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The Scope and Limitations of the Implied Warranty on Federal Government Design Specifications

INTRODUCTION

This article will focus on the scope and limitations of the implied warranty that originates when a contractor uses government design specifications to perform a government contract. The scope of the implied warranty is very broad, covering the suitability of the finished product, method and timeliness of manufacture, and the accuracy of the specifications. Limitations on the implied warranty include caveatory or disclaimer provisions included in the contract, the contractor's unjustifiable reliance on the specifications, the necessity of showing commercial impracticability, the contractor's authorship of the specifications, and the authorization to undertake alternative methods of performance.

Frequently, the inadequacy of a government design specification is not apparent and this fact can be determined only after some or all of the work has been performed on the contract. At common law, the implied warranty rule was developed to protect the contractor from unanticipated obligations imposed by the contract. Stated in another way, if the contractor performed in accordance with the specifications, he was deemed to have met his contractual obligations. Thus, any additional costs resulting from the defective specifications were recoverable.

SCOPE OF THE IMPLIED WARRANTY

A. *Suitability of the Finished Product*

1. The Government's Duty of Due Care

The common law implied warranty rule was incorporated into government contracts law by *United States v. Spearin*.¹ In *Spearin*, the plaintiff contracted with the government to construct a drydock in conformity with plans and specifications supplied by the government. The plans and specifications called for the relocation of a sewer, which plaintiff completed and which was accepted by the government. About a year after its relocation, the

1. 248 U.S. 132 (1918).

sewer burst, flooding the drydock. Plaintiff promptly notified the government of his unwillingness to rebuild the sewer and finish the rest of the construction unless the government promised to pay for the damages incurred and also agreed to assume responsibility for future damages. Insisting that it was plaintiff's responsibility to remedy the existing conditions, the government terminated the contract and took possession of the plant and materials at the worksite. Plaintiff then sued for breach of contract.

In allowing plaintiff's claim, the Court applied the common law rule which placed responsibility on the government for the consequences of defects in government-prepared specifications which the contractor was required to follow. There is an implied warranty that if the specifications are followed, a suitable finished product will be produced.² This implied warranty is based on the presumed expertise of the government and cannot be obviated by general clauses in the contract requiring the contractor to inspect the site, study the specifications or assume responsibility for the work until completion and acceptance.³

These specifications, however, do not have to be perfect. The government is allowed a reasonable number of errors as long as the specifications have been prepared with reasonable care and are of average quality as judged by industry practices. This rule was stated in *John McShain, Inc. v. United States*:

Although Government-furnished plans need not be perfect, they must be adequate for the task or "reasonably accurate." Here, the defendant, in its haste to meet a fiscal year deadline, failed to have the drawings prepared with ordinary care, and they were issued before necessary checking was accomplished. Such "failure to be reasonably careful in the preparation of the plans" is basis for a breach claim. The evidence clearly demonstrates that the drawings and addenda originally provided by the defendant were not sufficiently legible or coordinated to permit satisfactory construction of the desired building. Thus, defendant is liable for breach of warranty in

2. *Id.* at 135.

3. *Id.* at 137. The government inserted three general exculpatory clauses in the contract with *Spearin*:

"271. Examination of site.—Intending bidders are expected to examine the site of the proposed dry-dock and inform themselves thoroughly of the actual conditions and requirements before submitting proposals."

"25. Checking plans and dimensions; lines and levels.—The contractor shall check all plans furnished him immediately upon their receipt and promptly notify the civil engineer in charge of any discrepancies discovered therein The contractor will be held responsible for the lines and levels of his work, and he must combine all materials properly, so that the completed structure shall conform to the true intent and meaning of the plans and specifications."

"21. Contractor's responsibility.—The contractor shall be responsible for the entire work and every part thereof, until completion and final acceptance by the Chief of Bureau of Yards and Docks, and for all tools, appliances, and property of every description used in connection therewith. . . ."

the furnishing to plaintiff of defective drawings.⁴

The standard of reasonableness is tested by the end result. If the specifications are followed but the end result is an unsuitable or unusable product, the government will have breached its duty of reasonable care. For example, in *R.E.D.M. Corporation v. United States*,⁵ the court, in awarding damages to a contractor who was unable to attain the contract's mass production goals by using government specifications, stated:

In light of the singularly contrary purport of all of its factual determinations relevant to the problem of arming, it was plain error for the Board to refuse to acknowledge, simply because plaintiff experienced less than total arming test failure, that the contract drawings were defective in expressly authorizing too broad a range of leaf metal thickness to insure proper arming of the completed fuze assemblies.

The fact that tolerance specifications yield some acceptable finished articles clearly does not mean that they may not be deemed defective for purposes of the author's liability to the user. In *Ithaca Gun Co. v. United States*, the court did not hesitate to declare tolerance specifications for machine gun subassemblies defective even though some of the components that were manufactured according to those specifications fit together satisfactorily. In awarding the manufacturer reimbursement of additional costs incurred in attempting to achieve satisfactory results by following the Government's original specifications, the court expressed the liability standard applicable to tolerance specifications included in Government contracts as follows. Unless some reason therefor is indicated, contractors normally are not required, prior to bidding, to undertake an expensive and time-consuming "tolerance check" with respect to every possible permitted dimension of every component simply to verify the accuracy of the Government's drawings and their suitability for the production of a properly functioning end item. Contractors are ordinarily entitled to assume that parts manufactured in compliance with the prescribed dimensions and permitted tolerances, even the extremes thereof, will, when joined, properly function.⁶

The government may breach the implied warranty of suitability of the finished product by omitting vital information from the specifications. Such an omission may entitle the contractor to damages on the theory that it is equivalent to a positive statement by the government of the non-existence of certain facts. In *Michigan Wisconsin Pipeline Company v. Williams-McWilliams Company*⁷ the contractor, while dredging a bay under a government contract, damaged a natural gas pipeline belonging to a third party, who then brought suit against the contractor. The contractor contended that the government should be held respon-

4. 412 F.2d 1281, 1283 (Ct. Cl. 1969).

5. 428 F.2d 1304, 1309 (Ct. Cl. 1970).

6. *Id.* at 1308.

7. 551 F.2d 945 (5th Cir. 1977).

sible for the accident because the government specifications did not indicate the existence of any pipelines. The court agreed, stating this omission amounted to a positive statement of their non-existence. Thus, the absence of depiction is just as much an item of information upon which the contractor may rely as depiction would be, given a prolonged course of conduct justifying contractor reliance on the government providing this information one way or the other in specification drawings.⁸ In such cases, the contractor is entitled to rely on the government specifications, and it is not incumbent on him to make an independent investigation into their accuracy.⁹

2. Duration of the Implied Warranty and Standing to Sue Thereunder

Although *Spearin* represented the initial attempt to define the scope of the implied warranty of suitability, questions concerning the duration of the implied warranty of suitability and standing to sue thereunder were not resolved in that case. In *Poorvu v. United States*¹⁰ the Post Office Department obtained an assignable option to purchase certain land on which the construction of a new post office facility was planned. The POD then hired an architect to design and supervise the project. The architect's survey of the area showed that, due to soft subsurface conditions, pilings would be needed both under the building and in the parking and truck maneuvering areas. Because the cost estimates were excessive, pilings in the outside areas were eliminated from the specifications. Thereafter, the POD entered into a contract with one Forman under which he agreed to take over the POD's option to purchase the land, construct the post office facility in accordance with the specifications prepared by the architect, and then lease back the property to the POD. Three years later, Forman conveyed the property and assigned the lease to plaintiffs. Plaintiffs experienced no difficulty in the management of the property until breaks in the waterline to the building were discovered. These breaks caused the building to settle. Had construction proceeded in the manner originally proposed by the architect, the extensive

8. *Id.* at 951.

9. In *Hollerbach v. United States*, 233 U.S. 165, 172 (1914) the Court held that positive statements in the specifications that the dam which the contractor was scheduled to repair was backed with broken stone, sawdust, and sediment relieved the contractor from the responsibility of investigating the dam site to determine the character of the filling behind the dam and the accuracy of the specifications. *See also* *Mountain Home Contractors v. United States*, 425 F.2d 1260, 1264 (Ct. Cl. 1970); *Maurice Mandel, Inc. v. United States*, 242 F.2d 1252, 1255-56 (8th Cir. 1970).

10. 420 F.2d 993 (Ct. Cl. 1970).

damage to the building would not have occurred. Plaintiffs, claiming that the POD breached the implied warranty of suitability, sued for the damages inflicted on the building.

Two of the issues confronting the court were whether or not the case was controlled by *Spearin* due to the fact the damage occurred not during construction but several years later, and secondly whether plaintiffs, as assignees, had standing to sue. As to the first issue, the court held that the time when the defects in the specifications first appeared was unimportant:

It would make little sense to impose the obligation of an implied warranty and then limit the life of the warranty to the period of construction. It is an implied warranty that the plans, if followed, will result in a properly constructed building; not merely a warranty that the contractor will be able to build a building within a given time period for a certain price.¹¹

As to the second issue, the court held that the plaintiffs, as assignees, had standing to sue, citing the Restatement of the Law of Contracts and noting that the Anti-Assignment Act was inapplicable.¹²

3. Interagency Liability for the Implied Warranty

Generally, an independent federal agency will not be charged with another federal agency's contractual responsibilities.¹³ In effect, this means that a contractor will find it difficult to try to hold one agency responsible for the implied warranty created by another. The contractor may succeed, however, if he can prove the existence of an inter-agency relationship, involving a meaningful link between the agencies.¹⁴ Once an inter-agency relationship exists, there is a mutual duty of disclosure.¹⁵ The first agency must indicate to the second agency that it may be responsible for the implied warranty, although the second agency's actual knowledge on this matter is not controlling.¹⁶ The key factor in upholding the implied warranty against the second agency is establishing that the contractor reasonably believed that the second agency was aware of it.¹⁷ In *L.W. Foster Sportswear Co., Inc.*

11. *Id.* at 1000.

12. *Id.* at 1001-03.

13. *J.A. Jones Construction Co. v. United States*, 390 F.2d 886, 891 (Ct. Cl. 1968).

14. *L.W. Foster Sportswear Co., Inc. v. United States*, 405 F.2d 1285, 1291 (Ct. Cl. 1969).

15. *Id.*

16. *Id.*

17. *Id.*

v. United States,¹⁸ plaintiff, from 1949 to 1956, successfully manufactured flying jackets from the Navy under a series of contracts. The Navy permitted plaintiff to deviate from the specifications, which were defective, so that the contracts could be performed. In 1956 the Army assumed responsibility for purchasing the jackets and, subsequently, insisted on strict compliance with the defective specifications. Plaintiff then requested reimbursement for the additional costs incurred. The Army argued that plaintiff assumed the risk because it knew from the previous contracts that acceptable flying jackets could not be made by adhering to the specifications. The court, however, stated that since the Navy waived adherence to the specifications on the previous contracts, plaintiff, with justification, did not expect that it would ever have to perform using the original specifications and, therefore, did not assume the risk.¹⁹ The court concluded that, even though there had been a formal change in the procuring agencies, the inter-agency relationship between the Navy and the Army made it reasonable for plaintiff to believe that the Army would continue the Navy's policies respecting the manufacture of the flying jackets.²⁰ Accordingly, the Army also impliedly warranted the adequacy of the specifications.

The outcome may be different if the government's waiver is less than absolute or if it is only a partial waiver.²¹ The implied warranty of suitability may be destroyed if the government has been inconsistent in granting waivers or if the contractor has been warned that waivers will be granted only for certain aspects of the contract.²²

4. Hybrid Design and Performance Specifications

There are several varieties of specifications. Design specifications generally include information about measurements, tolerances, materials, in process and finished product testing, quality control, and inspection procedures. Performance specifications state the performance characteristics desired for the item or items to be manufactured, but are silent about the manner in which this is to be accomplished. With regard to performance

18. *Id.*

19. *Id.* Even if the specifications are *free from defects*, the contractor's reasonable belief as to the *waiver of performance* under the specifications is grounds for relief when the government later ends its silence on the matter and asks the contractor to follow the specifications. *Gresham and Company, Inc. v. United States*, 470 F.2d 542, 554 (Ct. Cl. 1972).

20. 405 F.2d at 1291.

21. *Doyle Shirt Manufacturing Corp. v. United States*, 462 F.2d 1150, 1154 (Ct. Cl. 1972).

22. *Id.*

specifications, implied warranty of suitability does not attach.²³ There is considerable difficulty, however, in the fact that many specifications combine both design and performance features. If the contractor complies with government-supplied design specifications, but is unable to meet performance requirements, is he nevertheless entitled to relief? This issue, although not addressed in the *Spearin* case, was settled by subsequent cases. In *Hol-Gar Manufacturing Corporation v. United States*,²⁴ the government drafted specifications for the manufacture of generator sets. The specifications established definite size and weight limitations, set forth environmental restrictions, and also designated that the sets be operable twenty-three hours a day for six months with only normal maintenance. Several years later, upon discovering that the desired performance requirements could not be met, the government changed the specifications. This change allowed the contractor to complete the contract. It was held that the contractor was entitled to recover the additional money that was spent in trying to follow the defective specifications, irrespective of its performance aspects.²⁵

This principle is *a fortiori* applied when the government itself questions the adequacy of its own specifications.²⁶ This may occur when the contracting officer employs an expert to study the feasibility of achieving performance requirements and the expert's report on this subject is unfavorable.²⁷

If the information contained in the design specifications is fragmentary, the contractor may be liable for failing to achieve per-

23. See, e.g., *John Thomson Press and Manufacturing Co. v. United States*, 57 Ct. Cl. 200, 209 (1922). In that case, the contract required that the projectiles manufactured satisfy standards established by the government inspectors. After the government rejected the projectiles manufactured by plaintiff as not conforming to the specifications, the court upheld the government's rejection and stated that there was no liability on the part of the government to pay for the rejected projectiles because the government did not indicate the method of manufacture. The court observed that "it was for the plaintiff to meet these requirements of the specifications as it saw fit."

The government may not be absolved of liability, however, if it breaches an independent duty to disclose information or if the performance specification embodies a material misrepresentation which causes the contractor to be misled. *Helene Curtis Industries, Inc. v. United States*, 312 F.2d 774, 778 (Ct. Cl. 1963).

24. 360 F.2d 634 (Ct. Cl. 1966).

25. *Id.* at 638.

26. *Southwest Welding and Manufacturing Company v. United States*, 413 F.2d 1167, 1175 (Ct. Cl. 1969).

27. *Id.*

formance requirements. In *Penguin Industries, Inc. v. United States*,²⁸ plaintiff contracted to supply the government with ignition cartridges, however, the specifications did not describe the amount of glue to be used or the points to which the glue was to be applied in the manufacturing process. Because the specifications offered no guidance, plaintiff devised and used its own gluing method. After plaintiff refused to replace the defective ignition cartridges that were made by using its own gluing method, the government partially terminated the contract. The court upheld the government's action, stating that the specifications were more performance than design oriented:

While detailed specifications for the cartridges were provided, the specifications did not spell out in detail the manufacturing processes by which the cartridges were to be fabricated. It was left to the contractor to use its own judgment, experience and know-how in determining how to manufacture certain aspects of the cartridge. Thus plaintiff construes the contract too narrowly when it contends that it had only to meet the specifications set out in the contract. The fact is it had to go beyond those specifications as, for example, in the case of devising a method of gluing the flash tube to the disk. As to this limited aspect, the contract was more like a "performance" contract than a "design" specification and, as in a performance contract, the contractor must assume responsibility for the means and methods selected to achieve the end result. In short, it had the obligation to adopt and use a process of gluing that would achieve, in a workmanlike manner, a functional cartridge.²⁹

The result is that the courts will look to the predominant intent of the parties before classifying the specification as design, design with performance aspects, or pure performance.³⁰ To aid the courts in classifying the specification, there is a general presumption that it is a design specification.³¹

5. Suitability of Government-Furnished Property

Closely related to the issue of the suitability of the finished product is the suitability of the government-furnished property used to make the finished product. A novel case of impression on this subject was *Topkis Brothers Company v. United States*.³² In that case, a contract for the manufacture of field jackets provided that the government would be the exclusive supplier of the cloth to be used and that the cloth would be of a type which was "suitable for use." Soon after receiving the first cloth shipment, plaintiff began production in the manner described in the specifications. Although the cloth conformed to the specifications, its stiffness made it very difficult for plaintiff to perform the contract. Cloth

28. 530 F.2d 934 (Ct. Cl. 1976).

29. *Id.* at 937.

30. *Id.*

31. *Id.*

32. 297 F.2d 536 (Ct. Cl. 1961).

fracture, needle burning, thread breakage, and malformed stitching were some of the difficulties hindering plaintiff's performance. As a result of these difficulties, plaintiff was forced to repair the jackets which required a slow-down in the operation of plaintiff's machinery and increased plaintiff's overhead expenses. In opposing plaintiff's claim for additional compensation, the government took the position that since the cloth conformed to the specifications, the "suitable for use" clause meant only that the jackets could be manufactured from the cloth. In a sharp break with earlier precedents, the court rejected the government's position, stating that it was too restrictive, and held that the "suitable for use" clause did not mean merely that the cloth conformed to the specifications and that the jackets could be manufactured from the cloth. Rather, the court interpreted the clause to mean that it was suitable for use in the *process of manufacturing* the jackets:

Suitability, taken in context, does not mean merely that the end product can be manufactured from the cloth, but rather refers to the cloth as it is cut and sewn upon *in the process of manufacturing* the end product. The cloth itself must be suitable from a mass production manufacturing standpoint, taking into consideration the background of price and delivery schedules.

The fallacy in defendant's interpretation of "suitable for use" may be illustrated by carrying it to its logical conclusion. Thus, in this case plaintiff agreed to manufacture 1,000,000 jackets from specification cloth to be furnished by defendant. There is no doubt that the cloth so furnished met the technical wording of the specifications and that it could be, and was, used to fabricate specification jackets. However, if the condition of the cloth was nevertheless such that the jackets could not be made on a mass production basis at all, but had to be hand-sewn individually, plaintiff would not be entitled to increased costs of production under the theory defendant urges upon us. This is so because the cloth would obviously be specification cloth from which specification jackets could be manufactured, albeit at an unreasonable expenditure of time and money. It can hardly be said that the parties contemplated such a result would follow from the "suitable for use" clause at the time they entered into the contracts.³³

The rule in *Topkis Brothers* has no application to a situation where the government-furnished property is suitable for the purpose for which it has been furnished.³⁴ Also, if the government is not obligated by contract to furnish any materials as, for example, where the contract only *describes the condition* of the existing materials, the government will not be liable if it becomes more

33. *Id.* at 541.

34. *Preuss v. United States*, 412 F.2d 1293, 1301 (Ct. Cl. 1969).

costly for the contractor to perform the contract.³⁵

B. Adequacy of the Method of Production

End product specifications signify that the government is relying completely on the contractor's technical and manufacturing skills to produce the item or items as contracted. If the government decides not to surrender control over production, it will specify the production methods to be followed. The contractor who complies with the defective specifications may obtain compensation on a breach of implied warranty of suitability theory³⁶ as enunciated in *Spearin. Helene Curtis Industries, Inc. v. United States*³⁷ extended the *Spearin* rule to cover methods of production. Thus, if a different and more expensive method of production is necessitated, the contractor will be entitled to recover additional expenses. The contract in *Helene Curtis* involved the production of a new disinfectant to be used by troops in the field during the Korean War. Although the government developed the disinfectant several years before hostilities broke out, it had never been mass produced. The specifications listed the ingredients required to mass produce the disinfectant. The government knew that the ingredients would have to be subjected to an expensive grinding process, but this information was omitted from the specifications. In seeking to recover additional costs stemming from the use of grinding equipment, the contractor stated that the specifications were actively misleading as to the methods of producing the disinfectant. The government argued that it was not obligated to tell the contractor what methods to use but the court disagreed, noting that the disinfectant was new, the government sponsored its research and development, and the government was aware of the contractor's ignorance.³⁸ The court stated that the government breached a duty of full disclosure.³⁹ For similar reasons, the court also held that the specifications were misleading with respect to grinding:

This was not merely a specification for an end-product, without any implications at all as to the method of manufacture. The reasonable bidders it erroneously implied, in its context, the grinding would not be necessary to make the desired item; and in the circumstances defendant should have known that this would be the inference. Specifications so susceptible of a misleading reading (or implication) subject the defendant to answer to a contractor who has actually been misled to his injury.⁴⁰

35. *Wm. A. Smith Contracting Company, Inc. v. United States*, 412 F.2d 1325, 1341 (Ct. Cl. 1969).

36. *United States v. Spearin*, 248 U.S. 132 (1918).

37. 312 F.2d 774 (Ct. Cl. 1963).

38. *Id.* at 778.

39. *Id.*

40. *Id.*

C. Timeliness of Performance

The *Spearin* rule was extended to other areas in cases subsequent to *Helene Curtis*. The government's failure to draft adequate specifications generally will result in a breach of the implied warranty that the contractor will be able to perform the contract in the specified time period, if use of the inadequate specifications delays completion.⁴¹ The contractor is not required to prove that the delay was unreasonable, since *any* delay caused by the use of inadequate government specifications is *per se* unreasonable and hence compensable.⁴² If the subcontractors suffer an equivalent delay and thereafter attempt to hold the contractor liable, the contractor is entitled to additional compensation.⁴³ The government may also breach this implied warranty by being dilatory in recognizing the defect and revising the specifications to prevent a delay.⁴⁴

A breach of the implied warranty of timeliness of performance cannot be cured by the government's decision to grant the contractor an extension of time or to refrain from enforcing a liquidated damages provision.⁴⁵ The government will be relieved of liability, however, if the delay was caused by the contractor's inefficiency or factors outside the government's control.⁴⁶ Further, even if the specifications are inadequate, unless the cumulative effect of the errors is *unreasonable*, the government will not be liable for the contractor's losses.⁴⁷

The question as to what is an *unreasonable* error has proven to be troublesome. In *Jefferson Construction Company v. United States*,⁴⁸ plaintiff was awarded a contract to construct two reinforced concrete buildings, a retaining wall, and a pumphouse at a

41. *Laburnum Construction Corporation v. United States*, 325 F.2d 451, 457 (Ct. Cl. 1963).

42. *Chaney and James Construction Company, Inc. v. United States*, 421 F.2d 728, 731 (Ct. Cl. 1970).

43. *Morrison-Knudsen Company, Inc. v. United States*, 397 F.2d 826, 852 (Ct. Cl. 1968); *Blount Brothers Construction Co. v. United States*, 346 F.2d 962, 965 (Ct. Cl. 1965).

44. *Luria Brothers and Company, Inc. v. United States*, 369 F.2d 701, 708 (Ct. Cl. 1966).

45. *J.D. Hedin Construction Company, Inc. v. United States*, 347 F.2d 235, 241 (Ct. Cl. 1965).

46. *United States v. Howard P. Foley Co., Inc.*, 329 U.S. 64, 68 (1946).

47. *Wunderlich Contracting Company v. United States*, 351 F.2d 956, 964 (Ct. Cl. 1965).

48. 392 F.2d 1006 (Ct. Cl. 1966), *cert. denied*, 386 U.S. 914 (1967).

government research center. Before construction could begin, plaintiff had to excavate soil at the site until bedrock was reached. Plaintiff excavated to the depth indicated on the government specifications but did not reach bedrock. Plaintiff then made deeper excavations, which required additional time, manpower, and special equipment, and sought compensation for a seventy day delay. The court rejected plaintiff's claim, stating that although the specifications were defective, in the absence of proof that the government was negligent, plaintiff was not entitled to delay damages. Thus, for an error to be *unreasonable*, the government has to be negligent.⁴⁹

In so ruling, the court considered several factors which might lead to a conclusion that the government had acted negligently. If the delay has been caused by unforeseen conditions, the government may not have acted negligently.⁵⁰ However, if the government has failed to observe reasonable industry standards of accuracy in preparing the specifications, the opposite may be true.⁵¹

Other court opinions have declined to follow the negligence standard established in *Jefferson Construction Company*. Rather, a strict liability standard has been formulated. An *unreasonable* error is *any* error, regardless of fault, and will entitle the contractor to judgment on his claim for delay damages.⁵²

There is no touchstone for determining when the negligence as opposed to the strict liability standard will be applied, except that the courts have shown a greater inclination to apply the latter if there is evidence of an affirmative misrepresentation or if the contract contains a suspension of work clause.⁵³

49. *Id.* at 1015.

50. *Id.* at 1013-14.

51. *Id.*

52. *Carl M. Halvorson, Inc. v. United States*, 461 F.2d 1337, 1345 n.1, (Ct. Cl. 1972); *J.L. Simmons Company, Inc. v. United States*, 412 P.2d 1360, 1383 (Ct. Cl. 1969).

53. *Id.* U.C.C. § 2-315, providing for the implied warranty of fitness for the particular purpose, lends support for the exclusive use of the strict liability standard. That section provides:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

The implied warranty of fitness for the particular purpose envisages a *specific use* which is peculiar to the buyer's needs. U.C.C. § 2-315, comment 2. *See Blockhead, Inc. v. Plastic Forming Company, Inc.* 402 F. Supp. 1017, 1025 (D. Conn. 1975) where the court held that because cases manufactured by defendant for plaintiff distributor were never intended for any purpose other than the *ordinary purpose* of carrying hairpieces and accessories, the implied warranty of fitness for the purpose was not applicable to the cases.

D. Accuracy of the Specifications

The government impliedly warrants the accuracy of its specifications, and thus, the contractor has the right to rely on them for the purposes stated therein. These purposes may not necessarily include the manufacture of a finished product, which differentiates this implied warranty from the others previously discussed. The reason for the imposition of warranty of accuracy is to protect the contractor from hazards incident to the competitive bid-

Two requirements must be satisfied before the implied warranty of fitness for the particular purpose can be invoked: 1) the buyer must *rely* on the seller's skill or judgment in selecting or furnishing suitable goods and 2) the seller must *have known or had reason to know*, at the time of the sale, of the buyer's peculiar needs and that the buyer was relying on his skill or judgment. U.C.C. § 2-315, comment 1. See *Jetero Construction Company, Inc. v. South Memphis Lumber Company, Inc.*, 531 F.2d 1348, 1353-55 (6th Cir. 1976) where it was held that defendant, a seller of lumber to be used as studs in constructing buildings, breached the implied warranty of fitness for the particular purpose with regard to lumber which warped, bowed, and discolored after delivery to plaintiff builder. Findings that defendant generally knew of the purpose for which the studs would be used and the defendant was an experienced lumber dealer and had greater skill and judgment than plaintiff's representative concerning specifications of various lumber types and grades and the suitability of such lumber for *specific construction projects*, were supported by substantial evidence and were sufficient to establish a breach of implied warranty.

Once the requirements of U.C.C. § 2-315 have been met, the implied warranty will be imposed by operation of law on the basis of public policy. The UCC strict liability standard can be imported into government contract law and can be used to exclusion of the negligence standard. Federal courts have established the general applicability of the UCC to government contracts, and other UCC provisions have influenced federal decision. See *United States v. Wegematic Corp.*, 360 F.2d 674, 676 (2d Cir. 1966) where the Court stated:

We find persuasive the defendant's suggestion of looking to the Uniform Commercial Code as a source for the "federal" law of sales. The Code has been adopted by Congress for the District of Columbia, has been enacted in over forty states, and is thus well on its way to becoming a truly national law of commerce, which . . . is "more complete and more certain, than any other which can conceivably be drawn from those sources of general law, to which we were accustomed to resort in the days of *Swift v. Tyson*."

See also *Gardiner Manufacturing Co. v. United States*, 479 F.2d 39, 41 (9th Cir. 1973) (cites U.C.C. §§ 2-403 & 1-201); *In Re King-Porter Company* 446 F.2d 722, 726, 732 (5th Cir. 1971) (cites U.C.C. §§ 9-301 & 9-312); *Lea Tai Textile Co., Ltd., v. Manning Fabrics, Inc.*, 411 F. Supp. 1404, 1406 (S.D. New York 1975) (cites U.C.C. & 2-207).

The contractor who accepts and uses government design specifications is in a position similar to that of a buyer in relation to a seller. The contractor and the buyer both customarily rely on the superior skill and judgment of the government and seller, respectively. Therefore, to effectuate uniformity in federal decisions, it behooves courts to consider using the standards set forth in U.C.C. § 2-315 whenever defective government specifications produce delay damages.

ding system.⁵⁴ Under the competitive bidding system, the contractor must submit the low bid in order to be awarded the contract. Because the bid period is usually of very limited duration, the contractor's right to rely on the accuracy of the government specifications is understandable.⁵⁵ He does not have sufficient time to check for errors in the government specifications, and this increases the possibility of an inadvertant miscalculation in the submission of his bid.⁵⁶

In *Arcole Midwest Corp. v. United States*,⁵⁷ plaintiff contracted to construct a dam for the government. The specifications stated that sufficient power lines were already available in the immediate vicinity. Plaintiff estimated that about 1250 kilowatts were needed for it to perform the contract, however, the power company operating near the construction site told plaintiff that the power plant could generate only 200 kilowatts. Plaintiff then had to construct a power line of about sixteen miles in length to serve the construction site. The court held that plaintiff was entitled to recover its construction costs. The rule is well established that where the Government makes positive statements in the specifications or drawings for the guidance of bidders, a contractor has a right to rely on them regardless of the contractual provisions requiring the contractor to make investigations.⁵⁸

The contractor's right to rely on the accuracy of government specifications could indicate that *actual* reliance need not be shown.⁵⁹ However, nearly all courts have been reluctant to so hold. Generally, some degree of reliance must be demonstrated.⁶⁰

There is no implied warranty of the accuracy of the specifications if the contractor waives their accuracy by failing to take ac-

54. See *Blount Brothers Construction Co. v. United States*, 346 F.2d 962, 972-73 (Ct. Cl. 1965).

55. *Id.*

56. *Id.*

57. 113 F. Supp. 278 (Ct. Cl. 1953).

58. *Id.* at 280.

59. See, e.g., *Railroad Waterproofing Corp. v. United States*, 137 F. Supp. 713, 716 (Ct. Cl. 1956). There, the contract was for cleaning and resealing joints on the runways, taxiways, parking and standing areas at an Air Force base. The plaintiff not only inspected the Air Force base prior to the submission of its bid but, also, did not rely on the specifications after it began to doubt their accuracy. The plaintiff did, however, rely on the lineal footage specified in the Invitation for Bids. On that basis, the court granted plaintiff relief, stating that "it was not incumbent upon plaintiff to correct errors in the specifications; it was incumbent upon the Government to make them reasonably accurate." While it is true that the government has a duty to make its specifications accurate, the court departed from the weight of authority by stating that the contractor has no duty to correct errors in the specifications. The opposite is true. See notes 83-85 and 88-90, *supra*.

60. Patten, *The Implied Warranty That Attaches to Government Furnished Design Specifications*, 31 F.B.J. 291, 294 (1972).

tion to repudiate or rescind the contract once he becomes convinced that the specifications are inaccurate.⁶¹ Also, if the inaccuracy cannot be attributed to any act or omission by the government, there is no implied warranty.⁶²

LIMITATIONS ON THE IMPLIED WARRANTY

A. Caveatory Language and Disclaimers

Many government contracts contain caveatory and disclaimer provisions to shield the government from the implied warranty. Typically, these provisions call for the contractor to inspect the work site, satisfy himself of all the conditions, and familiarize himself with all the information, or they will state that the government does not guarantee any of the factual statements in the specifications. If the caveatory and disclaimer provisions are too general, they will not vitiate the implied warranty.⁶³ In other cases, they may be enforced. For example, in *Archie and Allen Spiers, Inc. v. United States*,⁶⁴ plaintiff contracted with the Navy to repair pipelines on piers located at a Navy supply center. The specifications were defective and plaintiff was unable to complete the project in the time allotted. Consequently, plaintiff sued for the increased direct labor, overhead, and equipment costs attributable to the prolonged period of performance. The Navy defended by asserting that clauses in the contract warning the contractor not to rely on the specifications precluded liability. Plaintiff contended that the clauses were legally meaningless and cited *Spearin* as support.

Spearin was distinguishable on its facts in that there had been a *misrepresentation* of the conditions at the drydock. Before making the contract, the government knew that the sewers had periodically overflowed. That fact, however, had not been communicated to the contractor. In *Archie and Allan Spiers*, the evidence did not reveal any misrepresentation. The government was unaware of any instability in the subsurface areas around the piers and at all times represented what it believed to be the true

61. *United States v. Idlewild Pharmacy, Inc.*, 308 F. Supp. 19, 22 (F.D. Va. 1969).

62. *Premier Electrical Construction Co. v. United States*, 473 F.2d 1372, 1374 (7th Cir. 1973).

63. *United States v. Spearin*, 248 U.S. 132, 137 (1918). See also *United Contractors v. United States*, 368 F.2d 585, 598 (Ct. Cl. 1966).

64. 296 F.2d 757 (Ct. Cl. 1961).

conditions. The court, therefore, upheld the validity of the disclaimer clauses.⁶⁵

The cases have generally held that if the government makes a factual misrepresentation on which the contractor can justifiably rely, the caveatory and disclaimer clauses will be disregarded.⁶⁶ The reason for this is that contractors normally are not expected to conduct work site tests and investigations. This is the government's responsibility. If contractors were to perform these duties, there would be a reduction in the number of bids and a rise in bid prices, which would hurt the competitive bidding system.⁶⁷

Midland Land and Improvement Company v. United States,⁶⁸ cited with approval in *Archie and Allan Spiers*, set forth standards to sustain a misrepresentation finding:

The burden of proving misrepresentation rests upon the party making the allegation. . . . There must be some degree of culpability attached to the makers of the maps and charts, either that they were knowingly untrue or were prepared as the result of such a serious and egregious error that the court may imply bad faith. The many contract cases in this court, too many to cite, sustain this principle.⁶⁹

By defining a misrepresentation as a "knowing untruth" or a "serious and egregious" error so as to suggest "bad faith," the implication is that gross negligence or recklessness is required. This is not true. A misrepresentation may result from ordinary negligence⁷⁰ and a showing of bad faith is not necessary.⁷¹

Because it cited the misrepresentation standards set forth in *Midland Land and Improvement Company*, the court in *Archie and Allan Spiers* may have erred in concluding that the government did not misrepresent the specifications. Since ordinary negligence is sufficient to sustain a misrepresentation finding, it is arguable that the government was negligent and misrepresented the specifications by neglecting to undertake a thorough preliminary study in order to discover whether the contract could be successfully completed through use of the specifications. Other cases have referred to the government's duty to disclose facts that it has greater opportunity to discover.⁷² In *Archie and Allan*

65. *Id.*

66. *See, e.g.*, *Hollerbach v. United States*, 233 U.S. 165, 172 (1914); *Railroad Waterproofing Corp. v. United States*, 137 F. Supp. 713, 716 (Ct. Cl. 1956).

67. *See Robert E. McKee, Inc. v. City of Atlanta*, 414 F. Supp. 957, 959 (N.D. Ga. 1976).

68. 58 Ct. Cl. 671, 683-84 (1924), *aff'd*, 270 U.S. 251 (1925).

69. *Id.*

70. *See, e.g.*, *Christie v. United States*, 237 U.S. 234, 242 (1915).

71. *Chris Berg, Inc. v. United States*, 404 F.2d 364, 365 (Ct. Cl. 1968).

72. *See, e.g.*, *J.A. Jones Construction Co. v. United States*, 390 F.2d 886, 888 (Ct. Cl. 1968) which dealt with problems relating to interagency relationships and the duty of disclosure. Plaintiff entered into an agreement with the Army, acting as the construction agency for the Air Force, to build various facilities at Cape Ken-

Spiers, the government, not the contractor, had a greater opportunity to discover the facts relevant to the performance of the contract because Navy ships were serviced and other Naval activities were likewise carried out at the piers. Therefore, the disclaimer clauses should have been invalidated.

Even when misrepresentation is not present, courts have refused to honor disclaimer clauses which do not warn the contractor of specific problems that could be encountered.⁷³ The courts have interpreted such disclaimer clauses strictly to avoid the

nedy. At the time the agreement was executed, the Air Force knew, but failed to disclose to the Army or the plaintiff, that a high priority ICBM construction program, for which premium wages were going to be paid, was to be initiated in the same labor area. The labor shortage following the initiation of the ICBM construction program, which resulted from the use of premium wages and overtime, forced the plaintiff to absorb increased labor costs in order to obtain the labor necessary to complete the project on time. The court held that the Air Force breached a duty to disclose these facts to the Army and to the plaintiff and should be liable for the plaintiff's increased labor costs.

In non-disclosure cases, the contractor may also *avoid* the contract if it would be unfair for him to continue working on it. A balancing test is used to determine unfairness. Factors balanced include the character of the information to which the contractor was privy, its relationship to the contract, the government's conduct in making information available or withholding it, and the reasonableness of the contractor's reliance on the information made available. In *J.A. Jones Construction Co. v. United States*, 390 F.2d 886, 890 (Ct. Cl. 1968), the court stated:

As we have pointed out, this record shows each prerequisite to liability

(a) The Air Force's personnel knew of the other construction and its probable consequences at the time plaintiff's contract was awarded; (b) plaintiff neither knew nor should have known those facts; and (c) the Air Force was or should have been aware of plaintiff's ignorance but nevertheless failed to disclose the pertinent information.

Avoidance will invariably be denied if the contractor had access to the correct information, which was the situation in *Aerojet General Corp. v. United States*, 467 F.2d 1293, 1298 (Ct. Cl. 1972). There, Aerojet purchased shipyards from contractors who were using them under prior agreements with the government. Before the purchase had been finalized, Aerojet sent several of its employees to the shipyards to inquire about the status of the prior agreements. Aerojet was told that they were about one-half completed and that no losses were anticipated. This information was incorrect. Nevertheless, the court held that the government's duty was merely a duty not to be negligent in ascertaining the information before making the representation.

The absence of intent to defraud and the inadvertent withholding of information are other grounds on which the government has successfully relied to resist *avoidance* of the contract. *H.N. Baily and Associates v. United States*, 449 F.2d 376, 382-83 (Ct. Cl. 1971). *LaCrosse Garment Mfg. Co. v. United States*, 432 F.2d 1377, 1381 (Ct. Cl. 1970). However, the better view is that the good faith element of the government's representation is immaterial. *Everett Plywood and Door Corp. v. United States*, 419 F.2d 425, 431 (Ct. Cl. 1969).

73. *Thompson Ramo Woolridge, Inc. v. United States*, 361 F.2d 222, 231-33 (Ct. Cl. 1969).

harsh effect intended by the government.⁷⁴ The essence of this procedure is to promote basic fairness. In this connection, disclaimer clauses have also been struck down when an insufficient amount of time has been given to the contractor to make a site inspection⁷⁵ or when such an inspection is impossible or impractical.⁷⁶

Clear and fair disclaimers of government liability, however, will override the implied warranty. This was the case in *Flippin Materials Co. v. United States*,⁷⁷ where the contract contained the following elaborate provisions on site inspections and representations:

The contractor acknowledges that he has satisfied himself as to the nature and location of the work, the general and local conditions, particularly those bearing upon transportation, disposal, handling and storage of materials, availability of labor, water, electric power, any roads, uncertainties of weather, river stages, tides or similar physical conditions at the site, the conformation and condition of the ground, the character, quality and quantity of surface and subsurface materials to be encountered, the character and equipment and facilities needed preliminary to and during the prosecution of the work and all other matters which can in any way affect the work or the cost thereof under this contract. Any failure by the contractor to acquaint himself with all the available information concerning these conditions will not relieve him from responsibility for estimating properly the difficulty or cost of successfully performing the work. The Government assumes no responsibility for any understanding or representations made by any of its officers or agents during or prior to the negotiation and execution of this contract, unless (1) such understanding or representations are expressly stated in the contract and (2) the contract expressly provides that responsibility therefor is assumed by the Government. Representation made but not so expressly assumed by the Government in the contract shall be deemed only for the information of the contractor and the Government will not be liable or responsible therefor.⁷⁸

Apparently, decisions on disclaimers may also turn on whether the contractor has been put on notice of the wisdom of including a price contingency in his bid price.⁷⁹

B. Unjustifiable Reliance on the Specifications: The "Knew or Should Have Known" Defense

1. Where the Contract Directs the Contractor to Other Information

In *Flippin Materials*, plaintiff entered into a contract with the government to excavate a rock from a government owned moun-

74. *Id.*

75. *Fehlhaber Corp. v. United States*, 151 F. Supp. 817, 825 (Ct. Cl. 1957).

76. *Morrison-Knudsen Company v. United States*, 345 F.2d 535, 539 (Ct. Cl. 1965).

77. 312 F.2d 408 (Ct. Cl. 1963).

78. *Id.* at 415 n.11.

79. *Id.* at 408.

tain. Part of the mountain consisted of clay-contaminated rock, which rendered plaintiff's job more difficult. The government specifications did not show that the cavities in the mountain were clay-filled, but the contract contained provisions directing plaintiff to government information relating to soil conditions, including government test borings and field logs. The issue was whether plaintiff's reliance on the government specifications was justified. The court held that since the government information was readily available to plaintiff, plaintiff could not recover additional costs for the removal of the clay-contaminated rock.⁸⁰

The general rule is that a contractor cannot justifiably rely on government specifications unless he scrutinizes *other* government materials referred to in the contract.⁸¹ The rationale for this rule is twofold. First, the other government materials may qualify, expand, or explain the government specifications. If such is the case, a contractor cannot honestly allege that he has been misled unless he has had access to all the relevant information.⁸² Second, it is the court's policy to look at the entire contract when interpreting the contractual duties.⁸³

2. Obvious Errors and Discrepancies

In *Allied Contractors, Inc. v. United States*,⁸⁴ plaintiff entered into a contract with the Army to construct a missile facility. During construction, two walls collapsed due to water pressure exerted behind them. After rebuilding the walls, plaintiff sued the government for breach of the implied warranty of the adequacy of the specifications. The court denied plaintiff's claim, stating that the defects of which plaintiff complained were so obvious that plaintiff either knew or should have known of them.⁸⁵ Thus, a contractor who knows or should have known of an obvious government error must call it to the government's attention so that

80. *Id.* at 413.

81. *Id.*

82. *Id.*

83. *Id.* For other cases denying recovery to contractors for ignoring directions to examine other sources of information, see *Puget Sound Bridge and Dredging Co. v. United States*, 130 F. Supp. 368 (Ct. Cl. 1955); *C.W. Blakeslee and Sons, Inc. v. United States*, 89 Ct. Cl. 226, *cert. denied*, 309 U.S. 659 (1939). See also *Central Dredging Company, Inc. v. United States*, 94 Ct. Cl. 1 (1941); *Trimount Dredging Co. v. United States*, 80 Ct. Cl. 559 (1935).

84. 381 F.2d 995 (Ct. Cl. 1967).

85. *Id.* at 999.

proper steps may be taken to rectify the mistake.⁸⁶

The duty to detect obvious errors, and communicate these discoveries to the government does not apply to situations where the contractor is under no contractual obligation to examine the specifications.⁸⁷ No contractual obligation arises when a contractor looks at the specifications merely for the purpose of computing his bid.⁸⁸

Additionally, the contractor's prospects for compensation on the implied warranty theory will not be favorable if a glaring discrepancy exists in the specifications. A duty is imposed on the contractor to seek a clarification of such a discrepancy. In *Wickham Contracting Co., Inc. v. United States*,⁸⁹ plaintiff contracted with the government to build an underground electrical cable. The specifications contained two different scales. One scale provided that 1'=200', whereas the other provided that 1''=200'. Plaintiff based its bid on the erroneous 1'=200' scale. The issue was whether plaintiff was entitled to recover extra expenses for using the erroneous scale, which caused it to under-bid. The court, citing *Allied Contractors* with approval, stated that plaintiff's failure to act on the glaring discrepancy barred recovery.⁹⁰

Other courts have applied this rule in different contexts. For example, it held that a contractor will be bound by the government's interpretation of the contract requirements if he fails to advise the government of an alleged conflict in the specifications.⁹¹

3. Actual Knowledge of Defects

Generally, actual knowledge of defects in government specifications will be fatal to the implied warranty claim if the contractor does not notify the government or state any exceptions in his bid.⁹² However, the contractor's actual knowledge may not foreclose relief if the government and the contractor are mutually at fault. In cases of mutual fault, the courts have the power to split the losses between the parties. In *Dynalectron Corporation v. United States*,⁹³ the controversy arose when the government ter-

86. *Id.*

87. *Thompson Ramo Woolridge, Inc. v. United States*, 361 F.2d 222, 231-33 (Ct. Cl. 1966).

88. *Id.*

89. 546 F.2d 395 (Ct. Cl. 1976).

90. *Id.* at 398.

91. *See, e.g., H.L.C. Associates Construction Co., Inc. v. United States*, 367 F.2d 586, 598 (Ct. Cl. 1966).

92. *Anthony M. Meyerstein, Inc. v. United States*, 137 F. Supp. 427, 430-31 (Ct. Cl. 1956).

93. 518 F.2d 594 (Ct. Cl. 1975).

minated a contract due to plaintiff's inability to comply with specifications calling for the production of an airplane antenna system. Prior to bidding, plaintiff knew that the specifications were defective and that considerable difficulties would ensue if it attempted to use them. However, despite this knowledge, plaintiff did not tell the government of its suspicion but decided to perform the contract, apparently assuming that the defects could be corrected in a manner that would be acceptable to the government. Unable to overcome the specification defects, plaintiff was late in making delivery and the government terminated the contract for default. The government itself was not blameless. It contributed to the errors that were made and exploited plaintiff's problems by learning what would not work at plaintiff's expense. Citing *National Presto Industries, Inc. v. United States*,⁹⁴ the court

94. In that controversial case, the losses were split between the parties on the ground of mutual mistake. Subsequent decisions have limited the case to its peculiar facts. See, e.g., *Sperry Rand Corp. v. United States*, 475 F.2d 1168, 1174-76 (Ct. Cl. 1973).

The *mutual mistake* cases have created problems in the application of government contract law. Instances where relief has been granted indicate that the contractor has had to prove that both he and the government acted under the misapprehension of some fact. This proof is easily obtained if the mistake is found in the contractual documents, such as the bidding papers. Otherwise, the contractor must use parol evidence concerning their discussions and negotiations in order to prove that the mistake was mutual. This is a very difficult task in that discussions and negotiations involving a *specific* mistaken fact are usually non-existent. More often, discussions and negotiations show only a general recognition by the government and the contractor that some production techniques are superior to others. Except for *National Presto*, the rule is that unforeseeability as to performance difficulties resulting from defective production techniques does not qualify as a *mutual mistake*. In *McNamara Construction of Manitoba, Ltd. v. United States*, 509 F.2d 1166, 1167-68 (Ct. Cl. 1975) the court stated:

Plaintiff's claim must fail. There was, simply, no mutual mistake of fact by the parties of the type for which judicial relief may be given. Both parties, at the time of executing the contract, were fully aware of the potential for labor difficulties What we have in the instant case, therefore, is a risk which is known to both parties and results from human inability to predict the future. The authorities are unanimous in distinguishing such risks from bonafide mutual mistakes of fact.

THE RESTATEMENT (SECOND) OF CONTRACTS § 502, comment F. supports this distinction:

Where the parties know that there is doubt in regard to a certain matter and contract on that assumption, the contract is not rendered voidable because one is disappointed in the hope that the facts accord with his wishes. The risk of the existence of the doubtful fact is then assumed as one of the elements of the bargain.

Similar statements are made in 3 CORBIN, CONTRACT § 598 (2d ed. 1960) at 585-86 and WILLISTON, CONTRACTS § 1543 (3d ed. 1970) at 75.

It therefore seems that for a contractor to obtain relief on the theory of *mutual*

decided that the equitable solution would be for the parties to split the losses.⁹⁵

Dynalectron Corporation stands for several propositions. Once the contractor determines that performance under the specifications is impracticable, he has the duty to so inform the government. Also, the government cannot compel the contractor to do what is impossible. Finally, if both the government and the contractor are mutually at fault, the losses will be split.⁹⁶

4. Follow-On Contracts

Follow-on contracts are a series of contracts, each part of a scheme to satisfy on-going government requirements. A follow-on contractor is not entitled to relief if he enters into a second contract with knowledge that the specifications were inadequate under prior contract. This rule,⁹⁷ stated in *Helene Curtis*, is analogous to the defense that a defendant may assert in a suit for misrepresentation, namely, that plaintiff's reliance on the challenged representation was unjustified.⁹⁸

In *L.W. Foster Sportswear*, the court refused to apply this rule after making the observation that the contractor reasonably relied on the government's practice of granting waivers to known defects in the specifications. Such waivers had been granted in five prior contracts. These facts, however, were dissimilar to the facts in *Helene Curtis* and *R.E.D.M. Corporations*, where the government had a waiver policy and where the contractors knew that defective specifications had been used under previous contracts.⁹⁹

mistake the traditional guidelines will have to be met or the contractor's case must be directly on point with *National Presto*, namely: 1) a joint enterprise, experimental undertaking in which neither the contractor nor the government assume the risk, 2) great concern by the government with regard to the undertaking, and 3) a benefit flowing to the government from the contractor's protracted period of trial and error.

95. 518 F.2d at 604.

96. See also *Grumman Aerospace Corporation v. United States*, 549 F.2d 767, 774-75 (Ct. Cl. 1977). There, the contractor sought reimbursement for amounts paid to a subcontractor, who was guilty of overpricing. The court permitted contractor to recover from the government *one-half* of the amounts paid because the government did not maintain close surveillance over the subcontract pricing and because purchase order memoranda indicated that the contractor had exercised reasonable business judgment in allowing the subcontract.

97. See also *Firestone Tire and Rubber Company v. United States*, 558 F.2d 577, 590 (Ct. Cl. 1977) where it was held that the contractor was not entitled to recover extra costs caused by drilling problems when at the time the contract was executed, the contractor was completely aware of those problems by virtue of its subcontracting activities for other contractors participating in the project; *Accord*, *Wickham Contracting Co., Inc. v. United States*, 546 F.2d 395, 400 (Ct. Cl. 1976).

98. *L.W. Foster Sportswear Co., Inc. v. United States*, 405 F.2d 1285, 1290 (Ct. Cl. 1969).

99. 312 F.2d at 779 and 428 F.2d at 1308.

A contractor cannot safely compete for a follow-on contract with defective specifications. He should contact the procurement agency and suggest the postponement of the procurement until the defects have been corrected. If the procurement agency proceeds with the procurement, the contractor should refrain from bidding on the contract.

5. Insufficient Detail in the Specifications

In *National Presto Industries, Inc. v. United States*,¹⁰⁰ the government and the contractor entered into an agreement for the production of artillery shells by the use of a new hot cup cold draw method. To facilitate production, the contractor asked the government to add plunge grinders and turning devices to the equipment to be supplied. The government replied that it did not want these items to be used and omitted them from the final agreement. After the contractor experienced production difficulties, it sued the government for breach of the implied warranty. The court stated:

In these circumstances we cannot find any warranty or representation by the Government, express or implied, as to plunge grinders or turning equipment. Before the contract was made, the plaintiff understood that the defendant, for better or worse, would not then countenance the acquisition of these items. Nevertheless the plaintiff went ahead to complete and execute the bargain. The situation was not materially different from pre-contract negotiations in which the participants haggle over equipment to be financed or furnished by the Government for a new procurement. In the absence of overriding special knowledge on the part of the defendant, or some explicit clause later inserted in the contract, the defendant's refusal to agree to plaintiff's introductory request is not a warranty or a representation that the contract can be effectively performed on the Government's terms, any more than the defendant's insistence in negotiation on a certain price is a warranty or representation that the contractor will be able to make a profit at that price.¹⁰¹

National Presto illustrates several problems confronting a contractor who attempts to invoke the implied warranty. If the specifications are vague or incomplete, the implied warranty may not be a viable theory. The contractor's solution might be to suggest a method of production needed to perform the contract, although he then may have assumed the risk for any defect in the specifications. The fact that the government agrees to accept the contractor's suggested method of production is not an implied warranty that *no other* method of production is needed.

100. 338 F.2d 99 (Ct. Cl. 1964).

101. *Id.* at 105.

C. Contractor Participation in Specification Preparation

The contractor may jeopardize the implied warranty by proposing additions or substitutions to government specifications. In *Austin Company v. United States*,¹⁰² plaintiff entered into an agreement with the government to develop a new digital data and recording system. Prior to the execution of the agreement, plaintiff reviewed the government specifications and announced that they would not produce a workable system. Plaintiff then proposed substitute specifications, which the government accepted. When the specifications proposed by plaintiff also turned out to be defective, the court held plaintiff was not entitled to recover extra costs.¹⁰³

Hence, if the government drafts the specifications an implied warranty in favor of the contractor is created.¹⁰⁴ The converse is also true: if the contractor drafts the specifications and the government incorporates them into the contract, the government is entitled to rely on the specifications and the contractor is not entitled to relief if the specifications are defective.¹⁰⁵ This rule operates to prevent the contractor from gambling on a contract involving a new product and forcing the government to pay the expense for an unsuccessful gamble.¹⁰⁶

In *Austin* there was no attempt by the contractor to resist damages, which were not sought by the government in that case. The inference is that if the contractor drafts defective specifications, the government has a cause of action and may assert it by way of suit or counterclaim.¹⁰⁷

In order for the contractor's implied warranty to be negated, his authorship of the specifications must, of course, be proven. In this regard, courts look not to the form of the specification but rather to its substance. The critical issue is not which party actually wrote the specification but rather which party *established its requirements*.¹⁰⁸

When definitive government specifications are unavailable, the usual method of formal advertising is abandoned and the two-step formal advertising procedure is utilized.¹⁰⁹ The first step requires the government to inform the contractors of its general require-

102. 314 F.2d 518 (Ct. Cl. 1963).

103. *Id.* at 520.

104. *United States v. Spearin*, 248 U.S. 132, 135 (1918).

105. 314 F.2d at 520.

106. *United States v. Wegematic Corporation*, 360 F.2d 674, 676-77 (2d Cir. 1966).

107. 314 F.2d at 520.

108. See Bruner, *Impossibility of Performance in the Law of Government Contracts*, 9 AF JAG L. REV. 6 (1967).

109. See *ASPR* §§ 2-501 to 2-503 (January 1, 1969).

ments and then evaluates the technical proposals submitted to determine whether minimum requirements have been met. All acceptable technical proposals then qualify for the second step, which follows the usual method of formal advertising. This procedure is similar to the events that happened in *Austin*, except for the fact that in two-step formal advertising the contractor *must* submit a technical proposal to be considered for the award of the contract. In *Austin* the contractor *voluntarily* submitted a technical proposal. This factual difference should not change the holding in *Austin* as applied to two-step formal advertising. When the contractor submits a technical proposal, *voluntarily* or *mandatorily* he vouches for its adequacy.¹¹⁰

The government may place its trust on the contractor's superior technical knowledge in preparing the specifications. If this is the case, there may be no implied warranty. In *Bethlehem Corporation v. United States*,¹¹¹ a case that lies between the opposite extremes of *Hol-Gar* and *Austin*, plaintiff entered into an agreement with the Army to manufacture and install an environmental test chamber. The Army asked plaintiff, an expert manufacturer in this field, if such a chamber could be made with the relative humidity ranging from 10% to 95% over a temperature range of -100°F to +100°F. When plaintiff told the Army that these requirements could be satisfied, the Army prepared specifications in reliance on the representations made by plaintiff. Subsequently, plaintiff learned that the chamber requirements were impossible to meet and sought relief, citing *Hol-Gar* to bolster its arguments. *Hol-Gar*, however, was not on point. Unlike the contract in Bethlehem, the contract in *Hol-Gar* contained a special provision committing the government to pay extra costs in the event that tests showed that the specifications were inadequate and would have to be changed.¹¹²

The court stated the contract in *Bethlehem* more closely resembled the contract in *Austin* and held that plaintiff assumed the

110. See, Dygert, *Implied Warranties in Government Contracts*, 53 MIL. L. REV. 39, 43 (1971).

111. 462 F.2d 1400 (Ct. Cl. 1972).

112. *Id.* at 1404. See also *Foster Wheeler Corporation v. United States*, 513 F.2d 588, 598-99 (Ct. Cl. 1975), where the government assumed the risk of impossibility of performance because the government's expertise surpassed the contractor's in connection with the use of testing procedures necessary to produce hardened boilers and also because the Invitation for Bids included *extremely detailed specifications*.

risk of impossibility of performance because it gave expert advice to the Army:

Admittedly, unlike the facts in *Austin*, here Bethlehem did not itself prepare the specifications, although its Technical Proposal was made a part of the contract. However, prior to bidding, Bethlehem assured the Government's representative that the specifications were reasonable and attainable. Bethlehem was aware that it was being consulted as a leading expert in environmental chamber manufacture and that the Government's project engineer was not an expert in that area. On the record before it, the Board correctly found there was no showing that the Laboratory, or the purchasing office, or any other Government activity *involved in preparing the specifications*, knew anything about the technical difficulties Bethlehem might experience or had knowledge equal to or superior to that possessed by Bethlehem.¹¹³

It is possible for the contractor to prevent the forfeiture of the implied warranty even if expert advice is offered to the government in drafting the specifications.¹¹⁴ The contractor's expertise can be offset by the equivalent expertise of government officials within the contracting agency.¹¹⁵ However, unless there is an inter-agency relationship,¹¹⁶ the expertise of government officials from different agencies will not be imputed to government officials within the contracting agency.¹¹⁷

D. The Commercial Impracticability Hurdle

When it directs the method of manufacture, the government does not impliedly warrant that its method can be pursued without difficulty. It impliedly warrants only that performance is possible within the state of the art.¹¹⁸ A severe limitation on the implied warranty of the adequacy of the method of manufacture is that the contractor has the burden of proving that the government's method is commercially impracticable.¹¹⁹ Commercial impracticability means that performance can be achieved only at exorbitant costs.¹²⁰ Thus, if the gist of the contractor's complaint is that the government's method is uneconomical, the contractor has not stated a cause of action.¹²¹

It is not enough for the contractor to convey to the government

113. 462 F.2d at 1404.

114. *But cf.* *J.A. Maurer, Inc. v. United States*, 485 F.2d 588, 594-95 (Ct. Cl. 1973) where the court held in the government's favor for the reason that the contractor had *assured* the government that it had the special expertise to perform a very experimental task which it knew had never been performed.

115. 462 F.2d at 1404.

116. *See* *L.W. Foster Sportswear Co., Inc. v. United States*, 405 F.2d 1285, 1291 (Ct. Cl. 1969).

117. 462 F.2d at 1404.

118. *Natus Corporation v. United States*, 371 F.2d 450, 458 (Ct. Cl. 1967).

119. *Id.* at 458.

120. *Id.* at 456.

121. *Id.* at 457.

its opinions regarding commercial impracticability, even though the contractor has overwhelming evidence to support those opinions. The contractor must make some effort to perform the contract under the specifications as a prerequisite to claiming commercial impracticability.¹²² One advantage the contractor has is that if the specifications are ambiguous and the contractor's interpretation differs from the government's, the contractor's interpretation, if reasonable, will prevail under the *contra preferentum* rule.¹²³

The contractor can enhance his chances of recovery on the implied warranty of the adequacy of method theory if he alleges commercial impracticability *and* mutual mistake. In *R.M. Hollingshead Corporation v. United States*,¹²⁴ the contract required plaintiff to supply the government with a substantial quantity of DDT concentrate in metal drums. The contract stated that the concentrate should not become filmy or otherwise deteriorate while stored for a one year period. After one-fifth of the concentrate had been delivered, an inspection indicated that it was beginning to lose its clear color. At the time the contract was executed, the concentrate was a new and untested product so that neither the government nor plaintiff knew that it could not be stored in metal drums for a long period of time without an accompanying loss in clearness. That lack of knowledge was the mutual mistake. Plaintiff sued for the contract price of the concentrate that had been delivered. The court held for plaintiff, stating that the parties under a mutual mistake entered into a commercially impracticable contract, and that plaintiff should not have to shoulder the entire loss.¹²⁵

E. Where Alternative Methods of Performance Are Permitted

Some types of government specifications afford the contractor greater flexibility in performing the contract by permitting alternative methods of performance. However, if too much discretion is left to the contractor, these specifications will begin to take on characteristics of performance specifications¹²⁶ thus weakening

122. *Koppers Company, Inc. v. United States*, 405 F.2d 554, 565 (Ct. Cl. 1968).

123. *Owens-Corning Fiberglass Corporation v. United States*, 419 F.2d 439, 459 n.21 (Ct. Cl. 1969).

124. 111 F. Supp. 285 (Ct. Cl. 1953).

125. *Id.* at 286.

126. See note 22, *supra*.

the contractor's claim for additional compensation.¹²⁷ The courts have been erratic in deciding when to give relief to the contractor who performs the contract using these types of specifications. The result appears to depend upon a determination of which party has assumed the risk of non-performance.¹²⁸

Where the specification requires the contractor to furnish a "brand name" or "equal product," the normal implied warranty rule governs. The government impliedly warrants that the "brand name" or the "equal product" are both available in the marketplace and that if either is used, the contract can be performed without undue difficulty. This point was made clear in *Aerodex, Inc. v. United States*,¹²⁹ where the court stated:

[W]here the Government issues an invitation for a procurement item containing a component which is given a purchase description consisting of a brand name product manufactured by a designated company or its "approved substantial equal" . . . it is the obligation of the Government to ascertain and assure the bidders the commercial availability of the component from its manufacturer before it employs it as a purchase description or, failing that, to provide bidders with a sufficient description of the physical specifications and performance characteristics so that it may be duplicated by the bidders either by in-house fabrication or by purchase from suppliers.¹³⁰

Other than the "brand name" or "equal product" specification description, the specification may state that the contractor has the option of selecting any of the production methods listed. If the contractor makes a bad choice, finding out later that performance is being hampered by the defective method, the contractor should be able to obtain compensation.¹³¹ However, if the contractor ignores advisory methods and uses his own techniques, he may have assumed the risk that his own techniques would not yield a satisfactory result. In *Gulf Western Precision Engineering Co. v. United States*,¹³² plaintiff entered into an agreement with the government to manufacture guided missile warheads. There were both mandatory and advisory design specifications which were subsequently found to be defective. Plaintiff followed the mandatory design specifications but not the advisory ones. Rather, plaintiff used a less costly technique of its own to manufacture the initial set of warheads. These were rejected by the government as unsuitable. Plaintiff then performed the contract in accordance with the more costly advisory design specifications, but the second set of warheads also were unsuitable. Plaintiff

127. *Id.*

128. *Gulf Western Precision Engineering Co. v. United States*, 543 F.2d 125, 131 (Ct. Cl. 1976); *Aerodex, Inc. v. United States*, 417 F.2d 1361, 1367 (Ct. Cl. 1969).

129. 417 F.2d (Ct. Cl. 1969).

130. *Id.* at 1366.

131. *Id.*

132. 543 F.2d 125 (Ct. Cl. 1976).

urged the court to award it damages covering the costs connected with the manufacture of the initial set of warheads and also in performing the contract using the more costly advisory design specifications. The court denied each of plaintiff's claims, despite the defectiveness of both the mandatory and advisory design specifications, stating the plaintiff's rejection of the advisory design specifications meant that it assumed the risk of non-performance as to the initial set of warheads.¹³³ As to the post-change additional costs, the court stated that since the government relaxed ballistics standards after acknowledging that they could not be met by the specifications, plaintiff's decision to use the advisories at the time meant only that plaintiff was shifting to the government the risk that the warheads would not adequately perform even under the relaxed ballistics standards.¹³⁴ In return, plaintiff accepted responsibility for the additional costs.¹³⁵

The decision in *Gulf Western* is perplexing. The rationale of *Hol-Gar* should have been controlling. In that case, it was held that where a change is required due to defective government specifications, the contractor is entitled to recover additional costs.¹³⁶ The fact that some of the specifications in *Gulf Western* were *disregarded*, whereas in *Hol-Gar* they were *explicitly followed* is an immaterial distinction. In *Gulf Western* the government knew, almost from the inception, that its specifications were defective. Yet it did not make any corrections. Therefore, when plaintiff substituted its own technique, it only assumed that risk that it would not be able to perform the specifications *possible of performance*.¹³⁷

CONCLUSION

The implied warranty is a useful legal tool to gain additional compensation for attempting to comply with defective government design specifications. Thus, contractors dealing with the government should take every precaution to preserve the implied warranty. The following steps may help contractors identify and avoid some of the implied warranty problems frequently encountered.

133. *Id.* at 131.

134. *Id.* at 132.

135. *Id.* at 132-33.

136. See notes 23 & 24, *supra*.

137. See dissenting opinion 543 F.2d at 133-34.

1. If the government insists on inserting caveatory or disclaimer provisions in the contract, make certain that such language is general.¹³⁸

2. If the caveatory or disclaimer provisions are specific, check to discover whether a misrepresentation has been made. It will neutralize the specific provisions.¹³⁹

3. For hybrid design and performance specifications, avoid accepting complete discretion in the selection of the method of performing the contract, unless the government expressly agrees to assume the risk for failure to attain performance goals.¹⁴⁰

4. Obtain the government's agreement on terms to assume the risk whenever it incorporates contractor drafted specifications into the contract.¹⁴¹

5. If offering expert advice on specification preparation, forfeiture of the implied warranty can be prevented by requesting that government experts participate.¹⁴²

6. Do not volunteer specifications to replace defective government specifications except on the condition that the government accepts responsibility for the substituted specifications.¹⁴³

7. Before beginning work on the contract, analyze the specifications and decide which method will yield the greatest efficiency.¹⁴⁴

8. Make inquiries into whether any specific problems might result from using the specifications.¹⁴⁵

9. Examine the specifications to determine whether there are obvious errors or discrepancies, or if they refer to outside sources of information.¹⁴⁶

10. Point out ambiguities and omissions to the government.¹⁴⁷

138. *United States v. Spearin*, 248 U.S. 132, 137 (1918).

139. *See* notes 65 to 70, *supra*.

140. *Penguin Industries, Inc. v. United States*, 530 F.2d 934, 937 (Ct. Cl. 1976); *Hal-Gar Manufacturing Corporation v. United States*, 360 F.2d 634, 638 (Ct. Cl. 1966); *John Thomson Press and Manufacturing Co. v. United States*, 57 Ct. Cl. 200, 209 (1922).

141. *United States v. Wegematic Corporation*, 360 F.2d 674, 676-77 (2d Cir. 1966); *Austin Company v. United States*, 314 F.2d 518, 520 (Ct. Cl. 1963).

142. *Foster Wheeler Corporation v. United States*, 513 F.2d 588, 598-99 (Ct. Cl. 1975); *J.A. Maurer, Inc. v. United States*, 485 F.2d 588, 594-95 (Ct. Cl. 1973); *Bethlehem Corporation v. United States*, 462 F.2d 1400, 1404 (Ct. Cl. 1972).

143. *Id.*

144. *United States v. Howard P. Foley Co., Inc.*, 329 U.S. 64, 68 (1946).

145. *Thompson Ramo Woolridge, Inc. v. United States*, 361 F.2d 222, 231-33 (Ct. Cl. 1969); *Morrison-Knudsen Company, Inc. v. United States*, 397 F.2d 826, 852 (Ct. Cl. 1968).

146. *See* notes 78 to 90, *supra*.

147. *Michigan Wisconsin Company v. Williams-McWilliams Company*, 551 F.2d 945, 951 (5th Cir. 1977); *Penguin Industries, Inc. v. United States*, 530 F.2d 934, 937

11. Inform the government of suspected errors.¹⁴⁸
12. Once a defect becomes known, immediately ask the government to correct it.¹⁴⁹
13. In bidding on a follow-on contract with specifications identical to the defective specifications used on the prior contract, contact the procurement agency and suggest postponement of the procurement until the defects have been remedied.¹⁵⁰
14. For specifications permitting alternative methods of performance, do not deviate from the authorized alternatives.¹⁵¹
15. If the contract includes mandatory and advisory specifications, use the advisory specifications from the beginning.¹⁵²
16. Be circumspect about using specifications that appear economically impracticable to use.¹⁵³
17. Whenever a performance problem is recognized, request that the government split the losses.¹⁵⁴
18. If the specifications have been waived, obtain a written agreement that the waiver is absolute, complete, and represents the established policy of the procurement agency.¹⁵⁵

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(Ct. Cl. 1976); *National Presto Industries, Inc. v. United States*, 338 F.2d 99, 105 (Ct. Cl. 1964).

148. *Dynalectron Corporation v. United States*, 518 F.2d 594, 604 (Ct. Cl. 1975).

149. *United States v. Idlewild Pharmacy, Inc.* 308 F. Supp. 19, 22 (E.D. Va. 1969); *Allied Contractors, Inc. v. United States*, 381 F.2d 995, 999 (Ct. Cl. 1967).

150. *L.W. Foster Sportswear Co., Inc. v. United States*, 405 F.2d 1285, 1291 (Ct. Cl. 1969).

151. *Gulf Western Precision Engineering Co. v. United States*, 543 F.2d 125, 131-33 (Ct. Cl. 1976); *Aerodex, Inc. v. United States*, 417 F.2d 1361, 1366 (Ct. Cl. 1969); *John Thomson Press and Manufacturing Co. v. United States*, 57 Ct. Cl. 200, 209 (1922).

152. *Gulf Western Precision Engineering Co. v. United States*, 543 F.2d 125, 131-33 (Ct. Cl. 1976).

153. *Koppers Company, Inc. v. United States*, 405 F.2d 554, 565 (Ct. Cl. 1968); *Natus Corporation v. United States*, 371 F.2d 450, 458 (Ct. Cl. 1967).

154. *Dynalectron Corporation v. United States*, 338 F.2d 99, 112 (Ct. Cl. 1964).

155. *Doyle Shirt Manufacturing Corp. v. United States*, 462 F.2d 1150, 1154 (Ct. Cl. 1972); *L.W. Foster Sportswear Co., Inc. v. United States*, 405 F.2d 1285, 1291 (Ct. Cl. 1969).

