CANCELLATION OF GOVERNMENT CONTRACTS

A Thesis

Presented To

The Judge Advocate General's School, U. S. Army

The opinions and conclusions expressed herein are those of the individual student and do not necessarily represent the views of either The Judge Advocate General's School, U. S. Army, or any other governmental agency. References to this study should include the foregoing statement.

by

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SCOPE

A study of the definition and situations giving rise to cancellation of Government Contracts. Particular emphasis is placed on decisions of the Comptroller General and his reasoning in various cases. This paper considers the effect of judicial treatment of cancellation on the Comptroller General and the remedies available to a cancelled contractor.

TABLE OF CONTENTS

CHAPTER I
INTRODUCTION

Like science, the law is in continuous search for methods of correcting its own peculiar deficiencies. Again, like science, much of the difficulty in finding legal cures is eased once the problem has been isolated and defined. This paper has been written with the intention of defining the problems concerned when government contracts[1] are cancelled after an apparent award and suggestion of possible solutions.

The following examples of cancellation of awards must be clearly distinguished from cancellation of the invitation for bids. Statutory authority[2] exists for the Government to reject all bids and in the particular circumstances of the situation it can readvertise the procurement, cancel the procurement requirement, or seek another method of procuring the item. The bid of the hopeful contractor is merely an offer and may be

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1. Multi-year procurement, with its very special problems, if felt to be a sufficiently large body of law to be treated as a subject in and of itself and will not be considered in this article.
2. 10 U.S.C. 2305(c) (1964), "However, all bids may be rejected if the head of the agency determines that rejection is in the public interest."

rejected at any time before it has been accepted. The awarding of the contract is the acceptance that is so vital to creation of a contractual relationship. Notwithstanding the aforementioned authority, the Comptroller General has maintained the position that although cancellation of the invitation is a discretionary administrative function, such action must be justified by compelling reasons.[3] He has consistently reviewed cancellations of invitations within this strict framework and has held that cancellations for other than compelling reasons were improper.[4] However, the cancelled bidders have no standing to compel award after cancellation has been determined to have been improper. The courts have supported the Comptroller General in this area, both as to the criteria for cancellation of the invitation and the nonavailability of the Statute[5] to the rejected bidder. In Perkins v. Lukens Steel Co.[6] the court upheld

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3. 37 Comp. Gen. 760 (1958); 37 Comp. Gen. 12 (1957); 36 Comp. Gen. 364 (1956).
4. 40 Comp. Gen. 671 (1961); 36 Comp. Gen. 62 (1956).
5. 10 U.S.C. 2305 (1964).
6. Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

the Comptroller General's treatment in prior cases by announcing, "The statutes requiring advertising for bids and award are based upon the most advantageous bid submitted by a responsible bidder were enacted for the benefit and protection of the Government, and confer no enforceable rights upon bidders."

CHAPTER II
DEFINITION OF CANCELLATION

To understand the problems involved when the Government cancels a contract, it is first necessary to define what is meant by cancellation. The definitions in the dictionaries are of little help. Webster[7] defines cancellation as a noun meaning "a deleted part or passage, a passage or page from which something has been deleted," and the verb cancel as meaning "to mark or strike out for deletion, to destroy the force, effectiveness, or validity of, or to bring to nothingness." Black's Law Dictionary[8] defines it as

> to revoke or recall, to annul or destroy, make void or invalid, to set aside; to rescind or abandon; to repeal, surrender, or waive; or to terminate." Cancellation is treated as ". . ., an act which manifests an intent to annul and puts the instrument in condition where its invalidity appears on its face, annulment or abrogation; . . . .

The definitions supplied by the various courts are likewise of little help in understanding the meaning of

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7. Webster's Seventh New Collegiate Dictionary, copyright 1965, Rand McNally & Company, Chicago, Illinois, at 120.
8. Black's Law Dictionary, Fourth Edition, West Publishing Co., 1951, at 259.

cancellation as used in connection with Government contracts. The courts have defined it as being very closely synonymous with revocation and meaning to annul in some cases.[9] In other cases[10] it has been defined as the "termination of the agreement prior to its expiration and in accordance with its provisions."[11]

The dictionary definitions are not descriptive of cancellation of Government contracts because the results of cancellation differ from the results of common law revocation, annulment, and rescission. Cancellation, as the term is used in Government procurement, is unique, having no real counter-procedure in commercial or common law transactions. It's an act bringing the apparent contractual relationship to a close. The transaction is considered void and the attempted terms of the contract may be resorted to by

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9. Glenram Wine & Liquor Corp. v. O'Connell, 67 N.E. 2d 570, 572, 295 N.Y. 336 (1946). Golden v. Fowler, 26 Ga. 451, 464 (1858) to cancel is to annul or revoke. Teeter v. Allstate Ins. Co., 192 N.Y.S. 2d 610, 616, 9 A.D. 2d 176 (1959) - meaning revoke or recall, to annul.

10. Schwartz v. Van Winkle, 47 N.Y.S. 2d 264, 265 (1944).

11. It must be pointed out that the above common law definitions were announced in actions not involving any issue as to the legality of the contract or the competency of the parties.

the contractor. Its uniqueness arises in the consequences which flow from this act by the Government. To understand this special peculiarity one must examine the more familiar methods of terminating contracts.

It is not like rescission as known at common law for there is no requirement, or even any attempt, to restore the cancelled contractor to his former status. At common law a prerequisite for rescission of a contract is the prompt restoration of the other party to his previous position.[12] It is said that the objects of a suit in rescission are to restore the status quo and correct any wrong that has been committed; not to punish a transgressor nor reward the victim.[13] Suits in rescission most frequently arise as the result of fraud, misrepresentation, or mistake and are equitable in nature. Such is not the case when the Government cancels a contract. Clearly, when the Government cancels one of its contracts, the requirement to restore the contractor to his original position is not applied.[14]

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12. U.S. v. Arkansas Mills, 216 F.2d 241 (8th Cir. 1954).
13. Ehrlich v. United States, 252 F.2d 772 (5th Cir. 1958).
14. Ms. Comp. Gen. B-149795, 4 Jan 1963.

The decisions of the Comptroller General[15] and the courts[16] expressly forbid such restoration.

Nor is cancellation of a contract the same as a termination for the convenience of the Government. Most government contracts must contain a termination for convenience clause.[17] Under the standard termination for convenience clause the contract may be terminated unilaterally, by the Government, in whole, or from time to time in part, whenever the contracting officer determines that it would be in the best interests of the Government to do so.[18] Terminations for convenience are not concerned with the legality of the contract. That is, there is no legal impediment preventing continued performance, the only consideration being the best interests of the Government. Convenience terminations arise most frequently when Congress fails to appropriate the money necessary to

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15. Ms. Comp. Gen. B-164826, 29 Aug 1968; Ms. Comp. Gen. B-158902, 21 Oct 1966.
16. Prestex, Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963), United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961); Klein v. United States, 285 F.2d 778 (Ct. Cl. 1961).
17. ASPR Section VIII, Part 7 - requires the clause for all contracts over $2500; ASPR 8-201 (fixed price contracts).
18. ASPR 8-701(2).

continue the contract, when scientific advances make the item presently being procured obsolete, or when the Government's requirements change and the item is no longer needed.[19] In the absence of such a clause the repudiation of the contract would be treated as a breach by the Government.[20] The terminated contract is not treated as being void or annulled and the terminated contractor, unlike the cancelled contractor, is entitled to relief. The measure of that relief depends upon the termination for convenience clause. The clause provides for recovery of costs incurred in performing the contract, including a reasonable profit on such costs.[21] Unlike the remedy for breach of contract, the measure of damages for termination for convenience does not include recovery for anticipately profits. The clause sets the limits on any possible recovery and does not provide for this kind of relief.[22]

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19. Commercial Cable Co. v. United States, 170 Ct. Cl. 813 (1965); 20 Comp. Gen. 358 (1941); 18 Comp. Gen. 826 (1939).
20. United States v. Speed, 75 U.S. 77 (1869); but see United States v. Penn Foundry & Mfg. Co., Inc., 337 U.S. 198 (1949).
21. ASPR 8-701(a).
22. Brown & Son Electric Co. v. United States, 325 F.2d 446 (1963); John Reiner & Co. v. United States, 325 F.2d 438 (1963), cert. denied 377 U.S. 931 (1964); G. L. Christian & Associates v. United States, 312 F.2d 345 (Ct. Cl. 1963), pet. for rehearing denied 320 F.2d 345 (Ct. Cl. 1963).

Thus, not only is relief available, its availability is found in, and limited by, the contract itself. But, as already mentioned, where a government contract is properly cancelled, even this limited recovery may be denied the contractor.[23]

Nor is cancellation the same as termination for default within the meaning of the default clause.[24] Such terminations occur when the contractor fails to make timely delivery or perform adequately under the contract. The terms of the contract itself and the actions of the contractor give rise to this kind of termination. Termination for default can be distinquished from cancellation on these two points, for it is the Government who is the injured party in these situations and not the contractor. However, if the contract is terminated for default improperly, the contractor is provided with a remedy[25] under the disputes clause in the contract. He may appeal the

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23. See discussion p. 3 supra.
24. ASPR 8-707.
25. ASPR 7-103.12(a) (supply contracts); ASPR 7-602.6 (construction contracts); 41 U.S.C. 321, 322 (Wunderlich Act).

determination to terminate for default administratively for a decision by the Armed Services Board of Contract Appeals,[26] or other similar forum; and if unsuccessful there, to the Court of Claims[27] or Federal District Court.[28] If it is found that the contractor was not in fact in default the termination will be converted to a termination for the convenience of the Government and his recovery will be governed by that clause in the contract.[29]

At this point the reader may wonder with justification what is meant by cancellation. Ordinarily, a contract will be cancelled where there is some illegality associated with the transaction between the contractor and the Government. It is the notification by the Government to the contractor that the arrangement between them is considered terminated. For example, where a contracting officer makes an award to other than the lowest responsive, responsible bidder in violation of a statute, the so called contract is void and the contractor is notified of that fact by what we call a cancellation.[30]

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26. ASPR 7-103.12, ASBCA Charter
27. 28 U.S.C. 1491.
28. 28 U.S.C. 1346 - where the amount involved is $10,000 or less.
29. ASPR 8-707(e).
30. Ms. Comp. Gen. B-165835 31 Jan 1969.

CHAPTER III
SITUATIONS GIVING RISE TO CANCELLATION

Cancellation normally arises where the transaction is tainted by some "illegality." This situation may arise through some action on the part of the contractor,[31] but most frequently arises where there has been no fault or wrongdoing by the cancelled contractor. Such cases most commonly occur where the contracting officer lacked the proper authority to enter into the agreement,[32] or when he has erred in making his determination of responsiveness[33] or responsibility[34] of the bidder, or where the bid was mistakenly evaluated.[35] It is at this point that the first conflict as to the treatment to be accorded the contractor makes its appearance. Historically the Comptroller General has argued that it is the public interest and the need to preserve the integrity of the competitive bidding system that is the

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31. United States v. Acme Process Equipment Co., 385 U.S. 138 (1966), reh denied 385 U.S. 1032 (1967)
32. Warren Bros. Roads Co. v. United States, 355 F.2d 612 (Ct. Cl. 1965).
33. 43 Comp. Gen. 761 (1964).
34. Case cited note 32 supra.
35. 46 Comp. Gen. 123 (1966).

paramount consideration in determining whether to cancel a contract or allow continuation or performance.[36] The courts, on the other hand, apply other standards in making their determinations. The judicial tests being the presence of good faith by the parties and the absence of "papable illegality."[37]

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36. 45 Comp. Gen. 325 (1965); Ms. Comp. Gen. B-164826, 29 Aug 1968.

37. Coastal Cargo Co. v. United States, 351 F.2d 1004 (Ct. Cl. 1965); John Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963); Prestex, Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963).

CHAPTER IV
COMPTROLLER GENERAL TREATMENT OF CANCELLATION

The Comptroller General treatment of cancellation seems to be inconsistent. In some cases he will hold that the illegality surrounding the award requires[38] that the award be cancelled while in other cases the holding on similar facts has been that the contract may[39] be cancelled. The cases lend little or no assistance in formulating a rule as to when cancellation will be treated as a requirement or merely allowed, except that the best interests of the Government is usually given as the basis of his ruling.[40]

In a recent decision the Comptroller General held that where the Navy had erroneously evaluated the contractor's bid as being low, the contract must be cancelled.[41] ("Must" is emphasized to bring out the difference in this decision and others where the Comptroller General has taken a more permissive view and has

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38. Ms. Comp. Gen. B-164826 29 Aug 1968.
39. Ms. Comp. Gen. B-165835 31 Jan 1969.
40. 46 Comp. Gen. 745 (1967).
41. Ms. Comp. Gen. B-164826 29 Aug 1968.

held that where the award was illegal the contract "should"[42] be cancelled or "may"[43] be cancelled). The decision stated that the general rule is that an award which is not actually made to the lowest bidder as required by 10 U.S.C. 2305(c)[44] is illegal. In determining whether such an award should be cancelled the controlling factor is to uphold the integrity of the bidding system. It is not enough that the award was made in apparent good faith and appears to be regular on its face. In this case the supplier had incurred substantial expenses in preparing to perform the contract, however, these expenses were not recoverable. The decision stated:

> While the situation as it affects the contractor is unfortunate, the primary consideration is upholding the competitive bidding system. Accordingly, the award to the contractor should be cancelled and the contract should be awarded to the actual low bidder.

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42. Ms. Comp. Gen. B-161448, 12 Apr 1968; Ms. Comp. Gen. B-153923, 13 Jan 1965.
43. Ms. Comp. Gen. B-156723, 21 Jun 1965.
44. 10 U.S.C. 2305 "Formal Advertisements for bids; time; opening; award; rejection "(c) Bids shall be opened publicly at the time and place stated in the advertisement. Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be most advantageous to the United States, price and other factors considered. However, all bids may be rejected if the head of the agency determines that the rejection is in the public interest."

In reaching his conclusion, the Comptroller General distinguished this case from an older case[45] reaching an opposite conclusion on the ground that the earlier case resulted from the contracting officer's erroneous interpretation of the applicability of a tax provision and it was therefore a legal conclusion that constituted the error. In this case the error was one of mathematics.

In a similar case decided shortly after the above Navy case, the Comptroller General again held that where the contracting officer erroneously evaluates a bid, the award that follows such error does not create a binding contract.[46]

> Our office has held that such provisions /referring to 10 U.S.C. 2305(c)/ require that award, if any, be made to the low bidder, with certain exceptions not applicable here, and that an award of a contract by a Government agency contrary thereto is a nullity[47] and confers no rights on the contractor against the United States. Therefore, even when the failure to make award to the lowest responsive, responsible bidder has been occasioned by a mistake on the part of the Government, we have held that administrative officers usually[48] are required to cancel the contract.

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45. 39 Comp. Gen. 503 (1960).
46. Ms. Comp. Gen. B-165186, 7 Nov 1968.
47. Emphasis mine.
48. Emphasis mine.

particularly if such may be done without jeopardizing the interest of the United States.

Here again the Comptroller General supports his holding by citation to several old (in view of subsequent judicial treatment of mistakes by the contracting officer) decisions.[49] With respect to the cancelled[50] portion, Cosmodyne, the cancelled contractor, urged that since it had accepted the award in good faith, a valid contract was created. And, as such the cancelled portion should be treated as a termination for the convenience of the Government or as a change in scope.[51] This assertion was rebuke by the Comptroller General and no termination costs were allowed.

In still another decision involving erroneous evaluation of bids by the contracting officer, the Comptroller General again adhered to the standard of

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49. Ms. Comp. Gen. B-149795, 6 Nov 1962; Ms. Comp. Gen. B-148569, 10 Apr 1962.
50. In this case only two items were cancelled as the contractor remained the low bidder on the remaining portion of the contract which was awarded on an item by item basis.
51. ASPR 1-201.2.

absolute compliance with statutory and regulatory requirements.[52] The rule that an award to other than the lowest responsible, responsive bidder, the good faith of the parties notwithstanding, violates the law and must be cancelled was reiterated. However, in this decision the Comptroller General chose a more recent case to support his ruling.[53]

> It was and is our position that if an award is contrary to statutory and regulatory requirements it cannot operate to create a valid contract, that any proported contract thus made is a nullity and void. . . .[54]

It would appear then, at this point, that the rule concerning cancellation when there has been a showing of noncompliance with a statutory or regulatory requirements is clear and of long standing. However, such is not the case. The rule is neither clear nor of long

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52. Ms. Comp. Gen. B-161722, 11 Oct 1968 (holding that a contracting officer's erroneous determination that the low bidder was unresponsive and apparent oversight of the second-low bidder, rendered the award to the third-low bidder illegal under 10 U.S.C. 2305(c) and required cancellation).
53. Ms. Comp. Gen. B-154530, 15 Jul 1964 (denying that the Comptroller General applies different standards than the courts).
54. Id.

standing, as perusal of the Comptroller General decisions will reveal patent inconsistencies.[55] A more accurate definition of the rule applied by the Comptroller General is that the best interests of the Government, including any possible effect on the competitive bidding system, are paramount to any other consideration in all matters relating to Government contracts.

An award made to a bidder whose product did not comply to the contract specifications was upheld by the Comptroller General because the contract was entered into in good faith, the contractor had spent considerable money to perform under the contract and because the deviation from the specifications was held to be insubstantial.[56] It was said that the bid

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55. Ms. Comp. Gen. B-144012, 16 Jan 1961 (improper contract - not cancelled); 43 Comp. Gen. 323 (1963) (situation would "ordinarily require cancellation" - not cancelled); 45 Comp. Gen. 71 (1965) (improper award - cancelled); 46 Comp. Gen. 123 (1966) (improper award - contract voidable at option of Government; 46 Comp. Gen. 348 (1966) (improper award - cancelled); Ms. Comp. Gen. B-160537, 17 Oct 1967 (violative of statute, but not cancelled); Ms. Comp. Gen. B-161448, 12 Apr 1968 (warrants cancellation, but not if adverse results to U.S. would occur).
56. 43 Comp. Gen. 761 (1964).

actually offered to supply a product that was superior to what was required by the specifications, and with respect to the deviation, that requirement was unnecessary to the Government's needs. These determinations were made after award and were generated by the contractor in the form of a protest to the Comptroller General after the Defense General Supply Center had informed the contractor that the contract was to be cancelled. It is significant to note that the opinion is quick to point out that as a matter of fact the bid was non responsive and the specifications were inadequate.[57] It was held however, that "cancellation would not be in the best interests of the Government."

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57. Id. at 766. "Had this matter been brought to our attention prior to the award of the contract it seems clear that the best interests of the United States would have required cancellation of the invitation and a readvertisement of the Government's needs. However, the deviation in the bid was, concededly, a deviation to a requirement in the purchase description which is actually unnecessary to the Government's needs. We also note that the award was made in good faith and that the contractor, at the express request of the Government to expedite deliveries, has expended substantial sums of money in preparing to meet its obligations under the contract. In view of the foregoing it is our opinion that the best interests of the Government would not be served by cancelling the contract."

Infeasibility of cancellation is sometimes given as the reason for not cancelling a contract that is admittedly violative of statutory and regulatory provisions. In reply to the actual low bidder's protest, the Comptroller General ruled that the contract would not be cancelled because it wasn't feasible to do so.[58] Here again it was readily acknowledged that the bid submitted by the contractor was nonresponsive and should not have been considered by the contracting officer. The determination by the Comptroller General was apparently based upon what was believed to be substantial performance under the contract awarded.[59] Nonperformance by the contractor caused another contractor on the same project to be delayed and thus rendered him unable to perform by his contract date for completion. The result was that the Government's failure to furnish necessary materials

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58. Ms. Comp. Gen. B-153923, 13 Jan 1965 and 20 Oct 1964.

59. However, the subsequent protests by the low bidder brought forth a tacit admission from the Comp. Gen. that that determination was at least in part based on erroneous information supplied by the contractor.

to the second contractor was treated as a breach, and a penalty amounting to $5,600.00 was assessed against the Government. However, the contractor to whom the erroneous award was made agreed to reduce his contract price by the amount of the penalty as consideration for an extension of time for performance.[60]

Why was it not feasible to cancel this contract at the time of the first bid protest? It was conceded that the award was clearly in contravention of the applicable regulations. In terms of cost to the Government, the costs would have been absolutely nothing. For, as we shall see later,[61] at the time of the first protest no tangible benefits had been received by the Government. Yet, the Comptroller General did not cancel. In response to a later protest the Comptroller General adhered to his refusal to cancel the contract by stating:

> Termination of the Certified contract would not be in the best interest of the Government as it would be time consuming and would be extremely expensive from the standpoint that all cabinets presently

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60. This was the contractor's third extension.
61. See discussion at p. 44.

> installed would have to be removed and replaced by reprocurement. Also, such action would further delay the building contractor.[62]

It is not understood to this writer why the Comptroller General ruled that all of the cabinets that had been installed prior to cancellation, or termination, would have had to be removed. Clearly, under the "Termination for Convenience" clause[63] that was required to be in the contract, such is not the case.

In his January 13, 1965 decision concerning this same contract, the Comptroller General simply stated that cancellation would be too expensive and time-consuming, and, since by that date, the contractor had in fact complied with the contract to a large degree, such substantial performance made it not feasible to cancel the contract.

Thus it would appear ultimately, that where a contract has been awarded to other than the lowest responsive, responsible bidder, and the contractor has substantially performed the contract, it is not in the

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62. Ms. Comp. Gen. B-153923, 13 Jan 1965.
63. ASPR 8-701(a), see also ASPR 8-505.

best interest of the Government to cancel the contract. What is in the best interest of the Government seems to take into consideration costs to the Government, time factors and the effect of cancellation on other contractors working on the same project.

Another representative situation is one where the Government awards a contract to a bidder who is responsive to very technical specifications, determined to be responsible, and then cancels the contract.[64] After award, an unsuccessful bidder protested that the specifications were technical to such a degree as to make them restrictive of competition. Upon review it was found that they were not restrictive in light of what was considered to be the requirements of the Government. However, the review also disclosed that what was thought to be required was in excess of the minimum requirements and that a substantial savings could be realized if the contract was cancelled. The requirements could be restated, the procurement re-advertised, and new bids received. This was done.

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64. Ms. Comp. Gen. B-156823, 21 Jun 1965.

The Comptroller General has consistently held in situations like this that the best interests of the Government require that the contract be cancelled.[65] Unless the cancelled contractor has conferred a tangible benefit on the Government prior to cancellation he has no enforceable claim; notwithstanding any actual expenses he may have incurred in his good faith reliance upon the contract. Further, he has no standing to complain that upon re-advertisement certain of his prices may have been exposed to competing bidders, possibly jeopardizing his position through this exposure. The Comptroller General recognizes that it may appear unduly harsh from the contractor's point of view, but offers nothing in the way of relief other than solace.[66]

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65. 46 Comp. Gen. 348 (1966); 46 Comp. Gen. 275 (1966); Ms. Comp. Gen. B-161722, 11 Jan 1968.
66. 46 Comp. Gen. 348 (1966); Ms. Comp. Gen. B-165186, 7 Nov 1968.

CHAPTER V
COURT TREATMENT OF CANCELLATION

The courts have taken a more liberal approach in their treatment of cancellation of contracts. Their efforts to come to the aid of the wrongfully cancelled contractor offer some measure of relief when he is successful, but fail totally when he is not. It is apparent that most cancellation cases do not reach the courts for review; probably because of the costs and the time involved. Perhaps it is felt that court action would only be pouring good money in after bad. Nevertheless, the fact remains that contractors are not generally contesting the rulings of the Comptroller General in the courts.

Two very significant court decisions[67] dealing with the validity of contracts have had but a limited effect on the Comptroller General in his approach to cancellation. In particular, the Reiner case has

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67. John Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963), cert. denied 377 U.S. 931 (1964) and Brown & Son Electric Co. v. United States, 325 F.2d 446 (Ct. Cl. 1963)

caused him to take what might be considered a defensive attitude in reviewing the propriety of contracting officers' actions in cancelling contracts.[68] However, he has also been upheld by the court when his determinations have been sound,[69] and appeal to the judicial forum is not automatic relief for a cancelled contractor.

The facts in the Reiner case are typical of cancellation situations. The invitation for bids stated a desired delivery schedule, but authorized bidders to propose their own, with the caveat that submitted schedules which extended the delivery schedule by more than sixty days beyond the one desired in the invitation. Reiner was sent written notice of award and the formal contract soon followed. Subsequently, he was informed that he was to suspend all operations under the contract until further notice and to so inform all suppliers and subcontractors. By this time Reiner had incurred certain costs under the contract in

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68. 46 Comp. Gen. 22 (1966); 44 Comp. Gen. 221 (1964); 43 Comp. Gen. 761 (1964).
69. Prestex, Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963).

preparation for performance. An unsuccessful bidder protested the award on the ground that invitation was not sufficiently specific to adequately inform bidders as to how they should bid with respect to delivery schedules. The Comptroller General ruled that the award to Reiner was improper and should be cancelled.[70] Reiner was unable to have this decision changed, whereupon the contracting officer informed him that in compliance with the ruling, the contract was cancelled. Reiner then instituted a breach of contract action in the Court of Claims seeking to recover common law damage, i.e., anticipatory profits.

The court held that the award and the resulting contract was valid. In so doing the court stated that the test for validity of a contract is whether the alleged illegality is plain, and that the contractor is to be given the benefit of reasonable doubts to uphold

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70. Ms. Comp. Gen. B-128405, 3 Aug 1956, 17 Sep 1956.

the award.[71] It rationalized that the invitation for bids was issued in compliance with legal requirements and that Reiner's bid was responsive. The award to Reiner by the contracting officer was viewed as an

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71. Reiner, supra 325 F.2d at 440, "In testing the enforceability of an award made by the Government, where a problem of the validity of the invitation or the responsiveness of the accepted bid arises after the award, the court should ordinarily impose the binding stamp of nullity only where the illegality is plain. If the contracting officer has viewed the award as lawful, and it is reasonable to take that position under the legislation and regulations, the court should normally follow suit. Any other course could place the contractor in an unfortunate dilemma. If he questions the award and refuses to accept it because of his own doubt as to possible illegality, the contracting officer could forfeit his legal bond for refusing to enter into the contract. The full risk of an adverse decision on validity would rest on the bidder. If he accedes to the contracting officer and commences performance of the contract, a subsequent holding of non-enforceability would lead to denial of all recovery under the agreement even though the issue of legality is very close; and under the doctrine of quantum meruit there would be no reimbursement for expenses incurred in good faith but only for tangible benefits actually received by the defendant. United States v. Mississippi Valley Generating Co., 364 U.S. 520, 566n.22, 81 S. Ct. 294, 5 L. Ed. 2d 268 (1961); Clak v. United States, 95 U.S. 539, 542, 24 L. Ed. 518 (1877). It is therefore just to the contractor, as well as to the Government, to give him the benefit of reasonable doubts and to uphold the award unless its invalidity is clear."

exercise of his business discretion contemplated in the Armed Services Procurement Act of 1947,[72] as amended. The contracting officer is to be guided by the requirements of the agency and the bid most advantageous to the Government, price and other factors considered in making the award. Clearly, a delivery schedule is included in included in the phrase "other factors considered." The court went on to suggest that the Comptroller General applies criteria other than pure legal principles in determining the legality of an award.[73] Thus disposing

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72. Armed Services Procurement Act of 1947, 41 U.S.C. §152 (1952), as amended.

73. Reiner, supra 325 F.2d at 440 "This inquiry, we believe, is not precisely the same as that which the Comptroller General dealt. Because of his general concern with the proper operation of competitive bidding in government procurement, he can make recommendations and render decisions that, as a matter of procurement policy, awards on contracts should be cancelled or withdrawn even though they would not be held invalid in court. He is not confined to the minimal measure of legality but can sponsor and encourage the observance of higher standards by the procurement agencies. Courts, on the other hand, are restricted, when an invitation or award is challenged, to deciding the rock-bottom issue of whether the contract purported to be made by the Government was invalid and therefore no contract at all--not whether another procedure would have been preferable or better attuned to the aims of competitive bidding legislation.

of the issue of legality, the court turned to the question of how such a cancelled contractor is to be compensated.

The court held that the termination for convenience clause limits the contractor's damages and the common law damages for anticipatory profits are not proper. The court pointed out that the failure of the contracting officer to invoke the termination for convenience clause does not require a holding that the cancellation was a common law breach of the contract.[74] It has long been the law that where a legal right is available to the Government, the failure to assert the right does not extinguish it, and the court may invoke the right at the trial for the first time.[75]

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74. G. L. Christian & Associates v. United States, 312 F.2d 345 (Ct. Cl. 1963), pet. for rehearing denied 320 F.2d 345 (Ct. Cl. 1963) - Even in cases where the parties have specifically agreed to exclude the termination for convenience clause, or it is omitted for any reason, the courts will limit the recovery as if the clause had in fact been included. It was ruled that ASPR procedures have the force and effect of law, and, therefore are available and binding, notwithstanding the actual terms of the contract.

75. College Point Boat Corp. v. United States, 267 U.S. 12 (1925).

This limitation on recovery did not go unprotested. In a strong dissent, Judge Whitaker in the Reiner case pointed out that the contract was cancelled because it was ruled to be a nullity by the Comptroller General in that its award was violative of the applicable statute.

> It is a contradiction to say that it terminated a contract that in law it asserted had never existed. Whether it had a right to do so or not is immaterial, because it did not in fact do so. The possession of a right means nothing unless that right is exercised.[76]

However, the court has remained firm in this area[77] and has continued to allow only termination for convenience settlements and not common law damages.[78] In cases where the contractor is unsuccessful, his recovery is limited to quantum Valebat.[79]

In Prestex[80] the court was tested as to the extent of its liberality in determining the propriety of

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76. Reiner, supra 325 F.2d at 444.
77. Attorneys for G. L. Christian moved for a rehearing before the Court of Claims which was denied and their three attempts to have the matter heard by the Supreme Court have also been to no avail. Certiorari was also denied in the Reiner case.
78. Warren Brothers Roads Company v. United States, 355 F.2d 612 (Ct. Cl. 1965); Coastal Cargo Co. v. United States, 351 F.2d 1004 (Ct. Cl. 1965).
79. Id.
80. Prestex, Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963).

cancellation and the damages available. In that case the court upheld cancellation of the contract where the contractor submitted a sample which was not in conformance with the advertised specifications. When the variance was discovered the contracting officer notified the contractor of the deficiency but he refused to comply with the specifications. The contractor maintained that by accepting his low bid which was predicated on the sample supplied and accepted, such acceptance was a modification of the specifications. The Government refused to accept the cloth and the contractor sold it on the market for a loss and sued to recover the difference between that price and the contract price.

The court had no difficulty disposing of the contractor's contention. It held that acceptance of such a bid was beyond the authority of the contracting officer in that the Armed Services Procurement Regulations forbids award to a bidder who is not responsive. "Indeed, where the specifications in the invitation to bid are at a variance with the contract awarded the successful bidder, the resulting contract may be 'so irresponsive to and destructive of the advertised

proposals as to nullify them.'"[81] The court held that the deviation from the specifications was substantial, after applying the Comptroller General's definition of a substantial deviation.[82]

Turning to the issue of damages the court readily acknowledged that in certain limited cases quasi-contractual relief was available to a contractor whose contract was rescinded because it was found to be invalid. However, such relief is limited by equitable principles which would prevent the United States from being unjustly enriched by such circumstances. Here the United States was not so enriched; it enjoyed no benefits under the contract. As soon as the failure to meet the specifications was discovered the contract was repudiated and none of the material was accepted or used by the Government. The court alluded to the possible bad faith of the contractor in submitting a sample which was misleading both in appearance and in the written description, particularly since the

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81. United States v. Ellicott, 223 U.S. 524 (1912).
82. 30 Comp. Gen. 179 (1950) . . . A substantial deviation is defined as one which affects either the price, quantity, or quality of the article offered.

contractor knew that the sample was not what had been used in many prior years. On the basis of the facts the court distinguished the New York Mail and Newspaper[83] case on the issue of entitlement to damages other than quantum meruit. Therefore since the contractor had delivered no benefit to the government, despite his expenses under the invalid contract, he was entitled to no recovery.

In subsequent cases the court has added the element of good faith by the contracting officer in making the award to the test for validity announced in Reiner. In the Coastal Cargo case[84] the contract was cancelled when it was learned that a lower bidder's bid had not been considered because the bidder lacked the required certification by the Small Business

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83. New York Mail and Newspaper Transportation Company v. United States, 154 F. Supp. 271 (Ct. Cl. 1956), cert. denied. 335 U.S. 904, (1957) where contract was cancelled as being in violation of the requirement to advertise. The court held that the contract had already been executed to a large extent and that damages were not restricted to strict quantum meruit because there had been a bona fide purpose to render services to the Government under an agreement that had been fully approved by the Postmaster General.

84. Coastal Cargo Company, Inc. v. United States, 351 F.2d 1004 (Ct. Cl. 1965).

Administration. The contracting officer made a determination that it was necessary to award with contract immediately but did not seek certification from the Small Business Administration as required by appropriate regulations. He awarded the contract instead to Coastal Cargo and then issued a certificate of urgency to explain his action. The Government contended that the contracting officer violated the applicable regulations when he failed to refer the matter of competency to the Small Business Administration and therefore the subsequent award was illegal. The court found that the contracting officer was acting in good faith when he sought to come within an exception to the requirement that a certificate of competency be obtained from the Small Business Administration. The court further held that the only impediment to the contract was the failure to issue the certificate of urgency within the required time limits, but held that the determination of urgency was made timely and the court does not look to form, but rather to substance. It did limit recovery to the termination for convenience clause, relying on the Reiner decision for authority

that the Government may look to that clause even when it was not invoked by the contracting officer. The same results obtained in a similar case where the court announced that the illegality complained of was not present.

> If the contracting officer acts in good faith and his award of the contract is reasonable under the law and regulations, his action should be upheld. In other words, a determination should not be made that a contract is invalid unless its illegality is palpable.[85]

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85. Warren Brothers Roads Company v. United States, 355 F.2d 612 (Ct. Cl. 1965).

CHAPTER VI
EFFECT OF COURT DECISIONS ON COMPTROLLER GENERAL

The reference in Reiner that the Comptroller General applies other than pure legal standards in determining the legality of contracts did not go unanswered. The Comptroller General responded that where an award is found to have been made contrary to statute it may be cancelled.[86] The Comptroller General has stated that in determining whether the award is illegal only the prevailing standards of law are applied. However it is the Comptroller General's position that ". . . if an award is contrary to statutory and regulatory requirements it cannot operate to create a valid contract; that any purported contract thus made is a nullity and void."[87]

Is the Comptroller General saying in some cases, that an illegal contract is voidable[88] but not in all?

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86. Emphasis mine.
87. Ms. Comp. Gen. B-154530, 15 Jul 1964 in an advisory opinion to the Veterans Administration requesting propriety of cancelling a contract on a "no cost" basis.
88. 46 Comp. Gen. 123 (1966) - held to be voidable at the option of the Government where bid was erroneously evaluated.

That appears to be the result in certain cases where he has held it to be in the best interests of the Government to continue with the arrangement even though apparently contrary to law.[89] I use the term "arrangement" for lack of a better description. That a contract which is entered into contrary to law is a nullity and void is also the position of the Comptroller General.[90] What then do we have, a voidable nullity? Are there comparative degrees of illegality in Government contracts? Or is the Comptroller General really considering the public interest in each specific instance as the most compelling element in interpreting the legal status of the contract.[91] Or is he applying Reiner and Brown standards in some cases and different standards in others? Each time this thought is aired, he sharply

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89. 43 Comp. Gen. 761 (1964) (distinguishing the Prestex Case).
90. Ms. Comp. Gen. B-154530, 15 Jul 1964.
91. 46 Comp. Gen. 745 (1967) . . . concluding that the award under circumstances much like those in Reiner was improper because of ambiguous delivery terms. Contract was not cancelled because the award was already completed, the good faith of the contracting officer in making the award was demonstrated, and found not to be in the best interests of the Government to cancel. The contractor in this case was the low bidder.

responds in the negative,[92] but the decisions indicate the contrary. However, the best interest of the government is cited as the reason in most cases. It may well be that included in the best interests of the Government, as determined by the Comptroller General, are the considerations and standards referred to in Reiner, Brown and later cases.

How does one determine what is in the best interest of the Government and who should make the determination? The rule as to who makes the latter determination is clear and has withstood the test of time. Such a determination is a matter for administrative determination, usually by the contracting officer. It is settled that a contracting officer may cancel a contract he was authorized to make when the public interest requires it.[93] Additionally, in the absence of an abuse of discretion or wrongdoing by a Government agent, the Comptroller

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92. 43 Comp. Gen. 761 (1964) "With respect to the Reiner case, . . . no more need be said than that we are in complete disagreement with the philosophy that this Office applies higher or different standards than are applied by the courts in determining whether a contract award is illegal."
93. 29 Comp. Gen. 36 (1950); 18 Comp. Gen. 826 (1939).

General will not attempt to substitute his judgment for that of the contracting agency. Any attempt to define "best interests of the Government" would result in a very vague and general description; it is simply too broad a matter to be cramped into any single definition. What it is today may not be what it was yesterday or will be tomorrow. It has been construed on an "as needed" basis within the framework of individual cases, emphasizing certain considerations more often than others. Its worth in contract cases should be more in the area of predictability than in definition, however the personality of the decision maker is of critical consideration when judging its value. "The soundness of an opinion on public policy depends upon experience and is in proportion to the knowledge of the past and the intellectual power of the one who holds it."[94]

A survey of the announced considerations in recent cases and decisions will enable a cancelled contractor to predict the outcome in his particular case only to a very

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94. A. Corbin, Corbin on Contracts, (one volume Edition, at 1160, 1952).

limited degree. Such items as savings to the Government,[95] termination costs,[96] urgency of the requirement,[97] good faith,[98] and the effect on competitive bidding[99] are frequently uttered in connection with the term "public interest." In cases where the contracting officer has erroneously awarded the contract to other than the lowest bidder it has been held to be in the public interest not to cancel where the parties were acting in good faith and the contractor has completely performed,[100] or the contractor has spent substantial sums towards performance.[101] Comparison of those decisions with others having essentially the same fact

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95. Ms. Comp. Gen. B-156823, 21 Jun 1965.
96. Ms. Comp. Gen. B-161991, 15 Sep 1967.
97. 46 Comp. Gen. 123 (1966); Ms. Comp. Gen. B-165835, 31 Jan 1969; Ms. Comp. Gen. B-160537, 17 Oct 1967.
98. 46 Comp. Gen. 745 (1967); Ms. Comp. Gen. B-161991, 15 Sep 1967 - where because the contracting officer and the contractor "appear to have acted honestly and reasonably and because we are advised termination costs would be excessive. . . . do not think the present contract should be disturbed."
99. Ms. Comp. Gen. B-164826, 29 Aug 1968.
100. Ms. Comp. Gen. B-154976, 15 Sep 1964; 43 Comp. Gen. 323 (1963).
101. 43 Comp. Gen. 204 (1965).

situations where the contracts were cancelled[102] underscores the dilemma of the contractor. The contractor in these latter situations can expect only a rejection of his claim and an expression of futility by the Comptroller General.[103] An attempt to reconcile the decisions in cases where the specifications were declared defective leads to the same results.[104] A

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102. 46 Comp. Gen. 348 (1966) - where the cancelled contractor was only seeking reimbursement for the premiums paid for performance and payment bonds that were required under the cancelled contract; Ms. Comp. Gen. B-164826, 29 Aug 1968.

103. Ms. Comp. Gen. B-149795, 4 Jan 1963 cancelled because of erroneous bid evaluation, "It may appear unduly harsh to require a contractor who acted in good faith to absorb the costs applicable to those items undelivered at the time of cancellation."; 46 Comp. Gen. 348 (1966) "we recognize that it may appear unduly harsh to require a contractor who acted in good faith to absorb the costs applicable to procurement of the performance and payment bonds required before performance could commence under the contract."; Ms. Comp. Gen. B-165186, 7 Nov 1968.

104. 46 Comp. Gen. 745 (1967) specifications as to delivery were held improper, but because award was made in good faith best interests of the Government militated against cancellation; 47 Comp. Gen. 448 (1968) brand name or equal procurement had defective specifications which did not correctly state the minimum requirements of the Government. Cancellation was not required "due to the urgency of the procurement."; Ms. Comp. Gen. B-156723, 21 Jun 1965 Specifications did not accurately state the requirements of the Bureau of Engraving. It was discovered only upon protest by a nonresponsive bidder that the specifications were overstated. The contract was cancelled.

careful reading of the cases discloses that where there has been a significant pecuniary advantage to the Government it is frequently said that it would not be in the best interests of the public to cancel.[105] Although the Comptroller General denies that the motivating factor in determining what's in the best interest of the Government is the best financial position, in those cases where there are no other compelling reasons, no other explanation seems plausible.[106] The urgency of the procurement is frequently the determinant that the public interest[107] requires that the award not be disturbed; likewise the fact that the contractor has already substantially performed[108] is used as the determinant. In certain cases the costs to the Government in cancelling are weighed against continuation and

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105. 45 Comp. Gen. 325 (1965) "The maintenance of competitive bidding procedures, . . . is infinitely more in the public interest than the obtaining of a possible pecuniary advantage in a particular case by a violation of the rules."
106. 46 Comp. Gen. 745 (1967).
107. 47 Comp. Gen. 448 (1968); 46 Comp. Gen. 123 (1966).
108. 47 Comp. Gen. 409 (1968); 46 Comp. Gen. 745 (1967).

the contract is not cancelled.[109] Clearly, such a guage should not be employed. Except for the administrative costs of a new procurement, the only costs to the Government would be for items received and accepted prior to cancellation. Since the recovery limited by the courts and the Comptroller General is for quantum valebat, there can be no expenses for other than retained tangible benefits.[110]

Often an award which would ordinarily be void is not cancelled because of extraordinary overriding considerations. For example where the contracting officer's evaluation of the bids is erroneous thus making his award to the contractor a violation of 10 U.S.C. 2305(c). Such a case arose as recently as January 1969.[111] In this case the Government's stock of the item was depleted after the contract had been cancelled and an immediate need existed to fill orders. The contracting officer was advised to rescind the

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109. 46 Comp. Gen. 745 (1967); Ms. Comp. Gen. B-161491, 15 Sep 1967.
110. United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961); Ms. Comp. Gen. B-165186, 7 Nov 1968.
111. Ms. Comp. Gen. B-165835, 31 Jan 1969.

cancellation, upon agreement by the contractor to reduce his price to the amount quoted by the lowest bidder. If the contractor did not agree to these terms, the contract was to remain cancelled and award to be made to the low bidder. Why, in this case, was the contractor forced to reduce his price when in other cases where cancellation would have been proper, no such requirement was imposed?[112] This procedure certainly doesn't uphold the integrity of the competitive bidding system. Not only is the Comptroller General saying that contracts made in violation of laws and regulations are voidable in some, but not all cases, but whether or not they are cancelled depends upon the ability of the contracting officer to negotiate a contract, the terms of which have already been dictated.

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112. Ms. Comp. Gen. B-161448, 12 Apr 1968; 46 Comp. Gen. 745 (1967).

CHAPTER VII
VIOLATIONS OF COLLATERAL STATUTES

The discussion to this point has been primarily concerned with cancellation of contracts resulting from some illegality in the award caused by the conduct of the Government. Consider now, the situation where the illegality results from the conduct of the contractor. Here the concern is not so much with the illegality surrounding the award of the contract as with the conduct of the contractor, which may be violative of one of the collateral statutes[113] concerned with Government contracts. Such a situation occurred in the case of United States v. Acme Process Equipment Company.[114] Acme involved a violation of the Anti-Kickback Act.[115]

This Act provides that any fee, commission, gift or gratuity of any kind paid by a subcontractor, directly or indirectly, to any officer, agent, employee, or partner of a prime contractor holding a negotiated

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113. Several statutes provide that in the event of non-compliance, the contract may be cancelled. E.g. Davis-Bacon Act, 40 U.S.C. §276a-1 (1964); Walsh-Healy Public Contracts Act, 41 U.S.C. §36 (1964); Service Contract Act of 1965, 41 U.S.C. 351-357 (1965); Executive Order 11246, 28 Sep 1965 (Non-Discrimination in Employment) required to be provided in the contract.

114. United States v. Acme Process Equipment Co., 385 U.S. 138 (1966), reh den 385 U.S. 1032 (1967)

115. 41 U.S.C. §51-54 (1964).

contract with the Government, as inducement for the award of the subcontract, is prohibited. The Act provides for two express sanctions for its violation: criminal penalties of fine or imprisonment against individuals who make or receive kickbacks, and recovery of the amount of the kickback by the Government to the extent it inflated the contract price. The Act as first legislated in 1946 was limited to specific types of negotiated contracts. Another feature of the 1960 amendment was that it made the civil sanction retroactive to allow the Government to recover kickbacks on prior contracts. The Act did not provide for cancellation of a contract so tainted and a literal reading makes it applicable to kickback arrangements entered into prior to the award.

In Acme the Supreme Court expanded the sanctions available to the Government by vigorously upholding the cancellation of the contract. Further, in an unusual approach to statutory interpretation the court unanimously held that when such statutes are violated the public good requires that they be cancelled.

The facts in Acme were that at least five subcontracts were obtained through kickbacks paid to three of Acme's employees. Acme had been warned that one of these employees had been suspected by the Army of having violated the restrictions of contingent-fee arrangements in his dealings with other Government contractors. However, no evidence was produced and no action was taken against him by Acme until the kickback activities of the three were known. At that time the president of the corporation caused their resignations. The Government cancelled the contract on the ground that the Anti-kickback Act had been violated, where upon Acme sued for breach of contract.

The Court of Claims held that the Anti-Kickback Act did not authorize cancellation of contracts and awarded judgment for Acme.[116] The Supreme Court held that it does.

Applying the rationale of United States v. Mississippi Valley Co.[117] that "a statute frequently implies that a contract is not to be enforced when it arises

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116. 347 F.2d 509 (Ct. Cl. 1965).
117. United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961).

out of circumstances that would lead enforcement to offend the essential purpose of the enactment,"[118] to the facts in the Acme case, the Court failed to give credence to a vital distinction made by the Court of Claims. In the Mississippi Valley case the statute involved did not provide for a civil remedy as did the Anti-Kickback Act. There the cancellation was allowed on the gound that nonenforcement was essential to effectuating the public policy embodied in the Act, where there was no civil remedy. In reaching the same conclusion, the court in Acme said:

> There is absolutely no indication in the legislative history of the Anti-Kickback Act that Congress, in providing a civil remedy for a more tangible evil, intended to preclude other civil sanctions necessary to effectuate the purpose of the Act.

The court went on to add that nothing in the Act specifically precluded them from providing additional sanctions not necessarily considered by Congress. The holding was further justified on the grounds that long-standing public policy against the evils of kickbacks required such action to comply with Congress' 1960

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118. Acme, supra, 385 U.S. at 145.

attempt to close all the loopholes in the 1946 version of the Act. And, "it is the inherent difficulty in detecting corruption which requires that contracts made in violation of the Anti-Kickback Act be cancelled."[119]

No mention was made of possible compensation for goods already accepted by the Government under such a contract. However, it would be difficult to conceive of the notion that the Government would cause a forfeiture, even in those cases in which the contractor commits a criminal act in violating a statute. If the contract is unenforceable, nothing would preclude the Government's return of previously accepted, but unused, goods to the contractor, thus defeating any argument that it was unjustly enriched. As in cases such as Acme, where the product procured was recoiless rifles, the contractor who perhaps has already substantially performed is left in a very strained position. He has no ready market to dispose of his product and if the Government has not already accepted his goods, he stands to lose all.

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119. Acme, supra, 385 U.S. at 148. (Emphasis mine).

CHAPTER VIII
CONCLUSIONS

Must a Government contractor live in fear that his contract may be cancelled after he has spent considerable time, effort, and money in a good-faith effort to perform? Must he rush to deliver his product so that in the event of cancellation his losses will be mitigated? And must he perform with the gnawing anxiety that he may be cancelled because of a mistake by an agent of the Government? Certainly the answer to the above questions should be an unqualified no. However, that is not the case. Positive legislative relief is needed to overcome the problems of cancellation. Allusion to the wispy legal phrases such as "public policy" and "the best interests of the Government" has proven to be an inadequate method of resolution. Attempting to resolve the problem in certain selected situations through the use of Public Law 85-804 is a frustrating experience for both the Government and the contractor.[119] Its availability

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119. 50 U.S.C. §1431-1435 (1964) allows agencies of the Government who exercise functions connected with national defense to give limited relief in certain cases when it is deemed that such action would facilitate the national defense.

is limited, in that the Act specifically provides that it shall not be construed as authority to negotiate for contracts that are required to be formally advertised.[120] Nor may the Act be used as authority to amend a contract so as to increase the contract price to an amount higher than the rejected bid of the lowest, responsible bidder.[121] The Act doesn't become of any real help to a cancelled contractor except to the extent that it seems to say he may be entitled to some compensation where there was no formal contract. However, it must be borne in mind that the Comptroller General has already asserted his broad power with respect to the contract and that his approval of the voucher for payment is necessary. It is not likely that he will, in effect, reverse himself and pay the contractor. His position, that contracts made in violation of the statutes or regulations are void except when it is in the best interests of the Government

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120. 50 U.S.C. §1432(c) (1964).
121. 50 U.S.C. §1432(e) (1964).

to continue them, negates the relief that might have been forthcoming. Thus relief under this Act is not easily accessible.

Nor is the cancelled contractor likely to obtain a more favorable result under the "Meritorious Claims Act."[122] This Act provides that the Comptroller General shall, in effect, sponsor a bill for the contractor's relief in a case which the Comptroller General decides to be meritorious. No further discussion under this Act is necessary to see the futility that faces the contractor.

Only Congress can adequately provide the relief that is needed. It appears unreasonable that the Government should have this awesome power over a contractor, which if exercised, could result in the inequitable conclusions such as discussed above. Legislation is essential to protect the Government as well as the contractor. Relief in the form of a mandatory contract provision providing that in the event the award is cancelled, compensation will be allowed to the extent of actual expenses incurred, plus a

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122. 31 U.S.C. §236 (1928).

reasonable profit on such expenses, conditioned on the good faith of the contractor. An easy way to accomplish this kind of relief would be to amend the "Termination for Convenience" clause to provide that in the event the contract is cancelled by the Government, and not due to the contractor's misconduct, the cancellation shall be treated as a termination for the convenience of the Government.

The Government has consistently maintained that it is to be bound by the usual rules of agency, but is not estopped from denying the lack of authority of its agents.[123] However, such a policy is unrealistic in light of the extremely complex and technical requirements of doing business with the Government. The great majority of the situations in which contracts have been cancelled have arisen as a result of the mistakes or misinterpretation of the Government agent, not the contractor. Although there has been some liberalization in connection with the "apparent

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123. United States v. Zenith-Godley Co., 180 F. Supp. 611 (S.D.N.Y. 1960); 259 F.2d 634 (2d Cir. 1961); Kelley v. United States, 91 F. Supp. 305 (Ct. Cl. 1950), cert. denied 340 U.S. 850 (1950), reh den 340 U.S. 898 (1950).

authority" of Government agents, contractors still face the harsh reality of cancellation and/or the expense of a law suit whenever the contracting officer makes the award. Only relief in specific statutory language can protect the contractor from paying for the mistakes of the Government. Until that time contractors must struggle with the vagueries of public policy, best interests of the Government, and the harsh rules of specific authority.

In so doing, it is submitted, the contractor hedges against possible cancellation, with inadequate recovery, by inflating his bid. Surely it cannot be presumed that most Government contractors are uninformed of the decisions of the Comptroller General and the Court of Claims. Likewise, it must be presumed that being reasonably sound businessmen, the risk of cancellation has been considered in determining the bid offered. Thus it may well be more in the public interest to alleviate this bid-factor from Government contracts by legislating relief to cancelled contractors who have suffered loss through no fault of their own.

TABLE OF CASES, STATUTES AND REGULATIONS

PAGES

United States District Courts

State Courts

Comptroller General Decisions - Unpublished

Federal Statutes

10 U.S.C. §2305 (1964).

28 U.S.C. §1491 (1964).

28 U.S.C. §1346 (1964).

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Regulations

ASPR 1-201.2.

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