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Casenotes: Contracts — Damages — Government Procurement — Government Not Liable for Impact Damages Suffered in the Performance of a Subsequent Contract Allegedly Caused by Constructive Changes to a Prior Contract. General Dynamics Corp. v. United States, 585 F.2d 457 (Ct. Cl. 1978)

Francis John Gorman
University of Baltimore School of Law

CONTRACTS — DAMAGES — GOVERNMENT PROCUREMENT — GOVERNMENT NOT LIABLE FOR IMPACT DAMAGES SUFFERED IN THE PERFORMANCE OF A SUBSEQUENT CONTRACT ALLEGEDLY CAUSED BY CONSTRUCTIVE CHANGES TO A PRIOR CONTRACT. *GENERAL DYNAMICS CORP. v. UNITED STATES*, 585 F.2d 457 (Ct. Cl. 1978).

I. INTRODUCTION

In *General Dynamics Corp. v. United States*,[1] the United States Court of Claims considered a government contractor's claim for impact damages and rendered an opinion creating as many questions as it answers. In the context of government contracting, the Court of Claims defined impact damages in multiple-contract circumstances as "the extra cost in performing one contract, caused by the government doing things it has a right to do, respecting other contracts."[2] The court reviewed prior cases in which impact damages have been granted in situations involving more than one contract and, drawing on those cases, outlined the requirements that will have to be present for future relief. A major conclusion of the opinion was that contractors' claims for impact damages in multiple-contract situations will not be recognized except under "exceptional circumstances."[3] Another significant holding in *General Dynamics* was that even extensive change ordered by the government to a complicated weapons contract or a contract for a technologically sophisticated product will not constitute a cardinal change or breach of that contract.[4]

II. THE FACTUAL BACKGROUND

During the early 1960's, the United States Navy awarded several contracts for the construction of nuclear submarines. One of these contracts, encompassing three submarines, was awarded to General Dynamics Corporation.[5] Two other contracts, for one submarine each, were awarded to Bethlehem Steel Company's Quincy, Massachusetts shipyard.[6] During the early stages of construction on General Dynamics' three submarines, and before any construction

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1. 585 F.2d 457 (Ct. Cl. 1978).
2. *Id.*
3. *Id.* at 466.
4. *Id.* at 463.
5. *Id.* at 459.
6. *Id.* Bethlehem had no experience in submarine construction. The government awarded it the contracts in order to increase the number of submarine construction facilities. Normally, contracts are awarded by the government on a strictly competitive basis. Here, however, the Navy invoked a national security rationale to award Bethlehem these two contracts despite the fact that Bethlehem was not the low bidder. There was a substantial difference in price between General Dynamics' contract for three submarines ($59,862,606) and

on Bethlehem's two submarines began, the Navy's lead, or model, ship for these new submarines, the U.S.S. Thresher, sank off the coast of New Hampshire.[7] Although the exact cause of the accident was never determined, it was assumed that the cause of the accident was design related.[8] Consequently, to preclude further disasters, the Navy embarked on an extensive submarine redesign program given the name "Subsafe."[9] It was the "Subsafe" program and its effect on General Dynamics' building program that led to General Dynamics' claim for damages.

Eight months after the Thresher incident, and several months after all of the submarine builders were aware that design changes probably would be required by the Navy, Bethlehem closed its Quincy shipbuilding yard.[10] At that time, Bethlehem had not yet begun construction on its two submarines, even though the contracts were almost two years old.[11] Partially because the "Subsafe" program was causing a backlog of work at its Groton, Connecticut shipyard, General Dynamics purchased the Quincy yard from Bethlehem.[12] In a separate contract, General Dynamics, Bethlehem, and the Navy agreed that General Dynamics would assume Bethlehem's two submarine construction contracts.[13] The Navy's original contract with Bethlehem had contained a provision against assignment; thus, as consideration for the Navy's waiver of its rights against assignment, General Dynamics and Bethlehem agreed to be bound by the standard government novation clause. As it appeared in the contract, the novation clause read:

Bethlehem's contracts for one submarine each ($28,456,000 and $33,500,000). One of the reasons for the higher costs of construction for Bethlehem was that it had never built a submarine before this, and consequently would have had start-up costs and higher labor costs. On the other hand, General Dynamics had long been in the submarine construction business and could take advantage of economies of scale. *See generally* General Dynamics Corp., ASBCA No. 13885, 73-2 B.C.A. ¶ 10,160 (May 15, 1973).

7. Plaintiff's Request for Review Pursuant to Rule 54(b)(3) at 6; 585 F.2d 457 (Ct. Cl. 1978).
8. 585 F.2d at 459-60.
9. *Id.* Because at the time of the initiation of "Subsafe" the cause of the Thresher loss was unknown, the redesign program encompassed every structural modification that could have led to the accident.
10. *Id.* at 459. The builders were of course aware of the accident from the extensive press coverage at the time, and were aware that one of the speculated causes of the sinking was design defects. The Navy inquiry centered largely around design, and the builders were active participants in these discussions.
11. *Id.* It is not clear why construction had not begun, but the delay was assuredly caused, in part, by Bethlehem's reluctance to initiate performance on these contracts which would have been costly and financially damaging to the already weakened corporation. *See generally* General Dynamics Corp., ASBCA No. 13885, 73-2 B.C.A. ¶ 10,160 (May 15, 1973) at 47,782.
12. 585 F.2d at 459-60.
13. *Id.* at 459.

> The Transferor [Bethlehem] and the Transferee [General Dynamics] hereby agree that the Government shall not be obligated to pay or reimburse either of them for, or otherwise give effect to, any costs, taxes or other expenses, or any increases therein, directly or indirectly arising out of or resulting from (i) said assignment, conveyance and transfer, or (ii) this Agreement, other than those which the Government, in the Absence of said assignment, conveyance and transfer, or this Agreement, would have been obligated to pay or reimburse under the terms of the Contracts.[14]

The first significant "Subsafe" change ordered by the Navy was the requirement that the hulls of the ships be lengthened by inserting an additional section.[15] General Dynamics realized that its Groton shipyard would be unable to accomplish this work in a timely fashion because other contracts were backed up at Groton.[16] General Dynamics therefore proposed to the Navy that two of the three Groton submarines be launched and towed to its newly acquired Quincy yard for hull lengthening. General Dynamics informed the Navy that, because of the light work load at Quincy, the submarines could be given top priority there.[17] In order to expedite delivery, the Navy gave its approval.[18] General Dynamics never mentioned the existing Quincy ships in its transfer discussions with the Navy and never detailed any of its construction plans.[19]

"Subsafe" affected many aspects of design; as each problem was resolved by design engineers, the government issued change orders to the builders in piecemeal fashion.[20] A few months after transferring the Groton ships to Quincy, General Dynamics realized that, although "Subsafe" was a year old, the program was complete in general terms only and that many important details were yet to be resolved.[21] As each "Subsafe" change developed, the Navy and General Dynamics adjusted the submarine delivery dates to accommodate the extra work required by the changes.[22] These

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14. General Dynamics Corp., ASBCA No. 13885, 73-2 B.C.A. ¶ 10,160 (May 15, 1973) at 47,782.
15. *Id.* at 47,784. This change was ordered in order to strengthen the hulls.
16. 585 F.2d at 460.
17. *Id.*
18. *Id. See also* 73-2 B.C.A. ¶ 10,160 (May 15, 1973) at 47,788-89.
19. 585 F.2d at 461.
20. *See* 73-2 B.C.A. ¶ 10,160 (May 15, 1973) at 47,783-807 (outlining change order problems).
21. *Id.* at 47,791.
22. *Id.* at 47,783-807. To illustrate the extent of the uncertainty surrounding the "Subsafe" program, the following chart shows the number of times the parties agreed to extend the delivery date for each of the four submarines involved. It should be noted that only one extension of four months to each ship was attributable to delay caused by General Dynamics. The remainder of the extensions were to accommodate the Navy's changes.

change orders shifting delivery dates caused disruption of General Dynamics' construction schedule.

The nature of the work force at Quincy exacerbated the scheduling problems caused by the "Subsafe" program. When General Dynamics acquired the Quincy yard and transferred its ships there from Groton, only a small number of skilled personnel were transferred from Groton to Quincy. General Dynamics rehired most of Bethlehem's old work force, although most of these employees were not skilled in submarine construction.[23] The lack of adequate workmanship and frequent errors by the Quincy crew were well documented on each of the four ships constructed there.[24] The two original Quincy ships suffered most in the hands of these inexperienced workers.[25] As the Navy increased the pressure on General Dynamics to expedite delivery, the best available workers were assigned to the two ships scheduled for earliest delivery, which were the original Groton ships.[26] Consequently, General Dynamics had to employ additional inexperienced workers to complete the original Quincy ships.[27] General Dynamics contended that, when it transferred the Groton ships to Quincy, it had intended to take maximum advantage of the scheduled sequential delivery of the four ships by effecting a "rollover" of skilled craftsmen from one ship to another, rather than employing four separate crews.[28] According to

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	Groton (impacting)		Quincy (impacted)	
Ship	SSN	SSN	SSN	SSN
designation	614	615	638	649
Original delivery date	2-9-64	6-9-64	7-30-65	6-66
First amended date	5-15-65	7-15-65	5-30-66	12-26-66
Second	8-15-65	10-15-65	8-31-66	2-25-67
Third	11-15-65	1-15-66	10-26-66	6-3-67
Fourth	1-8-66	3-12-66	1-26-67	7-3-67
Fifth	3-8-66	5-12-66	2-11-67	11-3-67
Sixth	5-15-66	7-16-66	3-11-67	2-24-68
Seventh	8-6-66	10-8-66	7-11-67	9-68
Eighth	2-25-67	11-5-66	10-7-67	
Ninth	5-25-67	5-20-67	5-68	
Tenth		7-5-67		
Actual delivery	11-16-67	1-25-68	10-27-68	3-15-68

23. *Id.* at 47,805.
24. *Id.* Specific examples were not provided in the record other than to indicate that many things had to be redone.
25. *Id.*
26. *Id.*
27. *Id.*
28. Plaintiff's Request for Review Pursuant to Rule 54(b)(3) at 8-9. General Dynamics claimed that "rollover" was a normal construction technique. In "rollover," a contractor who has similar products to deliver in sequence trains each employee to do a particular job. The employees then go from one item to the next and perform the same task picking up skill and speed as they progress. The

General Dynamics, this was its general custom, and, in addition, because of increased efficiency and decreased cost, General Dynamics believed the Navy was chargeable with ensuring that this "rollover" could take place. General Dynamics claimed the pressure for expeditious delivery thwarted its "rollover" plan, resulting in higher construction costs.[29] To the extent that General Dynamics ever actually implemented a "rollover," it had a very limited effect.[30] As a consequence of "Subsafe" and the setbacks caused by poor workmanship, the two original Groton ships, which were transferred to Quincy, were each delivered about three and one-half years later than originally scheduled, and the two Quincy ships were delivered about twenty-six months later than originally planned.[31] Because of the increased cost of each contract, General Dynamics filed its claim for impact damages, computed as the cost of the construction of the Quincy submarines allegedly attributable to the massive changes ordered to the transferred Groton submarines.

III. CLAIMS PROCEDURES

Government contracts generally have several standard clauses that greatly affect the rights of the parties. Of these, two played a role in the outcome of *General Dynamics* — the "Changes" clause[32] and the "Disputes" clause.[33] The "Changes" clause provides for equitable adjustment of claims arising specifically under the terms of the contract. The "Disputes" clause establishes the procedure to be followed by the contractor in seeking compensation. The "Disputes" clause applicable to General Dynamics' contracts required that disputes arising within the contract first be submitted to a

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theory is similar to the assembly line concept except that the employees move from item to item rather than the items moving to them. The entire point of this case is General Dynamics' contention that because of the quantity and unpredictability of the Navy's change orders pursuant to "Subsafe," General Dynamics was unable to implement its "rollover" plan. The problem was aggravated by the Navy's increasing emphasis on expediting delivery of all four ships. This led General Dynamics to hire unskilled labor to work on the impacted submarines (Quincy submarines) while the skilled workers remained on the impacting submarines (Groton submarines). According to General Dynamics, because the Navy promulgated orders that defeated the "rollover" schedule, the Navy should pay the cost of the additional labor.

29. 73-2 B.C.A. ¶ 10,160 at 47,789-90.
30. *Id.* at 47,805-07.
31. *Id.* at 47,792-96.
32. For an example of "Changes" clause, see R. NASH, GOVERNMENT CONTRACT CHANGES at 20 (1975) [hereinafter cited as NASH].
33. The "Disputes" clause plays a significant role in determining which issues reach the Court of Claims for review. *See generally* J. MCBRIDE & H. WACHTEL, GOVERNMENT CONTRACTS (1978) [hereinafter cited as MCBRIDE & WACHTEL].

government contracting officer for review.[34] From an adverse finding by the contracting officer, the contractor could appeal to the applicable Board of Contract Appeals.[35] For all military procurement disputes, as in General Dynamics' case, the appropriate board was the Armed Services Board of Contract Appeals (ASBCA). Following these administrative steps, the contractor's access to the courts for review of disputes is limited.[36] Claims arising outside of the contract, which are breach claims, were not covered by the "Disputes" clause procedures at the time of the *General Dynamics* decision.[37]

Congress enacted the Wunderlich Act[38] in 1954 in response to two United States Supreme Court decisions that gave a large measure of finality to findings of fact and law by government

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34. *See* Kihlberg v. United States, 97 U.S. 398, 401 (1878) (the purpose of the "Disputes" clause is to provide a quick, effective administrative remedy and to avoid "vexatious and expensive and, to the contractor oftentimes, ruinous litigation.").
35. There are eleven active Boards of Contract Appeals. When a contractor wishes to appeal a decision of a contracting officer, the appeal will either be entertained by the Board of the agency with which the contract has been made or, if the agency has no Board, the head of the agency will refer the case to one of the existing Boards. *See* Joseph, *A Primer on Remedies*, in RISKS AND REMEDIES IN GOVERNMENT CONTRACTING 31 (1974) (a conference sponsored by the A.B.A.); R. NASH & J. CIBNIC, FEDERAL PROCUREMENT 859-80 (2d ed. 1969). *See also* United States v. Utah Constr. & Mining Co., 384 U.S. 394, 405-06 (1966) (Court of Claims has limited jurisdiction to review the Board's decisions of claims arising under the contract provisions).
36. United States v. Utah Constr. & Mining Co., 384 U.S. 394, 405-06 (1966).
37. The Contracts Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (1978), modifies the procedural aspects of contract disputes significantly. The actual impact of the changes caused by this new act is unsettled and beyond the scope of this casenote.
38. Wunderlich Act, 41 U.S.C. §§ 321, 322 (1976).

The Wunderlich Act provided that administrative decisions were to be final only with respect to findings of fact. The two sections of the Wunderlich Act provide as follows:

> § 321. Limitation on pleading contract-provisions relating to finality; standards of review.
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> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.
>
> § 322. Contract-provisions making decisions final on questions of Law.
>
> No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

administrative Boards of Contract Appeals.[39] The Wunderlich Act provides that findings of fact by Boards of Contract Appeals are given finality, unless they are judicially determined to be fraudulent, capricious, arbitrary, so grossly erroneous as to imply bad faith, or not supported by substantial evidence.[40] Under the Act, findings of law by Boards of Contract Appeals are no longer given finality and are completely reviewable by the courts.[41] Despite the passage of the Wunderlich Act, the Supreme Court has interpreted it so that review by the Court of Claims of a Board of Contract Appeals decision on an issue of law nonetheless remains limited in scope.[42]

IV. THE *GENERAL DYNAMICS* DECISIONS

A. The Armed Services Board of Contract Appeals Decision

General Dynamics, pursuant to the "Disputes" clause in its assigned Quincy contract, filed a claim against the government for the increased costs of performance on the Quincy contracts.[43] The thrust of the claim was that the "Subsafe" changes ordered by the Navy to the Groton ships were so extensive that they interfered with General Dynamics' planned personnel "rollover" from the Groton to the Quincy ships.[44] This allegedly forced General Dynamics to use untrained and inadequate labor on the Quincy ships, resulting in higher construction costs. General Dynamics claimed that the changes to the Groton or "impacting" contract were so significant as to constitute a constructive change of the "impacted" or Quincy contract.

A constructive change to a contract, as opposed to a cardinal change, is any act or requirement of the contracting agency, other than a formal change order as provided for by the contract, that requires the contractor to perform work different from that specified

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39. United States v. Wunderlich, 342 U.S. 98 (1951); United States v. Moorman, 338 U.S. 457 (1950). The Court held in *Moorman* that administrative decisions in contracts disputes were "final and binding." 338 U.S. at 463. In *Wunderlich*, the Court further held that administrative decisions could be overturned by a court only if there were a determination of fraud in the rendering of the administrative decision. 342 U.S. at 99.
40. See note 38 *supra*.
41. *Id.*
42. *See, e.g.*, S & E Contractors, Inc. v. United States, 406 U.S. 1 (1972) (government has no right to appeal adverse decisions of boards of appeal); United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966) (Board findings of fact are final in subsequent breach claims under the same contract); United States v. Carlo Bianchi & Co., 373 U.S. 709 (1963) (review of board decisions is limited to the record); Roscoe-Ajax Constr. Co. v. United States 499 F.2d 639 (Ct. Cl. 1974) (the government may appeal only those aspects of the case that the contractor has appealed and is estopped from raising other issues). *See also* Pasley, *The S & E Contractors Case–Beheading the Hydra or Wreaking Devasation?*, 1973 DUKE L.J. 1.
43. 585 F.2d at 460–61.
44. *Id.* at 461.

under the original contract.[45] A constructive change may entitle the contractor to price and performance adjustments. Unlike in a formal change, however, in which the government admits responsibility for the cost and performance adjustment, the government does not always openly admit in a constructive change situation that the contractor is entitled to a revision of the contract terms.[46] Constructive changes typically come about informally or piecemeal, and the word "change" is not often used by the parties when a constructive change is occurring. Often, the parties do not recognize until after the fact that the contract has been changed to the extent that the contractor is entitled to additional compensation. Whether or not a constructive change entitles the contractor to equitable adjustment is a question of fact. A contractor, however, may not refuse to perform a change that amounts to a constructive change.[47] Unsettled claims for equitable adjustment arising from constructive changes are resolved pursuant to the "Disputes" clause of the contract.[48]

A cardinal change, in distinction to a constructive change, is an order that, because of its scope, exceeds the changes permissable under a "Changes" clause and is considered a breach of the contract.[49] Because a cardinal change constitutes a breach, a contractor may refuse to perform the change.[50] The very magnitude of many government contracts causes difficulties in identifying when a specific change constitutes a breach and, worse yet for the contractor if he refuses to perform, whether the government may assert a breach.[51] A contractor generally will perform a change that it believes is a cardinal change, but will reserve its right to litigate the alleged breach by notifying the contracting officer of its intent to seek relief.[52] Because a cardinal charge is a breach of the contract, the contract's "Changes" and "Disputes" clauses are inapplicable. General Dynamics could have pursued its breach claim directly in the Court of Claims without first resorting to formal administrative

45. California Continuing Educ. of the Bar, BASIC TECHNIQUES OF PUBLIC CONTRACTS PRACTICE 90 (1977); NASH, *supra* note 32, at 203. Formal change orders typically are evidenced by written orders to modify the contract as originally written. Formal change orders are provided for by the contract in the "Changes" clause which specifies the procedures to be followed when ordering a change in the contract and also outlines the contract price and performance adjustment procedure to be followed by the parties. See note 33 *supra*.
46. California Continuing Educ. of the Bar, BASIC TECHNIQUES OF PUBLIC CONTRACTS PRACTICE 90 (1977).
47. Stoeckert v. United States, 391 F.2d 639 (Ct. Cl. 1968).
48. See note 34 *supra*.
49. California Continuing Educ. of the Bar, BASIC TECHNIQUES OF PUBLIC CONTRACTS PRACTICE 88 (1977).
50. Gilbert W. Savage, ASBCA No. 11090, 66-2 B.C.A. ¶ 5832 (1966).
51. Axel Electronics, Inc., ASBCA No. 18990, 74-1 B.C.A. ¶ 10,471 (1974).
52. California Continuing Educ. of the Bar, BASIC TECHNIQUES OF PUBLIC CONTRACTS PRACTICE 88 (1977).

procedures.[53] Unsure of whether its claim was a constructive change under the contract or a cardinal change, General Dynamics decided to pursue successive claims, first pursuing its administrative remedy for a constructive change with the Navy's contracting officer and then the ASBCA. If the administrative route proved unsuccessful, General Dynamics could then file a breach claim in the Court of Claims, and also appeal to that court the administrative decision on the constructive change claim.

The Navy's contracting officer rejected the constructive change claim. General Dynamics appealed the adverse decision to the ASBCA on two alternative theories of recovery.[54] General Dynamics first asserted that the changes ordered to the Groton submarines impacted the performance of the Quincy submarine contracts to the extent that the changes to the Groton contract constructively changed the Quincy contracts. This claim will be referred to as the multiple-contract impact claim. Second, General Dynamics asserted that the novation clause amounted to an amalgamation of the separate contracts into one entitling the contractor to equitable adjustment. This claim will be referred to as the one-contract impact claim. More substantial precedent exists for allowing one-contract claims than multiple-contract claims.[55]

The ASBCA findings of fact included a determination that there was no submarine construction plan at the time of the transfer, and therefore, that the Navy had no reason to know of any such plan. The Board also found that General Dynamics transferred the impacting ships for its own benefit to relieve congestion at Groton and that the damage claimed was the result of this transfer. General Dynamics was also charged with the knowledge that "subsafe" was forseeably complex and incomplete at the time of the transfer. The ASBCA additionally found that the Navy had not interfered in any way with General Dynamics' performance.[56]

On the issues of law with respect to the multiple-contract impact claim, the ASBCA held that the changes to the Groton (impacting) contract did not amount to a constructive change to the Quincy (impacted) contract, stating:

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53. *Id.* at 274. *But see* note 36 *supra*. The Contract Disputes Act of 1978 provides that all claims, including those for breach of contract based upon an alleged cardinal change, must be presented first to the contracting officer. Contractors are no longer able to raise breach claims initially in court. Contract Disputes Act of 1978, Pub. L. No. 95-563 §§ 6-8, 92 Stat. 2383 (1978).
54. 73-2 B.C.A. ¶ 10,160 (May 15, 1973) at 47,780.
55. *See, e.g.*, Merritt-Chapman & Scott Corp. v. United States, 429 F.2d 431, 432 (Ct. Cl. 1970), Paul Hardeman, Inc. v. United States, 406 F.2d 1357 (Ct. Cl. 1969).
56. 73-2 B.C.A. ¶ 10,160 (May 15, 1973) at 47,807-08.

> Absent unusual and extreme factual circumstance, the ordinary rule is that the proper exercise of one's legal rights, such as [the Navy's] right to make changes under [the Groton contract], does not give rise to relief even when this lawful exercise of one person's right causes an economic loss to another.[57]

According to the ASBCA, because the Groton contracts contained "Changes" clauses, the Navy was free to issue changes as necessary, provided that General Dynamics was equitably compensated as required by the "Changes" clause. The ASBCA also rejected General Dynamics' one-contract impact claim because the language of the novation clause released the Navy from any liability for costs arising from the contract assignment between Bethlehem and General Dynamics.[58] The ASBCA did not directly answer the question whether the clause created a single new contract.

B. The Court of Claims Decision

General Dynamics appealed to the Court of Claims in two alternative counts. The first, a breach claim invoking the original jurisdiction of the Court of Claims, alleged a cardinal change.[59] In the second, General Dynamics requested Wunderlich review of the ASBCA decision, alleging that the Board's decision was not supported by substantial evidence.[60]

Generally, in determining whether a change is a cardinal change, the course of performance must be examined by measuring the number and quality of ordered changes and their effect on the entire contract. At a certain point, the extent of changes amounts to a breach.[61] Under the facts of *General Dynamics,* however, the court held that this test was inapplicable. It reasoned that the nature of the goods contracted for — technologically sophisticated warships necessary to the national defense — and the recent U.S.S. Thresher tragedy, which demonstrated the necessity for design modifications, justified the changes so long as they did not constitute an abuse of governmental discretion. Inasmuch as no such abuse was found, the court granted summary judgment for the government on the cardinal change claim.

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57. *Id.* at 47,808.
58. *Id.* at 47,809. See note 13 and accompanying text *supra.*
59. 585 F.2d at 462. *See also* Plaintiff's Request for Review Pursuant to Rule 54(b)(3) at 2.
60. 585 F.2d at 464. *See also* Plaintiff's Request for Review Pursuant to Rule 54(b)(3) at 2.
61. 585 F.2d at 462.
62. *Id.* at 464. In its decision, the court never clearly identified the counts in General Dynamics' claim.

In the Wunderlich review claim, General Dynamics alleged that the changes to the Groton contract amounted to a constructive change of the Quincy contract for which it should receive equitable adjustment.[62] General Dynamics claimed that the ASBCA made errors of law in holding that the government was not liable for the increased costs of constructing the Quincy ships and that the novation agreement barred recovery of those increased costs. General Dynamics also alleged error in the ASBCA's findings that General Dynamics, by creating the situation resulting in the increased costs, assumed the risk of cost overruns, and that General Dynamics should not have relied on the government's representations in early 1964 that the "Subsafe" program was complete. Errors of mixed law and fact were alleged in the findings that the submarine "rollover" plan did not exist, that the Navy did not interfere with General Dynamics' planned performance, and that the Navy did not subordinate performance of the Quincy (impacted) contracts to the Groton (impacting) contract.[63]

The Court of Claims held that, even accepting the existence of the alleged "rollover" plan, General Dynamics was not entitled to relief.[64] The court found, as had the ASBCA, that the "rollover" plan was never communicated to the Navy and that the Navy never performed any act acknowledging the existence of a construction plan.[65] It also found that the Navy never waived its right to make changes as provided in the contracts. The government possessed a right to modify the contract unilaterally, and the Navy's approval of the transfer to Quincy, according to the court, neither expressly nor impliedly waived this right. Without addressing the issue of whether the novation clause created a single new contract, the court held that the Navy was liable only for normally compensable contract changes as set out in the "Changes" clause.[66] In addition, the court stated that the manner of deployment of the available labor pool was entirely General Dynamics' decision. It also found that the Navy did not order any specific manner of utilizing the work force. While

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63. *See* Plaintiff's Request For Review Pursuant to Rule 54(b)(3) at 12-13. General Dynamics claimed that the following findings of fact by the ASBCA were actually issues of law or mixed fact and law: that General Dynamics created the impact by its assumption of the Quincy contracts and by the transfer of the Groton ships, thereby assuming the risk of increased costs; that General Dynamics could not reasonably have relied on assertions by the Navy in early 1964 that the "Subsafe" program was complete; that General Dynamics had no "rollover" plan; that the Navy did not interfere with any plan; and that the Navy did not order General Dynamics to subordinate performance of the Quincy contracts to the Groton contract. *See also* Plaintiff's Motion for Summary Judgment Pursuant to Trial Judge's Order Under Rule 165(b) at 6-8.

64. 585 F.2d at 464.

65. *Id.*

66. *Id.*

acknowledging that when changes lead to disruption, extra work, or new procedures in performance, the contractor is entitled to equitable adjustment, the court severely limited such an adjustment in situations involving more than one contract.[67] Prior case law granting equitable adjustment was referred to by the court, but in each such case relief had been sought upon a single contract.[68] Specifically, the court stated that had this been one contract instead of three, General Dynamics probably would have been able to obtain equitable adjustment.[69] At this point, the court could have denied General Dynamics' relief on the second claim and concluded its opinion.

The court further addressed the concept of impact damages in multiple-contract situations, however, and delineated in dicta the applicable criteria for relief in future multiple-contract impact damages claims.[70] It stated that "exceptional circumstances" must be present to justify an equitable adjustment for increased costs in the performance of one contract caused by rightful government conduct under other contracts. The government's refusal to adjust the contract price must be inequitable to the contractor. The court outlined some situations in which relief might be warranted, such as when the government conceals facts from the contractor that are necessary to formulate costs, or intentionally hinders the contractor's performance, and "perhaps other instances where some degree of government culpability and 'proximate cause' exist."[71] Because the actions of primary importance in *General Dynamics* (the novation, transfer, and use of the labor force) were found to be General Dynamics' own management choices and not caused by the

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67. *Id.* at 465. *See, e.g.,* Merritt-Chapman & Scott Corp. v. United States, 429 F.2d 431 (Ct. Cl. 1970) (unreasonable delay by Government causing contractor to encounter additional construction costs); Paul Hardeman, Inc. v. United States, 406 F.2d 1357 (Ct. Cl. 1969) (contractor incurred additional labor costs in constructing a dam due to changed conditions).
68. See note 55 *supra*.
69. 585 F.2d at 465.
70. Although the court never acknowledged the fact in its opinion, the claim for impact damages under circumstances involving separate contracts with the claim being made under the *first* contract was one of first impression. As discussed by the court in its opinion, most prior cases dealt with claims arising within one contract. *Id.* at 465–66. In United States v. Rice, 317 U.S. 61 (1942), the Supreme Court set the test for recovery for impact, delay, indirect, or ripple costs. The Court held that the government was required to adjust price only for the changed work and not for unchanged work. For a discussion of an alternative to this doctrine, see Roesler, *Recovery of Impact Costs Under the Pre-1968 Changed Conditions Clause*, 31 FED. B.J. 327 (1972) (Under the test for recovery proposed in this article, General Dynamics might have recovered because the proposed standard does not require forseeability.). Since the modification of the "Changes" clause in 1968, the continued validity of the *Rice* criteria may be questionable.
71. 585 F.2d at 466.

government, the court held that the multiple-contract impact criteria were not satisfied.[72]

The court concluded its opinion by returning to the novation clause, as had both the ASBCA and the trial judge. By its terms, the novation clause precluded government liability for costs arising directly or indirectly from the assignment of the Quincy contracts. Both of the lower decisions relied heavily upon this clause to deny relief by making their rulings on the effect of the novation agreement dispositive of the case. The Court of Claims, however, skirted General Dynamics' assertion that the novation created a single new contract. In fact, the import of the novation agreement was not addressed because the court found other grounds dispositive of the case.[73]

V. ANALYSIS

General Dynamics presented the Court of Claims with an opportunity to clarify the law of multiple-contract impact damage claims based upon constructive change. While the court did articulate a test — "exceptional circumstances" are required if such a claim is to be successful — that test is so imprecise that it offers little in the way of objective standards by which a contractor can ascertain whether the government's actions might make possible a viable multiple-contract impact claim. In applying this test to the *General Dynamics* facts, the court found that the requisite exceptional circumstances did not exist. Moreover, the court noted that the actions of General Dynamics itself contributed to the cost overruns.[74] Stated alternatively, the court did not find in *General Dynamics* the "government culpability and proximate cause" that had been present in prior cases in which multiple-contract impact damage claims had been successful.

The Court of Claims did make clear, however, that changes to government weapon systems contracts and contracts for technologically sophisticated equipment can never amount to cardinal changes.[75] In denying General Dynamics' claim, the court noted the calamitous nature of the Thresher incident and the relation of that incident to the safety of submarine crews and to the national interest.[76] The court also noted that advanced submarine design is on the fringe of technological development and that a contractor could not, therefore, reasonably expect to complete a construction program without many changes reflecting technological break-

72. *Id.*
73. *Id.*
74. See note 66 and accompanying text *supra*.
75. 585 F.2d at 462-64.
76. *Id.*

throughs.[77] The conclusion can thus be made that contracts to build combat ships, fighter planes, tanks, cannons, and perhaps even rifles might fall within the scope of the reasoning of the *General Dynamics* court. Conversely, it is also clear that contracts to produce non-dangerous objects of ordinary manufacture would be subject to cardinal changes.[78] The problem with the court's rule, however, is that a clear line cannot be drawn between contracts that can be cardinally changed and those that can not. Defense materials contractors should realize that at any given moment an item destined for military use, no matter how mundane, could be vital. In such an instance, would the government escape liability for extensive changes to such contracts? The *General Dynamics* opinion does not answer this question.

In disposing of the cardinal change claim, the Court of Claims provided possible criteria for the successful pursuit of such a claim.[79] The court stated that the tests for cardinal change are the numbers of changes, the number of components changed and unchanged, the nature and timing of the changes, and the work necessary for the contractor to incorporate the changes.[80] The court implied that General Dynamics had satisfied these requirements, but failed nevertheless because of the nature of the object of the contract.[81] Cardinal change law therefore has been somewhat clarified. Contractors should look to the nature of the items being produced by them to determine whether the items may be of a nature that would allow changes amounting to a complete redesign not to be recognized as cardinal. Certainly, submarines fall within this class.[82]

The court's decision on General Dynamics' constructive change claim appears to be result oriented. The dichotomy set up by the court between possible relief under one set of criteria in a single-contract setting,[83] and no relief under a different set of criteria in a multiple-contract setting,[84] emphasizes form over substance. Moreover, the Court of Claims told General Dynamics that its claim

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77. *Id.* at 463.
78. Air-A-Plane Corp. v. United States, 408 F.2d 1030 (Ct. Cl. 1969) (this case, however, was settled, thus its precedential value is limited). *See* 585 F.2d at 463-64.
79. 585 F.2d at 462-64.
80. *Id. See also* Air-A-Plane Corp. v. United States, 408 F.2d 1030 (Ct. Cl. 1969).
81. 585 F.2d at 462-63.
82. *Id. Accord,* McCord v. United States, 9 Ct. Cl. 155 (1873), *aff'd sub nom.* Chouteau v. United States, 95 U.S. 61 (1877) (manufacturers of civil war Monitors held unable to assert a cardinal change no matter how extensive government changes may be).
83. See notes 66-69 and accompanying text *supra.*
84. See notes 71-72 and accompanying text *supra.*

might have been successful had it been brought under one contract, but failed to rule on General Dynamics' claim that the novation merged the three contracts into one. Without resolution of that issue, General Dynamics was left with only its multiple-contract impact claim. The court applied different criteria to the multiple-contract impact claim, and held that General Dynamics did not satisfy those requirements. General Dynamics, therefore, was left with a wrong without a remedy.

It is in the analysis of constructive change in multiple-contract impact claims that the *General Dynamics* opinion creates the most confusion. Even though the claim in *General Dynamics* was based upon contract law, the court's analysis was couched in terms of tort principles. Initially, the court examined the nature of the assent to transfer the submarines and construed its contractual effect in the Navy's favor.[85] This conclusion was based upon the general legal principle that the assent did not on its face purport to witness the Navy's deference to General Dynamics' labor plans, nor did it waive the Navy's right to make the extensive changes the court found permissable in its cardinal change analysis.[86] In the remainder of its discussion, however, the court pointed out that it was General Dynamics that managed the work force. The blame, therefore, for costs attributable to work force utilization was solely the contractor's.[87] This reasoning seems to stem from a proximate cause-contributory negligence approach. What General Dynamics was seeking in its constructive change claim was an equitable adjustment to the contract price. Equity requires that the contractor have clean hands. General Dynamics did not qualify because, even if the "Subsafe" changes affected its "rollover" plan, General Dynamics exacerbated those effects by its own poor management. In other words, General Dynamics' own management choices were the proximate cause of its damages.

The court's approach to impact damages in multiple-contract situations has further basis in tort law. The court construed a number of prior cases in which claims were based upon changes of one contract impacting another.[88] The court's conclusion, which appears sound, is that "only in exceptional circumstances can an equitable adjustment be made for extra cost in performing one contract, caused by the government doing things it has a right to do,

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85. 585 F.2d at 464.
86. *Id.*
87. *Id.* at 465.
88. *Id.* at 465-66. *See generally* United States v. Beuttas, 324 U.S. 768 (1945); Allied Paint Mfg. Co. v. United States, 470 F.2d 556 (Ct. Cl. 1972); J.A. Jones Constr. Co. v. United States, 390 F.2d 886 (Ct. Cl. 1968); Amino Bros. Co. v. United States, 372 F.2d 485 (Ct. Cl.), *cert. denied*, 389 U.S. 846 (1967); Specialty Assembling & Packing Co. v. United States, 355 F.2d 554 (Ct. Cl. 1966).

respecting other contracts."[89] The examples set forth by the court all amount to conduct on the part of the government that is tantamount to malicious interference with the contractor's business. For example, equitable adjustment may be allowed were the government knowingly to withhold information from the contractor that the contractor needs to estimate his costs,[90] or were the government knowingly and intentionally to hinder the contractor's performance.[91] Most interesting for future cases is the statement of the *General Dynamics* court in summary that the government would be liable were both government culpability and proximate cause to exist.[92] Proximate cause is not a contract principle. Perhaps what the court said, in essence, is that in order for impact damages to be awarded in an equitable price adjustment, the government must commit a tort on the contractual relationship. This government wrong must be the proximate cause of the contractor's increased costs outside of the contract, and the contractor must do nothing that contributes to that increased cost. More simply stated, if the government commits an intentional tort, it may have a defense when the contractor is contributorily negligent.

It appears that the court wanted to eliminate claims for impact damages, yet decided in light of prior cases[93] to leave the door open ever so slightly for a future plaintiff presenting a case with the proper facts. Slight changes in the facts might have resulted in General Dynamics prevailing on its claims. Had the Navy been informed of the "rollover" plans, General Dynamics might have met the "exceptional circumstances" test, inasmuch as change orders that disrupted that plan might have been viewed as tantamount to "government culpability and 'proximate cause.' "[94] Similarly, were General Dynamics building cargo vessels of routine design, the cardinal change claim probably would have been successful.

The decision of the ASBCA in *Ingalls Shipbuilding Division, Litton Systems, Inc.*,[95] a companion case to *General Dynamics* that never reached the Court of Claims, highlights the importance of General Dynamics' "contributory negligence." Litton filed an impact damages claim for increased costs in performing seven contracts (five Navy surface, and fourteen commercial vessels) allegedly resulting from "Subsafe" changes of Litton's contracts to build three submarines.[96] Litton claimed the increased costs were due to the

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89. 585 F.2d at 466.
90. *Id.*
91. *Id.*
92. *Id.*
93. See note 88 *supra.*
94. 585 F.2d at 466.
95. ASBCA No. 17579, 78-1 B.C.A. ¶ 13,038 (February 17, 1978).
96. *Id.* at 63,583.

Navy's insistence that it give priority to the construction of the submarines.[97] *Litton* was decided by the ASBCA eight months before the Court of Claims issued its opinion in *General Dynamics*. In *Litton*, the plaintiff contractor did not make any claims under the "Changes" clause to its contract, which distinguishes the case at least superficially from *General Dynamics*.[98] The ASBCA held for the contractor and awarded damages for an injury similar to that which General Dynamics had suffered. The ASBCA distinguished its decisions in *Litton* and *General Dynamics* on the grounds that General Dynamics had contributed to its own loss because of its management decision to move the ships. The Board also noted that in *General Dynamics* the plain language of the novation clause barred recovery.[99] It is not clear whether the ASBCA decision in *Litton* is good law due to the subsequent Court of Claims decision in *General Dynamics*. It is interesting to note, however, that the ASBCA implies in clearer terms than the Court of Claims that General Dynamics came close to recovery. The *Litton* decision implies that the requisite government inequity was present in *General Dynamics*, but that the contractor's own mismanagement broke the chain of proximate cause.[100]

VI. CONCLUSION

In *General Dynamics*, the Court of Claims reached three major conclusions. With respect to cardinal change law, the court held that contracts for technologically sophisticated items, for items that can endanger human safety if poorly designed, and perhaps for weapons systems in general, can be modified extensively by the government without running the risk of committing a cardinal change. Under the category of constructive change, the court made two rulings. Regarding one-contract impact damage claims, the court reaffirmed prior case law by approving equitable adjustment of the contract price in such situations. It stated that General Dynamics might have

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97. *Id.* Litton filed its claim under the "Suspension of Work" clause in its contract as a constructive suspension of work. The difference between this clause and the changes clause is not relevant to this note. For additional information on "Suspension of Work" clauses, see California Continuing Educ. of the Bar, BASIC TECHNIQUES OF PUBLIC CONTRACTS PRACTICE 90 (1977).
98. See note 49 and accompanying text *supra*.
99. 78-1 B.C.A. ¶ 13,038, at 63,659.
100. See notes 86-92 and accompanying text *supra*.

been entitled to adjustment if its claim had been brought under a single contract. In multiple-contract cases, the court pulled together criteria that may be used to determine whether "exceptional circumstances" exist that justify recovery by the contractor. It held that General Dynamics did not have a cognizable claim under these multiple-contract criteria. In summary, the court implicitly found that General Dynamics was "wronged" in its contractual relationship but could find no theory under which General Dynamics could obtain relief.

Francis John Gorman