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Government Contracts-Illegal Contracts-Jurisdiction of Court of Claims to Grant a Quantum Meruit Recovery- Yosemite Park & Curry Co. v. United States, 582 F.2d 552 (Ct. C1. 1978).

CASENOTES

Government Contracts—ILLEGAL CONTRACTS—JURISDICTION OF COURT OF CLAIMS TO GRANT A QUANTUM MERUIT RECOVERY—*Yosemite Park & Curry Co. v. United States,* 582 F.2d 552 (Ct. Cl. 1978).

In May of 1963 the Yosemite Park and Curry Co. (YPC) entered into a concession contract with the National Park Service. YPC agreed to provide services, including public transportation, to the visitors of Yosemite Park for a reasonable charge. This agreement was modified in 1971 to require YPC to provide the sole means of transportation in Yosemite Park. In the new contract the National Park Service agreed to reimburse YPC's costs, including federal income taxes, and pay a profit calculated at twelve and one-half percent of YPC's average gross investment in the transportation equipment.[1]

After YPC performed the modified contract for four years, a Department of Interior certifying officer informed YPC that the contract terms providing for reimbursement of federal income taxes and allowing more than ten percent profit on a cost-plus contract violated federal procurement law.[2] The transportation contract was therefore illegal and invalid, and no payment could be allowed.

YPC brought suit in the Court of Claims seeking the contract price for the transportation services provided. Both parties moved for summary judgment. The United States argued that there could be no recovery on a contract that violated federal procurement law.[3] In an opinion written by Judge Kunzig, the Court of Claims agreed with the government that the contract was illegal and invalid, but allowed a recovery in quantum meruit not to exceed YPC's cost plus ten percent.[4]

I. BACKGROUND

A. Sovereign Immunity in Federal Procurement

The unusual holding in this case must be read in light of the general proposition, inherited from the common law of England,

1. Yosemite Park & Curry Co. v. United States, 582 F.2d 552, 554 (Ct. Cl. 1978).
2. *Id.* at 554-55. The statute and regulation violated are 41 U.S.C. § 254(b) (1976) and 41 C.F.R. § 1-15.205-41(a)(1) (1978).
3. 582 F.2d at 555-56.
4. *Id.* at 561.

that the government cannot be sued without its consent.[5] In spite of the maxim that when the government enters the market place it becomes subject to the same laws that govern private parties,[6] contract rights can only be enforced against the government when it has waived its immunity from suit.[7] The authority to waive federal sovereign immunity is vested solely in Congress.[8]

Congress has lessened the impact of federal sovereign immunity in various ways. Originally, claims against the United States were brought before Congress for a hearing on the merits. If relief was appropriate Congress would pass a private bill providing a recovery. When Congress could no longer effectively deal with the number of suits,[9] it passed statutes waiving the government's immunity from broad classes of claims. The Tucker Act, passed in 1887, gave the Court of Claims jurisdiction to hear contract actions against the United States.[10] Although the language of the Tucker Act is broad, it actually delegates only limited jurisdiction.[11] Any suit which cannot be brought within the specific jurisdictional limits of the Tucker Act cannot be heard by the Court of Claims.

Another device that mitigates the effects of the doctrine of sovereign immunity is the power granted by Congress to the Comptroller General to settle accounts.[12] As head of the General Accounting Office, the Comptroller General has responsibility to supervise the spending of public funds. To facilitate the execution

5. For a concise discussion of sovereign immunity in the government contracts area, see Editorial Note, *Government Subcontractors' Remedies in Rem*, 30 GEO. WASH. L. REV. 994 (1962).

6. *See generally* Lynch v. United States, 292 U.S. 571, 579-82 (1934).

7. The United States may not impair or abrogate its contractual obligations. Consent to sue the United States, however, is not part of any contractual obligation with the United States; consequently, a contractor may have a legal right to recovery but no remedy. *Id.* at 580-81.

8. *See* Dalehite v. United States, 346 U.S. 15 (1953); United States v. Shaw, 309 U.S. 495 (1940).

9. For example, the private bills passed in 1883 (largely contract claims) cover 60 pages of the Statutes at Large. 22 Stat. 750-810 (1883).

10. Tucker Act, ch. 359, § 1, 24 Stat. 505 (current version codified at 28 U.S.C. §§ 1346(a), 1491 (1976)).

11. *See* notes 27-29 and accompanying text *infra*.

12. 31 U.S.C. §§ 71, 74 (1976). An individual or firm may file with the Comptroller General a claim arising out of a contract award or breach of contract. The General Accounting Office has no established procedure for filing such claims; both parties simply submit their versions of the case. Any disputed factual issues are resolved in favor of the government. *See, e.g.*, 44 Comp. Gen. 353 (1964); 36 Comp. Gen. 507 (1957). The Comptroller General resolves disputed factual issues in favor of the government because only the government is bound by his decisions. The contractor may still file suit under the Tucker Act after being denied relief by the Comptroller General.

of that responsibility, the Comptroller General has the authority to settle "[a]ll claims and demands . . . in which the Government of the United States is concerned, either as debtor or creditor."[13] Congress has further provided that decisions made by the Comptroller General on the settlement of public accounts are "final and conclusive upon the Executive Branch of the Government."[14] Under limited circumstances, aggrieved contractors have had their claims settled by the Comptroller General without his ever reaching the question of the government's immunity from suit. Appeal to the Comptroller General, however, is useful only in those situations where the liability of the government can be determined from the record without examination of witnesses or consideration of conflicting evidence.[15]

Through private bills and more recently through the Tucker Act and the settlement powers of the Comptroller General, the potentially harsh effects of sovereign immunity have been eased for those who deal contractually with the federal government. Certain claims remain, however, for which there may be no effective waiver of immunity. One of these is a claim based upon a contract that violates procurement law or regulations.

B. Illegal Contracts and the Tucker Act

1. Recovery upon an illegal express contract

When the terms of a contract with the government violate the central purpose of a procurement statute, courts follow the general rule of private contract law of no recovery on illegal con-

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13. 31 U.S.C. § 71 (1976). Similar settlement powers have been granted to all contracting officers under the recently passed Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (codified at 41 U.S.C.A. §§ 601-613 (Supp. 1979)). Section 4 of the Act provides:

> Each executive agency is authorized to settle, compromise, pay, or otherwise adjust any claim by or against, or dispute with, a contractor relating to a contract entered into by it or another agency on its behalf, including a claim or dispute initiated after award of a contract, based on breach of contract, mistake, misrepresentation, or other cause for contract modification or recission, but excluding a claim or dispute for penalties for forfeitures prescribed by statute or regulation which another agency is specifically authorized to administer, settle, or determine.

Although the report accompanying the bill is silent on the issue, *see generally* H.R. REP. No. 1556, 95th Cong., 2d Sess. (1978), this statute may provide another possible remedy for a contractor who in good faith enters a contract in violation of procurement law.

14. 31 U.S.C. § 74 (1976).

15. 44 Comp. Gen. 353, 358 (1964). *See also* Cibinic & Lasken, *The Comptroller General and Government Contracts,* 38 GEO. WASH. L. REV. 349, 362-66 (1970).

tracts.[16] For example, in *Acme Process Equipment Co. v. United States,*[17] the government claimed it could cancel a contract for the production of rifles, even though the contractor had prepared for production at considerable expense, because the contractor violated the Anti-Kickback Act.[18] The Court of Claims rejected this argument, holding that cancellation of contracts was not one of the sanctions provided in the Anti-Kickback Act.[19] The Supreme Court reversed, reasoning that a contract should not be enforced when enforcement would vitiate the central purpose of a statute.[20]

The Court of Claims denied recovery in the similar case of *City of Los Angeles v. United States.*[21] Los Angeles agreed to pay $75,000 to the Department of the Interior to investigate a dam site at Boulder Canyon. The Department agreed to reimburse the city should Congress ever make funds available for investigation and construction of Boulder Dam. When Congress did appropriate funds for that purpose, Los Angeles brought suit in the Court of Claims seeking reimbursement of the money advanced. The Court of Claims held that the agreement violated the Anti-Deficiency Act, which prohibited obligation of public funds prior to appropriation. Therefore, no recovery could be allowed.[22]

Although there are cases with dicta to the contrary,[23] the cases with clear holdings stand for the proposition that no recovery is allowed on a government contract that violates the central purpose of a statute affecting government procurements.[24] The harshness of this rule prohibiting recovery on illegal express contracts is eased in private contract law by such doctrines as quasi-contract and estoppel.[25] These doctrines permit recovery of the value of the benefit conferred, when justice requires it, even

16. RESTATEMENT OF CONTRACTS § 598 (1932). Comment, *Restitutionary Relief Under Illegal Contracts in California,* 19 HASTINGS L.J. 1143 (1968).

17. 347 F.2d 509 (Ct. Cl. 1965), *rev'd,* 385 U.S. 138 (1966).

18. 347 F.2d at 519.

19. *Id.* at 521.

20. 385 U.S. at 145.

21. 68 F. Supp. 974 (Ct. Cl. 1946).

22. 68 F. Supp. at 976.

23. *See, e.g.,* United States v. Mississippi Valley Generating Co., 364 U.S. 520, 566 n.22 (1961); Crooker v. United States, 240 U.S. 74, 81-82 (1916). In both of these cases recovery was denied on illegal contract grounds; however, each opinion contains language to the effect that a quantum meruit recovery would be proper if a tangible benefit had been conferred upon the government.

24. *E.g.,* United States v. Acme Process Equip. Co., 385 U.S. at 138; Pan Am. Petro. & Transp. Co. v. United States, 273 U.S. 456, 509-10 (1927); City of Los Angeles v. United States, 68 F. Supp. at 976; Loehler v. United States, 90 Ct. Cl. 158, 164 (1940).

25. *See, e.g.,* Daniels v. Tearney, 102 U.S. 415 (1880); Gasoline Prods. Co. v. Champlin Ref. Co., 46 F.2d 511 (D. Me. 1931); Hunt v. Turner, 9 Tex. 193 (1853).

though the party performed pursuant to an illegal contract. The doctrines, however, are not available to the same extent in government contract law.[26]

2. Recovery upon an implied contract

The section of the Tucker Act granting jurisdiction to the Court of Claims states:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.[27]

The grant of jurisdiction for implied contracts has been consistently interpreted by the Supreme Court as providing jurisdiction to hear claims only on contracts implied in fact, not those implied in law.[28] The distinction turns on mutual manifestation of assent:

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26. Because the Court of Claims has less flexibility in dealing with illegal contracts, it has been less willing to find procurement contracts illegal. *See* R. NASH & J. CIBINIC, FEDERAL PROCUREMENT LAW 863 (3d ed. 1977). *See also* John Reiner & Co. v. United States, 325 F.2d 438, 440 (Ct. Cl. 1963) ("court should ordinarily impose the binding stamp of nullity only when the illegality is plain"). The Court of Claims will decide whether the illegality is serious enough to justify a finding that the contract is void in light of applicable public policy. When the question of legality is close, the contractor is accorded the benefit of the doubt in order to allow the reimbursement of good faith expenditures. *Id.* at 438. For other cases showing the reluctance of the courts to find government contracts illegal, see American Smelting & Ref. Co. v. United States, 259 U.S. 75, 78 (1922); Warren Bros. Rd. Co. v. United States, 355 F.2d 612 (Ct. Cl. 1965).

27. 28 U.S.C. § 1491 (1976).

28. *See* Alabama v. United States, 282 U.S. 502 (1931); United States v. Minnesota Mut. Inv. Co., 271 U.S. 212 (1926); Merrit v. United States, 267 U.S. 338 (1925). *See also* Jankowitz v. United States, 533 F.2d 538 (Ct. Cl. 1976).

The reason for interpreting the words "implied contract" in the Tucker Act as providing jurisdiction only for contracts implied in fact appears to be historical. One commentator writing at the time of the passage of the Tucker Act observed:

> The terms "express contract" and "contracts implied in fact" are used then to indicate, not a distinction in the principles of contract, but a difference in the character of the evidence by which a simple contract is proved. The source of the obligation in each case is the intention of the parties.
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> The phrase "contract implied in law" is used, however, to denote, not the nature of the evidence by which the claim of the plaintiff is to be established, but the source of the obligation itself. It is a term used to cover a class of obligations where the law, though the defendant did not intend to assume an obligation, imposes an obligation upon him, notwithstanding the absence of intention on his part, and in many cases in spite of his actual dissent.

Kenner, *Quasi Contract, Its Nature and Scope,* 7 HARV. L. REV. 57, 59 (1893). Since implied in law contracts were not considered true contractual obligations, a statute, such

Contracts implied in fact are based on a manifestation of assent found in the conduct of the parties although not expressly stated. In contracts implied in law, or quasi-contracts, there is no manifestation of assent—they are a fiction created by the court to prevent the unjust enrichment of one of the parties.[29]

The distinction between contracts implied in fact and contracts implied in law seems simple, but it has become blurred in a few contexts.[30] For example, in cases where the government has illegally received money belonging to an innocent citizen, the Court of Claims has implied an obligation on the part of the government to return the money.[31] This is essentially a restitutionary recovery granted without mention of mutual assent. In one case involving an alleged oral contract, a district court sitting under Tucker Act jurisdiction[32] admitted the relief it fashioned might be quasi-contractual in nature.[33] Despite these apparent excursions into the realm of contracts implied in law, lower courts have not fully disregarded the Supreme Court's interpretation of Tucker Act jurisdiction.[34] The federal courts have been particularly reluctant to grant anything resembling quasi-contractual relief on illegal contracts because the rule prohibiting such recoveries deters contractors from entering illegal bargains.[35]

The Court of Claims has, however, permitted recovery on a contract implied in fact when the express contract is found illegal. *New York Mail & Newspaper Transportation Co. v. United States*[36] has been cited by the Court of Claims as permitting an implied in fact recovery where the express contract was illegal.[37] The contract in *New York Mail* provided for the rental by the government of pneumatic tubes for the purpose of mail delivery.

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as the Tucker Act, intended to waive immunity for contract claims would not include implied in law contracts.

29. *E.g.*, J.C. Pittman & Sons v. United States, 317 F.2d 366, 368 (Ct. Cl. 1963).

30. For a discussion of the various contexts in which the Court of Claims apparently permits quasi-contractual recovery, see Mewett, *The Quasi-Contractual Liability of Governments,* 13 U. TORONTO L.J. 56 (1959); Note, *Government Contracts: Quasi-Contractual Recovery Against the Government,* 42 CORNELL L.Q. 278 (1957).

31. *E.g.*, Kirkendall v. United States, 31 F. Supp. 766 (Ct. Cl. 1940). *See also* Royal Indem. Co. v. Board of Educ., 137 F. Supp. 890 (M.D.N.C. 1956).

32. The section of the Tucker Act giving district courts jurisdiction to hear contract claims against the United States is codified at 28 U.S.C. § 1346 (1976).

33. Halvorson v. United States, 126 F. Supp. 898, 901 (E.D. Wash. 1954).

34. *E.g.*, Barnett v. United States, 397 F. Supp. 631 (D.S.C. 1975); Collins v. United States, 532 F.2d 1344 (Ct. Cl. 1976).

35. *See generally* Sutton v. United States, 256 U.S. 575 (1921); Elgin Manor, Inc. v. United States, 279 F.2d 268 (Ct. Cl. 1960).

36. 154 F. Supp. 271 (Ct. Cl.), *cert. denied,* 355 U.S. 904 (1957).

37. 347 F.2d at 529.

After substantial expense had been incurred by the contractor, the government declared the contract illegal for failure to follow formal advertising procedures. The court held that because there was a bona fide purpose to render services to the United States the parties should be returned to the position they would have occupied without the attempted contract. It is, however, important to note that the opinion itself never uses the words "implied in fact contract." Only subsequent interpretation has given the case this significance.

3. Contract by estoppel

In private contract cases courts will occasionally estop the parties from denying the validity of a contract if entered into in good faith and performed by one party.[38] The government can be estopped when its agents knowingly mislead the contractor with conduct or communications upon which the contractor could be expected to rely.[39] Estoppel, however, does not apply to the formation of a contract that violates procurement law. In this situation the contractor is deemed to have constructive knowledge of procurement law and the limitations that it places on an agent's authority; formation of a contract beyond that authority cannot be in good faith. This rationale was articulated by the Supreme Court in *Federal Crop Insurance Corp. v. Merrill.*[40] The plaintiff in that case, a farmer, received oral assurances that reseeded wheat was covered by federal insurance, when in reality Federal Crop Insurance Corporation regulations prohibited coverage of reseeded wheat. When the farmer suffered the loss of his crop he brought suit to recover on the policy. The Supreme Court stated:

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. . . . And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.[41]

When the duty is placed on the contractor to know the limits of the government agent's authority in a formation situation, the

38. *See, e.g.*, Daniel v. Tearney, 102 U.S. 415 (1880); Hunt v. Turner, 9 Tex. 193 (1853).

39. United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970).

40. 332 U.S. 380 (1947).

41. *Id.* at 384.

contractor cannot claim that he entered a contract in excess of the agent's authority in good faith.

C. Recourse to the Comptroller General

Where the facts are undisputed and the government does not object, the Comptroller General has used his settlement power to allow recoveries on illegal contracts.[42] For example, in one decision the Secretary of War requested an advance ruling on whether a contractor could be reimbursed for his expenses on a contract that violated the prohibitions against cost-plus-percentage-of-cost contracts. The Comptroller General recommended that the contractor be allowed to recover on a quantum meruit basis.[43] Regarding the Comptroller General's decisions granting relief on illegal contracts, one commentator stated: "Whatever the theory, it appears that the Comptroller General, in the instance of the illegal contract, grants relief that is not only technically beyond the power of the courts to give under the Tucker Act, but may be unavailable as a matter of private law."[44]

The use of the words "quantum meruit" by the Comptroller General can be confusing. Often quantum meruit is used as a measure of damages for implied in fact contracts, meaning simply the reasonable value of the benefit conferred.[45] In other decisions, however, the Comptroller General uses quantum meruit as a synonym for restitutionary recovery. For example, in one decision he held, "If there has been no prior contract, formal, expressed, or implied, the Government is liable on a quantum meruit for the service which has been rendered."[46] This ambiguous usage[47] does not raise jurisdictional questions because the Comp-

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42. The Comptroller General's response to illegal contracts has not been uniform. Some cases seem to apply the rigid standard of no recovery upon an illegal contract. In one decision involving a contract in violation of the Walsh-Healey Act, the Comptroller held: "Not only is an unauthorized contract unenforceable according to its terms, but no contract may be implied where a statute possibly prohibits the transaction." 33 Comp. Gen. 63, 65 (1953).

43. 21 Comp. Gen. 800 (1942).

44. Dickson, *Restitutionary Concepts and Terminology in Government Contracts Decisions of the Comptroller General,* 6 PUB. CONT. L.J. 1, 30 (1973).

45. Harrington, Howard & Ash, 6 Comp. Gen. 84 (1926); Totty Trunk & Bag Co., 3 Comp. Gen. 100 (1923).

46. 1 Comp. Gen. 323, 325 (1921).

47. In some cases quantum meruit recovery is denied because the mutual assent necessary for an implied in fact contract is absent. *E.g.,* Pope & Talbot, Inc., [1976] 2 COMP. GEN. PROCUREMENT DEC. (FPI) ¶ 69. Other Comptroller General decisions permit a quantum meruit recovery in the absence of an implied in fact contract where a tangible benefit is received by the government and the unauthorized action is expressly or impliedly ratified. *See* SWF Plywood Co., [1977] 2 COMP. GEN. PROCUREMENT DEC. (FPI) ¶

troller General's jurisdiction, unlike the Court of Claims', does not derive from the Tucker Act and its requirement of an express or implied in fact contract.

II. The Decision of the Court of Claims

Yosemite presented the problem of whether compensation should be awarded for services performed pursuant to an illegal express contract. The court found that the contract violated the statute limiting profit on cost-plus contracts to ten percent and the regulations prohibiting reimbursement of federal income taxes as fixed costs.[48]

The court rejected the argument of YPC that the government should be estopped from denying the validity of the contract after YPC had performed for four years. The court correctly pointed out that the United States is never estopped from denying the legality of a contract that by its terms violates procurement law and added, "'One who purports to contract with the United States assumes the risk that the official with whom he deals is clothed with actual authority to enter the contract alleged.'"[49]

Despite the conclusions that the express contract was not enforceable and that four years of performance did not make it enforceable, the court held that YPC was entitled to a quantum meruit recovery. The case was remanded to the trial court for a determination of damages representing the reasonable value of the benefit received by the government. The trial judge was instructed that YPC's recovery should not exceed the total cost of YPC's performance plus ten percent.[50]

III. Analysis

The Court of Claims failed in *Yosemite* to confront the limitations of its jurisdiction and to explain the basis of recovery. Examination of prior decisions reveals three rationales that the Court of Claims has used to extend its jurisdiction to contracts that are defective under federal procurement law. However, when carefully examined none of these rationales completely explains the result in this case.

297; Monitor Prods. Co., [1976] 2 Comp. Gen. Procurement Dec. (FPI) ¶ 85; Dictametric Corp., [1974] 1 Comp. Gen. Procurement Dec. (FPI) ¶ 260.

48. 582 F.2d at 560-61.

49. *Id.* at 558 (quoting Haight v. United States, 204 Ct. Cl. 698, *cert. denied*, 429 U.S. 841 (1976)).

50. *Id.* at 561.

A. *Did the Court of Claims Base the Recovery on an Implied in Fact Contract?*

The Court of Claims has jurisdiction to render judgments on contracts implied in fact. There are indications in the opinion of the court that the mutual assent necessary for an implied in fact contract was present. For example, the court stated: "[W]hile it is clear that the Government could no longer be bound by [the] terms of the Agreement, it is equally clear that the Government bargained for, agreed to pay for, and received the benefit of YPC's services. . . ."[51] The court here lays considerable emphasis on the fact that the government bargained for and agreed to pay for the transportation services. This implies a finding of mutual assent. The court reasoned further:

> In determining the amount which plaintiff is entitled to recover, the Trial Judge is instructed that we do not deem the Government to have assented to payment of more than 10 percent of the *total costs of YPC's performance of the contract* nor to reimbursement of the federal income taxes.[52]

One could infer from the court's language that, even though the Government could not assent to all the terms of the contract, the parties had substantially agreed to perform the contract and this substantial agreement could supply the basis for an implied in fact contract.

While the parties could have entered an enforceable contract using the terms suggested by the court, the facts indicate the parties only assented to a contract that included all the terms. There was evidence that YPC would not have even entered the contract if the illegal terms had been excluded.[53] Given this evidence, it can hardly be said that the parties tacitly assented to the terms recommended by the court.

YPC relied on *New York Mail & Newspaper Transportation Co. v. United States,*[54] the case the Court of Claims cites as permitting implied in fact recovery when the express contract is illegal.[55] *New York Mail,* however, involved a sort of illegal contract that made it a better case than *Yosemite* for finding an

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51. *Id.* at 560.

52. *Id.* at 561 (emphasis in original).

53. Plaintiff's Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment at 63, Yosemite Park & Curry Co. v. United States, 582 F.2d 552 (Ct. Cl. 1978).

54. 154 F. Supp. 271 (Ct. Cl.), *cert. denied,* 355 U.S. 904 (1957).

55. *See* note 36 and accompanying text *supra.*

implied in fact contract. The contract in *New York Mail* was held invalid for the failure of the parties to conform to procurement regulations regarding formal advertising. The parties contracted for a legal purpose; only formation formalities invalidated the contract. The mutual assent necessary to find an implied in fact contract was evidenced by a document with legal terms that could be enforced in their entirety. The contract in *Yosemite* evidenced YPC's intent to render services for a compensation that was illegal; the terms of the contract were illegal, not just the formation. There is no evidence that the parties intended to enforce less than all of the terms of the contract.

The court in *Yosemite* does not state that an implied in fact contract is the basis of their judgment. However, if the suggestions of mutual assent lead to that conclusion, the decision is the first to hold that contractors can include terms that violate procurement laws and still recover on implied in fact theory.

B. Did the Court Apply the Christian *Rationale?*

In the past the Court of Claims has been willing to insert into government contracts the terms necessary to make them conform to federal procurement law. When the *Yosemite* court instructed the trial judge regarding the measure of damages in this case, it merely substituted the maximum legal percentage for that agreed to by the parties and disallowed federal income taxes as a reimbursable fixed cost.

The leading case permitting insertion of the terms necessary to make a government contract legal is *G.L. Christian & Associates v. United States.*[56] The contract in that case did not include the government's mandatory termination-for-convenience clause. Because regulations require the clause in all government contracts and because failure to include it would make the contract invalid, the court assumed that the parties bargained with the clause in mind.[57]

The facts in *Yosemite* can be easily distinguished from those in *Christian.* In *Christian* the contract was silent on the issue of termination for convenience, hence the court was able to assume that the parties intended that the standard clause be implied. The contract in *Yosemite* was not silent on the issue of compensation but expressly provided for compensation illegal under pro-

56. 312 F.2d 418 (Ct. Cl.), *rehearing denied,* 320 F.2d 345 (Ct. Cl.), *cert. denied,* 375 U.S. 954 (1963).

57. 312 F.2d at 424-27.

curement law. The *Christian* concept of reformation has not been extended to contracts where an express term would have to be changed to make the contract legal.[58] The policy reason for not permitting a party to an illegal contract to simply exclude any illegal terms and enforce the remainder is that little incentive would be left for contractors to exclude illegal terms in their contracts if, when they do, they can still recover on the next best legal terms.

C. *Did the Court of Claims Recognize Quantum Meruit as an Exclusive Theory of Recovery?*

The court's specific use in *Yosemite* of quantum meruit without any treatment of whether the basis of recovery was contract implied in law or in fact creates the impression that quantum meruit is an alternative form of recovery. This impression is strengthened when *Yosemite* is read in light of *Narva Harris Construction Corp. v. United States,*[59] a decision written by Judge Kunzig three months prior to his decision in *Yosemite.* In *Narva Harris* an agent of the United States made oral representation during the negotiation of an urban renewal construction contract that the contractor's cost estimates could be adjusted upward at a later date. When this opportunity was never provided, the contractor brought an action for breach of contract. The government moved for summary judgment on grounds that the alleged agreement violated a statute requiring written contracts. In denying the government's motion, the Court of Claims recognized it could not give implied in law recovery, but stated several times that the contractor might be entitled to a recovery "on implied-in-fact contract or *quantum meruit.*"[60] The use of the disjunctive suggests implied in fact contract and quantum meruit may be alternative theories of recovery.

The idea of quantum meruit as a form of recovery indepen-

58. The following language from *Yosemite* may imply that Judge Kunzig allowed the quantum meruit recovery on the express contract, after severing the illegal price terms: "The plaintiff is not entitled to enforcement of the provision of the express, written contract at issue here since those provisions are invalid as violative of the applicable procurement law. We also hold, however, that plaintiff is entitled to recover as *quantum meruit* the reasonable value of the services. . . ." 582 F.2d at 561. Compare this with the court's earlier statement that the contract "is rendered invalid as not in accordance with applicable procurement statutes and regulations." *Id.* at 553-54.

59. 574 F.2d 508 (Ct. Cl. 1978). *Cf.* Cities Serv. Gas Co. v. United States, 580 F.2d 433 (Ct. Cl. 1978) (decided the same day as *Yosemite;* used quantum meruit as measure of damages for a contract implied in fact).

60. 574 F.2d at 510-11.

dent from implied contracts is not completely foreign to federal procurement law. The use of quantum meruit by Judge Kunzig in both *Yosemite* and *Narva Harris* is reminiscent of Comptroller General decisions.[61]

It is not clear whether the use of quantum meruit by the Court of Claims in *Narva Harris* and *Yosemite* is fashioned after the usage of the Comptroller General or private contract law. In either instance, the Court of Claims has failed to confront the limits of its jurisdiction. The Comptroller General derives its authority to grant quantum meruit relief from the settlement powers conferred upon the office by Congress. Neither the Comptroller General nor courts adjudicating private contracts are bound by the implied in law/implied in fact distinction imposed upon the Court of Claims by the Tucker Act.

D. Evaluation

No clear precedent permits the Court of Claims under the facts of *Yosemite* to grant a recovery on any of the theories discussed in this Note, nor is it clear that the court intended by its decision to expand any of these theories. The court may have sought what it considered a fair result but left its reasoning intentionally vague to rob the decision of precedential value. On the other hand, the decision may be an additional venture by the Court of Claims into the realm of quasi-contract.

The *Yosemite* decision will most likely invite further attacks on the rules prohibiting recovery on illegal contracts and limiting the jurisdiction of the Court of Claims to express or implied in fact contracts. Resolution of the issue is the responsibility of the Supreme Court, where the advantages of giving the Court of Claims authority to grant restitutionary relief[62] should be balanced against the largely historical reasons for the implied in law/implied in fact distinction and the need for deterring contractors from entering illegal bargains.

The government did not appeal the decision of the Court of Claims in *Yosemite*. The government may sense that its position is vulnerable and that the only way of preserving the rule prohibiting recovery on implied in law contracts is to raise it only in the best cases.

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61. *See* notes 45-47 and accompanying text *supra*.

62. These advantages are considered in Wall & Chilfres, *The Law of Restitution and the Federal Government*, 66 Nw. U.L. Rev. 587 (1971).

IV. Conclusion

In *Yosemite* the Court of Claims did not explain how it granted relief on an illegal contract within the limitations of the Tucker Act. The court's prior decisions do not explain the result. Past decisions involving illegal procurement contracts in which recovery was based on mutual assent or reformation can be distinguished from *Yosemite*. The terms of the contract in *Yosemite* clearly and directly violated procurement statutes and regulations—there is no precedent for extending *New York Mail* or *Christian* that far. Such an extension, if possible, might be undesirable given the government's interest in discouraging the formation of illegal contracts. Only further litigation can establish whether, by its decision in *Yosemite,* the Court of Claims intended to open the door to litigants seeking quasi-contractual relief on illegal contracts. Since the Supreme Court essentially created the rule limiting the Court of Claims' jurisdiction, it must ultimately decide the issue.

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