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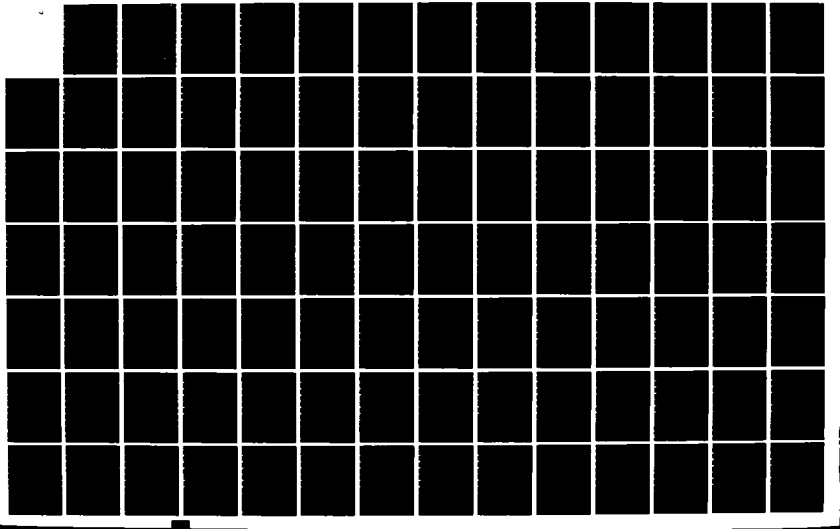

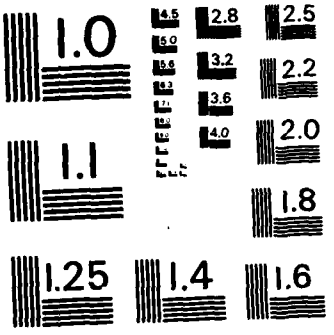

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SECURITY CLASSIFICATION OF THIS PAGE (When Data Entered)

REPORT DOCUMENTATION PAGE		READ INSTRUCTIONS BEFORE COMPLETING FORM
1. REPORT NUMBER AFIT/CI/NR 83-97T	2. GOVT ACCESSION NO. AD A139473	3. RECIPIENT'S CATALOG NUMBER
4. TITLE (and Subtitle) The Contracting Officer's Representative		5. TYPE OF REPORT & PERIOD COVERED THESIS/DISSERTATION
		6. PERFORMING ORG. REPORT NUMBER
7. AUTHOR(s) Robert Allen Tepfer		8. CONTRACT OR GRANT NUMBER(s)
9. PERFORMING ORGANIZATION NAME AND ADDRESS AFIT STUDENT AT: George Washington University		10. PROGRAM ELEMENT, PROJECT, TASK AREA & WORK UNIT NUMBERS
11. CONTROLLING OFFICE NAME AND ADDRESS AFIT/NR WPAFB OH 45433		12. REPORT DATE May 1983
		13. NUMBER OF PAGES 143
14. MONITORING AGENCY NAME & ADDRESS(if different from Controlling Office)		15. SECURITY CLASS. (of this report) UNCLASS
		15a. DECLASSIFICATION/DOWNGRADING SCHEDULE

16. DISTRIBUTION STATEMENT (of this Report)

APPROVED FOR PUBLIC RELEASE; DISTRIBUTION UNLIMITED

17. DISTRIBUTION STATEMENT (of the abstract entered in Block 20, if different from Report)

18. SUPPLEMENTARY NOTES

APPROVED FOR PUBLIC RELEASE: IAW AFR 190-17

7 March 84

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19. KEY WORDS (Continue on reverse side if necessary and identify by block number)

20. ABSTRACT (Continue on reverse side if necessary and identify by block number)

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AD A139473

THE CONTRACTING OFFICER'S REPRESENTATIVE

By

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BA June, 1972, Indiana University in Bloomington

Doctor of Jurisprudence, May 1975, Indiana University in Indianapolis

A Thesis submitted to

The Faculty of

The National Law Center

of the George Washington University in partial satisfaction of the requirements for the degree of Master of Laws

May, 1983

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FOREWARD

The author is a Major, Judge Advocate, in the United States Air Force, currently assigned to San Antonio Contracting Center, Air Force Training Command, San Antonio Air Force Station, Texas.

The views expressed herein are solely those of the author and do not purport to reflect the position of the Department of Defense, or any other agency of the United States Government.

Chapter I

The Basic Themes

A. Introduction

At the very heart of Government contracting are the issues of who may bind the Government, under what circumstances, and to what extent. The obvious response from those experienced in the field is to point to the warranted Contracting Officer. Seeing a Contracting Officer's warrant is clear evidence of authority. It represents actual authority in its most obvious and direct form. But what if the Government representative with whom the contractor deals does not have a warrant, what then? Does the representative have authority, and if so what are its limits? Answering these questions requires a study of the prerequisites to the existence and proper transfer of authority. A preliminary understanding of the basic principles is therefore essential to any indepth analysis of the topic. The purpose of this chapter is therfore to briefly analyze the predominate legal themes and to outline and categorize the types of authority arguments used to bind the Government in the area of representative action.

The theory in this area begins with the requirement for actual authority. It is ostensively the driving force for all subordinate arguments. The stream of Contracting Officer (C.O.) arguments begins with direct C.O. involvement in the form of ratification, moves slowly through actual C.O. knowledge and acquiescence, and then to the imputed knowledge. Ultimately, there are those decisions dealing with the implied authority of the representative which brings in questions of express and implied delegation of the C.O.'s au-

thority. Examination of these legal concepts at this point should serve to alert the reader to the type of issues with which the contractor and legal forums must contend, and which the different agencies have not as yet adequately addressed. The fact that the stated principles often strain in their application serves to attest to their inadequacy as a complete explanation of what is really taking place. Examination of these theories now also permits Chapter III's analysis at an altogether different level of the subordinate issues of relationship, good faith, and circumstance. In short, the classic legal principles having been outlined, new legal patterns may accordingly be discussed.

B. The Need for Actual Authority

The requirement that a Government agent be "authorized" is no more than the sovereign's attempt to prescribe limits on the conduct of its representatives. While the rules used may be unique to the Government, the problem is not. Not all agents of corporations and partnerships may bind their respective entities, neither may all Government representatives bind the United States.

Distinctive to the field of Government contracts is the need for actual authority to contractually bind the Government.[1] Arguments that all appearances would lead a reasonable man to believe a Government representative was authorized are an inadequate basis for contractor recovery. Such "apparent authority" simply cannot bind the United States. The essence of this most fundamental principle of Government contracts is clearly set out by the United States Supreme Court in Federal Crop Insurance Corporation v. Merrill[2] where the Court stated:

> Whatever the form in which the Government functions anyone entering into an arrangement with the Government takes the risk of having accurately

> ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitation upon his authority[3].

If all actions were or even could be taken by or through warranted C.O.'s, the inquiry as to the existence and limits of a representative's authority could be easily satisfied. However, the complexity of action required by proper contract award and administration is such as to often involve numerous other Government representatives who do not have a warrant. In fact, in many contracting environments, the warranted C.O. serves as little more than an administrative conduit, signing required modifications, giving necessary approvals, but relying heavily on the expert decisions and guidance of non-warranted Government personnel.

The dilemma of the contractor in trying to decide who does and who does not have authority is well illustrated by the 1982 NASA BCA decision of DBA Systems[4] where the contractor relied on statements made by a "contract specialist" responsible for the day to day administration of the contract. Summarily dismissing the contractor's claim the, board stated:

> It is of no consequence to the determination of this appeal that [the contract specialist's] title may have sounded important, or implied authority to approve funding of the overrun[5].

In DBA, actual authority was lacking and reasonable appearances of what the Government's "contract specialist" could or could not do were completely immaterial. It was the contractor's responsibility to confirm or obtain all guidance from the C.O. When the contractor elected to deal with a Government representative other than a war-

ranted C.O., he did so at his own risk.

One further comment is in order before leaving the topic of actual authority. While the C.O. is clearly identified with actual authority, the actual C.O. himself may not be so clearly identified. This is evident from a reading of the Defense Acquisition Regulations (DAR) definition of "Contracting Officer." DAR 1-201.3 begins by describing the specifically appointed or designated C.O. and then includes the following language:

> The term also includes the authorized representative of the contracting officer acting within the limits of his authority. (Emphasis added)

Similar language is a part of the Federal Procurement Regulation (FPR) definition of the C.O.[6] While the complete resolution of the potential implications of this expanded concept of Contracting Officer is clearly beyond the scope of an introductory chapter, the potential impact of this definition on representative authority is obvious. Simply stated, it stands as clear evidence of actual authority in representatives other than the warranted C.O. Issues as to how these representatives are appointed, and what they can or cannot do will be addressed at later point.

C. Ratification

The need for actual authority, or perhaps put more accurately the fear of apparent authority, is in most instances the driving force in representative authority arguments. For this reason assertions that the representative was authorized often include an express or implied connection to the C.O. Implicate the C.O. in the particular action or inaction and the Government stands a much better chance of being bound. Leave the C.O. out and absent a specific delegation, the argument may equate to nothing more than appearances and equity, and

chances of contractor recovery diminish substantially.

The need for C.O. involvement makes the concept of ratification an ideal argument for contractor recovery. C.O. confirmation of a Government representative's actions makes charges of apparent authority immaterial. To recover under a ratification theory, the contractor must show that the unauthorized Government representative has had his actions adopted by one with authority and knowledge of the facts.[7] This is ordinarily the designated C.O. It can take place in the form of express ratification,[8] affirmative conduct,[9] and even silence.[10]

The case of express ratification is the easiest to comprehend. It is simply some form of oral or written statement ordinarily made by the C.O. which adopts previously unauthorized conduct.[11] The classic cases are the issuance of a modification which includes changes made by an unauthorized Government representative or the C.O.'s reassertion of a inspector's prior incorrect contract interpretation.[12]

Ratification by conduct may take place even though authorized officials do not expressly ratify the unauthorized actions. This routinely occurs where an agency makes some statement that the work was needed, or was in the Government's best interest, and then recommends payment.[13]

Ratification inferred from silence or inaction by the C.O. obviously requires less evidence than the other two categories. By definition, there need be no evidence of a statement or action.[14] The simple tolerance of the unauthorized action by an individual with authority is seen as tacit acceptance of the action. The typical case is where the C.O. simply sits back, accepts the benefits derived from the unauthorized action with full knowledge of what has taken place,

and then disavows the action based on the technical absence of authority.[15] The C.O.'s knowledge of the facts together with his acquiescence is held to preclude the contractor form being labeled a "volunteer". The Government is bound.

The overwhelming desire of the courts and boards to find C.O. contact with an otherwise unauthorized action is best evidenced by the Court of Claims' decision of Williams v. United States.[16] This case which will be discussed in more depth in Chapter II was arrived at by finding ratification based on constructive notice and silence. The ordinary prerequisite to ratification, C.O. knowledge was omitted as a result of the particular circumstances of the case. No action was required by the C.O. No knowledge was required by the C.O. The factual circumstances themselves created the basis for finding ratification, or at least a finding that the actions in issue were authorized. Arguably the C.O. is responsible for those situations he tolerates, notwithstanding whether he was on actual notice to them. The next section's discussion of imputed knowledge moves authority issues even further from direct C.O. involvement.

D. Imputed Knowledge

Attempts to link representative action or inaction with the designated C.O. have sometimes lead to use of the theory of imputed knowledge. The supposed basis for the concept as it applies to Government representatives is the rule of agency that a principal is bound by knowledge of its agents as to all information that the agent had a duty to deliver to the principal.[17]

The concept of imputed or constructive knowledge can have obvious advantages to a contractor searching for a theoretical link to the C.O. Use of imputed knowledge effectively translates C.O. ignorance

and inaction into the necessary binding contact with the C.O.'s warrant. Because of this, it is based on the most strained basis of "contact" with the C.O. In reality, it is a lack of C.O. contact. The theory is amply illustrated in the ASBCA decision of Southwestern Sheet Metal Works[18] where a C.O. was found to have imputed knowledge from an inspector. The board's basis for implementing the theory was as follows:

> Even the inspector did not possess the necessary authority to give such an order, we believe that the Contracting Officer had actual or constructive knowledge of the situation.
>
> * * *
>
> [The contractor] was in constant contact with the inspector and the inspector with his supervisors. Therefore if the Contracting Officer did not know of the order ". . . he ought to have known, and the knowledge is imputed to him." Gresham & Co., Inc. v. United States . . .[19]

The theory is also spelled out in the 1975 ASBCA decision of U. S. Federal Engineering & Manufacturing[20] where the Government's project manager and not the C.O. received notice of necessary changes due to defective specifications. The board found the Government legally bound and pointed to the C.O.'s warrant as authority:

> The fact that the contracting officer did not have actual knowledge of the additions to be made to the device does not insulate the Government from the consequences that actual knowledge would impose. His various representatives are his eyes and ears (if not his voice) and their knowledge is treated for all intents and purposes as his.[21]

The above decisions seem to address the existence of two duties: (1) the representative's duty to inform the C.O.; and (2) the C.O.'s duty to stay informed. Both duties point to the C.O. and are implicitly based on the belief that the representative does not have authority on his own. Fears of apparent authority, no doubt, demand the C.O. nexus

for a viable argument. Discussion in Chapter III will examine the basis for imputed knowledge and whether it is really even necessary to bind the Government.

E. Implied Authority

While apparent authority is an inadequate basis to hold the Government responsible for the actions of its representatives, the courts and boards have often granted relief on the basis of "implied authority", a form of actual authority.[22] The theoretical basis for implied authority is that authority to bind the Government may be implied when that authority is considered to be an integral part of the duties assigned to the Government representative. Thus, analysis of implied authority demands a study of factual circumstances surrounding both the actual delegation and the task being assigned. It stands as the clear recognition that a representative must have at least that amount of authority necessary to perform the task to which he has been assigned. To that extent it is the courts' and boards' application of a little common sense to task delegations. This tempering of authority delegations with contracting realities is well illustrated by the following language from the 1979 ASBCA decision of Urban Pathfinders:[23]

> We are not unmindful of the fact that the con tracting officer did not delegate the authority to him to change the terms of the contract but we conclude that his delegated authority was sufficiently broad to include the authority to change the terms of the contract in a situation where expeditious action was required to avoid a frustration in the objectives for which the contract was awarded. We find, therefore, that, under the circumstances of this case, the Project Officer had the implied authority to order the additional work for which appellant claims compensation.[24]

The major issue surrounding implied authority is not whether it exists, as some implied authority no doubt follows with almost every

task delegation from the C.O. The question is how much implied authority is present or what actions outside the specific delegation may be considered authorized? A classic implied authority decision struggling with the bounds of a delegation is the ASBCA decision of Switlik Parachute Co.[25] In Switlik an inspector had been delegated authority to accept. The question was whether this necessarily implied authority to state conditions for acceptance. The ASBCA stated the bounds of the express delegation of authority and noted:

> Since the authority to accept necessarily embraces the authority to reject...we conclude the QAR acted within the scope of authority conferred on him by necessary implication...when he prescribed conditions under which he would inspect and accept... (Emphasis added)[26]

To decide a case involving implied authority therefore requires an analysis of to what extent authority is necessary and inherent to the proper performance of the assigned tasks. This is the "scope of authority" issue discussed in Switlik. It is also arguably the foundation for the requirement that the C.O.R. be working within the "limits of his authority" in order to satisfy the previously referenced DAR[27] and FPR[28] definitions of "Contracting Officer."

F. Conclusion

The common thread of all the above arguments is some form of C.O. attribution. Direct C.O. involvement may result in a ratification. Representatives who have information and fail to report it to the C.O. have breached their duty to inform their warranted superior and arguably, the C.O. has failed in his duty to properly manage his agent. The agent's knowledge is therefore imputed to the C.O. Finally, specific delegation of tasks clearly implies the power or authority necessary to perform those tasks. Again, C.O. authority in the formal delegation translates into implied authority to perform

unstated but necessary tasks. Only the briefest analysis is required to determine that all of the stated arguments begin and end with the C.O.'s warrant.

The simple priciples set out in this chapter constitute an incomplete explanation of representative authority. Since they focus on the C.O., they really do not address representative authority. The next chapter addresses intra-agency guidance in the area of Government representatives. The absence of any meaningful guidance as to what representatives other than the C.O. may or may not do is the basis of much confusion. Formal supplements to DAR and FPR offer only the most rudimentary guidance on the topics of appointment, authority. delegation, and contractor interface, and this limited guidance relates only to the formally appointed Contracting Officer's Representative. Other representatives are not even addressed. For this reason, all legal arguments cling to the only certainty in the area, the C.O.'s warrant. The lack of meaningful intra-agency guidance, well illustrated by the brevity of Chapter II, has spawned the complexity of problems discussed by the courts and boards in a voluminous Chapter III. Chapter III, in a sense, begins where Chapter I left off. Having established principles in the representative authority area, a second level of analysis becomes appropriate. This involves a statement of the basic legal principles cited by the courts or boards and then an indepth examination of patterns to determine why the Chapter I legal principles seem to be only selectively applied.

Chapter II

Intra-Agency Guidance

A. Introduction

It takes only a very brief examination of the regulations and case law to realize that there are essentially two major categories of contracting personnel representing the Government: (1) Formally designated Contracting Officer Representatives (C.O.R.); and (2) other Government representatives working on the contract who have a title other than the C.O.R. designation. The first category, the formally designated C.O.R.'s ordinarily go by their title of "Contracting Officer's Representative" or "Contracting Officer's Technical Representative." Occasionally they are referred to by the task they perform, inspector with authority to accept, project officer, resident engineer etc. Regardless of how they are referred, the fact remains that they have a formal delegation of authority either directly from the C.O., or from the contract created by the C.O. It is this formal connection with the C.O. which distinguishes the formally designated C.O.R. from the other Government representatives working on the contract. This second category goes solely by the title of the task they are performing, since they routinely have no formal designation or delegation of authority. The extent of these representative's contact with the C.O. varies and can only be determined in part from the task they have been assigned. Careful investigation of all the factual circumstances is required to discover whether the C.O. has implicitly or explicitly transferred authority to these representatives. This analysis, performed by the boards and courts, is the topic of Chapter III.

The purpose of this chapter is to examine the intra-agency guidance with regard to these different Government representatives. The area breaks out into two sections: (1) Formal regulatory guidance and (2) miscellaneous intra-agency guidance. The formal regulations include the DAR and the particular agencies' regulations which are subordinate to either DAR or FPR. The informal intra-agency guidance examined consisted of pamphlets, directives, technical manuals, policy letters supplementing DAR and FPR. The agencies included in this study were the Army, Navy, Air Force, the National Air and Space Administration, the General Services Administration, the Department of Transportation, and the Department of Energy.

B. Formal Regulatory Guidance

The following provisions are virtually all the formal regulatory guidance for the agencies studied. They are set out together to foster easy comparison and contrast of what they do or do not address with regard to the particular issues in this area.

(1) The Regulatory Guidance

(a) The Formally Designated Contracting Officer's Representative

While there are some indirect references to the formally designated C.O.R., the following is essentially the only direct guidance in this area.

Army DAR Supplement (ADARS)

> 1-406.50 Contracting Officers' Representatives (COR's)
>
> (a) A contracting officer may select and designate any Government employee, military or civilian, to act as this authorized representative in administering a contract which is not assigned for administration to DCAS, subject to the authority and limitations in 1-406.51. In selecting an individual for designation as his authorized representative, the contracting officer shall ensure that the individual possesses qualifications and experience commensurate

with the authorities with which he is to be empowered.

(b) Normally a COR shall be designated by name and position title. When it is not feasible to designate a COR by name and position title, a designation may be made by position title only, provided the designation is clearly understandable to all concerned.

(c) Each designation of a COR shall be in writing and shall clearly define the scope and limitations of his authority, and shall include the statement that COR authority is not redelegable. Changes in the scope and limitations of authority may be made either by issuance of a new designation or by an amendment to the existent designation. When one COR is to act for the contracting officer on more than one contract, separate designations shall be issued for each contract.

(d) A designation of a COR shall remain in effect through the life of the contract concerned unless-

(i) sooner revoked by the contracting officer or his successor, or

(ii) revoked by the reassignment of the individual designated.

(e) Nothing in this paragraph shall be construed as-

(i) requiring individuals responsible for accomplishment of broad functions of contract administration, such as engineering evaluation, testing, and inspection to be designated COR's; or

(ii) authorize COR's to initiate procurement actions by use of imprest funds, blanket purchase agreements, or purchase orders, to place calls or delivery orders under basic agreements, basic ordering agreements, or indefinite delivery type contracts.

1-406.51 Authority and Limitations

(a) A COR shall not be authorized to award, agree to, or sign any contract or modification thereto, or in any way to obligate the payment of money by the Government; except that-

(i) a COR may be empowered to issue change orders under the Changes clause in contracts for supplies and services and under the Changes [Standard Form 23-A] or subparagraph (a) of the Changes and Changed Conditions [Standard Form 19] clauses in construct contracts, provided such change orders do not involve a change in unit price, total contract price, quantity, quality, or delivery schedule; and

(ii) a COR may be empowered to issue or change shipping and marking instructions which may affect the unit or total contract price within the limits of funding authority certified to him,

provided such shipping and marking instructions or changes thereto in no way change the total production quantity in the contract delivery schedule and provided further that the COR furnishes a copy of each document issuing or changing shipping and marking instructions to the contracting officer concurrently with its release to the contractor.

(b) Within the limitations in (a) above, a COR may be empowered to take any actions under a contract which could lawfully be taken by the contracting officer except where the terms of the contract itself specifically prohibit a COR from exercising such authority.

(c) A COR may not be authorized to initiate procurement actions by use of imprest funds, blanket purchase agreements, or other small purchase methods, nor to place calls or delivery orders under basic agreements, basic ordering agreements, or indefinite delivery type contracts.

1-406.52 Terminations of Designation.

Terminations of designations of COR's shall be in writing and shall set forth the date upon which the termination is effective.

1-406.53 Distribution and Acknowledgement of Designations.

(a) The original and one copy of each COR designation shall be furnished the COR who shall be required to acknowledge its receipt on the original thereof and return it to the contracting officer for retention in the appropriate contract file.

Air Force DAR Supplement (AF DAR Sup)

1-201.55 Technical Representatives of the Contracting Officer (TRCO). See ARF 70-9 for duties and responsibilities.

General Services Procurement Regulations (GSPR)

5A-1.404-70 Contracting officers' representatives.

(a) Appointment. A contracting officer may appoint any Government employee who is qualified to act as his authorized representative. A contracting officer's representative may be designated by name and position title or by position title only. The appointment shall be in writing and shall define the scope and limitations of the representative's authority. The appointment will remain in effect throughout the life of the contract unless revoked. Copies of appointments shall be placed in appropriate contract files. A copy of each appointment, change, or termination shall be furnished to each contractor.

This section does not require appointment of individuals for accomplishment of contract administration (e.g. engineering evaluations, testing, quality control, inspection).

(b) Authority. A contracting officer's representative may represent the contracting officer with respect to one or more contracts and may take any action which may be taken by the contracting officer, except that the representative may not award or modify a contract. The contracting officer may empower his authorized representative to issue change orders, provided that the orders do not involve changes in unit price, total contract price, quantity, quality, or delivery schedule. Change orders issued by representatives will contain the following statement: "In accepting this change order the contractor agrees that the price and all other terms and conditions of the contract remain unchanged." The contractor will also be instructed not to proceed under the change order until he has accepted the quoted statement, signed it, and returned it to the authorized representative.

Department of Transportation Procurement Regulations (DOTPR)

12-1.402-50 Contracting officer's representatives.

(a) A contracting officer may designate Government personnel to act as his authorized representatives for such functions as inspection, approval of shop drawings, testing, approval of samples and other functions of a technical nature not involving a change in the scope, price terms or conditions of the contract or order. Such designation shall be in writing and shall contain specific instructions as to the extent to which the representative may take action for the contracting officer, but will not contain authority to sign contractual documents. The responsibilities and limitations of the contracting officer's representatives may be set forth in the contract or in a separate letter, a copy of which shall be furnished to the contractor.

* * *

Department of Energy Procurement Regulations (DOEPR)

9-1.451 Contracting Officer's representatives.

(a) A Contracting Officer may designate Government personnel to act as authorized representatives for such functions as inspection, approval of shop drawings, testing, approval of samples, and other functions of a technical nature not involving a change in the scope, price, terms, or conditions of

> the contract or order. Such designation shall be in writing and shall contain specific instructions as to the extent to which the representative may take action for the Contracting Officer, but will not contain authority to sign contractual documents. The responsibilities and limitations of the Contracting Officer's representatives may be set forth in the contract or in a separate letter, a copy of which shall be furnished to the contractor.
>
> * * *

In the formally designated C.O.R. area there is essentially no Navy or NASA guidance. The only Air Force guidance is to AFR 70-9, a technical manual which addresses no substantive authority issues. With the exception of the previously discussed DAR and FPR definitions of C.O. discussed in Chapter I, there is no direct regulatory guidance relating to the formally appointed C.O.R.

(b) Representatives other than the Formally Designated Contracting Officer's Representative.

The regulations examined contained almost no guidance on the status of the numerous representatives that have functions connected with formation or administration of contracts but are not formally designated C.O.R.'s. The little guidance that does exist applies primarily to procurement personnel and inspectors. Listed below are the provisions applicable to this area.

The Defense Acquisition Regulations (DAR)

> 7-602.43 Government Inspectors
> GOVERNMENT INSPECTORS (1965 JAN)
> The work will be conducted under the general direction of the Contracting Officer and is subject to inspection by his appointed inspectors to insure strict compliance with the terms of the contract. No inspector is authorized to change any provision of the specifications without written authorization of the Contracting Officer, nor shall the presence or absence of an inspector relieve the Contractor from any requirements of the contract.
>
> 3-801.2 Responsibility of Contracting Officer.

(a) Contracting officers, or their authorized representatives acting within the scope of their authority, are the exclusive agents of their respective Departments to enter into and administer contracts on behalf of the Government in accordance with ASPR and Departmental procedures. Each contracting officer is responsible for performing or having performed all administrative actions necessary for effective contracting. The contracting officer shall avail himself of all appropriate organizational tools such as the advice of specialists in the fields of contracting, finance, law, contract audit, packaging, engineering, traffic management, and price analysis.

(b) To the extent services of specialists are utilized in the negotiation of contracts, the contracting officer must coordinate a team of experts, requesting advice from them, evaluating their counsel, and availing himself of their skills. He shall not, however, transfer his own responsibilities to them. Thus, determination of the suitability of the contract price to the Government always remains the responsibility of the contracting officer.

NASA Procurement Regulations (NASA PR)

14.403 Guidelines for Use in Arranging for Quality Assurance Functions at NASA Suppliers' Plants.

(a) General.

* * *

(2) Since the contracting officer is the only official of the Government authorized to bind the Government contractually in dealings with contractors, it is essential that all actions which affect the contract be taken through the contracting officer.

(3) NASA representatives visiting plants where inspection services are being performed for NASA by a Government agency shall notify the agency in advance of the purpose of the visit. Any instructions, decisions, or advice to the contractor shall be provided either simultaneously to the contractor and to the agency, or via the agency. All oral commitments shall be confirmed in writing.

General Services Procurement Regulations

5A-1.404-70 Contracting Officer's representatives

* * *

(c) Personnel assigned, not appointed, as representatives. A person assigned to and performing

> duty within a procurement office, under the supervision of a contracting officer, does not require designation as a representative. Persons considered to be subordinate to the contracting officer and who act in his behalf have the inherent authority of the contracting officer. The contracting officer cannot authorize subordinates who are not formally appointed contracting officers (§5A-1.404.2) to sign any documents or letters which require the signature of a contracting officer.

Department of Transportation Procurement Regulations

> 12-1.402-50 Contracting officer's representatives.
>
> * * *
>
> (b) A person assigned to and performing his primary duty within a procurement office, and who is under the supervision of a contracting officer, does not require designation as a representative to perform his assigned duties. Such a person is considered to be an employee of the contracting officer, acting in his behalf and as such has the authority to perform acts as assigned by the contracting officer. The contracting officer cannot, without delegating contracting officer authority, authorize his employees to sign any contract document or letter where the signature of a contracting officer is required.

The occasional inclusion of procurement personnel under the title of "Contracting Officer's Representative"[29] seems to indicate that being a C.O.R. does not require designation as such. However, the lack of guidance on this issue, as well as the absence of any guidance regarding appointment and limitations of the authority of other non-designated C.O.R. representatives,[30] has posed a serious dilemma for the courts and boards. In short, as noted in Chapter I, the brevity of the regulations has spawned the complexity of the courts's and boards' opinions discussed at length in Chapter III.

(2) Manner of Appointment

(a) The Formally Designated Contracting Officer's Representative

While the designation of C.O.R. may be formal, the steps necessary for that appointment are in most cases very informal. Vague generalities with references to no particular level of expertise are common to the appointment process.[31] Occasionally the designation may be directed to be in writing,[32] with the further requirement that it clearly define the scope and limitations of the authority involved.[33] Even in these instances, however, exceptions are often made in the areas of engineering[34] and procurement.[35]

The problems associated with the manner of C.O.R. appointment flow over into the next section, "Limitations of Authority". An ambiguous appointment can open to doubt to all parties the limits of the representative's authority. Similarly, those C.O.R. provisions which eliminate the need to formally designate certain procurement[36] and engineering personnel[37] create ambiguity as to which category of representative these individuals belong. The overlap of these issues however, is not so much a problem as it is an indication of what is going on. A poor or ambiguous appointment can and does play havoc with the clarity of the authority grant. The result is a representative and a contractor who are uncertain of the limits of the grant and a judicial review which must look to other than the grant to find those limits.

Neither the DAR nor the FPR prescribe any method by which formally designated C.O.R.'s acquire authority to bind the Government. The topic of delegation is not discussed. The same can be said for the Navy Procurement Directives, the Air Force DAR Supplement, and the NASA Procurement Regulations.

The Army DAR Supplement at ADARS 1-406.50 sets out that department's procedures for appointment of a C.O.R. The regulation

permits the C.O. to select and designate "any" Government employee, with the vague requirement that the C.O. "ensure that the individual possess qualifications and experience commensurate with the authorities he is to be empowered."[38] In accordance with ADARS 1-406.53, a copy of the designation is to be given to the contractor. A questionable requirement in ADARS 1-406.50 is the statement that any changes in the scope and limitations of authority "may" be made either by a new designation or by amendment.[39] The ADARS specifically states that formal C.O.R. designation is not required for individuals responsible for accomplishment of the "broad functions of contract administration, such as engineering evaluation, testing and inspection."[40] This statement could be read as meaning that the tasks are sufficiently ministerial as to not mandate the designation. Also plausible in light of the reference to the language "broad functions" is the argument that these representatives are already C.O.R.'s as a result of their positions and do not require the formal designation. Which explanation is to govern is unclear, particularly since the inspection function, normally associated with a very narrow grant of authority, is one of the referenced positions not requiring a formal C.O.R. designation.[41]

The General Services Procurement Regulations (GSPR) set out procedures similar to those in the ADARS. According to the GSPR, appointment to the position of C.O.R. can be made to "any Government employee who is qualified..."[42] The appointment is to be in writing and is supposed to define the scope and limitations of the representative's authority.[43] A copy is to be furnished to the contractor.[44] As was the case with the Army guidance, the GSPR states there need not be an appointment of individuals involved in the accomplishment of

"contract administration," also described to include engineering evaluations, testing, quality control, and inspection.[45] Also exempt from these appointment procedures are individuals assigned to and under the supervision of the designated C.O.[46] These procurement personnel are said to have the "inherent authority of the contracting officer."[47] It is unclear from the regulation as to whether the previously referenced contract administration personnel also have the C.O.'s "inherent authority."

The Department of Transportation Procurement Regulations at DOT PR 12-1.402.50 and the Department of Energy Procurement Regulation at DOE PR 9-1.451 are virtually identical in their coverage of the Contracting Officer's Representative. Paragraph (a) of both regulations states that the designation is to be in writing and is to be specific. Prticularly interesting is the fact that both regulations begin by stating that the C.O. may designate Government personnel to act as authorized representatives when they perform such technical functions as inspection and testing.[48] These "technical" functions seem to closely correspond with the positions specifically exempted by the Army and GSA regulations from having to have a formal designation. Both the DOT and DOE regulations[49] also have a paragraph which exempts procurement personnel from having to have a formal designation.[50] The DOT regulation has the added statement that such a person is considered to be an employee of the C.O. and as such has the authority to perform acts assigned by the C.O.[51] Implicit seems to be the fact that these procurement personnel are C.O.R.'s without a formal designation or that the regulation is itself the formal designation.

(b) Representatives other than the Formally Designated Contracting Officer's Representative.

While the formal regulatory guidance with regard to appointment of the formally designated C.O.R. is at best inadequate, there is at least some guidance. Close scrutiny of the regulations has revealed no formal guidance applicable to the non C.O.R. representative which is of any substance.

(3) Limitations on Authority

(a) The Formally Designated Contracting Officer's Representative

While some of the departments do provide procedures for appointment of a C.O.R. including a written statement of the C.O.R.'s scope of authority, the actual bounds of the representative's authority are still unclear. The typical pattern of regulatory guidance in this area is to state the C.O. may authorize a C.O.R. to perform any one of a number of tasks outside the signing of a contract.[52] At the conclusion of the regulation, however, is typically a statement that no C.O.R. may take any action which could impact price and varying other factors, often including aspects of product service or quality.[53] These regulatory prohibitions are routinely picked up and included in the actual grant of C.O.R. authority. Read literally, the authority restrictions at best confuse the issue of the representative's scope of authority and at worst completely withdraw the grant.

The Army DAR Supplement at ADARS 1-406.51 specifically addresses "Authority and Limitations of the C.O.R. The regulation's stated grant of power seems almost to equate the C.O.R. with the C.O. Within the stated limitations the regulation notes that "a COR may be empowered to take any actions under the contract which could lawfully be taken by the contracting officer..."[54] Specifically excluded from a C.O.R.'s authority is the authority to sign any contract or modification or to

obligate payment of money by the Government. The regulation then states that the C.O.R. may issue change orders under the changes clause "provided such change orders do not involve a change in unit price, quantity, quality or delivery schedule."[55] It takes only the briefest analysis to realize that the regulations effectively swallow up any grant. ADARS 1-406. 50(c) precludes redelegation of C.O.R. authority.

The General Services Procurement Regulations provides its only direct statement of C.O.R. limitations in paragraph (b) of GSPR 5A-1.404-70. The regulation begins with a statement that a C.O.R. may take any action which may be taken by the C.O. except that "the representative may not award or modify a contract."[56] The regulation then states that the C.O. may empower his authorized representative to issue change orders, provided that the orders do not involved changes in unit price, total contract price, quantity, quality or delivery schedule.[57] This language is somewhat similar to the Army ADARS 1-406.51(a)(i). GSA, however, does go one step further by requiring that all change orders issued by the representative contain a statement that the contract price and all other terms and conditions remain unchanged.[58] The regulation also states that the contractor is to be instructed not to proceed until a signed acknowledgement of this statement has been returned to the Government.[59]

Department of Transportation regulation DOTPR 12-1.402.50 and Department of Energy regulation DOEPR 9-1.451 indicate that the C.O.R.'s only restrictions are those set out in his designation along with the added prohibition that C.O.R.'s may not be authorized to sign contractual documents.[60] No other limitation is given.

(b) Representatives other than the Formally Designated Contracting Officer's Representative.

There is essentially no express guidance in any of the regulations on the topic of "limitations of authority" with regard to non-C.O.R. representatives. The fact that these non-C.O.R. representatives could have any authority seems almost never to have been contemplated by the regualtions.

The Defense Acquisition Regulation at DAR 3-801.2(a) does state that C.O.'s or their authorized representatives acting within the scope of their authority "are the exclusive agents of their respective Department." "Authorized representatives" seems to presume formally designated C.O.R.'s is what are meant. Under this reading the regulation seems to exude exclusivity since it effectively reserves all authority to formally designated C.O.R.'s. Non C.O.R.'s are more than just limited under such a reading, they would have no authority. The primary argument supporting this interpretation is that the statement would be meaningless if authority were restricted to <u>all</u> Government agents and not just formally designated C.O.R.'s, unless of course, the words "scope of their authority" sufficiently limited the class of agents or representatives such that the authority reservation, read in its broadest sense, once again had meaning. The Army DAR Supplement at ADARS 1-406.50(e)(i) states there is no need to designate C.O.R.'s for certain "broad functions" of "contract administration." These individuals are referenced under a paragraph entitled "Contracting Officer's Representatives." This paragraph could be read to mean that these individuals do not need a C.O.R. designation because they do not need authority. This seems unlikely, if for no other reason than it appears as a useless statement. A better reading would seem to be that they already have authority, as C.O.R.'s, inherent to the "broad function" of the task assigned to them by the C.O. Such a reading

effectively eliminates C.O.R. and non C.O.R. representatives and creates designated and undesignated C.O.R. representatives. Once again, the issue becomes whether they are acting within "scope of their authority."[61] Under such a reading the classes of representatives begin to converge and the absence of regulatory stated limits on the undesignated C.O.R.'s authority becomes the basis for arguments that excepting limitations like that of DAR 7-602.3 on inspectors, no limits in fact exist, in the regulations.

The above conclusion that there are undesignated C.O.R.'s possessing authority without stated regulatory limits seems clearly supported by the General Services Procurement Regulations. While the FPR does not address non-designated C.O.R.'s as a topic, GSA Procurement Regulations at GSPR 5A-1.404-70 does speak to the "inherent authority" of persons "considered to be subordinate to the contracting officer." These individuals, the regulation states do not reguire disignation as a C.O.R.[62] The only stated limitation is that only the designated C.O. may sign documents or letters that "require the signature of a contracting officer."[63] While not using the expression "inherent authority", the DOT Procurement Regulations also refer to the existence of authority in what are referred to as "employees" of the C.O.[64] With the exception of a statement that only a C.O. may sign documents and letters, no limitation is stated.[65]

C. Miscellaneous Intra-Agency Guidance

A careful sampling of informal agency publications, consisting of pamphlets, directives, technical manuals, policy letters and the like revealed no substantive agency guidance on any aspect of representative authority. Several of the publications reviewed cited only their respective DAR and FPR supplements.[66] Others simply included broad

statements that changes in price, quantity or quality could not be made by anyone other than the designated C.O.[67] In several instances the topic of Government employee-contractor interface was essentially restricted to caveats on the topics of accepting gratuities[68] or permitting personal services contracts.[69] The best that could be expected was a sample appointment letter for a formally designated C.O.R.[70]

D. Conclusions

The major conclusion in the area of intra-agency guidance must be that it is grossly inadequate in those instances that it even exists. With regard to the formally designated C.O.R., the regulations qualify more as grounds for speculation, than as guidance. The term C.O.R. is not even defined. Non-C.O.R. representatives, with the exception of inspectors, seem not to even be considered by the DAR, FPR and their supplements. Another uncertainty are those C.O.R.'s which do not require a formal designation, but qualify for formal C.O.R. status, for whatever that means.

Any informal guidance is ordinarily too general to be meaningful. Complex technical manuals often include only the broad statement that no one other than the C.O. may issue changes. Only occasionally does a pamphlet include an appointment letter or a portion of a DAR or FPR supplement, as inadequate as they be.

It must be concluded that the agencies seem to have missed an excellent opportunity to classify their representatives, state limitations on their authority and ability to delegate, and issue meaningful guidance on relations with contractors. Instead, to some extent they have taken to making self-serving statements that only C.O.'s can issue changes and bind the Government. The net result of this guidance, if taken at face value, would be to permit the Government to

take advantage of any benefits representative guidance might offer, while disavowing any unpleasant results. Chapter III indicates this is not the law. It is unfortunate for contractors and Government personnel that the rules of their relationships cannot be adequately defined prior to any litigation. This would ultimately make for more efficient contracting, the savings on which the agencies would enjoy. It would also give the agencies a chance to make realistic decisions favorable to itself as opposed to ignoring the issues and letting the courts and boards decide all aspects in this area.

Chapter III

The Boards and Courts

A. First Analysis - What the Law Seems to be

While there are several clear principles of law in this area, there is very little clear guidance. These principles which were briefly discussed in Chapter I are set out below. Examined together, it becomes apparent that they tend to overlap, covering basic fact situations which, on at least first analysis, appear identical. The result is that the boards and courts seem to have a choice of legal reasoning permitting or denying the existence of a contractor's recovery.

One of the primary principles cited throughout these decisions is that there must be actual authority to bind the Government. This concept when cited to deny a contractor's recovery often comes from those technical representative clauses which strictly limit the particular representative's authority to act. A second group of decisions play down or completely overlook the existence of these "disclaimer" provisions and find the actions of the Government representative to be binding. Several forms of analysis are used to come to this conclusion, but the primary focus of all of them is on the duties, responsibilities, and working relationships of the representative involved. A third group of cases find authority, but avoid the issues surrounding the Government representative and look to the designated C.O. A brief analysis of these basic categories and related issues follows.

(1) Clauses Limiting Authority

The Government routinely attempts to preclude the implication of authority by expressly informing the contractor of limitations on the scope of authority of particular personnel. Such notifications are often accomplished by contract clause. Classic among the regulatory provisions which inspire such contract clauses is GSPR 5A-1.404-70(b) which states:

> Authority. A contracting officer's representative may represent the contracting officer with respect to one or more contracts and may take any action which may be taken by the contracting officer except that the representative may not award or modify a contract. The contracting officer may empower his authorized representative to issue change orders, provided that the orders do not involve changes in unit price, total contract price, quantity, quality, or delivery schedule.

Another provision directed at limiting the Government's responsibility for its technical personnel is DOEPR 9-1.51(a) which states:

> A contracting officer may designate Government personnel to act as authorized representatives for such functions of a technical nature not involving a change in the scope, price, terms or conditions of the contract or order.

Many decisions summarily holding for the Government point tocontract clauses inspired by these provisions which stress the need for actual authority and the fact that apparent authority will not bind the Government.[71]

(2) The Authority of the Government's Representative

As has already been discussed in Chapter I the term C.O. includes "the authorized representative of the C.O. acting within the limits of his authority."[72] Thus, a major issue is whether the representative was, in fact, acting " within the scope of his authority." Very close to the "scope of authority" concept is the principle of implied

authority.[73] Also noted in Chapter I was the fact that authority to bind the Government is generally implied when such authority is considered to be an integral part of the duties assigned to the Government employee.[74] Most of these cases arise where Government inspectors or technical personnel lacking authority to order changes issue interpretations or give instructions which cause the contractor to perform work beyond stated contract requirements.[75] Under these circumstances, the courts and boards frequently hold the Government to a constructive change. A typical case is Switlik Parachute Co.[76] where an inspector had been delegated the authority to accept the end product. The following language from Switlik illustrates how the concepts of scope of authority and implied authority can be read together in such a manner as to bind the Government:

> "Since the authority to accept necessarily embraces the authority to reject, and since the reason for the threatened rejection by the QAR related to the testing to be performed, we conclude that the QAR acted within the scope of authority conferred on him by the necessary implication from the express terms of the contract when he prescribed the conditions under which he would inspect and accept...."[77]

Although the principle seems fairly clear, later language in the case does hint at potential problems in application when it requires the particular direction be "reasonable under the circumstances"[78] and that the required action not go beyond the inspection and acceptance functions. However, standing alone, Switlik does give depth to the authority of this particular Government representative. Using similar logic, a number of court and board decisions have held that when a C.O. designates technical personnel, such as engineers or project officers to give guidance or instruction about specifications to contractors, the Government is liable for the impact of any guidance given.[79]

(3) The Contracting Officer's Authority

Some decisions do not seem comfortable in finding a basis for binding authority in any of the Government's representatives. Perhaps this is due to contract language clearly restricting the authority of the Government's representatives, or possibly the narrow scope of the duties associated with a particular representative. Regardless of the reason, these decisions often circumvent the authorized representative issues by finding authority in the related legal concepts of C.O. ratification, acquiescence, and imputation of knowledge.

Triangle Electronics Manufacturing Co.,[80] a 1974 ASBCA case, is a classic ratification decision in the authorized representative context. In Triangle, the contract provided the usual disclaimer that actions by "unauthorized" persons were not to be binding on the Government and that designation of an individual as the Government's representative did not entitle that individual to make contractual commitments on behalf of the Government. Setting the notification of the representative's limitations aside, the ASBCA held the Government bound by the actions of its contract negotiator. The stated basis given for the ratification was the fact that the C.O.'s representative conducted the contract negotiations, administrated the contract, and interpreted the provisions, all with the C.O.'s knowledge. The board determined that the C.O.'s silence amounted to approval of the duties as performed.[81] In Lox Equipment Co.[82] the ASBCA found that the C.O. had "ratified" the inspector's requirements which exceeded the contract specifications when the C.O. knew or should have known of his representative's actions and failed to correct the situation.[83] It is an interesting footnote that what the C.O. "should have known" was sufficient to satisfy the

board's prerequisites to ratification.

A typical decision binding the Government on the basis of the C.O.'s acquiescence is W. Southard Jones.[84] In setting out the basis for its finding acquiescence, the ASBCA stated:

> Here we have a case where the contractor, the C.O., and the concerned Government technical personnel are all operating on the same military base. ...Base technical personnel clearly knew what was going on and clearly intended that the original drawing should not be followed. ....Conceding therefore that the contracting officer was the only one empowered to authorize changes in the contract and that a special clause was included to emphasize the limitations of authority of the technical personnel, we must hold under the particular circumstances of this case that he had timely notice of changes, if not actually, then constructively.[85]

Stated concisely, the decisions based on C.O. acquiescence hold that where the C.O. was or should have been in contact with the proceedings so as to have been aware of changes proposed by his Government technical colleagues, he will be held to have approved them. Taken at face value decisions such as W. Southard Jones seem to emasculate the previously discussed clauses putting the contractor on notice to the representative's limited authority.

Cases based on imputed knowledge are very closely related to and sometimes indistinguishable from the above discussed acquiescence decisions. The concept of imputed knowledge frequently arises where a contractor fails to give notice within a stated time limit such as a constructive change[86] or for a suspension of work.[87] The theme which is consistent throughout these decisions is that the C.O.'s representatives are the "eyes and ears" of the C.O., making the knowledge of the Government's representative that of the C.O.[88] These cases most graphically illustrate the problems of overlap and conflict in this

area. The cases in section (a) above provided strict guidance that narrowly construed actual authority of the designated C.O. was a prerequisite to all contractual actions. Later decisions permitted the particular Government representative to take action within the scope of his authority based on implied authority. Other decisions bound the Government based on the C.O.'s knowledge and inaction. Imputed knowledge decisions dispense with concern for the C.O.'s actual knowledge and rely entirely on what the authorized representative knew or should have known. Thus, currently there are decisions denying particular Government representatives can take any action to change the contract and other cases saying his actual and, under the right circumstances, constructive knowledge is sufficient to bind the Government.

(4) Duty to Inquire

The contractor's duty to inquire has evolved from a line of decisions recognizing that the certain Government representatives may have some authority to make changes. In a clear attempt to put some limits on the legal impact of Government representatives' statements and actions, a duty to inquire or appeal the particular representative's statement or action has developed. The essence of the principle as it was initially set out is stated in the ASBCA decision of Barton and Sons[89] where an inspector was alleged to have ordered additional work. Central to the board's holding for the Government in one claim was the fact that there was no apparent reason why the contractor did not seek clarification of the alleged order. The board simply stated:

> Even if the inspector had ordered it, the failure of Appellant to seek confirmation of the order from the contracting officer or anyone else in authority in the Air Force would bar relief under the "Contracting Officer's Representative" clause of the contract.[90]

The 1968 decision of WRB Corporation v. United States[91] indicates that an absolute requirement for inquiry or confirmation does not exist. In WRB the contractor requested an increase in contract price, claiming that extra work required by the Government's resident engineer constituted a change. In holding for the contractor, the Court of Claims noted that the contract contemplated delegation of C.O.'s power. Carefully enumerating the engineer's duties under the contract, the court determined that the grant empowered the resident engineer to make the alleged changes.[92] Denying the existence of any duty to inquire the court noted:

> Since [the Government's representative] was acting within his authority, the plaintiff was not obligated to appeal to the contracting officer, and the Government is liable if the resident engineer erroneously construed the contract.[93]

However, notwithstanding the language of WRB, the prudent contractor would be still well advised to inquire at every opportunity. This is well illustrated in the 1972 case of John H. Moon and Sons.[94] In that decision, the Interior Board of Contract Appeals denied an equitable adjustment stemming from a resident engineer's guidance. Dismissing evidence of past reliance on the engineer's direction, the board pointed to authority limiting provisions in the contract. The board noted:

> Since no exigency was present which precluded the appellant from seeking review of the resident engineer's decision before allegedly incurring the costs....and since at the time the claim was presented options contemplated by adherence to established procedures had been foreclosed to the Government, the claim is regarded as without merit and is therefore denied.[95]

It is possible to read the WRB decision and the John H. Moon case

together by saying that in Moon the established procedures resulted in a very limited authority which the engineer exceeded. However, the board's emphasis on exigent circumstances appears to indicate that confirmation of changes should be made when circumstances permit.

B. Analysis by Title and Function - Who Can Bind the Government?

Complete examination of this area seems to require a tracking of the different Government representatives to determine which representative performing what duties are capable of binding the Government. The different categories of representatives appear to be located at different points on a spectrum. The spectrum is one of increasing authority; the basic inspector having a very narrow scope or small amount of authority, the C.O.'s representative having arguably the equivalent authority of the C.O. for certain matters. At least the attempted emphasis in this section is, therefore, on the categories of representatives. Focusing on representative categories, however, is made complex by the overlapping of issues of different amounts of authority depending on the contract, specific delegation, and degree of direct or indirect C.O. involvement. At certain points hard issues of authority appear to fade into a purely circumstantial analysis dictating an equitable solution. In depth analysis indicates that a finding of authority and a resulting contractor recovery may be heavily dependent on the reasonableness of the contractor's conduct. As the C.O. turns over more and more responsibilities to the particular representative and relies on him, the reliance on that representative by the contractor for interpretation or direction becomes more reasonable. In short, as the representative gathers more delegated responsibilities from the C.O. he seems to take on more of the powers or the C.O and

courts and boards seem less willing to turn to legal technicalities to deny a contractor recovery. Strict authority analysis seems to fade away to a discussion of license, constructive knowledge, constructive authority or the discovery that the Government's representative is in reality the C.O.'s authorized representative.

(1) Inspectors

The primary function of "inspection" is essentially that of examination. Under normal circumstances, the inspector stands as little more than the Government's "observer." At his broadest point, the inspector is authorized to examine drawings and specifications and make determinations regarding contractual compliance; but absent modification by either delegation or circumstance, the inspettor appears to lack authority to unilaterally take his determination and act on it. Similarly, thereis ordinarily no reasonable basis for justifying a contractor's reliance on an inspector's direction.

The inspector attains his position as a detached observer as a result of his functional remoteness from the C.O. This lack of contact with the C.O. effectively deters arguments that knowledge of the inspector can be legally imputed to the C.O. There seems to be almost a presumption that the inspector's tasks are so mundane that he need only look to the specifications and the particular product or service to perform his duties. He need not look to the C.O. The net result of this anemic inspector - C.O. relationship is a broader duty on behalf of the contractor to inquire of the C.O. Consistent with the previous discussion of WRB, this broad duty to inquire complements the very narrow scope of the authority of the representative.

(a) The Basic Inspection Function

The 1968 Court of Claims decision of WRB Corporation v. United States[96] discussed several Government representative issues, one of which relates to the basic inspection function. The discussion ofthe other representatives provides a valuable insight into the very limited authority associated with the basic inspection function. In WRB the contractor contended that it was entitled to additional compensation because the Government's resident engineer misinterpreted the contract when he ordered the contractor to insulate certain water pipes and that the Government's inspector had directed the contractor to perform other work not required by the contract. In WRB the C.O. designated the resident engineer as his representative for assuring compliance with the terms of all contracts within his area, and specifically delegated to him the functions of; (a) examining and testing workmanship; (b) rejecting defective material and or workmanship; and (c) requiring replacement of defective material and or workmanship. The court held that this grant of authority empowered the resident engineer to direct the contractor in accordance with his interpretation of the specifications.[97] The court ruled that the contractor was not obligated to appeal the decision to the C.O. since the resident engineer was acting within the scope of his authority.[98] Accordingly, the contractor was held to be entitled to recover even though the resident engineer's interpretation was incorrect. Similarly, the Court of Claims noted that neither the contract, the C.O. nor the resident engineer had empowered inspectors to direct the contractor's operations in accordance with their interpretation of the specifications.[99] Thus, the contractor could not recover for that portion of its claim which was based on the allegation that the inspectors had issued directions based on a

misinterpretation of the contract; the exception being where the contractor's objections to those directions were brought to the resident engineer's attention and the engineer who had authority and had confirmed those directions.[100] After the ruling in WRB, the law as to inspectors appeared to be that contractors could only recover where; (1) the inspectors were themselves authorized to order changes[101] (which in WRB they were not) or; (2) the inspector's actions were directed by or ratified by the C.O. or one of his authorized representatives[102] (in WRB, the engineer). Ultimately the court in WRB did permit the contractor to recover under a breach of contract theory based on the fact that the Government had breached its implied obligation to neither hinder nor delay the contractor's performance.[103] The breach occurred when the inspector's erroneous interpretation imposed a stricter standard for certain items than required by the contract and when he insisted on less efficient procedures contrary to what was industry practice. The court never addressed the question as to whether either of these two situations might be regarded as unauthorized inspector ordered changes for which relief could arguably be denied, since as it noted, only an authorized Government representative could order changes.[104]

The immediate result of WRB was to severely restrict the authority of the Government inspecto.. The 1958 ASBCA decision of Cameo Curtains[105] had held that an inspector interpretation imposing a stricter than contractually required standard could be construed to be a change.[106] The controversy in Cameo Curtains arose out of a production contract for cargo parachute assemblies where the stated standard for quality was freeness from "excessive irregularities . The

contractor claimed and the board held that any requirements imposed by the inspectors to correct irregularities which were not "excessive" were compensable as changes to the extent they increase contract costs. After WRB, absent C.O. or C.O.R. knowledge or involvement, such actions and interpretations of an inspector, at least theoretically, no longer constituted changes.

Considering the very narrow scope of authority ordinarily attributed to an inspector, it is not surprising that this representative will not as a result of inaction be held to have impliedly changed a contract. Consistent with the view that the inspector is only a detached observer, the ASBCA in Penn Construction Co. [107] refused to read any meaning into an inspector's tolerance of a contractor's patent deviation from stated contract requirements. In Penn Construction a contract which involved roofing required that longitudinal joints of roof sheathing be staggered on the beams to guarantee the support of the roof. Disregarding the stated requirement, the contractor installed the sheathing so that all the joints were on one beam and asserted that he was relieved of the responsibility for the nonconformity by the fact that a Government inspector present at the site had made no objection. Close inspection at the completion of the project properly revealed that the roof was sagged as a result of the failure to stagger the sheathing. The facts revealed no evidence that the inspector directly approved the contractor's deviation from the specifications. Denying the contractor's claim, the court stated:

> In light of Clause 22(b) of the contract, cited above, expressly providing that no provision for supervision, approval, or direction, by a Government representative should relieve the contractor of responsibility for the sufficiency of the work and the provisions of Claim 26, requiring the contractor to maintain his own inspection system to insure that

> the work was performed in accordance with contract requirements, there is little merit, even arguendo, that the brief visits of the Government Inspector, to the job site ought in any measure to snift responsibility from [the contractor] to the Government for the sufficiency of work.[108]

While the board in Penn Construction chose to point to the clause, it seems equally logical to argue that a stated contractual requirement cannot be waived by mere implication or acquiescence, at least not by an inspector. As will be shown, contractor recoveries based on the C.O.'s constructive or imputed knowledge of facts known by an inspector are rare. This theory and its heavy dependence on the factual circumstances is addressed in more detail later.[109]

The 1969 NASA BCA decision of Aeroflex Laboratories[110] deals with an inspector's deliberate attempt to change the contract specifications which the contractor knew was beyond the inspector's authority. The problem developed when the Government inspector wrote a memo in which he attempted to waive the contractor's deviations from specific contract requirements. The case goes a long way to illustrate the narrow bounds of a basic inspector's authority. The contractor argued that inspection included the authority to accept. The board disagreed:

> [The Contractor] maintains that the Government representative... must have had the authority to accept the object, at least with regard to patent defects. Since the defects in dispute that were allegedly waived by the Government were patent, the argument runs, the Government representative must have had authority to accept...and authority to waive the defects. [The contractor] however, has cited to the Board no provision in the contract in law which requires us to accept the conclusion that authority to inspect implies further to accept. In fact, the inspection function seems often to exist apart from functions having authority to change contract terms.[111]

Based on this analysis of authority, the inspection function by itself has only a narrow scope of authority associated with it. With the

exception of the reasonable interpretation of matters clearly associated with the items being inspected, it is unlikely that an inspector, absent authority to accept, has much authority, or at least authority to issue changes. The element of reasonableness plays an ambiguous but certain role in the court's analysis. After setting a rigid authority analysis for concluding that the contractor was not entitled to recover, the board preceded to discuss reasonableness of reliance.

> Even if this were not the case, it is difficult to see how this would overcome the fact that [the inspector] did not have authority to accept the defects and that [the contractor] knew this. In one case in which the Board has applied a doctrine of estoppel, we found that the Contracting Officer knew or should have known of the circumstances leading to the detrimental reliance by [the contractor] in that case. INET Power, NASA BCA. 566-23, 68-1 BCA Para 7020. In the present appeal, there is no reason for such a finding because [the inspector] made his lack of authority clear. Nor is there any basis for us to conclude the [contractor] reasonably relied on [the memorandum].[112]

The discussion of reasonable reliance immediately after the conclusion of the lack of the representative's authority may offer a meaningful insight. At least the NASA board seems to think that the absence of authority does not settle the issue. Thus, reasonableness of action may not merely be a factor, a part of the analysis of authority, but may arguably be a separate form of analysis potentially permitting contractor recovery all by itself. However, notwithstanding any discussion of reasonableness, the conclusion that an inspector does not possess the right to accept, has not been universally held. In the 1973 ASBCA decision of Baltimore Contractors[113] the board settled the decision by summarily stating that the Government's inspector was fully aware of the adequacy of the contractor's performance and accepted the

work.[114] The inspector's authority to accept was presumed to exist and was conclusive on the matter in issue.

In contrast to Aeroflex's subtle inquiry of reasonableness, the IBCA in Sam Kal Mines[115] addressed only the inspector's lack of authority. Like many decisions in this area Sam Kal speaks to the contractor's obligation to inquire of the C.O. In Sam Kal the inspector allegedly stated that he would recommend payment for certain unhauled dirt, since hauling it as required by the contract was not advantageous to the Government. Citing the absence of C.O. involvement the board stated:

> Even if it were shown that without question the inspector made the "concessions" described by the [contractor] in its claim letters, the Board would not find a change. The fact that the Contracting Officer did not sanction the alleged revisions in hauling and measuring requirements, and indeed was not aware of the purported field agreement, is fatal to the claim.[116]

The obvious equity of not paying the contractor for work unperformed is not addressed. Unlike Aeroflex, there is no discussion of reasonableness or the absence of detrimental reliance.[117] The board simply states that the inspector is without authority. In this regard Sam Kal Mines is typical of many denials based on strict authority, discussions of "reasonableness" often being routinely reserved for contractor recovery decisions where the normal prerequisites to authority are clearly absent.

The 1967 decision of L. B. Samford[118] seems to restate the general rule that inspectors are not authorized to make contract changes. Samford involved a changed condition under a construction contract where a Government inspector had changed the contract by directing the contractor to blast boulders, making it impossible to

measure the boulders with the method set out in the contract. The board pointed to contract language which stated that inspectors were not authorized to alter any contract terms and held for the Government.[119] Blending reasonableness and the requirement for authority, the board reasoned in part as follows:

> The most reasonable course of action that could have been followed when the large massed boulders presented the parties with a measurement problem was one that the contracting officer had a right to direct under the changed conditions clause.
>
> * * * *
>
> The inspector was not empowered to authorize a change or to agree upon a new measurement method once a changed condition was discovered. In seeking entitlement to a method of measurement . . . . [the contractor] should have dealt with the contracting officer, or at least the Regional Engineer.[120]

While Samford points to the stated lack of an inspector's authority, as the case notes, it is the failure to follow the stated guidance under the changed condition clause which seems to cause the contractor's actions to be less than reasonable and not doubt results in the denial of the claim. Furthermore, the clear implication from the second paragraph is that there is a spectrum of authority. In Samford the reasonableness of the contractor's actions and the authority of the representatives involved diminished as he moved down the spectrum to the inspector.

The narrowness of an inspector's authority is demonstrated by contrasting the impact of authority limiting language common to many technical representative provisions. To the extent that the restrictions read consistent with the duties to be performed, the restrictions will be upheld. But when the position and the restrictions amount to a

contradiction, reasonableness and the realities of the actual function being performed seem to win out. In the inspector context the 1970 ASBCA decision of Allens of Florida[121] illustrates this point. In Allens, a Government inspector allegedly instructed a contractor to remove timber and stumps from a roadway. No contractual interpretation was required. The contract specifically provided that such items would be removed by someone other than the contractor. The contract's "Government Inspectors" clause, clause #47, contained the following language:

> No inspector is authorized to change any provision of the specifications without written authorization of the Contracting Officer, nor shall the presence or absence of an inspector relieve the Contractor from any requirements of the contract.[122]

Holding for the Government, the board noted that there was no evidence that the contractor had made a protest to the C.O.'s authorized representative.[123] He had not even been informed of the additional work until one month after it had been completed. Basing its conclusion on strict principles of authority and the authority limiting provision of the contract's inspection clause, the board noted:

> By the terms of paragraph (b) of the Changes clause, "any other written order or an oral order" is required to be issued by the Contracting Officer before it may be considered a change order under the clause. The alleged order in this case was given by the Government inspector. By General Provision No. 47 entitled Government Inspectors, it is specifically provided that no inspector is authorized to change any provision of the specifications without written authorization.
>
> * * *
>
> Under these circumstances we decide that [the contractor's] claim cannot be allowed.[124]

Without stating its reasoning, the board in Allens continually

discussed the C.O.'s and C.O.R.'s authority in the same breath, clearly indicating that at least for certain matters, their authority may be the same. This is best illustrated by the following language at the end of the decision:

> ...[The Contractor] does not argue that the Contracting Officer or the Contract Administrator directed it to perform the extra work. [The Contractor] does contend, however, that the Government inspector directed its clearing superintendent to push the salable pines and stumps off to the side of the roadway in order to permit the work to continue in an orderly fashion.[125]

The fact that the C.O.R. has broad powers and is sometimes identified with the C.O. is not all that remarkable. It could also be argued that the previously discussed language of clause #47 puts limits on what would otherwise be the implied authority of the inspector. But what is unaddressed is the impact of language similar to the restrictions of clause #47 which routinely restricts the authority of a C.O.R. Is the board implying that C.O.R.'s have such broad authority that specific restrictions may be overcome? Or would the reliance on this key Government representative, the C.O.R., have simply been so much more reasonable than reliance on a mere inspector that it might have been overlooked? The cases in the next section's discussion of "license" indicate that reasonable contractor conduct may be just that persuasive.

Allen's holding that failure to inform the C.O. and obtain authorization for extra work ordered by an unauthorized inspector will bar recovery may not always be the rule. The appearance of "who is taking advantage of whom" often seems controlling. In Townsco Contracting Co.[126] the facts appear similar to Allens and yet the ASBCA overlooked an authority limiting clause almost identical to that in

Allens and held the Government liable for extra costs associated with a faulty direction given by an inspector.[127] The logic given by the board was that the inspector had merely filled in a gap in the contract specifications and that this did not amount to a change.[128] Thus, the Government should therefore be liable when it turned out that the inspector's instructions were wrong.

(b) Contracting Officer Acquiescence and Imputation of Knowledge

Upon leaving the narrowly defined function of contract interpretation routinely associated with inspection, it can be generally stated that the likelihood of the basic inspector's actions being viewed as "authorized" diminishes greatly. As will be shown, however, exceptions based on ratification, acquiescence and specific delegations of authority do exist. In Lox Equipment Co.[129] the Government argued that even if the contractor did perform cleaning work in excess to what was required by the contract specifications, the fact that the inspector's acceptance was conditioned on the performance of the additional work did not alter the inspector's lack of authority to make such changes. The ASBCA conceded the inspector's lack of authority, but still found for the contractor.[130] The board stated that the C.O.'s failure to take corrective action after either his C.O.R.'s actual or constructive knowledge of the new conditions for acceptance in effect "ratified and confirmed" the change.[131] As is often the case in this area, this decision points to the C.O. and not the representative as the basis for its legal justification. This avoids representative authority issues and arguably elevates a case based on not much more than difficult circumstances to a decision determined by the unques-

tionable authority of the C.O.

Extreme reliance by the C.O. on the inspector can result in the inspector's knowledge being imputed to the C.O. In Southwestern Sheet Metal Works[132] the ASBCA noted:

> Even if the inspector did not possess the necessary authority to give such an order, we believe that the C.O. had actual or constructive knowledge of the situation. The Contracting Officer lacked technical expertise...he readily acknowledged this, and he admitted he relied completely on his inspectors in the day to day supervision and conduct of [the contract]. [The Contractor] was in constant contact with the inspector and the inspector with his supervisors. Therefore if the C.O. did not know of the order "...he ought to have known, and the knowledge is imputed to him." Gresham & Co., Inc. v. United States...[133]

In Southwestern Sheet Metal the facts indicate that the representative was really much more than an inspector. He was really the C.O.'s field representative as was demonstrated by the C.O.'s reliance on him. The Court of Claims, however, apparently felt awkward finding an inspector authorized and, therefore, felt compelled to look to the C.O. for authority. In any case, Southwestern clearly displays a major principle in this area. Transfer of C.O. discretion to a Government representative may result in the Government being bound by the transferee agent's actions. Theories vary. In Southwestern the court used imputation of knowledge.

Research of the basic inspector decisions discloses only a relatively small number of cases based on acquiescence or imputed knowledge. The reason, although nowhere stated, probably lies in a spectrum analysis. The closer the working relationship of the representative is with the C.O. the more likely the representative's knowledge will be presumed to be the knowledge of the C.O. C.O.'s

simply do not have as much contact with, or reliance on inspectors as they do project officers, resident engineers, or other field representatives.

(3) Specific Delineation of the Inspector's Authority

The position of inspector may have additional or altered responsibilities and authority as a result of a specific delineation set out in the contract or separate letter. The inspector's authority may also be limited by implication, as where a specific procedure requires a Government representative other than the inspector to take action. Consistent with the previous discussion of reasonableness are these decisions which base their outcome on clear and specific notification to the contractor of the inspector's responsibility and authority. Like a clear and specific disclaimer, a precise statement setting out an inspector's duties or authority leaves no doubt but that a contractor is on notice to the scope of a particular inspector's authority. The specificity of the statement, whether it be to what an inspector can or cannot do, seems to be the key. Unlike the authority restricting broad language of some clauses, carefully defined duties set out in a contract or separate letter seem to carry more weight. Although nowhere discussed, the outcome appears determined by or is at least consistent with the the previously discussed concept of reasonable contractor action or reliance.

Where the C.O. has provided the contractor with a written statement of the inspector's authority, that guidance will ordinarily be controlling over all other factors. In the case of F. H. Antrium Construction Co.,[134] the C.O. in a letter to the contractor carefully outlined the authority of the project inspector and clearly put the

contractor on notice that this official did not have authority to make changes to the contract. Based on this notice, the GSBCA took a very conservative position emphasizing fundamental legal precepts dealing with authority. The board did not discuss the project inspector's duties or their relationship to the contractor or C.O. However, the issue of reasonableness of action, although latent, is definitely present. The entire focus of the board's reasoning was on the letter which gave the contractor clear notification of the inspector's limited authority.[135] The fact that all other arguments are subordinate was well illustrated by the following language:

> The letter from the contracting officer to appellant...outlined the authority of the project inspector and clearly placed the contractor on notice that this official did not have authority to make changes to the contract. [The Contractor] admitted that he was aware of the fact that changes required the approval of the contracting officer. Appellant attempts to overcome this deficiency in its proof by alleging that the contracting officer was aware that extra work was being required and citing decisions holding that work not required by the contract which was accomplished at the direction or instigation of subordinate officials with the knowledge or acquiescence of the C.O. or his authorized representative constituted a constructive change. We are fully in accord with the cited principle and have applied it where the facts warranted.[136]

The emphasis on the contractor's failure to stay within the letter's specific statement of the inspector's authority dominates. The implication of this decision is that action inconsistent with such a delegation in light of clear contractor notification is simply not reasonable.

As initially noted the increase or alteration of the basic inspector's authority may be the result of a clear statement set out in the contract. The 1974 ASBCA decision of Switlik Parachute Co.[137]

deals with the contractual statement that the inspector had the additional authority to accept.[138] The decision clearly demonstrates that the basic inspector may have substantially increased powers as a result of contractual agreement. In Switlik the contractor complained that more testing was being conducted than was actually required by the contract. To this charge the inspector responded that the testing was in accordance with his interpretation of the contract specifications and that the contractor had to test on that basis or he would not accept. The ASBCA found that the testing performed did in fact exceed the contract's requirements.[139] On the key question as to whether the inspector acted with the scope of this authority when he directed the contractor to perform testing in excess of the contract requirements, the language of the inspection provision proved decisive. It provided that inspection would be performed by "an authorized inspector of the Government" and that acceptance would be performed "by an authorized Government representative." The Government's inspector was the individual authorized in both instances. Basing its conclusion on the inspector's authority, the board reasoned as follows: Since (a) the authority to accept necessarily includes the authority to reject and (b) the inspector's reason for threatening rejection related to the testing to be performed, the board determined that the inspector had acted within his scope of authority when he prescribed the conditions under which he would inspect and accept the contractor's product.[140] The board then concluded that the contractor's "compliance with direction was reasonable under circumstances" and that the Government was therefore bound.[141] Again, a consideration for reasonableness is displayed. However, central to the facts in Switlik is that they

display a contractually created "super inspector" having authority in excess to that inherent to the position. This is clearly illustrated in the following language:

> The extra testing which is the subject of the constructive change here was performed . . . without a formal protest by [the contractor] to the C.O. We have held, in a case in which the contract specifically denied an inspector's authority to change the specifications without written authorization of the C.O., that absence of a protest to the contracting officer was fatal to a constructive change claim. Allens of Florida (SIC) However, where as here, a constructive change has been proved and the person ordering the change is found to have had the authority to do so, the failure to lodge a formal protest with the C.O. is of no moment.[142]

With the addition of contractually provided authority, analysis becomes more complex. There is first the implied authority relating to the basic inspection task having a narrow scope of authority, and secondly, the express contractual delegation of authority creating an authorized representative, who has a much broader scope of authority. Switlik also stands as a classic case of how it may become difficult to isolate an "inspector decision" from a C.O.R. decision.

In the 1966 Court of Claims decision of Northbridge Electronics, Inc. v. United States[143] the inspector had been contractually designated by the C. O. as the representative authorized to approve changes in contract requirements. The clause in the contract delegating this authority read as follows:

> DESIGNATION OF REPRESENTATIVES: The C.O. designates the representatives specified below to approve changes which are in the best interest of the Government, provided such changes will not affect quality, quantity, price or delivery schedule. Any changes affecting quality, quantity, price, or delivery schedule shall be submitted to and subject to the written approval of the C.O.

* * *

(a) Quality Assurance Activity

> (1) The Chief of the Quality Assurance Activity designated in this contract, or the chief of any other activity to whom inspection responsibility is delegated, or other designated representative, may approve changes on those matters which pertain to the inspection and testing of supplies. These matters include, but are not limited to establishment of Government inspection systems, determination of the type and amount of Government inspection to be performed, and interpretation of specification requirements.
>
> (2) The Signal Corps Quality Assurance Activity designated in this contract is ... authorized to introduce technical and engineering changes. (Emphasis added)[144]

As a result of this delegation, the Court of Claims held that an agreement between the inspector and the contractor to substitute an augmented and stiffer visual and mechanical inspection test for the one initially required by the contract was binding.[145] What was not discussed was how this change could not affect quality. This appears as a classic case of the respect given languange of specific delegation, even in the presence of a general disclaimer restricting authority.

(c) Transfer of Authority Based on Circumstances and Reasonable Reliance

This entire area contains strong equity overtones in that analysis is often directed at reasonableness of conduct and reliance with traditional authority aspects being only secondary. Central to this kind of reasoning is a discussion of how and to what extent the Government is responsible for the contractor's predicament and to what extent the contractor's actions were reasonable. The courts and boards may look to the C.O., but ask not so much if he gave the inspector authority, but whether he was on notice of or responsible for creating

the circumstances.

In Barton and Sons[146] an Air Force contract inspector ordered that more epoxy than was needed be applied to certain material preparations. Because the epoxy had to be poured within a short period of time, the contractor, based on the inspector's insistence, knowingly added more epoxy than was necessary. To the Government's assertion that the inspector's direction was unauthorized due to a contract clause limiting the inspector's authority, the ASBCA stated:

> The Board finds that [the inspector] did order the added epoxy used, and that the appellant had no alternative but to comply because the epoxy would spoil if not used immediately. In this instance in contradistiction to the alleged orders . . . where [the contractor] could easily have sought clarification of any orders of the inspector, the inspector must have had authority to order the change notwithstanding the previously cited clause.[147]

The board found authority in a very conclusionary fashion with the obvious emphasis on the fact that it would be unconscionable not to.[148] There simply was not time to appeal to the C.O. Again, the circumstances were a major determining factor in reaching the outcome. Traditional principles of authority were at best not discussed, and at worst violated to obtain an equitable result.

In the 1973 ASBCA decision of Industrial Boiler and Steam Co.,[149] the contractor asserted he had performed extra work in reliance upon discussions with the Government inspector. The board denied the contractor's claim noting that the contractor's assertions were disputed by the Government and that the contractor had failed to present evidence which would sustain his burden of proof.[150] The board cited the inspection clause regarding the inspector's not being authorized and noted:

> [The Contractor] has presented no proof in support of the facts which it has alleged. Moreover, even if its allegations concerning work performed in reliance upon discussions with the Government inspector were proved, the claims based thereon would not be allowable in the absence of a further showing that the actions of the inspector were actually or constructively authorized or ratified by the contracting officer. (Emphasis added)[151]

The board never discussed what it takes to have "constructively authorized" an action, but they apparently recognize that it can take place. Blacks Law Dictionary[152] defines "constructive" as follows:

> That which is established by the mind of the law in its act of construing facts, conduct, circumstances, or instruments; that which has not the character assigned to it it its own essential nature, but acquires such character in consequence of the way in which it is regarded by a rule or policy of law...[153]

The board's reference to constructive authority would seem to be all but an acknowledgement of the existence of some kind of equity doctrine. It also poses the obvious question of what is the difference between "constructive authority" and apparent authority?

In the Engineering Board of Contract Appeals decision of Desonia Construction Co.[154] the contractor was on notice that the Government Inspector lacked authority to make any changes. However, the board dismissed the claim only after commenting on the fact that the work was mentioned in the contractor's daily report without even the slightest intimation that it was considered to be a change order.[155] In the context of a strict authority analysis, reference to what the contractor thought seems misplaced. However, in light of what may really be a disguised doctrine of equity, the contractor's reasonable expectations may be a significant factor for analysis.

Fox Valley Engineering, Inc. v. United States[156] provides an excellent case for showing why titles alone may not be the sole basis for

evaluation. In Fox Valley the contractor was to produce a large number of sketches for the Army Map Service (AMS). While the work was in progress, an AMS representative visited the contractor's plant and gave various instructions regarding the work. The contractor claimed that the instructions it was directed to follow amounted to an upgrading of the technical standards of performance, thereby entitling it to an equitable adjustment for price under the changes clause. Among other arguments raised by the Government was that the contractor could not recover since it had performed without a formal protest. To this the Court of Claims responded that a formal protest against performing work is important where an unauthorized subordinate gives orders without the C.O.'s knowledge.[157] But the court noted that this problem was not present since the actions taken by the AMS representative were authorized by the C.O.[158] The court set the title of "inspector" aside and analyzed the factual circumstances to resolve the key issue of authority. The court noted:

> It matters not as [the Government] contends, that this official was employed in the Inspection Section and that "inspectors" are not authorized to accept work in the field. This official may have sometimes been referred to as an "inspector", but at least for the purpose of this contract he was vested by the Contracting Officer with powers which went beyond these ordinarily associated with an "inspector." Although employed in the Inspection Section, his official title was that of cartographer, and he was considered to be an AMS field representative. He was sent to [contractor's] plant by the Contracting Officer for the express purpose of giving guidance and any necessary instructions and directions. (Emphasis added)[159]

Fox Valley never clearly states whether the representative was misclassified as an inspector, since he had more authority all along, or if the factual circumstances of extreme C.O. reliance and resulting

contractor's reliance were sufficient to transfer authority to the AMS representative. It is very likely that this is in fact a "distinction without a difference." The main thrust of Fox Valley however, is that factual analysis can be a pivotal factor. If there are confining rules applicable to an inspector, they may apparently be avoided by finding that the representative has been misclassified. The circumstances either indicate, or create, the misclassification, it makes no difference which. Implicit from this analysis and discussed at length in the next section is the presumption that "field representatives" inherently have more authority than inspectors. This is entirely consistent with the spectrum of authority and responsibility concept. Finding more responsibility has been transferred to a representative, seems to be the equivalent to the finding of a greater amount of authority, the ultimate authority lying with the C.O. In Fox Valley the finding that the representative is a "field representative" is simply the board's way of quickly moving the representative down the spectrum. To that extent titles provide an easy method for understanding the issues involved.

(d) Conclusions with regard to Inspectors

The study of inspectors begins at the narrowest point on the spectrums of authority, responsibility, and reasonableness. Inspectors by the very nature of their position, routinely have fewer responsibilities than other Government representatives. Similarly, relying on inspector guidance in the context of their lack of responsibility and remoteness from the C.O. may be unreasonable. Exceptions exist, primarily where there is specific delineation of additional duties or authority clearly set out in either the contract or in a separate

letter; or where the responsibilities of the inspector are such that he has in fact been misclassified as an "inspector." Thus, increased responsibility may lead to the representatives being found to be a field representative, as was the case in Fox Valley, and as should have been the case in Southwestern Sheet Metal. The net outcome of these reclassifications is to move the representative down the spectrum of authority, thereby binding the Government. It also permits the courts and boards to keep the appearance of consistency with those decisions stating that inspectors have no authority to issue changes.

The position and working relationships of inspectors are not of such a nature as to promote a multitude of decisions based on acquiescence, ratification, and imputation of knowledge. These cases exist in the inspector context, but not with the frequency with which they can be found elsewhere. Clearly absent is the close C.O. interface. The result is that C.O.'s tend not to rely on inspectors as much and as often as they do other Government representatives. Thus, absent instances of misclassification, these remedies are rare. And if the representative has been misclassified, C.O. authority may be unnecessary in light of the representatives being found to have his own authority implied from the duties delegated to him.

(2) The Field Representative

The description of a "field representative" is essentially the description of a working relationship. Many different titles such as "resident engineer" or "project officer" are used. Among the many factors characterizing a "field representative" is his routine interface with the C.O. in a technical setting. The degree of guidance and direction given by these individuals varies, but it can generally

be said that some guidance and some direction seems inherent to the job. This fact, together with each case's peculiar C.O. and contractor reliance on the particular field representative are determinative of many authority issues. Field representatives, like inspectors, have a definite technical relationship to the contract, but unlike inspectors, field representatives have a guidance or direction element to their positions. These broader duties, and correspondingly broader scope of authority, in effect distinguish inspector's from field representatives. "Inspectors" who have such a guidance element to their written or actual job descriptions have no doubt been misclassified. That these classifications are not in all instances properly made, attests to the very circumstantial and therefore subjective analysis involved. It also further evidences the existence of a spectrum model with regard to classifications and authority. Thus, it can be generally stated that the addition of further responsibilities can potentially alter the classification of a representative, and with it, the amount of the representative's authority.

The function of a "field representative" by its very nature is a recognition of the need for someone other than the C.O. to technically monitor or give guidance on a contract. It is in essence the formal or informal transfer of some C.O. responsibilities to Government personnel in the field without necessarily the formal transfer of authority. The functions of these representatives vary. They could serve to alert the C.O. to issues as they develop, that is, simply communicate the facts to the C.O. and C.O. decisions to the contractor. In other instances the C.O. may elect to, or due to the technical climate, must rely on a field representative's discretion. Both of these instances can result

in decisions binding on the Government. As will be shown, several different theories are used. However, the primary emphasis of all of them lies in analysis of relationship. Transfer of responsibilities seems to correspond with transfer of authority. Some responsibilities seem to result in the representative's becoming the C.O.'s "eyes and ears." A duty to inform the C.O. evolves and arguments of imputation of knowledge or acquiescence settle the issue in the contractor's favor. In other cases where the amount of responsibility is such that the particular field representative assumes a supervisory role in the contract, the actual representative may be found to be authorized. The subjectiveness of such "relationship" analysis is unquestionable. Equitable issues of reasonable contractor action, reliance, and good faith seem determative of the outcome of many decisions.

(a) Limited Field Representatives - The Exception

A good amount of responsibility is generally inherent to most field representative positions. This is the logic for their classification and thus by definition moves them further down the spectrum towards increased authority. However, exceptions do exist. The classic cases are where the contractor had actual notice of the representative's limited authority, or where the contractor had notice of facts not known to the field representative. Seemingly common to all these situations is the fact that the contractor's conduct was less than reasonable.

The 1976 GSBCA decision of Birdair Structures[160] is set out as a hardcore authority context reciting and closely adhering to the contract's "Authorities and Limitations" provision. The facts indicate that a resident engineer, mistakenly believing that overtime funding

still existed, told the contractor to continue overtime work. The contractor, however, knew that overtime funds were exhausted. Denying the contractor's claim, the decision begins by emphasizing the "Authorities and Limitations" provision and by summarily noting that there had been no showing that the contractor had been given direction by an authorized representative of the C.O.[161] The board put great weight on self-serving affadivits filed by the Government stating that the engineer had no authority to issue changes.[162] The case contains no indepth analysis of the resident engineer's duties and does not address the daily professional relationship of the engineer and C.O. And yet while the decision contains no discussion of the engineer's duties, his potential for implied authority, or the contractor's failure to obtain confirmation, the holding seems entirely appropriate. The fact that the end result may have been the board's primary concern is indicated when it stated:

> Since only [the contractor] or its subcontractor knew the true facts and remained silent, we cannot hold under these circumstances that direction of the construction engineer constituted a compensable claim under the contract's "changes" clause.[163]

It seems very likely that the "circumstances" and considerations of equity were the foundation for the board's reasoning. Notwithstanding this fact, the law as stated in Birdair Structures reflects the more conservative theme of strictly adhering to the authority limitation provisions of the contract.

The 1970 ASBCA decision of Eastern Construction Co.[164] provides a traditional authority analysis for its denial of the contractor's claim. The claim was for compensation for removal and replacement of roofing. The contractor asserted that he had deviated from the

contract pursuant to a conversation with a resident engineer ordering the changes. Prior to submission of shop drawings, the contractor attempted to contact a C.O.R. to obtain a deviation from a fastening requirement. He spoke instead with another Government engineer who approved the deviation. However, soon after commencement of the work the contractor was formally advised to comply with the contract specifications. The board held that since the engineer involved was neither a C.O. nor a C.O.R., the conversation was an insufficient basis for deviation from the stated design requirements.[165] One factor, no doubt, influencing the board's determination was the fact that the contractor's nonconforming shop drawings had been approved subject to their adherence to specifications. The contractor was thus on notice to the Government's position before he had made any changes and no detrimental reliance had occurred. Providing a strict authority analysis for the decision, the court stated:

> Nothing in the above facts constitutes a waiver of the contract requirements for fastening the roof or submitting shop drawings for approval, or justifies [the contractor] in disregarding these provisions. [The C.O.R.] had no authority to delegate contractual authority to the engineering division. Even if the record supported his intention to do so, which it does not, such a waiver was countermanded immediately when [the contractor] undertook to take advantage of it. Investigation soon disclosed that engineering approval of the deviation in fastening the roof was given under the misapprehension, and without any attempt to determine the facts. (Emphasis added)[166]

While this board chose the conservative and safe precedential approach based on authority, the facts clearly show a lack of good faith on behalf of the contractor, no doubt influencing the end result.

In the 1972 IBCA decision of John H. Moon and Sons,[167] the contract was for road construction. During the performance of the

contract the Government's resident engineer refused to permit the contractor to use material from a particular borrow pit based on the mistaken belief that the material would not meet contract specifications. The contractor contended that these actions being improper entitled him to an equitable adjustment. Central to the board's denial of the contractor's claim was the fact that long before the above actions took place, the contractor was well aware of the limited nature of the resident engineer's authority and the fact that his decisions could be appealed.[168] The decision of John H. Moon and Sons, however, should not necessarily be read as a case recognizing only limited authority in resident engineers. Peculiar to Moon is the limited grant of authority to that particular resident engineer and the contractor's familiarity with this fact as well as the procedures to be used for appeal. The contractor's knowledge of these facts is shown to be the basis for the board's reasoning in the following language:

> ...The record is clear that the [the contractor] was aware of the limited nature of the authority of the resident engineer long before the directives in question were issued and of the fact that if the conditions imposed by him were considered onerous they could be appealed to the district office.[169]

Since the contractor had actual knowledge of the facts, his reliance on the engineer was less than reasonable. To some extent Moon also stands for the proposition that clear and specific delineations of procedures and authority will be recognized, since to deviate from them would be unreasonable.

Another decision based on specifically delineated procedures but coming to a different conclusion is the IBCA decision of Franklin W. Peters and Associates.[170] In Peters the C.O. sent the contractor a letter carefully delineating a procedure for processing change orders

through the program coordinator and the project officer. He further advised the contractor that all questions as to whether the work was within the bounds of the contract should be submitted in writing to the C.O. so that he could make any contract changes. The technical direction clause further restricted the authority of the project officer. All the above language, both specifically and generally restricting the authority of the C.O.R's was overridden, however, by prior dealings and the inclusion of phrases such as "as directed by the project officer" and "as approved by the project officer" which were included in some contract modifications.[171] A major consideration was that substantial other services had previously been obtained relying on the approval and direction of the project officer.[172] Noting the language in the above referenced modifications and the Government's failure to follow its own procedures, the court gave the following as guidance:

> The Board finds that the above language plus other actions of the Government (sic) lend substance to appellant's contention that the Technical Direction clause insofar as it restricted the authority of the project officer had been abrograted...
>
> * * *
>
> In view of the foregoing finding and the totality of the circumstances discussed above, we hold that the Government's reliance of the alleged lack of authority of the individuals who ordered and accepted the seeding service is misplaced.[173]

The board's reference to "totality of circumstances" clearly demonstrates the flexibility in this area. Here, the specific delineation of authority was overridden by the inconsistent language of the modifications and Government's past conduct. The fact that principles of contract interpretation were not even discussed further indicates

that issues of equity and reasonableness dominated the board's reasoning.

(b) Acquiescence and Imputation of Knowledge

Two themes predominate with regard to field representatives in the area of acquiescence and imputed knowledge. They are the related concepts of "constructive authority" and "constructive knowledge." In constructive authority decisions the boards and courts find actual C.O. knowledge of the transactions and construe the C.O.'s acquiescence of these situations as authorization. Constructive knowledge decisions go a step further and look to the representative as opposed to the C.O. In these decisions the presumption is that the particular representative has a duty to inform the C.O. of the facts. Failure on the part of the representative to carry out this duty results in the court's or board's constructively finding that the C.O. is informed. Important to note is that these decisions are not quite as much relationship or reliance oriented as are the next section's cases which find the representative authorized. While these decisions do examine relationships, they usually look more to the magnitude or significance of the change in issue.

A subfactor in these decisions is the presumption that no contractor does a significant amount of work under a change without expecting to be paid. Thus, the finding of a significant change, particularly when there is an increase of substantial cost, seems to shift the burden to the Government to prove that the contractor is in all actuality a "volunteer." The subjectiveness of all these considerations seems obvious. What's a significant change creating a duty on the part of the C.O. to be informed? Also unclear is the part

played by other equitable factors which can result in the denial of a contractor recovery. Apparently, even if the change was significant, contractor knowledge of facts not known to the C.O. or other evidence that the Government is being taken advantage of, may result in the Government's prevailing. This is the theme discussed in the last section. The complexity and subjectivity of the above considerations precludes anything short of a case by case analysis. In short, Franklin W. Peters' procedure of examining the "totality of circumstances" probably best describes what is going on.

In W. Southard Jones[174] no specific technical representative is identified as being key to either supervising the contract or generating the claim in issue. All references are simply to Government "technical" or "engineering" personnel. The work in controversy consisted of the digging of a conduit which was later abandoned before completion in favor of the use of already existing conduits. The facts indicated that shortly after the start of contract performance, responsible, but apparently unauthorized "technical personnel" discussed" with the contractor the changing of a lighting system from the contractually required double circuit to a single circuit system and the increasing of the number of conduits to be dug. Later, the Government issued revised contract drawings which incorporated all informal contract changes previously agreed upon, with the exception of the one underground conduit, which the contractor had started to dig but abandoned at Government request. The following language from W. Southard Jones is routinely cited in support of facts depicting acquiescence:

> The digging of the conduit in question continued in plain view along the taxiway at the Base every day for almost a month. Base technical personnel clearly

> knew what was going on and as clearly intended that the original drawings should not be followed.
>
> * * *
>
> Presumably the Base engineer and contracting officer met not infrequently about projects at their Base of mutual concern, as this one surely must have been.
>
> * * *
>
> Conceding, therefore that the contracting officer was the only one empowered to authorize changes in the contract, and that a special clause was included to emphasize the limitations in the authority of the technical personnel, we must hold under the peculiar circumstances of this case that he had timely notice of the changes, if not actually then certainly constructively. (emphasis added)[175]

The presumption that the C.O. is on notice as to all technical matters of "mutual concern" seems to open the door wide for finding C.O. acquiescence in numerous situations. The concept of "constructive notice" seems to create a C.O. duty to be informed of such matters. Only the vague reference to "peculiar circumstances" limits the dispensing of the remedy.[176] In W. Southard Jones these "circumstances" were at least in part the inequity of the Government's selective ratification of the technical personnel's other actions. This factor, although not emphasized, no doubt, played a major role in the ASBA's decision.

The 1977 ASBCA decision of Canadian Commercial Corporation[177] indicates that finding a C.O. has "constructive knowledge" may be highly dependent upon the role of the particular representative. In Canadian Commercial the representative was a resident inspector who did not routinely have contact with the C.O. Arguing that notice and concurrence of the resident inspector was binding on the C.O., the contractor cited W. Southard Jones. Distinguishing the facts from W.

Southard Jones the board stated:

> In W. Southard Jones, the digging of a conduit at an air field at variance with the contract drawings proceeded under eyes of the Government supervisory personnel, including the base engineer, and the Board assumed that the base engineer and the contracting officer "met not infrequently about projects at their Base" and thus the contracting officer must have been, if not actually then certainly constructively, on notice of how the work proceeded. There is no showing here of such close contact between the resident Canadian inspector (who has remained unidentified) and the respondent's contract administration or technical personnel.[178]

The implication from reading Canadian Commercial is that W. Southard Jones may only be applicable to those technical representatives having more routine C.O. contact role than is ordinarily associated with inspectors. Consistent with the discussion of inspectors, this would seem to place it primarily in the field representative section of the spectrum.

The 1964 decision of Bregman Construction Co.[179] is based on W. Southard Jones. In a very conclusionary fashion the decision gives only a glimpse of the ASBCA's reasoning. In Bregman the board found that in a construction project that the contractor had substituted fill material "at the suggestion and with the acquiescence" of the resident engineer. Central to the contractor's recovery was the board's finding that a significant expense was involved.[180] Citing W. Southard Jones the board noted:

> The substitution represented a clear departure from the specifications. (SIC) Yet the Resident Engineer, as the Government's job representative, knowingly suggested it and acquiesced therein. And in whole context, the changed condition was obvious occasion for the substitution. Upon such showing, appellant cannot be deemed to volunteer; and equitable adjustment should be determined on such account as for a change...(Emphasis added)[181]

Noticeably absent from Bregman is any discussion of C.O. acquiescence.

The resident engineer's acquiescence is referenced, but the case includes not even the conclusion that the resident engineer had authority. Nor is their any analysis of relationships, the C.O.'s relationship with the resident engineer or the role the resident engineer played with this contract. That there was a duty to inquire of the C.O. or a finding that the work was within the engineer's scope of authority is nowhere discussed. There is only the conclusion that the "economic burden" involved was more than "de minimis." This, together with the resident engineer's suggestion and acquiescence was sufficient to result in a contractor recovery. That the finding in W. Southard Jones stands for such a broad proposition seems somewhat questionable.

In the GSBCA decision of M. S. I. Corporation[182] the contractor made a claim for the cost of providing a rubbed finish for certain concrete surfaces. The work, not provided for under the contract, was ordered by a resident engineer for the Government's architect. Although the resident engineer was not a formally designated representative of the C.O., another party was so designated and knew or should have known that the work was being done. A dominant theme throughout the M.S.I. decision is the GSBCA's reluctance to accept that work of any consequence would be volunteered.[183] The impact of this view is well reflected in the following language:

> We believe that, on balance, it is fair to conclude that either the contracting officer or his representative, or both, knew, or should have known, that this work was being performed, that it was work not required by the contract, that it was work of a significant costly nature, and that the contractor would expect to be paid for same, rather than that it was "volunteer" work.[184]

In M.S.I. the GSBCA states that absent circumstances compelling a

contrary conclusion, the board is most reluctant to conclude that any work of any consequences is volunteered. There are many cases binding the Government to what the C.O. knew[185] or should have known,[186] thereby creating a C.O. duty. M.S.I., however, seems to go further by saying that once the contractor establishes that the work in issue is of significant value, it becomes the Government's burden to show that the C.O. or C.O.R. did not at a minimum acquiesce and thereby bind the Government.

In the 1955 Court of Claims decision of Williams v. United States[187] the contract was for road paving. In order to accomplish this work the contractor had initially considered either renting or buying an asphalt plant. However, through investigation the contractor learned that there was such a plant located at another base. The plant was under the jurisdiction of a Major Russell who was responsible for the maintenance of the roads at the Air Force Base. After negotiations, during which a Major Russell represented that he had been given authority to enter into an agreement, the contractor submitted a proposal whereby the contractor agreed to seal coat the main paved roads on the base in exchange for use of the asphalt for the road job. Major Russell accepted the proposal and the contractor proceeded to carry out its part of the agreement. After the contractor had performed, Major Russell learned that he in fact was not authorized to make such an agreement. The Government then refused to permit the contractor to use the asphalt plant rent-free and an amount equal to that rent was deducted from the contractor's final payment.

While framed as a decision based on C.O. ratification, Williams stands as a classic decision driven by issues of good faith. The Court

of Claims simply would not tolerate the result supported by the Government's arguments.

> No question is raised by the defendant as to the fact that the plaintiffs performed the services or that the services were worth at least the amount sued for. The sole defense of the defendant is that since Major Russell was not a contracting officer with full authority to bind the Government in the fullest contractual sense, the plaintiffs cannot recover on this item. Surely, compelling reasons would be required to have any court sanction any such inequitable result. . .[188]

The court ultimately pointed to ratification, claiming that the base C.O. must have been on notice to the work being performed. But the reference to ratification appears mostly as a technical legal after thought. The court simply refused to deny the contractor's good faith claim based on a legal technicality of authority.

In the 1965 decision of Carroll Co.[189] a Government inspector ordered a subcontractor to change a contract by requiring the formation of a crown on a road where it was not previously required by the terms of the contract. After carefully reviewing the facts, the Engineering Board of Contract Appeals found the change compensable, even though the contract specifically required the C.O.'s approval on all changes.[190] (Clause GS-1F) Basing its conclusion the resident engineer's knowledge and acquiescence of the inspector's actions, the decision contains no discussion of the normal prerequisites for authority. The Engineering Board stated:

> The Government argues that its inspectors had no authority to direct changes in the work without written authorization of the Contracting Officer (citing paragraph GS-1F of the contract) and would have us deny this item on the ground that such authorization was never issued. This Board and other administrative boards have on numerous occasions found that adherence to the strict letter of contractual provisions such as GS-1F would require overlooking the realities of particular construction

situations such as we believe are present here.

* * *

> we think it fair to presume that as a result of visits to the jobsite [the resident engineer] knew the prime contractor had been instructed to leave the subgrade flat and that later [the subcontractor] was instructed to shape a crown with crushed rock.[191]

Carroll, thus portrays a constructive knowledge decision using the resident engineer's presumed knowledge and acquiescence to bind the Government to an inspector ordered change.

The ASBCA decision of U. S. Federal Engineering and Manufacturing[192] deals with a project manager's approval of certain additions correcting defective specifications. In Federal Engineering neither the project manager nor the contractor informed the C.O. that the extra work was required and was going to be performed. Holding for the contractor, the board stated:

> The fact that the Contracting Officer did not have actual knowledge of the additions to be made to the device does not insulate the Government from the consequences that actual knowledge would impose. His various representatives are his eyes and ears (if not his voice) and their knowledge is treated for all intents and purposes as his.[193]

Implicit to the board's finding for the contractor was the fact that Government would have had to correct the deficiencies. The contractor was, thus, not a volunteer. Indicating that the Government got precisely what it needed the Board stated:

> We are sensitive to the need to protect the Government from bearing the cost of contractor's performing extra work which is beyond the Government's determined need, i.e., the volunteer. So far as those additions here were to correct defects in the device, the Government had a need and a duty to correct the defect. So far as the Government has notice of the added work before it had the opportunity to determine whether the particular cure was to its liking. It had the opportunity to choose a more suitable cure if one existed. Here, of course,

> there is no suggestion that a better or cheaper cure might be found.[194]

The above language reveals that the Government had received a needed change to the contract making the formal technicalities of authority seem somewhat secondary. The inequity of giving the Government something for nothing seems to have been determinative.

The 1965 ASBCA decision of R. W. Borrowdale Co.[195] is concerned with a contractor's claim for a price increase for Government ordered changes in a contract to furnish and install a massive camera. In response to an advertised bid invitation, the contractor submitted a letter specifically stating how it proposed to comply with the contract's performance specifications. This letter was made a part of the contract. Thus, when at a pre-construction conference Government technical personnel ordered the use of different performance specifications, the contractor claimed the different performance methods constituted compensable contract changes. To this contention the Government argued that the technical personnel issuing the alleged changes were not authorized. Holding for the contractor on this issue, the ASBCA determined that the C.O.'s authorized representative was probably aware that the Government's technical personnel had proposed the changes and had approved their actions.[196] Implicit from the R. W. Borrowdale decision is the fact that the technical personnel involved were not authorized. This conclusion may have resulted from the fact that no one technical representative could be charged with having played a key role in the change. Furthermore, since the changes took place at the pre-construction conference, there could not have been the established relationships or pattern of reliance routinely associated with the finding that a particular, technical representative was

authorized. Absent these factors, the board seems to have dropped back a level and examined the relationship of the C.O.R. and the Government technical personnel. Discovering an apparently close working relationship between these individuals, the board uses the C.O.R.'s constructive knowledge to bind the Government.[197]

(c) Finding the Field Representative Authorized

As initially noted in the introductory discussion, the key in determining whether a particular field representative is authorized appears to be in analysis of working relationships with the controlling considerations being equitable. To that extent the courts and boards seem more interested in determining the nature of the relationship between the representative and the contractor and the peculiar facts leading to the claim than in applying any specific rules of law. In this context issues of reasonable reliance, good faith, and fair conduct seem to control the day.

In the case of Centre Manufacturing Co. v. United States[198] a technical representative was sent to the contractor's plant for the sole purpose of settling problems of surplus material and equipment failures. The Court of Claims found that an integral part of the representative's assignment was the giving of guidance and any necessary instructions to the contractor.[199] The court reasoned that if the technical representative was not sent for this purpose, then his visit was void of all significance.[200] Confronting the argument that the changes were made by a mere technical representative as opposed to a designated C.O., the court responded:

> Liability for the actions of a Government agent, who carried out exactly what he was ordered to do, cannot be avoided by pointing to labels. The appellation, "technical adviser," does not detract from [his] actual function. It is to the actuality that we must look. (Emphasis added)[201]

To buttress its position the court went on to reason along strict lines of authority, quoting the testimony of the C.O. clearly stating that he had relied entirely on his technical representative on all operational matters. While the court never actually stated that the technical representative was authorized to make changes, it still managed to set aside any charge that the change was not binding by noting that it would be incongruous if the technical representative had no authority to make decisions at the contractor's plant, but had that same authority when he made those decisions for the C.O. at his own office. Making absolutely certain that any authority issue was laid to rest, the court finally brought in and found applicable the concepts of C.O. acquiescence and ratification with regard to the technical representative's action.[202]

The 1952 Court of Claims decision of General Casualty Co. v. United States[203] specifically addresses the authority of a resident engineer. In General Casualty the contractor's claim related to the "Changed Conditions Clause" then used in Government construction contracts. According to the facts of the decision the contractor discovered a substantially larger amount of shale than had been represented in the contract drawings. The changed condition clause required that the C.O. be immediately notified prior to any changed conditions being disturbed. In General Casualty the contractor gave immediate notice, but to the resident engineer as opposed to the formally appointed C.O. The court found that a changed condition did exist and noted the several occasions that the contractor had contacted the resident engineer. The court cited Article 21(B) of the contract which stated that "the term 'Contracting Officer' as used herein shall

include his duly appointed successor or his Authorized Representative," and the logic of W. C. Shepherd v. United States.[204]

> In both the Shepherd Case and the instant case the resident engineer was clothed by the contracting officer with authority to be on the job and see that the work was performed. In the Shepherd Case the court held that the resident engineer was the Authorized Representative for the Contracting Officer, that the resident engineer had a duty to communicate to the C.O. matters which were brought to his attention regarding conditions encountered in the excavation and that notice to the resident engineer constituted compliance with the contract.[205]

Citing the contractor's notice to and reliance on the resident engineer the court went on to state:

> It would be inane indeed to suppose that the Resident Engineer was at the site for no purpose. We believe as in the Shepherd Case, supra, that the Resident Engineer was the Authorized Representative of the Contracting Officer.
>
> * * *
>
> [The Contractor's] responsibility ended when notice was given to the Authorized Representative of the Contracting Officer. If the Resident Engineer did nothing, certainly it was no fault of [the contractor.] He did all that was required of him under the contract.[206]

The fact that the resident engineer was "clothed by the Contracting Officer with authority to be on the job and see that the work was performed" apparently created a C.O.R. This is perhaps an unnecessarily broad conclusion. The factual emphasis is as much on the issues of notice and duty to inform as it is on the resident engineer's working relationship with the C.O. and contractor. Thus, the facts of General Casualty would seem to point to an imputed knowledge decision. The court, however, selected the broader ground of finding a C.O.R.

The case of Industrial Research Associates[207] carefully analyzes the delegation of authority. It represents an attempt to provide some

technical prerequisites in the context of a functional analysis of the Government representative involved. The following language best represents the board's reasoning:

> The recent decision of the Court of Claims in Centre Manufacturing Co. v. U.S....very clearly teaches that a contracting officer can and sometimes does delegate his authority to technical representatives. (SIC) And in these circumstances, the Government is bound by the directives given by the representative. ...Similarly, an engineer or some other kind of technical adviser whose function is the giving of technical guidance to a contractor may also order a change in work. Thus, it seems clear to us that what is at issue here are the actual functions of the Government's engineer, and [the contractor's] engineer as well as measured by what was said and done. On the other hand, we also disagree with [the contractor's] general position, which seems to regard every oral exchange between the Bureau's engineer and a company employee as a constructive change order if it resulted in altering the course of the work in any respect however insignificant or whatever the surrounding circumstances. (Emphasis added)[208]

The board then preceeded to analyze each of the contractor's claims in the context of the constructive change doctrine's two prerequisites of a "change" element and an "order" element. The failure to satisfy these two requirements it concluded determines the case's outcome.[209] Industrial Research Associates, however, does show the form of analysis to be used. It is centered around the representative's function which is based on working relationships. This precludes hard and fast rules and demands circumstantial analysis.

In 1961 ASBCA decision of Lillards,[210] the Government's installation engineer admittedly directed a construction contractor to provide manhole covers not required by the contract. The Government naturally argued that the engineer was unauthorized. Holding for the contractor, the board found that the installation engineer did in fact have authority. The following language from Lillards is indicative of

when authority may be found:

> He was in direct control of the job, the covers were obviously needed - they were probably omitted from the contract by inadvertence - and it is inconceivable that he lacked the authority to do what he did.[211]

The first statement that the installation engineer was "in direct control of the job..." typifies the emphasis on the representative's relationship with the contractor. Transfer of responsibilities seems to transfer authority. The C.O., having given the representative so many powers cannot now reasonably deny that the representative is authorized. To do so the board concludes would be "inconceivable." Also, very much a part of the board's conclusion is the fact that the manhole covers were really needed. Not stated, but certainly implied, is the fact that the Government would be getting something it needed for nothing. This inequity probably played an important part in the outcome of the case.

In the 1966 ASBCA decision of Sperry Rand Corporation,[212] the board denied a contractor's claim which was based on the mistaken belief that the direction came from the project engineer. Upon investigation of all the facts, it was revealed that the contractor had been directed by a superior of the project engineer who did not have authority to give directions. While the board denied the claim, it did suggest that it might have been favorably considered had it resulted from the direction of someone who had "some color of authority" such as the Government project engineer.[213] What exactly constitutes "color of authority" was never discussed, but it seems safe to say that it is probably heavily dependent on working relationships.

In the ASBCA, decision of Clevite Ordinance Co.[214] the contractor

had routinely been compensated for past overruns by after the fact contract modifications even though the contract contained a "Limitation of Cost" clause. The claim in issue dealt with a similar cost overrun where the Government refused to pay. Examining the position of project engineer the board determined that that individual was in general superintendence of the contractor's activities, both technically and financially.[215] The board then determined that the conduct of the parties authorized the overrun and reduced the Limitation of Cost clause to nothing more than "...transitory and provisional accounting procedures only, not intended and not permitted to pose a barrier to payment."[216] Finding the project officer authorized, the board stated:

> The limitations on money and man-hours were reduced to meaningless ciphers by the conduct of the parties; performance by [the contractor] was prosecuted in obedience to explicit instructions of authorized and cognizant Government personnel who were alert to the fiscal status of the contract...; and the Government has received and enjoyed the benefits of [the contractor's] good faith performance in reliance upon assurance of reimbursement by an Official Bureau who we find to have been constituted in fact as the authorized representative of the Contracting Officer concerning the matters in dispute.[217]

Clevite seems to be a discussion of equities. Good faith performance based on reasonable assurances of reimbursement was apparently sufficient to overcome the Limitation of Cost clause. Clevite creates speculation as to what other clauses may be rewritten through equitable conduct.

In the 1979 ASBCA decision of Urban Pathfinders,[218] the project officer directed the contractor in a consultant contract to assist in the movement of furniture. There was no doubt that such direction, although essential to successful completion of the contract, was beyond

the consultant services required. The contract contained provisions authorizing the project officer to inspect and accept, as well as provide necessary information and coordination on the project. The contract also specifically reserved to the C.O. the right to make changes. The board examined both the project officer and the project officer's supervisor to determine whether they had the necessary authority to bind the Government. The board's analysis reiterates the factors which are significant in such a determination:

> There is no evidence that the [Project Officer's Supervisor] had any contractual authority or responsibility with regard to the contract, and we conclude therefrom that he had no authority to bind the Government to a change in the terms of the contract. The Project Officer, on the other hand was very closely associated with the performance of the contract. He was on site during the move and was designated as the Project Officer by the contracting officer. He was responsible for ensuring that the technical objectives of the contract were met. Certifying payment vouchers submitted by the [contractor] receiving the Progress Report Letters and performing inspection and final acceptance of the [contractor's] contract performance. In short, he was the key Government person with regard to the performance of the contract. We are not unmindful of the fact that the contracting officer did not delegate the authority to change the terms of the contract but we conclude that his delegated authority was sufficiently broad to include the authority to change the terms of the contract in a situation where expeditious action was required to avoid a frustration in the objectives for which the contract was awarded. We find, therefore, under the circumstances of this case, the Project Officer had the implied authority to order the additional work. . . .(Emphasis added)[219]

The board in Urban Pathfinders finds implied authority in the project officer. It appears to be the byproduct of the equities and factual circumstances surrounding the contract and exists despite express contractual statements reserving all change authority to the C.O. As purely an analysis of a project officer, Urban Pathfinders illustrates that the spectrum of reasonableness of reliance increases as the representative's actual and apparent responsibility increases. The

ultimate result can be a finding of authority sufficient to bind the Government.

The circumstantial recognition of authority or "licensing" of a Government representative may result in the court's or board's designating or discovering that the particular representative involved has assumed the role of the C.O.'s authorized representative. This adds a new dimension to Chapter II's question of "What does it take to create the C.O.'s authorized representative." It is not clear as to whether such licensing always creates a C.O.R. or whether this occurs only under certain circumstances. It is also unclear as to what, if any difference this makes. The existence of this problem however, does underscore the fact that a spectrum of different and overlapping authority issues is involved.

In the case of Historical Services[220] the contract was for the creation of a film. The contractor's claim was that it was entitled to recover costs which were incurred when the Government initially approved its narrator and then later improperly required it to obtain the services of a new narrator. The Government argued that the resident engineer who had approved the first narrator was unauthorized. Holding that the resident engineer was really the authorized representative of the C.O., the DOT Appeals Board held for the contractor.[221] Central to the board's reasoning was the fact that for a substantial period of time the resident engineer was the only individual with whom the contractor had had any dealings. Even the C.O. conceded that the resident engineer had been "superintending the performance of the work."[222] The focus of the board's analysis is demonstrated by the following language:

> [The resident engineer's] decisions on technical and professional matters, such as filmmaking were normally final. Considering his active and virtually exclusive role vis a vis [the contractor] and reading his official Position Description...we cannot believe [he] was unauthorized to grant approval of the first narrator. Based on the facts and the cases cited above we conclude that...he was the "authorized representative" of the then quiescent contracting officer.[223]

Some of the cases cited by the board in Historical Services include Max Drill[224] and Centre Manufacturing[225] which, although both heavily dependent upon circumstancial analysis, do not find the representatives involved to be C.O.R.'s. Also cited were Fox Valley[226] which did find a C.O.R. and Industrial Research Associates[227] which did not. The commingling of these decisions lends some credence to the assertion that C.O.R. and license may be identical. Further analysis of the decision of Tasker Industries,[228] a formally designated C.O.R. decision is necessary to show contrasting aspects of the concepts of license and C.O.R.

In Tasker the facts deal with an individual specifically designated as the C.O.'s technical representative. The board spent a good deal of time analyzing the delegation of authority and then quoting the restrictions on the use of that authority.[229] And yet while there was no doubt that the representative involved was a C.O.R., the board felt compelled to establish the existence of license to find the acts binding on the Government.[230] The clear implication from this line of reasoning is that the specific restrictions designating the authorized representative are enforceable against the contractor and that license must be established to overcome them. Absent the establishment of license, this restrictive language may mean what it says. The conclusion from this analysis is that the circumstantially created

authorized representative which frequents the area of field representatives has more expansive authority than the formally designated authorized representative who is tied to specific restrictions. This issue will be addressed further in the section discussing C.O.R.'s.

(d) Conclusions with regard to Field Representativees

When the Government places a representative in a position such that his actual function is inconsistent with stated limitations on his authority, those limitations may give way to functional realities. The very position of field representative portrays just such an inconsistency. The case law's emphasis on functional realities has its apparent underpinnings in the equitable considerations of good faith and reasonable reliance. The cases seem to hold against the Government's placing a representative in a supervisory position and then denying all responsibility for the guidance given. In a spectrum context, this means that as technical and supervisory responsibilities accumulate such that the representative has substantial discretion, that discretion carries with it authority. For this reason, decisions reasoning along these lines tend to show up much more frequently in the field representative area, than in, for instance, the inspector area. Similarly, basic technical representatives having only a narrow area of responsibility serve less of a function under the contract and will thus have less opportunity to fulfill the functional prerequisites necessary to overcome authority limitations. In these cases, where the facts show that the C.O. knew or should have known of the alleged change, the cases look to the doctrines of acquiescence and imputed knowledge. This is particularly the case where the change is large or the Government is being unjustly enriched by the receipt of a clearly

needed alteration of a project.

(3) Procurement Personnel

Procurement personnel could be described as those Government representatives performing functions in immediate administrative support of the contracting activity. Actual job titles include buyers, estimators, pre-award survey team members and the like. The study of this representative category is much more complex than inspectors or field representatives. These previously discussed groups tend to gather at certain points on the spectrum. The category of procurement personnel, however, is comprised of many diverse skills and resulting C.O. relationships. Varying skills and working relationships result in varying amounts of discretion being transferred from the C.O. to the representative. Subcategories may also evolve based on such factors as individual skill, physical location, and activity workload. A case by case analysis becomes necessary, but is based on the same elements already discussed. Issues of good faith, functional actuality and reasonable reliance are still determinative in what is essentially a relationship analysis resulting in a spectrum of varying degrees of authority. What is gone are the categorical generalities-field representatives have a lot of discretion and authority, inspectors very little discretion and very little resulting authority. Still, while the generalities are missing, the elements leading to these other patterns are available for purposes of analysis.

If there is a trend in the category of "procurement personnel," it is that the boards and courts either find the representative authorized or unauthorized. Imputed knowledge or C.O. acquiescence decisions are rare. The cases seem largely determined by classifying

the particular representatives involved as either ministerial and therefore unauthorized, or as C.O.R.'s acting within the scope of their authority, and therefore authorized. This places the representatives at extremes on the spectrum, issues of acquiescence or imputed knowledge occasionally surfacing, but often being blended into what is ordinarily viewed as a circumstantially transferred authority. Individual titles of the procurement personnel are placed on the spectrum and studied accordingly. Interestingly enough, the same titles show up at both extremes. The conclusion seems to be that the circumstances and not titles are determinative or indicative of the absence as well as the existence of authority.

It should be noted prior to beginning analysis that careful study of this category has revealed far fewer authority decisions than one might initially expect. One reason seems to exist. Since the primary function of the procurement process is the creation of contracts, many of the decisions in this area are decided based on principles of extrinsic evidence prior to even reaching any authority issues.

(a) Limited Authority Cases

The limited authority decisions associated with this category ordinarily revolve around one or more good faith issues. This is the case where the contractor either knew or should have known that the Government representative did not have authority. Also routinely discussed is the fact that contractors may not reasonably rely on guidance given by representativies who work in procurement in a purely ministerial capacity. Analysis of each individual's particular duties or functional actuality is therefore very important.

The 1982 NASA BCA decision of DBA Systems[231] is concerned with

the position of contract specialist and the "Limitation of Cost" clause. In DBA, the Government's contract specialist was described as the individual responsible for acting as the "contact point" between the contractor and the Government on a day to day basis.[232] His functions included the preparation of documentation supporting procurement actions including contract modifications.

After the contract was complete, the contractor in DBA informed the contract specialist about a potential overrun and requested that the contract's estimated cost be increased. The contract specialist prepared a proposed contract modification increasing the contract's estimated cost by the amount requested and sent the unsigned document to the contractor who executed and returned it to the Government. The document, however, was never signed by the C.O. The Government argued that there was no authority for the action. The contractor responded by contending that the transmittal to it of the Standard Form 30 showed that an agreement had in fact been reached and that its signature merely "memorialized" the agreement set forth in that modification. Pointing to the absence of the contract specialist's authority, the board stated:

> It is of no consequence to the determination of this appeal that [the contract specialist's] title may have sounded important, or implied authority to approve funding of the overrun.[233]

The above quotation together with authority limiting language from Federal Crop Insurance Corporation. v. Merrill[234] was used as the basis for denying the contractor's claim. And yet while this conservative view of the contract specialist's scope of authority may seem particularly narrow, a good faith issue may have been the real basis for the board's holding. Almost immediately after the recitation of basic

authority principles, the board commented on the fact that this procedure of sending the contractor a copy of the modification list without the contracting officer's signature was standard practice at Goddard Space Flight Center, and that the contractor knew this.[235] Clearly, a reasonable basis for the contractor's reliance was not present, as the contractor was fully aware that the document had not yet been approved by a warranted C.O. Thus, notwithstanding recitations of authority principles, the absence of good faith reliance may have played a major role in DBA.

The facts in the 1975 ASBCA decision of A Padilla Lighterage Co.[236] centered around the actions and authority of a disbursing officer. In A Padilla a requirements contract to provide bargaining services stated that the contractor would be paid in Philippino pesos at the official rate of exchange "as of the date of the contract award." During contract performance the Government's disbursing officer adopted the position that the contractor would be paid the current rate of exchange in effect at the time of payment. More than a year after the last payment, the C.O., following a Comptroller General audit, issued a final decision demanding that the contractor return the amount by which its payments exceeded what it should have been paid at the exchange rate set out in the contract. While the contractor's main arguments in A Padilla were jurisdictional, the contractor did argue and the board did address the role and authority of the Government's disbursing officer:

> The role of the disbursing officer here was purely ministerial. He converted the dollar amount which he was authorized to pay to pesos and wrote a check for delivery to appellant. He was not the responsible official whose interpretation might have a binding effect on the Government. That official was the contracting officer and he never agreed to payment at

> the conversion or exchange rate different from that provided in the contract. (Empnasis added)[237]

A Padilla seems to read consistent with previous decisions. The disbursing officer's job was described as being "ministerial" which presumes the absence of discretion.[238] The disbursing officer was not supposed to be "responsible" for such actions.[239] Having neither responsibility nor discretion, the disbursing officer had no authority. Implied from the board's choice of words in the above quotation is the distinct possibility that disbursing officers may not always be without authority. This, however, would require an analysis of those areas where they do have discretion and responsibility.

The ASBCA decision of General Electric Co.[240] dealt with a cost plus fixed fee contract having a "Limitation of Cost" clause. The clause provided that the Government was not obligated to reimburse the contractor and the contractor was not obligated to incur any cost exceeding the contract's estimated cost, unless the C.O. notified him that the estimated cost had been increased.[241] When performance was almost complete, the contractor informed the Government that it was incurring a cost overrun and refused to furnish a final test report until additional funds were made available. A contract specialist, whose only function was to serve as a contact point between the Government and the contractor, maintained that the Government was entitled to the report and tried to induce the contractor to furnish the report, notwithstanding the absence of additional funds. The contractor preceeded to furnish the report, and then sought recovery of the overrun expenditure. The ASBCA denied recovery noting that the contract specialist was little more than a "messenger" [242] They emphasized that there was no evidence that he had been delegated any power

to bind the Government.[243] However, notwithstanding this analysis, a major factor was probably the contractor's admission that he was fully aware that the contract specialist lacked authority to fund the contract.[244] Once again, the absence of good faith on the part of the contractor may have been determinative of the outcome.

The fact that circumstances and not job title often decide the outcome is well illustrated by comparing the outcome of in General Electric Co. to that of the 1962 ASBCA decision of N. Ferman. In N. Ferman[245] the board accepted as credible evidence the contractor's version of a telephone conversation with what were admittedly unidentified persons in the contracting officer's office.[246] Specifically rejected by the board was the Government's contention that only statements by the C.O. could be relied upon.[247] The board's analysis of the buying section and its finding that the particular representative was authorized is indicative of what they saw as significant factors.[248] Citing General Casualty Co. v. United States the board stated:

> The heavy canvas buying section of the Agency consists of the contracting officer, two buyers, contract assistants, and administrative and clerical help, all grouped together in a bay or section of a large room. [The Government's representative's] desk was within a "couple" of desk lengths from the contracting officer's own. It is fair to assume in all of these circumstances that those who undertook to answer the prospective contractor's questions and who were persons obviously cognizant of the procurement and had access to necessary procurement records were authorized representatives of the Contracting Officer acting within the limits of their authority and thus were themselves contracting officers by definition.[249]

The result may have been fair, but the logic seems questionable. How can authority be determined by the distance seated from the C.O.? How does access to files relate to a finding of a C.O.R.? The only

argument that seems plausible is that the C.O. has either placed these individuals in their positions or was on notice that they were or could be dispensing information to contractors. Thus, arguably the C.O. was on notice to what was going on, where as the contractor was not. But was reliance on this untitled procurement contact in Ferman any more reasonable than reliance on the contract specialist in General Electric? Accordingly, Ferman is at best very difficult to reconsile with other "good faith" decisions.

In the 1969 GSBCA decision of Hedlund Lumber Sales,[250] the contractor contended that when he was advised of the impending award of his contract, he orally stated to the Government procurement agent that he would "honor" the contract only under the condition that had he an unlimited extension of time until the market price had dropped. The agent supposedly agreed.

The board in Hedlund never stated as a general rule whether procurement agents can bind the Government, and if so under what circumstances. It is very likely that a firm rule based on title does not exist. Using reasoning reminescent of the previously discussed decision of Desonia Construction Co.,[251] the board concerned itself with what the contractor could have reasonably believed.[252] Taking careful note of this particular contractor's wealth of Government contract experience, the board concluded:

> As the representative of a company which had completed 851 Government contracts within the preceding three years, the sales manager knew or should have known that the Contracting Officer was the only Government official who was authorized to agree to approve any changes in the terms of the contract. Therefore, even if the sales manager had reason to believe that the FSS Procurement Agent had agreed to grant an unlimited extension of time for delivery of the supplies, he knew, or should have known, that such an agreement was not binding on the

> Government and did not release the [contractor] from its contractual obligations.[253]

It only seems logical if such an agreement is per se not binding, that that fact alone should settle the issue. However, the board's overwhelming concern for the contractor's reasonable expectations clearly indicates that this is not necessarily the case.

In the 1970 ASBCA decision of Burnett Electronics Lab[254] the board denied a contractor's claim based on the actions and knowledge of a pre-award survey team member. The contractor's contention was that contrary to statements in the IFB and contract, it had a contractual right to use its off-the-shelf model as the pre-production model. The contractor based this claim on the admitted awareness of Government personnel of his intentions and the favorable conduct and report of the Government's pre-award survey official. The essence of the contractor's claim was that these individuals' knowledge and conduct amounted to a modification of the contract requirements. A major consideration was that contractor reliance on any team-member's conduct seemed less than reasonable.[255] At trial the Government's technical consultant testified that the off-the-shelf model was obviously nonconforming. The board was also quick to note that the record did not disclose any detailed examination or testing of the off-the-shelf model by the survey official involved.[256] The survey member testified that he was not an engineer and was not qualified to determine whether a unit met specifications. Addressing the survey official's expertise and the contractor's reliance on it, the board noted:

> While such lack of expertise may not have been apparent to the appellant, any assumption that a cursory examination by a survey official constituted an approval by the Government of his off-the-shelf model for use as the preproduction model <u>was not reasonable</u> in light of the ninety day period provided

> by the IFB and contract for Government approval, conditional approval or disapproval of the pre-production model.. . (Emphasis added)[257]

This language seems to be a balancing of equities, the fact that the survey official's expertise was not known to the contractor being offset against his obviously brief examination. The brevity of the examination was also being balanced off against the specific provision setting out a 90 day approval period. The ultimate outcome of the case was based on the absence of reasonable conduct. Job title was not a major consideration.

While the board in Burnett denied the contractor's claim, the door seems to have been left open with regard to permitting possible modification by a pre-award survey team member or the like.[258] The board concluded with the following language indicating that the contractor may simply have failed to carry the evidentiary burden necessary to proving his assertions:

> Nothing about the foregoing course of conduct shows or establishes agreement for modification of the IFB or contract in any respect; certainly not such a substantial modification as appellant contends. (Emphasis added)[259]

The clear implication is that in Burnett the issue was not authority, but lack of evidence.

The GSBCA decision Hegeman-Harris Co.[260] was concerned with a contractor's claim for an equitable adjustment as a result of unanticipated utility expenses. The Government representative with whom the contractor dealt with was an estimator. The board noted that he was not authorized to make binding commitments on behalf of the C.O. and that his function was "merely that of examining the appellant's claim, reviewing supporting data, and making recommendations to his

AD-A139 473 THE CONTRACTING OFFICER'S REPRESENTATIVE(U) AIR FORCE 2/2
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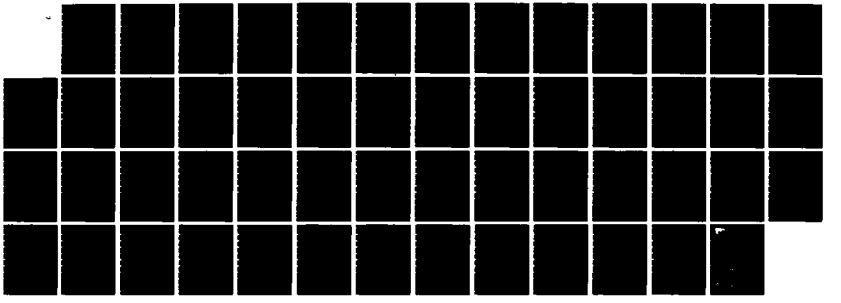

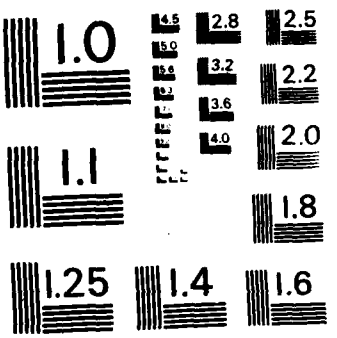

superior officer."[261] Not stated, but certainly implied from this narration of the estimator's duties, was the significance of the fact that the C.O. retained all discretion. Further inferences can be drawn from the board's concluding language:

> The fact that [the estimator] told [the contractor] in an informal although written document that the Government was accepting [the contractor's] electric power cost did not constitute an accord and satisfaction on a disputed matter. The Government representative involved did not have authority to bind the Government on a matter of this consequence. (Emphasis added)[262]

The board's reference to the lack of formality possibly relates to the reasonableness of the contractor's reliance, since the absence of this element was no doubt indicative of a lack of finality and officiality. The underscored language seems to imply that the estimator has some authority, but that the scope of this authority is not broad enough to include these particular actions.

The decisions in this area are possibly the most difficult to either predict or explain. While an obvious lack of contractor good faith will result in a denial, cases decided solely on what has been determined to be less than reasonable reliance are more difficult to predict. These personnel often seem to take on the appearance of having at least some of the C.O.'s authority, while in fact having only responsibility and discretion for ministerial tasks. Stated briefly, this area is extremely ripe for apparent authority, where some reliance may actually be reasonable, but authority, simply does not exist.

(b) Finding Authority Based on Circumstance and Equity

The decisions finding authority on a circumstantial or equitable basis are not any different than those discussed in the area of field representatives. Analysis based on reasonable reliance,

fuctional actuality, and transfer of C.O. discretion is clearly present. What is different is the absence of imputed knowledge or acquiescence decisions. The close working relationship of procurement personnel with the C.O. seems to result in either a finding that the representative is or is not authorized. Clearly absent is the middle ground based on actual or imputed C.O. knowledge. The result is to bring this section which finds authority based on circumstances and equity and place it right next to the prior section which often denied the representative's authority as a result of a lack of good faith or reasonable reliance. While it is true that these decisions are on opposite ends of the authority spectrum, it underscores how the same elements of good faith, reasonable reliance, and functual actuality may be used to either find or deny the existence of authority.

In the 1972 ASBCA decision of Morrison-Knudsen Co.[263], one of the issues addressed concerned the authority of procurement personnel who gave guidance at a pre-bid conference. The Government attempted to deny responsibility for the guidance given, arguing that the individual who presided over the conference was not authorized to amend the substance of the bid package. This individual who was the C.O.'s assistant was determined by the board to be a C.O.R., and in this situation was held to have had authority equivalent to the C.O. Having placed the buyer in this extremely sensitive position, the board seemed to find a presumption of authority which the Government was incapable of rebutting.[264] The board reasoned:

> There is no evidence that bidders who attended the conference were made aware of any limitations on [the buyer's] authority, or that answers provided by [the buyer] would not bind the Government.[265]

The above language appears to be no more than the converse of the rule

that actual notice of the representative's authority limits precludes contractor recovery.[266] Implicit is a finding of reasonable reliance. Morrison-Knudsen Co. is significant, however, because the issue is framed in terms of authority in the context of actions occurring prior to contract formation.

The 1973 ASBCA decision of Norman M. Giller and Associates[267] involved the interpretation of cost principles and the representations made by procurement personnel during negotiations. Dismissing Government assertions that the contract negotiators were not authorized, the board stated:

> . . .the Board has no difficulty over the authority of the Government's negotiations representative, and its principal audit representatives, sufficiently under the present circumstances to make the Government responsible for their representations, conduct and actions upon those matters which are disputed in the case.[268]

The board then essentially described why they could conclude that the actions in issue were within the representative's scope of authority:

> Each, as representative of the contracting office, dealt in regular course and officially with the appellant concerning matters within their cognizance. (Emphasis added)[269]

The impact of reasonable reliance as it relates to and arguably determines scope of authority is also noted:

> The Government's negotiator was a regular functionary of the procurement and contracting office. Under circumstances shown, his explanation could not reasonably be expected to arouse suspicion; and we cannot accordingly conclude that appellant was put to any inquiry beyond. Factually he made none; but relied upon the representations as made, reasonably under circumstances. (Emphasis added)[270]

ARB Corporation v. United States[271] stated that the duty to inquire existed only for acts outside the representative's scope of authority.

Norman M. Giller and Associates, a procurement personnel decision, seems to come right out and define that scope with reasonableness.

In the ASBCA decision of Wickham Contracting Co.,[272] the estimator was found to have authority, but the particular circumstances of who had the "last clear chance" to avoid the problem resulted in the Government's prevailing.[273] In Wickham, the single drawing in an IFB for an underground electrical cable replacement contract contained two different scales; the first, a graphic bar scale marked one inch equals 200 feet was next to the drawing's title block and a second scale of one foot equals 200 feet set forth in the drawing's site plan section. The one foot scale was wrong and should have read one inch. The case was essentially an analysis of different contervailing duties. The board recognized that the Government ordinarily warrants its drawings, but noted that in the instant case the facts were such that the contractor should have had reason to know that there was a drawing error.[274] The board held that once alerted to this possibility, the contractor should have tested the drawings and ultimately inquired as to their validity.[275] This is where most cases end. However, in Wickham, the Government's estimator knew of the error and improperly failed to report it. The board noted that the estimator ordinarily would report drawing errors to the design group which had prepared the drawings. If the project had already gone out, his office had the responsibility to initiate an amendment to the IFB.[276] Confronting these facts the ASBCA stated:

> Based on this record, we find that the Government's estimator was the authorized representative of the contracting officer for the purpose of preparing the Government's estimate of the cost of the work, and for the purpose of initiating drawing corrections...[277]

The board defined the scope of its new found C.C.R. very narrowly. But

even this finding may be unnecessarily broad for a decision which discusses, but does not determine its outcome, based on a finding of imputed knowledge.

> We conclude that the actual knowledge of the estimator must be considered actual knowledge of a responsible Government employee and hence of the Government.[278]

Once again, transfer of responsibility is the board's point of focus. Consistent with its normal emphasis on good faith and reasonable conduct, the board analyzed who had the last opportunity to prevent the problem from developing:

> Other things being equal, we might well regard the Government's duty to disclose its actual knowledge to the bidders, including [Wickham], as a higher duty superseding a bidder's duty to recognize and seek clarification of an obvious drawing error of which it did not have actual knowledge. However, in the present case later events presented [Wickham] with a last clear chance to avoid damage from the drawing error.[279]

The "last clear chance" referred to by the board occurred when the contractor was asked to verify his bid. This, the board determined, placed the contractor on an equal footing with the Government, making him actually aware of the error. The burden was thus returned to the contractor, and the conscience of the board was able to rest. The convergence of these equitable considerations of authority, imputation of knowledge, and duty to inquire was good evidence that authority fits well within the purview of being shaped and arguably determined by equitable considerations. In Wickham, the last opportunity was the contractor's and that equitable consideration was therefore held to govern. The particular Government representative just happened to be an estimator. The circumstances which ordinarily would have been determinative of estimator's scope of authority were vitiated by the

contractor's failure to inquire. This essentially equates with a lack of grounds for reasonable reliance, even a lack of good faith. In summary, Wickham shows a priortization of conflicting equities, the order of which is ultimately determined by the equitable concept of "last clear chance." The fact that a procurment representative was involved was inconsequential.

Pre-award survey team members seem to have some authority, but analysis of that authority is made more complex by the evidentiary and interpretation issues permeating the cases studied. The 1973 ASBCA decision of Unidynamics/St Louis[280] analyzes authority in the context of a pre-award survey team. The contractor's claim was based on ambiguous drawings in a contract to furnish and install elevators. While the case was to a large extent determined by principles of contract interpretation, the ASBCA seemed influenced by and did comment on the survey team's role.[281] A primary issue in the interpretation was whether the openings in the buildings being constructed would be large enough to allow factory-assembled elevator cabs to be used. At a conference with the contractor the pre-award survey team comprised of engineers and construction, production and procurement personnel assured the contractor that the openings would be large enough. The Government contended that it was not responsible for any pre-contractual assurances and pointed to an IFB provision which read in part as follows:

> The Government assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of this contract, unless such understanding or representations by the Government are expressly stated in the contract.[282]

The board referred to the pre-award survey team as C.O.R.'s. Unlike

previous decisions there was no discussion as to how this designation was arrived at and whether it was viewed as being of any significance. Basing its conclusion at least in part of the concept of imputed knowledge, the board stated:

> The contracting officer's representatives were sent to the pre-award survey to determine on his behalf appellant's ability to manufacture the elevator cabs to the Government's specifications and to meet the project's installation requirements. Their knowledge and understanding of appellant's interpretation of the IFB as to design choice and work interface of the elevator shaft openings at installation time is imputed to the contracting officer.
>
> * * *
>
> Such pre-award clarifications of ambiguities in the specification establish a mutual understanding of the requirements of the contract as of the date of execution. (Emphasis added)[283]

In Unidynamics the "imputed knowledge" issue is intertwined with issues of interpretation and contract formation. The pre-award survey team, as authorized representatives, were apparently part of a "collective" C.O., their technical knowledge and "mutual understanding" being essential or identical with and a true meeting of the minds. Such a reading is entirely consistent with the view that the C.O.R. is the C.O. when acting within the scope of his authority. What is significant about Unidynamics is that once again the C.O.R. is having an impact, through imputed knowledge, even before contract award.

The peculiar expertise of the audit function is somewhat reminisient of the prior discussion of the field representative. The complexity of the job invites C.O. reliance and transfer of discretion to these skilled individuals. In some instances they are even formally designated C.O.R.'s. While many of the decisions in this area are decided summarily, their outcomes appear consistent with the

previously discussed principles of representative authority. In the 1972 ASBCA decision of AC Electronics Division, General Motors[284] the auditor sent the contractor a notice disallowing certain general and administrative expenses. The notice specified that as to any disapproved costs identified therein it would constitute a final decision of the C.O.[285] The board summarily cited Section 3 of ASPR as the foundation for finding a C.O.R. in the auditor and noted:

> [A]ppellant points out that since the notice was signed by the resident auditor it "was not the official action of the Contracting Officer." On this point, we disagree. The resident auditor who signed the notice was authorized to represent the contracting officer in this respect (ASPR 3-809(c)). Therefore, the contracting officer acted within the meaning of Article 1(b) of the General Provisions of the contract, when he signed the notice.[286]

Accounting expertise, like engineering expertise, invites C.O. reliance. The language of DAR 3-809(c) relates to cost contracts and specifically states that the contract auditor is a C.O.R. "for the purpose of examining reimbursement vouchers received directly from contractors..." AC Electronics Division, General Motors evidences formal recognition of the auditors being a C.O.R. The decision which follows indicates that circumstances of C.O. and contractor reliance can and do make the auditor's scope of authority even broader than that set out in Section 3 of DAR.

The impact of a contractor's notice of an auditor's limited authority was displayed in the 1969 ASBCA decision of North American Rockwell Corporation.[287] Circumstances ultimately resulted in the finding of some authority.[288] In that decision the Government's auditors were to play a key role in settling performance problems relating to a cost contract. The board only briefly addressed the issue

of authority, noting that the contractor had been informed of the fact that the Government's auditors had no authority to commit the Government on any costs.[289] The good faith element of notice seems to have defined the auditor's scope of authority by precluding a finding that his statements were authorized. Yet, the board in Rockwell did find, based on the circumstances, that the auditors had authority to "discuss" these issues.[290] Ultimately, the case was decided in part on evidentiary considerations as to what were reasonable costs based on these "authorized" discussions.[291] Once again, evidentiary and authority issues were intertwined; evidentiary elements really defining the case's outcome.

In the 1976 NASA BCA decision of Aerojet-General Corporation[292] the Government contended that disallowance of costs by DCAA did not bind the NASA C.O. Key to the Government's argument was the fact that suspension and disapproval of costs were nondelegable functions. The C.O.'s reliance together with evidence of acquiescence seemed to carry the day, notwithstanding any regulatory restrictions to the contrary.

> However this may be in terms of the ultimate contractual authority of the Contracting Officer, audit services were delegated by the Contracting Officer (SIC) who chose to follow the advice of the DCAA auditors on the issues in dispute in this appeal. NASA had notice of the Dade County cost disallowances affecting this contract performance and there is no evidence that NASA took contrary action.[293]

In this instance transfer of discretion to the auditor resulted in transfer of authority.

(c) Some Conclusions with regard to Procurement Personnel

The analysis of procurement personnel clearly illustrates how equitable factors of circumstance can both make and foreclose arguments of representative authority. Both ends of the spectrum become a part

of circumstantial analysis. The absence of acquiescence or imputed C.O. knowledge decisions emphasizes this fact. This commonality of analysis as applied to the area of procurement personnel, however, does not necessarily make for easily decided cases. The close proximity of procurement personnel to the C.O. clouds the issues of transfer of C.O. discretion, functional actuality, and reasonable reliance. It is easy to misinterpret what or how much discretion has in fact been transferred to a procurement representative. The office itself may appear to lend the representative authority. The result is that a contractor may rely on what is no more than apparent authority without any C.O. acquiescence or involvement.[294]

(4) The Formally Designated Contracting Officer's Representative

The telling factor with regard to the formally designated C.O.R. category is not any specific characteristic or wrinkle of legal reasoning, but rather the very absence of these. While it is true that the formal C.O.R. designation establishes that the representative is authorized, the extent or scope of this authorization remains open to question. Once again, this is the problem of deciding where on the spectrum of authority the representative lies. The particular language of the C.O.R.'s formal delegation becomes only one more factor in an analysis focusing on good faith, C.O. relationships and issues of reasonable reliance, the same factors used in analysis of the prior representative categories; and the C.O.R. becomes only one more representative to be placed the spectrum.

(a) The Formally Designated Contracting Officer's Representative - Limited Authority

Limited C.O.R. authority is sometimes found in those decisions

emphasizing the restrictive language which is a part of most formal C.O.R. designations. The question thus becomes what makes the court or board choose to focus on the restrictions as opposed to the grant? The answer, although nowhere stated, no doubt lies the particular circumstances, the very same concept which enables a board or court to overcome the authority restrictions. These circumstances are defined as reasonable reliance when finding authority and are normally couched in terms of a breach of good faith when authority is held to be absent. In some instances the case may not even discuss the circumstances involved. In those decisions the court, like a magician, distracts its audience by focusing the opinion on that portion of the clause viewed as significant under the facts. In all actuality, the facts apart the clause are what are really determinative of the outcome.

The IBCA decision of Arizona Machine and Welding[295] illustrates a very narrow construction of the limits of two C.O.R.s' authority. The two C.O.R.'s, the contract engineer and inspector, had the following language as a part of their delegations:

> Section I - DEFINITIONS AND ABBREVIATIONS USED
>
> ENGINEER: The Engineer employed by the Government and designated by the Contracting Officer under whose direction the work is performed.
>
> INSPECTOR: An authorized representative of the Engineer assigned to make necessary inspections of the work performed and materials furnished by the Contractor.
>
> Section 16 - AUTHORITY OF THE ENGINEER
>
> The Engineer shall decide any and all questions which may arise as to the quality and acceptability of materials furnished and work performed, the manner of performance and the rate of progress, interpretation of the plans and specifications, and acceptable fullfillment [sic] of the terms of the Contract.
>
> * * *

> In cases of differences arising between an inspector and the contractor or his agent, appeal shall be taken to the engineer.[296]

The contract in Arizona Machine involved the drilling of wells. In one instance a well was drilled to a depth of 155 feet and the contractor encountered hard material. He orally requested payment on an hourly as opposed to a per foot basis. This request was allegedly approved by the Project Inspector and Project Engineer as authorized representatives of the C.O. Later when the contractor was paid by the foot, he made a claim based on the C.O.R.'s approval. Summarily deciding in the Government's favor, the board said:

> Assuming without deciding that either the Government inspector or Government engineer authorized additional payment for drilling at a rate other than the unit price per foot specified in the contract, appellant would still not be entitled to additional compensation...because there is no proof of ratification by the contracting officer, and because there is nothing in the record to indicate that either of them were empowered to agree to make an additional payment. Their responsibilities and authority are defined and limited in the General Conditions, supra. It is well settled that unauthorized Government representatives may not waive the terms of a contract.[297]

No further guidance is given as to the board's reasoning. Arguably, while the stated grants of authority to the C.O.R.'s permitted the engineer to give some technical guidance, it did not allow changes to pricing aspects of the contract. This is ordinarily viewed as a function reserved to the designated C.O. or other procurement personnel. And yet, even using this rationale, Arizona Machine appears difficult to explain, particularly in light of the previously discussed IBCA decision of L. B. Samford[298] which clearly implied in dictum that a regional engineer could change the method of contract payment.

However, notwithstanding the outcome in Arizona Machine the case stands as clear evidence that C.O.R. designations are not always equated with broad grants of authority, perhaps even when they should be.

In the 1975 DCAB decision of Scientific Systems[299] the contractor claimed a price increase to his negotiated fixed price contract based on the alleged assurances of cost reimbursement made by the C.O.'s technical representative. The board pointed to contract language clearly limiting the C.O.R.'s authority to "make any commitments or otherwise obligate the Government."[300] It then preceded to scrutinize the entire contracting situation, summarily concluding that at no point had the contract provided any terms for cost-sharing or profit margin.[301] The board also noted that the contractor could not even provide the names of those C.O.R.'s who had supposedly misled them.[302] Thus, no close working relationship involving transfer of C.O. discretion could be presumed, and as a result any reliance on C.O.R. assurances could hardly be deemed reasonable. More than likely, the authority restrictions of the C.O.R. formal delegation were completely consistent with the contracting realities, and therefore those restrictions were upheld.

The 1965 GSBCA decision of Electronic and Missile Facilities[303] illustrates a decision giving a narrow scope to the authority of the formally designated C.O.R. involved. In Electronic and Missile Facilities the contractor contended that the C.O.R. had ordered more flash patching of concrete floors than was required by the conctract specifications. The Government asserted that the contractor was a mere volunteer.[304] While the board pointed to language in the contract restricting the C.O.R.'s authority to make changes, issues of good

faith probably determined the outcome of the case.[305] Indicating that the contractor's reliance on the C.O.R. was less than reasonable, the board stated:

> Inasmuch as the Appellant's Chief Contract Administrator had more than 15 years of experience with Government contracts, he knew or should have known that the Government Representative at the project site did not have any authority to order or direct the performance of any work which was not required by the contract. . .[306]

Once again, the contractor's reasonable expectations were determinative. This raises the question that if the authority restricting language carries any weight, why isn't it alone sufficient to put the contractor on notice of the representative's limitations? The implication from the logic set out in Electronic and Missile Facilities is that such disclaimers are just one consideration in determining what a contractor should have reasonably anticipated. Because C.O.R.'s are defined as C.O.'s when acting within the scope of their authority, the attempted contract modification contemplated by the instant case is really no more than a scope of authority question. Electronic and Missile Facilities says that modifying the contract in this fashion was a designated C.O. decision outside the C.O.R.'s scope of authority. Reasonableness is a major factor used to define that scope. Since reasonableness in this decision was defined in part by the contractor's prior contract experience,[307] would a less experienced contractor have resulted in a broader scope of C.O.R. authority? Or would it have simply placed a larger duty on the C.O.R. to inform the C.O. of the transactions taking place? To that extent, good faith issues could arguably transform a narrow scope of authority decision into a case involving a duty to inform or constructive knowledge. This is one way

to view these decisions. The cases in the next section, however, seem to indicate that the primary issue may be authority, even when it is disguised as a "duty to inform."

(b) Acquiescence and Imputation of Knowledge

While this section addresses issues of implied duties, imputed knowledge, and acquiescence surrounding the formally designated C.O.R., the conclusions derived appear to apply to representatives generally. This is no doubt due to the fact that all Government representatives are the creature of some form of authority delegation and the formal designation of a C.O.R. is simply another method of such a delegation. The cases in this section deal with issues of C.O. or C.O.R. inaction. In that regard, the designated C.O.R. cases appear more willing to turn to the C.O.R.'s authority to take action; there is less of a need to impute the C.O.R.'s knowledge to the C.O. or find C.O. acquiescence. Perhaps, since DAR and FAR clearly state that the actions of the C.O.R. are those of a C.O. when acting within the limits of his authority,[308] the principles of imputing knowledge to the C.O. or C.O. acquiescence appear unnecessary. Exceptions exist, primarily where clearly stated authority restrictions in a C.O.R. formal delegation lay open to doubt the true limits of his authority.

In the NASA BCA decision of Inet Power Co.,[309] the contract called for the furnishing of electrical equipment fabricated in accordance with a designated Government specification. Not long after the contract was signed, the contractor stated that he was extremely doubtful as to whether he could meet some of the specification requirements. The NASA BCA stated that if the Government intended to demand that the contractor meet the stated requirements, it should

have done so within a reasonable time after the contractor revealed its difficulties, not several months later.[310] Also revealed was the fact that formally appointed C.O.R.'s had strongly urged the contractor to continue performance and had even led him to believe that the Government was willing to accept the the items with the defects the contractor had disclosed.[311]

In Inet, the contractor's principal argument was that the Government, by its course of conduct, was estopped from insisting on strict adherence to the contract modification.[312] The Government did not directly confront an estoppel argument, but simply countered that the C.O.R.'s involved lacked authority.[313] While the board's opinion initially seemed to accept the contractor's estoppel theory,[314] it concluded with language clearly echoing the concept of constructive knowledge as set out in W. Southard Jones.[315] This is particularly evident in the following quotation which addressed aspects of relationship, reliance and the duty to inform:

> It is clear that one or both of the representatives of the C.O. had knowledge or should have had knowledge of the deficiencies the contractor expected, and it is also clear that contractor reliance on the course of conduct of the Government representatives was present. The Government relied heavily on the fact that both of the representatives of the C.O. were subject to formal written appointments that provided the representatives were not authorized to enter into verbal or written modification to the contract. However these representatives were required to notify the C.O. of any difficulties that arose.[316]

In Inet the transfer of C.O. authority to the C.O.R. is transformed into a C.O.R. duty to inform the C.O. Thus, at least under these facts C.O.R. authority equates to a C.O.R. duty. The ultimate result is the C.O.R.'s knowledge being imputed to the C.O. Inlet's facts appear to portray the hypothetical discussed at the end of Electronic and Missile

Facilities, a scope of authority issue evolving into a representative duty issue. The cases which follow seem to indicate that the issue arguably remains representative authority.

The previously discussed decision of R. W. Borrowdale[317] involves a C.O.R.'s knowledge of an unauthorized contractor change to a camera being purchased. Citing W. Southard Jones,[318] the ASBCA held that the C.O.R.'s knowledge and acquiesience overcame the contention that the contractor was no more than a mere "volunteer."[319] Particularly significant was the fact that the C.O.R. and not the C.O. had acquiesced. A possible explanation is that the formal designation of the C.O.R. and the reference to C.O.R.'s in the definition of C.O. are sufficient, at least under this set of facts, to establish the requisite C.O. contact. The absence of any discussion of the C.O. also implies a corollary to the DAR and FAR definitions of C.O.:[320] The C.O.R. is the C.O. when acquiescencing within the limits of his authority. Would this principle apply as well to informally designated representatives of the C.O. acquiesing within the limits of their authority?[321] If so, it is possible that this corollary derived from R. W. Borrowdale, a C.O.R. decision, explains the concept of "duty to inform" used in constructive knowledge cases.[322] The essence of the argument ordinarily made is that the representative closely involved with the contract had a duty to inform the C.O. Acquiescence presumes authority somewhere, but is ordinarily an argument reserved for C.O.'s. But if the representative could be established to be a C.O.R. would not the issue of C.O. constructive knowledge and the C.O.R.'s acquiescencing "within the limits of his authority" be identical concepts? The only difference would be that constructive knowledge decisions point to the

designated C.O.'s as opposed to the C.O.R.'s authority as the basis for binding the Government. Finding that the representative acquiesced, would implicitly be a finding that the representative had the authority all along.

It is possible to argue that a representative has a duty to inform which is more expansive than the limits of that representative's authority; that is, the representative could not act with authority but is obligated to inform the C.O. The failure to inform the C.O. results in the C.O. still being constructively on notice, thereby resulting in C.O. acquiescence. However, such a distinction between the duty to inform and the limits of the representative's authority would appear to be not well taken. The elements of constructive knowledge are in essence nothing more than representative acquiescence to matters within the limits of the representative's authority. There would be no duty if it were outside these limits, as the representative's responsibility and discretion would terminate. The same elements, responsibility and discretion, which would also establish duty would satisfy the prerequisites to that representative's being authorized, the limits or scope of that representative's authority being precisely defined by the C.O.'s transfer of discretion or responsibility.

This correlation between "duty to inform" and authority is supported by the designated C.O.R. decision of Reeves Instrument Co.[323] The facts in Reeves center around a formally designated C.O.R. who had an RCA employee and an ITT employee working for him for purposes of monitoring and integrating the Reeves equipment being purchased. The C.O.R. testified at the hearing that the RCA and ITT employees were his "eyes and ears" but that he retained the mouth.[324] In the first claim

made by Reeves, the board found that these contractor employees had no authority to direct changes and that Reeves knew this.[325] Accordingly, the board held that Reeves could not recover for changes ordered by those employees, unless a Government representative authorized to order changes had actual or constructive knowledge of the changes and approved or ratified them.[326] The contractor contended that the C.O.R. did in fact ratify a control panel change ordered by the RCA and ITT employees. The board summarily rejected this argument by noting that the Government never participated in the discussions concerning the changes.[327] But actual C.O.R. participation in discussions would appear to be a needless prerequisite to contractor recovery of the RCA and ITT issued changes if these employees were, in fact, the C.O.R.'s "eyes and ears" as the C.O.R. had testified. Clearly, a constructive knowledge argument would seem to exist. Yet, if constructive knowledge or the duty to inform is really the representative's acquiescing within the limits of his authority, Reeves makes perfect sense. The ITT and RCA employees had no authority and they therefore had no duty to inform. Absent actual C.O.R. knowledge, these employees could not bind the Government.

In summary, it should be noted that the decisions discussed clearly indicate that the duty to inform is quite possibly nothing more than a disguised authority concept linking the action in issue to the C.O. The cases in the next section will show that a fictional C.O. link is unnecessary, as a direct C.O. link is already present.

(c) The Impact of Factual Circumstances on the Formally Designated Contracting Officer's Representative.

The impact of factual circumstances on the C.O.R. is not all that

much different from the other representative categories studied. Since the C.O.R. is obviously authorized, the need to use this method serves to emphasize that the true issue is not the existence of authority, but is rather the scope of authority known to exist. Implicit in the court's or board's analysis of circumstances is the fact that the C.O.R.'s formal designation is not to be accepted at face value. In an attempt to confirm the designation, the courts and boards often look to functual actuality. To the extent functual actuality is consistent with the delegation, the delegation will be upheld; and as was the case with the other categories, if the functual realities do not coincide with the formal delegation, the realities will govern.

In the 1962 ASBCA decision of Rentel and Frost[328] the stated basis for the contractor's recovery was the C.O.'s imputed knowledge from his formally designated C.O.R.'s, however the real issues were centered around equity and good faith. The facts indicate that a construction contractor submitted a bid for a basic bid item and certain alternate work which the Government had the option to award. Because the Government lacked funds for the alternate work, the Government sent the contractor a notice of award stating that a contract was awarded "in accordance with your bid..." and then cited only the amount of the contractor's basic bid. Thereafter, the parties signed a formal contract for the basic bid amount, but inadvertently included the alternate work as well. Not realizing that there was an inconsistency between the contract price and the statement of work, the contractor began to perform the alternate work. The evidence indicated that formally designated C.O.R.'s were fully aware that the contractor was exceeding his required contract obligations.[329] The board's

opinion evidenced obvious concern for the contractor's good faith perceptions and the fact that one party was being taken advantage of.[330] Leaving no doubt as to the true basis for the contractor's recovery, the board stated:

> [W]e find no basis in logic, equity or reason or upon reasonable interpretation of the entire record in this appeal for making this appellant suffer a loss for the work it performed in good faith...[331]

Good faith performance of work genuinely needed by the Government was the actual basis of the contractor's recovery. No reference was made to the C.O.R.'s having any added authority or being held to any different standard than any other category of representative. In short, the issue of the C.O.R.'s formal designation appears to have played no role in the outcome of this decision.

The previously discussed decision of Triangle Electronics Manufacturing Co.[332] addresses the problem of a C.O.R. who had duties inconsistent with his stated delegation of authority. In Triangle the contractor claimed that a C.O.R.'s misinterpretation of a contract requirement entitled it to recover a contract price increase for resulting extra work. The Government countered by noting that the C.O.R. was not authorized pointing to a letter which designated the C.O.R. and stated that he was not authorized to make any agreement changing contract quantity or quality. The board in Triangle recognized the significance of this formal letter limiting the C.O.R.'s authority, but still held for the contractor.[333] Central to the board's reasoning was the fact that interpretation of contract data requirements was apparently very much a normal part of the C.O.R.'s regular duties.[334] The board concluded that these routinely performed duties also included the power to make erroneous interpretations.

While the board in Triangle went on to find a case of C.O. acquiescence, strongly implied was the fact that this was but one other factor leading to the contractor's recovery. Once again, a "totality of circumstances" approach seems to best describe what was taking place. Clearly, consideration was also given to the C.O.R.'s stated authority limitations[337] as well as to contractor and C.O.'s working relationships with the C.O.R.[338] While each of these factors has at sometime been cited as the sole basis for legal conclusion, in Triangle they were each discussed as a significant issue meriting some consideration. The "totality of circumstances" approach, overtly used in Triangle, is particularly revealing in the consideration given the formal C.O.R. designation. In weighing the various factors, the board focused not on the individual's being the C.O.'s authorized representative, but looked instead to the authority limiting aspects associated with the delegation.[339] At least as viewed by the board in Triangle, the tone of the delegation was more of authority restricting as opposed to authority granting. It is for this reason that the board spent the majority of the decision overcoming the presumption that the stated restrictions were valid and binding.

Contrary to Triangle's emphasis on the restrictions of the C.O.R. designation, the fact that reliance may be reasonable based solely on the representative's formal designation was actually recognized in the 1973 DOT CAB decision of Holland Construction Co.[340] In Holland Construction the contractor's claim arose from an engineer's erroneous instructions regarding emplacement of topsoil. Pointing to the engineer's C.O.R. designation as evidence of reasonableness, the board stated:

> Absent other contractual directions, appellant's reliance upon the engineer's designation of the fills as the proper areas for emplacement of topsoil was entirely reasonable under the circumstances inasmuch as the engineer was the Contracting Officer's designated representative with authority under the specifications to "decide all questions" relating to "interpretation of the plans and specifications. (Emphasis added)[341]

While in Holland Construction the existence of a formal C.O.R. designation resulted in a finding of authority, other decisions appear to consistent with the viewpoint of Triangle Manufacturing that it is only one factor. In 1980 ASBCA decision of Charles G. Williams Construction Co.[342] the contractor's claim centered around the allegation that the C.O.R. waived defects in a construction contract. The contractor argued that the formally designated C.O.R. had sufficient apparent authority to waive the defects in issue. The board summarily dismissed the assertion of apparent authority, quoted the C.O.R. clause from the contract and then noted:

> This does not preclude an examination to determine whether the engineer was vested with such authority by implication from the terms of the foregoing standard clause referenced above; or whether the Government was not otherwise estopped to deny his authority.
>
> * * *
>
> However, we are unable to discern any valid basis in support of the contractor's assertions.[343]

The board's denial of the claim was at least in part based on C.O. communications to the contractor, which it felt were "sufficient by their very nature to place appellant on notice of [the C.O.R's] limited authority..."[344] This, the board reasoned, eliminated any basis for reasonable reliance.[345] Once again, a "totality of circumstances" approach seemed to have been controlling.

The fact that a particular representative's duties or functional actuality may be a significant factor with regard to formally designated C.O.R.'s seems clearly implied from the ASBCA decision of Randall H. Sharpe.[346] In Sharpe the issues centered around changes ordered by the C.O.'s technical representative who was the base civil engineer. The board found authority,[347] but seemed to impliedly confine its conclusion to the previously discussed category of "Field Representatives,"

> ...where the contracting officer has designated a resident engineer, a project engineer or, as here, the base civil engineer to be his technical representative for purposes of technical surveillance of workmanship and inspection of materials under the contract, and the functions delegated to such engineer include: (1) inspection of workmanship; (2) rejection of defective material and/or workmanship; and (3) requiring replacement of defective material and/or workmanship, this delegation empowers the technical representative to direct the contractor on the basis of his interpretations of the specifications. In such case the contractor is not obligated to protest to the contracting officer personally and the Government is liable if the technical representative erroneously construes the contract. (Emphasis added)[348]

In Sharpe the representatives duties appeared to be the driving force. The actual designation seemed secondary.

Consistent with the need to examine the "totality of circumstances" is the fact that the boards and courts seem not to be inhibited by any presumption that these formally designated representatives frequent any particular location on the spectrum of authority. The analysis set out in the previously discussed decision of Tasker Industries[349] clearly evidences this. In Tasker the finding of license together with its heavy dependence on C.O. relationships and not the formal C.O.R. designation ultimately identified the representative as

having the authority necessary to bind the Government.[350] The board displayed the primary foundation for its decision when it noted:

> In a number of cases the Court of Claims has indicated that when a contracting officer licenses technical personnel, such as engineers or inspectors, to give guidance or instruction about specification problems to contractors the Government is liable for the consequence of the guidance given.
>
> * * *
>
> And as in all the cases cited, liability attaches where the actual exercise of authority is in error and hence induces the contractor to perform work beyond the scope of the contract.
>
> * * *
>
> We think much depends upon the circumstances of the case. (Emphasis added)[351]

The case of Tasker Industries does an excellent job of illustrating two significant points: (1) The commingling of categories of cases as precedential authority in this area is not an oversight, but is the very essence of what is going on. In Tasker not one of the decisions cited to establish the legal concept of "license" involved a formally appointed C.O.R.[352] The clear implication is that the formal designation itself is only one factor being considered. This brings up the second and related point: (2) To the limited extent that the formal C.O.R. delegation is a factor, the authority restricting language routinely made a part of the designation may even create a presumption that the formally designated representative has less authority than his informally created counterpart. This was at least the tone of Triangle Manufacturing. In Tasker this would have meant that absent the establishment of license, the C.O.R. designation together with its restrictions would have meant what it said. This would have been entirely consistent with the already established principle which when

stated in its converse reads "where the duties performed by the representative are consistent with the formal delegation, the restrictive aspects of the delegation will be upheld."[353] Once again functional actuality would prevail.

The expansiveness of the concept of license is best displayed in the context of the C.O.R. The prior discussion of Tasker Industries has already indicated that the authority derived from license may be broader than that inherent to a formally designated C.O.R. The 1978 DOTCAB decision of Wismer and Becker Contracting Engineers[354] shows further evidence of the breadth of this concept. Wismer dealt with a C.O.R.'s refusal to allow a contractor's substitution of a vendor who supplied a technically acceptable product to a step-one technical proposal. The contractor had apparently stated on the equipment list submitted with his technical proposal that the equipment listed was tentative and that he might substitute other technically acceptable equipment for that named. When the contractor tried to substitute equipment, however, the Government C.O.R.'s refused to accept it, stating that substitutions were not permitted. The contractor claimed a constructive change. The Government asserted as one defense the absence of a final decision. The facts in Wismer indicated that the C.O.R.'s had repeatedly rejected the contractor's request for approval. Furthermore, the contractor had specifically requested an immediate decision for the C.O., but no such decision was ever issued or promised. Under these circumstances the board concluded that the contractor had no choice but to obtain another supplier or face contract termination.[355] Summarily illustrating the impact of license, the board stated:

> Neither was a final decision by the Contracting Officer a necessary prerequisite for appellant to take the action it did. Both the Court of Claims and this Board have ruled that whether the contract or the Contracting Officer licenses technical personnel to give guidance or make decisions under the specifications, the Government is liable for the consequences of the action taken.[356]

As was the case in the previously discussed decision of Clevite Ordinance,[357] the contract was at least in part rewritten by the equitable aspects of license. The fact that the board felt compelled to draw on the concept shows that it is broader than the position of formally designated C.O.R. The essence of the concept, as displayed in Tasker, Clevite, and Wismer, simply stated is that if there is an inconsistency between a express or implied delegation of authority and a contractual limitation on that authority, the functional actuality of the representative will prevail, even at the cost of rewriting the contract. In Tasker the C.O.R.'s authority was limited by language set out in the C.O.R. clause in the contract. The C.O.R. supposedly could not issue contract changes. License changed this.[358] In Clevite the set procedures of the "Limitation of Cost" clause were deemed"... transitory and provisional accounting procedures... not permitted to pose a barrier to payment."[359] And in Wismer the final result was that the disputes procedure which necessitated a designated C.O. final decision was held to be unnecessary.[360]

(d) Formally and Informally Created Contracting Officer's Representatives. - What is Really Going On

The fact that C.O.R.'s absent their formal designation are indistinguishable from other representatives having authority is readily apparent from the case law "finding" C.O.R.'s in representatives not formally designated. The issue in these decisions seems

simply to be finding the conveyance of C.O. authority to a Government representative. Since there may be no formal delegation, the boards and courts are forced to look to other factors. The question, however, remains the same: Did the C.O. intentionally, or perhaps even unintentionally give the representative authority to do what was done? Typical of this type of analysis is that set out in the previously referenced case of Switlik Parachute Co.:[361]

> Paragraph 5.101 of the DCSC contract provisions provided that inspection for compliance with contract specifications would be performed at origin "by an authorized inspector of the Government." Furthermore, paragraph 5.104 provided that acceptance would be performed "by an authorized Government Representative at origin." We conclude from this provision that the resident QAR was implicitly authorized by the Contracting Officer to inspect and accept...(Emphasis added)[362]

The ASBCA ultimately found the inspector to be an authorized representative of the C.O.[363] Clearly, all that the board was really concerned with was that the inspector had authority to perform the tasks in issue. The board was simply involved in a search for evidence of that authority. A formal C.O.R. designation is one form of such evidence. Switlik illustrates a case where the authority delegation was in the contract, but was not quite as formal.

The search for authority and the finding of a C.O.R. is not confined to formal documents. In the 1970 ASBCA decision of Contractor's Equipment Rental Co.[364] a field representative was "found" to be the C.O.'s authorized representative based on an oral statement made by the C.O to the contractor.[365] The board's reasoning read as follows:

> The contracting officer's designation of Colonel Meyers pointedly as the "man to satisfy," and the clear evidence that, by the contracting officer's acquiescence, all questions as to equipment needs and

> sufficiency were referred to the former's choice, is tantamount to a delegation defacto as the contracting officer's authorized representative. (Emphasis added)[366]

The logic in Contractor's Equipment Rental Co. is simple. The representative received a delegation from the C.O., and he acted within that delegation; he is therefore a C.O.R. This all equates to a finding of authority.

While scope of authority is the key issue, actions by Government employees still require a nexus with the contract to qualify as a C.O.R. This point is brought home by the 1972 ASBCA decision of Frank K. Blas Plumbing and Heating Co.[367] In Blas a construction contract called for the alteration of the heating system in a Government plant being operated by a third party contractor. On one occasion, about an hour after one of the contractor's shifts had reported for work, the plant security officer ordered contractor's employees to vacate the plant because of a bomb scare. The contractor preceeded to make a claim under the contract's "Suspension of Work" clause. The board denied the claim notwithstanding the finding that the security officer had acted within the limits of his authority when he ordered the plant vacated.[368] The board reasoned:

> While we have no doubt that the security officer acted within the limits of his authority when he ordered the plant be vacated during the bomb scare, he was not a duly appointed authorized representative of the Contracting Officer and had no authority or responsibility with respect to the Government contract with appellant. It would seem that his actions ordering the plant to be vacated applied with equal force to all persons in the plant without regard to whether they were engaged in the performance of any contract with the Government.[369]

The absence of any nexus to a contract precludes the contractor's recovery in Blas.[370] It displays a Government representative acting

within the limits of his authority, and who is yet not a C.O.R. Though never formally addressed as such, the acts in issue were probably sovereign as opposed to contractual in nature. This would explain the authority without the C.O.

Authority for all transactions related to a contract comes directly or indirectly from either the C.O. or the contract. Since the C.O.'s authority gives life to the contract, even contractual delegations are C.O. delegations. Thus, to the extent a representative is authorized under a contract, he is an authorized representative of the C.O., lack of formal designation notwithstanding. The search for authority or analysis of a particular representative's scope of authority, is the determination of whether the actions taken may be classified as those of a C.O.R. Finding license, or discovering a C.O.R. equates to nothing more than a determination that the actions in issue were authorized. The delegation may have been express or implied, intentional or unintentional, but the vast majority of decisions feel compelled, as well they should, to point to the C.O.[371] For in a legal context which will not recognize apparent authority, all authority arguments must point to a Contracting Officer. Thus, all authorized representatives leading to contractor recovery must be authorized representatives of the C.O. acting or acquiescing within the limits of their authority.

(e) Conclusions with regard to the Formally Designated Contracting Officer's Representative

The examination of the "totality of circumstances" to find or confirm the C.O.R.'s scope of authority is essentially the same process used to analyze the other categories of representatives. The very need

to examine the same elements impliedly places the formally designated C.O.R. on the same spectrum of authority as the other representative categories and therefore effectively eliminates any arguments that the formally designated C.O.R. stands in a position of higher stature than other Government representatives.

While the designation of C.O.R. is clear evidence of the existence of some amount of authority, it tells you nothing about the scope of that authority. The use of a spectrum paradigm converts all issues into scope issues. Analysis of factual circumstance makes the actual C.O.R. designation only one more factor to be scrutinized. Inconsistent language in the designation or a fact situation inconsistent with that designation could also prove determinative of the functional actuality of the representative in issue. These functional realities will govern. This brings us back to the same authority prerequisites previously used to find a C.O.R. or establish C.O. license. It all becomes an attempt to find a particular representative authorized under the circumstances in issue, and amounts to nothing more than validating that the representative acted within the limits of his authority. Once again, C.O. action, relationships or knowledge play a paramount role in translating equity of circumstance into a finding that the representative did in fact act within scope. Direct or indirect contact or attribution to the C.O. appears to be the common thread to all the categories. In short, the C.O. appears to be held accountable for the situations he either creates or tolerates.

The conversion of all issues to scope of authority issues contains an implied recognition that all Government representatives working on the contract are C.O. representatives. The key issue of

scope determines whether they are the C.O.'s authorized representative's acting within the limits of their authority. And to the extent they are, they act as the C.O. and bind the Government. The circle thus becomes complete. The C.O. is directly or indirectly responsible for the delegation of authority and his actions effectively create other C.O.'s, arguably a prerequisite to all actual authority.

Study of the formally designated C.O.R. brings all the authority issues together in part because it brings all the representative categories together. Placing them all on the same spectrum conceptually permits them all to act as C.O.'s to the extent they act within the limits of their authority. The key to analysis thus becomes scope of authority and the circumstantial elements necessary to determine it.

Chapter IV

Some Conclusions

Issues of representative authority appear to be reasonably predictable. Transfer of discretion by the C.O. equates with transfer of authority. Expressed in other terms, this means that the functional actuality of the representative will govern, regardless of contrary C.O. statements, made orally or included as a part of the contract. These principles are dictated by the predominate elements of equity, good faith, and reasonable reliance, all included under the expression of "totality of circumstances." Under functual actuality if the C.O. places a representative in a role inconsistent with stated restrictions on the representative's authority, the representative's placement stands as a modification. Thus analysis of the "totality of circumstances" means that a C.O.'s actions may speak louder than his words and the courts and boards will not confine their analysis to written documents when the actions in issue were taken by one with authority. In short, equity and good faith dictate that written disclaimers be overruled by contracting realities.

The spectrum of authority paradigm appears as a sound approach to study the totality of circumstances present in most fact situations. It is an efficient model for conceptualizing varying degrees of equity, good faith, and reasonable reliance. It contributes to the predictability of the outcome of representative authority issues by making one sensitive to patterns of equity, and good faith as they apply to designated C.O. and contractor relationships. Study of these rela-

tionships is essentially analysis of functional actuality.

The need for discovering functional actuality is brought about by the contracting agencies' failure to properly depict what is really taking place. Similarly, the courts and boards concern for equity and good faith complements the agencies' lack of concern for these issues. Agency regulations and informal publications do not adequately address and in many instances misrepresent representative authority issues. In a sense the agency is acting as no more than a party to the contract, refusing to admit to even the possibility of any liability. This is best apparent from the disclaimer provisions routinely made a part of the contract. Agency adamancy that only the designated C.O. may make material changes to the contract stands in defiant contrast to the contrary case law in this area. The agencies' failure to recognize that such changes are possible explains their lack of efforts to control the situation.

The agencies' failure to contend with contracting realities has simply transferred that burden to the courts and boards. It has become a case of defining the rules of contract performance after the fact. The result of the agencies' refusal to rise above their position as a party to the contract is to essentially deprive them of the opportunity to shape the rules in this area. Instead of addressing the fuctional actuality of the representative, the agencies have tended to disclaim any responsibility. They wish the benefits that representative guidance offers, while disclaiming liability for errors. This is per se a violation of good faith and is not to be tolerated by the courts and boards. What is particularly unfortunate for both contractors and the Government is that the rules of their relationships cannot be

clearly defined in advance to encourage efficient contracting. This would certainly contribute to the integrity of the procurement process in a performance sense, and save substantial amounts in time and money otherwise wasted on inevitable litigation.

FOOTNOTES

1. Byrne Organization, v. United States, 152 Ct. Cl. 578, 287 F.2d 582 (1961); Jascourt v. United States 207 Ct. Cl. 955 (1975); Housing Corp. of America v. United States, 199 Ct. Cl. 705, 468 F. 2d 922 (1972); Gordon Woodroffe Corp. v. United States, 122 Ct. Cl. 723, 104 F. Supp. 984 (1952).

2. 346 U.S. 86 (1947).

3. Id., at 383.

4. NASA BCA No. 481-5, 82-1 BCA ¶15217 (1981).

5. Id., at 76,652.

6. FPR 1-1.207.

7. United State v. Beebe, 180 U.S. 343 (1901) at 354.

8. Globe Constr. Co., GSBCA No. 2197, 67-2 BCA ¶6478 (1967); Triangle Elec. Mfg. Co., ASBCA No. 15995, 74-2 BCA ¶10,783 (1974); Varo Inc., ASBCA 16087, 73-2 BCA ¶10,206 (1973).

9. Acme Inc., Comp. Gen. B-182584, 74-2 CPD ¶310 (1974); INTASA Inc., Comp. Gen. B-180876, 74-1 CPD ¶148 (1978); Mathews Furniture Co., Comp. Gen. B-195123, 79-2 CPD ¶ 131 (1979).

10. Lox Equip. Co., ASBCA No. 8985, 1964 BCA ¶4463 (1964).

11. Triangle Elec. Mfg. Co., supra, note 8; Varo Inc., supra, note 8.

12. Triangle Elec. Mfg. Co., supra, note 7.

13. Acme Inc., supra, note 9.

14. Lox Equip. Co., supra, note 10.

15. Id.

16. 130 Ct. Cl. 435, 127 F.Supp.617 (1955).

17. W. Seavey, Handbook of the Law of Agency §98 (1964).

18. ASBCA No. 22748, 79-1 BCA ¶13,744 (1979).

19. Id., at 67,364, citing Gresham & Co., v. United States, 200 Ct. Cl. 97, 470 F.2d 542 (1972).

20. ASBCA No. 19,909, 75-2 BCA, ¶11,578 (1975).

21. Id., at 55,298-99.

22. Switlik Parachute Co., ASBCA No. 17920, 74-2 BCA ¶10,970 (1974); General Cas. Co. v. United States, 130 Ct. Cl. 520, 127 F. Supp. 805 (1955); Centre Mfg. Co. v. United States 183 Ct. Cl.115, 392 F.2d 229 (1968); Futuronics, Inc. DOT CAB No. 67-15, 68-2 BCA ¶7079 (1968); Historical Services, DOT CAB No. 72-8, 72-2 BCA ¶9582 (1972); Industrial Research Assocs., DCAB No. WB-5, 68-1 BCA ¶7079 (1968); Tasker Industries, DOT CAB No. 71-22, 75-2 BCA ¶11,372 (1975); Urban Pathfinders, Inc., ASBCA No. 23134, 79-1 BCA ¶13,709 (1979).

23. Urban Pathfinders, Inc., supra, note 22.

24. Id., at 67,260.

25. Switlik Parachute Co., supra, note 22.

26. Id., at 52,209.

27. DAR 1-201.3.

28. FPR 1-1.207.

29. GSPR 5A-1.404-70; DOTPR 12-1.402.50.

30. ADARS 1-406.50(a)(i).

31. ADARS 1-406.50(a) and (c); GSPR 5A-1.404.70(a); DOTPR 12-1.402-50(a); DOEPR 9-1.451(a).

32. Id.

33. ADARS 1-406.50(c); GSPR 5A-1.404-70(a); DOTPR 12-1.402.50(a); DOEPR 9-1.45(a).

34. ADARS 1-406.50(e)(i); GSPR 5A-1.404-70(a).

35. GSPR 5A-1.404-70(c); DOTPR 12-1.402.50.

36. Supra, note 35.

37. Supra, note 34.

38. ADARS 1-406.50(a).

39. ADARS 1-406.50(c).

40. ADARS 1-406.50(e)(i).

41. See Section B of Chapter III.

42. GSPR 5A-1.404.70(a).

43. Id.

44. Id.

45. Id.

46. GSPR 5A-1.404-70.

47. Id.

48. DOTPR 12-1.402.50(a); DOEPR 9-1.451.

49. GSPR 5A-1.404.70(a); ADARS 1-406.50(e)(i).

50. GSPR 5A-1.404-70(c); DOTPR 12-1.402-50(b).

51. DOTPR 12-1.402.50(b).

52. ADARS 1-406.51(a); DOTPR 12-1.402-50(a); DOEPR 9-1.451(a).

53. Id.

54. ADARS 1-406.51(b).

55. ADARS 1-406.51(a)(i).

56. GSPR 5A-1.404-70(b).

57. Id.

58. Id.

59. Id.

60. DOTPR 12-1.402-50(a); DOEPR 9-1.451.(a).

61. Supra, note 26.

62. GSPR 5A-1.404-70(c).

63. Id.

64. DOTPR 12-1.402-50(b).

65. Id.

66. United States Army Logistics Management Center, Fort Lee, Virginia, Student Reference Book, Contracting Officer's Course, (ALM-37-0336-RB(A)), July 1982, at 16-19, 84-85; United States Department of Energy Acquisition Letter AL 80-29, 12 Dec 1980.

67. National Air and Space Administration, Goddard Space Flight Center, Announcement Letter No. 2383, Relationship Between Government Personnel and Contractor Support Service Personnel, July 23, 1979; United States Department of Energy Acquisition/Assistance Guide for Technical Personnel, October 1980, at III-2 and VI-5; United States Department of Energy Draft Postaward Contract Guide for Contracting Officer's Technical Representative, September 1981, at IV-5; Air Force Regulation 89-1 (AFR 89-1), June 20, 1978, para. 13-10(e). Air Force Systems Command Supplement 70-9, (AFSC 70-9), October 4, 1976, para. 6d(3) (j); United States Navy, NAVSEA COTR Duties, prepared by NAVSEA 0284, May 21, 1981, at 49,A20; Secretary of the Navy Instruction 4200.23A (SECNAVINST 4200.23A), May 23, 1972, para. 7c; United States Department of Transportation Comptroller Manual Vol. X, Quality Assurance, (COMDTINST M4855.1), at III-2 and III-3; National Air and Space Administration, Godard Space Flight Center, Technical Directions 20.603, January 1, 1981.

68. General Services Administration, Contract Administration for Program Personnel, (PRS TM 3.1), November 1980, at 5 and 6; National Air Space Administration, Goddard Space Flight Center, Project Man-

ager's Handbook, (GHB 7150.1A), April 1972, para. 8.7.1.

69. United States Army, Logistics Management Center, Fort Lee Virginia, Student Reference Book, Contracting Officer's Representative Course, supra, note 66, at 5; United States Department of Energy Acquisition/Assistance Guide Technical Personnel, supra, note 67, at III-5.

70. United States Army Logistics Management Center, Fort Lee, Virginia, Student Reference Book Contracting Officer's Representative Course, supra, note 66, at 20-23; United States Department of Energy Draft Postaward Contract Guide for Contracting Officer's Technical Representative, supra, note 67, at Appendix A; Navy Support Instruction 4330.6A, (NAVSUPINST 4330.6A), June 30, 1982, enclosure (1); Naval Regional Contracting Office Instruction Washington 4330.1, (NRCO-WASHINST 4330.1), April 11, 1979 enclosure (1); General Services Administration, Contract Administration for Program Personnel, supra, note 68, at 4.

71. Supra, note 2.

72. Supra, notes 27 and 28.

73. See Section E Chapter I.

74. Supra, note 22.

75. Id.

76. Switlik Parachute Co., supra, note 22.

77. Id., at 52,209.

78. This language begins to reveal the underlying equitable theme of this area.

79. General Cas. Co. v. United States, supra, note 22; Max Drill, Inc. v. United States, 192 Ct. Cl. 608, 427 F. 2d 1233 (1970); Futu-

ronics, Inc., supra, note 22; Historical Servs., supra, note 22; Industrial Research Assocs., supra, note 22.

80. Triangle Elec. Mfg. Co., supra, note 7.

81. Id., at 51,276.

82. Supra, note 10.

83. Id., at 21,472.

84. ASBCA No. 6321, 61-2 BCA ¶3182 (1961).

85. Id., at 16,498.

86. Davis Decorating Serv., ASBCA No. 17342, 73-2 BCA ¶10107 (1973).

87. Piland Corp., ASBCA No. 22560, 78-2-BCA, ¶13503 (1978).

88. United States Fed. Eng'r & Mfg. Co., supra, note 20.

89. ASBCA Nos. 9477 and 9764, 65-2 BCA ¶4874 (1965).

90. Id., at 23,100.

91. WRB Corp. v. United States, 183 Ct. Cl. 409 (1968).

92. Id., at 423.

93. Id.

94. IBCA No. 815-12-69, 72-2 BCA ¶9601 (1972).

95. Id., at 44,876.

96. Supra, note 91.

97. Id., at 423.

98. Id.

99. Id., at 424.

100. Id.

101. Id.

102. Id.

103. Id., at 491.

104. Id., at 424.

105. ASBCA No. 3574, 58-2 BCA ¶2051 (1958).

106. Id., at 8647.

107. ASBCA No. 10780, 77-2 BCA ¶5800 (1977).

108. Id., at 26,949.

109. See Chapter III, Sections B(1)(b) and B(2)(b).

110. NASA BCA Nos. 666-35 and 967-32, 69-2 BCA ¶7865 (1969).

111. Id., at 36,560.

112. Id.

113. ASBCA No. 15852, 73-2 BCA ¶10281 (1973).

114. Id., at 48,550.

115. IBCA No. 582, 66-2 BCA ¶6010 (1966).

116. Id., at 27,753.

117. Id.

118. IBCA No. 523-10-65, 67-1 BCA ¶6223 (1967).

119. Id., at 28,780.

120. Id.

121. ASBCA No. 14656, 71-1 BCA ¶8646 (1971).

122. Id., at 40,177.

123. Id., at 40,179.

124. Id., at 40,180.

125. Id.

126. ASBCA 13742, 71-2 BCA ¶8962 (1971).

127. Id., at 4,674.

128. Id.

129. Supra, note 10.

130. Id., at 21,472.

131. Id.

132. ASBCA No. 22748, 79-1 ¶13,744 (1979).

133. Id., at 67,364, citing Gresham & Co. v. United States, 200 Ct. Cl. 97, 470 F.2d 542 (1972).

134. IBCA No. 882-12-70, 71-2 BCA ¶8983 (1971).

135. Id., at 47,019.

136. Id.

137. Switlik Parachute Co., supra note 22.

138. Id., at 52,209.

139. Id., at 52,210.

140. Id., at 52,209.

141. Id., at 52,210.

142. Id.

143. 175 Ct. Cl. 426 (1966).

144. Id., at 431.

145. Id., at 436.

146. Supra, note 89.

147. Id., at 23,099.

148. Id.

149. ASBCA No. 17582, 73-2 BCA ¶10,193 (1973).

150. Id., at 48,048.

151. Id.

152. Blacks Law Dictionary, (4th ed 1951).

153. Id., at 386.

154. Eng. BCA Nos. 3231, 3257, 73-1 BCA ¶9797 (1973).

155. Id., 45,767.

156. 151 Ct. Cl. 228 (1960).

157. Id., at 237.

158. Id., at 240.

159. Id.

160. GSBCA No. 4288, 76-1 BCA ¶11,714 (1976).

161. Id., at 55,841, citing L. B. Samford, supra, note 118.

162. Id.

163. Id.

164. ASBCA 13924, 70-1, BCA ¶8342 (1970).

165. Id., at 38,831.

166. Id.

167. Supra, note 94.

168. Id., at 44,871.

169. Id.

170. Franklin W. Peters and Assocs., IBCA No. 762-1-69, 71-1 BCA ¶8615 (1971).

171. Id., at 40,029.

172. Id.

173. Id.

174. ASBCA No. 6321, 61-2 BCA ¶3182 (1961).

175. Id., at 16,498.

176. Id.

177. ASBCA 17187, 77-2 BCA ¶12,758 (1977).

178. Id., at 61,985.

179. GSBCA No. 15020, 72-1 BCA ¶9411 (1972).

180. Id., at 21,336.

181. Id.

182. GSBCA No. 2428, 68-2 BCA ¶7268 (1968).

183. Id., at 33,751.

184. Id.

185. Triangle Elec. Mfg., supra, note 7; Lox Equip. Co., supra, note 10.

186. Supra, note 84.

187. Supra, note 16.

188. Id., at 446-47, 127 F.Supp. at 623.

189. Eng BCA No. 2525, 65-2 BCA ¶4966 (1965).

190. Id., at 23,432.

191. Id.

192. Supra, note 20.

193. Id., at 55,298.

194. Id., at 55,299.

195. ASBCA No. 9905, 65-1 ¶4853 (1965).

196. Id., at 22,976.

197. Id.

198. Centre Mfg. Co. v. United States, supra, note 22.

199. Id., at 127-28, 392 F.2d at 235-36.

200. Id., at 127, 392 F.2d at 226.

201. Id.

202. Id., at 130, 392 F.2d at 236.

203. General Cas. Co. v. United States, supra, note 22.

204. 125 Ct. Cl. 724, 113 F. Supp. 648 (1953).

205. Supra, note 203, at 533.

206. Id.

207. Supra, note 22.

208. Id., at 32,685, citing Centre Mfg. Co., supra, note 22.

209. Id., at 32,686.

210. ASBCA No. 6630, 61-1 BCA ¶3053 (1961).

211. Id., at 15,801.

212. ASBCA No. 8689, 66-1 BCA ¶5403 (1966), rev'd. on other grounds, 201 Ct. Cl. 169, 475 F.2d 1168 (1973).

213. Id., at 25,373.

214. ASBCA No. 5859, 1962 BCA ¶3330 (1962).

215. Id., at 17,155.

216. Id.

217. Id.

218. Urban Pathfinders, supra, note 22.

219. Id., at 13,709-10,

220. Historical Services, Inc., Supra, note 22.

221. Id., at 44,792.

222. Id.

223. Id.

224. Max Drill, Inc. v. United States, supra, note 79.

225. Centre Mfg. Co., supra, note 22.

226. Supra, note 156.

227. Industrial Research Assocs, supra, note 22.

228. Tasker Industries, supra, note 22.

229. Id., at 54,135.

230. Id., at 54,139.

231. Supra, note 4.

232. Id., at 76,652, citing Federal Crop Ins. Corp. v. Merrill, supra, note 2.

233. Id.

234. Id.

235. Id.

236. ASBCA No. 17288, 75-2 BCA ¶11,406 (1975)

237. Id., at 54,308.

238. Id.

239. Id.

240. ASBCA No. 11990, 67-1 BCA ¶6377 (1967).

241. Id., at 29,519.

242. Id., at 29,525-26.

243. Id., at 29,526.

244. Id.

245. ASBCA No. 8102, 1962 BCA ¶3566 (1962).

246. Id., at 18,067.

247. Id., at 18,068.

248. Id.

249. Id.

250. GSBCA No. 2638, 69-1 BCA ¶7726 (1969).

251. Supra, note 154.

252. Supra, note 250, at 35,900.

253. Id., at 35,899.

254. ASBCA 13663, 70-2 BCA ¶8536 (1970), aff'md.202 Ct. Cl. 463, 479 F.2d 1329 (1973).

255. Id., at 39,687.

256. Id.

257. Id.

258. Id.

259. Id.

260. GSBCA No. 2485, 70-1 BCA ¶8136 (1970).

261. Id., at 37,796.

262. Id.

263. ASBCA No. 16483, 72-2 BCA ¶9733 (1972).

264. Id., at 9733.

265. Id.

266. Good faith issues seem to work on either side, arguably for all representatives.

267. ASBCA No. 14696, 73-1 BCA ¶10,016 (1973).

268. Id., at 47,011.

269. Id.

270. Id., at 47,012.

271. Supra, note 91, at 420-23.

272. ASBCA No. 19069, 75-1 BCA ¶11,248 (1975).

273. Id., at 53,580.

274. Id., at 53,579.

275. Id.

276. Id., at 53,576.

277. Id.

278. Id., at 53,580.

279. Id.

280. ASBCA No. 17592, 73-2 BCA ¶10,360 (1973).

281. Id., at 48,933.

282. Id., at 48,929.

283. Id., at 48,933.

284. ASBCA Nos. 14388, 14426, 14427, 14428, 14429, 14430, 14710, 14711, 14712, 72-2 BCA ¶9736 (1972).

285. Id., at 45,517.

286. Id.

287. ASBCA No. 13067, 69-2 BCA ¶7812 (1969).

288. Id., at 36,302.

289. Id.

290. Id.

291. Id.

292. NASA BCA No. 675-6, 77-1BCA ¶12,295 (1977).

293. Id., at 59,171.

294. See Chapter I with regard to the need for actual authority.

295. IBCA No. 480-2-65, 65-2 BCA ¶5281 (1965).

296. Id., at 24,855.

297. Id., at 24,856.

298. Supra, note 118, at 28,780.

299. DCAB No. NBS-9-74, 75-2 BCA ¶11,432 (1975).

300. Id., at 54,415.

301. Id.

302. Id.

303. GSBCA No. 1376, 65-2 BCA ¶5305 (1965).

304. Id., at 24,942.

305. Id.

306. Id., at 24,943.

307. Id.

308. Supra, notes 27 and 28.

309. NASA BCA No. 566-23, 68-1 BCA ¶7020 (1968).

310. Id., at 32,441.

311. Id., at 32,440.

312. Id., at 32,439.

313. Id., at 32,440.

314. Id.

315. Supra, note 84.

316. Supra, note 309, at 32,440.

317. Supra, note 195.

318. Supra, note 84.

319. Id., at 22,976.

320. Supra, notes 27 and 28.

321. The word "acquiescing" has been substituted for the word "acting."

322. See W. Southard Jones, Inc., supra, note 84.

323. ASBCA No. 11534, 68-2 BCA ¶7078 (1968).

324. Id., at 32,737.

325. Id., at 32,738.

326. Id.

327. Id.

328. ASBCA No. 7344, 1962 BCA ¶3536 (1962).

329. Id., at 17,965.

330. Id., at 17,965-66.

331. Id.

332. Triangle Elec. Mfg. Co., supra, note 8.

333. Id., at 51,275-76.

334. Id., at 51,276.

335. Id.

336. Id.

337. Id., at 51,275- 76

338. Id.

339. Id., at 51,275.

340. DOTCAB No. 72-12, 73-2 BCA ¶10,142 (1973).

341. Id. at 47,701.

342. ASBCA No. 24,967, 81-1 BCA ¶14,893 (1981).

343. Id., at 73,685.

344. Id., at 73,686.

345. Id.

346. ASBCA No. 22 800, 79-1 BCA ¶13,869 (1979).

347. Id., at 68,051.

348. Id.

349. Tasker Indus., supra, note 22.

350. Id. at 54,139.

351. Id.

352. Cited decisions include General Cas. Co. v. United States, supra, note 22; Centre Mfg. Co. v. United States, supra, note 22; Max Drill, Inc., v. United States, supra, note 22; Futuronics, Inc., supra, note 79; Historical Services, Inc., supra, note 22; Industrial Research Assocs., supra, note 22.

353. The principle stated in Chapter, Section B(2) was that to the extent functional actuality was inconsistent with written limitations, the functional actuality governs.

354. DOT CAB No. 76-24, 78-1 BCA ¶13,199 (1978).

355. Id., at 64,560.

356. Id.

357. Supra, note 214.

358. Tasker Indus., supra, note 22, at 54,139-40.

359. Clevite Ordinance, Supra, note 214, at 17,155.

360. Supra, note 354, at 64,560.

361. Switlik Parachute Co., supra, note 22.

362. Id., at 52,207.

363. Id., at 52,210.

364. ASBCA No. 13052, 70-1 BCA ¶8183 (1970).

365. Id., at 38,072.

366. Id.

367. ASBCA Nos. 16563, 16627, 72-1 BCA ¶9454 (1972).

368. Id., at 43,922.

369. Id.

370. Id.

371. See Chapter I, Section B.