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Contractual liability of Government for an Act Enhancing Cost of Performance--Element of Knowledge

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The dignity and sanctity of the individual are not to be jeopardized by the whim or zeal of policemen. The constitutional insulation of prior judicial determination of probable cause is suspended only under classes of exigencies which have received judicial approval on review and which now form a discernible pattern of instances. In these situations the law is adjusted and imposes on the law enforcement agent a standard of discrimination. Those who fear that the increased latitude given to officers of the law will evolve into pure license may take heart from the fact that most of the cases in this area are cast in a mold of judicial caution, the primary aim of which is the preservation of individual liberty during attempts to meet the imperatives of contemporary law enforcement problems.

E. P. K.

**Contractual Liability of Government for an Act Enhancing Cost of Performance—Element of Knowledge.**—P contracted with a government agency for certain construction work. Subsequently, D, the government, awarded an atomic energy project in the same area. Wages on the atomic project were in excess of those paid by P and in order to maintain his labor force, P was forced to raise his wage level. P contended it was entitled to recover increased costs because of a breach by D of an implied condition that neither party would hinder the other in the discharge of any obligations created by contract. **Held,** D's motion for summary judgment denied and case referred to trial commission. If D knew at the time it contracted with P that it was going to do something which would require P to pay a wage that was higher than that existing in the community where the work was to be done and P was ignorant of the fact, good faith required D to inform P thereof. **Bateson-Stolte, Inc. v. United States,** 172 F. Supp. 454 (Ct.Cl. 1959).

It is an implied condition of every contract that neither party will hinder the other in his discharge of obligations imposed upon him, nor increase his cost of performance. **Beuttas v. United States,** 324 U.S. 768 (1945).

"Applicability of this principle in a given case depends not only on the nature of the act which is alleged to have increased the cost of performance but also upon the intention of the parties with respect to such an act, either expressed or implied in the contract." **Sunswick Corp. v. United States,** 109 St.Cl. 772, 75 F.Supp. 221 (1948).
These implied provisions apply to contracts between the government and individuals as well as to those between individuals. *Fuller v. United States*, 108 Ct.Cl. 70, 69 F.Supp. 409 (1947).

Determining what constitutes a breach of the implied condition seems to depend on the court's finding as to what actually caused the increase. In one such case, the government raised the wages of other laborers in the vicinity of the contractor's work and the court decided that such act made it impracticable for the contractor to obtain labor at the wage anticipated in bargaining for the original contract. Since it was then necessary to raise the wages of the contractor's employees in order to make the work as attractive and desirable as the other jobs in the area, the government was liable for the extra cost. *York Eng'r. & Constr. Co. v. United States*, 103 Ct.Cl. 613, 62 F.Supp. 546 (1945).

However, in similar cases the court, though the existence of the implied condition is admitted, held that the government did not breach that condition merely by increasing the minimum wage of other laborers working on another project in the same vicinity. Such an increase is not an express demand that the contractor pay a higher wage. *Beuttas v. United States*, supra. The fact that another branch of the government found it advisable to increase wages on an entirely different project in the same vicinity did not create any obligation on the government to vary the terms of the contract which the original contractor had undertaken. *LeVeque v. United States*, 96 Ct.Cl. 250 (1942).

The fact that the cases hold differently indicates the validity of the principle that the government is not necessarily liable because it directly or indirectly increases the costs of a party under contract with the government. *Evans v. United States*, 74 F.Supp. 59 (E.D. Pa. 1947). The basis for the latter view seems to hinge on the fact that the court did not feel the government knew that the subsequent act would be the cause of the increase so therefore there was no breach. However, even if such knowledge were established in the principal case, it still should not be an adequate ground for the decision. The act which is causing the increase seems to be one which the government is permitted to do. In the *Restatement, Contracts* § 315, illustration 3 (1932), it is stated:

"A contracts to sell and B to buy in the future a large quantity of Georgia pine. Before the time for performance B makes large purchases of Georgia pine from other parties, thereby making it more difficult for A to fulfill his contract. B has not
committed a breach of contract. Risk of such hinderance as has occurred was assumed by A. If B's purpose in making other purchases was to corner the market or otherwise hinder performance in ways or for purposes not within the risk assumed he would have committed a breach."

As large and as complicated as our system of government agencies is today, it would be difficult to imagine that a contract with one agency should alter contractual liabilities on other projects of all such agencies within a specified area. Such activity by other agencies ought to be a risk that is assumed as is normal competition on the commercial market. If there is an assumption of such a risk, then the act creating the competition for the labor supply is not a breach.

The majority of the court in the principal case, however, does not consider the act of the government in raising prevailing wages in the area as the breach for which it would grant a right to compensation for extra costs. The majority feels that it was the obligation of the government agency to disclose any material information at the time of making the contract relating to the cost of performance and that failure to inform the contractor of an impending future contract was a breach of the implied condition.

As mentioned by the dissenting opinion, the majority of the court in the principal case has cited no cases, and this writer can find none, that hold one party to a contract must disclose information to a prospective bidder relating to another and different contract which might cause competition in the labor market.

As the dissenting opinion states, it is not a breach when one creates a competitive situation and it does not seem that it could be a breach for merely failing to disclose that which one is allowed to do by law.

M. J. F.

Mines & Minerals—Mining Rights Determined by Construction of Deed—Common Mining Practice at Time and Place of Execution of the Deed.—In an action for damages, P alleged that D's auger mining was unauthorized by deeds under which D was conducting mining operations on P's land. One of the deeds to the minerals under which D claimed granted the right to remove the minerals in the most approved method, and another deed under which D claimed reserved all minerals, together with all necessary and useful rights for the proper mining thereof. Held, that the lan-