replacement of defective materials or workmanship are those presently set forth in AFPI.⁸² These provisions leave much to be desired in the draftsmanship. As they directly affect the determination of the ultimate contract price, the ambiguities

⁷⁹ ASPR, 32 C.F.R. § 3.406-1 (Supp. 1963); FPR, 41 C.F.R. § 1-3.405-1 (1963); Navy Contract Law § 7.12 (2d ed. 1959).

⁸⁰ See, for example, Geotechnical Corp., A.S.B.C.A. Nos. 6221-6223, 61 B.C.A. ¶ 3195 (1961); Rocky Mountain Mach. Co., A.S.B.C.A. No. 3719, 56-2 B.C.A. ¶ 1138 (1956); Lewis Motor Co., A.S.B.C.A. No. 7435, 62 B.C.A. ¶ 3285 (1962).

⁸¹ ASPR, 32 C.F.R. § 3.406-1(b) (Supp. 1963); FPR, 41 C.F.R. § 1-3.405-1(b) (1963).

⁸² AFPI, 32 C.F.R. §§ 1014.000-1014.204 (1960).

contained therein are at present the subject of consideration by the ASPR Committee, which considers and proposes amendments to the regulations. The pending proposal, which would add a new part to section VII of ASPR and would specify uniform clauses for use in time and material contracts, is being considered by the Committee as a part of its current effort to reduce inconsistent coverage in the "subsidiary procurement regulations of the military departments (APP, NPD, AFPI, DSPI)."⁸³ The new part proposes an inspection clause for use in time and material contracts which would require correction or replacement of faulty materials or defective workmanship at a time rate reduced so as to eliminate profit. Otherwise, the contractor would be paid full time rates for all direct labor hours performed.

THE LABOR-HOUR CONTRACT

The labor-hour contract is a variance of the time and materials contract, differing only in that materials are not involved in the contract or are not supplied by the contractor. Its use is limited to a determination that no other type of contract will suitably serve. Because of the fact that this type of contract, like the time and material contract, provides no incentive to the contractor to manage his labor force effectively, its use is limited.

OTHER TYPES OF CONTRACTS

Because of some success in lowering overall contract performance costs by incentives, the regulations encourage the use of incentives in all types of contracts. Thus, in ASPR⁸⁴ it is pointed out that in addition to profit incentives to control costs there are other means of providing incentives to contractors to obtain extra management attention and effort. Accordingly, it is suggested to contracting officers that performance incentives with profit awards may be used in almost any type of contract. A contract with a performance incentive is defined as one which incorporates an incentive to the contractor to surpass stated performance targets by providing for increases in the fee or profit to the extent that such targets are surpassed and for decreases to the extent that such targets are not met. As this is not exactly a type of contract, but provides a method for an increase or decrease in profit in a fixed-price contract, it will not be discussed here in detail. Its concept, however, is available to the reader in ASPR.⁸⁵

There is also what is known as the "letter contract". It is defined by ASPR and FPR⁸⁶ as a written, preliminary contractual instrument

⁸³ Letter From Graeme C. Bannerman, Deputy Assistant Secretary of Defense (Procurement) to the National Security Industrial Association, April 26, 1963.

⁸⁴ ASPR, 32 C.F.R. § 3.407 (Supp. 1963), as amended, 28 Fed. Reg. 2577 (1963).

⁸⁵ ASPR, 32 C.F.R. § 3.407-2 (Supp. 1963).

⁸⁶ ASPR, 32 C.F.R. § 3.408 (Supp. 1963); FPR, 41 C.F.R. § 1-3.405-3 (1963).

which authorized immediate commencement of manufacture of supplies, or performance of services, including, but not limited to, pre-production planning and the procurement of necessary materials. It is to be used, however, only when the interests of national defense demand that the contractor be given a binding commitment prior to formalization of a contract so that the work can be commenced immediately, and where the negotiation of the definitive contract in sufficient time to meet procurement needs is not possible. Letter contracts must be converted to formal bilateral contracts. They generally contain, however, appropriate references to applicable statutory requirements, determinations and clauses—including a termination clause to be used in the event that a definitive contract cannot be mutually agreed upon. They are, however, true contracts and therefore must comply with all of the statutory and regulatory requirements if they are to have binding effect. They are not considered satisfactory contractual documents.

Another type of contract is the purchase order, designed to simplify and expedite procurements of standard commercial supplies and services not in excess of \$2,500. This is one of the exceptions to the formal advertising requirements. These purchase orders are addressed to the selected supplier and signed only by the contracting officer. Like most purchase orders they do not by their terms require or contemplate the supplier's acceptance, but merely require acceptance by performance. The purchase order is an offer by the government of a unilateral contract; in short the government's promise for the supplier's act.⁸⁷

A convenient device, other than the purchase order for shortcutting procurement, is the "open-end" type of contract, sometimes referred to as the master or indefinite delivery type of contract. This type of contract may or may not be a fixed-price contract. It is authorized by ASPR and FPR.⁸⁸ It constitutes an agreement between the contractor and the government as to the terms and conditions under which the contractor will perform orders, sometimes called task or job orders, which may be issued by the government from time to time during the contract period. This type of contract includes all applicable contract provisions, except price, quantity and time and place of deliveries, although sometimes price may be specified. It is used to avoid the preparation and execution of a series of similar contracts and sometimes is used for decentralization of procurement. When this type of contract binds the contractor without its further consent to perform orders placed by the government, this tends to establish an assured source of supply, and, when price is specified, it assures a firm price with respect to future procurements.

⁸⁷ Navy Contract Law § 7.15 (2d ed. 1959).

⁸⁸ ASPR, 32 C.F.R. § 3.409 (Supp. 1963); FPR, 41 C.F.R. § 1-3.405-5 (1963).

Sometimes these contracts specify a minimum amount of the supplies or services to be ordered by the government during the contract period. As the government, in its discretion, has the right under this type of contract to refrain from placing any orders, the agreement might be considered objectionable on the ground that either there is no consideration for the government's promise or that the agreement is too indefinite to be enforced.⁸⁹ The government, however, takes the view that these contracts are enforceable.⁹⁰

The problems surrounding the use of the open-end type contract are sometimes resolved by the use of the indefinite quantity open-end contract. This type of contract is similar to the master open-end contract, except that it specifies a minimum and a maximum quantity of supplies or services to be purchased or sold. This type of contract, having the aspects of a fixed-price contract, can be the subject of the formal advertising-bid method of procurement.

The requirements type of open-end contract is similar to the indefinite quantity open-end contract, except that it only obligates the government to order under the contract all of a specified government activity's requirements for the supplies or services that arise during the period covered by the contract. As a protection against the extremes of ordering, these contracts generally contain provisions exempting the contractor from furnishing orders for less than a minimum quantity or value and a maximum quantity or value. This type of contract is widely used by the Federal Supply Service of the General Services Administration, in the procurement of standard commercial supplies and services for all federal agencies.

From the foregoing, it would appear that one of the major purposes of the open-end form of contract is to facilitate the placing of multiple contracts with single suppliers for essentially similar supplies or services. A variation of this form of contract is the "Basic Agreement" described in ASPR and FPR.⁹¹ However, the Basic Agreement, standing alone, cannot be considered a contract. It is limited in scope to a written understanding negotiated between the government and a particular supplier as to what contract clauses or general provisions will be applicable to certain types of negotiated contracts which thereafter may be made between the parties during the term of the Basic Agreement. This type of agreement is authorized for use when past experience and future plans indicate that a substantial number of separate contracts may be entered into with a specific contractor during the term of the Basic Agreement and that substantial recurring

⁸⁹ I Williston on Contracts § 104 nn. 12 & 13 (3d ed. 1957).

⁹⁰ Navy Contract Law § 7.17 (2d ed. 1959).

⁹¹ ASPR, 32 C.F.R. § 3.410-1 (Supp. 1963), as amended, 28 Fed. Reg. 2557 (1963); FPR, 41 C.F.R. § 1-3.405-4 (1963).

negotiation problems exist with reference to a particular contractor. These contracts are required to provide for termination upon thirty days written notice by either party. As has been noted herein, however, with the present status of the standardization of contract clauses authorized or required for use in negotiated fixed-price supply contracts and the parallel development of ASPR printed forms of contract provisions which include all or substantially all of these clauses, the Basic Agreement has not been the subject of widespread use.