the work as well as the extent of control exercised during performance were the key elements for determining whether an employer-employee relationship was present. In Motors Insurance Corp. v. Aviation Specialties 304 F. Supp. 973 (D. Mich. 1969) the United States was held liable for property damage caused by negligence of employees of an aerial spraying company working pursuant to a contract with the Department of Agriculture since the Government officials had extensive control over the company's activities under the contract, including providing daily briefings and detailed maps of areas to be sprayed, operating the only means of communication between the planes and the ground, and providing full detail as to flight speed, altitude, and swath width. In Clifford v. United States, 308 F. Supp. 957 (D.S.D. 1970) the United States was held liable for the negligent acts of an individual working under a contract with the Department of Health, Education and Welfare to install fixtures in newly built houses, where the Government supplied all necessary tools and materials and fully supervised all aspects of the work.

II. USE OF COST TYPE CONTRACTS

A. Circumstances For Use

10 U.S.C. § 2306(c) and 41 U.S.C. § 254(b) permit the use of cost type contracts only if the agency head determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure the required property or services without using CPFF or incentive-type contracts. DAR 3-405.1(b) contains the following guidance:

> The cost-reimbursement type contract is suitable for use only when the uncertainties involved in contract performance are of such magnitude that cost of performance cannot be estimated with sufficient reasonableness to permit use of any type of fixed-price contract. In addition, it is essential that (i) the contractor's cost accounting system is adequate for the determination of costs applicable to the contract and (ii) appropriate surveillance by Government personnel during performance will give reasonable assurance that inefficient or wasteful methods are not being used. While cost-reimbursement contracts are particularly useful for procurements involving substantial amounts, e.g., estimated cost of $100,000 or more, the parties may agree in a given case to use this type of contract to cover transactions in which the estimated costs are less than $100,000.

See also FPR 1-3.405-1(b). These policies are based in part on the low risks associated with cost type contracts. The Department of Defense has been concerned by the lack of incentive for a contractor to avoid waste and inefficiency when the Government reimburses him for incurred costs. Then Assistant Secretary of Defense Ignatius, in hearings before the Military Operations Subcommittee of the House Government Operations Committee, 88th Cong., 1st Sess., 9-10 (1966), testified as follows:

> Accordingly, with the establishment of the cost reduction program in 1961, an intensive effort was made to reduce the use of this inefficient method of contracting to a minimum and, instead, to use contracts affording greater incentive for efficiency and economy.
>
> * * *
>
> The outstanding difference between CPFF contracts and the fixed-price and incentive contracts which are now used is the fact that the contractor's profit is no longer a predetermined amount that remains unchanged regardless of how well or how poorly his contractual obligations are performed.

Similarly, in Marine Management Systems, Inc., Comp. Gen. Dec. B-185860, 76-2 CPD ¶ 241 (1976) the Comptroller stated that "a fixed-price contract is inherently more advantageous to the Government" after noting that the Government bears the risk of overruns in cost type contracts. See also Cornell University, Comp. Gen. Dec. B-196915, 80-1 CPD ¶ 46 (1980).

Although these authorities clearly imply a preference for the use of fixed price type contracts, the regulations do recognize the appropriateness of cost type contracts in certain circumstances. DAR 3-401(a)(1) provides that the type of contract should be based on the degree of risk in contract performance and that the type should be chosen to avoid placing too great a cost risk on the contractor. Placing too great a cost risk on the contractor has several disadvantages. Competent firms may be hesitant to enter into such risky contracts. Offerors may include large contingencies in their pricing and receive windfall profits if less difficulty than anticipated is encountered during performance. Under such circumstances the cost to the Government would be greater than if a cost type contract had been used.

A more likely result from the improper choice of contract type is that difficulties will be encountered in obtaining performance if too great a risk is placed on the contractor. General Dynamics Corp., DOTCAB 76-9A, 78-2 BCA ¶ 13,281, Govt. mot. for reconsid. denied, 78-2 BCA ¶ 13,415 (1978) involved a competitively negotiated fixed price incentive contract where the contractor encountered a $14.5 million overrun on a contract with a target cost of $18.2 and a ceiling price of $19.2. Upon the contractor's failure to make progress satisfactory to the Government, the parties converted the contract from fixed price incentive to cost reimbursement. The board reviewed the following difficulties which caused the parties to agree to the conversion at 64,942:

> The Government's move to declare the contractor in default of its contract obligations was based upon failure to make progress. Appellant countered with claims that the scope of work had been increased by the Government with a consequent growth in program costs and schedules; that the specifications were defective; and that

> the Government's contract administration was faulty, i.e., its inaction or delayed action protracted appellant's performance.
>
> Government representatives anticipated that extensive litigation was in store and that it would not be possible to go immediately to another source to move the program along; so, in view of the impending litigation and their confidence that the involvement of high level General Dynamics management personnel in the surveillance radar program would put needed pressure on design and production personnel, the Government representatives were prompted to consider restructure of the contract. Government personnel were also concerned about "Congressional commitments"--pressure to expedite acquisition and installation of the radars in question to enhance air safety.
>
> In sum, the record shows that the Government's decision to continue under the instant contract as restructured rather than terminate for default was based upon many considerations, but the "dire need" for the radars was most prominent.

See also Ball Brothers Research Corp., NASABCA 1277-6, 80-2 BCA ¶ 14,526 (1980) where the Government agreed to conversion of a portion of a fixed price research and development contract rather than have the contractor file a claim based on impossibility of performance.

The present policy of the Department of Defense with respect to major weapons acquisitions was adopted following an attempt to use higher risk contracts. Unsatisfactory experience with cost overruns, loss contracts, and contractors who could not bear the financial losses led DOD to adopt a more flexible policy. In a memorandum to the service secretaries entitled "Policy Guidance on Major Weapon System Acquisitons," dated May 28, 1970, Deputy Secretary of Defense David Packard stated:

> In all our contracting, the type of contract must be tailored to the risks involved. Cost plus incentive contracts are preferred for both advanced development and full-scale development contracts for major systems.

The memorandum went on to state that fixed-price contracts should be used when risks had been reduced to the extent that realistic pricing was possible. In addition, it directed that consideration be given to a contractor's financial ability to absorb a loss in deciding whether to award a fixed-price contract. Similarly, DOD Directive 5000.1 "Acquisition of Major Defense Systems," July 13, 1971, provided that "contract type shall be consistent with all program characteristics including risk," and that, "cost type prime and subcontracts are preferred where substantial development effort is involved." DAR 3-402 provides comparable guidance and stresses that a decision on contract type should follow meaningful discussions and negotiations concerning technical considerations and risk characteristics of

the procurement. It further indicates that cost type contracts will normally be selected for research and development.

B. Determinations and Findings

10 U.S.C. § 2310(b) requires that the determination to use a cost reimbursement contract be based on a "written finding, which finding shall set out facts and circumstances that . . . clearly indicate why the type of contract selected. . ." meets the requirements of 10 U.S.C. § 2306(c). FPR 1-3.302 also provides that the determinations and findings required by 41 U.S.C. § 254(b) must be made in writing. 10 U.S.C. § 2310(b) and 41 U.S.C. § 257(a) further provide that such "determinations and decisions" are "final."

The Comptroller General has held that the finality provisions permit him to make only a limited review of determinations and findings. See Tosco Corp., Comp. Gen. Dec. B-187776, 77-1 CPD ¶ 329 (1977) stating:

> In this case, D&F No. 64,813 set forth as findings:
> "(2) The exact nature and extent of the work covered by the proposed contract and the precise method of performing that work, cannot be established in advance, but must be freely subject to improvisation and change as the work progresses.
> "(3) The costs of performing the work under the proposed contract cannot be accurately forecast so as to permit the undertaking of such work for a fixed price."
> The "determination" based upon those findings was that "It is impracticable to secure services of the kind or quality required without the use of the proposed type of contract."
> Our Office is precluded from questioning the findings issued pursuant to section 2306(c). We may question the determination based upon the findigns only if it is unreasonable or not based upon fact. 52 Comp. Gen. 801 (1973), and cases cited therein. Here, we conclude that the D&F properly justifies the use of a cost-plus-a-fixed-fee contract.

Thus, contracting officers have a great amount of discretion in determining the type of contract to be used. A determination that substantial pricing uncertainty exists will usually be sufficient to support a decision to employ a cost type contract, Comp. Gen. Dec. B-152598, Dec. 3, 1963, Unpub.; Comp. Gen. Dec. B-164165, Aug. 13, 1968, Unpub. In Jerry Fairbanks Productions, Comp. Gen. Dec. B-181811, 75-1 CPD ¶ 154 (1975) the Navy's decision to award a cost-plus-fixed-fee contract to secure training films was upheld where the contracting officer had determined that these services could not be obtained on a fixed price basis because "adequate specifications suitable for a firm fixed price contract" were not available. However, the formal determinations and findings rarely contain much more than a mere recitation of the statutory requirements. For example, the ERDA D&F in

the Tosco case is practically the same as that used by the Navy in Leo Kramer Associates, Comp. Gen. Dec. B-182340, 75-1 CPD ¶ 205 (1975). The Comptroller General will also usually defer to the agency's decision not to use a cost type contract, National Veterans Law Center, Comp. Gen. Dec. B-198738, 81-1 CPD ¶ 58 (1981).

III. THE WORK STATEMENT

The work statement is the portion of the schedule of the contract which describes the task which the contractor is expected to perform as his part of the agreement. It is of central importance in the contracting process since it serves as one of the major methods of communicating the desires of the Government to the contractor. The other major method is communication during the performance of the contract. It also has great legal importance since it serves as the baseline from which the contractor's performance is evaluated, his costs are judged allocable and his fee is found to be earned. From this perspective the work statement is the most important element of the contract, since all other elements of the agreement revolve around it.

It should be noted at the outset that the legal significance of the work statement varies quite considerably depending on the exact type of cost reimbursement contract that is being used. In the case of a cost-no-fee contract, which by its nature places a minimum of risk on the contractor, the work statement has relatively minor legal significance although it is still important in communicating the desires of the Government to the contractor. At the opposite pole, in a cost-plus-incentive-fee contract where the contractor bears significant risk, the work statement plays a major role in analyzing and deciding almost all legal issues that may arise under the contract. The cost plus fixed fee contract is in the middle ground in this respect, and the legal significance of its work statement is also midway between these other types of cost reimbursement contracts.

In these circumstances, it is highly important that those who work with cost reimbursement contracts develop a full understanding of the purpose of the work statement and the ways that it can be made to better serve this purpose as an integral part of the contract.

A. The Purpose of the Work Statement

In the contractual context, the major purpose of the work statement is to define the agreement which the parties have made so that they, and others, can determine what was expected of the contractor at the time he entered into the contract. From a legal point of view, it can be seen that the work statement describes the contractor's primary obligations under the contract. The work statement will accomplish this purpose if it is