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Recommended Citation

C. V. Stelzenmuller, *Formation of Government Contracts Application of Common Law Principles*, 40 Cornell L. Rev. 238 (1955)
Available at: <http://scholarship.law.cornell.edu/clr/vol40/iss2/3>

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FORMATION OF GOVERNMENT CONTRACTS — APPLICATION OF COMMON LAW PRINCIPLES

*C. V. Stelzenmuller**

Americans from colonial times have been blessed with governments reasonably free from arbitrary official action, thanks largely to the insistence of their attorneys and courts that their governments observe as well as enforce the law. There is an area of governmental activity, however, in which governmental officials make rulings which adversely affect the interests of private citizens, an area over which the control of law has been rather feebly exerted. This area is that relating to government contracts. The law which deals with government contracts is, of course, primarily public law, and the statutes and regulations in this field have become so numerous that looseleaf reporter services¹ are almost as standard references for this purpose as they are in federal taxation and labor law. It is not surprising, therefore, that practically all the recent periodical comment concerning government contracts has been concerned with legislative policies and administrative procedures. However, there are some questions relating only to the private rights of individual contractors and not to issues of governmental policy, which are undoubtedly of sufficient importance to the attorney whose practice may involve government contracts as to deserve careful study. It would not be correct to say that these questions have been ignored by writers;² but surprisingly those with which this article deals seem not to have been subject to critical examination. The result has been, in the writer's opinion, a perpetuation of serious errors which may have adversely affected many government contractors, and which, having become current among contracting officers, have no doubt contributed to a feeling in some quarters that it is precarious to deal with and to rely upon government contracting officers.

Two of these troublesome subjects will be here discussed: withdrawal of bids after opening but before award, and the doctrine that the government is not bound by the apparent authority of its agents. These involve principles familiar to every lawyer and law student, and would not merit extensive treatment, except for the fact that peculiar doctrines concerning them have arisen, and seem to prevail generally throughout the administrative hierarchy which deals with federal contracts. The purpose of this article is to refute these peculiar doctrines, and to show that the

* See Contributors' Section, Masthead, p. 326, for biographical data.

¹ E.g., CCH Government Contracts Reporter.

² See *infra* notes 8, 9, 10.

correct principles are substantially the same as those which apply to private contracts.

WITHDRAWAL OF BIDS AFTER OPENING, BEFORE AWARD

The first of these problems arises in this common situation: A contracting officer sends out invitations to bid on a "formally advertised"³ contract. The invitation to bid states that bids may not be withdrawn for a period of sixty days, or a specified shorter time, after the time fixed for opening the bids. Then after the opening, during the specified period, a bidder attempts to revoke his offer. Is the attempt effective?

On general contract law principles, one would naturally answer yes. The bidder is not contractually bound until his bid is accepted, and in some jurisdictions, not until such a formally advertised public contract is actually signed.⁴ An offer is revocable unless under seal, or given for a valuable consideration, or unless a statute provides otherwise, or perhaps if the requisites of a promissory estoppel are present.⁵ The bidder's promise not to withdraw is not enforceable because it is gratuitous, not under seal, there is no such statute, and there has generally been no change of position in reliance on it by the government. However, the view that the bidder may *not* withdraw his bid during this period, long espoused by the Comptroller General, has recently been adopted by the United States Court of Claims in the case of *Refining Associates, Inc. v.*

³ Throughout this discussion one should bear in mind the distinction made between "formally advertised" and "negotiated" contracts. There is no question that an offeror to the latter type of contract may revoke his offer according to the ordinary law of contracts. This discussion is limited to the correctness of applying another rule to formally advertised bids. Regulations purporting to create a different rule are expressly limited to the formal advertising method of contracting. See note 43 *infra*.

⁴ Cf. *Franklyn Snow & Co. v. Commonwealth*, 303 Mass. 511, 22 N.E.2d 599 (1939), wherein the court recognized the legal power of the bidder to withdraw his bid even after the award and up to the time the contract was signed. In accord with this dictum is *Covington v. Basich Bros. Const. Co.*, 72 Ariz. 280, 233 P.2d 832 (1951); contrary is *Berkeley Unified School Dist. v. James I. Barnes Const. Co.*, 112 F. Supp. 396 (N.D. Cal. 1953); and see authorities on both sides collected in those cases. Contracts with the federal government are enforceable upon the award, and signing of a formal contract is not a condition precedent to the formation of a contract. *United States v. Purcell Envelope Co.*, 249 U.S. 313 (1919). The *Franklyn Snow* view that the bid is revocable up until the contract is signed is explained by Prof. George J. Thompson's mimeographed text on contracts in use at Cornell Law School, at 97, as based on "the business usage in this field that there is no binding obligation until the definitive contract is signed and the required bonds put up. Accordingly, the bids are usually conditioned upon forfeit of the deposit if the bid is withdrawn or the bidder fails to sign the contract after its award to him." See *Williston, Contracts* (Williston-Thompson ed. 1938) §§ 31, 61, and Supplement, § 31, note 6a, § 61; cf. *United States v. Penn Mfg. Co.*, 337 U.S. 198 (1949).

⁵ Restatement, Contracts, §§ 35(e), 46, 47, 90 (1934).

*United States.*⁶ Although this view had been enunciated in many advisory administrative rulings and had come to be adopted by procurement regulations,⁷ government manuals for contracting officers,⁸ and writers of texts⁹ and articles¹⁰ on the subject, the *Refining Associates* case was the first to give the doctrine the respectability of a clear-cut adjudication. A doctrine so patently foreign to Anglo-American contract law should not be accepted by the bench and bar lightly, no matter how well entrenched it is in the manuals and texts; it behooves us, therefore, to review carefully the authorities and principles upon which this incongruous doctrine purports to be based.¹¹

The rule that bidders on formally advertised federal contracts may not withdraw after the bid opening had its origin in the advisory opinions of administrative officers. But note that the earliest such opinion, rendered in 1858, was quite to the contrary.¹² In this opinion the Attorney General very emphatically stated that the usual principles of contract law applied to the government, and that the Post Office Depart-

⁶ 109 F. Supp. 259 (Ct. Cl. 1953), approved, 66 Harv. L. Rev. 1312 (1953). See also *United States v. Lipman and Spilberg*, 122 F. Supp. 284 (E.D. Pa. 1954) where the court stated as dictum, "The federal common law rule . . . would appear to be this: because of the possibility of fraud among bidders the ordinary common law rule that an offer can be withdrawn at any time before it has been accepted does not apply to bids to the United States government, . . ."

⁷ ASPR 2-303, 32 Code Fed. Regs. § 401.303 (1951), Gov't Contract Rep. ¶ 29,072 (1951); Coast Guard Procurement Regulations § 116.02-62, 33 Code Fed. Regs. § 116.02-62, CCH Gov't Contracts Rep. ¶ 25,662 (1953).

⁸ NAVSANDA Publication No. 116, "Bid Procedures Memorandum" 13 (1949); *Navpers* 10841, "Navy Contract Law" 34 (1949); U.S. Chemical Corps, "Legal Aspects of Procurement Contracts" 20 (1949); U.S. Judge Advocate General's School, "Government Contracts and Readjustment" 111 (1945); *Id.*, "Government Contracts" 83 (1943); U.S.Q.M. School, "Laws Governing Q.M. Corps Contracts" 81 (1938); 2 Bull. JAG 437 (1943).

⁹ CCH, Gov't Contracts Rep. ¶ 2031; Research Institute of America, *Government Contract Problems* ¶ F.1,121, ¶ F.1,121a (1942); Coordinators' Corporation, *Pitfalls in the Law of War Contracts* 5 (1942); Naylor, *Federal Contracts and Procurement Procedure* 182 (3d ed. 1949); *Graske, War Contract Claims* 288 (*Williston, Contracts*, Vol. 9, 1945); *Shealey, War Supplement to the Law of Government Contracts* § 216 (1943); *Graske, The Law of Government Defense Contracts* 257 (1941). Cf. *Shealey, The Law of Government Contracts* § 216 (3d ed. 1938).

¹⁰ Ramey and Erlewine, "Mistakes and Bailouts of Suppliers under Government Contracts and Subcontracts—A Study of Doctrine, Practice and Adhesions," 39 *Cornell L.Q.* 634, 655-57 (1954); Lang, "Procurement by Formal Advertising," 12 *Fed. B.J.* 244, 247-8 (1952); Naylor, "Liability of the United States Government in Contract," 14 *Tulane L. Rev.* 580, 591 (1940).

¹¹ It is really astonishing that none of the writers who have considered this subject has attempted to explain or resolve this palpable inconsistency. One writer incorporates the mutually contradictory principles into successive paragraphs, apparently unaware of the logical absurdity in doing so. *Shealey, The Law of Government Contracts* § 216 (1938).

¹² 9 Op. Att'y Gen. 174 (1858).

ment had no power to enforce a rule that bids for carrying the mails should not be withdrawn after a certain time whether accepted or not, and that a bidder's gratuitous promise not to withdraw a bid is not binding.

An even stronger affirmation of this orthodox point of view was made by the Attorney General in 1877.¹³ In this case, the low bidder on a construction contract for certain canal locks withdrew his bid after opening, but before acceptance, in contravention of the terms of the invitation to bid. The Attorney General ruled that the bidder could effectively withdraw, and he did not even forfeit his bid bond.

While both of these early opinions were well supported by principle and authority in respect to the question of revocability, the transition to the contrary view was foreshadowed by an opinion rendered in 1894.¹⁴ The Attorney General said that "the rulings of this Department . . . , in the absence of any special statutory provision, are that the bidder may withdraw at any moment until notice of acceptance of his bid." Nevertheless, the Attorney General advised the contracting officer to award the contract to the bidder who had attempted to withdraw. He based this ruling on a deliberately strained construction of Revised Statutes, Section 3719,¹⁵ made expressly for the purpose of having the matter authoritatively decided by the courts.

Nineteen years later, the transition to the diametrically opposite position was complete.¹⁶ The Attorney General now ruled that the 1894 decision was too finical, and declared the general principle to be that when the invitation for bids provided that bids could not be withdrawn for a certain period after opening, before award, this provision was enforceable. The contrary case of *Scott v. United States*,¹⁷ to be later discussed, was said to be based on a statute and therefore distinguishable, but a careful reading of the *Scott* case shows this to be erroneous. The actual rationale of the Attorney General's opinion was that there was consideration for the promise of the bidder not to withdraw his bid for a reasonable period after the opening, namely, a promise by the government to consider only such bids as contain this provision. Therefore, the bid was considered to be an option irrevocable for the agreed period. This argument is ingenious, but appears to be clearly incorrect for

¹³ 15 Op. Att'y Gen. 648 (1877).

¹⁴ 21 Op. Att'y Gen. 56 (1894).

¹⁵ Rev. Stat. § 3719 (1875), as amended 34 U.S.C. § 562 (1946), repealed 62 Stat. 25 (1948). Now covered by 41 U.S.C. §§ 151, 152 (1952).

¹⁶ 30 Op. Att'y Gen. 56 (1913).

¹⁷ 44 Ct. Cl. 524 (1909), discussed *infra*, text at note 22.

several reasons. One reason is that government agents have no constitutional or statutory authority, express or implied, to make such a promise on the part of the government. A second is that the government's asserted promise was not bargained for in exchange for the bid.¹⁸ Since the standard bid forms contain a bare promise not to withdraw without any statement of any consideration therefor, it cannot be reasonably supposed that any such far-fetched counter-promise was actually bargained for and regarded as consideration by the bidder. A third reason is that it long has been held that a promise to take an offer under advisement is not valuable consideration, even though bargained for.¹⁹

Once the complete turnabout had been made, however, even though it seems both logically and legally erroneous, it was easy for subsequent administrative officers to reach the same conclusion; a species of precedent having been established, reasoning became unnecessary, and one could simply cite the earlier decision. At any rate, this appears to have been what has generally prevailed in later administrative rulings on the question. The later rulings, devoid of reasoning on this point, have flatly stated that "the government is entitled to a reasonable time to consider bids after they have been opened." Many of the authorities cited in the later rulings, evidently to add weight to the Attorney General's opinion last discussed, are quite irrelevant and some are cited entirely incorrectly.²⁰ Despite this lack of a sound basis in principle or precedent, the administrative rulings for the last forty years²¹ have

¹⁸ Restatement, Contracts, § 75(1), Comments b, c, Illustration 2 (1932). Comment c: "The fact that the promisee relies upon the promise to his injury, or the promisor gains some advantage therefrom does not establish consideration without the element of bargain or agreed exchange." See *Wisconsin & M.R. Co. v. Powers*, 191 U.S. 379 (1903). Cf. the modern doctrine of promissory estoppel, Restatement, Contracts § 90. But cf. *Sylvan Crest Sand & Gravel Co. v. United States*, 150 F.2d 642 (1st Cir. 1945).

¹⁹ *Boston & Maine R. Co. v. Bartlett*, 3 Cush. 224 (Mass. 1849).

²⁰ Several of the frequently cited cases are: *American Water Softener Co. v. United States*, 50 Ct. Cl. 209 (1915); *Scott v. United States*, 44 Ct. Cl. 524 (1909); *Ellicott Machine Co. v. United States*, 44 Ct. Cl. 127 (1909); and *Haldane v. United States*, 69 Fed. 819 (8th Cir. 1895). The *Water Softener* case involved an attempt to avoid a contract after award; the *Haldane* and *Ellicott* cases did not involve attempts to withdraw bids. All of these are quite irrelevant. The *Scott* case, discussed *infra*, text at note 22, actually stands for the proposition that a bid is revocable until accepted, but that collateral security may be forfeited by withdrawal before acceptance. Therefore, this case is also cited erroneously.

²¹ 31 Comp. Gen. 323 (1952); 29 Comp. Gen. 341 (1950); 19 Comp. Gen. 761 (1940); 6 Comp. Gen. 504 (1927); 24 Comp. Dec. 534 (1918). Cf. 29 Comp. Gen. 393 (1950); 20 Comp. Gen. 652 (1941); 17 Comp. Gen. 560 (1938); 17 Comp. Gen. 536 (1937); 17 Comp. Gen. 388 (1937); 15 Comp. Gen. 1049 (1936); 22 Comp. Dec. 529 (1916). But cf. 31 Comp. Gen. 477 (1952) and 31 Comp. Gen. 76 (1951). When read together, these seem to reach a result inconsistent with the rule against withdrawal after the bid opening.

repeatedly affirmed the proposition that a bid may not be withdrawn after opening.

The preceding discussion should make it clear that this presently prevailing view is the result of a reversal of earlier rulings in 1913, a reversal which was founded upon improper reasoning. The 1913 ruling is, indeed, incomprehensible in view of the fact that the Court of Claims had only four years earlier clearly said that a bid could be withdrawn until award is made, in the case of *Scott v. United States*.²² This was an action by the low bidder on leases of certain Indian lands to recover a \$500 deposit forfeited by his withdrawal before award. The court said:

It is elementary that a proposal or bid to convert it into a contract must be accepted by the other party, and the assent of the parties to the terms thereof must be mutual. It is an undeniable principle of the law of contracts that an offer of a bargain by one person to another imposes no obligation upon the former until it is accepted by the latter according to the terms in which the offer is made. Until the terms of the agreement have received the assent of both parties the negotiation is open and imposes no obligation on either; and since an offer or bid is not a contract it necessarily follows that the party making it may withdraw it at any time before acceptance.²³

The court went on to hold that the provision for forfeiture of collateral securing the bid against withdrawal was necessary to allow government agents time to evaluate bids, and the forfeiture should be enforced in order better to protect the public interest. The court also remarked that the government lost \$11,535 by Scott's withdrawal. Although the quoted passage appears to be dictum, the language is significantly strong and deliberate. The distinction relied upon by the Attorney General,²⁴ that this portion of the *Scott* case was based on a statute seems utterly absurd, as the quoted passage shows. It is remarkable, moreover, that many of the manuals, articles, and texts,²⁵ and several of the Comptroller General's rulings²⁶ cite the *Scott* case erroneously for the proposition (contrary to the dictum quoted) that a bid may *not* be withdrawn after

²² 44 Ct. Cl. 524 (1909).

²³ *Id.* at 528.

²⁴ *Supra*, text at note 17.

²⁵ Shealey, War Supplement to the Law of Government Contracts § 216 (1943); *Id.*, The Law of Government Contracts § 216 (3d ed. 1938); NAVSANDA Publication No. 116, "Bid Procedures Memorandum" 13 (1949); U.S. Judge Advocate General's School, Government Contracts and Readjustment 111 (1945); *Id.*, Government Contracts 86 (1943); Lang, "Procurement by Formal Advertising," 12 Fed. B.J. 244, 249 (1952); Naylor, "Liability of the United States Government in Contract," 14 Tulane L. Rev. 580, 591 (1940).

²⁶ 19 Comp. Gen. 761, 762 (1940); 20 Comp. Gen. 652, 658 (1941); 17 Comp. Gen. 536 (1937).

opening and before award. This egregious misconception seems to stem from a misunderstanding of a headnote to the *Scott* case, and of certain language taken out of context.²⁷

Until the *Refining Associates*²⁸ case arose, the question with which we are concerned had never been squarely presented to a court. But besides *Scott v. United States*, two other cases have some bearing on the question. In *Nason Coal Co. v. United States*,²⁹ the Court of Claims held that the bidder *could* revoke his offer after opening, but before award. However, the authority of this case is greatly weakened in that the court remarked that it was not shown that the invitation to bid contained a provision that bids could not be withdrawn after opening.³⁰ The court did not venture to explain how it could possibly make any difference if it had been proved that the invitation to bid did contain the standard provision to this effect; in fact, the remark would appear to be mere thoughtlessness. Nevertheless, it is there, inviting an inference that it would make a difference.

Another disappointingly equivocal case is *Alta Electric & Mechanical Co. v. United States*.³¹ After Alta's bid on a Navy yard construction contract was opened but before award, Alta attempted to revoke the offer, asserting that it had made a mistake in interpreting one of its suppliers' quotations. The court held that Alta could properly *withdraw its bid*. This language seems to indicate that the court was applying the orthodox doctrine that an offer is revocable until it is accepted, because it is more usual to speak of "rescission" or "avoidance" where an otherwise valid obligation is made unenforceable on the ground of mistake. Nevertheless, the court failed to make it clear that it would have reached the same result were there no mistake involved. The issues of revocability of bids after opening, forfeiture of bid security, and the effect of mistake, which should properly be kept distinct, are often badly confused in cases on this point. The ambiguity in the *Alta* case was probably inadvertent,

²⁷ 44 Ct. Cl. 524 (1909) The headnote reads as follows: "The agents of the Government must be allowed reasonable time for the examination of proposals after the opening of bids before the bidders can be allowed to withdraw." The opinion contains similar language. Taken in context, this language is merely a justification for the imposition of a forfeiture of bid security.

²⁸ *Refining Associates, Inc. v. United States*, 109 F. Supp. 259 (Ct. Cl. 1953).

²⁹ 64 Ct. Cl. 526 (1928).

³⁰ *Id.* at 532:

No claim is made that the written circular of May 31, 1922, contained a stipulation that proposals in response thereto, when once made, could not be withdrawn, and we think it unnecessary to cite axiomatic authorities that until the proposal was authoritatively accepted it could be withdrawn. This case presents a clear case of withdrawal.

³¹ 90 Ct. Cl. 466 (1940).

but the court might have been avoiding a holding squarely contrary to the Comptroller General's decisions.

Now, in the *Refining Associates*³² case, the Court of Claims has clearly swung over to the Comptroller General's view and has adopted the rule that bids may not be withdrawn after opening. The court distinguished the *Alta* and *Nason* cases as "founded on mistake"³³—certainly a possible construction of those equivocal cases—but again in the *Refining Associates* case failed to indicate the precise line of reasoning affirmatively relied upon to support the result. The case involved the bid of Refining Associates, Inc., submitted in reply to an invitation for bids containing the usual provision that bids might not be withdrawn for a fifteen-day period after the opening; on the sixth day the bidder attempted to withdraw because of a strike of its employees, notwithstanding which the government contracting officer purported to accept the bid on the thirteenth day. The Court of Claims held that an enforceable contract was thereby created. Stripped to its essentials, the court's opinion merely stated that the government offered two arguments in its favor, one that the government's promise to consider the bid is consideration for the promise not to withdraw, and the other that a regulation³⁴ makes the promise not to withdraw enforceable without consideration. The opinion did not indicate which argument was the basis of this anomalously reasoned decision;³⁵ however, having sounded the hollowness of the first

³² *Refining Associates, Inc. v. United States*, 109 F. Supp. 259 (Ct. Cl. 1953).

³³ *Id.* at 263. In *United States v. Lipman*, 122 F. Supp. 284 (E.D. Pa. 1954), the low bidders were allowed to withdraw their bid to a War Assets Administration contract, after opening but before the award, because of a mistaken belief that they could rent from the government at a nominal price heavy moving machinery to do the job. The court said the "federal common law" differs from ordinary contract law in not permitting withdrawal at that time as a general rule; however, it does permit withdrawal for honest mistake, as in the *Alta* case, 90 Ct. Cl. 466 (1940), and the low bidders here effectively withdrew their bid. The court indicated that it might decide differently in a case involving ASPR 2-303, 32 Code Fed. Regs. § 401.303. In this case, the standard instructions to bidders incorporated in the invitation for bids, did not in the court's view state with sufficient clarity that the bid could not be withdrawn, as to change the "federal common law." The result reached in the *Lipman* case seems quite correct, but it is regrettable that the court relied on the narrow ground of mistake. And the dictum that a regulation such as ASPR 2-303 destroys the power to withdraw even for honest mistake, before the award, seems both incorrect and unfortunate. ASPR 2-405, 32 Code Fed. Regs. § 401.303 (1950), 2 CCH Gov't Contracts Rep. ¶ 29,085, lists the circumstances under which bids may be withdrawn or corrected because of "mistake," but does not permit withdrawal for the type of mistake found by the court to exist in the *Lipman* case.

³⁴ ASPR 2-303, 32 Code Fed. Regs. § 401.303 (1950), CCH Gov't Contracts Rep. ¶ 29,072 (1951).

³⁵ But cf. 66 Harv. L. Rev. 1312 (1953).

argument, one would be less than fair not to consider the second line of reasoning based upon ASPR 2-303.³⁶

A careful examination of the latter must lead to its rejection on the simple ground that the regulation which adopted the rule against withdrawal of bids after opening seems certainly invalid insofar as it purports to affect the private rights of contractors.³⁷ The reason for this conclusion is as follows: under the Federal Constitution,³⁸ the legislative power is vested in Congress; and an agency of the executive branch may not exercise power of a legislative character except under a delegation of power from Congress, where the subject of regulation is clearly defined and a standard, policy, or rule of conduct for the application of the regulation is set forth in the act granting the power.³⁹ No such delegation of legislative power has been made to the executive departments which would authorize regulations forbidding the withdrawal of bids after opening.⁴⁰ Such regulations that have been adopted were undoubtedly intended as a codification of the rule announced by the Attorney General and the Comptroller General, and not as administrative legislation; but in either case, the regulations can have no legal effect on private rights. In the first place, if they be regarded as a codification, they are of no greater effect than the rulings they codify; and the latter, besides being erroneous legally, have no *quasi-judicial* force as precedents,

³⁶ Ibid. The note seems to accept this second line of reasoning somewhat naively.

³⁷ Supra, note 34. But cf. U.S. Judge Advocate General's School, Government Contracts 83 (1943).

³⁸ U.S. Const., Art. I, § 1.

³⁹ 1 vom Baur, Federal Administrative Law § 8 (1942).

⁴⁰ Title 41 U.S.C. (1946) and supplements thereto, relating to Public Contracts, do not contain any sections which delegate legislative power. Of course, procurement regulations of the various departments are valid to the extent that they constitute internal regulation of departmental procedures, because that is a purely executive matter, and no Congressional delegation is necessary, since the Constitution vests the President with executive power. There are several statutes restating this executive power to make regulations for internal departmental administration: 1 Stat. 28 (1789), as amended, 5 U.S.C. § 22 (1952); 20 Stat. 36 (1878), as amended, 22 Stat. 487 (1880), 5 U.S.C. § 218 (1952); 16 Stat. 319 (1870), as amended 18 Stat. 337 (1875), 10 U.S.C. § 16 (1952). Another statute, 20 Stat. 36 (1878), as amended 22 Stat. 487 (1883), 5 U.S.C. § 218, provides that: "The Secretary of War is hereby authorized to prescribe rules and regulations to be observed in the preparation and submission and opening of bids for contracts under the War Department. . . ." On its face, such authority as this statute "grants" is purely executive, or relating to the internal administration of Army contracting agencies, and not to private rights. But even were it otherwise, it is clear that this statute confers no quasi-legislative power under the rule stated in the text, supra at note 38, because the object of such power is not defined clearly and no standard is established for its exercise. An explanatory note at 32 Code Fed. Regs. § 401.303 (1950), 13 Fed. Reg. 3078, concerning the regulation in question, states: "Issued under R.S. 161; 5 U.S.C. 22. Interpret or apply P.L. 413, 80th Congress." This statute quite definitely confers no powers of a quasi-legislative nature.

since they do not constitute adjudications meeting the requirements of the due process clause.⁴¹ Such opinions have been held to be of no more effect on courts than the opinion of any person learned in the law.⁴² In the second place, the regulations cannot have the effect of quasi-legislative rule-making, affecting the substantive rights of private individuals, because there has been no delegation by Congress of the legislative power to promulgate that kind of regulation.

Consequently, the *Refining Associates* holding seems to teeter precariously on juristic straws, and if not supported by some compelling policy, it merits rejection by fair-minded men. In its support may be cited the need of protecting the government against arbitrary withdrawal of a low bid, as in the case where a low bidder learns from other bids that his is well below the market price, or where after the bid opening there is a rise in the market. Against the holding may be cited the desirability of protecting the businessman's expectation that he will be contractually bound with the government only by the same kind of juristic acts that bind him to any business agreement, and also the desirability of rational consistency in the law. Now, since the interest of the government may with little inconvenience be fully protected by requiring bid security, and further by suspension and barring of undesirable bidders, there certainly seems to be no preponderance of policy on the side of the *Refining Associates* rule. In support of this conclusion, it should be noted that there seems to have been no difficulty arising from the revocability of offers to "negotiated" government contracts, as opposed to "formally advertised" contracts.⁴³ The case and all the confusion of administrative decisions in accord with it should be rejected and the applicability to this field of the principles of general contract law should be reaffirmed. Or if such a rule is deemed practically desirable, the rule making bids to formally advertised contracts irrevocable

⁴¹ U.S. Const., Amend. V. See *McDonald v. United States*, 89 F.2d 128, 134-135 (8th Cir. 1937), cert. denied, 301 U.S. 773. No statutory delegation of a quasi-judicial power to affect the substantive rights of government contractors has been made to either the Attorney General or the Comptroller General. The applicable statutes defining the powers of those officers, 42 Stat. 25 (1921), 31 U.S.C. §§ 49, 52 (1952); Rev. Stat. § 356 (1875), 5 U.S.C. § 304 (1952), clearly are not such delegations. Besides, the procedural requirements of notice and hearing, necessary to the exercise of quasi-judicial power by executive officers, *Morgan v. United States*, 304 U.S. 1 (1938), are not present in the determinations of the Attorney General and the Comptroller General.

⁴² *McDonald v. United States*, supra note 41.

⁴³ See ASPR 3-101, 32 Code Fed. Regs. § 401.101 (1949), CCH Gov't Contracts Rep. ¶ 29,106 (1953); and note 3 supra. The procedures followed in "negotiation" are frequently nearly the same as in formal advertising, so that the likelihood of capricious withdrawal of bids may be just as great in many cases.

after opening could be given a proper basis in juristic theory by enactment of a statute by Congress.⁴⁴

AUTHORITY OF GOVERNMENT AGENTS

Every lawyer is familiar with the venerable commonplace that the doctrines of apparent authority and authority by estoppel do not apply to government agents.⁴⁵ However, many lawyers would be startled at the recent successful invocation of this doctrine by a major procuring activity of the federal government, in convincing a bidder to whom a formal award had been made that no contract existed.

As the facts have been related to the author, the procuring activity directed one of its contracting officers to purchase several of a type of specialized machine described only by a "commercial specification"; that is, the specifications read: "Merrimac model number 25, or equal."⁴⁶ Two manufacturers submitted bids, the Monitor Company's being substantially lower than Merrimac's. The procuring activity requested a sample of the Monitor machine in order to test it and to see whether it was substantially equal to the Merrimac; and after testing the sample, the procuring activity's testing laboratory notified the contracting officer that it *was* equivalent, whereupon a contract with Monitor was executed. Shortly afterwards, the chief of the testing laboratory notified the contracting officer that there had been a mistake, and that the Monitor machine was *not* equal to the Merrimac. The contracting officer notified Monitor that the contract was void, since he had actual authority to buy only machines which were equal to the Merrimac model 25. After much dispute, this argument prevailed with Monitor's lawyers, and the claim was abandoned.

On the surface, the government's position is plausible, but there are practical incongruities which immediately suggest themselves: Should a solemn determination of a fact be of no effect whenever a later determination is to the contrary? What reliance *can* be placed on technical findings of testing laboratories if they can be set aside so summarily?

⁴⁴ Williston, *Contracts* § 61 (Williston-Thompson ed. 1938).

⁴⁵ *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947); *Utah P. & L. Co. v. United States*, 243 U.S. 389 (1917); *Wilber Nat. Bank v. United States*, 294 U.S. 120 (1935); *United States v. San Francisco*, 310 U.S. 16 (1940); *United States v. Stewart*, 311 U.S. 60 (1940). For the purposes of this article, it is unnecessary to draw the exceedingly subtle distinction between apparent agency and agency by estoppel made in *Restatement, Agency* § 159, Comment e (1933) and *Restatement of the Law Continued, Tentative Drafts No. 1, Agency* § 8 and note (1953), since the principles dealt with herein may be applied to either one of these with equal logic. Compare with the cases cited in this note, *Crowley's Milk Co., Inc. v. Brannan*, 198 F.2d 861 (2d Cir. 1952).

⁴⁶ The name of the manufacturer and model number have been changed.

What assurance can a contractor have that the government may not avoid all liability by finding after the contract is performed that the contracting officer had no authority to enter the contract, since the contractor was not in fact "financially responsible" though formally found to be so; or that the government may not rescind a purchase of supplies on the ground that the inspector had no authority to accept the goods, because they did not actually meet specifications, even though inspected and declared to be acceptable? In short, should the government be allowed to avoid *every imprudent transaction* because its agents have no actual authority to make mistakes in judgment?

To state the question in this way is almost to answer it in the negative. However, a logical analysis of the principle that the government is not bound by the apparent authority of its agents seems appropriate to detect the fallacy in the above narrated application of that principle. The doctrine that the government is not bound by its agents' apparent authority is based upon the following postulates: (1) Every person has constructive knowledge of the law, and (2) Government agents derive all their authority from the law; whence this conclusion is usually drawn: Every person has constructive knowledge of the competent authority of government agents.

From this conclusion the usual reasoning proceeds that government agents cannot possibly have any apparent authority beyond their actual authority, the actual limits being known to all; and that third parties cannot set up an estoppel to establish authority, because no reliance on a representation of authority, constructively known by everyone to be false, can be reasonable. The vital part of the argument is expressed in the above syllogism, however, and the fallacy lies in the *inference*: The conclusion simply does not follow from the two premises, which are generally correct legal principles, to be sure, although some qualifications not here relevant might be placed upon them.⁴⁷ The reason why this inference is erroneous is this: although it is true that government agents *derive* all their authority ultimately from law, it is not true that their authority is in every instance *determinable* by law alone. On the contrary, the authority is quite commonly dependent on (a) the existence or non-existence of a pure and simple *fact*, or (b) the agent's discretionary finding that a fact exists or not.⁴⁸ This being true, the conclusion in the syllogism cannot be correct unless further qualified, "except so

⁴⁷ For example, the qualification that ignorance of the law has been held to constitute a valid defense to criminal prosecution in a few unusual cases. *People v. Ferguson*, 134 Cal. App. 41, 24 P.2d 965 (1933); *Long v. State*, 5 Terry 262, 65 A.2d 489 (Del. 1949).

⁴⁸ Of course, both of these are matters of fact, not of law.

far as such authority depends on the existence or non-existence of facts.”

Once this qualification is made, it is a simple deduction that the government would be bound by the apparent authority of its agents, where a third person's reliance on such authority was based upon reasonable ignorance of facts only: a very important limitation on the musty rule-of-thumb doctrine as it is usually stated. Unfortunately, the cases do not uniformly support this limitation, but it appears to be firmly established by three Supreme Court cases. *Levinson v. United States*⁴⁹ involved the sale by the Navy Department of the yacht *Wadena*, under authority of a statute and an executive order providing, among other things, that the yacht must be sold to the highest responsible bidder. A certain Johnson was the high bidder, but erroneously his bid was assigned to a boat of similar name. The yacht was sold to Levinson, who was in fact the second highest bidder. After discovery of the mistake, the Navy attempted to rescind the sale. In an opinion by Justice Holmes, the Court held that the sale was binding on the government, against the assertion that “the Secretary of the Navy had no authority to accept any other than what was the highest bid in fact.” The Court said:

It seems to us that the practice of ordinary business dealing ought so far to bind the United States that the ostensible authority given by the executive order, the Secretary's declaration that Levinson's bid was the highest, his approval of the price, and his execution of a bill of sale, should be held conclusive in favor of Levinson. The fact that the Secretary advertised that he would sell to the highest bidder could not limit his authority or diminish the effect of his acts. . . . We can see no justification beyond the wish to secure a higher price, for the refusal to allow the appellants to remove his yacht. The title passed to him upon the execution of the bill of sale.⁵⁰

The same result was reached in *United States v. Purcell Envelope Company*.⁵¹ A finding of fact that the contractor was financially responsible was made and a contract for Post Office envelopes was awarded, but not signed. The Postmaster General went out of office and his successor ordered a new investigation of the contractor's financial condition, wherein it was determined that it was not responsible. Thereupon, the successor attempted to rescind the contract, and the contractor sued in the Court of Claims. The Supreme Court held the government was bound by the contract, even though it had not been signed, and even though a mistaken determination of fact may have been made.⁵²

⁴⁹ 258 U.S. 198 (1922). Cf. *United States v. Blair*, 193 F.2d 557 (10th Cir. 1952); *United States v. Jones*, 176 F.2d 278 (9th Cir. 1949).

⁵⁰ 258 U.S. 198, 201 (1922).

⁵¹ 249 U.S. 313 (1919).

⁵² It appears from the opinion in the Court of Claims, 51 Ct. Cl. 211, that the *Purcell*

This same principle, that the government is bound by its agents' apparent authority when the third person's reliance on such authority was based upon his reasonably believing the prerequisite findings of fact were correct, is sometimes stated in more familiar administrative law terms as follows: that the government is bound by acts of the agent within his *discretion*. The *Purcell Envelope* case used such language. Actually, there is no great difference in the two statements of the principle, but the former terminology seems preferable because analytically more precise and more general in application.⁵³ The word "discretion" is unfortunately very elastic, and in many contexts "discretion" is bounded by an equally elusive concept of "abuse of discretion"; but in the present connotation, the agent's discretion can rationally mean only his power to choose for the government among alternative courses of action, depending upon the agent's conclusion as to the *existence of certain essential facts*.⁵⁴ Consequently, it seems that introducing the concept of discretion adds nothing to the analysis and may very well obscure it by its vagueness. For example, in *Speed v. United States*,⁵⁵ a stockyard operator was allowed to recover on a contract to slaughter hogs for the Army, although it had not been advertised as required by statute except where exigencies required immediate performance. The Court said,⁵⁶ "It is too well settled to admit of dispute at this day, that where there is a discretion of this kind conferred on an officer, or board of officers, and a contract is made in which they have exercised that discretion, the validity of the contract cannot be made to depend on the degree of wisdom or skill which may have accompanied its exercise." But did the Court mean to say any more than that the contractor's

Company was not the low bidder on all items but the contracting officer had determined that it was the low bidder by aggregating the price of all items together, and awarded the contract to it.

⁵³ The "discretion" line of reasoning can explain the *Levinson*, 258 U.S. 198 (1922); *Speed*, 8 Wall. 77 (U.S. 1869); and *Purcell*, 249 U.S. 313 (1919) cases, but cannot explain the *Potashnick*, 105 F. Supp. 837 (Ct. Cl. 1952), case and many others. See also *Shipman v. United States*, 18 Ct. Cl. 138 (1882) and *Dougherty v. United States*, 18 Ct. Cl. 496 (1882), the best explanation of which seems to be this distinction between the factual and legal elements in the agent's authority.

⁵⁴ See 2 vom Baur, *Federal Administrative Law* § 507 (1942); "The prime function of an administrative agency, as an arm of the legislature, is to determine the factual matters within the legislative province which have been lawfully delegated to the agency for determination, that is, administrative questions." This statement would seem to apply equally to the exercise of discretion by a contracting officer, as to that of a rule-making agency, concerning which it was written. See Rosenbaum, "Criteria for Awarding Public Contracts to the Lowest Responsible Bidder," 28 *Cornell L.Q.* 37 (1943); Note, "Administrative Discretion and the Low Responsible Bidder," 44 *Yale L.J.* 149 (1934).

⁵⁵ 8 Wall. 77 (U.S. 1869).

⁵⁶ *Id.* at 83.

reliance on the authority of the agents was reasonable because by awarding the contract they had implicitly found as a fact that exigencies did exist, and the contractor had no reason to disbelieve this fact? It does not seem that it did, and by using the word discretion in the opinion the Court simply introduced an unnecessary element of uncertainty.

Most,⁵⁷ but not all, of the lower court decisions have followed the rule of these Supreme Court cases. In *Thompson v. United States*,⁵⁸ the government's agent had authority to depart from formal advertising procedures in buying mules *only* if his commanding general had made a certain order finding an emergency to exist. It was not established that such an order was made. Nevertheless, Thompson was allowed to recover the contract price on a non-advertised contract to supply mules to the Civil War Union Army, it being held that the contractor was not charged with notice of the commanding general's orders, and that he might reasonably assume from the fact that the contract was made that the general had properly exercised his power to declare an emergency and that the subordinate contracting officer acted in accordance with the general's orders. But in *Cobb, Blaisdell & Company v. United States*,⁵⁹ the Court of Claims expressly overruled the *Thompson* case, holding that third persons were charged with knowing the limitation on the contracting officer's authority when no written order declaring an emergency had in fact been made. The *Cobb* case seems incorrect, and the *Thompson* case better reasoned.

In the recent case of *Condenser Service & Engineering Co., Inc. v. United States*⁶⁰ the Court of Claims seems to have erred in the same way. In this case a contractor purchased surplus nickel tubing from the War Assets Administration conditional on its availability and the execution of a formal sales contract. The tubing was a specific lot located at the Norfolk Navy Yard. By mistake it was subsequently sold and delivered to two other buyers. By another error the Administration executed a formal sales contract with the contractor. The contractor knew nothing of these mistakes. The Administration attempted to avoid the contract because it had no more tubing, all of it having been delivered to other buyers. The Court of Claims held that surplus property disposal agents have authority to sell only if the property is in fact owned

⁵⁷ *Lundstrom v. United States*, 53 F. Supp. 709 (D. Ore. 1944); *International Arms & Fuze Co. v. United States*, 76 Ct. Cl. 424 (1932); *Good Roads Machinery Co. v. United States*, 19 F. Supp. 652 (D. Mass. 1937).

⁵⁸ 9 Ct. Cl. 187 (1873).

⁵⁹ 18 Ct. Cl. 514 (1883).

⁶⁰ 115 F. Supp. 203 (Ct. Cl. 1953). See also cases cited therein.

by the government at the time the agreement is consummated; and since the government is not bound by the apparent authority of its agents, there was no contract. Two judges concurred on the ground that the Standard Conditions of Sale in the contract limited the government's liability to the amount paid by the buyer in case of loss or destruction prior to delivery. The majority opinion in this case is clearly contrary to the principles of the Supreme Court cases.

There is another group of cases which strongly supports the contention that contractors are not charged with knowledge of factual matters limiting the authority of government agents, though the issue involved in them is slightly different. These cases deal with the effect of false or fraudulent representations made to contractors by government agents. According to the formulary reasoning that the government is contractually bound only by the *actual* authority of its agents, it would follow that the contractor, though he might avoid the contract for fraud or mistake, could not recover additional compensation for performing the contract, in an action *ex contractu*.⁶¹ However, the courts have consistently allowed recovery on one contractual theory or another in this situation. *Potashnick v. United States*⁶² is a typical example. In specifications and drawings accompanying instructions to bid on an airport construction contract involving excavation and grading, the Army District Engineer represented to the contractor that all the rock underlying the site was sandstone, according to core-borings made in the area to determine subsurface conditions. This representation was false, for unknown to the contractor rock had been encountered at two locations, which was too hard for the drill to penetrate. Of course, the contractor had computed his bid in reliance on the specifications and drawings. The contractor later found extensive granite beneath the site, which had to

⁶¹ The Federal Government may not be sued in quasi-contract under the Tucker Act, 24 Stat. 505 (1887), as amended, 28 U.S.C. §§ 1346, 1491 (1952); *United States v. Minnesota Mut. Inv. Co.*, 271 U.S. 212 (1926); *Williston, Contracts* § 3, n. 9. Nor is the government liable *ex delicto*, of course, since the Federal Tort Claims Act of 1946, 60 Stat. 945 (1946), 28 U.S.C. § 2680 (1952), excludes actions in deceit against the government. Note, however, that 58 Stat. 660 (1944), 41 U.S.C. § 113 (1952); and 58 Stat. 665 (1944), 41 U.S.C. § 117 (1952) do provide an administrative and legal remedy for quasi-contractual obligations and for unwritten or informal obligations made within the apparent authority of government agents provided supplies or services "related to the prosecution of the war" have actually been furnished the government. However, these statutes were not applied in the cases herein discussed, and the words quoted herein do not seem to have been construed. In any case, even if the words are not limited to the war of 1941-45, they limit considerably the remedy granted by the statute. And note that the amendment to § 117 of June 18, 1954, 68 Stat. 300, set a time limitation for filing claims under the section. Claims must have been filed before Dec. 25, 1954.

⁶² 105 F. Supp. 837 (Ct. Cl. 1952).

be excavated by blasting at comparatively great expense. After completing the contract, the contractor discovered the fraud while attempting to obtain administrative relief, and thereafter sued in the Court of Claims for the value of the extra work. The court allowed him to recover on the theory of breach of warranty. It did not consider in its opinion the possible objection that the agent had no authority to make fraudulent representation or warranties known by him to be false, and, therefore, could not bind the government to a contractual obligation based on such action; but the result is clearly just and may be logically supported by the principle advanced in our present discussion; that is, that the government is bound by the apparent authority of its agent when reliance of the third party is grounded upon a representation of *fact* by the agent, and is reasonable. Moreover, this is the only sound way of explaining this result, for it would be strange indeed to say that the District Engineer was granted "discretion" to make fraudulent representations.

In other very similar cases the contractor has been allowed to recover for increases in costs occasioned by such fraudulent representations by contracting officers "under the implied terms of the contract,"⁶³ or for the "fair value of the services"⁶⁴ as a contractual obligation. These cases likewise support the conclusion reached in this article. It is difficult to see how application of that principle to all cases such as these would result in injustice. Unless the government agent is in a position to have superior knowledge, the reliance of the contractor thereon would not be reasonable. By applying the usual rules of contracts and estoppel, the author believes that the courts can permit the contractor to recover only when the government agent is really to blame.

The conclusion seems inescapable that the old rubric that the government is *never* contractually bound by the apparent authority of its agents cannot be supported either logically or by the cases. The rule which the preponderance of the cases apply is that persons contracting with the government are charged with knowledge of any defects in the authority of the government's agents inherent in the law granting the authority, but not of any defects resulting from extraneous *facts*.

Let us apply this principle to the situation considered in the inception of this section, where an error was made in determining whether the low

⁶³ Frazier-Davis Const. Co. v. United States, 100 Ct. Cl. 120 (1943); Lukens Dredging & Contracting Corp. v. United States, 90 Ct. Cl. 189 (1940); Dunbar & Sullivan Dredging Co. v. United States, 65 Ct. Cl. 567 (1928). Cf. Blauner Const. Co. v. United States, 94 Ct. Cl. 503 (1942); Lange v. United States for Wilkinson, 120 F.2d 886 (4th Cir. 1941).

⁶⁴ In re Construction Materials Corp., 18 F. Supp. 509 (D. Del. 1936).

bidder's product met the commercial specification called for, and the low bidder was persuaded to believe the government was not bound by its acceptance of his bid, on the reasoning that the agency had no real authority to accept a bid which did not in fact meet the specification. The reasoning now seems quite erroneous, because even had the low bidder known every statute and every regulation in existence, he could not have suspected the "defect" in the agent's authority. The supposed defect concerned fact alone, a fact which the bidder very likely did not know nor have reason to suspect; namely, that his product was not the practical equivalent of the commercial model specified. If he did have reason to suspect a mistake, the case should have been dealt with on the general principles of fraud or mutual mistake, for these principles would seem to protect the government adequately from the guiles of bidders under such circumstances. Indeed, the manner in which this controversy was handled seems indicative of a rather cavalier attitude on the part of government contracting officers toward the application of dubious legal principles when it is to the government's advantage. Popular ideas of justice would probably favor the bidder against the government in this controversy, and, accordingly, one would think that a thorough examination of the legal principles involved would be made in this kind of case, where reasonable business expectations were thus frustrated. Examination of the case authorities would no doubt have revealed the fundamental weakness of the government's position. Yet there is no reason to believe that this is an isolated instance, for the situation is fairly common; the erroneous view of this area of law is practically universal among contracting officials; and not only is it taught them in training courses, but the very example with which this discussion was begun is taught as an admirable or ideal example of its application.⁶⁵

CONCLUSION

An excellent article written in 1924 concerning certain phases of government contract law concluded as follows:

In the light of the foregoing discussion the conclusion is inevitable that

⁶⁵ The contracting officer should be a rather well-informed individual. The author submits as an example his own case of being charged with knowing the provisions of United States statutes, several volumes of poorly indexed procurement regulations, army fiscal regulations, a peace treaty and military government proclamations thereunder, the Italian civil law, and the applicable conflicts of laws principles; and further with the duty of ascertaining the solvency and technical competence of every sort of business firm. Yet is not the individual contractor in a less enviable position if he is required to know at his peril the facts behind the contracting officer's authority as well as this enormous body of law and regulations?

the Supreme Court considers it to be good policy to hold the United States to its contractual engagements on the same basis, in the main, as it would be held were it a private corporation. The surprising circumstance is the fact that it has been compelled to reiterate this position so often. Slight reflection would seem to lead one to the conclusion that its position is the only tenable one. It is not asking much to expect the government to live up to those rules and principles to which it exacts adherence from the citizen. The theory that the state is above the law and not to be governed by it has long since outlived its period of usefulness. . . .⁶⁶

However, government contracting officials seem to be subjected constantly to influences that incline them to distort the law and policies relating to government contracts to the detriment, or at least annoyance, of people who engage in business with the government.⁶⁷ These influences include the projection of the agent's self into, or identification of himself psychologically with his department or with the government; his inducement to cover up his mistakes if necessary even by unfair dealings with third persons; and his propensity to please superiors and win promotions⁶⁸ by saving, or appearing to save money⁶⁹—only to spend the balance remaining in the appropriations on the 30th of June. The result of all these influences has been to subject contractors in not a few instances to the oppressor's wrong, the insolence of office, the law's delay.

⁶⁶ Grismore, "Contracts with the United States," 22 Mich. L. Rev. 749, 764 (1924). See also Note, "Adaptation of Private Contract Principles to Government Contracts," 27 Ind. L.J. 279, 284, 291 (1952).

⁶⁷ Cf. the remarks in *Kemp v. United States*, 38 F. Supp. 568 (D. Md. 1941), concerning the actions of certain army purchasing officials:

The court cannot refrain from the observation that it is just this sort of arbitrary attitude by Government departments and their officials that is calculated to destroy confidence on the part of our citizens and taxpayers in the conduct of our Government. It is calculated to undermine proper respect for the Government, while encouragement of such respect, in accordance with the proper principles of law, is one of the prime duties of the Federal Courts.

See also Grismore, *op. cit. supra* note 67; and Note, 65 Harv. L. Rev. 1035, 1039 (1952).

⁶⁸ Cf. the epigram of Mr. Justice Jackson in his dissenting opinion in *United States v. Wunderlich*, 342 U.S. 103 (1951), noted, 37 Cornell L.Q. 493 (1952): "Men are more often bribed by their loyalties and ambitions than by money."

⁶⁹ A ridiculous example of a contracting officer who wanted to appear to save money, though actually saving nothing and perhaps hindering efficient performance, was called to the author's attention by an annoyed director of a research institute. In negotiating research contracts, though compensation was calculated according to a fixed schedule of variable costs plus a certain allowance for overhead (a "cost type" contract), for which no certain results were promised, but only a certain number of hours of research in a proper scientific manner, the contracting officer invariably asked for a lower price than that which the institute had estimated. Since the method of computing the costs was agreed to be fair and proper, granting his request could only result in curtailing the hours of research. The contracting officer never hesitated to agree to shorten the hours of research contracted for, provided the institute would accept a lower total price, evidently because it would look like saving money. But what could be the point of specifying a certain number of hours in the first place, had not that number been regarded the optimum?

Two of the areas in which perversions of the law have become firmly entrenched and universally accepted in government procurement officialdom have been discussed in this article. The first is the notion that bids to a formally advertised contract may not be withdrawn after opening but before the award of the contract. This proposition, though now unequivocally adopted by the Court of Claims, was shown to have little foundation in judicial precedent or legislative enactment. The common law principle that an unsealed, gratuitous offer is revocable until accepted should nevertheless continue to apply to government contracts. The second perversion is the application of the hornbook principle that the government is not bound by the apparent authority of its agents, to situations where the supposed defect in authority resulted from a mistake in necessary findings of fact, or from mistaken or fraudulent representations of factual matters by the agent, which were reasonably relied upon by third parties who entered into and performed contracts with the government. It was shown that adjudicated cases are for the most part opposed to that application; that the hornbook maxim is not literally true; and that the general rule that can be deduced from the cases is the simple and familiar proposition that one is charged with knowledge of the law, but not of facts. The sentences quoted above are as full of significance today as they were in 1924, and as worthy of the attention of fair minded procurement officials.