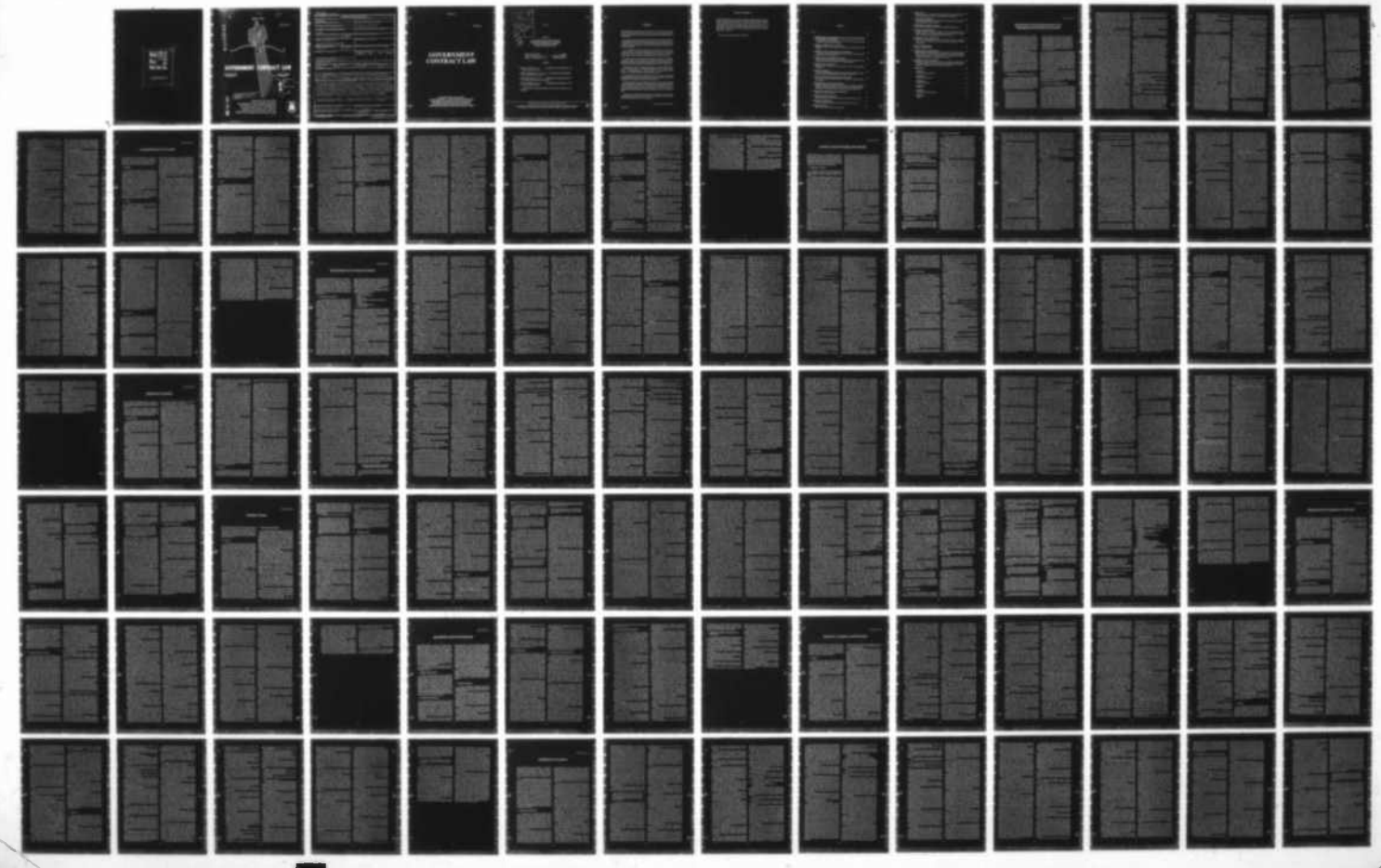
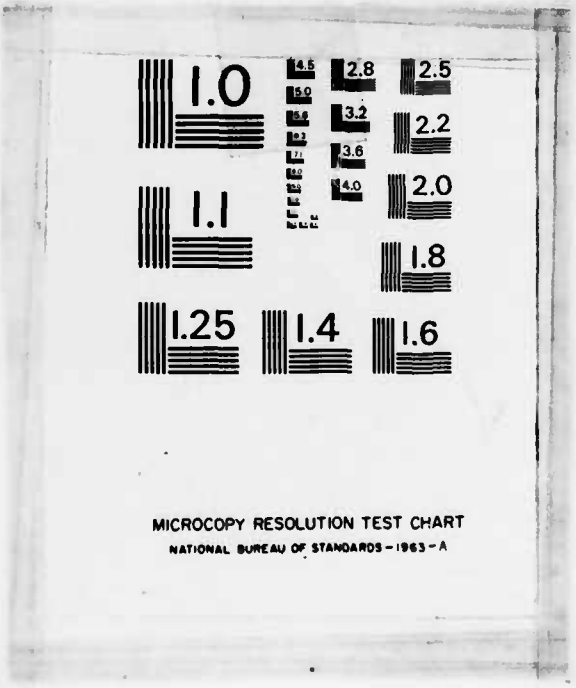
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This document provides a narrative treatment of the law of government contracts under twenty chapter headings: Introduction to Government Contract Law; Essential Elements of a Contract; General Contract Principles and Authority; Formation of Government Contracts Methods of Contracting; Funding Contracts; Financial Aid and Assistance to Contractors; Specifications and Work Statements; Inspection, Acceptance and Warranties; Modification of Contracts; Equitable Adjustment; Patents and Data; Labor Law; Government Property; Prescribed Contract Clauses; The Disputes Procedure; Remedies of the Contractor; Default Termination; Termination for Convenience; Remedies of the Government.

In addition are six appendices: Government Organization Charts; Glossary of Legal Terms; Selected Bibliography; Clauses; Roadmap of Contractor Remedies; and Statutes.

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THIS PUBLICATION HAS BEEN REVIEWED AND APPROVED BY COMPETENT PERSONNEL OF THE PREPARING COMMAND IN ACCORDANCE WITH CURRENT DIRECTIVES ON DOCTRINE, POLICY, ESSENTIALITY, PROPRIETY, AND QUALITY.

Foreword

THIS 1982 EDITION, like its predecessors, will serve as the textbook for the Government Contract Law Course taught at the School of Systems and Logistics. The primary purpose of this text is to facilitate course instruction at the class sessions presented at Wright-Patterson Air Force Base.

The course outline and content were approved by the Defense Contracting/ Acquisition Career Management Board. Study materials for this text have been produced from official, as well as auxiliary, sources by the faculty of the Department of Contracting Management of the School of Systems and Logistics, Air Force Institute of Technology of the Air University, Air Training Command.

As it is intended for non-lawyers attending a short course, the law is presented in a concise narrative form. This material is supplemented with cases drawn from "Government Contract Law-Cases", 1977 edition, for a rounded approach to the subject. This edition of the text includes coverage of Fraud, Waste and Abuse, not found in previous editions.

The subject matter covered is aimed at the broad Government outlook. In this respect, Government Contract Law complements the procurement regulations and provides a preventive law treatment for procurement personnel. While it may suggest workable solutions to legal problems, it does not purport to promulgate policy or be, in any sense, directive.

Of special help and value to students are the appendices A through F contained in this volume. The topics covered are: "Government Organization Charts," "Glossary of Legal Terms," "Selected Bibliography," (Contract) "Clauses," "Roadmap of Contractor Remedies," and "Statutes" pertinent to specific chapters of the text.

Acknowledgement and thanks are offered to Mr. Jerome G. Peppers, Acting Dean, School of Systems and Logistics, and Mr. Donald G. Benoit, Chief, Department of Contracting Management, who provided administrative support to the project.

The authors are listed on the inside title page. They are to be commended for undertaking a work of this magnitude in conjunction with their daily teaching responsibilities and within the time limitation for completion. Not to be forgotten are contributing authors to past editions: Attorneys Richard L. Stanley, Richart H. Shutte, W. Jack Grosse, William J. McGrath, John M. Rankin, Robert Bruce Shearer, Rufus Boutwell, Roy Garr, and James F. Gill.

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Professor James O. Mahoy, Editor

March 1982

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This volume is valued at 84 hours (28 points).

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CHAPTER 1

Introduction to Government Contract Law: Organization of the Federal Government

THE PURPOSE OF THIS CHAPTER is to provide a theoretical framework within which the concept of Government contracts can be understood in the light of both historical and current practices. The law of Government contracts, which is highly specialized, has increased in importance, scope and complexity with the growth of Government and the volume of its business. A knowledge of Federal Government organization, legislation pertinent to Government contracting, and regulations through which legislation is implemented, will facilitate the study of succeeding chapters.

2. Although it may be generally stated that the same basic legal principles which govern private contracts apply to Government contracts, exceptions are numerous because of the unique status of the Government as a contracting party. As a sovereign, the Government has certain unusual powers and immunities. On the other hand, it is subject to limitations arising from the fact that the United States is a Government of delegated powers. In particular, the agencies of the Government, such as military departments, have only that authority to contract which Congress or the President chooses to delegate. By comparison, private parties have full power to contract as they please, subject only to specific limitations based on public policy.

1. Constitutional Principles of Separation of Powers

1-1. The document emanating from the Philadelphia Convention of 1787, ratified by State conventions and chosen by the people, is called the Federal Constitution. Together with later amendments, this constitution established the basic legal relationships which characterize our form of Government. The most fundamental concept contained in the Constitution is the principle of separation of governmental powers; Chief Justice Taft expressed it as follows:

> The Federal Constitution nowhere expressly declares that the branches of the Government shall be kept separate and independent. All legislative powers are vested in a Congress. The executive power is vested in a President. The judicial power is vested in one Supreme Court and in such inferior courts as Congress may from time to time establish. The judges are given life tenure and a compensation that may not be diminished during their continuance in office with the evident purpose of securing them and their courts in independence of Congress and the Executive. Complete independence and separation between the three branches, however, are not attained, or intended, as other provisions of the Constitution and the normal operation of the Government under it easily demonstrate. By affirmative action through the veto power, the executive and one more than one-third of either house may defeat all legislation. One-half of the House and two-thirds of the Senate may impeach and remove the members of the judiciary. The executive can reprieve or pardon all offenses after their commission either before trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress. . . . Negatively one House of Congress can withhold all appropriations and stop the operations of Government. The Senate can hold up all appointments, confirmations of which either the Constitution or a statute requires, and thus deprive the President of the necessary agents with which he is to take care that the laws be faithfully executed.

1-2. These are some examples of positive and negative restraints available under the Constitution to each branch of the Government in defeat of the action of the other. They show that the independence of each branch is qualified. The fact is that the judiciary, quite as much as Congress and the executive, is dependent on the cooperation of the other two, so that Government may go on. Indeed while the Constitution has made the judiciary as independent of the other branches as is practicable, it is, as often remarked, the weakest of the three. It must look to the force of public opinion for a continuity of necessary cooperation, in the face of reluctance of either of the other branches.

1-3. From this point of view, each of the three branches of Government balances the others and this system of checks and balances prevents abuse of power by any one branch. In a sense, therefore, the Constitution creates powers and distributes them among the three branches of Government. At the same time, it imposes limitations on each branch separately and all three collectively.

2. General Concept of Delegation of Power

2-1. Whether a power can be legally delegated depends on the intention of the framers of the Constitution, as manifested by the wording used in the Constitution itself. Some powers cannot be delegated because they are granted to a specific person in the Constitution. For example, only Congress can declare war, because the Constitution specifically limits this power to Congress. But where a power is not specifically assigned, and where it logically appears that it would be impossible for the holder of the power to personally superintend the exercise of the power, delegation is not only permitted but necessary. Generally, the whole power cannot be delegated; but all this means is that final responsibility for the exercise of the power or the duty, as the case may be, still must rest with the one legally charged with the responsibility. Historically,

the measure of whether a power or duty had been properly delegated depended upon the presence of a standard by which the administrator could be guided in his decision making. More recently, it has been recognized that a standard provision does not provide the sole test: "In order to avoid an unconstitutional delegation of power, it is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaption of the congressional policy to infinitely variable conditions constitute the sense of the problem" (*Lichter v. United States* 334 US 742 (1947)).

2-2. **Executive Branch.** Article II of the Federal Constitution is often referred to as the Executive Article. It provides, in section 1, "The Executive Power shall be vested in a President of the United States of America." The executive power is given in general terms but, where necessary, limitations are expressly and specifically provided. With one notable exception, the field of foreign affairs, wherein the President is said to have an inherent power, the powers of the Chief Executive are enumerated in Sections 2 and 3: (1) He is Commander in Chief of the Army and Navy of the United States and the Militia of the United States when called to actual service; (2) He may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their offices; (3) He has the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment; (4) He has the power to make treaties by and with the consent of the Senate, provided that two-thirds of the Senators present concur; (5) He nominates and appoints, with advice and consent of the Senate, ambassadors, other public ministers and consuls, Supreme Court Justices, and all other officers of the United States (subject to some limitations); (6) He may fill vacancies that may happen during the recess of the Senate (they expire at the end of the next session); (7) He may, on extraordinary occasions, convene one or both Houses and in the case of disagreement with respect to time of adjournment, he may adjourn them to such time as he shall think proper; (8) He shall receive ambassadors and other public ministers; and (9) He shall commission all officers of the United States.

2-3. In addition to the above powers, the President has the following duties: (1) He shall take care that the laws be faithfully executed; (2) He shall from time to time give to the Congress information on the State of the Union; and (3) He shall recommend to their (Congress') consideration such measures as he shall judge necessary and expedient.

2-4. Very early in our history, it was recognized by the judicial branch of our Government that it would be literally impossible for the President to effectuate or superintend every power or duty that he possessed either expressly or impliedly. In *Williams v. United States* (1843), I How 290, Justice Daniel stated, "The President's duty in general requires his superintendence of the administration, yet this duty cannot require of him to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to such services, which nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform." The first agencies to be created were the cabinet posts approved by President Washington. As the Government became more complex and demanding, it was necessary to expand agency development in both the executive area of responsibility and in its legislative counterpart. This proliferation has resulted in the existence of hundreds of agencies and subagencies in Government today.

2-5. Under the executive branch of the Government there are departments, agencies, and offices which are responsible to the executive. These are the agencies through which the President discharges the responsibilities of his office. While it is neither feasible nor prudent to discuss all of the numerous agencies, a few of the more important ones will be briefly touched upon at this point. (See Appendix A.)

2-6. The Executive Office of the President consists of a number of offices, councils, and advisory boards created to assist the President in carrying out his functions by providing services and advice:

a. The White House Office is staffed by special assistants who serve the President in the performance of the many detailed activities incident to his immediate office. Many of these assistants are personal aides who are specialists in fields in which the President wishes and needs to be informed.

b. The Office of Management and Budget performs many services, the majority of which relate to the responsibility that the President has, under the Budget and Accounting Act, to transmit to Congress the proposed annual budget of the United States. In addition, that office serves as the Government's budget agency; and it plans and promotes improvement, development, and coordination of other agencies.

c. The Council of Economic Advisors analyzes the Nation's economy, advises the President on economic developments, and recommends policies for economic growth and stability.

d. The National Security Council, which includes the President, Vice President, Secretary of State, and Secretary of Defense, is advised by the Director of the Central Intelligence Agency and the Chairman of the Joint Chiefs of Staff. It functions to advise the President on the integration of domestic, foreign and military policies relating to national security.

e. The Office of Science and Technology Policy advises and assists the President in developing policies to use science and technology most effectively.

f. The Office of the United States Trade Representative sets and administers overall trade policy.

g. The Council on Environmental Quality formulates and recommends national policies to promote improvement in environment.

h. The Office of Policy Development, established in 1977, formulates and coordinates recommendations on domestic policy.

i. The Office of Administration provides administrative support services to all units within the Executive Office.

2-7. The Cabinet, which consists of thirteen executive departments, advises the President on the many matters which he is expected to superintend as the Chief Executive. The executive departments of the Cabinet are: State; Treasury; Defense; Justice; Interior; Agriculture; Commerce; Labor; Health and Human Services; Housing and Urban Development; Transportation; Energy; and Education.

2-8. Many so-called independent agencies tend to function for the benefit of other agencies or other activities not so

closely associated with Presidential functions. Some of these independent agencies are listed below.

a. The General Services Administration manages Government property records, and provides systems for the procurement and distribution of supplies.

b. The Nuclear Regulatory Commission develops national policy for generation, use, and control of atomic energy.

c. The National Aeronautics and Space Administration assists in implementing the policy that activities in space be devoted to peaceful purpose for the benefit of all mankind.

d. The Small Business Administration promotes the interest of small businesses. (See Appendix A.)

2-9. For purposes of Government contracts, the most important executive department is the Department of Defense. Within this Department are the Secretary of Defense, the Deputy Secretary of Defense, the Defense Staff Offices, the Joint Chiefs of Staff, the three military departments and the military services within those departments, the unified and specified commands, and other Department of Defense agencies. The Secretary of Defense is the principal assistant to the President in matters relating to the Department of Defense. The Department contains a number of Asssistant Secretaries in special functional fields. The Under Secretary for Research and Engineering has responsibility for the acquisition of all weapon systems of the Department of Defense. Logistics is managed by the Assistant Secretary for Manpower, Reserve Affairs, and Logistics.

2-10. The National Security Act, as amended in 1949, established the Department of Defense as an executive department, and at the same time designated the Department of the Army, the Department of the Navy and the Department of the Air Force as military departments within the Department of Defense. Each of the military departments is headed by a Secretary who is subject to the direction, authority, and control of the President as Commander in Chief and of the Secretary of Defense. Each Secretary of a military department is a member of the Armed Forces Policy Council, which functions as an advisory body to the Secretary of Defense on matters of broad policy relating to the armed forces. Each military department has an extensive organization which is necessary to the proper functioning of the department and to the discharge of its duties as directed by the Secretary of Defense and the President.

2-11. Each of the military departments, within the Department of Defense, has an organization responsible for procurement. In the Department of the Army, the Assistant Secretary (Installations, Logistics, and Financial Management) is authorized and directed to act for the Secretary of the Army in the field of procurement and production. In the Department of the Navy, the Assistant Secretary of the Navy (Manpower, Reserve Affairs, and Logistics), the Chief of Naval Material, and Naval Material Command are responsible for providing material support to the operating forces of the Navy. In the Department of the Air Force, the Assistant Secretary of the Air Force (Research, Development, and Logistics) is responsible for the direction, guidance, and supervision of procurement activities. Procurement authority has been delegated to the Office of Aerospace Research and all of the major commands. However, the bulk of procurement is done for the USAF by the Air Force Systems Command for the acquisition of weapon systems, and by the Air Force Logistics Command for the support of those systems when they become operational.

2-12. In addition to the procurement organizations of the military departments, the Department of Defense has, as an integral part of its organization, the Defense Logistics Agency. This Agency functions to provide logistical services directly associated with supply management activities and other support services as directed by the Secretary of Defense.

2-13. Most civilian agencies engage in some procurement that is peculiar to the function or mission of the agency. Notable is the National Aeronautics and Space Administration (NASA) in space exploration.

2-14. Easily the most important civilian agency procurement function is that of the General Services Administration (GSA)—the central supply agency of the Federal Government. It procures the items common to more than one agency, such as office equipment, computer services, automobiles, etc. Under the Federal Property and Administrative Services Act of 1949, it governs (1) procurement, supply, and maintenance of real and personal property and nonpersonal services; (2) promotion of utilization of excess property; (3) disposal of domestic surplus property, and (4) sound records management. To accomplish these functions, it operates four services; the Federal Supply Service, the Property Management and Disposal Service, the Public Building Service, and the Automated Data and Telecommunications Service. FSA operates the regional centers to carry out its mandates, especially procurement and property disposal.

2-15. Although DOD and GSA dominate federal procurement, other agencies buy, and issue procurement regulations to govern their purchases. Usually, however, these regulations merely supplement the Defense Acquisition Regulation (DAR) or Federal Procurement Regulation (FPR).

2-16. **Legislative Branch.** The legislative branch of the Government is often referred to as the law-making branch. This body, divided into several offices, exercises certain powers that are sanctioned by the Constitution.

2-17. Article I of the Constitution is called the "Legislative Article." It sets forth the organization of the legislative branch of our Government. The various sections of Article I provide for the creation of the two houses of Congress which comprise our legislature, for the granting of express powers (Section 8), and for limitations on the exercise of power (Section 9). Under Section 8, the Congress is given powers which can be implemented only through the passing of legislation. Under this Section, clauses 1 through 10 give Congress the power to regulate commerce, establish laws for maintenance of a monetary system, establish postal systems, promote science and useful arts, provide for courts lesser than the Supreme Court, and to punish crimes committed on the high seas. Clauses 11 through 16 are the "war clauses" and consist of the following:

> To declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; to Raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than Two Years; To provide and maintain a Navy. To make Rules for the Government and Regulation of the land and naval forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming and disciplining the Militia, and for governing

such Part of them as may be employed in the service of the United States.

Clause 17 provides for the District of Columbia. As in the case of the executive branch, the legislative branch finds it necessary to delegate many of the functions expressly and impliedly granted to it by the Constitution. To facilitate the discharge of responsibility, Congress has created the numerous agencies which characterize our governmental system today.

2-18. Within the legislative branch itself, several offices have been created by acts of Congress. The most important of these offices, in terms of Government contracts, is the General Accounting Office (GAO). Created by the Budget and Accounting Act of 1921, its functions and activities have been broadened and extended by subsequent amendments. The primary purpose of this office is to assist the Congress in providing legislative control over the receipt, disbursement, and application of public funds. It operates principally in the fields of auditing, accounting, claims settlement, legal decisions, and records management. The GAO is under the direction of the Comptroller General of the United States. The Comptroller General is appointed by the President, with the advice and consent of the Senate, for a term of 15 years. This office reports to the Congress and publishes the decisions it renders on the legality of expenditures of public funds to heads of executive departments or independent agencies. (Under some circumstances, contracting officers may request advance decisions on questions involving the awarding of a contract. In addition, any bidder may request a decision on the legality of a proposed or actual award of a contract that adversely affects him.) Recently added legislative offices are the Congressional Budget Office and the Office of Technology Assessment.

2-19. **Judicial Branch.** The third branch of the checks and balances system is the judicial. The Constitution provides for establishment of the Supreme Court and lesser courts, and outlines their functions as law interpreting bodies.

2-20. Article III, Section 1 of the Constitution of the United States provides that "The Judicial Power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." The Judiciary Act of 1789 created the Supreme Court of the United States in conformity with this constitutional provision. Section 2 of Article III provides that "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State (since affected by the eleventh amendment); between Citizens of different States; between Citizens of the same State claiming Lands, under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." The Constitution then proceeds to designate the original jurisdiction of the Supreme Court as extending to all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party. In all other cases in which the Supreme Court has jurisdiction, such jurisdiction is appellate.

2-21. According to the Constitution, Congress has the power to create inferior courts. At various times, Congress has in fact created such courts as the need became apparent. Immediately below the Supreme Court in the Federal Court System is the United States Court of Appeals. The United States is divided into 13 judicial circuits, and in each Circuit there is a Court of Appeals. The purpose of the Courts of Appeals is to relieve the Supreme Court from having to consider all appeals in cases originally decided by Federal trial courts. These appeal courts review all final decisions of many Federal administrative bodies. The decision of a United States Court of Appeals is final except that it is subject to review by the United States Supreme Court.

2-22. The US District Courts are the trial courts in the Federal Court System. Each state has at least one district court (many have more than one). Altogether, there are 94 district courts. Decisions from the district courts are reviewed by the United States Supreme Court. Since the passage of the Contract Disputes Act of 1978, government contract cases no longer are heard by these courts. The only exceptions are cases arising out of contracts of the Tennessee Valley Authority (TVA).

2-23. In addition to these courts of somewhat general jurisdiction, Congress has created some special courts. The United States Court of Claims (established in 1855) was reestablished in March 1982 as the United States Claims Court. Its original jurisdiction extends to any claim against the United States that is founded upon the Constitution, any act of Congress, any regulation of an executive department, or any contract (express or implied) with the United States. The United States Court of Military Appeals is a final appellate tribunal in court-martial convictions. This court is judicially independent, although it operates as a part of the Department of Defense for administrative purposes.

2-24. The Administrative Office of the United States Courts functions as the administrative office for all United States Courts. It is responsible for all matters relating to clerical and administrative personnel, and for statistical data relating to the operations of the Federal courts.

3. Sources of Procurement Law

3-1. The following sources of information are of particular pertinence in the area of Government procurement law.

3-2. **Statutes.** Acts of Congress are codified under general topics in the United States Code. Those laws relating specifically to the armed forces are found in Title 10 of the Code. References to the Code will be title and section number; e.g., 10 USC 2304(a)(1). Some Acts are not codified, and will be referred to by their public law number and number of the Congress which enacted them; e.g., Public Law 83-324. These uncodified laws are generally appropriation acts, legislation too recent to have been published in the Code, or temporary laws.

3-3. **Executive Orders.** Administrative directives are issued by the President (frequently implementing authority provided by Congress). These orders are referred to by numbers and dates; e.g., Executive Order No. 9859, May 21, 1947.

3-4. **Decisions.** Some decisions made by the executive, legislative and judicial branches of the Government are given the force and effect of law. These decisions are published periodically, for public information, and are the largest body of government contract law.

3-5. ***Administrative Agencies.*** Some of the agencies responsible for such Governmental decisions are:

a. Comptroller General. As the head of the General Accounting Office, the Comptroller General of the United States is charged with making certain that appropriated funds are spent properly. Since nearly all procurement involves appropriated funds, this officer's authority extends to nearly all areas of procurement law. He may not rule on Contract Disputes, however—this area is reserved by law to the Boards of Contract Appeals and to the Court of Claims and the Supreme Court. His more important decisions are published periodically in a set of books entitled "Decisions of the Comptroller General" published from 1852 to date and containing opinions from 1791. These are cited, for example, as 20 Ops. Att'y. Gen. 105.

b. Boards of Contract Appeals. The Armed Services Board of Contract Appeals (ASBCA), established by charter within the Department of Defense, consists of civilian attorneys. Its function is to decide contract claims under the Contract Disputes Act of 1978. Civilian agency disputes are heard by similar boards in the various agencies. These boards furnish the greatest number of procurement law decisions.

3-6. ***Courts.*** All of the Federal courts' decisions are published in bound form in one of several reporting series. References will be by volume and page number, e.g., 137 US 286. These cases form the most authoritative source of law on the subject of federal contracts.

3-7. **Regulations.** It is important to note that the decision-making processes of government agencies are governed by certain regulations. In particular, the Defense Acquisition Regulation and Federal Procurement Regulations play an important role in Government contract law.

a. ***Defense Acquisition Regulation.*** Defense Acquisition Regulation (DAR), formerly Armed Services Procurement Regulation (ASPR), is published by the Department of Defense. It is topically divided into 26 sections. References are by section and paragraph number, and date of latest revision. The provisions of DAR, being issued under statutory authority, have in part the force and effect of law; mandatory contract clauses set forth in DAR, if crucial to the contract relationship, will be regarded as incorporated into procurement contracts by operation of law even though not actually included in the contract. This law is being developed on a case-by-case basis. DAR amendments may be issued to become effective within a specified time after their publication, although their use is authorized on receipt on an optional basis. Such amendments will not be applicable to an invitation for bids issued after publication of the amendments but prior to their effective date if the bidders were not informed that the amendments would govern the procurement.

b. ***Federal Procurement Regulations (FPR).*** The General Services Administration promulgates these regulations pursuant to the Administrative Procedures Act. Because of compliance with the act, including publication in the Federal Register, these regulations are given the force and effect of law. To a great extent, they parallel the DAR, e.g., the DAR section is the FPR "part"; the DAR part is the FPR subpart. The FPR further breaks down into sections and subsections. Thus, DAR 15-205 corresponds with FPR 1-15.205. The number 1 indicates the chapter of Title 41, Code of Federal Regulation assigned to FPR.

3-8. **Office of Federal Procurement Policy (OFPP).** DAR and FPR regulate by implementing agency policy and the flow-down of statutes and executive orders. At the apex of procurement policy is the Office of Federal Procurement Policy, housed in the Office of Management and Budget. Created by Public Law 93-422 on August 30, 1974, it prescribes uniform procurement policy for all federal agencies toward six statutory goals: (1) uniform regulations, (2) criteria for soliciting viewpoints of interested parties in developing policies and regulations, (3) policy relating to reliance on the private sector to provide needed property and services, (4) promote and conduct research in procurement, (5) establish a government-wide procurement data system, and (6) recommend and promote programs for recruitment, training, career development, and performance evaluation of procurement personnel.

a. ***Federal Acquisition Institute.*** An example of the sixth goal is the creation by OFPP of the Federal Acquisition Institute (FAI). The broad policies thus promulgated by the Administrator (OFPP) are binding on all federal agencies, though he may not interfere in day-to-day operations. He is appointed with the advice and consent of the Senate, and is required to keep the Congress fully informed.

1. Federal Acquisition Regulation (FAR). In accomplishment of its first statutory goal of establishing uniform regulations, the OFPP has adopted the concept of the Federal Acquisition Regulation (FAR). This regulation, when promulgated, will consolidate and replace DAR, FPR, NASA-PR, and other acquisition regulations containing material applicable to more than one agency. FAR manuals will supplement the Regulation for better understanding of particular subject areas. Individual agency supplementation will be restricted to agency-peculiar subjects and internal management instructions.

(a) The Term "Acquisition." The FAR will use the term "Acquisition" in place of the term "Procurement." Procurement is to be considered synonymous with "contracting," as a sub-set of acquisition functions. "Acquisition" means the acquiring by contract with appropriated funds of property or services by and for the use of the Federal Government through purchase, lease, or barter, whether the property or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition includes such related functions as determinations of the particular public need, solicitations, selection of sources, award of contracts, contract financing, contract performance, and contract administration.

(b) Arrangement. FAR will be issued in the Code of Federal Regulations (CFR) as Chapter 1 of Title 41, Public Contracts. The general arrangement, CFR numbering systems and nomenclature, will conform with Federal Register standards. Subjects will be organized logically and sequentially.

CHAPTER 2

Essential Elements of a Contract

THE PURPOSE OF THIS CHAPTER is to provide a framework of reference within which one can understand the formation of a simple contract. The essential elements in contract formation are analyzed and related to the intentions of the parties who seek to enter the contract relationship.

1. Definition

1-1. A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty (Restatement of Contracts, Section 1). A contract may consist of a single promise by one person to another, or there may be any number of persons or any number of promises. Technically, there is a difference between contract and agreement. Agreement is a broader term since it encompasses promises which the law will not enforce. This difference illustrates the point that contract is strictly a legal concept, and that the kinds of promises that are enforceable through the legal system are those which the system deems of sufficient social or economic importance to warrant enforcement.

1-2. The parties must each give something of value, called "consideration." The terms of the agreement must be clear and certain. The agreement must not require the performance of an act which has been declared illegal, either by statute or by special rules of the common law.

2. Capacity

2-1. In order for our legal system to enforce agreements, certain elements are essential. If these elements are not present, the contract is unenforceable.

2-2. There must be at least two persons, each of whom has legal capacity to act. The parties to the contract must, by offer and acceptance, manifest *assent* to the terms of the contract. The word "manifest" is used, rather than "agree," because contract formation is essentially an objective process whereby the parties are judged not by what their subjective intention might be but by what they lead others to reasonably believe. Use of this objective standard to measure assent prevents one party from claiming, after it becomes apparent to him that the bargain or agreement is not what he really wanted, that he meant something other than what the other party thought that he meant. Through the use of an objective standard, the parties are held to have intended that which a reasonable person would interpret their actions to mean.

2-3. Actually, legal incapacity is the method the law uses to protect a party who may not have the ability to understand the terms of an agreement. For the most part, contracts in which certain classes of persons are a party are declared to be voidable. The distinction between a voidable and void contract is that the former is enforceable at the option of the party the law seeks to protect, while a void contract is not enforceable at all. The intention of the legal system is to protect classes of persons against their own unwise acts, while at the same time, to allow members of that class to enforce contracts that will benefit them. Under this theory, the contract is enforceable against the party who is not to be protected by the incapacity rule. Legal incapacity may arise from infancy, insanity, drunkenness, and contractual capacity on the part of corporations.

2-4. The contracts of infants (usually defined to be under twenty-one years of age) are voidable at their option. In most cases, the infant need not do any affirmative act in order to derive the benefit of the rule of voidability. An infant may avoid his obligations under a contract executory to him (meaning performance on the part of the infant has not been completed) by merely doing nothing. In order to bind himself in an executory contract, the infant must ratify the contract upon reaching majority. Ratification is any act which indicates that the infant intends to be bound by his promise. Such ratification can be express, orally or in writing, or implied. Ratification by implication occurs where the infant, after reaching majority, performs the contract (or begins performance), e.g., an infant obligated to the repayment of a loan makes an installment payment after reaching majority.

2-5. Where the contract has been performed or partially performed by the infant, he must take some affirmative action in order to avoid obligation. The affirmative action is referred to as disaffirmance. The result will be, of course, to have the contract rescinded. As in any case where rescission has been effected, the parties must return any consideration that they have received from the other party. Therefore, when an infant disaffirms a contract he must return whatever consideration he has received or he will not be able to demand the consideration that he has parted with from the adult party. An interesting question arises when the infant cannot return what he has received in consideration because he has squandered it. The majority of states would hold that the infant is still entitled to the return of the consideration with which he parted.

2-6. One major exception to the infant rule is that an infant is liable for the reasonable value of necessaries that are furnished him. This liability arises not out of any contract that he may have entered (this contract is still voidable at his option), but out of the theory of quasi contract. The infant is

liable for those necessaries that he has actually consumed. The value that the infant is liable for is the value that these things were to the infant. In most cases, the value will be approximately what the infant would have had to pay at retail. Just what is a necessary will depend on the circumstances of the case. Generally speaking, necessaries include subsistence, health, comfort, and education. The age of the infant, his customary standard of living, and other factors, will bear heavily on the definition in any particular case.

2-7. The law concerning insane persons is much the same as it is for infants. One important difference involves the distinction between nondeclared and adjudicated insanity. Where a party to a contract has, prior to contract formation, been legally adjudged insane, his contracts are absolutely void. Where a party to a contract has not been legally declared insane and he enters a contract, the insanity must have existed at the time that the contract was formed. If the party was lucid at the precise moment of contract formation, the contract is not voidable. Interesting problems arise where the contract was made during a lucid moment but where subsequently the party became insane.

2-8. A contract made by a person while he is drunk, so that he is incapable of understanding the effect and nature of it, is voidable at his option. The rules which are applicable to infancy, with respect to affirmance, ratification, and disaffirmance, are applicable to contracts of drunken persons.

3. Offer

3-1. One of the most frequent problems concerns the distinction between an offer and an advertisement. Advertisements are generally construed as invitations for offers—primarily because the language of advertisement does not indicate a present contractual intention. Where notices are published that competitive bids will be received, the submission of a bid constitutes an offer.

3-2. Another frequent problem is lack of clarity. An offer must be so definite in its terms, or require such definite terms in the acceptance, that the promises and performances to be rendered by each party are reasonably certain. This does not mean that every term in the offer must be absolutely certain. It is enough if the essential terms are certain; and under the Uniform Commercial Code, even essential terms can be supplied by implication. Under Section 2-305 of the Code, for example, the parties can conclude a contract even though price is left open. The price implied is a reasonable one at the time set for delivery. In all cases, the missing term is deemed to be a reasonable one under all the surrounding circumstances.

3-3. A cardinal rule is that only the intended offeree can accept an offer. In many cases, there is one and only one specific offeree in whom the power of acceptance is vested. Acceptance by one other than the intended offeree does not ripen into contract formation. The offeror may, of course, direct the offer to a class of persons or to the public generally, intending that any member of the class or public has the power to accept. Where reward notices are posted or circulated, the intention of the offeror (the one promising to pay the reward) is that anyone can be the offeree. Under most circumstances, there can be only one acceptance; but the number of offerees is unlimited.

3-4. In most situations, however, the power of acceptance is limited to a specific offeree, and no other may accept. Notice of the offer must be communicated to the offeree (an uncommunicated offer is not an offer at all). An offer communicated to a particular offeree cannot be accepted by another, and learning about such an offer will not avail another the opportunity to accept. This communication can be made by the offeror or by his agent.

3-5. In the vast majority of cases, contract formation is easily accomplished. The most important ingredient of contract formation is that the parties intend that a contract be formed. Where it is apparent that the parties really intended to be bound by their promises or acts, a contract will be found and enforced.

3-6. A general rule is that an offer continues to exist until the time stated in the offer itself for its expiration or, if no time is stated, until the expiration of a reasonable time. When the time has elapsed, the offeree's power of acceptance is terminated. Unless the offer is reinstated, there can be no contract. The clearest case is the one in which the offer itself contains a time limit. The offeree must accept within the stipulated time, and it is no excuse that circumstances beyond the control of the offeree caused the delay. Frequently, the time stated in the offer is based on a condition, e.g., a statement that the offer will remain open as long as the offeree remains in possession and control of a specific property. If the offeror does not express a definite time period, the offer remains open for a reasonable time. A reasonable time usually depends on the nature of the contract, usage of business, and other circumstances in the particular situation. Certain offers, by the very nature of the subject matter, are impliedly intended to expire within a relatively short time period. Where the offer is for the sale of corporate stock, futures, or other things which have quickly fluctuating prices, a reasonable time may be hours or days. On the other hand, certain types of subject matter have rather constant price structures over an extended period of time. In these cases, a reasonable time may be weeks or months. In any case, a reasonable time is a question of fact to be decided according to what the offeror must have reasonably intended under all the surrounding circumstances.

3-7. Termination of an offer can be brought about by an act of the offeror, an act of the offeree, or by acts or circumstances beyond the control of either. The act of the offeror which terminates an offer is called a revocation. It is important to keep in mind that an offer for a proposed contract is under the absolute control of the offeror, at least in its inception. An offeror may designate any time that the offer is to remain open (whether fair to the offeree or not), the place where the acceptance is to be communicated, and any conditions that he wants to impose (unless public policy intervenes). An offeror can recall his offer at any time before the acceptance has become effective (except where an option has been paid for by the offeree, or where the offeror looks forward to a unilateral contract and the offeree has begun performance).

3-8. A paid option is, in a sense, a separate contract. In the typical case, an offeror promises that his offer will remain open for a stipulated period of time. To insure that the offeror will keep his promise, the offeree gives to the offeror some consideration with the intention that this exchange will bind

the offeror to his promise. The promise and the payment bind the offeror to his promise. This paid-for option is necessary, except in the case of a unilateral contract offer, to prevent the offeror from revoking his offer (see UCC 2-205). A person is not held to his bare, unsupported promise (UCC 2-205). From time to time, exceptions are granted on this proposition (Restatement of Contracts, section 90.). A notable exception is contained in the "firm bid" rule, discussed in Chapter 4.

3-9. Where the offeror is looking forward to a return act rather than a return promise (called a unilateral contract offer), and the offeree actually begins performance of the requested act, it would be unfair to allow the offeror to revoke his offer. Commencement of performance prevents revocation of the offer until a reasonable time has elapsed.

3-10. Revocation of an offer is not effective until it has been communicated to the offeree. If the offeree fails to receive the notice of revocation because of some fault of the offeror, the revocation is not effective. If notice of revocation is not received because of the fault of the offeree, then the revocation is effective even though the offeree does not have actual knowledge of it.

3-11. In many situations, revocation may be implied by circumstances. Where the offer is for the purchase and sale of a specific thing and the offeree receives reliable information that the thing has been lost or destroyed or sold to another, the offer is impliedly revoked. As one might imagine, cases arise in which there is a question as to the definition of reliable information. This is particularly true where the information proves to be false. Falsity does not necessarily make the information unreliable, however.

3-12. The most frequent offeree act that terminates an offer is rejection. A rejection may be manifested in several ways. When an offeree communicates to the offeror that he does not want to accept the proposal, the offer is terminated. Rejection must be communicated to the offeror in order to become effective. All the problems relating to agency which were referred to in the discussion on revocation are equally true with respect to rejection.

3-13. Another method by which the offeree rejects the offer is by counter offer—either an attempt to accept an offer with a material term changed or altered, or a counter proposal. The offeree may state "I accept your offer but I am unwilling to pay the price stipulated. Instead, I accept at . . . price." In both of these examples, the communication by the offeree constitutes a counter offer. The effect of a counter offer is twofold: the original offer is effectively terminated in the same manner that it would have been by an express rejection; and the counter offer itself becomes an offer. There is an offer between the original parties, but their positions are reversed: the original offeror becomes the offeree, and the original offeree becomes the offeror. Occasionally, a counter offer will not constitute a rejection of the original offer. This happens in those situations where either the offeree conditions his counter offer by making it clear that he is not rejecting the original offer but merely bargaining for different terms, or where the offer itself leaves some room for negotiation. In each of these situations, fact determination is extremely important; and the instances in which counter offers do not reject the original offer are very few indeed.

3-14. Circumstances beyond the control of either the offeror or the offeree may have the effect of terminating the offer. Death of either the offeror or the offeree, for example, prevents contract formation. The principle involved is that one cannot contract with a dead man. Where the offeror dies, there cannot be any presumption of a continuing intention to be bound into a contract. An exception is recognized in those situations where the offer is an irrevocable one. The legal theory is that the offeror, by binding himself to keep an offer open for a stated time, has knowingly and willingly relinquished his right to revoke; and that his continued existence is not vital to contract formation. But this is true only in those cases where the offer does not require the personal services of the offeror. Where the offeree dies, there cannot be a valid acceptance.

3-15. Where a positive law is enacted which declares the subject matter of the contract to be illegal, it is said that the offer is terminated as a matter of public policy. This termination will occur whether the performance of the offeror or the offeree is declared to be illegal (or against some positive rule involving public policy).

3-16. Insanity of either the offeror or the offeree prevents the contract formation because a person cannot enter a contract where he does not have the requisite mental capacity to fully appreciate his acts. The legal system protects those suffering mental incompetency by allowing them to default on their obligation or by allowing them to not live up to their promises. Where the incompetency occurs before contract formation, acceptance by an incompetent offeree is not legally binding; nor can an incompetent offeror be forced to maintain the continuation of his offer.

4. Acceptance

4-1. Most offers can be accepted only by or on behalf of the designated offeree. As explained before, the offeror has the absolute right to choose the person with whom he wants to enter a contract. Subject to the ordinary rules concerning the legal relationship of principal-agent, someone other than the offeree can accept the offer for the offeree if the offeror has not stipulated to the contrary. Acceptance by the offeree must be unequivocal. The offeror must know what the state of his offer is, and he must not be put in a position of uncertainty by an ambiguous communication from the offeree. Therefore, a conditional acceptance (where the offeree accepts, subject to the offeror doing something more than he promised in the offer) or a communication which hedges, procrastinates, or leaves the offeror in doubt does not constitute a binding acceptance. Adherence to the strict rule of unequivocality in the acceptance frequently causes not only hardship on the part of the offeree, but also often prevents a willing offeror from considering the acceptance as effective. In an attempt to alleviate some of the problems in this area, the Uniform Commercial Code has mitigated the common law rule by providing that additional or different terms in an acceptance become part of the contract unless: (1) they materially alter the terms of the offer, (2) the offeror gives prompt notification of his objection to them, or (3) the offer expressly limits acceptance to its terms as stated (UCC 2-207). To the extent that (2) above is the important provision of the code, the effect of the code will be to increase communication about offer and acceptance. Other things being equal, this should reduce the amount of uncertainty in contract formation.

4-2. An acceptance must be communicated in order to become effective. The offeror implies, unless he states an intention to the contrary or by implication dispenses with such a requirement, that contract formation can take place only upon proper notice that the offeree accepts the offer. One situation in which notice of acceptance is not necessary is where the offer looks forward to a unilateral contract and the offeror will know that the offer has been accepted. Where the offeror asks for his grass to be cut, for example, it is not ordinarily necessary for the offeree to notify the offeror that he has accepted the offer; but where offeror would not in the ordinary course of events know that the act had in fact been performed, the offeree is under a duty to communicate acceptance. In bilateral contract situations, it is absolutely necessary for the offeree to communicate his acceptance unless, by express provision or by implication from past dealings, the offeror waives communication of the acceptance.

4-3. Time, manner, form, and other conditions of acceptance are within the absolute control of the offeror. If the time, place and means of communication are expressed by the offeror, no other time, place or means will constitute an acceptance. Occasionally, it is important to distinguish between a requirement that the acceptance meet certain stated conditions and a suggestion that those conditions would be desirable. In the latter case, acceptance could be effective even though the offeree ignored the suggestions.

4-4. The problem which arises most frequently is that of when the acceptance becomes effective. Was a contract formed when the acceptance was mailed by the offeree before he received notice of revocation, although the acceptance was received by the offeror after he dispatched the revocation? Was a contract formed when the offeree mailed his letter even though the letter was lost in the mail? Was a contract formed when the offeree mailed an acceptance but then changed his mind and telegraphed a rejection which reached the offeror before the mailed acceptance? Before answers can be given to these questions, it is necessary to establish when an acceptance becomes effective. Revocation and rejection are effective only when received, but this is not true of acceptances. A general rule is that an acceptance is effective as soon as it is dispatched if the means used to communicate the acceptance is one authorized by the offeror. The offeror may choose an agency, and is deemed to guarantee that the agency will properly handle the communication. In effect, the agency for communication becomes the legal agent of the offeror. Under the familiar theory that notice to the agent is notice to the principal, the acceptance becomes effective when the offeree gives it to the agency for communication. But there is a distinction between "authorized" and "unauthorized" communication. If an unauthorized means of communication is used, then the acceptance is effective, if at all, when received by the offeror. "If at all" was used because it is quite possible for the offeror to designate a means of communication which must be used. Any other means will be ineffective regardless of whether the acceptance is actually received. In most cases, however, any means of communication used by the offeree will be effective. In many situations, the offeror does not designate the means of communication that the offeree is to use, and "authorized means" must be implied. A very general rule is that the offeree is authorized to use the same means of communication as the offeror used. Technically, any means of communication other than the one used by the offeror, or designated by him, is unauthorized. The Uniform Commercial Code will bring more liberalization into the area of communication: Section 2-206(1)(a) provides "An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable under the circumstances." The official code comment expresses very clearly the intention of this particular section: ". . . former technical rules as to acceptance, such as requiring that telegraphic offers be accepted by telegraphed acceptance, etc. . . . are rejected and a criterion that the acceptance be in any manner and by any medium reasonable under the circumstances is substituted. This section is intended to remain flexible and its applicability to be enlarged as new media of communication develop or as more time-saving media come into general use."

4-5. An acceptance which is late (in terms of the time stipulated in the offer or, in the absence of a stated time, a reasonable time) is merely a counter-offer; it may be accepted or terminated in the usual manner.

4-6. Acceptance of an offer usually comes about by the offeree's express words that he accepts the proposal, but this is not an exclusive method of accepting an offer. The offeree's conduct can result in an acceptance being implied. Receipt and retention of goods or property, for example, imply that the offeree accepts the contract.

4-7. In addition to affirmative conduct, the offeree's inactivity may constitute an acceptance. From past dealings, custom of the trade, or other standards which bind the parties, silence on the part of the offeree may result in acceptance. Silence alone is not acceptance; but silence coupled with something else, such as past dealings or circumstances surrounding the particular offer, may constitute acceptance. Silent acceptance is rare, but it does occur.

4-8. Acceptance of an offer is a manifestation of mutual assent by at least two persons. In order for there to be a contract, there must be a meeting of the minds of its parties. This meeting of the minds need not be in a subjective sense. It is sufficient that the parties have manifested mutual assent in an objective sense. Undisclosed understanding, by either party, of the meaning of his own words and acts, or of the other party's words and acts, is material where the intentions of either party are uncertain. Where the offeree misunderstands what the offeror meant, his subjective meaning is material only if the offeror's words were so ambiguous that they could have had two or more meanings.

4-9. The two types of situations involving mistake are usually designated as unilateral and mutual. The general rule is that a contract will not be rescinded where there is a unilateral mistake, but there are some exceptions. The rule is based on the theory that the offer is what the offeror leads the offeree reasonably to believe it is, and that it is inequitable to charge the offeree with that which would not put a reasonable man on notice. The courts do not say that where one party makes a mistake, the other party can hold him to it. The courts do say that where the error or mistake made was the result of negligence and the other party did not or could not be reasonably expected to know that a mistake had been made, the contract will be enforced. If a mistake is not due to negligence, but the other party reasonably relies on the mistake, the contract is still valid. An exception is made

where the parties can be put in a position of status quo.

4-10. Mutual mistake presents a slightly different situation. The parties disagree even though they appear to be in harmony. This happens where the language is so ambiguous that it has two different meanings. One must analyze the subjective intentions of the parties to ascertain whether the agreement constitutes a legally binding contract. A contract could exist if one of the parties knew or should have known that the other party could reasonably have attached a different meaning to the language. Such a contract would exist according to the meaning attached to the term by the party who knew only one possible meaning. Cases involving mutual mistake are rare.

5. Consideration

5-1. A fundamental concept in contract formation is bargain and exchange. Each party receives something of value, and gives something of value. Consideration is the name given to the "something of value," i.e., the price paid for a promise. Our legal system requires only a promise to do or not do something in order to form a binding contract. In a unilateral contract, the offeror is looking for the act requested. In bilateral contracts, however, each party exchanges a promise for a promise. Actually, a number of things constitute consideration: a promise; a forbearance; or the creation, modification, or destruction of a legal relation (provided that these are given in exchange) (Restatement of Contracts Section 75).

5-2. The law distinguishes between the sufficiency and the adequacy of consideration. Adequacy refers to weight—the substantiality of the act or promise given. Because of the difficulty in determining the actual worth of a promise or an act, the law will generally not delve into the adequacy of a consideration. Sufficiency, however, is another matter. "Sufficiency" means that consideration must have value, and is frequently stipulated this way: every consideration is sufficient consideration except that which is against public policy. An obvious example of an insufficient consideration would be a promise to murder someone.

5-3. The test of sufficiency involves benefit and detriment. In order for a promise to be binding on the party making it (the promisor), he must receive in return a legally sufficient consideration. This return consideration must be legally detrimental to the one who either gives it or promises to do so.

5-4. A promise to do something that the promisor is not legally bound to do, or a promise not to do something that he has a legal right to do, constitutes a detriment. The detriment suffered by the one who promises is usually of benefit to the other party, but this is not always true. Suppose that one person promises to pay another $100 if he will give up smoking cigarettes. The promise to give up smoking is a detriment to the promisor because he is giving up a right to do something that he has a legal right to do. It may not be a benefit to the one who extracted the promise, but it is not necessary that such benefit exist. It is enough that the one promising to give up smoking suffered a detriment. On the other hand, mere benefit without detriment is not sufficient consideration. Where Able agrees not to murder Baker, it is not sufficient consideration because Able does not suffer a legal detriment; he is promising not to do something that he does not have a legal right to do anyway. Where one promises to do something and lacks legal capacity to bind himself (insanity, or perhaps minority in a state where these contracts are void rather than voidable), the promise is not detrimental. Where one who promises to do something is already legally bound to do that act by prior commitment, or where a promise is illusory in the sense that it really promises nothing of any substantial value (a promise to buy all of a product that the promisor wants to buy), there is no detriment. The same can be said of a promise to do an illegal act.

5-5. Another important concept is that of mutuality of obligation. Both parties must be bound, or neither is bound. If consideration given by one party is legally insufficient, the party receiving the legally insufficient consideration is not obligated. If Able promises to do something that he is already bound to do (finish a building according to an existing agreement), and if this promise is given in exchange for a promise on the part of Baker (to pay money), Baker's promise will not be binding. Since Able would not be suffering a detriment, Baker is not receiving sufficient consideration. The idea behind contract formation is bargain and exchange, and Baker would not be receiving a fair exchange. An interesting line of cases involves requirement contracts. Suppose that Able promises to buy from Baker all the widgets that he needs or requires in the next year in return for Baker's promise that he will not sell to anyone else. This contract is binding on both parties. When Able promises to buy all the widgets he needs from Baker, he impliedly promises that he will not buy widgets from anyone else. This is a detriment because he has a legal right to buy widgets from anyone he pleases.

5-6. The promise of future performance and the giving up a right are valid considerations, but past "favors" of contractors for which no legal obligation exists may not be consideration for present promises by the Government. A contractor who "gave" supplies to the Government, for example, could not claim this as consideration for slipping the delivery schedule on a later acquired Government contract.

5-7. The doctrine of consideration has from time to time come under attack as unfair and, in many instances, unrealistic. The requirement of consideration in contracts stems from the theory that it is more likely that one party to an agreement will perform according to his promise if he expects to receive something of value in exchange. Therefore, it probably will not be necessary to force compliance by court action. Furthermore, it is more likely that a promise has in fact been made where there is consideration supporting it. In early England, it was possible to make unsupported promises binding by the use of a seal. It was thought that where the promisor took the time and trouble to affix his seal to a written promise, there was not much doubt that he made the promise and that he was serious. The majority of states have abolished the seal as a substitute for consideration, but some states have made consideration unnecessary in certain situations. Pennsylvania, New Mexico, California, and New York are typical of states where promises in writing are valid even though they are not supported by consideration. The Uniform Commercial Code, in Section 2-205, provides that an offer which states that it is irrevocable for a stipulated length of time, is in fact irrevocable if the promise is in

writing and signed by the offeror or his agent. Because of the hardship that is sometimes caused by the unenforceability of promises which are not supported by consideration, the doctrine of promissory estoppel was created. The Restatement of Contracts, Section 90, states, "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Through the use of this doctrine, the law attempts to prevent hardship even though a promise is not supported by consideration. The doctrine is infrequently applied.

6. Certainty of Terms

6-1. It is essential to contract enforceability that its terms be sufficiently clear to permit the courts to conclude that a contractual agreement was intended. If so concluded, the courts will apply well-established rules of construction to construe the meaning of the language used by the parties. Even important provisions, such as price and delivery schedule, have been supplied by the courts (a reasonable price or time) so that they might find the contract enforceable. Thus, to be fatally uncertain, the contract must be so indefinite as to have no exact meaning.

7. Lawful Purpose

7-1. The right to contract is fundamental, but not absolute. The liberty to contract is subservient to the public welfare. Reasonable restrictions may be imposed under the police power (when clearly required for the public interest). In addition to statutory control of the right to contract, the courts have the power to declare certain types of contracts contrary to the public policy—and to render them void.

7-2. As a general rule, a contract which violates a statute is unlawful and void, and will not be enforced. A statute can expressly declare that a specific type of contract is prohibited, and such contract is absolutely void. This is true whether the statute is State or Federal. An example of this type of statute is the one pertaining to gambling contracts.

7-3. There are some problems in this area, however. The view once taken was that a contract was void if made in violation of a statute which imposed a penalty. The modern trend seems to be to look to the intention of the legislature to determine whether that body intended the statute for the protection of the public or for the purpose of raising revenue. If revenue were the intention, then the contract is not void and, as a result, is not illegal. The following statutes are found in many states and, as a general rule, are for the protection of the public. Contracts made in violation of these statutes are null and void:

1. Statutes prohibiting gaming and wagers;
2. Statutes prohibiting the taking of usury;
3. Statutes prohibiting labor, business, etc., on Sunday;
4. Statutes regulating the sale of intoxicating liquor; and
5. Statutes regulating the conduct of a particular article of commerce.

7-4. Even without the benefit of statute, certain categories of contracts are against public policy. Public policy is the common sense and conscience of the community, extended and applied to matters of public morals, health, safety, and welfare. The principle of law is based on the theory that one cannot lawfully do that which has a tendency to be injurious to the public or against the public good. Contracts that bring about results which the law seeks to prevent are unenforceable as against public policy. Generally, actual injury or damage need not be shown since it is the tendency to prejudice the public good that is being prohibited. The following list is illustrative of those types of contracts deemed to be against the public interest:

1. Agreements to unreasonably restrain trade or business (reasonable restraints, such as a promise not to engage in business for a short time and in a small area, are not against public policy).

2. Agreements for the sale of, or traffic in, a public office (as where I contract with you for a price to use my political influence to get you appointed to a public office).

3. Agreements by public officers for greater pay than is fixed by law for the performance of official duties (where I offer a public official money to do something that he already is required to do).

4. Agreements involving the assignment by a public officer of his pay for future duties to be performed (assignment for past duties is not illegal or against public policy—here, the harm is that the public officer is not as likely to perform diligently where he knows that his future compensation in reality does not belong to him).

5. Agreements to influence legislation by personal solicitation of the legislature or other objectionable means, rather than by objective persuasion and argument (I can persuade him to pass this bill because of personal or political reasons).

6. Agreements to procure Government contracts by personal or political influence, or by corrupt means. Whether the fee is contingent is material in some courts—the rule being that if the fee is contingent, it appears that corrupt means or duress will be used; and this is against public interests.

7. Agreements by or between public or quasi public corporations which interfere with their public duty (where two railroads might contract to do something which might adversely affect their service to the public).

8. Agreements between private citizens which would violate duties owed to the public (as an agreement whereby one person for a return consideration agrees to withdraw his appeal to the legislature for a public improvement).

7-5. Other types of contracts are illegal and unenforceable because they are considered unfair or overreaching, or are believed to corrupt morals:

1. Contracts to defraud or injure third persons (an agreement to sell inferior goods and falsely advertise them—a contract to induce a person to break a contract with another person—a contract to commit a tort against another person, etc.).

2. Contracts harmful to the administration of justice (a contract to perjure yourself in a trial—a contract to suppress lawful evidence—a contract to not prosecute a felony, etc.).

3. Contracts whereby one party who does not have any interest in a suit maintains one of the parties to a controversy with the result that a suit is brought which would not have

been brought had it not been for the assistance (called maintenance).

4. Contracts whereby one party unrelated to the suit agrees with a party to the suit that they will split the proceeds of the suit, and whereby the one not related to the suit agrees to bear all the expenses of the suit (called Champerty).

5. Contracts harmful to the marriage relation (a contract between two persons to prevent the marriage of a third person—a contract whereby one person "bet" the other that he will not marry within a certain time period—a marriage brokerage contract—a contract whereby the father for consideration promises that his daughter will marry the other).

7-6. The law will not aid either party to an illegal contract. If the contract is executory, neither party may enforce it. If the contract is executed, a court will not permit rescission and recovery. Where an agreement is illegal in part only, the part which is lawful may be enforced if it can be separated from the part which is illegal. If any part of the consideration given for a single promise is illegal, and there is no possibility of separation, there can be no enforcement. If several considerations, one of which is bad, are given for several promises, and if the legal consideration is apportioned to the legal promise, the legal part is enforceable. If two promises, one lawful and one unlawful, are given for a legal consideration, the lawful promise is enforceable.

7-7. There are some exceptions to this "hands-off" doctrine. Where a party to the contract is the very one (or where he is in that class) for whose protection the contract was made illegal, he may enforce it or obtain restitution. Examples include:

1. Where a person buys bonds that are illegal because they conflict with Blue Sky laws, the one who buys them is the very one for whose benefit the laws were passed and, therefore, can enforce the contract.

2. One who is insured under a policy which is illegal because the company did not use an approved form can enforce the policy.

3. Where a party to the illegal contract repents and rescinds before any part of the illegal purpose is carried out, he may have restitution of the money or goods he has given.

4. Where a party to the contract is not in pari delicto because he was induced to enter into the bargain by fraud, duress, or strong economic pressure, he may have restitution (the other party is more to blame for this contract).

CHAPTER 3

General Contract Principles and Authority

ALTHOUGH SUBJECT to some important exceptions, general contract principles apply equally to private contracts and Government contracts. It is essential, therefore, that fundamental contract principles become a part of the working knowledge of anyone interested in the subject of Government contracts. To this end, this chapter endeavors to highlight some of the more basic general contract principles.

1. Classification of Contracts

1-1. Contracts are usually classified according to the intention of the offeror at the time he extends his offer. They may be bilateral or unilateral, express or implied, oral or written.

1-2. **Bilateral and Unilateral Contracts.** An offer which asks for a promise as agreed exchange is called a bilateral contract. In such a contract, each party is a promisor and a promisee. Probably the majority of contracts are of this two-sided kind. On the other hand, an offer which looks forward to an act as the agreed exchange is called a unilateral or one-sided contract. In this situation, one party is a promisor only while the other is a promisee only. The promise is conditioned upon the requested act, and does not become binding until the act is given. In some circumstances, it is either very difficult or impossible to determine just what the offeror wants in return for his promise. In these cases, it is presumed that an offer invites the formation of a bilateral contract. The rationale behind this presumption is that if the offer looks forward to a return promise, the offeror is afforded some degree of protection. This is true because in a unilateral offer the offeree may begin the act but not finish it, in which case the offeror does not receive what he wanted while at the same time, during the performance of the act by the offeree, the offeror is bound to keep his offer open, at least for a reasonable time.

1-3. **Express and Implied Contracts.** There are two kinds of implied contracts: implied in fact and implied in law (quasi-contracts). Express contracts and implied in fact contracts are based on actual agreement. In express contracts, the parties manifest their intention to be bound by using oral or written words or other signs or symbols that, by previous convention, stand for words and predetermined meanings. In the implied in fact contract, the parties manifest their intentions by conduct rather than by such words or other symbols. On the other hand, implied in law contracts (quasi-contracts) are not based upon an agreement or promises. Manifested intention to contract is not an element in its structure. In very general terms, an implied in law contract exists where one person has received or used something for which it is just that he should compensate the other. If one person confers a benefit upon another, he may recover the reasonable value of it in quasi-contract if, as between the two persons involved, it is otherwise unjust for the recipient to retain or enjoy the benefit. Under quasi-contract, the amount of recovery is not necessarily the amount that is paid for similar things or services (although this may be the price arrived at by the courts in some cases), but rather the worth of these benefits or things to the person who has received them. If Able expends costly time and money in doing something for Baker under such circumstances that the doctrine of quasi-contract would be brought into effect, Able may not recover if the service performed was not of any monetary value to Baker. In addition, not all benefits are compensable. One cannot force benefits on another, for example. Where one person refuses the service and the other performs the services anyway, there will not be any recovery in quasi-contract. The theory upon which quasi-contract is based is that of unjust enrichment. Quasi-contract is utilized only where it would be unjust not to compensate the person who performed the service, or who transferred title or use of goods.

1-4. Generally speaking, there are two prime areas in which quasi-contract cases arise. The first involves emergency fact situations. Where there is an emergency and one performs services for another, there is a presumption that the services are performed gratuitously. An exception is made when the performer of the services goes to great trouble or expense in the doing of the service. Another exception is where the one performing the service is a professional in that particular line of work. (There is a presumption that the professional is pursuing his profession.)

1-5. The second area in which quasi-contract cases arise is where one has a duty to do something and someone else voluntarily acts for him so that his duty is discharged or satisfied. The one who had the duty is unjustly enriched, and must answer in quasi-contract.

1-6. The Government cannot be held to be obligated under the quasi-contract doctrine; and the Court of Claims has no power to bind the United States in "quantum meruit" (for the reasonable value of services rendered) (*Fincke v. US*, Ct Cl 470-80C (1982)).

1-7. **Oral and Written Contracts.** As a general rule, a contract need not be in writing to be enforceable. In fact, the vast majority of contracts executed today are oral ones. However, there are some very important exceptions to the general rule. These exceptions were initiated about three

hundred years ago, in England. The British Statute of Frauds was enacted by Parliament in 1677. Its purpose was "the prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury." It contained two sections relative to the requirement of a writing in contract formation. Most states, by enactment of their own statutes, have followed the substance of each of these sections. In many states, however, variations have been deemed necessary and desirable. Section Four of the original statute required that no action could be brought unless the agreement was in writing, or unless there were some note or memorandum relating to the agreement and signed by the party who was to be charged with the contract, on

1. promises by an executor or administrator to answer damages to the estate out of his own estate,
2. promises to answer for the debt of another,
3. promises made upon the consideration of marriage,
4. contracts for the sale of lands or any interest in land, and
5. contracts not to be performed within one year of their making.

Section Seventeen of the original statute relates to the sale of goods over a specified amount. Both the Uniform Sales Act and the Uniform Commercial Code contain sections which have in effect enacted the provisions of the original Section Seventeen. Most states will not enforce a contract for more than $500 unless it is embodied in a written contract or memorandum signed by the party to be charged. There are some escape clauses, relating primarily to receipt and retention of goods.

1-8. The statute of frauds requirements do not apply to executed (completed on both sides) contracts, and the doctrine of part performance will operate so as to make enforceable many contracts which would have otherwise been unenforceable.

1-9. In the vast majority of cases involving large and socially important contracts, the parties reduce their understanding to writing so as to preclude any problems concerning the statute of frauds. In very few cases does one find any difficulty with a statute of frauds problem in large contracts. Probably the most frequent area in which statute questions arise is where the parties to a prior written agreement purport to modify the agreement orally. When the parties have entered a written contract and then subsequently agree to modify it orally, the oral modification is unenforceable if it is still executory. If the oral agreement has been executed, then it is enforceable because the only purpose of the statute is to prevent the enforcement of executory oral agreements.

1-10. The oral contract as such is not used in Government contracting. The funding statutes require:

> a binding agreement in writing . . . in a manner and form and for a purpose authorized by law

before an obligation can be recorded as such (31 USC 200). Oral orders under $10,000 may be placed with Federal Supply Schedule contractors (DAR 5-107). (The "writing" requirement is satisfied by the contractor's use of a delivery ticket.)

2. General Contract Principles

2-1. There are several principles involved in Contract Law. A principle can be defined as a fundamental truth or a basic law. Principles help us to understand certain aspects of Contract Law. We shall see how certain principles relate to four important aspects of Contract Law: conditions, divisibility, substantial performance, and discharge of contracts.

2-2. **Conditions.** The parties in many contracts either expressly or impliedly qualify their promises to perform upon the happening or nonhappening of an event which is called a condition. This condition can be almost anything other than the mere passage of time. It is customarily said that only contingent events can constitute conditions because if the event is not contingent, then it is bound to happen and therefore it falls within the rule that mere passage of time is not a condition.

2-3. Although it is only procedurally important, there are types of conditions that can qualify a promise. A condition which must happen before a duty to perform arises is called a condition precedent. A condition which follows the performance and operates to defeat or annul it upon the subsequent failure of either party to comply with the condition is called a condition subsequent. In either case, the happening of the condition excuses performance. The effect of a condition failure is to discharge the duty of the promisor (except where the condition is within his control and he is under a duty to bring about the happening of the condition). Where a condition is also a promise, its failure both excuses performance on the part of the promisor and gives him a cause of action for breach of contract. Frequently, however, it is difficult to determine when a condition is also a promise. In such circumstances, rules of thumb are resorted to. A condition is also a promise where the event which constituted the condition is within the control of the one who imposes it, and where he is under a duty to bring about the happening of it. A condition is also a promise where a bilateral contract is intended and the condition is the whole performance which has been promised.

2-4. Where promises in a contract are not expressly mentioned, the law may imply them as condition. Where the courts imply a condition, there is said to exist a constructive condition. In other words, the courts will imply, if they can reasonably interpret the parties to so intend, that promises may be conditions as well as promises. The real question is whether a promise is independent of the other promise (in a bilateral contract) so that the promise may bring an action for breach without performance or tender of performance. Suppose that Able agrees to buy Baker's house with delivery of the deed to be made on May 1, 1985. Payment must be made before Baker is obligated to perform or before Able can sue for breach. This is true even though Baker did not extract from Able the condition that he must pay or offer to pay simultaneously. A general rule is that where mutual promises are agreed to as the exchange for each other, and are to be performed simultaneously, each performance is a constructive condition of the duty to perform the other. If one is to be performed before the other, its performance is as much a condition precedent as if expressly made so. This was not always true. In the past, if promises were not expressly said to be dependent and conditional on each other, they were construed as independent and not conditional. The end of this

doctrine came in the early English case of *Kingston v. Preston*, Kings Bench, 1773. Today, the rule is that performances in bilateral contracts for an agreed exchange are constructively dependent and conditional (solely in the interests of a just result, whatever the intention of the parties in this regard).

2-5. **Divisibility.** Problems frequently arise with respect to contracts in which performances are in installments. Where the parties to a contract have divided their respective performances into installments or otherwise separate units, it is important to determine whether the contract is divisible. If the contract is divisible, the performances are independent—and it is only necessary to perform one installment in order to be entitled to receive the corresponding equivalent performance. Where a contract is not a divisible one, all of the installments would have to be performed before any payment or counter performance could be demanded. Suppose that Able has agreed to build four houses for Baker at a price of $50,000 per house. Able can collect $50,000 as soon as he finishes the first of the four houses. On the other hand, suppose that Able agrees to supply Baker with 75,000 bricks to be delivered in installments of 25,000 each on specified dates. Unless otherwise agreed upon, Baker will be required to pay only when all of the 75,000 bricks have been delivered.

2-6. Where performances are to be rendered at different times, the performance which is to come first is a constructive (if not express) condition precedent to the duty of the other party to perform later. If Able promises to buy goods from Baker on June 1 and pay on June 15, and Baker promises to deliver the goods on June 1, the delivery on June 1 by Baker is a constructive condition precedent; and Able may sue for nondelivery, on June 2, without tendering payment (which would not be due until June 15). If Able waited until June 15 to bring suit, he would be forced to tender payment because the performances become current conditions by the lapse of time. Since the agreed exchange can now be performed at the same time, the law will construct concurrent conditions.

2-7. If one performance takes time while the other can be performed instantaneously, the one that takes time is a condition precedent to the duty to perform the other. If Able agrees to work for Baker for one month, he cannot collect until he finishes the month's work.

2-8. **Substantial Performance.** Where a party to a contract promises a certain performance, the other party expects full performance, even if it is extremely difficult (or even impossible). The parties can require exact or perfect performance if they so desire; but insofar as constructive conditions are concerned, the promisor who has substantially performed has met the condition precedent to the extent that he can recover the full contract price, less damages suffered by the other party because of only partial performance. The doctrine of substantial performance does not apply where the party who partly performed is guilty of bad faith, or of willful breach.

2-9. The doctrine of substantial performance requires that the performance actually tendered be substantial in an objective sense. The concept of substantial performance is entwined in the concept of material breach. It might be said that performance is substantial where there has not been a material breach of a promise to perform. The relationship of material breach to substantial performance can be marked by a dividing line, one side of which is substantial performance and the other side material breach. As in all situations where a fine line separates two values, there are cases in which substantial performance and material breach are proximate to each other. In determining the materiality of a failure to fully perform a promise, the courts use a variety of considerations. A representative but not all inclusive list would include the degree of completion of the promise in a physical sense, the hardship on each party, the determination of the one failing to fully perform, and the adequacy of compensation to the injured party.

2-10. **Discharge of Contracts.** The "discharge of a contract" means that obligations incurred by the parties when they entered into the agreement are excused. They are no longer bound to perform. Contracts may be discharged in a number of ways:

1. Performance by both parties.
2. An agreement to rescind the contract.
3. A new contract. By agreement of all parties, the new contract can discharge the original one. An express substitution of the new contract for the original one would be given that effect by the courts. Additionally, a new contract (between the same parties, and relating to the same subject matter) which is wholly or substantially inconsistent with the first contract may discharge duties arising under that first contract. Under such circumstances, the courts infer a substitution.
4. The original parties may agree to substitute a new party for one of themselves. Assuming consent (of the new party), the new party assumes the obligations of the original party. A release, such as an agreement called "novation," acts to discharge only the substituted party's obligations.
5. An accord and satisfaction operates to discharge a contract. One of the parties may become dissatisfied with his promise and wish to substitute a new one. There are even instances where the parties are not certain just what they did promise. In both of these cases, the parties might agree to a new contract which has the effect of discharging the old one. Suppose that Able contracted to provide a service for Baker, with the price term left open (not unusual for service contractors, who frequently only quote cost estimates). After the work is completed, Able sends Baker a bill for $500. Baker, believing the bill to be unreasonable, refuses to pay it. After several discussions, the parties are unable to reach an agreement. Baker sends Able a check for $400, and writes "Final payment of amount due from Baker to Able on service contract no. 123 4" on the reverse side of the check. Able's cashing of the check would be interpreted by the Courts as final agreement on the price. Such an agreement is called an accord. When the bank honors the check by making payment, the agreement has been performed; and the performance of the new agreement in lieu of the old obligation is called a satisfaction. Thus, by accord and satisfaction, Baker's obligations under the original contract have been discharged. Note, however, that an accord and satisfaction will operate only where there is a genuine dispute over a contract term.
6. When a contract provides for the payment of a stated sum, payment of that amount will discharge the paying party of any further obligations; but actual payment is not essential if the contract amount is sufficient to act as a discharge (otherwise, the party to be paid could withhold performance by merely refusing to accept payment).

7. Finally, contract duties can be discharged by operation of law (execution of a judgment, or adjudication of bankruptcy).

3. Power and Authority of the United States to Contract

3-1. Among the powers delegated to the United States is the authority to enter into contracts. Though some of the specific contract duties are authorized in the Constitution, other duties are implied.

3-2. **Inherent Power to Contract.** The United States Government has the right to contract as an essential element of its sovereign powers. Not expressed in so many words, this right is implied from the theory that a Government is charged with the performance of public duties and that contract formation is not only proper but necessary. Since our Government is one of delegated powers, this right to contract is limited in scope to the authority delegated. Therefore, in order to ascertain whether a particular contract entered into by the Government is valid, it is necessary to examine the subject in light of constitutional authority. Both the executive and legislative branches of our Government are delegated specific duties under the Constitution; and in carrying out these duties, it is necessary for the Government to enter into contracts with non-Government parties. Article I establishes the Legislative Branch of our Government, and designates the power that is vested in Congress. Section VIII (of Article I) lists a number of powers that require contract formation. The most prominent powers include "To raise and support armies . . .", "To provide and maintain a Navy," "To borrow money on the credit of the United States." One of the most important clauses in the entire Constitution is Section VIII, Clause 18, which provides "To make all laws which shall be necessary and proper for carrying into execution of the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof." This "necessary and proper" clause supplies (by implication) power for the Government to enter into contracts, or engage in other acts which promote the discharge of responsibilities delegated to it by express provisions of the Constitution.

3-3. **The Concept of Authority.** The role of the contracting officer, or agent, is important in forming contracts. Since the agent exercises certain powers, his actions are crucial to the legal relations between the principal and the third party.

3-4. What a person can do himself, he can appoint someone else to do for him, subject to certain exceptions. In many cases it is not only permissible for one to act for another, but absolutely necessary. This is true where the one purporting to act is a corporate or Governmental entity.

3-5. **Principal-Agent Relationship.** Our Government can act only through persons, called agents. An agent can be defined as one who represents another person, called a principal. The relationship created by the association of a principal and an agent is called agency. This relationship arises when the principal authorizes the agent to act for him, in negotiation with third persons, and the agent consents to so act.

(A) Authority of the Agent. The link that binds third parties to the principal is the concept of authority. "Authority is the power of the agent to affect the legal relationships of the principal by acts done in accordance with the principal's manifestations of consent to him." (Restatement of Agency, Section 5.) Agencies are usually classified as (1) Real, Genuine, or Actual; or (2) Apparent. Real or Actual agency is further divided into Express, Implied, and by Operation of Law. Apparent authority is basically the legal situation of estoppel. It will be fruitful to discuss each of these agencies in moderate detail.

(1) Express Authority. Express agency, or authority, is created by explicit language, either in writing or orally. Ordinarily, where authority is given in writing, the element of proof necessary where a dispute arises is easily supplied by the writing itself. In those cases where the writing is ambiguous, parol or oral evidence may be used to prove the existence and limits of the authority, subject to the rule that oral evidence may not be used to contradict plain and clear meaning of a writing. Agency created by oral words is as binding as one created by a writing, but is sometimes more difficult to prove.

(2) Implied Authority. The second type of actual agency (authority) is that which is implied. There have been various interpretations of implied authority. Sometimes it is intended to mean incidental authority. This authority is that which is impliedly, although not expressly, given to an agent so that he may accomplish the task assigned to him by the principal. It frequently happens that the agent is assigned a task to accomplish but the minute details of accomplishment are not spelled out in the oral or written authority given to him. It can be safely assumed that the agent has implied authority to do what must be done in order to accomplish the purpose of the agency. The limits of this incidental authority are usually defined in general terms such as "usual, customary, and necessary." On other occasions, implied authority is that which is supplied by conduct rather than by expression. It is likened to an implied in fact contract situation wherein the act of a person creates authority in an agent to act for him. One case, *Moore v. Switzer,* 78 Colo. 63, defined implied authority as follows: "Implied authority of an agent is actual authority evidenced by conduct; that is, the conduct of the principal has been such to justify the jury in finding that the agent had actual authority in what he did. This may be proved by evidence of acquiescence with knowledge of the agent's acts, and such knowledge and acquiescence may be shown by evidence of the agent's course of dealing for so long a time that knowledge and acquiescence may be presumed."

(3) By Operation of Law. Agency by operation of law occurs where the principal has not actually given authority, but where he allows another to act as though the authority has been given.

(4) Apparent Authority. Apparent authority is based upon equitable grounds, and is effective only between the principal and the third party. It is supplied after the fact, and it can be truly said that the only purpose in finding apparent authority is to prevent unjust consequences. The principal creates apparent authority by leading a third party to believe that it exists. The principal's conduct must be such that the third party was acting reasonably in relying on the authority (and did it to his detriment). There are numerous situations wherein agency by apparent authority can be found. One of the most frequent is where the principal puts someone in charge of property or of a business. Ordinarily, a person in such a position is in fact an agent. Thus, where a storeowner

asks a friend to "mind the store, but don't sell anything or take any orders," and a customer buys an article, the necessary authority for the sale will be found. Other cases arise where there really is an agency relationship between the principal and his agent, but the agent's authority falls short of the authority usually vested in agents in similar positions. Where a third party justifiably relies on the usual authority of such persons in similar positions, apparent authority will supply the missing authority.

(B) Ratification. Events happening after the reliance by the third party are not material to the question of whether an agency actually or apparently existed. However, events which happen after the time when the third party purports to enter the contract with what he thinks is an agent, may create the agency or authority. The principle involved is called ratification. As a general rule, a principal may ratify an unauthorized act of his agent which the principal could have authorized the agent to perform at the time that the agent did in fact perform the act. If the agent actually acted for his own benefit, then the principal cannot ratify.

(C) Burden of Proof. Agency is not presumed, but must be proved by he who asserts that there is an agency.

(D) Ramifications of Principal-Agency Relationship. Many ramifications may flow from the relationship of principal and agent.

(1) Fiduciary Relationship. It is generally stated that there exists between the principal and agent a fiduciary relationship which requires the utmost good faith and loyalty on the part of the agent. The agent must act solely for the principal, and must not work against the principal's best interests in any personal capacity.

(2) Liability of Agent. An agent is liable to his principal for any wrongful use of the principal's property which is in the agent's charge. Of course, the agent is not liable in his personal capacity for any of the contracts that he enters in behalf of his principal, unless he is acting without authority and the principal does not ratify his unauthorized acts.

(3) Imputation of Knowledge. Probably the most outstanding characteristics of the relationship, as it affects third parties, is the imputation of knowledge acquired by the agent to his principal. Any knowledge acquired by the agent, within the scope of his duties, must be relayed to his principal and if the agent either does not relay the information, or does so belatedly, the principal may suffer injury that may have been caused by such inaction. The rationale is that the agent is the principal for purposes falling within the scope of his agency. There are exceptions to this rule, however. Where the agent acquires knowledge from a source which requires that he keep it confidential, for example, such knowledge will not be imputed to the principal. Similarly, where the agent and the third party collude to cheat or injure the principal, the knowledge of the agent will not be imputed to the principal. Finally, where the agent acquired knowledge in some capacity other than his agency, such knowledge will not be imputed to his principal.

3-6. In previous paragraphs, reference was made to the authority given to Government by the Federal Constitution, and to the fact that redelegation was necessary. Reference was also made to the Defense Acquisition Regulation, which is in reality a redelegating authority designed to implement the responsibilities of the branches of Government. The Defense Acquisition Regulation vests responsibility for procurement in the heads of departments and agencies of the executive branch. Within the Act itself, the heads of agencies are given the authority to delegate any power under the Act that the head of the agency has authority to exercise, subject to certain exceptions. The Defense Acquisition Regulation unifies the implementation of authority by subordinate officers and agents, and it specifies the duties, responsibilities, and express authority of officers contracting for the benefit of the Government. Thus, the Constitution, legislative acts, and executive department regulations, provide a framework within which the concept of authority is defined.

3-7. **Similarities and Differences Between Commercial and Government Authority and Contracts.** In this section, we shall examine some commercial/Government similarities and differences in order to better understand the principles of Contract Law. Generally, these similarities and differences are centered around the roles of Government and the commercial agent.

3-8. ***Similarity.*** Actually, there are many similarities between commercial and Government contracts with respect to the concept of authority. Of course, when we speak of a Government principal, we are speaking of the United States Government. All those who act for or in the name of the Government are agents. As in private contracting, the Government is bound by the acts of its agents committed within the scope of their authority. In many cases, the problem is one of ascertaining the authority of the officer or person purporting to act in behalf of the Government. In the majority of cases, fortunately, the authority of agents is a matter of statute or regulation. Where the duties, powers, responsibilities, and authority exercised are not in conformity to the statute or regulation, that exercise is *ultra vires* and not binding on the Government. In answer to the charge of harshness, one can point to the often stated principle that one is presumed to know the law or, stated another way, ignorance of the law is no excuse. Since all statutes and regulations are required by law to be published and available to the general public, one cannot claim ignorance of the written law. Even though a party dealing with the Government does not, in fact, know of the appropriate law, he is deemed to know it under the doctrine of constructive notice.

(A) Ratification. In the area of ratification, the rules in Government contracts are approximately the same as in private contracts. A contract made by an agent of the Government, not binding because the agent lacked the authority to act, may become binding on the Government upon ratification by a principal (superior agent) who had the power to grant the authority at the time the unauthorized act was committed. The Head of the Procuring Activity has this authority.

(B) Approval. One final word on the subject of authority concerns the concept of "approval." Ratification and approval are entirely different concepts. Approval of a contract, if required by statute or other rule, involves the procedure of submitting a proposed contract (or provision of a contract) to superior authority as a condition precedent to binding effect. At all times, the agent has authority to enter the contract, subject to the condition precedent. In ratification, as previously stated, the contracting officer does not have the authority to enter the contract at any time.

3-9. The Government may be legally bound by acts of its agents, even though the authority of the agent is not spelled out in a statute or regulation. Where a contracting officer has express authority to act, he may have implied authority to implement the responsibility charged to him. This is the doctrine of implied authority, discussed earlier. An agent of the Government, who needs to act in order to accomplish an objective, has implied authority to do whatever is necessary to carry into effect his express obligation. This implied authority is usually referred to as being incidental to express authority. The rules regarding implied authority applied to Government contracts are the same as those applied to private contracts.

3-10. ***Differences.*** One of the major differences between Government contract law and commercial contract law is the agent's authority to exercise the proper power within certain bounds. The principle that deals with this concept is apparent authority or estoppel.

(A) Apparent Authority and Estoppel. Government contract law differs from private contract law in the area of apparent authority or estoppel. The Government is not bound by the unauthorized acts of its agents. This principle has been based on the doctrine that a party entering into arrangements with representatives of the United States has the responsibility of ascertaining whether the representative is acting within the bounds of his authority. Since apparent authority and estoppel are based on the concept of reliance, a party doing business with an agent of the Government relies at his own risk because if the agent does not have actual authority to act, he will not be found to have apparent authority. This position can be rationalized, although it is frequently said to be a departure from private contract law principles. In discussing apparent authority earlier, it was said that the justification for applying the doctrine could be found only in those cases where it was the holding out of the principal that the agent had authority (and not the holding out of the agent himself). Since the delegation of authority from principals to agents in the area of Government contracts is open and available for everyone to see, it can hardly be said that the third party was misled. Apparent authority or estoppel will not apply so as to bind the Government where the act by the agency was not authorized by legislation or is unconstitutional. On the other hand, where an agent makes false representations in an area where he is authorized to make representations, the Government will be bound by such misrepresentations. A more difficult problem arises where the agent exercises authority that he doesn't have, although the agency which he represents has the authority to authorize such an act, or acts in excess of that which he has. In either of these cases, the Government can and may be estopped to assert that the agent lacked the authority he exercised. The reason for allowing the third party to hold the Government to contracts based on authorized acts of its agents is not much different than it is in the area of private contracts: it is unfair not to protect the third party. Two elements are present: it will be unjust, and the principal had the legal ability to allow the agent such authority. It almost goes without saying that a principal cannot be held to authorize an act which is illegal or which he could not authorize; but where legal ability to authorize an act is found, then it is necessary to examine the circumstances. More and more Government contracts, or parts of them, are being enforced on the basis of apparent authority.

(B) Equitable Estoppel. Another form of estoppel has been employed to bind the Government to the actions of its agents. The courts have called it "equitable estoppel." It arises only when: (1) the Government is acting in its proprietary, rather than sovereign capacity; and (2) the agent of the Government is acting within the scope of his authority. Since contracting is a proprietary function of Government, that requirement is easily satisfied; and most actions of Government contracting personnel are within the scope of their authority. When these criteria are present, the Government may be estopped from denying the binding nature of its agent's action if:

a. the Government knew the facts;

b. the Government intended the contractor to rely on its actions;

c. the contractor was ignorant of the facts; and

d. the contractor relied, to his detriment.

An exhaustive treatment of the doctrine is given in the case of *United States v. Georgia-Pacific Co.*, 421 F2d 92,99 (9th Circuit, 1970). The Comptroller General has applied the doctrine in bidding situations (Fink Sanitary Service, Inc., B-179040, 1974). Although the doctrine is employed sparingly, courts do expect the Government to turn "square corners" with the people.

3-11. **Sovereignty of the Government.** Sovereignty of the Government suggests autonomous control, or existence without external control. We shall see in this section that our Government is sovereign, but permits itself to appear nonsovereign as situations require.

3-12. ***General Nature.*** The Supreme Court of the United States has said that when the Government comes down from its position of sovereignty and enters commerce, it submits itself to the same laws that govern individuals. This statement represents the position that our Government is on an equal footing with the contractor. The Government never fully "steps down" from its position, however, and the delegators prevent a complete stepping down by the very terms of the Constitution. Our Government never gives up its image as a sovereign unless it does so voluntarily, and this can be done only to the extent that the Constitution authorizes.

3-13. Earlier, reference was made to the Constitution's delegating power. The "necessary and proper" clause vested discretionary power to carry these activities into effect, with whatever reasonable means deemed necessary. Extension of this "necessary and proper" clause involves the concept of "eminent domain." Our Government, with fair compensation, can appropriate whatever is needed to accomplish its ligitimate ends. In a very practical sense, then, it can be said that the Government never really steps into another world but merely allows itself to become involved to the extent necessary to accomplish desired ends.

3-14. Why bother to enter the field of commercial contracts at all if the Government could, as a sovereign, acquire whatever it needed by condemnation? The philosophy that it is easier to encourage cooperation than demand it lies at the root of the answer. The Government encourages private action to accomplish its goals. The Government can never allow itself to be put in a position that endangers the purpose intended or that benefits one private individual at the expense

of another. For this reason, the Government cannot and will not be taken advantage of because to allow this would be to prefer one constituent over another. The primary method used to accomplish tight control is to require those dealing with the Government to do so on an all-or-nothing basis. Through the use of a standard form contract designed to afford maximum protection to the government under all possible known circumstances, the Government is able to dictate the terms of contracting to such an extent that the other contracting party has very little to say about what the contract terms shall be. The judicial branch, acting as the watchdog of justice and fairness, frequently decrees relief to nongovernment parties on the grounds that an ambiguous contract is construed against the one who dictates its terms. This is consistent with the balancing theory that is used in private contract law to protect the weaker party.

3-15. In summary, it is fair to state that the Federal Government maintains its image of a sovereign at all times; but it can and does permit itself to play the role, at least in part, of a nonsovereign. That role is always subject to change, however. It could be said that the Government is still the prince though clothed in commercial rags.

3-16. ***Fundamental Rules.*** With a few notable exceptions, the differences between contracts involving the Government and those involving private parties are attributable to the nature of contract negotiations rather than to some theory of Governmental privilege. However, there are some fundamental rules by which the Government receives preferential treatment.

(A) Immunity from Suit. One aspect of this is that the sovereign is immune from suit. A sovereign acting in accordance with its delegated responsibilities must not be harrassed by private suits to such an extent that its function is impaired. Actually, however, the Government puts aside its sovereign immunity and allows itself to be sued under certain circumstances. Under the Tucker Act, the Government permits suits that arise out of express or implied contracts. These actions are brought in federal courts, and are subject to review.

(B) Sovereign Acts. Another aspect of sovereignty is the immunity that the Government enjoys from acts of obstruction to the performance of its contracts. Where one agency (say legislative) obstructs or impairs the performance of another Governmental agency (say executive branch), the Government is not liable for such obstruction. This immunity is subject to one exception: where the obstruction is of a direct, rather than indirect, nature. The distinction is between an act committed for the general public good and an act committed solely for the purpose of interfering with a particular contract. While the effect of the latter might be general, its application is direct; and any such obstruction caused by the act would be compensable or remedial.

(C) Federal Law Governs. Another aspect of sovereignty is the question of which law is to be applied. The very famous case of *Erie R R v. Tompkins* (decided in 1938) held that in federal court cases involving private parties, the state law of the place where the federal court sits will be applicable to the controversy. If the Erie doctrine were applied, the Government's rights under a contract could vary from state to state; and it is highly desirable that the Government's affairs be administered on a uniform basis. The case of *Clearfield Trust Company v. United States* (1943), however, held that the Erie doctrine does not apply to cases in which the Government is a party. The rule of law that governs litigation between private parties and the Government is formulated either by the legislature through appropriate acts or by the federal judiciary through case decisions.

(D) Immunity from Taxation. Finally, the Federal Government and its agencies and property are immune from state and local taxation under the supremacy clause of the Federal Constitution. This tax immunity was established in the very famous case of *McCulloch v. Maryland* (1819), where John Marshall stated that "the power to tax involves the power to destroy." The modern tendency, however, is to retreat from a strict interpretation of this principle. In many situations, a tax on a party dealing with the Government, or upon property owned by the Government, will be upheld unless the tax discriminates against either the Government or its business associates.

3-17. ***Contract Principles.*** Generally speaking, there are three areas in which Government contract principles may differ from commercial ones: Required Clauses, the Firm Bid Rule, and Implied Contracts.

(A) Required Clauses. The majority of the differences between Government and private contracts arise because of clauses that are required in Government contracts. The Defense Acquisition Regulation (DAR) requires that certain clauses be inserted in contracts in which the Government is a party. Many of these mandatory clauses would not be found in contracts between private parties. An example is the Changes clause. Under this clause, a contracting officer may make changes within the general scope of the contract and, where a change in the cost of the promised performance occurs, an equitable adjustment is provided for. The unique feature of this clause is that the contractor is required to proceed with the work as changed before negotiating the price of the change. The Disputes clause sets Government contracts apart from those involving private parties. Under this clause, any dispute (between the contractor and the contracting officer) that relates to the contract must first be determined by the contracting officer. An appeal by the contractor may be taken to the agency Board of Contract Appeals; but unless the decision of that Board is fraudulent, capricious, arbitrary, or so grossly erroneous as to imply bad faith, or is not supported by substantial evidence, it is final. In the field of private contracts, there is no such provision to be found. Perhaps the closest that one could possibly come to this procedure would be in contracts involving mandatory arbitration of a dispute over a question of fact.

(B) Firm Bid Rule. Under ordinary contract law, an offeror may withdraw his offer (bid) at any time before it is accepted (unless the offeror accepted consideration to keep it open). This is true even though the offeror has expressly promised to keep the offer open. In Government contracting, however, under formally advertised procurement, the general rule is that an offeror (bidder) cannot, in the absence of special circumstances, either withdraw a bid or recover a deposit made at the time of its submission. On occasion, this doctrine has been relaxed by the courts where there are special circumstances such as an honest mistake or a misleading on the part of the Government. The rationale behind this doctrine is that the Government is at a disadvantage in

comparison with private offerees in the sense that the Government must either accept the highest (or lowest as the case may be) responsive bid or reject all of the bids and readvertise. Therefore, the Government should be allowed a reasonable time after the opening of bids to ascertain whether collusion or fraud has been perpetrated.

(C) Implied in Law Contracts. A final difference can be found in the area of implied contracts. Earlier reference was made to the distinction between implied in fact and implied in law contracts. Generally, the Government is subject to the same rules that are applicable to implied in fact contracts as a private party would be subject to. Implied in law contracts present a different situation. The crux of the matter is consent. The courts have consistently declined to recognize a contract binding upon the United States where the element of consent was wholly lacking and could not be reasonably implied. Even in those instances where the Government has actually derived a benefit from the services of a private individual, the courts have refused to recognize an obligation on the part of the United States to pay where no evidence of consent on the part of the Government could be shown. In private contracts, the law would probably imply consent on the theory of unjust enrichment. As in all cases of doctrine, there are some exceptions. Where the Government has taken property or services under fraud (through its authorized agents), for example, relief is given in quasi-contracts. Also, where the Government uses property with the express consent of the owner, but where the owner expects compensation, an implied contract to pay a reasonable compensation for such usage arises. Notwithstanding these two areas of exception, cases in which the Government has been held liable under a theory of implied in law contract are very rare.

4. Procurement

4-1. In order for the Government's many branches to properly carry out their numerous functions, they must engage in the business of acquiring equipment and supplies. By far the most significant (in volume of expenditure) is military procurement. Military procurement began even before the founding of the nation. The problem of equipping and supplying the forces of George Washington must have been as complex, measured by the standards of the time, as the problems of the missile and space age are today. Our nation was still an infant when familiar questions arose—who should control military purchasing, and how should it be accomplished?

4-2. **History.** From the very early years of this country's beginning, the military faced problems of procuring equipment and supplies for its forces. However, provisions made by Congress authorized certain Departments to be responsible for certain procurement matters. As the procurement matters grew more complex, more provisions had to be made to insure that the business of acquiring supplies and equipment could be regulated more efficiently.

4-3. In 1792, Congress provided that War Department supplies would be purchased by the Treasury Department. Just six years later, in 1798, the War Department and the newly created Navy Department were authorized to procure all the supplies and services needed for the military and naval services. In 1809, the first federal statute requiring advertising appeared. Although a literal reading of this early statute would indicate contracting officers had a choice between two equally available methods of procurement, purchases were made by advertising except where public exigencies necessitated immediate contract performance. And subsequent statutes developed specific ground rules for advertising. In 1842, a law dealing with stationery supplies and printing required (1) advertising for bids once a week for a least four weeks in a newspaper published where the work was to be performed, (2) description of the required supplies or services in the advertisement, (3) sealed bids opened under direction of the procurement officer in the presence of at least two persons, and (4) award to the low bidder, provided he could furnish security for the Government in case of default.

4-4. In 1843, a statute added a requirement for the preparation of an abstract of bids. In 1852, contracts were required to be advertised at least sixty days before award; and the presence of bidders at the bid opening was authorized. These requirements are quite similar to those now set forth in Section 2305 of Chapter 137. In 1860, a statute (later incorporated in Section 3709 of the Revised Statutes) was passed that reads: "All purchases and contracts for supplies or services, in any of the departments of Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery of performance is required by public exigency, the article or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged between individuals." The particular significance of this statutory provision was the requirement of advertising with only two exceptions: contracts for personal services and contracts where public exigencies necessitated immediate performance. This statute, with certain exceptions, continued to regulate the placement of military contracts until World War II.

4-5. One further and important exception to Section 3709 of the Revised Statutes must be mentioned. The courts, the Attorney General and the Comptroller General consistently ruled that advertising was not required under that statute in circumstances which made competition impractical (e.g., the existence of only one source). From these early days, then, in some cases where only one source was available, neither the War nor Navy Departments utilized the procedures of formal advertising to effect such procurements.

4-6. Less than two weeks after Pearl Harbor, the Congress enacted Title II of the First War Powers Act of 1941. This Act authorized the President to empower agencies connected with the war effort to enter into contracts without regard to existing provisions of law, wherever such action was deemed to facilitate prosecution of the war. On December 27, 1941, Executive Order 9001 implemented the act and authorized the War and Navy Departments to make contracts without compliance with statutory requirements for formal advertising. On March 3, 1942, the Chairman of the War Production Board prohibited all contracting by the formal advertising method unless specifically authorized. For the duration of

World War II, the great bulk of military procurement was negotiated under the authority of the First War Powers Act.

4-7. At the close of World War II, a study was initiated for the purpose of developing peacetime methods. The proposed bill which evolved from that study was transmitted to Congress by the Acting Secretary of the Navy, who stated that its primary purpose was to permit the War and Navy Departments to award contracts by negotiation when the national defense or sound business judgment dictated the use of negotiation rather than the more rigid formal advertising procedures. The Senate Committee on Armed Services, in commenting on the purpose of the bill in its report, stated: "This bill, as amended, provides for a return of normal purchasing procedures through the advertising—bid method on the part of the armed services, namely, the War Department, the Navy Department, and the United States Coast Guard. It capitalizes on the lessons learned during wartime purchasing and provides authority, in certain specific and limited categories, for the negotiation of contracts without advertising. It restates the rules governing advertising and making awards as well as fixing types of contracts that can be made." This bill was eventually enacted as the Armed Services Procurement Act of 1947. Our present law, Chapter 137 of Title 10, United States Code, which amended and codified the Armed Services Procurement Act of 1947, requires Department of Defense contracts for property or services to be formally advertised except under seventeen specific situations where negotiations may be used. Chapter 137 is applicable to the purchases and contracts to purchase of the Department of the Army, the Department of the Navy, the Department of the Air Force, the Coast Guard, and the National Aeronautics and Space Administration.

(A) Armed Services Procurement Regulation. The Armed Services Procurement Regulation was issued by direction of the Assistant Secretary of Defense (Installation and Logistics) under the authority contained in Department of Defense Directive No. 4105.30 dated March 11, 1959 and Section 2202, Chapter 137, United States Code. As stated in the Introduction (1-101), it " . . . establishes for the Department of Defense, uniform policies and procedures relating to the procurement of supplies and services under the authority of Chapter 137, Title 10 of the United States Code, or under other statutory authority." The Armed Services Procurement Regulation (ASPR) is now called Defense Acquisition Regulation (DAR).

4-8. It is important to note that some mandatory provisions of DAR have the force and effect of law. The very important case of *G. L. Christian and Associates v. United States*, 312 F2d 418 (1963), held that the termination for convenience available to the government was a part of the contract even though the mandatory clause to that effect was not included in the contract.

CHAPTER 4

The Formation of Government Contracts

THIS CHAPTER EXAMINES the common law, statutory, and procedural framework affecting the formation of Government contracts. The preceding chapter explained legal concepts and principles generally applicable to the formation, performance, and discharge of contracts. The following chapter analyzes statutes and regulations prescribing specific methods and processes involved in the selection of Government contractors. Here, legal topics which may influence the outcome of efforts to form Government contracts are considered.

1. The Common Law Framework

1-1. The law recognizes a number of circumstances under which the attempts by the parties to form a contract may not be effective in creating the intended legal obligations. In some instances, neither the Government nor the contractor may be bound. In other instances, either of the parties may have an option to get out of the bargain. In still other instances, one party may have an option while the other party may be obliged to honor the bargain. Fault or blame may be a material consideration in determining which contracts are effective in binding a party. The various rules in this area are generally reflected in the concept of avoidance.

1-2. **Avoidance.** Either or both parties to a contract may, in some instances, totally avoid the legal obligations contemplated in the contract. Avoidance may be at the election of both parties, at the election of only one party, or imposed upon both parties although neither seeks it. It occurs only where an intended contract has been completely formed but, for some reason, is ineffective.

(A) Means. The rights and obligations set forth in any completed contractual instrument may be subject to avoidance by several means. The contract may be void from the beginning. It may be voidable by one or both parties. It may be subject to rescission, wholly or in part. It may be subject to reformation, wholly or in part.

(B) Effect. It does not follow that the failure of a contractual instrument to impose legal obligations on one or both parties leaves their respective legal positions unaltered. A complete failure to alter legal positions may occur in only a few cases where the instrument is void upon its creation and neither party has commenced performance. In some cases, on the other hand, either or both parties may be entitled to be restored to their positions extant before performance began. In other instances, avoidance may be prospective only; relieving either or both parties of further obligation to the other, but not undoing or attempting to undo what has been done. Other circumstances may give one party a right to compel reformation of the instrument, reflecting different obligations than those described in it (although the other party no longer wants any part of the deal). Lastly, one party may be forced to restore the other to its original position, though unable to obtain such restoration in turn.

(C) Bases. The grounds for avoidance of contractual obligations include one or more of the following—in either creating or performing the contract:

1. mistake of law or fact
2. actual or constructive fraud
3. duress
4. undue influence
5. material misrepresentations (honest or otherwise)
6. illegality
7. tortious conduct
8. contravention of public policy
9. unconscionability

A common thread running through these grounds for avoiding government contractual obligations is the need to determine which of the manifested intentions of the parties will be treated as effective. Another common element is the focus of inquiry upon the conduct of the parties.

1-3. ***Void Contracts.*** A contract that was void at the time of its creation never confers any legal rights or imposes any legal obligations upon either party. It seldom matters whether performance has been rendered by one or both parties. It is said that such contracts are *void ab initio.*

1-4. Prior to performance under a void contract, the parties are deemed to be in the same legal position as if no contract had been awarded or consummated. After performance has been commenced or completed, the legal effect appears to be at least partly dependent upon the conduct of each party. Illegality may be a basis for voiding a contract. If both parties are responsible for the illegality, they are both *in pari delicto* and neither has a remedy against the other. If one is not blameworthy, the culpable party may be required to restore the blameless one to his original position. The party at fault has no such right.

1-5. This has important consequences in government contracts. The United States is a creation of law, it exists by operation of law, and it has no power to act except in accordance with law. Where a natural person purporting to act for the United States engages in illegal activity or makes an illegal bargain, the United States is not chargeable. It is viewed more as the victim of a constructive fraud perpetrated by its agent. If the other party participated, or knowingly

acquiesced in the illegal bargain, such party may be required to restore the United States to its original position. Where both parties have performed, this may mean that the United States is entitled to restitution of monies paid under the illegal contract. The contractor, on the other hand, has no right to be restored to his original position, and is not entitled to restitution of goods sold and delivered or to recompense for services rendered. If, on the other hand, the contractor did not knowingly participate or acquiesce in the illegal conduct, it is not clear that the United States would be entitled to be restored to its original position. The better rule would not require the blameless party dealing with the United States to suffer as a consequence of the illegal conduct of an agent chosen by the United States. The rule in the *Merrill* case, discussed in the preceding chapter, is inapposite—*Merrill* involved a mistake of law by the government's agent and by the contractor, rather than illegal conduct by either.

1-6. The legal effect of a contract that is void because of illegality is not clear when the contractor has no knowledge of such illegality, but is negligent in that regard. It does not appear that contractors have a duty to save the United States from its own agents. It does appear that contractors have a duty of reasonable care in the conduct of their own affairs, including the making of contracts with the United States. While it appears that policy considerations may restrict the ability of even a blameless contractor to compel restoration by the United States, no such restriction appears to limit the rights of the United States against a negligent, but otherwise blameless, contractor.

1-7. Given the presumption that everyone knows the law, a contractor can claim to be blameless in a contract infected by illegality only if unaware of the prohibited facts or circumstances. In any such cases, it appears that the contractor may show mutual mistake to protect himself from a Governmental demand for restoration.

1-8. Some contracts, apparently subject to avoidance (voidable), may be subject to reformation and subsequent enforcement instead. (Inasmuch as a void contract is no contract at all, there is nothing between the parties which may be reformed or enforced.)

1-9. Illegality is far from the sole basis for determining a contract *void ab initio*. Violation of a statutory proscription or an important public policy, though not illegal, may be sufficient to render a contract void at its inception—especially where the United States is a party. Prior to the commencement of performance, nearly any grounds (except mutual mistake) for considering a contract voidable may be a basis for considering it void as well. At that point, distinctions between void and voidable contracts are hardly apparent.

1-10. ***Voidable Contracts.*** The distinction between a void contract and one that is merely voidable is that the former is stillborn while the latter is not. Voidability extinguishes the obligations of the parties in prospect only. Thus, a contract under which the performance of all parties is complete is not voidable in a technical sense. As a practical matter, voidability is of concern only where one or both parties have rendered partial performance or where one party has completed performance and the other has not.

1-11. Voidability may be effected by several means. The parties may elect to treat the contract as a nullity for the future. The parties may treat the contract as divisible, and excise the infected part while honoring the remainder. In appropriate circumstances, one party may compel this result over the objections of the other. The parties may elect to modify the contract. One party may repudiate the contract over the objections of the other. In other instances, a party may elect to either get out of the bargain or compel the other to live up to it.

1-12. A slightly different result obtains where the United States is a party. Where a statute, regulation, or important public policy is violated, voiding of the contract may be compulsory even if the bargain is otherwise advantageous. If the acts or omissions involved are illegal, unlawful, or in excess of the Constitutional power of the United States, the contract is void. On the other hand, the act or conduct may be clearly within the power of the United States but outside the scope of power granted by Congress to a Federal agency. Conduct leading to the creation of a contract, or engaged in pursuant to a contract, may go beyond established limitations. In some cases, Congress, or the agency imposing such limitations, may approve an exemption. Rarely will the undoing of what has been done be required as a matter of law; but the agency may elect to treat the bargain as voidable to preserve the integrity of its own procurement or management processes.

1-13. A ready example is the statutory limitation on the use of cost-plus-percentage-of-cost as a method of compensating contractors. Certain authorized compensation arrangements may inadvertently exceed this statutory limitation. Once the character of such conduct is understood, neither party may proceed further in the face of a specific Congressional limitation. The contract is voidable at that time, but not in the sense that voiding it is elective. Rather, it is voidable only in the sense that the blameless contractor may not be compelled to restore the Government to its original position by making restitution of payments received. On the contrary, a contractor may well argue that such a contract, which is not beyond the powers of Government and which is entered and performed in good faith, should be considered valid. The contractor may not compel further performance by the Government, but he has committed no breach or default. The Government may not impose a different arrangement upon the contractor as to price (a material consideration), absent agreement by the contractor. The Government must treat the contract as prospectively void, while the contractor may be entitled to treat it as valid. In such a case, the contractor may enforce the contract to the extent of the remedy it agreed to accept in lieu of its otherwise available remedies for breach, i.e., termination for convenience.

1-14. ***Rescission.*** The idea of rescission is closely related to the concepts of void contracts and voidable contracts. It is distinguishable from a void contract in that, for rescission, a contract must exist. No contract exists where the agreement is void, yet a rescinded contract is similar to a void contract in that it involves restoration of the parties to the status quo. While restoration is sometimes an option where the agreement is void, it is a necessary element of rescission unless certain circumstances exist. A rescindable contract is similar to a voidable one in that each refers to a contract that creates rights and obligations between the parties. Rescission is different in that it is available even after all parties have

completed performance. (A contract where performance has been completed is no longer voidable.) Voidability involves a mere release of the parties from further obligation, whereas rescission, a right that arises by operation of the contract, involves the additional obligation to restore the status quo. Lastly, rescission involves repudiation of a contract under circumstances which would otherwise be a breach.

1-15. The normal effect of rescission is to entitle both parties to be restored to their prior positions. Each must return everything it has received from the other. Where there is a breach of contract, on the other hand, one party must be placed (at the other's expense) in the same position as if the contract had been performed. Where a contract is voidable, the parties are, for the most part, left as they are—neither recovering their original position nor obtaining the benefit of future performance. In some instances, one party to a void contract may obtain restoration at the expense of the other. Where a contract is subject to reformation, both parties may obtain the benefit of future performance.

1-16. ***Reformation.*** Reformation involves a material change in contract rights and obligations between the parties. Reformation differs from novation, substitution, or accord, sometimes considered means of avoidance, in that it involves continuity of the same contractual relationship. It is a vehicle of avoidance in that it provides a means for relief from the obligations wherein there was at least nominal agreement of the parties. Reformation as a remedy is more far-reaching than mere correction of contractual documents to reflect the actual intent of the parties. Reformation goes to the substance of the intentions manifested by the documents, rather than the form in which such intent is manifested. While rescission involves restoration of the status quo, reformation involves alteration of the positions of the parties, i.e., changing the status quo.

1-17. The effect of reformation is to allow one or both parties to alter the rights and obligations of the original agreement. It avoids the risks and requirements inherent in the formation of new agreements (necessarily involved in cases of substitution or novation). Reformation provides for continuity of contractual relationship between the parties. In some instances, one party may seek rescission while the other demands reformation.

1-18. Means for effecting reformation of a contract include: (a) by agreement of the parties; (b) by the recognized course of dealing between the parties; and (c) by compelling a party to perform.

2. Bases for Avoidance

2-1. This section will name and discuss five bases for avoidance, some of which have more than one type.

2-2. **Mistake.** Mistake is a common ground for avoidance of contractual obligations. Mistake may consist of the failure of the parties to express their agreement, although there was actually a meeting of the minds. Mistake may also consist of a misconception, common to both parties, of facts and circumstances. It may consist of a misunderstanding of the legal effects of particular facts or circumstances.

2-3. ***Mutual Mistake.*** Where there is an agreement that is clearly understood between the parties but the parties fail to manifest such agreement, the result is said to be a mutual mistake. The same characterization obtains where both parties believe in the existence of a fact which does not exist; and where each party thought they knew or understood the status of the law, or the legal effect of certain facts or circumstances, and each party drew the same erroneous conclusion. "Mutual mistake" means a "mistake common to the parties" which the law recognizes. Generally, correction is proper where there is a mere failure of the parties to express their actual agreement. Reformation is generally proper where both parties hold the same erroneous beliefs.

2-4. ***Mistake of Law.*** When both parties operate under the same erroneous conclusion as to the legal effect of certain facts and circumstances, or as to the status of the law, it is characterized as a mistake of law. In this case, it is a "mutual" or common mistake of law. When the Government is a party, the relative legal positions differ. The presumption that everyone knows the law would preclude avoidance of obligation by the contractor, but apparently it would not preclude avoidance by the Government: where the Government pays a contractor through a mutual misunderstanding of the legal effect, the Government may recover the sums paid; but the contractor may not be able to obtain restitution of goods delivered.

2-5. Rescission, rather than reformation, is generally considered the appropriate remedy where there is a common erroneous belief as to a material fact. In Government contracts, however, the Court of Claims has allowed reformation in such a case. The Comptroller General appears to consider such contracts subject to cancellation. It is unclear whether by "cancellation" the Comptroller General means rescindable with a restoration of the *status quo ante;* voidable, not disturbing what has been done but extinguishing future obligations; or reformable, so as to halt performance but pay the contractor for what has been done.

2-6. Where there is a mere common failure of the parties to express their actual agreement, the contractor may be permitted to perform the agreement as intended.

2-7. ***Mistake of Fact.*** Avoidance on the basis of a mistake of fact by one party to the agreement may be permitted under very limited circumstances. A general requirement is that the erroneous belief by the party seeking relief cannot be caused by the neglect of a legal duty by such party, e.g., the legal duty to exercise due care. There must then be uncommon ignorance of a past or present material fact, or belief in the present existence of a material fact which does not exist. Apparently, nonbelief of an existing present fact or positive belief in a nonexistent past fact are not sufficient, unless induced by the other party. The Government must bear the risk of its own factual mistakes, but the Government mistake must not be induced by the contractor. One party may not induce such misperceptions or knowingly rely upon them.

2-8. In forming Government contracts through formal advertising, the firm bid rule operates to restrict avoidance on the ground of mistakes.

2-9. **Duress.** The essence of duress relates to the unlawful confinement of a person, unlawful detention of property, or threat of injury to the character of a person. Fraudulently obtaining any such result in lawful form may also constitute duress. It is obvious that assent to a bargain obtained through duress is not effective as a matter of law. Such a bargain is void at its creation. Taking advantage of financial hardship is

not duress; but a threat of legal action, not made in good faith, may amount to duress. A contractor's right to avoidance based upon duress by the Government must be preceded by the contractor's timely objection; otherwise it is waived.

2-10. **Actual Fraud.** A contract obtained by actual fraud is *void ab initio.* A distinguishing aspect of actual fraud is intent to deceive. It may be effected by: (1) suggestion of a fact which is not true by one who does not believe it true; (2) unwarranted positive assertion of facts which are not true, but which the person making the statement believes to be true (negligent misrepresentation); (3) suppression of the truth by one who knows it; and (4) promises made without intent to perform.

2-11. **Constructive Fraud.** Generally, it is considered a constructive fraud against the principal when an agent exceeds his authority, or acts contrary to instructions in making a contract with a third person. The remedy available to such defrauded principal is to take action against the agent. Usually, the law will not penalize an innocent third party entering into such a contract in order to rescue the wronged principal from the resulting bargain. Thus, whether the principal may avoid a contract formed as a result of the unauthorized acts of its agents usually depends upon whether the third party knew, or should have known, of the particular limitation of the agent's authority. The elements of constructive fraud may also include: (a) the existence of a duty which is breached; (b) absence of fraudulent intent; (c) gain of advantage by the person at fault; together with either (1) misleading another to his prejudice or (2) an act or omission which the law specifically declares fraudulent without regard to actual fraud. It would appear that the notion of constructive fraud includes instances where the Government's agent honestly misrepresents his authority. It would also appear to include honest misrepresentations by contractors.

2-12. Constructive fraud gives the Government the option to treat resulting contracts as *void ab initio*, as subject to rescission, or as voidable. The contractor appears to have no such options for constructive fraud by the Government. The contractor may achieve the same results, in some instances, by relabeling constructive fraud as a mutual mistake or as a Government-induced mistake of fact. But where the Government agent misrepresents his actual authority (a matter of law), even that route to avoidance would appear closed.

2-13. **Undue Influence.** Undue influence, as a ground for avoidance of contracts, generally includes: (a) use by a person in whom confidence is placed by another, or use by a person who holds authority over another, of such confidence or authority to obtain unfair advantage over such other; (b) taking unfair advantage of another's weakness of mind; and (c) taking oppressive and unfair advantage of another's needs or distress. Undue influence would not appear to result from taking advantage of ignorance or stupidity, but taking such advantage may give rise to a claim of mistake. And causing another to remain ignorant through concealment or suppression of fact may give rise to a claim for fraud.

2-14. In Government contracts, the concept of undue or improper influence is substantially broader. It includes the use of personal influence to obtain Government contracts, *Oscanyan v. Winchester Repeating Arms Co.*, 103 US 261 (1880). It also includes the use of means to obtain Government contracts which merely have a tendency to corrupt, whether actually corrupt or not. Undue or improper influence is an example of public policy grounds for avoidance.

2-15. The grounds upon which the Government may avoid contract obligations are much more numerous than those available to private parties. Private parties may, of course, expressly include provisions in their contract making them voidable upon assignment. The Bankruptcy Reform Act limits the effectiveness of such provisions in the case of assignments by operation of that statute. "Due-on-Sale" provisions, in certain installment contracts, are under attack in many states. The assignment of a Government contract makes it voidable, according to Judicial interpretation of the Assignment of Contracts Act of 1862. A Government contract is considered voidable if infected by graft, conflict of interest, or bribery.

3. The Statutory Framework

3-1. A review and analysis of all the statutes which may affect the formation of federal acquisition contracts exceeds the scope of this text. Nevertheless, this section reviews some of the more noteworthy statutes. Understanding the operation of various statutes to effect the formation of government contracts is essential to an understanding of the legal concepts and principles involved.

3-2. **The Small Business Act.** General policies of the United States respecting aid, counsel and protection to small business concerns by the government have been announced by Congress on numerous occasions. The Armed Services Procurement Act and the Federal Property and Administrative Services Act each announce a policy that a fair proportion of the total purchases and contracts or subcontracts for property and services provided by the Government be let to small business concerns. The Small Business Act, codified at 15 USC Sec 631 *et seq* (the "Act"), also declares such a policy; and establishes an independent Federal agency to execute specific measures to carry it out. It is recognized that such policies and measures are required to further the national interest in preserving free and open competition in the United States' market place.

3-3. **Small Business Administration.** The Small Business Act created the Small Business Administration (SBA), an independent Federal agency operating under the general direction and supervision of the President. It authorizes the SBA to provide specific kinds of assistance to small business concerns in their competing for Federal Acquisition contracts or subcontracts. The Act, at Sec 637, empowers and imposes the duty on SBA:

(A) To enter into contracts with the US Government and any agency or officer thereof having procurement powers, which oblige the SBA to furnish articles, equipment, supplies or materials to the Government or to perform construction services for the Government, (15 USC Sec 637(a)(1)(A). This section of the Act also authorizes any officer of the Government having procurement powers to let procurement contracts to the SBA in any case where the SBA certifies that the SBA is competent and responsible to perform such contracts. The Administrator of the SBA (the "Administrator") is directed to refer appropriate matters to the head of the agency concerned if the SBA and the contracting officer

are unable to agree on the terms and conditions of such procurement contracts.

(B) To arrange for performance of procurement contracts placed with the SBA by letting subcontracts to socially and economically disadvantaged small business concerns (15 USC Sec 637(a)(1)(C)). The term "socially and economically disadvantaged small business concerns" is defined to include:

(1) Any small business concern which is at least 51 percent owned by socially and economically disadvantaged individuals or, if publicly owned, 51 percent of the stock of which is owned by such individuals. The management and daily business operations must be controlled by one or more socially and economically disadvantaged individuals. Only those individuals who are considered to have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group are "socially disadvantaged" within the meaning of the Act. The Act infers that group membership alone is a sufficient indicator of social disadvantagement. An individual who is considered socially disadvantaged may also be considered economically disadvantaged. They are so considered if their competitive ability has been impaired due to diminished capital and credit opportunities, as compared to others in the same business area who are not socially disadvantaged. Reference to the assets and net worth of a particular socially disadvantaged individual is required to determine the degree of impairment of capital and credit opportunities (15 USC Sec 637 (a)(6)). The threshold inquiry then, is whether a small business concern has the requisite degree of ownership by members of prescribed groups. Inquiry should then be made to determine whether management is controlled by socially disadvantaged individuals. Inasmuch as the Act provides for subcontract assistance to firms which can be considered both socially and economically disadvantaged, the next inquiry is whether the assets and net worth of the individual reflect a degree of impairment regarding capital and credit opportunities. Whether a group is such that its members should be considered socially disadvantaged is to be determined by the Administrator after consultation with a designated associate administrator. The degree to which an enterprise is owned and managed by socially disadvantaged individuals and whether a socially disadvantaged individual is also economically disadvantaged is to be determined by the Associate Administrator for Minority Small Business and Capital Ownership Development, rather than by the Administrator.

(C) To determine within any industry the business enterprises which are to be designated "small business concerns," and to issue upon request certificates certifying an individual concern as a "small business concern." Such certificate shall be accepted as conclusive by Government officers having procurement or property disposal powers (15 USC Sec 637(b)(6)).

(D) To certify, with respect to all elements of responsibility of any small business concern or group of concerns, the ability to perform a specific Government contract. Whether certified responsible by SBA or not, no small business concern may be precluded from being awarded a Federal Procurement or Property Disposal contract on the basis of any element of responsibility, without referring the matter for final disposition to the SBA (15 USC Sec 637(6)(7)(A)).

(E) To dismiss findings by a contracting officer that a small business concern does not comply with the manufacturer or regular dealer requirements of the Walsh-Healy Public Contracts Act (41 USC Sec 35(a)), and certify the small business concern eligible as a Federal contractor; or to refer the matter to the Secretary of Labor, if the SBA concurs with the contracting officer. If the SBA refers a matter of compliance with this provision of Walsh-Healy to the Labor Department, the small concern cannot be certified eligible for Federal contracts unless the Secretary of Labor finds the concern not in violation (15 USC Sec 637(b)(7)(B). Once SBA certifies a small business concern as competent, such certification is to be accepted as conclusive by contracting officers.

3-4. SBA has obligations and authority under the Act to determine which firms in any industry will be considered small business concerns, to certify that individual businesses are small business concerns, and to certify that an individual business or group of businesses is competent to perform a particular Government contract. Accordingly, SBA: (i) promulgates size standards for each industry, (ii) issues certificates of small business status upon request, and (iii) issues certificates of competency where required. The foregoing assistance is available to any small business concern. Assistance where the SBA acts as a prime contractor and awards subcontracts is available to socially and economically disadvantaged small business concerns.

3-5. Notwithstanding congressional action vesting sole discretion in SBA to determine all matters relating to the competency of small business concerns to perform federal contracts, DAR provides that DOD will endeavor to make such matters subject to agreement between DOD and SBA (see DAR Sec 1-705.4(d)). A significant portion of the DAR on this subject is devoted to procedures and methods for challenging SBA certificates of size or competency (see DAR Sec 1-703). Where a small business concern is not the manufacturer of items which it proposes to supply, and such items are distributed or manufactured by enterprises which are not small business concerns, DAR limits application of SBA certificates regarding competency to the nonmanufacturing small business concern. The competency of such distributor or manufacturer must be separately determined by the contracting officer (see DAR Sec 1-701.1(c)). DAR also limits the applicability of SBA certificates of competency where the highest competency obtainable or the best scientific approach is needed by the Government (see DAR Sec 1-705.4(b)).

3-6. The Act imposes obligations (upon agencies effecting acquisitions) that promote subcontracting opportunities for socially and economically disadvantaged and other small business concerns. It requires in each designated contract inclusion of a clause containing an agreement by contractor to carry out a national policy that such small business concerns shall have the maximum practicable opportunity to participate in contracts let by any agency. The "small business concern," for the purpose of the obligations of contractors in this connection, is one which meets SBA size standards or which is certified as a small business concern by SBA. Contractors are directed to presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities or any other individual found by the Administrator or Associate Administrators to be

disadvantaged. The Act provides no expressed certification provision to the effect that an individual or small business concern is socially and economically disadvantaged. Contractors are obliged to either make their own determination in this regard, inquire of the Administration, or inquire of the potential subcontractor. The Act permits contractors acting in good faith to rely upon written representation by subcontractors as to their status (15 USC Sec 637(d)(3)(D)).

3-7. The Act further requires the inclusion of a subcontracting plan as a material part of each contract or amendment or modification of contract which:

(A) may exceed $1 million where the contract is for construction of any public facility;

(B) may exceed $500 thousand where the contract is for any other object;

(C) is for more than $10 thousand, is not for services, and will not be performed entirely outside US territory;

(D) offers subcontracting possibilities. The subcontracting plan is required to include percentage goals for utilization of subcontractors, small business concerns, and socially and economically disadvantaged small business concerns. It is also required to include a description of the contractor's plans to assure that such firms have an equitable opportunity to compete for such contracts. The prime contractor is required to assure that such contractors who receive subcontracts meeting the tests for covered prime contracts undertake to carry out national policy in this regard and, as appropriate, include subcontracting plans in contracts with next-tier subcontractors (17 USC Sec 637(d)(1) through (6)).

3-8. If, within the time limit prescribed in regulations of the Federal agency concerned, the apparent successful offeror fails to negotiate the subcontracting plan required, such offeror shall become ineligible to be awarded the contract. Prior compliance of the offeror with other such subcontracting plans shall be considered by the Federal agency in determining the responsibility of that offeror for the award of the contract.

3-9. Notwithstanding any other provision of law, every Federal agency, in order to encourage subcontracting opportunities for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals as defined in the Act, is authorized to provide such incentives as the agency may deem appropriate in order to encourage such subcontracting opportunities as may be commensurate with the efficient and economical performance of the contract.

3-10. Each subcontracting plan required shall include, according to the Act:

(A) percentage goals for the utilization as subcontractors of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals;

(B) the name of an individual within the employ of the offeror or bidder who will administer the subcontracting program of the offeror or bidder, and a description of the duties of such individual;

(C) a description of the efforts the offeror or bidder will take to assure that small business concerns and small business concerns owned and controlled by the socially and economically disadvantaged individuals will have an equitable opportunity to compete for subcontracts;

(D) assurances that the offeror or bidder will include the clause required by paragraph (2) of this subsection in all subcontracts which offer further subcontracting opportunities, and that the offeror or bidder will require all subcontractors (except small business concerns) who receive subcontracts in excess of $1,000,000 in the case of a contract for the construction of any public facility, or in excess of $500,000 in the case of all other contracts, to adopt a plan similar to the plan required under paragraph (4) or (5);

(E) assurances that the offeror or bidder will submit such periodic reports and cooperate in any studies or surveys as may be required by the Federal agency or the Administration in order to determine the extent of compliance by the offeror or bidder with the subcontracting plan; and

(F) a recitation of the types of records the successful offeror or bidder will maintain to demonstrate procedures which have been adopted to comply with the requirements and goals set forth in this plan, including the establishment of source lists of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals; and efforts to identify and award subcontracts to such small business concerns (15 USC Sec 637).

3-11. The Small Business Act commits certain determinations to the discretion of the SBA or the administrator of the SBA or the Associate Administrator for Minority Small Business and Capital Ownership Development. Such determinations are subject to the requirements and standards of the Administrative Procedures Act discussed in paragraphs 3-3 *infra*. When such determinations comply with the Administrative Procedures Act, and are made by the SBA or its administrator, they have the force and effect of law.

3-12. Included in such determinations are: (a) whether a particular group has been subject to prejudice or bias; (b) whether a particular business meets small business size standards; and (c) all elements of responsibility of any small business concerns or group of such concerns to receive and perform a particular government contract. The Small Business Act specifically prohibits rejection of any small business or small business group for award of a contract on the grounds of responsibility without a final disposition of the matter by the SBA. Thus it would appear that a contracting officer may determine a small business concern to be responsible without intervention of the SBA. The converse is not true, however.

3-13. No award can be made or proposal accepted, unless the procuring authority determines that the subcontracting plan provides maximum performance of the contract. There is no apparent exemption of this determination from the standards of the Administrative Procedures Act. While inclusion of such subcontracting plan in the contract is a precondition to award of a contract, it has been considered a matter of responsibility in advertised procurements. Thus a bid which does not contain an appropriate subcontracting plan may be considered for award, so long as a plan is included in the bid prior to award. It has also been held that the procuring agency may require a bid to include such a subcontracting plan in order to be considered for award, making it a matter of bid responsiveness. GAO pronouncements discourage this practice.

3-14. The Small Business Act represents a substantial legislative departure from agency and GAO policy of obtaining maximum practicable competition in federal procurement. It

is squarely consistent, however, with the Congressional policy declared in both the Armed Services Procurement Act and the Federal Property and Administrative Services Act, i.e., the placement by fair proportion of federal contracts with small business. This act does not limit competition among appropriate small business for Government contracts. In the longer run, it promotes competition by increasing the number of competitors for Federal contracts and the strength thereof.

4. Aid to Labor Surplus Areas

4-1. Small Business concerns are required to receive " . . . any award or contract or any part thereof . . . " which is determined by the Administration and the contracting procurement agency to be in the interest of: (a) maintaining or mobilizing the nation's full production capacity; (b) war or national defense programs; or (c) assuring that a fair proportion of purchases and contracts are placed with small business concerns. Such determinations may be made for " . . . individual awards or contracts or for classes of awards or contracts" (USC Sec 644(a)). Priority in awarding contracts set aside pursuant to Sec 644 of the Act is given to small business concerns which will perform a substantial portion of production on those contracts in areas of concentrated unemployment or underemployment or of labor surplus.

4-2. The Department of Defense policy and procedures, with respect to aiding areas of persistent or substantial labor surplus, hereinafter referred to as labor surplus areas, in the United States, its possessions, Puerto Rico, and the Trust Territory of the Pacific Islands are covered in DAR 1-800 and FPR 1-1-800, *et seq.* The policy of the Government is to encourage the hiring of disadvantaged individuals, to aid areas of persistent or substantial labor surplus by the placing of contracts and facilities in areas of persistent or substantial labor surplus, and to assist such areas in making the best of their available resources.

4-3. **Labor Surplus Area Concern (DAR 1-801).** The term "labor surplus area concern" means a concern that agrees to perform or cause to be performed a substantial proportion of a contract in labor surplus areas. A concern shall be deemed to perform a substantial proportion of a contract in labor surplus areas if the aggregate costs that will be incurred by the concern or its first-tier subcontractors, on account of manufacturing or production performed in labor surplus areas, amount to more than 50 percent of the contract price.

4-4. The policy of the Government is to aid labor surplus areas by placing contracts with labor surplus area concerns to the extent consistent with procurement objectives and where such contracts can be awarded at prices no higher than those obtainable from other concerns, and by encouraging prime contractors to place subcontracts with concerns which will perform substantially in labor surplus areas. This general policy and its implementing procedures are found in DAR 1-802 and 1-803 (Rev Apr 73) and FPR 1-1-802 and 1-1-803. When reviewing this policy, one should also review the policy of DAR 1-706.7, Combined Small Business-Labor Surplus Area Set-Aside.

4-5. In no case will price differentials be paid for the purpose of carrying out this policy. Heads of procuring activities and heads of field purchasing and contract administration activities are responsible for effective implementation of the Labor Surplus Area Program within their respective activities. Responsibility for administration of the program may be assigned to small business specialists appointed pursuant to DAR-704.3.

4-6. ***Labor Surplus Area Set-asides.*** The procedures for making a set-aside, set forth in DAR 1-804.2, require use of the "Notice of Labor Surplus Area Set-Aside." This basic policy is as outlined in the DAR Set-Aside Procedures.

4-7. ***Subcontracting With Concerns in Labor Surplus Areas.*** It is the policy of the Government to promote equitable opportunities for labor surplus area concerns to compete for defense subcontracts and to encourage placement of subcontracts with concerns which will perform such contracts substantially in areas of persistent or substantial labor surplus in the order of priority described in DAR 1-802, where this can be done, consistent with efficient performance of contracts, at prices no higher than are obtainable elsewhere.

4-8. Policy reflected by DAR 1-702 and FPR 1-1-702 requires that small business concerns be afforded an equitable opportunity to compete for all contracts that they can perform. Therefore, the military departments, to the extent consistent with the best interests of the Government, are expected to:

(1) Attempt to locate additional qualified small business suppliers by all appropriate methods, including use of the facilities of the Small Business Administration, particularly where only a limited number of small business concerns are on bidders' mailing lists.

(2) Give wide publicity to purchasing methods and practices.

(3) Publicize proposed procurements by the use of advance notices or other appropriate methods.

(4) Include all established and qualified potential small business suppliers on the bidders' mailing lists.

(5) Send solicitations to all firms on the appropriate list except that where less than a complete list is to be used pursuant to DAR, at least a pro rata number of small business concerns shall be solicited.

(6) Divide proposed procurement of supplies and services, except construction, into quantities not less than economic production runs, so as to permit bidding on quantities less than the total requirements; allow the maximum time practicable for preparation and submission of bids, proposals, or quotations; where feasible, establish delivery schedules which will encourage small business participation.

(7) Examine each major procurement to determine the extent to which small business subcontracting should be encouraged and required.

(8) Use small business concerns to the maximum extent feasible as planned producers in the Industrial Readiness Planning Program.

(9) Maintain liaison with Federal, State, and local agencies, and other organizations, for the purpose of providing information and assistance to small business concerns.

4-9. ***Small Business Set-asides.*** DAR 1-706 and FPR 1-1-706 detail the procedures for making contracts available to small business firms by a procedure called a set-aside.

4-10. ***Small Business Protests.*** Representation by a bidder or offeror that it is a small business concern shall be effective, even though questioned, unless the Small Business

Administration, in response to such question determines that the bidder or offeror in question is not a small business concern. The controlling point in time for a determination concerning the size status of a questioned bidder or offeror is the date of award, except that no bidder or offeror is eligible for award as a small business concern unless it has, in good faith, represented itself as a small business prior to the opening of bids or closing date for submission of offers.

4-11. Any bidder or offeror may, in connection with a contract involving a small business set-aside or otherwise involving small business preferential consideration, question the small business status of any apparently successful bidder or offeror by sending a written protest to the contracting officer who is responsible for the particular procurement. The protest should contain the basis for the protest, together with specific detailed evidence supporting the protestant's claim, that such bidder or offeror is not a small business.

(A) Timely Protests. When the contracting officer receives a timely protest prior to award, he shall forward the protest record to the Small Business Administration's regional office serving the area in which the protested concern is located. The Small Business Administration will promptly notify the contracting officer of the date of its receipt of any such protest, and will advise the bidder or offeror in question that its small business status is under review.

(B) Untimely Protests. A protest which is not timely, even though received before award, should be forwarded to the Small Business Administration's regional office serving the area in which the protested concern is located (with notation thereon that the protest is not timely). The protester should be notified that his protest cannot be considered on the instant procurement but has been referred to Small Business Administration for its consideration in any future actions.

(C) Post Award Protests. A protest received after award of a contract shall be forwarded to the Small Business Administration's regional office serving the area in which the protested concern is located, with a notation thereon that award has been made. The protester shall be notified that award has been made, and that its protest has been forwarded to Small Business Administration for consideration in future actions.

(D) Questioning Status of Small Business. A contracting officer may, any time prior to award, question the small business status of the apparently successful bidder or offeror by sending a written notice to the Small Business Administration regional officer of the region in which the bidder or offeror has his principal place of business. The notice should contain a statement of the basis for the question, together with available supporting facts. The Small Business Administration will advise the bidder or offeror in question that his small business status is under review.

(E) Determination by the Small Business Administration Regional Director. The Small Business Administration Regional Director will determine the small business status of the questioned bidder or offeror, and will notify the contracting officer and the bidder or offeror. This determination is final, unless it is appealed and the contracting officer is notified of the appeal prior to award. If an award was made prior to the time the contracting officer received notice of the appeal, the contract is presumed to be valid.

5. Procurement Statutes

5-1. The principal statutes which specifically regulate the process of forming Federal acquisition contracts are the Armed Services Procurement Act, 10 USC Sec 2301 *et seq* (ASPA) and the Federal Property and Administrative Services Act of 1949, 40 USC Sec 470 *et seq* (FPASA). The specific methods, prescribed by these statutes for obtaining offers by those wishing to engage in business with the Government, are described more fully in Chapter 5 *infra*. The omission of any other methods of obtaining offers from ASPA and FPASA is considered a preclusion of any other method.

5-2. **Multi-year Contracting.** Heads of agencies, covered by ASPA, are authorized to make contracts for periods up to five years. Subsection (g) was added to 10 USC Sec 2306 by PL 90-378, imposing a $5 million ceiling on cancellation costs under multi-year contracts. The Defense Authorization Act of 1982 added a new subsection (b) to 10 USC Sec 2306 which removed the foregoing cancellation ceiling and inserted a provision requiring notice to Congress before the Government agrees to cancellation costs of $100 million or more.

5-3. Policies and procedures for use of multi-year contracting are set forth in DAR section 1-322.1 to 1-322.8. The Defense Authorization Act of 1982 specifically limits the application of multi-year contracting methods in the cases of the Coast Guard and the National Aeronautics and Space Administration. Use of multi-year contracting under ASPA is also limited in the acquisition of automatic data processing equipment covered by FPASA.

5-4. Multi-year contracting is only authorized, in any case, to the extent that funds are otherwise available for obligation by the head of the procuring agency. This has been interpreted as neither authorizing violation of the Anti-Deficiency Act, 31 USC Sec 665 *et seq*, nor limiting contracts to the term of annual appropriation acts. This method contemplates no-year funds and/or cancellation if funds are not made available.

5-5. **Procurement for Foreign Military Sales.** The Arms Export Control Act of 1976, 22 USC Sec 2751 *et seq* (AECA), provides statutory authority to sell articles and services to certain friendly foreign countries. The AECA, at section 2762, authorizes contracts for the procurement of such articles and services. The sales are to be for US dollars and to countries which furnish a dependable understanding for payment, 22 USC Sec 2762(a). Letters of offer may be issued with payment on 120 day billing terms if the customer country has inadequate funds, and if the President determines that an emergency need exists (22 USC Sec 2762(b)). Sales on credit for up to 12 years are authorized by 22 USC Sec 2763.

5-6. Sales of $7,000,000 or more for defense articles, or $25,000,000 or more for defense services, require prior notice to Congress; but there is no specific statutory requirement for Congressional approval. Licenses for commercial sales of major military equipment, whereby private US companies sell directly to foreign governments, are prohibited with respect to contracts of $100,000,000 or more, except in accord with the AECA (see 22 USC Sec 2778(b)(3)). Such commercial sales to Australia, Japan, the NATO member countries, and New Zealand, are not subject to this prohibition under certain conditions. However, the

President has authority to require that any commercial sales of defense articles and services be made under AECA.

5-7. Sections 6-1300 *et seq* of DAR set forth policies and procedures for acquisitions made for foreign military sales (FMS) under AECA. The DAR describes the functions of letters of offers and acceptance, as well as the role of government-to-government agreements, in acquisitions for FMS purposes. It directs contracting officers to honor requests by customer countries for sole source prime and subcontracts. It prohibits contracting officers from accepting directions of FMS customers as to source selection decisions or contract terms. FMS customer representatives may not direct exclusion of particular firms from bidders' lists. FMS customers are not permitted to interfere in the placement of subcontracts by prime contractors (see DAR Sec 6-1307).

5-8. FMS agreements may affect source selection in US procurement to the extent that they require procurement from foreign sources under off-set arrangements. DAR See 6-1310 provides policies and procedures for effecting off-set arrangements.

5-9. **GATT Government Procurement Code.** The General Agreement on Trade and Tariffs (GATT) is a multilateral treaty which obliges signatory countries to seek reductions of various national barriers to international trade. The latest round of negotiations resulted in a number of international trade agreements, including the International Government Procurement Code.

5-10. The GATT Government Procurement Code (GPC) is intended to reduce various non-tariff barriers to international participation in procurement activities of member governments. Examples of such non-tariff barriers include the Buy American Act, the Balance of Payments Program, and unpublished or informal procurement procedures. This international agreement on Government procurement, along with other agreements negotiated under the GATT, were implemented by the Trade Agreement Act of 1979, PL 96-39 (TAA) and Executive Order 122607, December 21, 1980. The TAA is codified at 19 USC See 2511-2518. It has been implemented by the US Department of Defense by promulgation of part 16 of Section 6, DAR, entitled "Purchases under the Trade Agreements Act of 1979."

5-11. The GPC requires, among other things, that GATT signatory countries, including the US: (1) establish and publish formal bidding procedures, (2) publicize pending procurements, and (3) eschew discrimination against qualified foreign sources.

5-12. The TAA, in effect, authorizes the President to accord either Most-Favored-Nation (MFN) treatment or National Treatment to eligible products of specified types of countries. Most-favored-nation treatment generally means that the most favorable treatment given by the United States to any other country must he given to all countries entitled to MFN treatment. National treatment means, in effect, that nationals of the other countries are to be treated no less favorably hy the United States than a United States national would he treated hy the United States. Countries designated as eligible for either national treatment or MFN treatment, are those:

(1) which have become parties to the GPC and will provide reciprocal competitive government procurement opportunities to United States products and suppliers of United States products;

(2) which, though possibly not a party to the GPC, in the case of countries which are not major industrial countries, will assume the obligation of the GPC and provide reciprocal opportunities to United States products and suppliers of United States products;

(3) which, though possibly not a party to the GPC and though possibly unwilling to otherwise assume the obligations of the GPC, are nevertheless willing to provide reciprocal opportunities to United States products and to suppliers of United States products; or

(4) which are least-developed countries (19 USC Sec 2500(b)).

5-13. The TAA defines the term "major industrial country" to include Canada, The European Economic Community, Japan, and any other country so designated by the President (19 USC Sec 2136(d)). The European Economic Community, as an entity, is entitled to MFN or National Treatment in source selections (19 USC Sec 2158(s)). The term "Least Developed Country" is defined to include countries on the United Nations General Assembly list of Least Developed Countries (19 USC 2158(b)).

5-14. The GPC and TAA do not automatically apply to services; only to products and suppliers of products according to the terms of the TAA. DAR Section 6-1607 contains a list of items covered by TAA, insofar as DOD is concerned, but the GPC and TAA also apply to agencies not covered by DAR. A list of federal agencies covered was set forth in 46 Fed Reg 1654-1655. Moreover the TAA allows the President to accord MFN or National Treatment for "eligible products." The term "eligible products" is defined at 19 USC Sec 2518(4)(A) to include services that are related to products.

5-15. DAR Sec 6-1602 announces the policy of evaluating offers in DOD procurement, of eligible products with a total value up to $182,000, without regard to the restrictions of the Buy American Act and the Balance of Payments Program. Section 6-1603 preserves such restrictions with respect to the exceptions listed therein.

5-16. If the head of the procuring agency determines it to be in the public interest, contracts with foreign governments, agencies, international organizations, or subsidiaries of such entities, may be exempted from the Contract Disputes Act of 1978 (CDA), 41 USC Sec 602(c). The CDA is silent, however, with respect to contracts by government-owned or operated commercial activities. The TAA specifically precludes its operation to create a private right of action, or remedy, not explicitly made under the laws of the United States (19 USC Sec 2504). It does not, on the other hand, bar recognition of rights or remedies. The Administrative Procedures Act (5 USC Sec 702) recognizes a right of Judicial review held by a person who is adversely affected or aggrieved as a consequence of agency action. It has been widely (but not universally) recognized that disappointed bidders may have standing, under Sec 702 of the APA, to obtain judicial review of source solution procedures in government contracts. It would appear that, once the President accords a country and its products and suppliers either MFN or National Treatment, such suppliers would receive National Treatment on the question of standing.

5-17. Countries which do not enjoy MFN or National Treatment may nevertheless enjoy nondiscriminatory treatment. Such treatment, considered favorable, involves treating a country no worse than other countries are treated who receive nondiscriminatory treatment. The TAA, in effect, bars United States procurement from countries which have not been designated for MFN or National Treatment. Apparently, an attempt to effect a procurement from a country enjoying mere nondiscrimination treatment could give rise to grounds for a judicial challenge from both the United States and foreign suppliers.

6. Procedural Framework

6-1. Openness in government contracting activities, along with vigorous competition for government business, is thought to be a fundamental safeguard to the public. Yet, important property rights information or data may be, in effect, confiscated by the government through disclosure to competitors and to the general public.

6-2. **The Freedom of Information and Privacy Acts.** The disclosure of information, obtained by the government in its procurement activities, to the general public and to competitors of government contractors, raises several policy and legal considerations. The Freedom of Information Act, 5 USC Sec 552, amends the Administrative Procedures Act by creating a statutory presumption in favor of making government records open to the public. The Privacy Act (5 USC Sec 552(a)) also amends the Administrative Procedures Act, but recognizes that disclosure of some information may infringe upon the right of privacy.

6-3. The FOIA created a statutory right to compel governmental release of certain information. Such information must be disclosed unless it falls within one of the recognized exceptions to the Act. However, a person required to submit information to a federal agency may obtain judicial review of an agency decision to release such information to others. The right to obtain such review may be based either upon the judicial review provisions of the Administrative Procedures Act, 5 USC Sec 706, or upon the Trade Secrets Act, 18 USC Sec 1905 (see *Chrysler v. Brown* 99 S CT 1705 (1979)).

6-4. The Administrative Procedures Act was amended on October 21, 1980 by PL 96-481, codified at 5 USC 504, to provide that the prevailing party in agency adversarial proceedings, other than the Government, may receive costs and expenses incurred in adjudicating the matter. This Act provides that the party seeking reimbursement must make application to the agency, within 30 days of final disposition of its case, and state that the agency position in the controversy was not substantially justified. The burden then shifts to the Government to prove that its position was substantially justified in the matter. The adjudicative officer may deny the award of attorney fees, or reduce the amount awarded to the extent that the controversy was protracted or unduly delayed by the conduct of the nongovernmental party.

6-5. The act limits the kinds of persons who may be awarded such costs and expenses to:

(A) individuals whose net worth does not exceed $1,000,000 at the start of the proceedings;

(B) sole proprietorships, corporations, and partnerships with net worth not in excess of $5,000,000 at such time; and

(C) nonprofit or tax exempt organizations under the Internal Revenue Code.

This Act was repealed effective October 1, 1984, except as to proceedings instituted prior to that date.

6-6. The Act pertains to agency adjudications. The term "agency" is defined, at Sec 551 of the APA, to exclude the Congress and to exclude military authority exercised in the field in time of war, or in occupied territory. Otherwise, a United States governmental organization is considered an agency if it has the power to act with the power of the government behind it. It is thus doubtful if the Comptroller General, in deciding bid protests, would be considered an agency making an adjudication (entitling a winning protestor to costs and fees).

6-7. The APA specifically excludes the Courts of the United States from the agencies covered thereby. It would thus appear that only proceedings by the various boards of contract appeals in determining protests are includable in the category of adversarial agency adjudications.

6-8. The BCAs appear to be increasing their role in the area of offeror protest since the Contract Disputes Act of 1978. The ASBCA held in *Hi-Tech Electronics* (ASBCA No. 25968, dated 22 Sep 1981) that the CDA confers upon it jurisdiction to consider the protest of a disappointed bidder. The basis for such jurisdiction included the expressed intent of Congress to vest such jurisdiction with respect to implied contracts and an implied promise by the government to consider all bids fairly. The widely recognized right of disappointed bidders to obtain judicial review of contracting procedures according to 702 of the APA provides a compelling reason for BCA involvement in the offeror protest area. Such involvement may provide disappointed offerors a viable alternative to judicial process. Congress, in enacting the CDA, had a clear opportunity to validate the GAO rule in this area on the basis of its 57 years of experience. Congress clearly declined this opportunity. The role of the Court of Claims, in awarding offer preparation costs in appropriate cases to disappointed offerors, has become clear.

6-9. **Protest of Award.** Contracting officers must consider all protests or objections to the award of a contract, whether submitted before or after award. If the protest is oral, and the matter cannot otherwise be resolved, written confirmation of the protest must be requested. The protester is notified, in writing, of the final decision on the written protest.

6-10. ***Protest Before Award.*** If award has not been made, the contracting officer may require that written confirmation of an oral protest be submitted by a specified time. If the written protest is not received by the time specified, the oral protest may be disregarded; and an award may be made in the normal manner unless the contracting officer, upon investigation, finds that remedial action is required. In that event, such action shall be taken. The GAO has published definitive rules for handling bid protests (4 CFR, Part 20).

6-11. In appropriate cases, notice of a protest will be given to bidders affected thereby. For example, when a protest against the making of an award is received, and the contracting officer determines to withhold the award pending disposition of the protest, the bidders, whose bids might become eligible for award, should be informed of the protest. They are then requested, before expiration of the time for acceptance of their bids, to extend the time for acceptance (with consent of

sureties, if any) in order to avoid the need for readvertisement. In the event of failure to obtain such extension of bids, consideration should be given to immediately proceed with award.

6-12. Where a protest has been received before award, the views of the Office of the Comptroller General may be obtained by the Contracting Officer before award. Where it is known that a protest has been lodged directly with the Comptroller General, a determination to make the award must be approved at an appropriate level above that of the contracting officer. While award of a protest need not be withheld pending final disposition by the Comptroller General, notice of intent to make the award must be furnished to the Comptroller General; and advice is obtained prior to making the award.

6-13. Where a written protest against the making of an award is received, award is not made until the matter is resolved unless the contracting officer determines that:

(1) the items to be procured are urgently required;

(2) delivery or performance will be unduly delayed by failure to make award promptly; or

(3) a prompt award will otherwise be advantageous to the government.

6-14. The contracting officer documents the file to explain the need for an immediate award, and gives written notice of the decision to proceed with the award to the protester and to others concerned.

6-15. ***Protest After Award.*** If an award has been made at the time of the protest, the award will be overturned only for compelling cause (such as patent illegality or abuse)—and then normally only upon the advice of the Comptroller General. The award results in a presumptively valid contract, conferring substantive rights upon the contractor. Repudiation of the contract on the basis of the protest, absent one of the recognized grounds for avoidance, would constitute a breach. The termination for convenience clause may be invoked to prevent government liability for damages in the best of cases. Nevertheless, the successful offeror may be entitled to an appropriate settlement.

6-16. The Comptroller General has essentially four choices. He may:

(1) Declare the contract illegal and void. This may occur if the award was arbitrary or if an essential legal requirement was not followed. This finding is quite rare. The power to make a binding declaration of the legal rights and obligations of the parties is vested in the courts.

(2) Direct a Termination for Convenience of the Government, and award to the proper bidder. This action upsets the award, and is quite rare. It is taken only when a major miscarriage occurs.

(3) Direct a letter of criticism to the agency involved. This points out the offensive action taken, and directs that it not be repeated in future procurements. This choice is not uncommon.

(4) Direct a letter to the protester informing him that the government agency's award was properly made.

6-17. The great majority of protests after award are disposed of by the third and fourth choices.

6-18. ***Judicial Review.*** The question of whether and under what circumstances courts will judge the propriety of government conduct in the course of forming contracts has a long and interesting history. Federal Courts have long followed a policy of self-imposed restraint in exercising their power to determine the propriety of actions by other branches of government. One means of effecting such restraint is the imposition of a requirement that a protagonist challenging government conduct have adequate standing to do so.

6-19. This judicial restraint has been neither absolute nor evenly applied. It involves competing public policies. On the one hand, it is antithetical to US notions of openness and accountability in government to completely preclude Judicial review of Executive action. On the other, government could not operate if its functions were interrupted by incessant challenges by those who are unhappy.

6-20. The US Constitution vests power in the Federal Judiciary to decide "Cases and controversies arising under the Constitution and laws of The United States." The US Supreme Court early decided that a case or controversy involves a situation where there are competing claims of legal right. It later decided (1939) that government procurement laws and regulations do not confer legal rights upon those seeking to do business with the government. Thus, procurement laws and regulations in and of themselves do not provide a basis upon which vendors may stand to challenge government action (*Perkins v. Lukens Steel Co.* 310 US 113).

6-21. The Administrative Procedures Act of 1965 (5 USC 551 *et seq*) (The "APA"), following the *Perkins* case by 26 years, codified previously recognized basis for standing in addition to the narrow concept of legal rights. The APA reflected fairly consistent congressional policy favoring judicial review. It focused on the propriety of government actions and actual or threatened harm to the challenger of such official action. The APA specifically provides for judicial review when it is alleged that such actions are improper and that they harm or threaten harm to such challengers.

6-22. The US Court of Appeals for the District of Columbia decided, in *Scanwell Laboratories v. Shaffer* 424 F2d 859, that Federal Courts have the power under their policy of self restraint to determine whether governmental conduct was proper. Such power exists particularly where propriety depends upon conflicting interpretations of the legal effect of specified governmental acts and conduct. The position of the executive branch in forming government contracts has been that allowing judicial review permits interruption of procurement processes. This is especially so in light of the *Perkins* case holding that no vendor legal rights under procurement law are involved. In the absence of legal rights compensable by damages, disappointed vendors in our courts would be left with equitable or injunctive remedies, i.e., restraining orders. Such injunctions may reasonably be expected to interrupt procurement processes.

6-23. The Court of Claims, on the other hand, fashioned a remedy alternative to the injunction, i.e., the award of preparation costs. The Declaratory Judgments Act provides for mere declarations by the Court as to matters properly before it, even in the absence of specific relief. The Contract Disputes Act of 1978 provides authority for Boards of Contract Appeals to determine matters arising under and related to contracts. Hi-Tech Electronic (*op cit* para 4-8) appeared to treat precontractual procedures as related to an implied contract to proceed according to the requirements of law.

6-24. The Judiciary Act (28 USC Sec 1491) was amended

in 1982 to provide for the establishment of a new United States Claims Court. The new Court was given express authority " . . . to afford complete relief on any contract claim brought before the contract is awarded" (28 USC 1941(a)(3)). That section of the statute goes on to grant to the new Claims Court " . . . exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief."

6-25. The Act provides for power to hear pre-award contract claims, but does not define this concept. The definition may well include an implied contract to consider offers fairly, or to conduct the process of government contract formation according to the rules.

6-26. The United States has long admonished foreign state-owned or operated enterprises that, in effect "when the sovereign descends from the throne and enters into the world of commerce, it will be treated as any other merchant." Precise formulations of rules by which commercial activities by government organizations can be distinguished readily from sovereign activities, i.e., activities uniquely governmental in nature, are difficult to devise. There would appear little that is uniquely governmental in the purchasing of supplies, equipment, or services needed to carry on governmental functions.

6-27. The road from *Perkins* to *Scanwell* and the 1982 Courts Improvement Act has been long; perhaps longer and more twisted than necessary. The absurdity of interrupting essential governmental functions to quarrel about how supplies and services are purchased is obvious. The absurdity of using the crown of the sovereign to obtain preferential treatment by the courts with respect to commercial nongovernmental activities is no less obvious. Failure to make such distinctions or, worse, deliberately obscuring them assures that one will be treated like the other. The proper functions of government can only suffer as a result.

6-28. Nearly every development since the 1969 *Scanwell* case indicates that it is past the time for arguing whether contract formation actions by the government should be virtually exempt from judicial review.

CHAPTER 5

Methods of Contracting

THIS CHAPTER DESCRIBES methods of forming government contracts as prescribed by Statute or Regulation. It also explains the principles of law and policy related to each method.

2. An understanding of the principles described will enable you to recognize the consistency of standards of governmental conduct required in using each method. You should also be able to distinguish the various means required to meet such standards according to the method used.

1. Statutory Scheme

1-1. The principal statutes that describe specific methods of forming government contracts were identified in Chapter 4. They are the Armed Services Procurement Act of 1947, codified at 10 USC Ch 137 ("ASPA" herein), and the Federal Property and Administrative Service Act of 1949, codified at 40 USC Secs 471 *et seq.* ("FPASA" herein) Numerous other statutes affect specific matters involved in this process.

1-2. Some such statutes have been previously described. ASPA and FPASA specifically prescribe methods of forming government contracts. Recognized rules of statutory construction require that these statutes take precedence over others which may more generally affect the selection and use of available methods of contracting; but they must be interpreted and enforced in light of, and in a manner consistent with, such other statutes.

1-3. Statutes authorizing federal departments, agencies, or instrumentalities usually authorize purchases of necessary supplies and services. If such legislation prescribes methods of forming purchase contracts, it usually sets forth requirements in addition to, but not in derogation of, ASPA and FPASA standards. Therefore, statutes and regulations specifically applicable to particular departments, agencies, or instrumentalities are part of the general statutory scheme.

1-4. ASPA and FPASA prescribe methods of forming contracts which alter the usual positions of offeror and offeree in business transactions. The customary practice in business transactions is for sellers to solicit offers from purchasers, and to reserve powers of acceptance to themselves. This is the circumstance in the average consumer transaction, for example. Congress, however, requires the government to solicit offers from sellers and to reserve the power of acceptance to the government as purchaser. In this manner, the government retains control of the contract formation process. The Government thus controls the manner, means, and conditions under which it will become obligated under contracts. Acceptance or award creating a contract is always at the discretion of the Government.

1-5. APSA requires that offers be solicited through a process of formal advertising. FPASA requires solicitation through a process referred to as advertising. ASPA permits negotiation of offers if formal advertising is not feasible and practicable under existing circumstances, if any of fifteen specified situations exist, or if the head of an agency makes appropriate determination and findings with respect to two additional specified situations. FPASA differs from ASPA in that its terms do not specifically require that advertising be unfeasible or impracticable before negotiation is permitted. The existence of any one of fifteen situations, mostly similar to those specified by ASPA, is sufficient to permit negotiation in accordance with the express provisions of FPASA.

1-6. ASPA and FPASA prescribe the offers that may be accepted when solicitation by advertising is used. They also prescribe the manner of acceptance. Acceptance of bids which conform to the advertised invitation and which are most advantageous to the government, price and other factors considered, is mandated if the offeror is considered responsible. The statutes provide relief from that mandate when the head of an agency determines that all offers (by way of bids submitted in response to an invitation) be rejected in the public interest. The manner of acceptance prescribed is the giving of notice with reasonable promptness, in writing to the appropriate offeror.

1-7. Neither ASPA nor FPASA expressly prescribes the offers which may be accepted when negotiation is permitted; nor do they prescribe the manner of acceptance or conditions of acceptance. ASPA requires either oral or written discussions with responsible offerors whose proposals are within a competitive range. It also permits acceptance of proposed offers without discussion under authorized set-aside programs or where the solicitation has provided notice of the possibility of acceptance without discussion. In the latter event, it is necessary to demonstrate that offered prices are fair and reasonable. While both statutes mandate acceptance of most advantageous offers obtained by advertising, unless rejections of all offers is determined to be in the national interest, no such mandate or provision for rejection is prescribed in the case of negotiated offers.

1-8. Unless a statute is remedial in nature, definitions and descriptions therein are deemed to preclude application of other definitions or descriptions. Thus ASPA and FPASA are considered to preclude authority for any other methods of soliciting offers. They also preclude authority for acceptance of any other kind of offer. Regulations, however, permit

negotiation of the non-price terms of offers and subsequent solicitation of price offers by advertisement to offerors who have negotiated acceptable non-price terms. This process is known as two-step formal advertising.

1-9. Armed Services Procurement Act (ASPA) and Federal Property and Administrative Services Act (FPASA) are thus not identical by their express terms. The terms and provisions of FPASA are not as specific as those of its military counterpart. One principle of statutory interpretation requires an inference that the legislature intended different results in the more recent statutes relating to identical or similar subjects. This is because it had the clear opportunity to adopt the language of earlier ones and declined to do so. It is thus possible to conclude that Congress did not intend that advertising be impracticable or not feasible before negotiation is permitted under FPASA. It would appear that there is a greater obligation on the government to make an advertised award under ASPA than under FPASA. Absent a showing of national interest, an advertised award under ASPA would appear mandatory unless negotiation is permitted. The regulations adopted by the various agencies, court decisions, and policy pronouncements by the GAO do not reflect such distinctions. In practice, it would appear that ASPA and FPASA are treated as essentially identical.

1-10. It is not apparent, however, that the government is equally obliged to make awards where offers are solicited through advertising and to accept proposals obtained through negotiation. Under ASPA, the more stringent of the statutes, there appears no requirement that any proposal be included in the competitive range. Even if acceptance is allowed without discussions, or proposals have been placed in a competitive range, there is no statutory or regulatory requirement that any proposal be accepted. The only limitations apparent in this area are the possible normal limitations on abuse, capriciousness, arbitrariness and bad faith generally imposed on Government actions and decisions. Even if those limitations are exceeded, it is clear that no absolute vendor's right exists which compels the government to enter a contract. Thus, absent a determination that the national interest would be served otherwise, the Government has a greater obligation to make an award under advertised procedures than it has to accept a proposal under negotiated procedures.

1-11. The Government, on the other hand, may not necessarily retain absolute freedom to reject all offers obtained through negotiation. At least one federal circuit court has prescribed tests for adjudicating whether the Government is bound to a contract prior to its execution in writing (*Banking and Trading Corporation v. Floete*, 257 F. 2d 765 (2d Cir. 1958)). The Comptroller General has required adherence to proposal evaluation criteria once such criteria is made known to offerors. Thus, while offerors may not necessarily compel the government to accept a proposal, it does not follow that the government has unlimited freedom to reject or decline negotiatcd offers.

2. Procedures

2-1. Three separate phases are involved in procedures which lead to formation of a Government contract. They are the solicitation phase, the evaluation phase, and the award or acceptance phase. The kinds of procedures which may be used include advertising, negotiation, and two-step advertising.

2-2. Acceptance or award involves a ministerial duty common to and dependent upon the solicitation and evaluation phases without respect to the kinds of procedures used. Technically, it appears that contracts are formed by making award when procedures involving advertisement are used. When negotiated procedures are used, contracts are formed by acceptance of proposals. The technical distinction between award and acceptance does not appear reflective of substantive legal differences beyond the solicitation and evaluation phases. This section explains some of the substantive legal concepts and principles involved in the solicitation and evaluation phases of each prescribed method of forming government contracts. It focuses first on the advertised method, because it is required and more often used. The next succeeding sections consider the negotiated method permitted by statute. The two-step advertised method is also authorized by regulations.

2-3. **The Solicitation Phase.** Federal agencies have been required (by statute) since 1809 to formally advertise their requirements for supplies and services to be purchased, subject to exceptions based on sound public policy. The purposes served by formal advertising continue to include: (a) to obtain maximum benefits to be secured by the utilization of competition in the market places of the country, and (b) maintenance of public trust in the propriety of methods used to expend public funds. Competition for Federal business is generally thought to result in lower prices and higher quality over the long term. It also encourages maintenance of an adequate number of sources of supply through the elimination of favoritism. Thereby it also maintains the public trust. Formal advertising includes solicitation of bids. The bid must conform to the invitation; and it must be most advantageous to the government, considering price and other factors. The term "most advantageous" usually means lowest in price.

2-4. The process begins when an agency needs a specified service or product. This need is communicated through a purchase request to the officer responsible for purchasing that particular service or product. The contracting officer then determines whether it is feasible or practicable to make the purchase by formal advertising, and unless a negative determination is made, the contracting office transfers the information contained in the purchase request to the schedule of an invitation for bids, which is then published. The Invitation for Bid is a solicitation for offers to be submitted by persons desiring to provide the needed supplies or services at a place, date, and hour designated in the solicitation. It is circulated as widely as practicable in order to obtain maximum competition. All bids received at the proper place and on or before the designated time, are publicly opened and read aloud.

2-5. The invitation for bid ("IFB") is a formalized document by a Government procuring activity to prospective contractors. It is a standard form that contains the terms and conditions under which the Government is willing to contract. In essence it is a request for those interested in entering the contract, on the terms outlined in the invitation, to submit sealed offers to the procuring activity by a certain date. The IFB is not an offer. It is an invitation to make an offer. It is

comparable to those situations in commercial transactions where a seller advertises in media of general circulation for potential purchasers to submit offers. The significance of this is that a response by the one solicited is not an acceptance, binding both parties to a contract; it is rather an offer, which in turn must be accepted or rejected by the seller who circulated the advertisement for offers.

2-6. Although not subject to acceptance, solicitations for offers do operate to restrict the options available to the solicitor. Generally, the solicitor has no obligation to accept an offer (whether it conforms to the solicitation or not). If the solicitor does accept an offer, however, it must conform to the terms of the solicitation. This requirement has been effected by reading into the offer accepted, the terms of the solicitation (*Carlile v. Carbolic Smokeball Co.*). More often, it is effected by limiting the offeree's power of acceptance to the terms of the solicitation. (See the discussion in Chapter 4 *supra.*)

2-7. Complete invitations are circulated as widely as possible in order to obtain maximum competition. There are various ways of soliciting bids. The principal method is to mail or deliver invitations to the prospective bidders. Mailing lists of potential bidders are kept at purchasing activities to provide ready information on current sources of supply. All known suppliers who appear to be qualified and eligible to fill the requirements of a particular procurement are carried on the appropriate mailing list. Additional methods of soliciting bids include the display of copies of the invitation at the purchasing office and at other appropriate public places; publishing brief announcements of proposed purchases in trade journals; and, in some instances, publishing the essential details of a proposed purchase in newspapers.

2-8. ***Equal treatment.*** One of the essential characteristics of Government procurement is that all offerors are treated equally. Necessary technical or other information to or from bidders during the solicitation phase in formal advertising must, for this reason, be transmitted only through the contracting officer. No disclosures or commitments can be made which may give any bidder an advantage over others. The contracting officer may discover through correspondence or by discussions with a prospective bidder that ambiguities or inconsistencies exist in the invitation. If not corrected, this may result in the receipt of nonresponsive bids. A timely amendment should then be made to the invitation for bids. Otherwise, the invitation may be cancelled. Note that responsiveness is apparently determined in light of the actual needs of the Government, rather than the terms of the IFB, where they differ. To insure equal treatment of all suppliers, no information concerning a pending or prospective purchase can be divulged to government personnel not directly concerned with the purchase, unless they require the information in the performance of their duties. All discussions or correspondence should be handled through the contracting officer or designated personnel.

2-9. Each IFB sets forth a specific place, date, and time for the opening of bids. The IFB should be circulated sufficiently in advance of the opening date so that all those who care to bid are afforded an adequate opportunity to prepare and submit their offers. It is the responsibility of each bidder to insure submission of bids in time to be received for the bid opening.

2-10. ***The Bid.*** A bid is an offer in the legal sense, submitted in response to an invitation for bid. Once the bids submitted in response to an invitation for bids are received, they are opened at the specified time and read aloud. All bids received are recorded on a form called an abstract of bids. Such data as the name of the bidder, the invitation number, bid opening date, a description of the procurement item, prices bid, and other pertinent information are included in the abstract of bids. The abstract is completed and certified by the bid opening officer as soon as possible after the opening of the bids.

(A) Bids may be modified or withdrawn, at any time prior to the time fixed for bid opening, by written or telegraphic notice (if received prior to such time). As in the case of late bids, a notice modification or withdrawal of a bid, if sent before the time set for opening, though not received until afterwards, may generally be given effect if (1) the bidder is not responsible for the delay in transmission, and (2) it is clearly shown that the modification or withdrawal was not submitted with knowledge of the terms of other bids. Inferential lack of such knowledge follows from the mere fact that notice was sent before the time for bid opening. If it is apparent that notice was sent prior to bid opening with knowledge of the other bids, investigation by law enforcement officials may be in order. A bid may, however, still be modified after the opening of bids when the modification is in the interests of the Government and is not prejudicial to other bidders. Where the low bidder offers to reduce its price, for example, the modification is in the interests of the Government and is not prejudicial to other bidders. The modification may be accepted. Since the low bidder was already entitled to the award, no valid complaint of prejudice could be made by other bidders.

(B) All bids may be rejected, but only when it is in the public interest to do so. The General Accounting Office strenuously objects to rejection of all bids when it believes there is an abuse of administrative discretion. Also, bidders may object where there is an abuse of discretion. The controlling consideration seems to be whether, by readvertising, the government may reasonably expect to receive bids that are substantially more advantageous. If resolicitation is not contemplated, the mere fact that the Government's needs have changed may suffice.

2-11. The bidder has the responsibility to communicate the bid to the correct person at the correct address at the proper time. Bids which are received in the office designated in the invitation for bids after the exact time set for opening are late bids, even though, as an example, they are received only one or two minutes late. Late bids may not be considered for award as a general rule, but there are several exceptions to the rule.

2-12. The Defense Acquisition Regulation ("DAR"), at Sec 2-203.1, provides that late bids, modifications of bids, or withdrawals of bids shall be considered if the circumstances outlined in DAR Sec 7-2002.2 warrant:

LATE BIDS, MODIFICATIONS OF BIDS OR WITHDRAWAL OF BIDS (1979 MAR)

(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and either:

(i) it was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for the receipt of bids (e.g., a bid submitted in response to a solicitation requiring receipt of bid by the 20th of the month must have been mailed by the 15th or earlier); or,

(ii) it was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.

(b) Any modification or withdrawal of bid is subject to the same conditions as in (a) above except that withdrawal of bids by telegram is authorized. A bid may also be withdrawn in person by a bidder or his authorized representative, provided his identity is made known and he signs a receipt for the bid, but only if the withdrawal is made prior to the time set for receipt of bids.

(c) The only acceptable evidence to establish:

(i) the date of mailing of a late bid, modification or withdrawal sent either by registered or certified mail is the US or Canadian Postal Service postmark on the wrapper or on the original receipt from the US or Canadian Postal Service. If neither postmark shows a legible date, the bid, modification or withdrawal shall be deemed to have been mailed late. (The term "postmark" means a printed, stamped, or otherwise placed impression [exclusive of a postage meter machine placed impression] that is readily identifiable without further action as having been supplied and affixed on the date of mailing by employees of the US or Canadian Postal Service. Therefore offerors should request the postal clerk to place a hand cancellation bull's eye "postmark" on both the receipt and the envelope or wrapper).

(ii) the time of receipt at the Government installation is the time/date stamp of such installation on the bid wrapper or other documentary evidence of receipt maintained by the installation.

(d) Notwithstanding the above, a late modification of an otherwise successful bid which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted.

NOTE: The term "telegram" includes mailgrams. There is no apparent provision authorizing consideration of late bids delivered in person, by ordinary mail, postal express, private express or delivery company.

2-13. **The Evaluation Phase.** Bid evaluation is the process of determining whether each bidder's offer meets the requirements of the Government, presumably as indicated in the invitation, both as to what is offered and as to the contractual terms offered. During evaluation, the contracting officer may be faced with the necessity of eliminating some bids from consideration, or even in some circumstances, of rejecting all bids and readvertising the procurement. Ordinarily, any bid which does not conform in every respect to the essential requirements of the invitation for bid is rejected. The basic standard applied is whether any deviation in what is offered by the bidder affects the price, quantity, or quality of the item or the contract terms specified by the government. If the deviation does affect terms or specifications, the contracting officer must reject the bid. The bidder cannot be permitted to alter the evaluation by curing the defect after the bids have been opened.

2-14. If an offer (bid) lapses, either by the passage of the time stipulated in the bid itself, or because it is withdrawn by the offeror (bidder) or rejected by the offeree (the Government), it cannot ordinarily be reinstated. Infrequently, a rejected bid may be reinstated and accepted without readvertising, where the bidder consents in writing and the government has sufficient time to accept. An attempt to accept a bid which has lapsed is, in legal effect, a counter-offer which may be accepted or rejected by the counter-offeree/contractor. Such a circumstance reverses the original positions of the offeror and offeree.

2-15. A bid submitted in response to the invitation must comply in all material respects with the invitation both as to method and timeliness of submission and as to the substance of any resulting contract. A bid which is not submitted in accordance with the invitation, or which contains qualifying terms or language of a substantial nature, is considered nonresponsive and must be rejected.

2-16. An unsigned bid may not be considered. A bid which contains the corporate name of the bidder and the typed name of the vice president in the space provided for signer's name and title, but no signature in the box headed "signature of person authorized to sign bid," or anywhere else on the bid, must be rejected. This defect is substantive and may not be waived. When the bid lacks proper signature, with no other indication in the bid that the purported bidder intended to be bound to an offer, a contracting officer cannot rely upon the document submitted. Acceptance of such a bid may not legally obligate the purported bidder.

2-17. A bid which fails to state (opposite each part number) that the article complies with specifications (if required by the invitation for bid) must be rejected as nonresponsive. Bid information is material; and a failure to indicate complete compliance of parts with specifications, after specific admonition in the invitation, is fatal to the bid. The deficiency may not be waived. The only errors which may be corrected after bid opening are those which do not affect responsiveness of bid.

2-18. It is necessary to define and measure the meaning of compliance in the relationship between bid and invitation. The criterion most frequently used to measure compliance is reflected in the term "substantial deviation." A substantial deviation occurs when the deviation so changes or conditions the bid that the resulting contract would be so materially altered that the noncomplying bidder is likely to thereby gain an unfair advantage over competing bidders.

2-19. Contracting Officers, when it is in the interest of the government, may waive minor deviations in bids which (1) do not affect the price, quality, etc. of the articles to be furnished, and (2) do not prejudice the rights of other bidders. However, the preferred procedure, time permitting, is to allow the bidder to correct the minor irregularity prior to the award of the contract.

2-20. The distinction between a responsive bid and a responsible contractor is that the latter concerns the offeror's ability to perform the contract while the former relates to the degree of consistency between the bidder's offer and the material aspects of the offers invited by the government.

2-21. The phrase "responsible contractor" refers to bidders in advertised solicitation and offerors in negotiated procurements. Such factors as judgment, skill, and integrity, play important parts in the overall determination. The Defense Acquisition Regulation (DAR 1-903) defines a responsible

bidder as one who meets all of the following general standards:

(a) has adequate financial resources, or the ability to secure such resources;

(b) is able to comply with the required or proposed delivery or performance schedule, taking into account all existing business commitments, commercial as well as governmental.

(c) has a satisfactory record of performance and integrity, and

(d) is otherwise qualified and eligible to receive an award under applicable laws and regulations.

2-22. Additional standards apply if the procurement involves production maintenance, construction, or research. They include having (a) necessary organization expertise and technical skills, or the ability to obtain them, and (b) necessary production, construction and technical equipment and facilities, or the ability to obtain them.

2-23. In practice, there are four principal criteria used to determine whether a bidder is responsible: (a) status as a manufacturer, construction contractor, or regular dealer; (b) financial position; (c) skill and experience; and (d) prior conduct and performance of Government contracts. In addition, integrity, or the lack of it, is a major consideration in the determination of responsibility. Some of these criteria are worthy of brief comment at this point.

2-24. The requirement of a manufacturer or regular dealer, when supply procurement is involved, is contained in the Walsh-Healey Public Contracts Act, (41 USC 35), and is based on the theory that the government should not be required to deal with submarginal, irresponsible, or unscrupulous persons. The Small Business Act dispenses with this requirement in some instances (see discussion in Chapter 4, *supra*).

2-25. The determination of financial responsibilty includes an evaluation of not only the offeror's current financial position but future plans and estimated financial position as well. An offeror who is in receivership is not a responsible offeror. In many borderline cases, however, a finding of financial nonresponsibility can be avoided by the requirement of a performance bond.

2-26. The skill of the offeror bears directly on his ability to perform the promises that he makes in the offer. Skill and experience are sometimes difficult to evaluate. Furthermore, the degree of skill or experience required varies with the complexity of the proposed contract. Standards to measure skill and experience are more or less subjective. In many cases, performance bonds can reduce the effect of error.

2-27. The best measurement of skill and experience, and the probability that the offeror will satisfactorily complete the performance required, is his prior conduct and performance record. The past is ordinarily an ample test of the future, but isolated events may be considered in order to determine what future performance is likely to be. A single default on a prior Government contract, standing alone, does not warrant a determination that the bidder is not presently responsible. On the other hand, prior misconduct or nonperformance can indicate the likelihood of current nonresponsibility. Debarment or prior criminal convictions are very serious matters, and they weigh heavily in the overall determination of current responsibility.

2-28. The Certificate of Competency (COC), obtained from the Small Business Administration, is binding on the Contracting Officer in all aspects of the determination of responsibility of the small business bidder. The DAR provides that contracting officers will generally accept a responsible Canadian firm proposed by the Canadian Commercial Corporation (CCC) as its subcontractor (see the discussion in Chapter 4, *supra*).

2-29. If a bid is rejected because the prospective contractor is found to be not responsible, the contracting officer must place in the contract file a report of nonresponsibility. Supporting documents, including any surveys made, are attached to the filed report of nonresponsibility.

2-30. ***Disputes.*** The Contract Disputes Act of 1978 includes all disputes arising under contracts and related to contracts in matters which may be cognizable by the various Boards of Contract Appeals. The Armed Services Board of Contract Appeals has determined that the act confers upon it power to consider precontractual matters such as bidding processes (*Hi-Tech Electronics Corp.* ASBCA No. 25968 (1981)). In the case which raised the question, the ASBCA determined that it had authority to decide whether to allow a successful bidder to rectify an alleged mistake in the bid after the contract was awarded. Thus it can be said that the Firm-Bid rule does not prevent a bidder from modifying a bid if a mistake is alleged and proven.

(A) The Firm-Bid rule states that the bid in response to an invitation cannot be withdrawn after the opening of the bids. This rule varies the ordinary principles of commercial contract law. The commercial rule is that an offer may be withdrawn (revoked) at any time prior to acceptance in the absence of an option. If the offer in a commercial transaction includes an appropriate option based on consideration, this option would make the offer irrevocable for the stipulated time. The Firm-Bid rule operates only after the opening of bids. It does not stop a bidder from withdrawing his bid after it is submitted, before opening. Actually, there is no Federal statute which expressly forbids the withdrawing of a bid prior to its acceptance; nor is there any Supreme Court case determining the issue of withdrawal prior to acceptance. Nevertheless, both the Comptroller General and the Court of Claims consistently follow the Firm-Bid rule in their decisions.

(1) There are some exceptions to the Firm-Bid rule. The rule does not apply to negotiated contracts. The rule does not apply where there has been a mutual mistake of material fact, where the invitation for bids is silent on the question of withdrawal, or where it is in the interests of the Government to allow the bidder to withdraw his bid. Finally, exceptions to the rule are made in cases where, if the Government required performance, it would be inequitable, unconscionable, or impossible.

(B) A mistake has been defined as an erroneous mental condition, conception, or conviction, induced by ignorance, misapprehension, or misunderstanding of the truth, but without negligence, and resulting in some act or omission done or suffered erroneously by one or both of the parties to a transaction, but without its erroneous character being intended or known at the time (see discussion in Chapter 4, *supra*). Where a mistake is made in a bid, there are two basic rules which come immediately into effect: (1) since a bid must conform to the invitation in order to be acceptable, a mistake in a material matter in the contract renders the bid

nonresponsive and it must be rejected; (2) since the bidder does not have the right to withdraw or modify a bid after opening, the bid is effective with the mistake as an included term after the opening. Of course, if the mistake in the bid by the bidder is discovered by him before the opening, then the bid may be withdrawn.

(1) Two types of relief are available if, before award, it can be shown that a mistake was made in the bid.

a. The bid can be completely withdrawn if it is reasonably established that it involves an honest mistake. The Contracting Officer cannot accept a bid in good faith if he knows (has actual knowledge) or reasonably should have known (constructive notice) that a mistake was made, i.e., that it does not in fact represent the bidder's actual intent. The mere claim of the bidder is not sufficient. The contracting officer must be reasonably certain that the claim of mistake has a basis in fact and is made in good faith.

b. In certain cases, a bidder may be permitted to correct the bid after opening and prior to award. This is an exceptional remedy. It should be allowed in only a small percentage of cases.

(2) The standard of proof required in all "Mistake in Bid" cases is "Clear and Convincing Evidence." A bidder must establish by such "clear and convincing evidence": (1) that a mistake was made, (2) the nature of the mistake, (3) the term actually intended. The correction will not be allowed if it will raise the bidder's price above that of the next lowest bidder.

a. In cases where both the error and the intended term can be determined from the bid documents, the bidder may be allowed to correct a high bid price downward so as to make him the lowest bidder. Acceptance of a bid which on its face is the lowest bid is not prejudicial to the other bidders.

b. After a bidder requests correction of a mistake, which he is unable to substantiate with evidence required to get a correction, he cannot waive the request for withdrawal and demand that the contract be awarded at the original erroneous low bid price. However, if the bidder can prove with reasonable certainty that the revised higher bid would still be the lowest, there is a possibility of acceptance of the bid.

c. A bid may be changed without any evidence where the bid is already low and the bidder wishes to further reduce. Here again, it is not prejudicial to other bidders.

2-31. ***Notice of Error.*** There is no one answer to the question of what is required to place a contracting officer on notice of error. The rule of reasonableness—whether there were factors which reasonably should have raised the presumption of error in the contracting officer's mind—is applied.

(A) The established rule is that where a bidder has made a mistake in a bid and the bid has been accepted, the bidder must bear the consequences thereof. This rule applies unless the mistake was mutual or the error was so apparent that it must be presumed the contracting officer knew of the mistake and sought to take advantage thereof.

(B) The contracting officer is charged with notice of mistakes obvious on the face of the bid (e.g., incorrect totaling of prices; failure to insert unit prices; inconsistency of unit prices and extended prices). Many bid invitations specifically provide that unit prices will govern. Despite this, if evidence establishes a mistake in unit price, the GAO has held that the extended price prevails since a bid cannot be acepted with notice of error.

(C) Factors other than those on the face of the bid which may place the contracting officer on notice include:

(1) wide range between low bid and several other bid prices;

(2) Government estimate substantially higher;

(3) contracting officer knows of prior government purchases of some similar items at substantially higher prices; and

(4) letter to contracting officer from higher bidder saying low bidder couldn't possibly meet contract at quoted price.

The contracting officer need not take account of general economic conditions, and he need not check the bid against wholesale labor and material indices.

(D) A low bidder who alleged an error in bid, after request for verification by the Government because the bid submitted was one-half the price quoted by other bidders, was permitted to withdraw his bid upon administrative determination that the bid was so far out of line that acceptance would be unfair to both the low bidder and other bona fide bidders. Correction in bid cannot be permitted in the absence of clear and convincing evidence of the bid price intended, in view of the rule that bids may not be changed after the time set for the bid opening.

(E) If the contracting officer suspects the low bid contains a mistake, he must request the contractor to verify his bid. If such verification is attempted and the contractor confirms the price, the contracting officer is under no obligation to inquire further. However, a contracting officer would be well advised to become familiar with the provisions of DAR 2-406.3 (e); FPR 1-2406.3 *et seq.* which deal with Bid Verification. Moreover, the contracting officer's action bars a later presumption that he did not act in good faith.

(F) Mistakes in Bids. Mistakes, other than clerical mistakes, require the contracting officer to determine whether to permit the bid, or require correction or withdrawal. Such determinations may be made by procuring activities having legal counsel, in the case of withdrawals, or in the case of corrections, by designated officials pursuant to delegated authority (DAR Sec 2-406.3).

2-32. **The Award.** A bid was defined as an offer submitted in response to an invitation for bids. An award is the acceptance of the offer. Legally, an award is a particular type of acceptance. It is only an acceptance of a bid submitted in response to an invitation and not an acceptance of any offer. In other words, it is a technical term used in connection with advertised contracts.

(A) It is the fundamental rule of both private and public contract law that an acceptance must be in accord with the offer before a binding contract can result. In legal effect, any material alteration or variation in the acceptance by the government results in both a rejection of the offer (bid) and the institution of a counter offer which, in turn, can be accepted or rejected. A material deviation would occur, of course, where the bid required acceptance by a certain date and the award was made after that date. Thus, late awards are not effective.

(B) The rule at common law is that an acceptance is effective when dispatched by the offeree if the means used to

communicate it is authorized. The means of communication is authorized when the offeree uses the means indicated by the offeror (bidder) or if not expressly indicated then the same means used by the offeror to communicate the offer. Relating these principles to Government contracts, it would appear that in the typical case the acceptance would be effective so as to bind the parties in contract when the acceptance (award) is placed in the mails. United States Supreme Court cases have held this to be the true interpretation of the contractual situation. Some Court of Claims cases have held to the contrary, and the decision in *Pacific Alaska Contractors, Inc. v. United States*, 141 Ct. Claims 303 (1958), reaffirmed the Court of Claims position that the acceptance (award) is effective only when received by the bidder. The Comptroller General has stated that GAO will not follow the Court of Claims interpretation until it is approved by the Supreme Court of the United States. To date, the Supreme Court has not approved the Court of Claims position.

(C) Under ordinary conditions, the acceptance of a bid by the government must be in writing. This is especially true where a statute requires the contract to be in writing. However, under emergency conditions, oral contracts have been upheld by the Armed Services Board of Contract Appeals.

(D) Contracts awarded after formal advertising must be of the firm fixed-price type, except that fixed-price contracts with economic price adjustment clauses may be used where some flexibility is necessary and feasible.

(E) Economic Price Adjustment clauses (reflecting such items as changes in labor rates) are not normally desirable, but, in appropriate cases, clauses providing for upward and downward revision of prices are used in order to protect the interests of both Government and supplier. Where the contracting officer, on the basis of knowledge of the market or previous advertisements for like items, expects that a requirement for firm fixed-price bids will unnecessarily restrict competition, or unreasonably increase bid prices, invitations for bids may include an Economic Price Adjustment clause. Any Economic Price Adjustment clause must provide an escalation ceiling identical for all bidders so that each bidder is afforded an equal opportunity to bid.

(F) Where an invitation for bid does not contain a price adjustment clause, bids received which quote a price and contain a price adjustment provision with a ceiling above which the price will not escalate, are evaluated on the maximum possible escalation of the quoted base price. If the bid is eligible for award, the contracting officer must request the bidder to agree to the inclusion of the award of an approved Economic Price Adjustment clause subject to the same ceiling. If the bidder will not agree to such approved clause, the award may be made on the basis of the bid as originally submitted. Bids which contain such clauses with no ceiling are rejected unless a clear basis for evaluation exists.

(G) Where an invitation for bid contains an Economic Price Adjustment clause and no bidder takes exception to the price adjustment provisions, bids must be evaluated on the basis of the quoted prices without the allowable adjustment being added. Where a bidder increases the maximum percentage of adjustment stipulated in the invitation for bids, or limits the downward adjustment provisions of the invitation, the bid is rejected as nonresponsive. Where a bidder deletes the adjustment clause from its bid, the bid is rejected as nonresponsive since the downward escalation provisions are thereby limited. Where a bidder decreases the maximum percentage of escalation stipulated in the invitation for bids, the bid must be evaluated at the base price on an equal basis with bids that do not reduce the stipulated ceiling. However, if after evaluation, the bidder offering the lower ceiling is in a position to receive the award, the award must reflect the lower ceiling.

2-33. **Relief After Award.** Another question which arises on occasion is what relief may a successful bidder be entitled to after the award has been made to him and a contract apparently results? The answer in the majority of cases involves a consideration of the question of mistake and error. Cases calling for relief after award fall into two categories: Mutual Mistake and Unilateral Mistake.

(A) Mutual Mistake. If both the Government and the contractor made the same mistake, the contract does not express the agreement both parties intended; and it may be reformed (changed) to express the true understanding. Reformation is generally not permitted where the contractor claims that the Government and contractor would have come to a different agreement had both been aware that certain critical facts were actually not what the contractor erroneously supposed them to be.

(B) Unilateral Mistake. Normally, a contract cannot be reformed to correct a unilateral mistake. Once the Government accepts a contractor's bid, a binding contract is formed and the contractor must bear the consequences of his own mistake. The general rule is not applicable where the contracting officer had actual notice or constructive notice of the probability of an error. In such case, acceptance does not result in a binding contract; and the GAO or courts will either: (1) relieve the contractor from performance, or (2) allow an adjustment in price. The adjustment is to equalize the error; however, it may not result in the total corrected price exceeding the next low bid. If the government makes a mistake of fact not known to or induced by the contractor, the contract may be enforced rather than reformed. The contractor will be permitted to perform the contract as intended, or the contract will be terminated for the convenience of the Government. (See discussion in Chapter 4, *supra.*)

3. Negotiating Offers

3-1. We have seen that, as a rule, formal advertising is the preferred method of procurement. Advantages of the competition are more assured by use of this method. Basic assumptions that circumstances are normal and that the competitive condition exists must, in fact, precede the determination that formal advertising shall be used. The history of Federal procurement attests to the fact that formal advertising is inadequate in a number of procurement circumstances. This section discusses the limitations, prohibitions, and conditions that prescribe the use of negotiation in procurement.

3-2. **The Concept of Negotiation.** Negotiation is a process of conferring, bargaining, or discussing, with a view toward reaching agreement. It involves bargaining between

buyer and seller with the objective of reaching an agreement on the price, terms, and conditions of the transaction. In terms of the acquisition process, negotiation is any method of forming acquisition contracts without formal advertising. In general terms, negotiation is used when: (1) there is no evidence, or insufficient evidence, of a competitive price situation; (2) urgent requirements override the delays normally incident to formal advertising; or (3) public policy considerations supersede the benefits to be gained from formal advertising.

3-3. In some instances, a contracting officer must obtain a business clearance in order to enter negotiations, even though negotiation may be permitted under one of the seventeen exceptions to the requirement of advertising. This business clearance is authority from a superior to negotiate. As an example, he would need a business clearance before entering negotiations for: (1) letter contracts; (2) contracts, amendments to contracts, options, or equitable adjustments which would obligate the Government to pay $300,000 or more; (3) contracts in excess of $50,000, negotiated under exception 10; and (4) an amendment or redetermination of a previously authorized contract.

3-4. The FPR and DAR prescribe four conditions that must be satisfied prior to entering a contract produced by negotiation: (1) the procurement must fall within one or more of the exceptions permitting negotiation; (2) necessary determinations and findings must be made; (3) business clearance and approval under agency procedures must be obtained; and (4) the prospective contractor must have been determined to be "responsible."

3-5. Further, the regulations under ASPA require that, even though the procurement may meet the above conditions, negotiation shall not be used where formal advertising is feasible and practicable, and that negotiated procurements shall be competitive to the maximum practical extent.

3-6. Negotiation authority is provided for under the seventeen circumstances defined in 10 USC 2304(a)(1) through (17), DAR Section III, Part 2, and implementing regulations. Such authority is provided under fifteen circumstances defined in FPASA. The first sixteen exceptions in ASPA are specific, i.e., each deals with a specified subject. For instance, exception (3) is concerned with "small purchases"; exception (5) provides for negotiation for the services of educational institutions; and exception (12) deals with classified purchases. The last exception, however, permits negotiation of "otherwise authorized by law," indicating that negotiated procurements can be made under circumstances other than those specifically permitted in preceding exceptions.

3-7. **Exceptions.** The exceptions will be considered individually. Several exceptions may apply in a given circumstance, but only one is cited as authority for the specific procurement. This citation will often be suggested by the regulation. If DAR or FPR is silent in respect to a given circumstance, the (exception) authority to be cited will be the basic or most compelling reason for negotiating instead of advertising.

1. National Emergency. Among the exceptions to formal advertising is the policy on national emergency. Title 10 USC 2304(a)(1) and Title 41 USC 252(c)(1) permit negotiation if "it is determined that such action is necessary in the public interest during a national emergency declared by Congress or the President." Procurement by negotiation during national emergency has a long history. During periods of emergency from the Civil War to date, Congress has authorized this method of procurement in varying degrees. In 1864, Congress authorized procurement by Army quartermasters "in the most expeditious manner." This limited exception to formal advertising was used when necessary for the operations of any detachment of the Army. While involved in various military actions around 1900, the War Department was authorized to procure supplies and ordnance items without advertising. During World War I, both the War Department and the Navy Department authorized award of contracts without formal advertising under the emergency provisions of existing statutes. In 1940, the Navy was authorized to negotiate contracts for the construction of naval aviation facilities and for the acquisition, construction and repair of naval vessels, aircraft and machine tools, when in the interests of national defense. A state of national emergency was declared under Presidential Proclamation 2914, dated 16 December 1950. Thereafter, Secretarial determinations have specifically authorized the Departments to negotiate contracts under this exception. This broad negotiation authority, however, has since been limited to specific categories of contracts. The use of Exception 1 is presently restricted to three situations: (1) procurements made in keeping with labor surplus set-aside programs or disaster area programs; (2) procurements made in keeping with small business programs; and (3) procurements entered into pursuant to the Balance of Payments Restricted Advertising method.

(A) Labor surplus areas are aided by the placing of contracts with firms that will perform them in such areas. This is done to the extent that such assistance is consistent with procurement objectives. Set-aside procedures, restricting competition, are utilized; and the resulting contracts are negotiated. One important restriction on labor surplus and disaster area assistance should be noted: the Defense Appropriation Act prohibits the payment of price differentials for economic dislocations. This means that the objectives of such programs must be achieved by other methods, such as restriction of competition.

(B) Another important element of national policy is the assistance rendered small businesses under the Small Business Act. Whether formal advertising or negotiation is used, set-aside procedures reserve all, or a portion, of certain procurements for exclusive small business participation. Though Small Business Restricted Advertising procedures are used, the resulting contracts are negotiated (since restricting competition is inconsistent with the cardinal principle of formal advertising, i.e., full and free competition). Note that "joint set-asides", those made by the contracting officer and a representative of the Small Business Administration, are expressly authorized by the Small Business Act. Therefore, the exception covering procurements "otherwise authorized by law" applies. For those procurements unilaterally made by the contracting officer, Exception 1 is the only authority.

(C) Contracts made pursuant to the Balance of Payments Program are also considered to be negotiated procurements, since competition is carefully circumscribed. Such procurements may be conventionally negotiated or entered into by the special method of "Balance of Payments Restricted

Advertising." This advertising is conducted in the same manner as formal advertising, except that bids and awards are restricted to US end products and services. Contracts resulting from conventional negotiation must cite any other appropriate Exception. Where such negotiation authority is not applicable, and Balance of Payments Restricted Advertising is used, Exception 1 must be cited. Substantial changes have been made in this area by recent statutes and treaties. (See discussion in Chapter 4, *supra.*)

(D) In the event of a labor surplus or business set-aside, and procurements made pursuant to Balance of Payments Restricted Advertising, the authority of Exception 1 must be used in preference to any other authority. Exception 1, however, may not be used where Exception 6, purchases outside the United States, would apply. Nor may the authority of Exception 1 be used to negotiate with a low, responsible, small business bidder whose bid has been determined by the contracting officer to be an unreasonable bid under Small Business Restricted Advertising procedures. When an unreasonable bid is received from a low, responsible, small business bidder, the set-aside must be dissolved; and the requirement must be procured by unrestricted formal advertising or, where appropriate, by other negotiation authority. The present use of Exception 1 is that of an instrument of national policy "in the public interest."

2. Public Exigency. Public exigency lends itself to the exceptions of formal advertising because of the nature of urgency outlined within the policy. Among the key points in this policy that overshadow formal advertising are Governmental financial trouble, fire, explosion, ship or aircraft repair, and flood or other natural disasters. Title 10 USC 2304(a)(2) and Title 41 USC 252(c)(2) permit negotiation if "the public exigency will not admit of the delay incident to formal advertising." This exception had its origin in the "landmark" statute of June 23, 1860.

(A) In order for this authority to be used, there must be a compelling and unusual urgency. For example, Exception 2 may be used when the Government would be seriously injured, financially or otherwise, if the supplies or services were not furnished by a certain date, and where they could not be procured by that date through formal advertising. A compelling or unusual urgency may be created by fire, flood, explosion or other disaster; or it may arise from the necessity of immediate repair of ships, missiles, or aircraft to preserve or maintain their operational capability. Note that, though the use of this authority connotes a situation of unusual urgency, competition to the maximum practicable extent, within the time allowed, is required.

(B) This exception cannot be cited where negotiation may also be authorized under Exception 3, small purchases, or Exception 6, purchases outside the US. Determinations and Findings, signed by the contracting officer, are required in order to justify the use of Exception 2. In the case of certain high-priority items, the citation of the priority in the Determinations and Findings (D & F) is sufficient justification.

3. Purchases of Not More Than $25,000. This policy may be said to have been put into effect to simplify procurement procedures for contracts within a certain financial range. Generally, it permits direct purchases to be made without formal advertising. Title 10 USC 2304(a)(3) and Title 41 USC 252(c)(3) permit negotiation of purchases and contracts if "the aggregate amount involved is not more than $25,000." Congressional authority for negotiated procurement of small purchases has existed for many years. Negotiated procurement of Army Ordnance supplies amounting to not more than $200 was authorized as early as 1892. The Quartermaster General was granted similar authority by laws enacted in 1894 and 1898. In 1906 and 1907, the amount was raised to $500 and applied to all supplies for both the War and Navy Departments. The maximum was raised to $1,000 with the enactment of the Armed Services Procurement Act of 1947. On December 1, 1981, PL 97-86 was enacted, raising the amount to the present $25,000 level.

(A) Because of the administrative costs of formal advertising, Congress considered it good business that small purchases shall be negotiated. Otherwise, administrative costs, both the Government's and the contractor's might often outweigh the value of a small-dollar purchase and thereby increase the overall costs out of proportion to such value. The intent of the law is to provide for regulated negotiation of small procurements, with the resulting speed, flexibility and simplification of the procurement process. The requirement that all procurements, whether advertised or negotiated, be competitive to the maximum practicable extent applies equally to small purchases over $500. A reasonable solicitation of quotations from qualified sources is required for purchases over $500, and purchases of $500 or less may be made without competition, but must be distributed equitably among qualified suppliers over a period of time.

(B) Exception 3 cannot be used when negotiation is authorized under Exception 6. Nor can Exception 3 be used when negotiations have been initiated under any other authority, even though one or more contracts of not more than $25,000 may result. In the case of construction contracts, proposed procurements in excess of $25,000 must be formally advertised. Requirements aggregating more than $25,000 shall not be broken down into transactions of less than $25,000 merely for the purpose of permitting negotiation. Generally, no written justification is required for the use of Exception 3.

4. Personal or Professional Services. Personal or professional services may be negotiated without formal advertising if the soliciting Government agency finds such action necessary. These services are sanctioned under certain conditions as long as they serve to further the mission of the requiring agency. 10 USC 2304(a)(4) and 41 USC 252(a)(4) permit negotiation of purchases or contracts "for personal or professional services." As in the case of Exception 2, this authority is derived from the act of June 23, 1860, as incorporated into Section 3709, Revised Statutes. This exception of personal services from the requirements of formal advertising was rephrased in 1946 by an amendment to Section 3709, in pertinent part as follows:

> when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis.

The regulations reflect that personal services are subject to the conditions of that amendment.

(A) Exception 4 shall be used only when all the following

conditions are satisfied: (1) personal services are required to be performed by an individual, not by a firm; professional services may be performed by either an individual or a firm or organization; (2) the services are to be performed under Government supervision and paid for on a time basis, or the services are of a professional nature; and (3) procurement of the services is authorized by other law, such as an Appropriation Act.

(B) It cannot be too strongly reiterated that unless specifically authorized, the procurement of personal and professional services is prohibited. Exception 4 is merely the procedural vehicle by which personal or professional services may be procured; it does not confer authority to procure such services in the absence of the necessary specific authorization of law and any required administrative approvals pursuant thereto. An example of specific authorization for procuring personal services is the Administrative Expense Act of 1946, as implemented by the annual appropriation acts.

(C) The controversial subject of personal services has precipitated a number of Comptroller General decisions in which the "test of Federal employment" has been applied to determine if contracted services are "personal." The "test" includes three requirements: (1) performance of a Federal function, such as services normally performed by government personnel; (2) appointment or employment by a Federal official; and (3) supervision or direction by a Federal officer. A private contractor is performing personal services as a "Federal employee" when he is acting within the scope of this test.

(D) It is apparent that the Comptroller General views the prohibition against personal services contracts as a general policy, rather than a requirement of positive law. Even when specific statutory authority exists, the Comptroller General has required an administrative determination that (1) the services will further the mission of the requiring agency, and (2) a personal services contract will be entered into for a cogent consideration, such as necessity, economy, or efficiency, if the services are normally a Federal function of that agency.

(E) Although no document justifying negotiation under Exception 4 is required, other Departmental procedures regarding the procurement of personal or professional services must be followed. Significantly, procurements of other types of services authorized by any other exception may not be made under Exception 4.

5. Services of Education Institutions. Generally, contracts may be negotiated without formal advertising if they pertain to educational services. The conditions of this policy are outlined in the following paragraphs. Title 10 USC (a)(5) and 41 USC 252(c)(5) permits negotiation of purchases or contracts "for any service to be rendered by a university, college, or other educational institution." The purpose of this authority is to permit the departments to negotiate for necessary research and for the training of personnel at educational institutions.

(A) The regulations provide two kinds of illustrations of circumstances under which Exception 5 may be used: (1) educational or vocational training services performed by educational institutions in connection with the training and education of personnel, and for necessary material, services, and supplies in connection therewith; and (2) experimental, developmental, or research work (including services, tests and reports), or analysis, studies, or reports to be conducted by educational institutions.

(B) Note that Exception 5 is used for Research and Development contracts with educational institutions. However, note also that Exception 5 is not used when negotiation is authorized either under Exception 3, small purchases, or Exception 6, procurement and use outside the US.

6. Purchases Outside the United States. There are cases wherein contracts or purchases can be made outside the US. These purchases are somewhat limited, however, depending on the conditions under which they are to be made. Title 10 USC (a)(6) and Title 41 USC 252(c)(6) permit negotiation of purchases or contracts "for property or services" to be procured and used outside the limits of the United States, and its possessions. Since 1945, the Navy has had a similar, although more limited, authority to purchase supplies " . . . which it may be necessary to purchase out of the United States for vessels on foreign stations." The broadened negotiation authority in the Acts, above, enables contracting officers to procure in conformity with the business methods generally in use in overseas areas.

(A) Exception 6 may be used only to procure services and suppliers under carefully defined conditions. If for services, they must be performed outside the US, its possessions, or Puerto Rico. If for supplies, they must be shipped from, delivered, and used outside these areas. This is so, regardless of the place of negotiation or execution of the contract. Note that Exception 6 takes precedence over all other exceptions, and that formal advertising shall not be used for purchases outside the US.

(B) The formal advertising restriction, however, does not apply to overseas construction contracts. Such procurements may be made by means of formal advertising if a finding is made that this method is practicable and advantageous to the US. Although no written justification is required for the use of Exception 6, applicable departmental procedures must be followed. Substantial changes have been made in this area by recent statutes. (See discussion in Chapter 4, *supra*.)

7. Medicines or Medical Supplies. Purchases of medicine or medical supplies are allowable by an agency of the Government. Title 10 USC 2304(a)(7) and Title 41 USC 252(c)(7) permit negotiation of purchases and contracts "for medicine and medical supplies." The Navy was authorized to negotiate the purchase of medicines as far back as 1845. The War Department was given authority to negotiate for medicines and medical supplies early in 1893.

(A) This authority is used only when two requirements are satisfied: (1) the supplies must be peculiar to the field of medicine, such as surgical instruments, orthopedic appliances, X-ray equipment and supplies, and other similar equipment and appliances, but shall not include prosthetic equipment; and (2) when practical, at least 15 days advance publicity must be given for procurements of such supplies over the amount of $10,000.

(B) A Determination and Finding, signed by the contracting officer, is required for this exception. Further, Exception 7 may not be used where negotiation is also authorized under Exceptions 3 or 6.

8. Supplies Purchased for Authorized Resale. Formal

advertising is not always necessary for the purchase of supplies that are to be resold. Title 10 USC 2304(a)(8) and Title 41 USC (c)(8) permit negotiation of purchases and contracts "for property purchased for authorized resale." This Exception is ordinarily used to purchase brand name items or articles of a proprietary nature for patrons of retail activities. The exception, therefore, is merely a specific application of the general exception in Revised Statutes, Section 3709, for proprietary sole source purchases where it is impractical to secure competition.

(A) This authority is used only for purchases for resale at military activities, such as base commissaries and ships' stores, and only where appropriated funds are involved. It is ordinarily limited to purchases of brand names or proprietary articles which a selling activity resells to supply a customer demand. The same notice of requirements applies as in Exception 7, and where practical, at least 15 days advance publicity must be given for procurements over $10,000.

(B) This exception does not apply to retail outlets which rely upon a return of sales for funds with which to make additional purchases, such as military exchanges. Such funds are considered to be nonappropriated funds. The use of Exception 8 requires a D&F, signed by the contracting officer. Exception 8 must not be used when negotiation is also authorized by Exception 3, small purchases, 6 purchases outside the US, or 9 purchases of subsistence supplies.

9. Subsistence Supplies. Due to the infeasibility of purchasing perishable and some nonperishable supplies through formal advertising, direct purchase and inspection of such supplies are necessary to insure the procurement of quality produce. Title 10 USC 2304(a)(9) and Title 41 USC 252(c)(9) permit negotiation or purchases and contracts "for perishable or nonperishable subsistence supplies." Long ago, the Navy Department was granted specific authority to procure certain perishable subsistence items by negotiation, e.g., butter and cheese (1847), pickles, vegetables, and preserved meats (1861), and flour and bread (1867). Later statutes broadened this authority to include all perishable subsistence supplies. The inadequacies of formal advertising in the produce market place were recognized by the congressional reporting committee, in pertinent part as follows:

> The only businesslike method of buying such items is by evaluation after visual inspection at the time and place such perishable items are offered, and by purchase at current wholesale prices.

In 1958, amendments broadened this exception to include nonperishable subsistence items. The necessity of negotiating for purchase of frozen foods and canned goods while still in the crop stage, had demonstrated the infeasibility of formal advertising.

(A) Exception 9 is used for the negotiated procurement of all subsistence items, whether perishable or nonperishable.

(B) This authority may not be used, however, where the procurement is also authorized by the exceptions covering small purchases or procurement for overseas use. No written justification is required for using Exception 9.

10. Impracticable to Secure Competition by Formal Advertising. Due to conditions of limited resources and other inadequacies to secure necessities, formal advertising may be excluded when it is impracticable. Title 10 USC 2304(a)(10) and Title 41 USC 252(c)(10) permit negotiation "for property or services for which it is impracticable to obtain competition." The War Department received similar authority in 1901. The Armed Service Procurement Act of 1947 extended this exception to all military services. This exception recognizes consistent Attorney General and Comptroller General rulings that formal advertising was not required by Section 3709, Revised Statutes, in circumstances which made competition impracticable. In reporting the bill, however, the committee also recognized that former strict interpretations of Section 3709 on the question of whether or not it was in fact impracticable to secure competition in a given circumstance had led to frequent reversal of decisions of purchasing agencies:

> It (the Committee) believes that under the terms of earlier legislation such decisions were probably in accord with the intent of Congress. However, this section is intended to place the maximum responsibility for decisions as to when it is impracticable to secure competition in the hands of the agency concerned. . . It is, therefore, intended that this section should be construed liberally and that review of these contracts should be confined to the validity and legality of the action taken and should not extend to reversal of bona fide determinations of impracticability where any reasonable ground for such determination exists.

(A) This exception should be used only when it is clearly established that competition by formal advertising is impracticable. Seventeen representative examples of circumstances which may justify the use of Exception 10 are enumerated in DAR 3-210.2, and 15 such examples are enumerated in FPR 1-3.210. These examples include the following circumstances where it is impracticable to secure competition by means of formal advertising within the meaning of this exception: (1) where there is only a single source of supply; (2) where competition is precluded by the proprietary interest of one supplier in patent rights, secret processes, control of materials, or similar conditions; (3) where adequate specifications or a detailed description for use in an invitation for bids cannot be drafted; (4) when the procurement involves supplies or services of a special nature, such as public utility services, stevedoring or warehousing services, training film or motion picture productions, and similar requirements.

(B) Use of this broad negotiation authority is carefully circumscribed. A Determination and Finding signed by the contracting officer is required. Department regulations require that a copy of the Determination and Finding be sent to the General Accounting Officer with a copy of the contract. Finally, Exception 10 may not be used when negotiation is authorized by any other exception (other than Exception 12, Classified Purchases).

11. Experimental, Developmental, or Research Work. The requirements of Research and Development do not adapt very well to the process of formal advertising. Because of this, formal advertising may be excluded in the procuring of the special skills and facilities and other necessities involved in Research and Development. Title 10 USC 2304(a)(11) and Title 41 USC 252(c)(11) permit negotiation of purchases or contracts "for property or services that he (the Secretary) determines to be for experimental, developmental or research work, or for making or furnishing property for experiment, test, development, or research." Section 6 of the Act of August 1, 1946, authorized the Navy Department to nego-

tiate experimental, developmental, and research contracts. Exception 11 is a restatement and an extension of the authority to other departments. World War II proved the necessity of continued Research and Development effort. However, the very nature of such programs was inconsistent with procurement by formal advertisement. Research and Development contractors would usually have to be selected from a limited list of possible contractors, on the basis of special skills or facilities. Accurate forecasts of costs were not often possible, making cost-reimbursement contracts necessary. It is apparent that the true Research and Development process was not amenable to the inflexible requirements of formal advertising.

(A) The authority of Exception 11 is basically three-fold. It applies to: (1) contracts relating to theoretical analysis, exploratory studies, and experimental in science and technology; (2) contracts relating to development of practical applications of scientific or technical investigative findings and theories; and (3) contracts for equipment, supplies (including parts, accessories, or patent rights thereto, and drawings or designs thereof), services, tests, and reports necessary or incidental to experimental, developmental, or research work.

(B) This authority must not be used for contracts with educational institutions (Exception 5), nor may it be used when negotiation is authorized under Exception 3, small purchases, or 6 foreign purchases. Further, this authority may not be used for quantity production. However, a research and development contract calling for a reasonable number of experimental, test, or prototype models is not regarded as a contract for quantity production.

(C) A Secretarial Determination and Finding is required for contracts exceeding $100,000 under this exception. For contracts under $100,000, a Determination and Finding by the contracting officer is sufficient, unless limited by a higher authority. Each Military Department is required to maintain a record of each procurement made under this authority, including: (1) the name of the contractor; (2) the amount of the contract; and (3) a description of the work to be performed thereunder.

12. Classified Purchases. Due to the character or nature of certain necessities, the Secretary may find it necessary to exclude formal advertising in the procurement process. This exclusion of formal advertising protects the public from injury. Title 10 USC(a)(12) and Title 41 USC 252(c)(12) permit negotiation of purchases or contracts "for property or services whose procurement he, the Secretary, determines should not be publicly disclosed because of their character, ingredients, or components." The predecessors of this substantially new negotiation authority, i.e., "new" in its broadened application to all agencies, were three Army statutes. The Act of May 11, 1908, authorized the War Department to purchase ordnance equipment in the most economical and efficient manner, whenever the public interest would be injured by publicly divulging the character of ingredients of such equipment; the Act of May 15, 1936, extended such authority to chemical warfare and signal equipment; the Act of July 13, 1939, extended coverage to aircraft parts, instruments and accessories.

(A) The exception is used for purchases or contracts classified "Confidential" or higher, or where because of other considerations the contract should not be publicly disclosed.

(B) This authority is not used when any other exception applies, except that it is preferred to Exception 4, Personal or Professional Services. A Secretarial Determination and Finding justifying the use of Exception 12 is required.

13. Technical Equipment Requiring Standardization and Interchangeability of Parts. For purposes of standardization and interchangeability of parts, formal advertising may be excluded in procuring equipment with the aforementioned requirements. The exclusion of formal advertising may also be justified as being in the best interest of the public. Title 10 USC 2304(a)(13) and Title 41 USC 252(c)(13) permit negotiation of purchases or contracts "for equipment that he, the Secretary, determines to be technical equipment whose standardization and interchangeability of parts are necessary in the public interest and whose procurement by negotiation is necessary to assure standardization and interchangeability." This exception originated in the Armed Services Procurement Act of 1947. Congress agreed that financial savings and simplified logistics would result from standardized equipment and interchangeable parts. Negotiated procurement of additional units and interchangeable replacement spare parts, the initial procurement of which is competitive for the most part, assists in the preservation of the Government's policy of standardization and interchangeability.

(A) Since standardization of equipment restricts normal competition, the regulations define a number of specific criteria which must be met before Exception 13 may be used: (1) the procurement must be for additional units and replacement items of specified makes of technical equipment and parts; (2) the items must be (a) for tactical use, or (b) an integral part of, or in direct support of, a weapons system; or (c) for use outside the continental limits of the United States, in theaters of operations, on board naval vessels, or at advanced or detached bases; (3) the items must have been adopted as standard items of supply; and (4) a current and recurring procurement requirement for the items must exist. DAR 3-213.2 and FPR 1-3.213 outline a number of examples where the use of this authority would be appropriate, for example, to limit the variety and quantity of parts that must be stocked; to create interchangeability among items of equipment damaged during combat or other emergency. This section also specifies twelve areas of consideration in making a determination to procure under authority of Exception 13, such as, whether future procurement of the standardized item can be effected at reasonable prices; whether standardization will enhance mission capability; whether standardization will adversely affect existing coordinated military standards, or impair the capability of industry to satisfy mobilization requirements.

(B) Exception 13 may not be used for initial procurement of equipment and parts, or for arbitrary selection of equipment and parts for certain suppliers. A Secretarial Determination and Finding is required, containing the following: (1) the equipment is technical equipment; (2) standardization and interchangeability of the equipment and parts are required in the public interest; and (3) procurement of such equipment and parts by negotiation is necessary to assure standardization and interchangeability. Finally, each Department or Agency must maintain a current master list of all

items for which Determinations and Findings have been made under Exception 13.

14. Technical or Specialized Supplies Requiring Substantial Initial Investment or Extended Period of Preparation for Manufacture. This exception is unique to the defense function, and is not found in the FPR. Generally, the Secretary may find it necessary to exclude formal advertising when procuring some technical or specialized supplies due to reasons of additional costs and delay in procurement. Title 10 USC 2304(a)(14) permits negotiation of purchases and contracts "for technical or special property that he, the Secretary, determines to require a substantial initial investment or an extended period of preparation for manufacture and for which he determines that formal advertising would be likely to result in additional cost to the Government by reason of duplication of necessary preparation which would unduly delay the procurement of the property." The exception originated in the Armed Services Procurement Act of 1947. In reporting the bill, the House Armed Services Committee stressed that this authority was essential for proper procurement of major items of a technical or specialized nature, such as aircraft, tanks, radar, missiles, rockets, and similar equipments. The committee recognized that such items could be procured to the best advantage from a contractor who, in developing the item, has already accomplished necessary preparatory effort and acquired the skill and capability to rapidly mass-produce such complicated mechanisms. Further, the full benefit of the development contract may be secured from a careful analysis of the contractor's cost experience in negotiating the follow-on production contract, and from the application of the contractor's already-acquired production experience in the succeeding effort.

(A) Exception 14 is used where it is preferable to place the production contract with the supplier who developed the equipment. Thus, the Government is assured of either the benefits of the techniques, tooling, and equipment already acquired by that supplier, or avoidance of the undue delay arising from a new supplier having to acquire such techniques, tooling and equipment. DAR lists five important considerations involved in the use of this exception: (1) high starting costs; (2) preliminary engineering and development work not usable by another supplier; (3) elaborate special tooling is required; (4) substantial time and effort already expended in prototype of initial production model development; and (5) the likelihood of important design changes.

(B) This exception should not be used to avoid duplication of private investment unless such duplications would be likely to result in additional cost to the Government. A Secretarial Determination and Finding is required, specifying that (1) the supplies are of a technical or special nature requiring a substantial initial investment of an extended period of preparation for manufacture; and (2) procurement by formal advertising would either (a) be likely to result in additional cost to the Government by reason of duplication of investment, or (b) result in duplication of necessary preparation which would unduly delay the procurement.

15. Negotiation After Advertising. There are three general conditions under which the Secretary or the Agency head may negotiate purchases or contracts after formal advertising failed to produce desired results. Title 10 USC 2304(a)(15) and Title 41 USC 252(c)(14) permit negotiation of purchases or contracts "for property or services for which he (the Secretary) determines that the bid prices received after formal advertising are unreasonable as to all or part of the requirements, or were not independently reached in open competition, and for which (A) he has notified each responsible bidder of intention to negotiate and given him reasonable opportunity to negotiate; (B) the negotiated price is lower than the lowest rejected bid of any responsible bidder, as determined by the head of the agency; and (C) the negotiated price is the lowest negotiated price offered by any responsible supplier." This exception originated in the Armed Services Procurement Act of 1947. Its purpose is to protect the Government against excessive or collusive bids. Any relief sought under the antitrust laws would be too late to assist in timely procurement at reasonable prices. The committee recognized that the only effective course of action, where excessive or collusive bids are involved, is to negotiate in a further attempt to procure the necessary items at reasonable prices.

(A) This exception is used in the circumstances described above. It permits (1) negotiation as a second procedural step to obtain reasonable prices, and (2) corrective action to prevent collusive bidding where further investigation reveals violation of antitrust statutes. Note that 10 USC 2305(d), DAR 1-111, and FPR Subpart 1-1.9 require that any evidence of collusive bids be referred to the Attorney General for corrective action.

(B) The use of this authority is carefully circumscribed. A Determination and Finding is required. It must state that the bid prices, after formal advertising, are unreasonable or were not independently reached in open competition. Even after such determination and after rejection of all bids, no contract shall be negotiated unless: (1) reasonable advance notice of intent to negotiate is given to each responsible bidder which had submitted a bid; (2) the lowest negotiated price is lower than the lowest rejected bid price; and (3) the negotiated price is the lowest negotiated price offered by any responsible supplier.

16. Purchases in the Interest of National Defense or Industrial Mobilization. This authority is unique to DOD. Title 10 USC 2304(a)(16) permits negotiation of purchases and contracts if the Secretary determines that: (a) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer or other supplier, available for furnishing property or services, in case of a national emergency; or (b) the interest of industrial mobilization in case of such an emergency, or the interest of national defense to have a particular facility or supplier available for furnishing supplies or services in case of a national emergency, and negotiation is necessary to that end; (c) that negotiation with a particular supplier would serve in the interest of industrial mobilization in case of a national emergency; or (d) negotiation with a particular supplier would serve the interest of national defense in maintaining active engineering, research, and development.

(A) Each Department is also required to maintain a record of contracts entered into pursuant to Exception 16, including the name of the contractor, the amount of the contract, and the description of work to be performed thereunder.

17. Otherwise Authorized by Law. This exception acts to preserve negotiation authority of prior permanent legisla-

tion. Title 10 USC 2304(a)(17) and Title 41 USC 252(c)(15) permit negotiations of purchases and contracts which are "otherwise authorized by law." The purpose of this authority is to preserve any prior statutory authority to negotiate as contained in unrepealed permanent legislation. Examples of preexisting Acts of this type would be the Act of April 25, 1939, Architectural or Engineering Services; the Act of August 2, 1946, Temporary Employment of Experts and Consultants; The Small Business Act (15 USC 631); The Foreign Assistance Act of 1961; *et seq*; and Sec. 321 of the Transportation Act of 1940.

(A) In addition to preserving the negotiation authority of prior permanent legislation, this Exception permits negotiation under any relevant statute enacted after the passage of the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949; for instance, in negotiating joint set-asides for small business as authorized by the Small Business Act. It should be noted that this authority shall be used strictly in accordance with Agency or Departmental procedures.

(B) No written justification for the use of this exception is required. However, general procedures may require a memorandum for the file in appropriate procurements.

3-8. Thus far, our discussion has treated only the negotiation of supplies and services. However, 10 USC 2304(a) and 41 USC 252(c) also apply to the procurement of public works, buildings, and facilities. By their wording, certain exceptions do not apply to the procurement of construction work within the United States. For example, contracts to construct public buildings can be negotiated only under Exceptions 1 through 3, 10 through 12, 14 FPR and 15 DAR.

3-9. Further, as we noted in our discussion of Exception 6, the statutory preference for formally advertised procurement of construction does not apply if it is to be performed outside the United States. Government policy, however, has been to advertise such procurements wherever feasible. Where formal advertising is not feasible for overseas construction, negotiation may be employed. Exception 6 is normally used, but any of the other exceptions outlined may be used where more appropriate. By virtue of its wording, however, Exception 6 may not be used for construction work to be performed in United States Territories and possessions.

3-10. In this discussion of negotiated procurement, we have referenced only the applicable provisions of Title 10 USC (Armed Forces) and Title 41 USC (Public Contracts). However, note that similar provisions may be found in other departmental and agency procurement regulations. Undoubtedly, a complete cross-reference to all statutes and regulations concerning procurement will be included in the proposed system of Federal Acquisition Regulations.

4. Protests

4-1. Since negotiated contracts involve a less formal procedure than formal advertising, it is obvious that protests of award would be less numerous and would be successful in fewer instances, requiring quite serious departures from the accepted norms to justify upsetting the award. Notwithstanding the broader areas of discretion inherent in this system, disappointed offerors have in recent years sought the aid of the Comptroller General and, in some instances the courts, in asserting their rights.

4-2. The "standing to sue" idea discussed in the preceding chapter applies to negotiated as well as to advertised awards, but the courts find for the Government in the absence of arbitrariness or abuse of discretion. The Comptroller General has recently taken an active role in this area based upon the statutory procedures adopted in 1962 as a result of Congressional concern over the number of sole source negotiations conducted by the Department of Defense. This legislation, which was adopted to insure that the maximum number of proposals will be received and considered, resulted in 10 USC 2304(g), which reads as follows:

> (g) In all negotiated procurements in excess of $10,000 . . . price proposals shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered.

Similar provisions may be found in other titles of the US Code and in agency and departmental regulations.

4-3. Such provisions have furnished the legal framework and standards for judging the negotiated award and defining the legal qualifications therefor. The following problem areas have emerged:

(1) Competitive Range. After receipt of proposals and resolution of any questions regarding the acceptance of late proposals, the procuring activity must determine with whom it will conduct discussion, i.e., who is within the "competitive range." In determining what is a competitive range, the Comptroller General has stated that negotiation should be conducted with offerors submitting proposals which are found to be in a competitive range and that the meaning of such determinations, particularly regarding technical considerations, is a matter of administrative discretion which will not be disturbed in the absence of a clear showing that such determination was an arbitrary abuse of discretion. In other words, this determination is a judgment question within the discretion of the agency. The question then arises as to how far out of line must a proposal be in order for the agency to say that it is outside the competitive range and therefore not subject to further discussion with the supplier. It should be pointed out that the issue of competitive range in negotiation is not analogous to the issue of responsiveness in formal advertising. This was emphasized by Comptroller General decisions stating that the primary consideration in negotiated procurements is not the responsiveness of proposals but the discussions (i.e., negotiations) with all offerors within a competitive range. In this connection, it should be noted that when a determination is made to conduct negotiations with all offerors within a competitive range, nonresponsive proposals are not automatically excluded from consideration but may be clarified or supplemented to bring them within the terms of specifications if they are determined to be within the competitive range from the standpoint of both price and technical considerations. The reason that responsiveness does not play the role in negotiation that it does in formal advertising is that the flexibility of negotiations allows the supplier to change his initial proposal both as to price and technical considerations, and this serves the basic policy of

encouraging the maximum possible competition in negotiated procurements. Therefore, the Comptroller General has held that a supplier may not be determined to be outside the competitive range because his initial proposal was unreasonably low, or technically inferior when the desired technical characteristics were not specifically set forth in the request for proposals. However, negotiations need not be conducted on proposals so technically inferior as to render meaningful discussions impossible.

(2) What Constitutes Discussion. After receipt of proposals and establishment of competitive range, the procuring agency will normally begin discussions with those offerors within the competitive range. The concept of negotiation was described by the Comptroller General as follows:

> The term 'negotiation' implies a series of offers and counteroffers until a mutually satisfactory agreement is concluded by the parties. Title 10 USC 2304 (g) implements and clarifies the definition of 'negotiate' in 10 USC 2302 (2) and it is our view that the term 'negotiate' must be read in conjunction with 10 USC 2304 (g) to include the solicitation of proposals and the conduct of written or oral discussions, when required, as well as the making and entering into a contract. 45 Comptroller General 417 (1966).

After receipt of proposals or quotations, no information contained in any proposal or quotation, or information regarding the number or identity of the offerors, shall be made available to the public or to anyone within the Government not having a legitimate interest therein. The contracting officer will then conduct negotiations with the prospective contractors, and he may not furnish any information to potential suppliers which alone or together with other information may afford them an advantage over others. Auction techniques are strictly prohibited; nor may "technical transfusion" be used to upgrade competitive proposals. Once the decision has been made to conduct discussions, then discussions must be entered into with all suppliers within the competitive range. It might be noted that a contracting officer's acceptance of a contractor's acknowledgment of an amendment to the solicitation after the date set for receipt of proposals has been held to constitute "discussions" within the meaning of 10 USC 2304 (g) so as to impose the concomitant obligation on the Government to conduct negotiations with all other offerors within the competitive range.

(3) Evaluation Criteria. In order to obtain the maximum practical competition contemplated by the statutes and regulations, the Comptroller General has consistently held that the criteria to be used in making the award must be clearly set forth in the solicitation. The requirement to disclose evaluation criteria has been extended by the Comptroller General to include the relative weights as between the various evaluation factors. In addition, a failure to follow the criteria set forth, or the substitution of new criteria without informing all potential offerors will result in an improperly negotiated procurement.

(4) Price and Other Factors. The courts have overturned an award made where only one of five offerors who submitted otherwise acceptable proposals was asked his price. Complete failure to require price has been held to constitute an abuse of discretion for which the courts will grant relief. *Schoenbroad, Trustee, v. United States*, 410 F.2d 400 (Ct Cl, 1969).

4-4. In summary, what constitutes the "competitive range" is within the broad discretion vested in the Contracting Officer. The concept of competitive range requires careful analysis, and sound judgment, exercised under the particular circumstances of the procurement involved. The definition of the concept should be flexible within the overriding consideration that the Government's best interest be served, price and other factors considered. Fair and reasonable contractual arrangements are products of sound business judgment and equitable commercial practice.

5. Two-Step Formal Advertising

5-1. The two-step formal advertising procedure is an exception to the usual method of formal advertising. It is used when definitive design and/or performance specifications are not presently available, and it is used to promote maximum effective competition. The procedure involves two steps: (1) a request for submission, evaluation, and, if necessary, discussion of a technical proposal without pricing, to determine the acceptability of the supplies or services offered; and (2) a formally advertised procurement confined to those offerors who have submitted acceptable proposals in the first step.

5-2. Two-step formal advertising is limited as to use. The regulatory authorization permits the use of this procedure where: (1) available specifications or purchase descriptions are not sufficient or complete to permit full and free competition without technical evaluation; (2) definite criteria exist for evaluation of technical proposals; (3) more than one technically qualified source is expected to submit a proposal; (4) a firm fixed-price type of contract will be used; and (5) sufficient time will be available for use of the two-step method.

5-3. After receipt of the proposal, a technical evaluation of the proposal is made. Sources whose technical proposals are not acceptable are notified of that fact, and are notified in general terms of the basis for the determination. Technical proposals that are marginal are given special consideration so as to bring them up to an acceptable status, if possible, by discussion. This would be particularly apropos in cases where only one or two contractors responded.

5-4. Invitations for bids are issued to only those sources whose technical proposals have been evaluated and determined to be acceptable under step one.

5-5. Some fundamental rules apply to the two-step formal advertising procedure: (1) in order to be responsive, bids must conform in all material respects to both method and timeliness; (2) a late bid is considered for award only if it is received before award, and acceptance is authorized by one of the circumstances set forth in DAR 2-303.3; (3) only those bidders whose technical proposals were acceptable after step one are to be solicited for price quotations in step two; and (4) in step two, the low bid must be accepted even though another bidder's proposal may appear more desirable, even at a very slightly higher bid price.

CHAPTER 6

Funding Contracts

HISTORY SHOWS that Government fiscal management has been subject to constant change. As a consequence, care must be exercised in examining any reference relating to this subject for current applicability. This chapter will discuss in a general way the various legal facets of fiscal management and funding, pointing up problems and the means that may be used in solving them.

1. Overview

1-1. The appropriation of public funds by the Congress, and the use of such funds by the Departments of Government for the procurement of supplies and services under contract, points up an interesting relationship: the separation of powers between two branches of the Government—the Legislative and Executive. This concept of "checks and balances" emphasizes the relationship of these two branches and shows the controls exercised by each over the other to prevent unauthorized expansion of authority and power. The Congress controls the purse strings of the Treasury. Thus, Congress authorizes the Departments to expend specific amounts of money for specific purposes, and appropriates funds for those purposes. The Departments obligate and expend these funds within the authorizations and limitations imposed by the Congress. The General Accounting Office, responsible to the Congress, watches over expenditures to insure compliance with Congressional restrictions.

1-2. It is not uncommon for Congress to attach "riders" to appropriations acts, thereby restricting the use of appropriated money. In addition to establishing specific restraints on how appropriated money will be spent, the Congress establishes some of the policies on how Government contractors may receive financial assistance on contracts. The effect of such aid can be expansion of production capability, increase of competition, and faster performance.

1-3. The Impoundment Control Act of 1974, 31 USC 1400, *et seq.*, adds another fiscal control by requiring the President to spend the money appropriated for the purpose appropriated. He may not impound the money and cancel the project without the express consent of Congress. This Act brought to an end the idea that the Executive branch could refuse projects insisted upon by the Congress by the simple expedient of not spending the money. The Act provides detailed procedures for the President to follow in obtaining the consent of Congress for not spending appropriated funds.

2. Programming and Budgeting

2-1. Through the Budget Accounting Act of 1921, the Congress created two agencies for establishing fiscal control in Government. One of these was the Office of Management and Budget (until 1970 the Bureau of the Budget), which reports directly to the President and assists him in developing the National budget (often referred to as "The President's Budget"). The other agency is the General Accounting Office (GAO), which monitors the expenditure of public funds. The GAO is in the Legislative Branch of the Government, and reports to the Congress. These two major agencies of the Government are primarily concerned with budgeting, programming, investigating, reporting, auditing, management, and funding procedures.

2-2. **Office of Management and Budget.** The 1921 Act has been amended many times to allow organizations and functions to keep pace with rapid changes in national interests, events, and requirements. This act was amended on July 1, 1970 to delete the Office of the Bureau of the Budget and replace it with the Office of Management and Budget. This was established by 1970 Reorganization Plan No. 2, effective July 1, 1970, 35 FR, 7959, 84 Stat. 2085. Executive Order No. 11541, dated July 1, 1970, 35 FR 10737, further prescribes the duties of the Office of Management and Budget (OMB) pursuant to Reorganization Plan No. 2. On March 2, 1974, the Act of 1921 was further modified to require the consent of the Senate before the President's appointment of the Director and Deputy Director of OMB would become effective (PL 93-250, 88 Stat 11).

2-3. The Director of the OMB is responsible directly to the President. The Act, as amended and revised by Executive Order, also outlines the organization of the Office. When directed by the President, the Office makes detailed studies of the departments and establishments to enable the President to obtain greater economy and efficiency in organization, activities, appropriations, assignments, and regrouping of services.

2-4. OMB, under such rules and regulations as the President may prescribe, prepares the Budget and any proposed supplemental or deficiency appropriations; and to this end, has the authority to assemble, correlate, revise, reduce, or increase the requests for appropriations of the several Departments or establishments (31 USC 16).

2-5. **The General Accounting Office (GAO).** The

Congress established the General Accounting Office as an agency through which it might determine whether public funds were being spent in accordance with the Congressional constraints which had been imposed. The investigative and reporting powers, as well as the decisions the GAO renders, have strongly influenced the fiscal and procurement policies of the Government.

2-6. The Budget and Accounting Act further states:

> There is created an establishment of the Government to be known as the General Accounting Office, which shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States. The offices of Comptroller of the Treasury and Assistant Comptroller of the Treasury are abolished. All other officers and employees of the office of the Comptroller of the Treasury shall be officers and employees in the General Accounting Office at their grades and salaries on July 1, 1921, and all books, records, documents, papers, furniture, officer equipment, and other property of the office of the Comptroller of the Treasury shall be the property of the General Accounting Office. The Comptroller General is authorized to adopt a seal for the General Accounting Office (31 USC 41).

2-7. The Comptroller General and the Assistant Comptroller General are appointed by the President with the advice and consent of the Senate. They serve for not more than fifteen years, subject to retirement at age seventy (whichever comes first); and the Comptroller General may not be reappointed.

2-8. The General Accounting Office, under the direction and control of the Comptroller General, is charged with the audit and settlement of Government accounts. It determines the validity and legality of expenditures so that the accounts of the fiscal officers can be settled. Under his statutory authority to settle claims by and against the United States, the Comptroller General may enter into an "accord and satisfaction" with a claimant which is binding upon the parties to the contract.

2-9. Certain functions of the General Accounting Office have a direct impact on Government contracting: the investigation of all matters pertaining to the receipt, disbursement, and application of public funds; the recommendation to the President and to Congress of legislation necessary to improve fiscal management; the investigation of governmental activities especially ordered by Congress; and reports to Congress of departmental expenditures or contracts that are in violation of the law.

2-10. The Comptroller General may render advisory rulings to disbursing officers and to the heads of executive agencies. He also responds to procurement officers on their submission of questions affecting the award of a public contract "when the prompt resolution of such questions is necessary or desirable as a prerequisite to the making of an award." The Comptroller General frequently advises bidders who have protested awards and contractors who are seeking relief under their contracts.

2-11. Illustrative of the breadth of decisions made are these determinations in the first several pages of a typical volume of the decisions of the Comptroller General: (1) a proper award was made on a particular procurement; (2) no legal basis existed to require the contractor to refund certain costs charged; (3) an award to another firm will not be declared invalid; (4) reformation of contract was not authorized; (5) a binding contract was consummated despite an alleged error in the bidding; (6) its claim division should certify a voucher for payment; (7) all bids in a certain procurement should be rejected and the procurement readvertised; (8) an invitation should be cancelled as too restrictive.

2-12. On the recommendation of the head of a Federal agency, the Comptroller General may remit the whole, or any part, of liquidated damages assessed for delay in performing a contract when he considers such action to be just and equitable. This authority is extraordinary, and is exercised by the Comptroller General with caution. It requires strong and persuasive equities on behalf of the claimant.

2-13. Because the General Accounting Officer may ultimately pass upon the validity of a Government contract, and procedures leading to its execution, any discussion of the law applicable to contracts must consider the opinions rendered by the Comptroller General.

3. The Military Program

3-1. Problems of national defense have given the role of programs, budgets and accounting a prominence that makes front page news. They are now the focal point of public interest in the formation of a policy to build up and maintain current military strength. In 1949, the Congress made the "performance budget" mandatory for the entire Department of Defense; and within three years following that date, all of the military services had reconstructed their budgetary methods. Prior to this time, it was virtually impossible to interpret expenditures in terms of defense objectives or to put a dollar sign on defense programs. The performance budget provided a means of analyzing the objectives of national defense in terms of the money necessary to accomplish such objectives. It also provided a means to relate costs to program effectiveness.

3-2. In order to understand the system, one must be aware of the "break out" of major military programs. Appropriations for the Department of Defense in the 1949 program covered five broad functional categories. These were personnel, maintenance and operations, major procurement, research and development, and acquisition and construction of real property.

3-3. In order to bridge the gap between long range military planning and formulation of annual budget requests, the Department of Defense in 1970 reorganized the defense effort into ten (10) major military programs. This programming system correlates all planning, programming, resources, material, and financial management systems within all Department of Defense components. Briefly, these major military programs are: (1) Strategic Forces, (2) General Purpose Forces, (3) Intelligence and Communication, (4) Airlift and Sealift Forces, (5) Guard and Reserve Forces, (6) Research and Development, (7) Central Supply and Maintenance, (8) Training, Medical, and other General Personnel Activities, (9) Administration and Associated Activities, and (10) Military Assistance. These programs are further broken down into program elements and program costs. Allocations of appropriated funds are made by DOD to its agencies by programs, and all programs and elements are identified to the related appropriation function.

3-4. A program element is an integrated force or activity.

It is a combination of men, equipment and facilities. For example, the B-52 aircraft together with all the supplies, bases, weapons, and manpower needed to make it effective, is an element. All the costs associated with research and development, initial investment, and operation of the B-52 are pulled together within the logistics system. It is readily seen that this is no small task, and it requires a reporting system which starts at the lowest cost-generating level and feeds information to all control and management elements.

3-5. Basically, public funds may not be used for procurement of supplies and services without authorization from, and appropriation by, Congress. The US Constitution (Article I, Sec 9, Clause 7) states: "No money shall be drawn from the Treasury, but in consequence of Appropriations made by Law . . . " The Authorization Statute (31 USC 627) states: "No Act of Congress passed after June 30, 1906, shall be construed to make an appropriation out of the Treasury of the United States, or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such act shall in specific terms declare an appropriation to be made or that a contract may be executed."

3-6. The budget process, therefore, provides the information (programs and dollars) on which the Congress bases its authorization by statutory action. Subsequent appropriation of funds by the Congress and their apportionment to Government agencies by the Office of Management and Budget provides the money required to buy the needed supplies and services.

3-7. Before submitting the Department of Defense budget, the various Departments do a considerable amount of preliminary work in planning, programming, coordinating, and reviewing. In September or October of each year, examiners from the Department of Defense and the Office of Management and Budget conduct intensive reviews of the estimates submitted by the Military Departments and Defense Logistics Agency (DLA) services. The consolidated requirements of the Department of Defense are placed into budget categories. These requirements are usually "cut and fit" to an amount which, based upon economic and political considerations, can be expected to gain approval.

3-8. In the review and enactment phase, there are four major procedural steps: review and adjustment, presentation to Congress, execution, and records keeping.

3-9. The joint review team (DOD-OMB), which also considers requests for reconsideration by the Services, balances the requirements within the framework of dollars expected to be approved. The budget is then submitted to the OMB, which makes further review and prepares a Consolidated Federal Budget.

3-10. In January of each year, the President presents the total Federal budget to a joint session of Congress. The House and Senate assign the budget to committees and subcommittees for review. A series of formal hearings are then conducted, at which each DOD Department presents testimony in support of its budget. When both Appropriations Committees (House and Senate) approve the budget, appropriations bills are drawn up.

3-11. Differences between the House and Senate are resolved by Committees from each group. A Compromise Appropriations Bill is then presented to the President for his signature. When the President signs this bill, it becomes the Appropriations Act for the fiscal year.

3-12. Execution is the phase of the budget cycle that is concerned with controlling the funds Congress has made available. This control involves financial plans, apportionment, budget authorizations and allocations, budget administration, and maintenance of records. These substantially represent the slicing up of the pie among the DOD Services and the further subdividing of each slice to major Department elements. The administration of funds through records constitutes the comptrollers' reviews and analyses to insure that the money is used for the purposes intended.

3-13. Finally, records on allocations and obligations are kept. Records of obligations incurred are continuously compared to money allocated to insure that the Department does not spend more than it has. We have referred to terms such as allocation and obligation; therefore, we shall now discuss briefly these and several other budget related items with which you should be familiar. These terms involve financial control.

3-14. Control of the funds made available by the Congress starts with the OMB and permeates the Services to the office which ultimately makes a payment from these funds. Even after an appropriation act has been passed by the Congress and signed by the President, funds are not available to a Government agency, such as DOD, until it has obtained a release in the form of an apportionment from the Office of Management and Budget. This is the Office's distribution of amounts available in an appropriation of fund account. It is an executive-level budgetary control made on a periodic basis. Even after an apportionment is made by OMB to DOD, no obligation may be incurred by a Military Department until the Secretary of Defense has first approved the Department's scheduled rate of obligations.

3-15. After the scheduled rate of obligation has been approved, the DOD comptroller then divides it into allocations to make the funds available to Military Departments who in turn make the funds available by allotment to their subdivisions such as the Navy Commands, Army Commands, and Air Force Commands. Depending on how much control is to be exercised, the Departmental subdivisions may make allocations directly available for obligation and spending, or they may further subdivide them into allotments and suballotments.

4. Obligation of Funds

4-1. An obligation is a Government liability resulting from a contract, purchase order, or similar document. This incurs a legal duty to pay the amount due. When a contractor has delivered the supplies or services and the Government has accepted them, the obligation is liquidated by payment to the contractor. A commitment is an administrative reservation of funds against a future obligation on a contract.

4-2. **Limitations on Obligating Funds.** The discussion of the OMB, GAO, and the budget was designed to give you a casual acquaintance with the constitutional authority, the separation of powers concept, and the mechanics of appropriation and obligation. It is in this area of obligations and funding that the contracting officer may find himself directly involved. It is important, therefore, that he understand

the limitations which the funding process may impose upon him.

4-3. ***Anti-Deficiency Act.*** This Act provides that no Government officer or employee shall authorize or create any obligation, or make any expenditure, in excess of an apportionment or administrative subdivision of appropriated funds. It also requires that executive agencies prescribe regulations for fixing responsibility in the event of a violation. For violations, the law provides:

> In addition to any penalty or liability under other law, any officer or employee of the United States who shall violate . . . shall be subjected to appropriate administrative discipline, including, when circumstances warrant, suspension from duty without pay or removal from office; and any officer or employee of the United States who shall knowingly and willingly violate . . . shall, upon conviction, be fined not more than $5,000.00 or imprisoned for not more than two years, or both (31 USC 665 (i) (1)).

4-4. ***Time Limitations.*** Congressional limitations on the use of appropriated funds are either time restrictions or subject-matter restrictions. Time restrictions limit the time during which funds may be obligated or expended, or both.

4-5. Appropriated funds are classified as annual funds, multiyear funds, or no-year funds. Annual funds must be obligated during the year for which they are appropriated or else they are lost for purposes of obligation; that is, they expire. Multiyear funds are appropriated for a longer period, but they do have time constraints limiting them to no more than five years. No-year funds have no "built-in" time limitation. However, subsequent appropriation acts may—and very frequently do—impose time constraints for funds which have been previously appropriated.

4-6. Although these time limits define the varying periods available for obligation, the funds carried in the annual appropriation act are one-year appropriations unless the act specifically provides otherwise. This is provided by statute:

> Except as otherwise provided by law, all balances of appropriations contained in the annual appropriation bills and made specifically for the service of any fiscal year shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year (31 USC 712(a)).

4-7. In recent years, Congress has provided some of the funds for the military departments in the form of no-year appropriations. Annual appropriations force the Services to award their contracts on a fiscal year basis. This causes gaps at the end of each fiscal year while the following fiscal year funds are being made available; therefore, continuing programs are interrupted. No-year appropriations make it possible for the Services to conduct programs with continuity over a several year period.

4-8. Annual appropriations are provided by the Congress for such things as pay and allowances for military personnel, maintenance and operation, and for subsistence and normal items of supply that can be delivered within two years after that fiscal year ends. No-year appropriations can be provided for research and development weapons systems procurements, long lead time construction, and similar long range projects.

4-9. ***Subject Matter Restrictions.*** Subject matter restrictions limit the use to which money may be put for accomplishing specific purposes, such as a program or project. Congress specifies in its appropriation acts the purpose for which funds are appropriated. In order to provide for the adherence to these purposes, the law states:

> Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the object for which they are respectively made, and for no other (31 USC 628).

4-10. Specific items accomplished under subject matter restrictions have included such things as building a post office at a specific location, or erecting a dam or building a ship. The appropriation specified by name the particular project and the specific amount of money. Execution of the project required strict administration with no latitude on the use of the funds. Since 1949, the DOD has been required by law to prepare its budget estimate and to administer its program so that the cost of performance of identifiable programs can be shown. This has resulted in a "performance type" budget wherein general categories of functions are established and the appropriation act authorizes funds for these functions. Major categories of functions in 1949 were personnel, maintenance and operation, major procurement, research and development, and construction. By eliminating specific item-by-item listings and using those general categories instead, the Military Departments have far greater flexibility for programming and reprogramming within the general appropriations. Since 1970, ten major categories (set forth under the heading "The Military Program" in this chapter) are being used.

4-11. ***MultiYear Procurement.*** Multiyear procurement is a method for competitive contracting for a period of several years (not over five) even though the total funds ultimately to be obligated by the contract are not available to the contracting officer at the time the contract is entered into. Typically under a multiyear contract, funds are appropriated annually for a single year's requirements, and the contract is subject to being cancelled or terminated by the Government. Cancellation would occur if, at the completion of a fiscal year, the government did not continue the contract for subsequent fiscal years due to a lack of funding. Termination would occur if during the course of the fiscal year the Government elected to terminate the remaining portion of the contract for that year. The termination liability would include both termination charges for the year and cancellation charges for the remaining years. The contractor is protected from loss in this event by contractual provisions allowing reimbursement for unrecovered, nonrecurring cost included in prices for cancelled items.

4-12. Multiyear contracting can result in significant savings for the Government. The most immediate savings is the potential for reducing start-up and other nonrecurring costs such as special tooling and special test equipment, plant rearrangement costs, preproduction engineering, specialized work force training, and so on. Under multiyear contracting, the contractor can spread or amortize these costs over the full contract quantity rather than only over a single year's quantity. In addition, recurring costs—production costs that vary with the quantity being ordered such as material and labor—can be reduced by using multiyear contracting. The contractor can order materials, parts and components in

economic lots for the full production quantity. Also, learning curve economies and economies resulting from a stable workforce are potential benefits of multiyear contracting.

4-13. The major disadvantage of multiyear contracting compared to annual contracting is the greater risk to the Government resulting from the longer contract. If funds are not made available for the full contract period or if the design features of the item are changed, the Government may find itself with useless parts and with an obligation to reimburse the contractor for its unamortized costs. Multiyear contracting should be used selectively. It makes no sense to use multiyear contracting when the requirements are subject to change, when the prospects of future funding are bleak, or when the cost benefits are minimal.

4-14. A contracting agency may not use multiyear contracting for procurement financed with annual year funds in the absence of specific statutory authorization. Such funds are made available to a contracting agency only for the needs of the fiscal year, and they must be obligated by the end of the fiscal year or returned to the Treasury. There are some statutory exceptions. Congress has authorized the Department of Defense to enter into multiyear contracts with annual year funds for base maintenance and certain other services (and related supplies) to be performed *outside* the continental 48 states if specified conditions are met (10 USC 2306 (g)). DOD is also authorized to enter into contracts for periods of up to 4 years for supplies and services required for the maintenance and operation of family housing, using funds which would otherwise be available only within the fiscal year for which appropriated (PL 91-1 and 2, Sec. 512). Statutory exceptions aside, multiyear contracting is conducted by using funds which are made available for obligation for 2 to 5 year periods of time. If funds are not made available for future year requirements, the contract is cancelled; and the contractor is entitled to be paid a cancellation charge, not to exceed a ceiling established in the contract, for unamortized costs.

4-15. The cancellation ceiling for DOD may not exceed $5 million unless statutory authorization is obtained for a higher ceiling (PL 94-106, Sec. 10, (1976)). As a result, DOD cannot use multiyear contracting for a major acquisition unless Congressional authorization is obtained to exceed the $5 million limit. A $5 million cancellation ceiling is too low for major acquisitions. Secretary of Defense Caspar Weinberger, in a statement to the House Committee on Armed Services on June 23, 1981, urged that Congress remove this ceiling. Another restriction on the use of multiyear contracting pertains to the type of costs which the contractor may recover under the cancellation clause. Under the multiyear regulation (DAR 1-322), the cancellation charge is based only on start-up or other nonrecurring costs. Any costs incurred by the contractor for the performance of future year requirements (recurring costs) are not recoverable. A contractor wanting to purchase material for the entire multiyear requirements in advance must assume the risk that the contract will not be cancelled. Many contractors do not want to assume this risk. It is possible that future Congressional action may remove these problems. The contractor is protected from loss in this event by contractual provisions allowing reimbursement for unrecovered, nonrecurring costs included in prices for cancelled items.

4-16. ***No-Year Procurement.*** No-year funding and contracts which are entered into with no specific time limitation will provide for notice, in writing, to the contractor of the availability of incremental funding. In the event such notice is not given, the contract provides for "cancellation" of the contract and for certain payments to be made to the contractor, but with a fixed "cancellation ceiling" cost to the Government.

4-17. **Validity of Obligations.** We have seen that Congress may impose either time or subject-matter restrictions, or both, on appropriated funds. These restrictions must be complied with for a valid obligation of funds, hence the Department of Defense (DOD) places strong reliance on controlling the use of appropriations through proper recording and reporting of obligations. In order to determine the validity of obligations, criteria have been established by law and by decisions of the Comptroller General. Several of these criteria or "tests for validity" are discussed below.

(A) Availability of Funds. This test includes both time and subject-matter restrictions. Annual funds may be obligated (by placing a contract, for example) only during the fiscal year covered by the Appropriation Act. If such funds are not obligated during the period, they "expire" and are lost to the Department. However, obligated but unexpended balances from contracts of a specific fiscal year may be used to pay off obligations resulting from other contracts of that same specific fiscal year.

(B) Definite and Certain Contract Terms. An additional test of the validity of a contract as an obligation is that its terms shall be definite and specific. A contract that is indefinite is either void or voidable; therefore, an indefinite contract, or one in which the amount of the Government's obligation is uncertain at the time of entering into the contract, is not enforceable. Hence, it does not serve to establish an obligation.

(C) Bonafide Need Rule. With regard to annual funds, the third test of validity is that the supplies and services contracted for are intended to serve a bonafide need of the fiscal year in which the need arises or to replace stock used in that fiscal year. In the case of changes to "inseverable" projects which are contracted for out of annual funds but which extend over into another fiscal period, payments from the appropriation may continue to be made. That is to say, changes which are provided for by a contractual provision (and which are inseverable from the rest of the contract) are funded out of the same annual appropriation which supports the basic contract, even though the change occurs during a subsequent fiscal period.

(D) Obligation Functions. In executing his administration functions, the Administrative Contracting Officer (ACO) will frequently be called upon to sign and issue obligating documents; this act will obligate the government for payments to a contractor. Such obligation actions must, of course, be within the ACO's authority and within the applicable budget allotment and commitment. Also, in administering cost reimbursable types of contracts, although the contract contains payment limitations, the ACO must always be alert to contractor expenditures to insure that spending does not exceed obligations or available funds.

(E) Basic Ordering Agreements (BOA). It should be noted that the Basic Ordering Agreement (BOA) is not a contract,

and that the individual orders placed against a BOA are in themselves contracts which obligate funds. Although these orders are usually placed by the Procuring Contracting Officer (PCO), authority is frequently contained in the BOA for the ACO to place orders when requested by the PCO. Orders may be priced or unpriced. If unpriced, funds in an estimated amount are nevertheless obligated on the order and become the payment limitation. In a BOA arrangement, then, the ACO must perform specific actions relating to funds.

4-18. Controls by the ACO of BOA orders are essential. These should include a control on both overall fund status and on the ordering arrangement. Extreme care must be exercised on fund control because each order contains its own combination of fund limitations. Frequent coordination with the corresponding comptroller component to obtain agreement on records insures against over-obligation. For order control, an order control register is maintained to keep track of events on each order placed by PCO or ACO.

4-19. **Other Types of Contracts.** Regulations authorize various types of indefinite delivery contracts when quantity requirement and delivery schedule are not known. Orders placed under indefinite delivery contracts must comply with the terms and conditions of the basic contract, but supplies or services are not specifically ordered by the basic contract. ACO action to be taken on contract review and management controls are basically the same as on a BOA. The indefinite delivery contract should also contain minimum and maximum amounts to be obligated and expended.

(A) Maintenance, Overhaul and Repair Contracts. This type of contract is difficult to administer because of the many determinations and actions required of the ACO. Services required under these contracts are difficult to define because of the great number of differences in the types of contracts used. One may find BOAs, Indefinite Delivery Contracts, Time and Material Contracts, Labor-Hour Contracts, Fixed-Price Contracts, or variations or combinations of these. As in the previous types discussed, the ACO will actually be involved in obligating funds. The judgments and controls exercised by an ACO are more numerous and exacting.

(B) The scope of work must be fully understood. Study of the contract should cover the same items as those in BOAs and Indefinite Delivery Contracts. However, in Maintenance Overhaul and Repair Contracts, one will find separate funds cited for labor, materials and parts. Parts may even be further broken out by contractor manufactured parts and contractor purchased parts. Management controls on funds status and on order control registers are maintained, as on BOAs. The obligation actions on these contracts will largely involve work requests (orders).

(1) Although the ACO will find fixed prices in the contract for defined work, the actual performance of work may result in variations in the price. The fixed-price portion may include different methods of coverage of work to be performed. It may cover the total price of repair or servicing of the complete article or subassembly; price per task performed; or any other method which defines the scope of work included in the fixed-price. It may establish only an hourly rate, and the number of labor hours, and prices of materials and parts are negotiated. For the input of defined work, the ACO issues a "work order." Although funds are already obligated for this item on the basic contract, the ACO must keep an accurate record of dollars used on each work order to prevent expenditures in excess of the total obligated amount.

(2) Frequently, work is required which is "over and above" the work contemplated by the fixed price. This will occur as the result of contractor tear down and inspection of the item to be serviced. When an "over and above" requirement occurs, the Contracting Officer will negotiate the price. He must make many determinations in arriving at this price prior to issuing a work order, which becomes the obligating document. In all cases, he must assure himself that sufficient funds are available for each category required (labor, materials, parts), and that appropriate citations are included in the work order.

(C) Spares, Special Tools and Test Equipment Contracts. Any end item of military equipment requires support and maintenance. For a new item, spares and spare parts, special tools, test equipment and support equipment are included as a contract requirement to cover an initial period of operation of the end item. This process of determining the range and quantity of items is called "provisioning." These items and quantities are not firm at the time production starts; therefore, the lists of spare parts with estimated unit prices are provided by the contractor for Government approval as early as possible to insure that support items will be available with delivery of the end item. Orders to proceed with the manufacture of spare parts are placed by the PCO through the ACO, or the ACO may be authorized to issue these orders directly. These orders obligate funds based on estimated prices. Priced exhibits which include specific items, quantities and unit prices are later submitted by the contractor at least 60 days prior to the first scheduled delivery of spares. Unless the responsibility is specifically withheld by the PCO, the ACO will negotiate firm prices based on the priced exhibits; and issue supplemental agreements which incorporate the orders issued.

(1) It should be recognized that the ACO may take two obligating actions in the provisioning cycle; one when he issues the production order, and the other when he issues the supplemental agreement. This latter action will only add (or conceivably, in some cases, delete) to the subsequently negotiated price. But in both actions, the ACO may not issue any obligating document unless funds are available. If additional funds are needed, he requests the PCO to furnish the funds required.

(D) Cost-Reimbursement Type Contract. This type of contract requires special attention to funds control. Although obligation actions are performed by the PCO, current knowledge of the status of a contractor's costs, contract limitations of cost, and control of overruns are areas requiring significant ACO action. A cost overrun occurs when actual costs exceed the target estimate of total costs.

(1) In a cost-reimbursement (CR) type of contract, it is important that any tendency toward cost overruns be controlled. A cost overrun condition exists when the contractor is unable to complete the work covered by the contract within the estimated amount obligated. The ACO continuously evaluates and controls contract funding in relation to contractor progress and costs incurred and forecasted. This control may be exercised through contractor periodic reports.

4-20. Evaluation and analysis of these reports will indicate cost trends which are out of line with work accomplish-

ment, indicating a possible overrun or underrun. An underrun exists when actual costs are less than estimated costs. An overrun situation will require additional funds if work is to be completed; an underrun requires contractual action to release excess funds.

4-21. The limitation of cost clause, contained in every cost-reimbursement type of contract, requires contractor notification to the contracting officer when the contractor anticipates that costs incurred or to be incurred within the next sixty days will equal or exceed a stated percentage of the estimated costs provided by the contract.

4-22. When a cost overrun is anticipated or has occurred, there are three courses of action open to the Government: (1) terminate the balance of the work and recoup obligated funds not yet expended, (2) provide additional funds to complete the work, or (3) permit the contract work to expire within the estimated costs. The ACO must make his recommendations to the PCO, and they closely coordinate all subsequent actions. Whether the overrun is to be funded is discretionary with the PCO, who notifies the contractor in writing if an overrun is authorized. The purpose of the clause is to prevent government liability for unauthorized overruns. Even so, if the contractor could not possibly have anticipated the overrun and the government arbitrarily refuses to pay, the government may be held liable. This appears to be the trend of recent court decisions. Also, overruns have been ordered paid when the government gave informal rather than formal consent to the overrun. The requirement of a writing was said to have been waived.

4-23. **Recording Obligations.** The methods by which obligations are created against appropriated funds, as well as the restrictions and limitations placed on these obligations, have been discussed. Now that the funds have been appropriated, apportioned, allocated, allotted, and suballotted, controls are needed to protect against over-obligation as well as to provide figures of unobligated balances.

4-24. A distinction should be made between the obligation and the recording of an obligation. Only a contracting officer may contractually obligate the government. Generally, the obligation occurs when both parties have signed the contract. The recording of this obligation is made by a comptroller element as part of the obligation-appropriations control system. These controls basically involve the examination of obligation records and comparison of dollars available. The method of recording obligations becomes a rather important procedure for the exercise of adequate control. The recording of obligations becomes the basis for the expenditures of one-year and multiple year appropriations. Against one-year appropriations, obligations represent the extent to which those appropriations have been used at the time additional funds are requested from the Congress. Let us examine some of the general rules that have been laid down by statute or by Comptroller General decisions.

4-25. Section 1311 of the Supplemental Appropriation Act of 1955 provides rules for recording an obligation (31 USC 200). An obligation must be supported by documentary evidence of a binding agreement, in writing, between the Government and a contractor. The agreement must call for specific goods to be delivered, real property to be purchased or leased, or work and services to be performed. For this purpose, orders for supplies and services placed by one military department against another Government department are placed on the same footing for recording obligations as contracts between the Government and private parties (41 USC 23; 31 USC 686). Although the criteria established by statute are clear enough, application of these criteria to specific types of contracts can become quite involved.

4-26. **Form of Contract.** As the result of departmental rules and Comptroller General decisions, specific treatment is afforded to certain types of contracts. These may be summarized as follows:

(1) Indefinite Quantity Contracts. The total estimated amount cannot be recorded as an obligation when the document is issued. Recording is made only as each call or order is placed, because each call contributes the specific obligation.

(2) Cost-Plus-Fixed-Fee and Letter Contracts. Only the fund limitation included in the contract may be recorded as obligations.

(3) Incentive and Price-Redetermination Contracts. The amount of the target or billing price in the case of incentive and the fixed-price in the case of Price-Redetermination may be recorded as obligations.

(4) Spare Parts. The price or the amount set aside may be recorded as an obligation when (a) specific order is placed with the contractor, (b) a production list approval with estimated prices has been issued, (c) a priced spare parts list is included in the contract, or (d) a contract formula contains an automatic determination of spare parts requirements.

(5) Change Orders. When a contract provides for the Government's unilateral issuance of change orders which increase price, the obligation must be recorded.

(6) Purchase Orders. These orders of $10,000 or less will be recorded as an obligation when issued.

5. Revolving Funds

5-1. One method of funding Department of Defense operations which does not depend on annual appropriations by the Congress, but is intended to be furnished on a one-time basis, is the establishment of working capital funds. This funding method was authorized by the Secretary of Defense in an effort to improve financial management within the Department of Defense. The funds are described as either stock funds or industrial funds.

5-2. **Stock Funds.** Stock funds are used to finance inventories of stores, supplies, materials, and equipment designated by the Secretary. For example, two stock funds were established originally for Defense Logistics Agency (DLA); one provided the capital necessary for DLA to buy initial stocks of food for commissaries and for subsistence in the armed services, the other provided stock funds for DLA clothing, textiles, medical supplies, chemicals, and similar items common to all military departments.

5-3. **Industrial Funds.** Industrial funds are used to finance industrial types of operations for services. For example, the DLA has been allocated industrial funds to finance the operation of clothing factories. The USAF Military Airlift Command operates its military airlift of people and cargo on an industrial fund basis. Military GOGO plants (Government-owned, Government-operated), are industrial plants which manufacture or perform maintenance and overhaul of common equipment.

5-4. Each stock fund or industrial fund operation establishes a supplier-customer relationship. The customer determines what, where, and when it wants an item, and the supplier determines how much to buy, stock, produce, and distribute. The customer pays the supplier for the supplies or services, thus reimbursing the funds and providing the capital for continuing operations.

6. Nonappropriated Funds

6-1. Nonappropriated funds are funds not appropriated by Congress; and expenditure of these funds does not involve the use of taxpayers' money. For example, within the Department of Defense (DOD), these funds are generated by military and civilian personnel and their dependents. They are used to provide a comprehensive, morale building, welfare, religious, educational, and recreational program designed to improve the well-being of military and civilian personnel and their dependents. Property is purchased with these funds by post exchanges, ship-stores, officer, and noncommissioned officer clubs, and religious, welfare or recreational activities.

6-2. Nonappropriated funds are derived primarily from the sale of goods and services to DOD military and civilian personnel and their dependents. A distinguishing characteristic of these funds is that there is no accountability for them in the fiscal records of the Treasury of the United States (Department of Defense Instruction - DODI 34-3). Regulations have been implemented by the various Services to regulate nonappropriated fund activities (AFR 34-3).

6-3. While a nonappropriated fund activity is an instrumentality of the United States Government, it is not generally subject to the statutes and regulations governing procurement from appropriated funds. This conclusion is based on the wording of the Armed Services Procurement Act of 1947, as amended (10 USC 2303), which restricts its coverage of purchases or contracts for which payment is to be made from appropriated funds.

6-4. There is a question of the extent of the Government's liability on contracts received by a nonappropriated fund activity within DOD. By the July 23, 1970 amendment to the Tucker Act (28 USC 1346(a)(2), PL 91-350), the Act was amended to bind the United States on contracts made with all service post exchanges. The Act states:

> For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

The coverage of the amended statute does not extend beyond post exchanges to another type of nonappropriated fund activity, such as a guest house for relatives visiting patients at an Army hospital (*Swift-Train Co. v. United States*, 443 F2d 1140 - 5th Cir. 1971).

7. Fraud, Waste, and Abuse

7-1. There is an increasing awareness of "white collar crime" in the United States. Because of this awareness, greater attention is being paid to this type of crime with respect to contractors doing business with the Federal Government. As the world's largest purchaser of goods and services, the Federal Government may be attractive to business concerns engaging in illegal practices. The common perception of unlimited funds within various Government agencies creates an atmosphere which may tempt unscrupulous contractors to attempt abuses on the Government Procurement System. There are a number of statutes that the Government can use in prosecuting contractors who may be engaged in illegal practices related to Government contracting.

7-2. **False, Fictitious or Fradulent Claims Statute (18 USC 287).** This is a criminal statute which states that:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years or both.

7-3. Federal courts have interpreted this statute to cover almost any fraudulent claim paid from the Treasury of the United States to a government contractor. Payment is considered to have taken place when the government issues a voucher authorizing disbursement of funds. Subcontractors are also held to this statute when they seek payment illegally from a prime contractor who is in turn reimbursed by the Government. It is interesting to note that the amount claimed is not relevant to the offense. A contractor who submits a series of small fraudulent claims, rather than a large fraudulent claim, can be prosecuted for each of these small claims.

7-4. **Fraud and False Statements (Statements or Entries, Generally), (18 USC 1001).** This statute is also criminal in nature:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both . . . .

7-5. The courts have broadly interpreted this statute. A criminal false statement may be oral or in writing. In some circumstances, concealment of a material fact which results in misinterpretation of the total situation by the Government can be interpreted as being a false statement.

7-6. One area that could expose contractors to the false statement is the possibility of "buying in." A contractor may occasionally be allowed to submit a below cost bid with the understanding that taking a loss on a specific contract may be an expedient business decision. However, if the contractor submits a below-cost proposal with an intent not to perform at the proposed price, he could be exposed to false claims liability under this Act.

7-7. There are a number of situations where a contractor has to certify that cost and pricing data are accurate, complete, and current as of the submission date. If the contractor misrepresents this data, the Department of Justice would

have grounds to seek a criminal indictment under 18 USC 1001 for the contractor's knowing falsification of a material fact or for making false statements in connection with obtaining a contract.

7-8. **Bribery of Public Officials (18 USC 201).** A statute which may be used in situations where contractors seek to bribe public officials is 18 USC 201:

> Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—
>
> (1) to influence any official act; or
>
> (2) to influence such public official or person who has been selected to be a public official to commit, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty . . .
>
> Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

Another section of this statute sets forth the same penalty for public officials who accept a bribe.

7-9. It should be noted that bribery is criminal in nature, and is distinguished from accepting gratuities. Various Government agencies have regulations which define the difference between significant and insignificant gratuities. For example, Department of Defense (DOD) employees are normally forbidden to accept gifts valued at more than $5.00. Generally, Government employees should not accept meals or lodging from a contractor unless it is impractical to obtain these items at Government expense. The value of a bribe is not material if it is proven that the contractor intended to influence the Government official. It may be difficult to prove intent, however, as is required in a criminal proceeding.

7-10. **Conspiracy to Commit Offense or to Defraud United States (18 USC 371).** This statute can be used to prosecute a contractor who agrees to act in conjunction with one or more other parties in the commission of an illegal act. The Act states:

> If two or more persons conspire either to commit any offense against the United States or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

7-11. Conspiracy is a separate offense which is distinct from the actual offense being plotted against the United States. Therefore, the contractor could theoretically be prosecuted simultaneously for both conspiracy and the actual offense that was committed. Thus, the conspiracy statute permits the Government to charge a contractor not only with violating a substantive criminal statute on fraud, but also with conspiring to defraud. Proof of conspiracy to defraud under this act does not require any showing of monetary or property loss.

7-12. **False Claims Act (31 USC 231).** This act is the *civil* counterpart to the *criminal* fraud statute (18 USC 287). It is a separate civil cause of action which may be taken *in addition* to a criminal fraud conviction. The contractor, thus, can be charged under both the criminal and civil statutes for false/fraudulent claims.

> Any person . . . who shall make or cause to be made, or present or cause to be presented, for payment or approval. . . . any claim upon or against the Government of the United States, knowing such claim to be false, fictitious, or fraudulent, . . . shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing . . . such act, together with the costs of suits.

The False Claims Act was passed during the Civil War to protect the public treasury from false claims by contractors. It is a very broad Act, and it covers virtually any expenditure of Federal funds. It is used against contractors billing for nonexistent or worthless goods. Fraudulent deceit by omission of a material fact also falls under the False Claims Act when the Government adversely relies on that falsehood knowingly concealed by the contractor. It should also be noted that negligent misrepresentation of a material fact, without any specific intent to defraud, can still give rise to False Claims Act liability. The Act provides for both compensatory repayment of double the government's actual loss arising from any fraudulent claim and a mandatory forfeiture of $2,000.00, which is in the nature of punitive damages. It should be noted that for *each* false claim presented, the Government can get the $2,000.00—even if it cannot prove any damages.

7-13. Government action against a contractor under this Act falls under a six year statute of limitations (31 USC 235 and 28 USC 2415). This is one year longer than the five year criminal statute of limitations for fraud (18 USC 287). Thus it can be seen that the Government still has an opportunity to sue the contractor on civil grounds between the fifth and sixth year after the right to sue under criminal grounds has expired.

7-14. **Fraudulent Claims Under the Contract Disputes Act of 1978 (41 USC 601).** Section 5 of the Contracts Disputes Act of 1978 directly relates to Contractor fraudulent claims:

> Fraudulent Claims
>
> Sec 5. If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of his claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim. Liability under this subsection shall be determined within 6 years of the commission of such misrepresentation of fact or fraud.

7-15. The consequences of Section 5 of the Disputes Act of 1978, at first blush, would seem to impose additional liabilities on a contractor when he certifies (in claims over $50,000, Sec 6(c)(1) of the Act) to the accuracy and completeness of his claim. However, this requirement is considered by many contractors as creating no greater risk than previously had existed under the civil or criminal provisions of the Civil False Claims Act (31 USC 231) or False Statement Act (18 USC 1001). Note, however, that the penalty for

misrepresentation under the Disputes Act can be greater than that of the Civil False Claims Act. Contracting Officers are increasingly referring to the Justice Department where fraud is suspected. Because of Section 6(a) of the Disputes Act, agencies are not authorized "to settle, compromise, pay or otherwise adjust any claim involving fraud." This Section does not allow Contracting Officers to negotiate further with the contractor. They must refer such matters for further investigation. Consequently, when fraud is suspected and the matter is taken out of the Agency's hands, final resolution will probably be made by the Justice Department. At this stage of investigation, the contractor (if he has not already done so) should seek advice from his attorney.

7-16. **The Department of Justice.** If a Government agency suspects that a contractor may be defrauding the Government, the facts involved are transmitted to the Justice Department for review and a determination on what to do. The Justice Department will handle any subsequent prosecution of a criminal charge against the contractor, under the direction of the Attorney General (281 USC 516).

7-17. The Criminal Division of the Justice Department was reorganized in 1977 to improve prosecution of white collar crime. A Government Fraud Branch was established within the Criminal Division Fraud Section for the specific purpose of monitoring prosecutions for fraud against the Government. The Department of Justice Fraud Branch is responsible for implementing the criminal statutes discussed previously. They operate under the premise that taxpayers money should not be spent paying for fraudulent or inflated claims or for inferior quality products which the Government didn't bargain for.

7-18. Conduct that is merely unethical in the private sector can be criminal under Federal Statutes when one is dealing with the Government. Some items the Justice Department might investigate to show an intent to defraud are:

- alterations of records,
- use of a "holding account" to enable a contractor to perform an "after the fact" reconstruction of costs,
- failure to disclose material facts before bidding,
- failure to disclose material facts to auditors,
- a deliberate attempt by a contractor to remain ignorant about the facts which might have an adverse impact on his claim,
- deceptive or unresponsive answers to questions posed by auditors,
- substitution of used products for new products,
- bribing Government personnel.

7-19. **"Hot Line" Information Gathering.** In January 1979, the General Accounting Office (GAO) established a national "Hot Line" for private citizens and Government employees to report incidents of fraud, waste, abuse or mismanagement in Government programs. During the first six months, 10,000 telephone calls were received. About one-third of these calls merited some further investigation. These "Hot Line" calls are taken by members of the GAO Fraud Task Force. "Hot Line" tips concerning the Department of Defense (DOD) are referred to the Defense Investigative Service; which may then forward them to an appropriate military investigation service. In addition to the GAO, the Office of Management and Budget (OMB), DOD, and various other Government agencies also have "Hot Lines" established within their organizations.

7-20. **Inspector General Act of 1978 (PL 95-452).** The Inspector General Act (IG Act) of 1978 creates independent Offices of Inspector General (IG) in twelve major civilian procurement agencies. It should be noted, however, that the Department of Defense (DOD) was not required to establish an IG office under this Act. The IG has a duty to investigate the agency's programs and operations. By law, IG investigations are to be separated from Agency influence. Potential criminal matters must be referred to the Justice Department for prosecution. Each IG Office reports to Congress twice a year. Although not required to establish an IG Office, DOD must also submit semiannual reports to Congress on its investigations and criminal referrals.

7-21. The IG Act created IG Offices in the following twelve agencies:

(1) General Services Administration (GSA),
(2) Department of Agriculture,
(3) Commerce,
(4) Housing and Urban Development,
(5) Interior,
(6) Labor,
(7) Transportation,
(8) Environmental Protection Agency,
(9) Community Services Administration,
(10) National Aeronautics and Space Administration,
(11) Small Business Administration,
(12) Veterans Administration.

These IG offices joined the previously established offices in the Department of Health, Education and Welfare, 1976 (42 USC 3521), and the Department of Energy, 1977 (42 USC 7138).

7-22. Inspectors General are under the general supervision of their Agency head. The IG Act, however, gives them a mandate to investigate their Agencies' operations and programs free from direct supervision. They have access to all records available to the Agency relating to its programs and operations. This has an impact on Government contractors, since the Audit and Records clause in most Government contracts allows examination of their books and records by the Government. Consequently, the IG can also request to review these contractor data.

7-23. **Investigative Elements of the Department of Defense (DOD).** Suspected fraud cases within the Department of Defense (DOD) are generally referred to one of four DOD investigative services; Army Criminal Investigation Division (CID); Air Force Office of Special Investigations (OSI); Naval Investigative Service (NIS); and the Defense Investigative Service (DIS). In addition, the IG for Intelligence may investigate suspected fraud in intelligence related procurements. These investigative services have personnel trained for administrative, civil and criminal investigations.

7-24. ***Defense Investigative Service (DIS).*** DIS is the most recent DOD investigative agency, and is the only one that does not support a specific military service. It was founded in 1972, and began criminal investigations in 1974. In January 1978, DIS was placed under the DOD General Counsel's direct authority in order to protect its indepen-

dence and provide more effective liaison with the Department of Justice. DIS provides investigative support for the Joint Chiefs of Staff, DLA, and all other DOD Agencies. A substantial portion of its employees are assigned to fraud investigation.

7-25. ***Air Force Office of Special Investigations (OSI).*** The OSI is considered the most successful DOD Agency investigating white collar crime. OSI has trained its agents since 1950 to investigate fraud matters. It operates under staff supervision of the Air Force Inspector General. The Director of OSI also serves on the Air Staff. All criminal actions which the OSI investigators discover in their investigation of a Government contractor is referred to the OSI Commander in Washington, DC. He is the only Air Force Officer permitted to refer these allegations to the Justice Department.

(A) The Air Force is working diligently to eliminate fraud, waste and abuse from its operations. The Air Force Secretary, Verne Orr, stated in 1982 that the Air Force recognized the need for a coordinated, structured approach to the problem. Consequently, an Audit, Inspection, and Investigation Council was established. The Council is composed of the Air Force Auditor General, the Commander of the Air Force Inspection and Safety Center, and the Commander of the Air Force Office of Special Investigations. The Inspector General was designated by the Secretary as the Air Force focal point in its combat against fraud, waste and abuse.

(B) The Council has developed a "Fraud Indicators Handbook." This Handbook was provided to commanders and resource managers throughout the Air Force "for the primary purpose of heightening awareness of the potential for fraud and providing managers with examples of this type of fraud.

7-26. ***Army Criminal Investigation Command (CID).*** The United States Army Criminal Investigation Command (CID) is the oldest military investigation service, and is the sole Army agency responsible for investigating felonies. (It is interesting to note that in 1977 the Army abandoned an attempt to change the widely used "CID" acronym to "CIC" because of the wide public acceptance of the name "CID.") CID elements, generally located at Army installations, provide investigative support to Army commanders. To aid in ferreting out fraud in Government contracting, the CID has set up a training program for specialized procurement investigations. Upon completion of a CID investigation of contractor fraud, CID Headquarters will provide the Justice Department with a full report of the violation. In practice, however, it is not unusual for local offices of the CID to refer smaller fraud matters directly to local FBI agents.

7-27. ***Naval Investigative Service (NIS).*** The Naval Investigative Service (NIS) is the Navy agency responsible for investigating major criminal offenses, including that of a Government contractor making false claims, false statements, or conspiracy to defraud the United States. It maintains a worldwide organization supporting both Navy and Marine Corps commanders. NIS is commanded by a Director who reports to the Commander, Naval Intelligence Command; who in turn is responsible to the Chief of Naval Operations. Naval and Marine Commanders must refer all suspected major criminal activities by a Government contractor to the NIS.

7-28. **Summary.** It can been seen that the United States Government has a variety of methods to combat the "white collar" crimes of Fraud, Waste, and Abuse in Government Acquisition. A number of Federal Laws, both civil and criminal, can be used to fight this kind of crime. Investigation and surveillance are performed by members of the Department of Justice, Inspectors General of Government agencies, public and Government employee participation by use of the "Hot Line", and DOD investigative elements (DIS, OSI, CID, NIS).

7-29. The Government contractor faces many potential legal consequences in doing business with the Government. The executives of a contractor company, in order to protect themselves, should impress upon their employees the importance of dealing fairly with the Government; and when providing information, to be accurate, complete and current. These normal "arms length" dealings between the contractor and the Government will provide an environment which should be mutually beneficial to both parties and eventually eliminate most of the fraud, waste, and abuse in the area of Government contracting.

CHAPTER 7

Financial Aid and Assistance to Contractors

FINANCIAL AID to contractors may assist in expanding production capacity, increasing competition, speeding performance, and furthering the Government's Small Business Program. To obtain these benefits, it is Government policy to help finance contracts if this is likely to make performance more prompt and efficient. The purpose of this chapter is to touch upon the law and procedures which relate to this important aspect of Government Contract Law.

2. To minimize the need for financial assistance, the Government emphasizes prompt payment on all contracts to its prime contractors and also in payments by the prime contractors to their subcontractors. Government administrative policy is designed to encourage this promptness of payment.

1. The Need for Financing

1-1. A situation may arise in defense contracting in which a contractor must be chosen and it is evident that financial assistance will be required. Inadequate finances or credit can harm contract performance as much as can the lack of production facilities, manpower, or knowledge and skill. Financial strength of a prospective contractor, therefore, is an important factor in contract placement. To be considered for an award, a contractor must have adequate financial resources or be able to obtain them; it does not handicap a prospective contractor who needs and seeks Government financial assistance, if he is otherwise qualified.

1-2. It is the objective of the Department of Defense to deal with responsible contractors only. Contract awards to concerns of marginal capability often lead to delays and failure in obtaining delivery of needed items or services, and to increasing costs.

1-3. Determining the advisability of entering into a contract financing program can be difficult because the Government is acting simultaneously as a procurement agent and as a banker. In almost every marginal case, the decision must be made by a determination as to how unstable a contractor must be before the Government will refuse to accept the risks of financing.

2. Partial Payment to Contractors

2-1. Contract clauses are provided in Defense Acquisition Regulations (DAR) to permit partial payment to contractors before all supplies or services are completed and delivered. These clauses can be used in fixed-price, cost-type, and time-and-materials contracts. Payment clauses vary with the purpose of the particular contract under consideration. Partial payments should not be confused with progress payments, however.

2-2. Fixed-Price Contracts. There are different ways whereby a contractor is paid for a contract that has a fixed price. The payment may be paid in full, or there may be partial payments of the total contract.

2-3. Supply Contracts. The applicable clause dealing with partial payment (DAR 7-103.7), provides that the contractor will be paid as he delivers acceptable goods. The disbursing office receives contractor invoices certified by cognizant Government personnel; and on the basis of these, it makes payments. The clause is not usually invoked unless a minimum payment is due; this procedure reduces the cost of processing many invoices for small sums. DAR 7-103.7 sets the minimum payment so as to: "equal or exceed either $1,000 or fifty percent of the total amount of this contract."

2-4. Research and Development Contracts. The Payments clause for fixed-price research and development contracts (DAR 7-302.2) provides that payment will be made for accepted work. However, unless the contract states otherwise, the contractor can only receive payment on parts of the work for which a price is separately stated in the contract.

2-5. Personal Services Contracts. Payment on these contracts is made for services rendered over a specified period, or for deliveries of specific material. The contract schedule describes the rates. At the end of specified periods or on completion of described units of work, the contractor submits invoices and time statements, and he is then entitled to payment (DAR 7-503.2).

2-6. Incentive and Redeterminable Contracts. Firm unit prices on fixed-price incentive and redeterminable contracts are not known prior to post-award pricing. Until then, payments are based on billing prices. The target price (target cost plus target profit) sets the initial billing price for fixed-price incentive contracts. For redeterminable contracts, the stated price before redetermination is used.

2-7. Cost-Reimbursement Contracts. Payments of cost and fee are made on cost-reimbursement contracts as the contractor incurs costs. In a cost-reimbursement type supply contract, however, payments will not be made more frequently than biweekly, in amounts approved by the contracting officer (DAR 7-203.4). These payments serve much the same purpose as partial and progress payments on fixed-price contracts, and are made after the contractor submits periodic vouchers (or invoices) which are supported by statements as to the incurred costs the contractor claims are allowable. The interim payments may be adjusted later for

any audited amounts the contracting officer finds unallowable.

(A) The Cost Accounting Standards Board, pursuant to 50 USC App. 2168, promulgated Cost Accounting Standards for the DOD, defense contractors, and other agencies purchasing for DOD. The statute provides for mandatory coverage, exemptions, and waivers. Appendix O of DAR and Appendix O, Code of Federal Regulations, incorporate these standards into Government operations. Even though the Board no longer exists, the standards are still in effect.

2-8. Time and Materials and Labor Hour Contracts. Payments are computed by multiplying the hourly rate by the number of direct labor-hours performed. Payments on vouchers submitted are made monthly, or even more frequently if approved by the contracting officer.

3. Financial Assistance to Contractors

3-1. Of the five methods of financing Government contracts, the one most preferred is that of private financing without Government guarantee. To assist in this arrangement, the contractor is able to assign his right to payment as security to a lender under certain conditions (41 USC 15). However, since many defense procurements require large amounts of working capital, private financing alone may not suffice. Large as well as small contractors may require some financial assistance from the Government. Progress payments in customary amounts (customary progress payments) are the preferred way to supplement private financing, and may be granted upon the request of the contractor when the contract has a relatively long production cycle and is a specified dollar amount. The preferential order of types of other Government financing is as follows: guaranteed loans; progress payments in unusual amounts (unusual progress payments); and advance payments. Guaranteed loans are private loans which the Government guarantees. They are suitable in helping a contractor who has several defense contracts or subcontracts. The contractor and lender may, at times, prefer them to customary progress payments. Advance payments are least preferred by the Government, since they usually involve greater risk and require closer supervision.

3-2. Progress and advance payments may be granted on foreign procurements as well as on domestic contracts. Guaranteed loans, however, are generally not feasible for foreign contracts, as difficulties in loan administration often arise. If guaranteed loans are used in such situations, legal advice should be obtained about the proper contract clause, since enforcement in a foreign jurisdiction may be dependent upon the law of the foreign country.

3-3. Private Financing. Generally, private financing takes one of three forms: the customary type of commercial loan; a commercial loan obtained by the contractor but guaranteed by the Government; and a commercial loan with the contractor executing an assignment to the lending agency of all or a part of the money due or to become due to him under the contract.

3-4. Customary Commercial Loans. The usual type of commercial loan is one obtained by the contractor from a private financial institution. The form that the loan takes could be either an immediate transfer of money for a specific contract, or the establishment of a line of credit which the contractor can use as the need arises. This type of financial aid does not directly involve the Government.

3-5. Commercial Loans Guaranteed by the Government. Under this form of financial assistance, the Military Departments act as "guarantor" to private financial institutions which lend money to defense contractors for working capital purposes. No Federal funds are expended unless the borrower defaults on his loan or the lending institution demands purchase by the Government of all or part of the guaranteed percentage of the unpaid principal on the loan. These are commonly called "V" loans, after Regulation V of the Board of Governors of the Federal Reserve System.

(A) The prospective borrower makes application for a loan to a private financial institution in the usual manner. The procedure is as follows:

(1) If the financing institution is willing to lend the money, but for some reason desires a guarantee, it makes application to its district Federal Reserve Bank for guarantee.

(2) The Federal Reserve Bank acts as the fiscal agent for the Government. It submits a copy of the application to the applicable agency (in this instance, the Military Department having the preponderance of defense business with a specific contractor) that must make a decision as to the guarantee.

(3) The Federal Reserve Bank also submits a copy of the application to the cognizant contracting officer, who then makes a determination as to the eligibility of the contractor. The contracting officer submits a report of his findings, including a Certificate of Eligibility, when appropriate, to the central procurement office or contract finance office within the guaranteeing agency.

(4) While eligibility is being determined, the Federal Reserve Bank makes a credit or other financial investigation and then submits its reports to the guaranteeing agency.

(5) The guaranteeing agency reviews the reports of the contracting officer and the Federal Reserve Bank, and approves or disapproves the guarantee. If approved, the agency authorizes the Federal Reserve Bank to execute the guarantee. This process can be accomplished in a period of from 30 to 45 days.

(6) The financing institution then makes the loan to the borrower.

3-6. Contractor Assignment of Money Due Under Contract. An assignment of money due under a contract is a widely used means of transferring financial interests from one person to another in ordinary commercial contracts. In the case of Government contracts, contractors having a contract providing for payments aggregating $1,000 or more may assign the rights to the moneys due under the contract to a bank, trust company, or other financing institution, including any Federal lending agency (31 USC 203—Assignment of Claims Act). This assignment provides security for a loan, and makes it easier for the contractor to borrow money. The Standard Assignment of Claims clause used in fixed price supply contracts is DAR 7-103.8.

(A) In time of war or national emergency, the provisions of the Assignment of Claims clause give additional protection to the institution which loans the money on the basis of the assignment. The Government is prevented from

withholding payments due under the contract to satisfy an indebtedness of the contractor when that debt to the Government arose independently of the contract.

3-7. General Assistance. In addition to the assistance of guaranteeing loans, the Government furnishes financial assistance in a more direct manner to contractors who are in need of such assistance. These "direct" methods of assistance can be classified as (1) direct loans, (2) progress payments, and (3) advance payments.

(A) Loans to Small Business Firms. The business loan program of the Small Business Administration (SBA) is designed to provide needed financing credit to worthy small businesses when loans are not available to them on reasonable terms from other sources. The primary purpose of this financial assistance is to provide small firms with funds to purchase equipment and materials, to expand and modernize operations, or to use as working capital.

(1) The SBA's loans are of two types, "participation" and "direct." In a participation loan, the Agency joins with a bank in a loan to a small business concern. In a direct loan, there is no participation by a private lender—the loan is made entirely and directly by the SBA to the borrower; but by law the SBA may not make a direct loan if a participation loan with a bank or other leading institution can be arranged.

(2) The SBA's participation may be either under a loan guaranty plan (deferred guarantee basis) or on an immediate basis. On a guaranty basis, SBA agrees that upon default of the loan as to principal or interest, it will purchase from the lender its guaranteed portion of the outstanding balance of the loan. In agreements to participate in loans on a deferred basis, the SBA shall not commit itself in excess of 90 percent of the balance of the loan outstanding at the time of disbursement (15 USC 636). On an immediate basis, SBA purchases from the bank a fixed percentage of the original principal balance of the loan. An immediate participation may not be entered into, if it can be done on a deferred guaranty basis.

(3) It should be emphasized that the SBA has specific limitations; and circumstances under which loans will not be granted. These circumstances are primarily concerned with the type of applicant, the purpose of the loan, and the availability of loans from other sources.

(4) By law, the maximum amount SBA may have outstanding to any one borrower is $350,000. There is an exception to the $350,000 limitation—the Pool Loan of $250,000 multiplied by the number of small businesses participating in the group corporation loan (15 USC 636).

(5) SBA Loans are usually repayable monthly, and payments include interest on the unpaid balance. SBA's loans must be of such sound value, or so secured, that repayment will reasonably be assured.

(B) Progress Payments. Progress payments are made to a contractor as work progresses under a contract, even though supplies or services have not been delivered. They are based on either costs incurred, percentage of completion, or a particular stage of completion. They are used only with fixed-price contracts and fixed-price subcontracts under cost-reimbursement prime contracts, providing funds in advance of delivery to help finance long-lead-time procurements. For most procurements, progress payments are based on incurred costs. However, construction, shipbuilding, ship repair, and ship conversion contracts usually use other criteria, such as the percentage of work completed, or the phase or stage of completion.

(C) Flexible Progress Payments. In September 1981, the Department of Defense (DOD) raised the progress payment rate to 90 percent of total costs for large firms and 95 percent for small ones. Payments are to be made monthly.

(1) Even with the increased progress payment rate, both Congress and industry have criticized the "fixed" rate policy on the ground that high interest rates have eroded the contractor's ability to obtain working capital needed for contract performance. Consequently, DOD earlier in 1981 began testing a "flexible" progress payment rate plan which would authorize the allowance of payment rates as high as 100 percent. In October 1981, DOD decided to allow general use of the flexible rate approach (DAR E-530, Flexible Progress Payments).

(2) The "flexible" progress payment rate is derived through use of the DOD Cash Flow Computer Model, available to contracting officers on the "copper impact" computer time-sharing network under the computer file name "CASH." The model takes into account key cash flow factors such as contract cash profile, delivery schedules, subcontracting progress payments, liquidation rates, and payment reimbursement cycles.

(3) Contractors who submit certified cost or pricing data for negotiated fixed-price contracts in excess of $1,000,000 may request flexible progress payments. Formally advertised contracts are not eligible for flexible progress payments. Flexible progress payments are not available for contracts awarded and performed entirely outside of the United States, its possessions and territories (DAR E-530.3).

(4) Subcontractors who meet the criteria imposed on the prime contractor per DAR E-503.3, can request a flexible progress payment rate, the same as that applicable to the prime contractor. The subcontract flexible progress payment rate will be determined by the prime contractor without regard to the progress payment rate in the prime contract (DAR E-530.7).

(5) Progress payments ordinarily are liquidated by the contractor as items are delivered or work is performed and accepted. Of course, these payments are a general debt to the Government; the contractor must repay them from other assets if the contract work is not performed. To secure progress payments, the Government obtains title to all work-in-process and to materials allocated to the contract. Progress Payment clauses require the contractor to mark or segregate all property acquired by the payments. They also set maximum limits on the amount of outstanding progress payments, and prescribe the method for liquidating them.

(6) Customary Progress Payments are used when a fixed-price contract has a long lead-time, generally considered to be six months or more for the first delivery, or when cash outlay for production will impact sharply on a contractor's working funds. Customary progress payments are granted as a matter of course, under these conditions, if a competent contractor has an adequate and approved accounting system and is financially responsible.

(7) Progress payments are not generally used on relatively small contracts with the stronger and larger contractors. For this purpose, contracts under one million dollars are considered

small. Contract size, however, has no bearing on payments to small business concerns when the contract otherwise meets the standard for such payments.

(8) In advertised contracts, provision for progress payments shall be made in Invitations for Bids (IFB's), whenever the contracting officer considers that the period between the beginning of work and completion of work will exceed four months for small business concerns, and six months for other firms; and he also considers that progress payments will be useful or necessary. Also, this will be done when the procurement will involve $100,000 or more and bids will likely be submitted by one or more small business firms, or when the procurement is for other than quick turn-over items.

(D) Unusual Progress Payments. Progress Payments which are other than the customary type are termed "unusual." They require special review. These include cases where the payments exceed the standard percentage for customary type progress payments, where lead time is less than six months and may require pre-delivery expenditures that will have a material impact on the contractor's working funds, and/or where the contractor's finances are impaired or overextended. In review, full weight is given to the Government's preference for private financing. The contractor must prove actual need. If approved, the payments should provide only the minimum amount that, with other sources of funds, will meet contract needs.

(1) Unusual progress payments require approval by the head of the procuring activity, or by a designated general or flag officer within such procuring activity, and at the Department headquarters concerned (DAR E-505).

(2) Prime contractors are encouraged to make progress payments to subcontractors as the prime receives them from the Government. The Government then reimburses the prime. Progress payments may also be made under a cost-reimbursement prime contract if the subcontract has a fixed-price. These payments are simply reimbursed in the interim payments to the prime.

(3) The subcontract provisions covering progress payments should be essentially the same as those in the prime contact. No interest should be charged. As security, the Government obtains title to property allocated to the subcontract. The payment percentage should be no higher than 90 percent of total costs. In the case of small business subcontractors, the rate may be 5 percent higher. As might be expected, unusual progress payments, including "flexible" progress payment, can also be made to a subcontractor under the same standards that apply to the prime's need.

(4) It should be remembered, however, that just as the Government has the right to reduce or suspend progress payments when lack of progress in the work jeopardizes the Government's investment, or when the contractor is in default, the Government also has a right to liquidate outstanding payments at a faster than normal rate. Since these payments are vitally important to the contractor, any decision to reduce or suspend payments, or step up their rate of liquidation, should be made only after careful consideration, and only if allowed by the contract terms. The Government must balance the risk of its investment against the effect on the contractor's performance caused by curtailed payments.

(5) Progress payments may sometimes be granted after contract placement if the contractor asks for them. Though this is not usual, some circumstances may justify it. The actual period between start of work and first delivery, for instance, may greatly exceed the estimated lead time, or unexpected pre-delivery costs may have a serious impact on the contractor's working funds.

(6) Adding a progress payments amendment to an existing contract requires some further consideration from the contractor. This may be a price reduction or some equivalent nonmonetary benefit. Its value should approximate what the reduction in contract price would have been if progress payments had been provided in the first place. This can be estimated as roughly equal to the expected cost of private financing that Government financing eliminated.

(7) If the Government's investment is in danger, a number of remedies may apply. Administrative control can be tightened, or the Government may be able to acquire special protective agreements from the contractor. These may include personal or corporate guarantees, subordination of other indebtedness to the Government's claim, or special bank accounts to make sure that progress payments will be used properly. Firmer physical controls may be applied to property to which the Government has a security title or, as mentioned, progress payments may be reduced or suspended, but this is an extreme measure. It is used only as a last resort, when further payments are likely to increase the Government's probable loss.

(E) Advance Payments. Advance payments are advances of money made by the Government to a contractor without relation to "progress" or the receipt of supplies or services. The authority for such advances is legislation (10 USC 2307 and 50 USC 1431-35) that countermands the prohibition concerning the advance of public money expressed by 31 USC 529. Advance payments, except to non-profit institutions, are the least preferred way to assist a contractor because they impose the greatest risk and administrative burden on the Government. When they are suitable, they may be granted either at time of award or later. They may be used in addition to progress payments and guaranted loans when deemed desirable.

(1) Advance payments may be made when it is determined that they are in the public interest, or the payments may be made to facilitate the national defense. This determination is made by the Secretary, Undersecretary, or his Deputy, of a Military Department.

(2) Where advance payments are made, the Government deposits the required funds in a special contractor bank account. The advances are normally secured in two ways: the Government takes a lien on the contract work, and also maintains some control over the special account. Other security, too, may be negotiated with the contractor.

(3) As previously stated, advance payments are made in anticipation of performance by a prime contractor. Such payments are considered useful and appropriate for specific types of contracts, such as contracts with non-profit educational and research institutions; contracts for acquisition of facilities at cost and for Government ownership; contracts for management of Government-owned facilities; highly classified contracts which preclude the assignment of claims; rare but essential contracts of unusually weak contractors; and for exceptional cases that are beneficial to the Government.

(4) Advance payments are not authorized when another contractor is able to furnish the desired supplies or services upon terms equally satisfactory to the Government and without provision for advance payments. Nor are advance payments authorized when another means of adequate financing is available to the contractor. However, non-profit Research and Development Contracts with educational institutions, and contracts for management and operation of Government-owned facilities are excepted.

(5) Under advance payments procedure, requests for payments are submitted periodically; usually every 90 days. Included with the request, is a cash budget flow showing the contractor's need for such money. These are reviewed and payment recommended by the ACO. After further examination and review of the request, disbursements are made to a special bank account supervised by an administrative contracting officer. The Government thereby exerts financial control over the account and the accounting record by having the ACO countersign all withdrawals, after ensuring that the money will be allocated to specific work.

(6) As the contractor actually performs or delivers a portion of the work under the contract and becomes entitled to contract payments, the advance payments are liquidated at the percentage specified in the contract. The contractor usually pays interest on the unliquidated portion of the advance payments. The Government does not take title to any property generated by the contractor in the performance of the contract as security for advance payments. Instead, the Government uses a conventional primary lien on the funds remaining in the special bank account, or a paramount lien on property generated by the contract, or a security-type mortgage on property owned by the contractor.

3-8. In order of preference, contracting officers financially assist contractors through progress payments, guaranteed loans, unusual progress payments, and advance payments.

CHAPTER 8

Specifications and Work Statements

THE WORK statement, specifications, drawings, and item description formulate the very heart of any procurement. Whether a contract will be successfully performed is quite often determined not at the time the contract is negotiated or the award made, but rather at the time the purchase or performance description is written. The need for clarity and preciseness of expression is perhaps greater in contracts than in any other form of communication. The extent to which this is or is not accomplished will have a direct bearing on the ultimate outcome of a contract. The greatest care, therefore, is required in formulating descriptions of desired products or services. A job well-done results in savings in time, money, effort and administrative headaches.

2. This chapter covers, in moderate detail, the more important aspects of specifications and their impact on Government contracts.

1. Definition of Specifications

1-1. Before any invitation for bids or request for proposals can be used or any contract entered into, it is necessary to define the item or service that is to be the subject of the invitation, proposal, or contract. The definitive or descriptive words identifying the subject matter are called specifications. Identification of the subject matter is the heart of each procurement, and it is the basis upon which bids are made, proposals offered, negotiations concluded, and contracts perfected. The use of specifications accomplishes two purposes: (1) requirements for an item, material, process or service; and its preservation, packaging, packing and marking; and (2) criteria by which the Government can determine whether contract requirements have been met.

2. Classification of Specifications

2-1. Specifications can be classified as Federal Specifications and Coordinated Military Specifications. A Federal Specification supercedes all antecedent specifications for the same material, product or service, and its use is mandatory where applicable. Coordinated Military Specifications are developed to cover materials, products or services of primary interest to military activities. These specifications, when published, also supercede all antecedent specifications for the same material, product, or service. When applicable, their use is mandatory upon the military departments.

2-2. These basic specifications are not generally applicable, and there is no obligation to use them, when purchase is a one-time procurement, or when the Government is purchasing for authorized resale, or when the purchase is of items for test or evaluation, or is incident to research and development. When it is determined that neither Federal nor Coordinated Military Specifications meet the Government's need in a given case, either an Interim Federal Specification or a Limited Coordinated Military Specification is used instead. An Interim Federal Specification is prepared and issued by a single agency. It is intended for final processing as either a new or revised Federal Specification. Other agencies have the option to use this specification before it is completely coordinated and promulgated as a Federal Specification. A Limited Coordinated Military Specification is issued by a military department to cover items in which it alone has an interest or to satisfy an immediate procurement need.

2-3. Where no applicable detailed specification exists, purchase descriptions can be used by Government procuring agencies. A purchase description sets forth the essential characteristics and functions of the item desired. In the case of services, it outlines to the greatest degree practicable the specific services the Government wants the contractor to perform.

3. Specification Categories

3-1. There are different categories by which the Government characterizes products. Generally, these products are characterized by description, design, performance, or a combination of these.

3-2. Minimum Acceptable Description. The minimum acceptable purchase description is the identification of a requirement by use of a brand name followed by the words "or equal." This is used only as a last resort when a more detailed description cannot be made available in the time for the procurement at hand and when more than one brand is indicated. The words "or equal" are not added when only a particular sole source product will meet the essential needs of the Government.

3-3. Design Specification. A design specification spells out, in detail, the materials to be used, their sizes and shapes, and how the item is to be fabricated and built. It provides a completely defined item capable of manufacture by a competent manufacturer in the industry.

3-4. Performance Specification. Performance specifications express requirements in such terms as capacity, function, or operation of equipment. In this type of specification, the details of design, fabrication, and internal structure are left to

the option of the contractor, except that certain features or parts may be specifically required.

3-5. Mixed Specification. Rarely does the Government use a pure form of either type of specification. Practically speaking, rarely is a specification either a 100-percent design specification or completely a performance specification. Actually, nearly every specification contains some elements of both types. Characterization of a specification as "design" or "performance" usually reflects which category predominates.

3-6. Whatever kind of specification may be used in a procurement, including plans, drawings, or purchase descriptions, is made available to all potential suppliers. This procedure is an important element in the basic specifications policy of the Government.

4. Specifications Policy

4-1. DOD Specifications policy is twofold: (1) to state only actual minimum need and (2) to describe need so as to stimulate maximum competition. The first precept seems self explanatory. It means that the specification must describe what is needed, not what may be desired. The second precept is to use the kind of specification which will generate maximum competition. There are occasions when the use of a design specification will accomplish this result as, for example, where the item was developed for the Government and can be exactly reproduced by any capable manufacturer without further development. On other occasions, the use of performance specifications may better assure competition being obtained as, for example, where the Government requirement can be met by any one of a number of commercially designed and available products. But, as we noted earlier, there are some instances when competition is just not available.

4-2. Some products, such as specialized military electronic equipment, are not available on the commercial market. Such equipment is especially developed and designed for military use, frequently a time-consuming process. Thereafter, when the Government wishes to buy such equipment in quantity, a design specification is used to tell prospective contractors precisely how the item should be made. This makes it possible to avoid duplication of development time, theoretically permits wide competition by firms which do not have the scientific or engineering staffs to do the development, and results in the delivery to the Government of relatively standardized equipment from various suppliers.

4-3. On the other hand, many items of equipment, such as tractors, earth-moving equipment, laundry equipment, etc., are available on the commercial market. Such items are commercially designed, and a manufacturer's design may differ markedly from his competitor's. Each manufacturer is tooled up to make equipment to his own design, and it would be very expensive to require him to construct equipment to some competitor's or to Government design. In these cases, the Government uses performance specifications so that competition can be obtained from every firm which regularly makes a suitable commercial product. Such a specification fosters competition and avoids favoritism which would occur by the adoption of one company's design or a Government design which was more nearly like the design of one company than of others. Such a specification also avoids special retooling and production starting costs, and results in lower prices to the Government.

4-4. Performance specifications are frequently used when no suitable commercial item is available and when there is no standardized Government design. In such cases where, in the opinion of the buying activity, the design problem is well within the capacities of a number of competent firms having design staffs, purchase will be made against a performance specification, with design details left to the contractor. In this way, it is possible to get competition for items of specialized usage; but such competition is necessarily confined to firms which are competent to design and build equipment meeting the agency's performance requirement. It is also obvious that research and development contracts are performed against what are basically performance specifications.

5. Specifications in Formal Advertising

5-1. The necessity for definitive specifications is clearly one of the most fundamental criteria for formal advertising. A sufficiently detailed and complete description of what the Government intends to buy is essential.

5-2. All bidders must understand what is being bought, without need for further clarification, in order that the product offered will comply with the specifications and will fulfill the Government's need. Thus, any critical dimensions must be spelled out in detail. Any necessary quality requirement must be fully described. At the same time, however, the Government must avoid imposing unnecessary conditions which would result in disqualifying an otherwise acceptable product because it fails to meet the essential condition. In short, it is imperative that the essential features of the contemplated contract be spelled out in the invitation for bids, so that all prospective suppliers may compete on an equal basis. In practice, this is a difficult requirement to meet.

5-3. Need for Clarity. The real problem in writing specifications for technical items, and to a lesser extent for standard items, which are suitable and adequate for use in formal advertising is to convey complete and accurate understanding of what is required. The same word or expression is subject to varying interpretations by different people. The prospective bidder in formal advertising will invariably interpret the specification requirement to his own advantage. It is essential that he do this; otherwise, he will lose out in the fierce price competition. A specification is essentially the transfer of knowledge between minds. Each mind will test the words of a specification against its own experience. In formal advertising, the prospective bidder must make his own interpretations in advance with no assistance from the Government.

5-4. Need for Preciseness. Specifications for use in formal advertising must be much more precise than those used for negotiation. This is so because in advertised procurement there can be no opportunity, after the opening of bids, to discuss various possible interpretations to assure mutual agreement. Also, because competition in formal advertising is usually limited to price, bidders are likely to offer the minimum quality item which will be responsive. This means that the specifications must be immune to

degradation by bidders which might result in the Government's getting an inferior product.

6. Principles Relating to Specifications

6-1. There are several general principles with which the Government and the contractor must comply in order for both parties to fully understand the specifications of the contract. Compliance with these principles is important in defining the contracting responsibilities of both parties.

6-2. Contract Must be Read in Its Entirety. It is a basic tenet of law that a contract must be read as a whole, and in its entirety. It is equally elementary that meaning must, if possible, be given to all the language employed. An accepted rule of interpretation is that no word in a contract is to be rejected or treated as a redundancy, or as meaningless, if any meaning which is reasonable and consistent with the other parts can be given to it, or if the contract is capable of being construed with the word or words left in.

(A) Thus, in determining the responsibilities of the contracting parties, and the performance that may be demanded of a contractor, a review solely of the "statement of work" or item description is not sufficient. In accordance with this rule, all parts of the contract should be read and considered in determining what is required.

(B) "All parts of the contract" includes not only the contract document itself, but also matters referenced or incorporated by reference. This of course, includes any referenced specifications and drawings even if they are not recited *in toto* in the contract document (or appended thereto).

6-3. Right to Require Compliance. Generally, a contracting party has the right to strict compliance with the specification by the other party. Therefore, a contractor who deviates from the specifications as written does so at his peril.

(A) However, where the Government, as a result of misinterpretation of the provisions of the contract, requires a contractor to perform work not called for under its terms, the order to perform is a "change order" entitling the contractor to an equitable adjustment in price in accordance with the "Changes" article in the contract.

6-4. Ambiguities. If the contract is considered ambiguous, the ambiguity must be construed against the drafter of the language. This too is a fundamental legal principle, and is equally applicable to the Government and the contractor. Thus, the Government is the "drafter," and any ambiguities will be construed against the Government. Obvious ambiguity, however, places on the other party a duty to seek clarification. Failure to do so will undermine later claims based on the ambiguous language.

6-5. Presumption of Adequacy of Government Specifications. Where the Government furnishes design specifications that control work under the contract, there is a presumption that the specifications are adequate for the purposes intended and that, if followed, the desired result will be obtained. There is, in effect, an "implied warranty" that the specifications are adequate.

6-6. Effect of Contractor's Knowledge of Defective Specifications. The precedent is also well-established that where a contractor is required to proceed under specifications which are defective or incomplete, or which make the contract impossible to perform, such situations form a basis for price adjustment under the "Changes" clause, together with necessary time extensions to delivery schedules, even though the unattainable requirement is ultimately relaxed to permit performance.

(A) However, if the contractor knows, or perhaps from his experience should know, that the desired result cannot be obtained, he cannot make a useless thing and expect to be able to charge for it. Where the contractor knows, or should have known, that the specifications are defective, he is under a duty to apprise the Government of this. He discharges his obligation by making the defect known to the Government. The Government then has a duty to act. Additionally, where specifications are defective on their face, or obviously unsuitable, the contractor has a duty to inquire; if he fails to so inquire, he cannot successfully advance a claim of excusability.

6-7. Workmanlike Performance. Strict compliance with the specifications is not the contractor's only responsibility. He is also under a basic duty to perform in the best and most workmanlike manner. This requires a performance standard equal to that of a qualified, careful, and efficient person performing similar work. This is so, even if the standard is not set forth in the contract. When the contract does not contain detailed specifications, a test of "skillful and workmanlike" performance is good industry practice.

6-8. Order of Preference. Conflicts sometimes appear between the basic contract and the specifications or drawings, or between the specifications and the drawings. Generally speaking, when there is a conflict between the contract and the specifications or drawings, the terms of the contract will prevail; if the conflict exists between the specifications and the drawings, the specifications will prevail. However, if the document of precedence is silent on the matter and the matter is not in conflict with some other provision, the "lesser" document will prevail. For example, if the drawings provide for something which is not in the specification, and it is not in conflict with the specifications or the basic contract document, the drawing would prevail to that extent. This is necessarily so under the rule that the contract must be read as a whole.

6-9. Impossibility of Performance. When a contractor undertakes to perform under a performance specification, he assumes the risk that he can, in fact, accomplish the end result. When he agrees to so perform, it is presumed that he knows the "state of the art." Furthermore, the parties are presumed to have contracted in the belief that the state of the art was such that performance was possible.

(A) When performance requirements cannot be met, contractors sometimes advance the argument that the specifications were impossible of performance. When the performance specifications are those of the Government, and are impossible to perform, the contractor will be relieved of compliance.

(B) The real question in issue in these instances is whether the level of performance called for is beyond the reach of any contractor in the field or is merely beyond the capacity of the contractor concerned. If the latter, an impossibility of performance situation would not exist. When the contractor is a leader in his field, the argument of "impossibility" is considerably weakened, and the position is much more difficult to maintain.

6-10. Alternate Methods of Performance. Where alternate

methods of performance are permitted by the specifications, the contractor has freedom of choice. However, if one method is impossible to perform, illegal, or more costly, the contractor is expected to follow the other method.

7. General Rules Applicable to Performance under Specifications

7-1. The following are general rules applied to questions involving performance and specifications. It should be noted that individual circumstances can alter their application.

(1) When the Government provides complete design information, there is an implied warranty that an acceptable product will result if specifications are met.

(2) If frustration is encountered in determining the meaning of conflicting or ambiguous specifications, interpretation will be in favor of the contractor if the words were written by the Government.

(3) The Government is entitled to strict compliance with quantitative specifications, although substantial compliance may be held to be sufficient (e.g., 2,000 r.p.m.).

(4) Qualitative specifications are interpreted in the light of custom and usage in the particular trade or profession (e.g. watertight).

(5) Process information supplied by the Government on a permissive or information basis does not warrant commercial practicability.

(6) If a contractor's proposal is included as a part of the specifications, there is a possibility that the contractor may be held to the performance suggested by the proposal (technical message as opposed to marketing message).

(7) A contractor may not sit back and rely on a patent ambiguity in specifications and then demand a compensable change. He has an obligation to address such ambiguity to the attention of the contracting officer prior to bid submission.

(8) Requiring either a greater or lesser performance than called for by contract is a "constructive change," entitling the contractor or the Government to an equitable adjustment under the Changes clause.

(9) Research and development contracts usually do not contain design specifications, since the contractor is generally required to design and build the item to meet performance specifications.

(10) In the event of a discrepancy between design specifications and performance specifications, the performance specifications generally control.

(11) Most contracts provide that, in addition to what is shown on the plans and what is spelled out in the specifications, the contractor shall be compelled to furnish and do whatever is necessary to provide a complete system or do a complete job. The test used is what should a reasonable contractor deduce from the plans and specifications.

(12) Where the language of the specification is indefinite, ambiguous, or of doubtful construction, the practical interpretations of the parties, as evidenced by usage or course of dealing, controls.

CHAPTER 9

Inspection, Acceptance, and Warranties

THE PROBLEM OF QUALITY is of prime importance in government contract law. Many disputes concern either difficulties with specifications or with whether the items or services delivered meet those specifications. In this chapter, inspection, delivery, acceptance, and warranties are examined—with a view toward interpreting and defining contract compliance with respect to quality.

1. Inspection

1-1. When a contract is awarded by the government, the contractor assumes responsibility for timely delivery and satisfactory performance. Performance includes furnishing the quality and quantity which the contractor has agreed to deliver. Inspection requirements are included in every contract.

1-2. DAR defines inspection as ". . . the examination and testing of supplies or services including, when appropriate, raw materials, components, and intermediate assemblies) to determine whether they conform to contract requirements." (DAR 14-001.3).

1-3. **Purpose.** The purpose of inspection is to determine whether the product or service conforms exactly to what the Government has ordered. The extent of inspection varies with the dollar value of the contract and with the type of product. For example, a contract for "off-the-shelf" items under small purchase procedures, may require minimum inspection after the items are received at their destinations. Such inspection may be limited to counting items, determining damage in transit, and verifying that the items are what was ordered. On the other hand, a contract for sophisticated aircraft or missile parts or assemblies will require a detailed inspection system which starts with the raw materials, continues through production, and ends with the completed item. Faulty inspection of one part during production could result in acceptance of a poor quality end item, which could cause aborted missions and loss of life.

1-4. Basic Government contract policy concerning quality is that contractors are responsible for controlling product quality and for offering only those items which conform to contract requirements. The inspection clauses contained in Acquisition Regulations establish contractor inspection responsibilities and vest in the Government certain rights. Improper application of the procedures (of inspection, waivers, corrections or replacements, and final acceptance) may jeopardize the Government's legal rights.

1-5. **Terms and Conditions of Inspection and Control of Quality.** The contract itself will contain the specifications or the description of the supplies or services and, when appropriate, terms and conditions concerning inspection and control of quality. These terms and conditions are called contract quality requirements.

1-6. ***Types of Quality Requirements.*** There are four basic types of quality requirements which obligate a contractor to perform inspection and to control the quality of his product. These requirements also establish the basis for Government inspection of supplies and services. For each procurement situation, the contract quality requirement should clearly define contractor responsibility in a document that is enforceable and that can be administered. Contracts which contain ambiguous terms, inadequate inspection/acceptance criteria, and omissions, jeopardize the Government's ability to obtain a quality product.

(A) Standard Inspection Requirement. The standard inspection requirement in the contract requires the contractor to establish and maintain an inspection system not otherwise defined except that it shall be acceptable to the Government. Included in the usual "boiler plate" contract inspection clause is contractor liability for latent (hidden) defects, fraud, and gross mistakes that amount to fraud. In substance, the standard inspection requirement actually is the foundation upon which all other Government inspection specifications are based. When the supplies are standard parts (commercial or military) of simple design produced by a manufacturer, it should not be necessary for the Government to spell out the precise details of how the desired quality will be obtained or measured. In combination, the commodity specification or purchase description and the standard inspection clause are sufficient to establish the supplier's responsibility for the quality of contract items tendered to the Government.

(B) Inspection System Requirement. In addition to the standard inspection requirement, the contract may stipulate that the contractor shall establish and maintain an inspection system in accordance with a higher Government standard. The objectives and essential elements of such an inspection system are prescribed in military specification MIL-I-45208A, which is referenced in all DOD contracts requiring defined inspection systems. Specification MIL-I-45208A is intended for use on those contract items which are of such a nature or complexity that the required quality cannot be attained unless the contractor establishes Government-specified inspection controls for operations not identified in the commodity specification or purchase description.

(C) Quality Program Requirement. In addition to the above inspection requirements, the contract may stipulate that the contractor shall establish and maintain a quality program in accordance with a Government inspection standard.

The objectives and essential elements of such a quality program are prescribed in military specification MIL-Q-9858A, which is referenced in all contracts requiring a defined quality program. Specification MIL-Q-9858A is intended for use on those contract items which are of such a nature or complexity that the required quality cannot be attained unless the contractor established a Government-specified quality control program encompassing all contractor activities in performance of the contract (e.g., design, manufacturing, testing, packaging, etc.).

(D) Product Inspection Requirement. A product inspection requirement is the simplest inspection requirement, and is used in accordance with the provisions of a Federal or military product specification referenced in the contract. It is advisable to consider the extent of evidence required to substantiate the fact that actual inspection was performed. The contractor is required to furnish documentation in the form of records or test reports attesting to his having performed the stipulated inspection/quality control tasks, and reflecting the results thereof. This is particularly important for those contracts involving Government inspection and/or acceptance at the point of manufacture.

1-7. ***Extent of Inspection.*** The basic responsibility for inspection and quality is the contractor's. He is responsible for controlling product quality and for offering to the Government only those supplies and services that conform to contract requirements, and for maintaining and furnishing evidence of this conformance. The Government's role is to determine how much it should inspect to insure the effectiveness of a contractor's procedure. The more inspecting the Government does, the more the contractor is relieved of his responsibility. The determination is usually made after considering four factors:

(1) Integrity and reliability of the contractor as a quality producer;

(2) The adequacy of the contractor's inspection system—which would include incoming material, lab testing, in-process inspection, end item inspection, packaging, packing, crating, and marking;

(3) Previous Government experience with the contractor;

(4) The nature and value of the item involved.

1-8. ***Methods of Inspection.*** Methods of inspection involve the way that the production process is examined as well as points in the process at which examination occurs. There are several ways of performing examinations. The most commonly used are: (a) visual and dimensional checks, and (b) conducting or witnessing physical or performance tests.

(A) Visual checks are done by eyesight; and the inspector exercises a great amount of personal judgment. This kind of examination reveals surface defects, missing pieces, and parts out of alignment. The dimensional check is made with gauges and micrometers.

(B) Conducting or witnessing physical or performance tests involves more objectivity. Seeing a motor run or an aircraft fly, or a submarine submerge are examples of this kind of examination. Chemical tests to determine chemical composition, and physical tests to determine hardness, are also in this category of examination.

1-9. ***Points at Which Inspection May Be Performed.*** Inspection may be performed at several points along the production route.

(A) Materials. The quality and type of raw materials used may affect the quality of the end product. Properties of materials such as hardness, brittleness, malleability, and machineability may change with succeeding operations. When raw material properties contribute to the functioning of the end product, examinations of these materials are made either at the subcontractor's plant or at the receiving point in the prime contractor's facility.

(B) Manufacturing Process. Some quality characteristics cannot be verified by means of end product inspection. Therefore, an inspection of the manufacturing process itself will reveal whether these special characteristics are adequately controlled. Examples of these processes are heat-treating, electro-plating, forging, casting, and welding.

(C) Subassemblies. When subassemblies can be changed or damaged before they are incorporated into the end item, inspection is made at accessible points of the in-process assembly of parts.

(D) End Item. Inspection of completed supplies is necessary to assure that contract requirements have been met. The responsibility of the contractor for inspection of completed supplies requires that he complete all examinations and tests set forth in the specifications. As the first step, the contractor will verify that all previous inspection operations have been performed. The inspections and tests performed must provide sufficient evidence of complete compliance with contract requirements.

1-10. Now that we have had a brief exposure as to what inspection is and how it is used, we shall examine the DAR Inspection clause which establishes inspection requirements for DOD contracts. The basic clause for firm fixed price supply contracts, DAR 7-103.5, serves as the basis for inspection clauses for other contract situations. Let us look at the basic clause, as set forth in Appendix D, and discuss its requirements and legal ramifications.

1-11. **The Government's Right to Inspect.** The first section (a) of this clause states, "All supplies (which term throughout this clause includes without limitation raw materials, components, intermediate assemblies, and end products), shall be subject to inspection and test by the Government, to the extent practicable at all times and places including the period of manufacture, and in any event prior to acceptance." This section of the clause, then, gives the Government the right to inspect all materials and workmanship at any time and any place where work on a contract is being performed. Although the following examples place test requirements and responsibility on the contractor, the Government reserves the right to perform any tests and inspections necessary to assure that the contractor is doing what is required. Let us examine several typical "time/place" situations.

1-12. ***First Article Approval.*** This inspection, test, and evaluation of a "first article" is designed to assure a satisfactory product. A first article may be pre-production models, initial production samples, test samples, first lots, pilot models, or pilot lots. Approval involves testing and evaluating the first article for conformance with contract requirements before or in the initial stage of production.

(A) First article approval tends to minimize risks for the contractor and for the Government. It says to the contractor, "manufacture the additional articles just like this one." To

the Government, it says "chances are in favor of a quality product on time."

(B) A DAR clause, First Article Approval-Contractor Testing, is used by DOD when the contractor is responsible for conducting first article approval tests. When the Government desires to conduct the tests, a different DAR clause is used.

(C) A first article approval clause is appropriate if the Government wants assurance that a product is satisfactory when it has not been previously furnished by the contractor; or it has been previously furnished by the contractor, but many specification changes have occurred; or a performance specification is applied. This clause is also used when the approved article is to serve as a manufacturing standard.

1-13. ***Pre-production Testing.*** First assurance of quality must start early. Therefore, a considerable amount of pre-production testing effort is exerted.

(A) Measuring and Testing Equipment. The contractor must provide gauges and other measuring and testing devices to assure that supplies and materials meet contract specifications. Inspection of these devices, by the contractor, is necessary to insure that they are calibrated according to specific national standards. The testing and, if necessary, adjustment and calibration of the instruments is done at specified intervals prior to and during production. The prime contractor must also assure that subcontracts follow the same procedure.

(B) Production Tooling. When production jigs, fixtures, tooling masters, templates, patterns and such devices are used as media of inspection, they must be proved for accuracy prior to use. The devices are also inspected at specific intervals during their use so that adjustment, replacement, or repair is done before inaccuracies develop.

(C) Materials. All suppliers' and vendors' materials are inspected upon receipt to assure conformance with technical requirements. Raw materials are laboratory tested as necessary to assure that materials conform to the necessary physical, chemical or other technical requirements. Subcontractors and suppliers must exercise equivalent control over raw materials used in the production of parts and items that they supply to the contractor.

1-14. ***During Manufacture.*** This inspection process is perhaps the most complex and time consuming of all. It is during this time and place that quality is controlled most closely.

(A) Controlled Conditions. The contractor must assure that all machining, wiring, batching, shaping, and all basic production operations of any type, together with all processing and fabricating of any type, are accomplished under controlled conditions. Controlled conditions include documented work instructions, adequate production equipment, and any special working environment. These controlled conditions must also be used during physical examinations, tests, or measurements of the materials or products processed through each work operation.

(B) Processed Materials. Inspection and monitoring of processed materials or products must be accomplished in any "suitable, systematic manner" selected by the contractor. This selection may include inspection by machine operators, automated inspection gauges, moving line or lot sampling, setup or first piece approval, or production line inspection, employed in any combination that will adequately and efficiently protect product quality and the integrity of processing.

(C) Complex Processes. Certain chemical, metallurgical, biological, sonic, electronic, and radiological processes are of such a complex and specialized nature that much more than ordinary work instructions are needed. For these special processes, the contractor must assure that the process control procedures or specifications provide for special inspections, authorization, and monitoring to the standard necessary for this ultra precise and supercomplex work function.

1-15. ***Prior to Shipment.*** Government inspection of the completed item is often performed at a contractor's plant prior to shipment of the supplies; however, the terms of the contract will specify where final inspection, as well as acceptance, will be made. Final inspection and testing of completed products will provide a measure of the overall quality of the completed product. Inspection will also be performed of preservation, packaging and shipping methods (to protect the products and to prevent damage, loss and deterioration). These specifications are described in the contract, and strict conformance is vital.

1-16. ***At Destination.*** If origin inspection is called for in the contract, a check at the destination will also be made (to determine any damage in transit, verify quantities, and spot-check for possible substitution or fraud). If destination inspection is called for in a contract, such inspection is usually limited to low dollar-value shipments of nontechnical items with a noncritical end-use. Destination inspections are also performed in situations where the required test equipment is located only at the destination. In the case of government purchase for resale of brand name items, or purchase of perishables, inspection is performed at destination.

1-17. **The Contractor Provides Facilities.** After establishing the Government's right to inspect, the clause further states, "If any inspection or test is made by the Government on the premises of the Contractor or subcontractor, the Contractor without additional charge shall provide all reasonable facilities and assistance for the safety and convenience of the Government inspectors in the performance of their duties." The contractor may also be responsible for furnishing labor to assist the Government inspectors.

1-18. When the Government performs inspection at locations other than the contractor's (or subcontractor's) premises, the inspections are at the Government's expense. DAR states, "If Government inspection or test is made at a point other than the premises of the Contractor or a subcontractor, it shall be at the expense of the Government except as otherwise provided in this contract; . . . ."

1-19. The basic inspection clause continues with "All inspections and tests by the Government shall be performed in such a manner as not to unduly delay the work." If the contract specified a test schedule, e.g., a number of days after submission of an item for test, and the government unreasonably delays the test, the contractor may either obtain a delivery time extension or recover additional costs caused by the delay or both. If the contract is silent on a test schedule, the Government is expected to complete its tests within a reasonable length of time.

1-20. The Government may charge to the contractor any additional costs for contractor-caused delays or for Govern-

ment reinspection of rejected items. DAR provides, "The Government reserves the right to charge to the Contractor any additional cost of Government inspection and test when supplies are not ready at the time such inspection and test is requested by the Contractor or when reinspection or retest is necessitated by prior rejection." The inspection clause gives the Government the right to reject any defective material or workmanship, or require its correction. The method used to identify corrected items, the impact of inspection on contractor responsibility, and the handling of ambiguous specifications will not be considered.

1-21. When submitting a corrected item for inspection, the contractor must disclose to the Government the identity of the corrected item or why it was corrected. The clause states, "Supplies or lots of supplies which have been rejected or required to be corrected shall be removed, or if permitted or required by the Contracting Officer, corrected in place by and at the expense of the Contractor promptly after notice, and shall not thereafter be tendered for acceptance unless the former rejection or requirement of correction is disclosed."

1-22. The Government may, at any time prior to acceptance, reject any item for defects even though prior Government inspections and tests had not rejected the items. "The inspection and test by the Government of any supplies or lots thereof does not relieve the Contractor of any responsibility regarding defects or other failures to meet the contract requirements which may be discovered prior to acceptance." It must be remembered that the inspection clause is for the Government's benefit; therefore, continuing inspection is contemplated during production. Even when a Government inspector has approved specific components, they may be rejected if found defective prior to acceptance. After an item has been approved and later correction required, the contractor cannot recover the additional costs of correction. Some interesting exceptions are worth noting, however.

1-23. If a Government inspector approved an item based on an extremely sloppy inspection (grossly indifferent inspection), subsequent reinspection and rejection may entitle the contractor to a contract time extension equal to the delay. Unreasonable interference (by a Government inspector) with a contractor's production will warrant relief to a contractor by an extension of time or additional dollars, or both. Unreasonable interference may occur when repeated inspections result in rejection of previously approved items.

1-24. **Contractor Failure to Correct Defects.** The inspection clause provides for specific measures to be taken in the event that a contractor fails to correct a defective item. If the contractor fails promptly to remove such supplies, or lots of supplies, which are required to be removed, or fails to promptly replace or correct such supplies or lack of supplies, the Government may replace or correct them at the contractor's expense, terminate the contract for default, or require delivery at equitably reduced prices. If the contractor fails to agree to the reduced price, it shall be considered to be a dispute concerning a question of fact under the Disputes Article.

1-25. ***Replace or Correct.*** The Government may award a new contract for a replacement item and charge the cost to the first contractor; or the Government may use its own resources to correct the defective items. It would then charge the contractor with reasonable costs of direct labor, equipment, and overhead.

1-26. The preferred remedy would include the correction of the item in place. If time is a problem (system continuity), the contract should include correction within a certain time after a defect is found. Whether the items are replaced or corrected, the corrected or new item should be similar to the original requirement in functional, mechanical and design characteristics. We do not want to obtain "gold-plated" versions of the basic requirement.

1-27. ***Default Termination.*** The Government may choose to terminate the contract for default rather than replace or correct items through this "last resort" type of action. In this case, the contractor will not be paid for any costs incurred, and will also be required to pay the Government any increase in price.

1-28. ***Price Reduction.*** When the rejected material is urgently needed and it is not feasible to replace or correct a nonconforming item, the Government may choose to use this material at a reduction in price. The extent of adjustment is determined by the Contracting Officer. Normally, the adjustment will not exceed the reasonable value to the Government after considering the possible cost of correcting the item. The price, however, should be low enough to discourage similar errors in the future. However, the Contracting Officer cannot reduce it in an amount that would constitute a penalty, but only in the amount of dollar damages that the Government can prove. The price adjustment is done by a formal contract change. If the Contracting Officer and contractor do not agree on what is an equitable price, this failure to agree may be considered a dispute over a question of fact under the Disputes Article.

1-29. **Contractor's Inspection System.** One additional inspection clause feature imposes on a contractor a requirement to use an acceptable inspection system. "The Contractor shall provide and maintain an inspection system acceptable to the Government, covering the supplies hereunder. Records of all inspection work by the Contractor shall be kept complete and available to the Government during the performance of this contract and for such longer period as may be specified elsewhere in this contract."

1-30. The contractor's records of inspection will be available for the Government inspector, and copies of individual records will be provided upon request. As a minimum requirement, the inspection and testing records must indicate the nature of the observations, the number of observations made, and the number and type of deficiencies found. Records will also indicate the acceptability of work or products and the action taken in connection with deficiencies.

1-31. **Expanded Contract Responsibility.** In addition to the standard inspection clause requirement for an acceptable contract inspection system, the contract may also contain clauses requiring additional contractor effort to assure acceptable quality. When the technical requirements of a contract are such as to require control of quality by in-process as well as end item inspection, DOD uses a military specification, MIL-I-45208, in addition to the prescribed inspection clause. The in-process inspections control measuring and testing equipment, drawings and changes, documentation and records.

1-32. When the technical production requirements of

complex supplies, components, equipments and systems require additional controls above those of MIL-I-45208 (inspection system), DOD uses the prescribed inspection clause with another military specification, MIL-Q-9858, which sets out functional criteria for a complex, complete quality assurance system. When MIL-Q-9858 is used, MIL-I-45208 is not used. In addition to in-process controls, this "MIL SPEC" includes organization, planning, work instructions, documentation control, work operations, and manufacturing processes. "The purpose of this control is not only to assure that particular units of hardware conform to contractual requirements, but also to assure interface compatability among these units of hardware when they collectively comprise major equipment, subsystems and systems."

1-33. **Comparison of Inspection Clauses.** It was stated earlier that the inspection clause in firm fixed-price supply contracts served as a basis for inspection clauses of other types of contracts. A brief review of these other types of clauses and concomitant comparisons with supply contracts will illustrate this basis.

1-34. ***Fixed Price Construction.*** An example of the clause used in fixed-price construction contracts is contained in DAR 7-602.11 (Appendix D). The differences from the Supply clause are:

(1) Inspection and test are performed in such manner as not to unnecessarily delay the work. This is similar to the supply contract clause except that since construction contracts usually contain a "Suspension of Work" clause, the contractor may be compensated for unreasonable Government delays in inspection or testing.

(2) Before acceptance, the Government can require removal or tearout of the completed work. If work is defective, the contractor pays for the inspection cost and rework. If work is acceptable, the contractor is compensated for the inspection time and for reconstruction of the work.

(3) Acceptance is similar to that of the supply contract except that if any other warranty is applicable, acceptance by the Government is not conclusive.

1-35. ***Fixed-Price Research and Development.*** An example of the applicable clause in fixed-price research and development contracts is containcd in DAR 7-302.4(a). When the contract objective is end items rather than drawings and reports, this clause may be used. The Contracting Officer may dctermine that the clause is impracticable and use a short-form clausc instead, as written in DAR 7-302.4(b). The short form clause merely gives thc Government the right to inspect, and requires the contractor to make facilities available to the inspectors. The (a) clause (long form) differences from the basic inspection clause are:

(1) The Government may inspect the premises of the contractor and any subcontractor.

(2) If the contractor fails to replace or correct defective work, the Contracting Officer may accept such work at an equitable reduction in price. This is the only relief offered to the Government in an R & D fixed-price contract inspection clause.

(3) All other inspection conditions are similar to those in a firm fixed-price supply contract.

1-36. ***Cost-Reimbursement Supply and Research and Development.*** The features of both types of cost-reimbursement contracts are the same, and will be described at the same time. The titles of the clauses differ. For Cost-Reimbursement Supply contracts, DOD uses DAR clause 7-203.5, "Inspection of Supplies and Correction of Defects." For Research and Development contracts, DAR clause 7-402.5(a)(1), "Inspection and Correction of Defects," is used. These clauses have the same basic provisions as the fixed-price supply clause with the exception that in the cost reimbursement contract:

(1) The Government may inspect the premises of the contractor and any subcontractor.

(2) Unless otherwise provided or unless acceptance has already occurred, acceptance shall be deemed to have occurred not later than 60 days after delivery for the supply clause and 90 days for the R & D clause.

(3) The Government may require contractor correction or replacement of supplies at any time up to 6 months after acceptance if at the time of delivery they were defective. Contractor's costs will be paid by the Government, but no fee will be paid.

(4) If the contractor does not replace or correct promptly, the Government may replace or correct and either charge the contractor for the cost or reduce the contractor's fixed-fee. In the event of undelivered supplies, the Government may reduce the fixed fee, or terminate for default.

(5) At any time after acceptance, the contractor may be required to replace or correct defective supplies if the defects resulted from fraud, lack of good faith, or willful misconduct of the contractor's supervisors.

(6) Contractor has no continuing obligation for correction of latent defects.

1-37. ***Fixed-Price Incentive.*** The inspection clause used in fixed-price incentive contracts is the same as the basic fixed price supply contract clause except for paragraph "b" which is quoted here in part. "Prior to the establishment of the total final price, the cost of replacement or correction shall be considered as a cost incurred, or to be incurred, for the purpose of negotiating the total final negotiated cost under the incentive price revision clause of this contract. After the establishment of the total final price, all replacements or corrections made by the Contractor shall be accomplished at no increase in the total final price." This clause also provides for contractor replacements or corrections of defective supplies. If the contractor does not, the Government may replace or correct, and reduce the final price; or the Government may terminate for default.

1-38. ***Fixed-Price Redeterminable.*** An inspection clause similar to the fixed-price incentive is used in price redcterminable contracts, and treats costs of replacement and correction in the same manner.

2. Acceptance

2-1. Acceptance is the act of an authorized agent of the Government by which the Government agrees that the supplies or services submitted by a contractor conform to all requirements of the contract. This includes quality, quantity, and the condition of the supplies. The contract itself will include the time and place of acceptance. The acceptance procedure is important because at the time and place of

acceptance, title passes from the contractor to the Government. The contract also states that acceptance is final except for latent defects, fraud, or such gross mistakes as amount to fraud. Because of the finality of the act of acceptance, an understanding of the procedure is important.

2-2. The contract terms control where items will be accepted. These points of acceptance may be either at the contractor's plant or at destination or somewhere else by mutual agreement. Normally, when a contract requires Government quality assurance actions at a plant, acceptance will be at the plant. When quality assurance actions are performed at destination, acceptance will ordinarily be at destination.

2-3. After delivery is made, a reasonable period of time is allowed for Government acceptance or rejection. Although the Government may not have formally accepted items, acceptance may be implied by the Government's conduct or by the Government's delay.

2-4. The contract inspection clause states, "acceptance or rejection of supplies shall be made as promptly as practicable after delivery, . . ." If items are rejected, the clause affirms that "it is important that a notice of rejection be furnished the contractor promptly, because if timely notice of rejection is not furnished, acceptance may in certain cases be implied as a matter of law."

2-5. Although formal acceptance is not accomplished, specific actions by the Government may be considered to imply acceptance. For example, if the Government consumes part or all of the defective items delivered, an acceptance of the consumed portion is generally considered to have been accomplished. Government alteration or use of the items prior to rejection constitutes an acceptance.

2-6. Ownership (title) transfers to the Government upon acceptance. The significance of this transfer is that any damage or loss to the products involved is borne by the owner. Therefore, regardless of the point of inspection and time of delivery, Government acceptance assumes title, ownership, and responsibility for the contract items.

2-7. **Procedure.** The Material Inspection and Receiving Report, DD Form 250, is the DOD document which accomplishes the formal acceptance of supplies or services on a Government contract. The Government agent authorized to make acceptance signs the document which later serves as the authorization for payment to the contractor. Since acceptance could be at the contractor's plant or at destination, delivery may be accomplished either through a Government Bill of Lading (GBL) or a Commercial Bill of Lading (CBL).

2-8. A Bill of Lading serves four purposes:

(1) It is a receipt for goods received by a carrier for transportation;

(2) It is a contract of carriage;

(3) It serves as documentary evidence of title to the goods in case of dispute or controversy;

(4) In the case of a Government Bill of Lading, it serves as the document by which a carrier is paid for the transportation service rendered.

2-9. When a carrier receives goods from a shipper, it must issue a bill of lading showing in detail the information necessary to properly classify and transport the commodity as well as collect for the services performed.

2-10. ***The Government Bill of Lading (GBL).*** The Government, rather than the carrier, issues the Government Bill of Lading. When acceptance is accomplished at the contractor's plant, title is automatically transferred to the Government. The contractor ships on a GBL, since the property belongs to the Government. For any damage or loss in shipment, the Government files and asserts a claim against the carrier.

2-11. ***The Contractor Bill Of Lading (CBL).*** When acceptance is at destination, the contractor retains title to the items until accepted. The contractor retains ownership during shipment, and ships on a Contractor Bill of Lading. In the event of damage or loss, the carrier is responsible to the contractor.

2-12. ***Certificate of Conformance (COC).*** Any discussion of inspection and acceptance would not be complete without describing the Certificate of Conformance (COC). At the discretion of the Contracting Officer, a clause may be inserted in a contract which requires the contractor to certify that supplies or services comply with contract requirements. This clause may serve one of two purposes. It may be used as the sole basis for Government acceptance and payment of contractor invoices without Government inspection (without prejudice to the Government's right to inspect at a different point in time or place). The COC can also be used to obtain additional assurance that supplies conform to contract requirements prior to acceptance.

2-13. ***Contractor Responsibility After Acceptance.*** The Government's acceptance is conclusive except for latent defects, fraud, or such gross mistakes as amount to fraud. Therefore, if any of these conditions are proved to exist, even after final payment is made, the contractor is still responsible. The remedies to the Government are considered to be the same as those available when the items are found to be defective before acceptance. Also, damage to items in shipment may require correction by the contractor, even though the Government owned the item at time of shipment.

2-14. A latent defect is a defect that existed at the time of Government acceptance but could not be discovered by a reasonable inspection. Determination of "latent" then becomes a matter of what is reasonable. If the inspection is reasonable and the defect is not discovered, the defect is latent. If a reasonable examination of an article would reveal a defect, and the examination is not made, the defect is not latent.

2-15. A reasonable inspection is one that would normally be performed as a custom of the trade. In the examination of shoes for example, a visual inspection would suffice and an X-ray would not be expected; however, in the examination of welding done on structual steel, an X-ray inspection would be reasonably expected.

2-16. The burden of proof is upon the Government, which must prove that defective material and workmanship is the most probable cause of the failure of a product when considered with reference to other possible causes. Under the standard inspection clauses, the contractor is responsible for latent defects discovered at any time after final acceptance; however, the extent of his liability is pro-rated over the useful life of the item. Note that latent defects applies not only to supplies and services but also to design. Therefore, where a contractor has a contract for design and manufacture and the design is defective in an "undiscoverable" manner, but the

product is manufactured properly in keeping with that design, the contractor must repair or replace the product free of additional charge. It should be noted that when a design is defective in a cost reimbursement contract, the "fix" has virtually no economic effect on the contractor because he will be paid all of his out-of-pocket costs.

2-17. A further problem arises as to latent defects: Is the so-called defect really latent, or is the defect caused by a fact that was beyond the knowledge and state of the art when the product was designed and/or manufactured? If it were beyond the state of the art, the contractor will get full costs and profit when he improves the product's design or manufacture or both.

2-18. Fraud and Gross Mistakes are the additional exceptions to the conclusiveness of acceptance contained in the inspection clauses. The contractor is responsible during the life of the product for any defects found because of fraud or gross mistakes. To obtain relief for a defective item, the Government must prove fraud, which means it is necessary to show intent to deceive by the contractor in that he misrepresented a material fact, and that the Government relied on the misrepresentation to its detriment. To establish a gross mistake that amounts to fraud, it is necessary to prove that the error was so gross that it should be considered as fraud; however, it is not necessary to prove intent to deceive. It is difficult to prove intent; thus, proof of fraud is extremely unlikely.

2-19. If the contract provides for delivery and acceptance at origin, the contractor will ship on a Government Bill of Lading. Yet, when subsequent damage to the supplies can be traced back to faulty packing and loading, the contractor can be held liable.

2-20. **Additional Responsibilities.** There are other responsibilities which regulate the contract agreements between the Government and the contractor.

2-21. ***The Contractor's Responsibility.*** The Title and Risk of Loss clause states that, unless otherwise provided for in the contract, (1) title shall pass to the Government upon formal acceptance regardless of when or where the Government takes physical possession, and (2) risk of loss or damage remains with the contractor until (a) delivery of supplies to a carrier, if transportation is f.o.b. origin, (b) acceptance by the Government or delivery of possession to the Government at the destination specified, whichever is later, if transportation is f.o.b. destination. Notwithstanding these provisions, the risk of loss or damage to supplies that are so nonconforming as to give the Government the right of rejection remains with the contractor until cure or acceptance. The contractor is not liable for any loss or damage caused by the negligence of officers, agents, or employees of the Government acting within the scope of their employment.

2-22. ***The Government's Responsibility.*** Just as the contractor has specific responsibilities under the inspection clause, the Government must also fulfill its responsibilities. When its agents do not properly execute their responsibilities, the Government gives up certain legal rights.

2-23. Progress payments may be made to contractors when a long lead time is required between beginning of work and first delivery, or for payments as work progresses. As security for these payments, the Government substantially assumes ownership of the contract supplies. The clause provides that the Government obtain "title to all parts, materials, inventories, work in process, special tooling . . . , special test equipment . . . , tools, jigs, dies, fixtures . . ."

2-24. It would appear that the Government would assume the responsibility for loss or destruction of these before acceptance, since the Government owns them. However, the progress payments clause also provides "in the event of loss, theft or destruction of or damage to any such property before its delivery to and acceptance by the Government, the Contractor shall bear the risk of loss and shall repay the Government an amount equal to the unliquidated progress payments . . ." (This appears only in fixed price contracts.)

2-25. When the Government inspector conducts an inspection according to the contract specifications, his rejection of supplies cannot be overturned by another test method, even though the other test shows that the supplies met the specifications of the contract. On the other hand, if a contractor produced an item according to a Government-furnished sample, the Government inspector's rejection may be overturned by the contractor because the contractor has complied with the contract (even though he may be making a product that absolutely will not work).

2-26. If the contractor can show that a Government inspector is inexperienced or incompetent, the inspection is improper; and any rejected supplies may later be accepted. Delays caused by such inspections are considered reasonable. If the neligence of a Government agent causes damages to a contractor, the Government becomes liable for the contractor's costs to repair the damages.

2-27. ***Inherent Destruction.*** Inspection and test may require that samples be destroyed or damaged. This may be necessary to determine a rupture point, or destruction point. If the Government arbitrarily destroys or uses unnecessary destructive tests, the contractor may be compensated for the damage. In addition, a delivery delay caused by degrading or damaging an item because of Government tests, may be considered an excusable delay. Thus, the contractor will be provided with enough time to rework or repair the damaged item before delivery.

3. Warranties

3-1. Many items procured by Government agencies are covered by warranties which permit a course of action to correct defects appearing after acceptance by the Government. These warranties may cover specification performance or fitness for a particular purpose. Any such warranty in writing is an express warranty. However, in the absence of a written warranty, the Government may fall back on an implied warranty.

3-2. **Implied Warranty.** The Uniform Commercial Code (UCC) is our source of law on this subject. Although the Code is binding in the commercial contracting world as to goods sold in trade, it is employed in government contract law mainly to fill gaps (*Reeves Soundcraft Corp.* ASBCA Nos. 9030 and 9130 (1964) 64 BCA para. 431T.). Since the implied warranty provisions of the Code protect buyers rather than sellers, the Government has willingly espoused these legal rules for Government contracts. Several provi-

sions of the UCC should provide an illustration of the protection given by implied warranties.

3-3. ***Merchantability and Usage of Trade (UCC 2-314).*** Unless excluded or modified, a warranty that the goods shall be merchantable is implied if the seller is a merchant with respect to goods of that kind.

3-4. "Goods to be merchantable must:

(a) pass without objection in the trade under the contract description; and in the case of fungible goods, (fungible goods are those where all units are identical, i.e., grains of corn) are of fair average quality within the description; and

(b) be fit for the ordinary purposes for which such goods are used; and

(c) run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and

(d) be adequately contained, packaged, and labeled as the agreement may require; and

(e) conform to the promises or affirmations of fact made on the container or label, if any."

3-5. ***Fitness for Purpose (UCC 2-315).*** "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under the next section, an implied warranty that the goods shall be fit for such purpose."

3-6. ***Implied Warranty Exclusions (UCC 2-316).*** Although implied warranties provide protection to buyers, an implied warranty may be specifically excluded by calling the buyers attention, in understandable language, to the fact that warranties are excluded and that there is no implied warranty. In addition, an implied warranty is excluded when a buyer has examined the goods, sample, or model as fully as he wanted to (prior to entering into the contract) or when he has refused to examine the goods. Also by agreement of seller and buyer, the extent of remedies can be restricted or limited.

3-7. Once a buyer accepts the goods, he must pay for them. Once he accepts, he may not reject; however, he may still seek other remedies. In order to seek remedy for an alleged breach, the buyer must notify the seller within a reasonable time after the "breach" is discovered, or should have been discovered. The burden of proof, of course, is on the buyer.

3-8. There are situations, however, where a buyer may revoke acceptance of goods. If the buyer accepted on a reasonable assumption that the defect would be cured, and it was not, or if before acceptance, the defect was difficult to detect, or if he were induced by the seller's assurance, the buyer may revoke his acceptance if the nonconformity or defect substantially impairs its value to him. In this case, the buyer's rights are the same as if he had initially rejected the products.

3-9. ***Remedies for Breach of Implied Warranty (UCC 2-711 thru 2-718).*** The UCC provides remedies to the buyer in the event of a breach of an implied warranty. It is interesting to note that these remedies bear a strong resemblance to the remedies available to the Government under the fixed price supply inspection clause. The following list is a very brief description of the UCC provisions:

(a) Where the buyer rejects goods or properly revokes acceptance, he may cancel the contract, recover the price paid, and may either "cover" and recover damages for the goods affected, or recover damages for non-delivery.

(b) "Cover" involves buying goods to substitute for those due from the seller. The damages to be recovered are equal to the difference between the cost or repurchase (cover) and the contract price, plus "incidental and consequential" damages, less expenses saved as a result of the seller's breach.

(c) Damages from non-delivery equals the difference between the market price and the contract price.

(d) "Incidental" damages are those expenses which are incurred in inspection, receipt, transportation, and any reasonable charges, expenses, or commissions in connection with repurchase. "Consequential" damages include losses resulting from requirements and needs of which the seller had reason to know at the time of contracting and which the buyer could not reasonably avoid, and injuries to person and property resulting from breaches of warranty.

(e) The contract between the buyer and seller may provide remedies other than those in the UCC and it may also change the amount of damages recoverable.

3-10. ***Implied Warranties in Government Procurement.*** Before acceptance, the inspection clause of the contract protects the Government's interests. What protection is there after acceptance? If the Government accepts contract items and later claims that the contractor has breached an implied warranty, does the acceptance eliminate any implied warranties? Examination of the contract inspection clauses suggests the answer: It depends on the type of contract.

(A) Cost-Reimbursement Contracts. For both Supply and Research and Development contracts (as well as Time and Material and Labor-Hour), the inspection clauses provide, "Except as provided in this clause, and as may be provided in the Schedule, the Contractor shall have no obligation or liability to correct or replace articles which at the time of delivery are defective in material or workmanship or otherwise not in conformity with the requirements of the contract." Implied warranties do not apply.

(B) Fixed-Price Contracts for Supplies or Services. For fixed-price supply contracts (as well as Research and Development, Incentive and Price Redetermination) the inspection clauses provide that "Except as otherwise provided in this contract, acceptance shall be conclusive except as regards latent defects, fraud or such gross mistakes as amount to fraud." This conclusive acceptance, then, kills any implied warranty.

(C) Fixed-Price Contracts for Construction. The inspection clause in this type of contract states, "Acceptance shall be final and conclusive except as regards latent defects, fraud, or such gross mistakes as may amount to fraud or as regards to Government's rights under any warranty or guarantee." Thus, implied warranties may apply, at least as to equipment supplied by the contractor (Federal Pacific Electric Co., IBCA, 1964 BCA para. 4494); also, as to subcontractors under DAR 7-604.4, "Warranty of Construction," for work and materials. Broader protection appears to be provided under the latent defects provision.

3-11. **Express Warranties.** DAR does not contain any

definition of "express warranty." The description taken from the UCC (2-213) is:

"(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyers which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warranty" or "guarantee," or that he have a specific intention to make a warranty; but an affirmation merely of the value of the goods, or a statement purporting to be merely the seller's opinion or commendation of the goods, does not create a warranty."

3-12. ***Purpose.*** The purpose of using a warranty clause is to increase the Government's latitude in exercising (within a specified period of time after acceptance) the right to have the contractor correct a deficiency in a contract item, or accept a reduction in price or provide other remedies.

3-13. A warranty clause is used when "it is found to be in the best interest of the Government after an analysis of pertinent factors."

3-14. This additional period of time may begin at the time of delivery, or at the occurrence of a particular event, and may run for a number of days or months until the occurrence of another specified event.

3-15. A warranty is a provision giving the Government a contractual right to assert claims regarding the deficiency of supplies or services furnished, notwithstanding any other contractual provision pertaining to acceptance by the Government. Warranties normally "shall" be used when it is found to be in the best interest of the Government. Provisions are also included for marking of warranted items so that those who store, stock, and use the items may advise the contracting officer of any defects.

3-16. Except for commercial, technical data, and Federal, Military, or construction guide specification warranty clauses, the decision to use a warranty is reserved for the Head of a Contracting Activity because warranties must be used only if economically feasible and administratively practical. Remember that warranties are not free; therefore, we must weigh cost against risk. DAR enumerates specific factors which must be considered in deciding whether to use a warranty clause. These factors include:

(a) nature of the item and its end use;

(b) cost of the warranty, and degree of price competition as it may effect this cost;

(c) criticality of achieving specified performance capabilities and design specifications;

(d) cost of correction or replacement by either the contractor or another source, in the absence of a warranty;

(e) administrative costs, and difficulty of enforcing the warranty;

(f) ability to take advantage of the warranty, as conditioned by storage time, distance of using agency from the source, or other factors;

(g) operation of the warranty as a deterrent against the furnishing of defective or nonconforming supplies;

(h) the extent to which Government acceptance is to be based upon contractor inspection or quality control;

(i) whether because of the nature of the items the Government inspection would not be likely to provide adequate protection without a warranty;

(j) whether the contractor's present quality program is reliable enough to provide adequate protection without a warranty or, if not, whether a warranty would cause the contractor to institute an effective and reliable quality program;

(k) reliance on "brand-name" integrity;

(l) whether a warranty is regularly given for a commercial component of a more complex end item;

(m) criticalness of item for protection of personnel, e.g., for safety in flight;

(n) the stage of development of the item and the state of the art; and

(o) customary trade practices.

3-17. Warranty clauses are not used in Cost-Reimbursement contracts because the inspection clause for those contracts has sufficient built-in warranty provisions. Although protection ceases after a specified date contained in a warranty clause, the contractor's liability for latent defects under the standard inspection clause continues after the expiration of a warranty clause period.

3-18. ***Kinds of Warranties.*** DAR 1-324.6, "Warranties of Technical Data" and DAR 1-324.7, "Examples of Warranty Clauses," illustrate warranty clauses which are used for different situations. Where the clauses are examples only, they may be tailored to fit any particular procurement situation. In general, there are five basic types of warranties with, of course, numerous variations.

(A) Failure-Free Warranty. This type is sometimes referred to as a hardware guarantee. Under this arrangement, the contractor accepts responsibility to correct any failure or defect which occurs during a specific time or measured amount of operation. Extreme care should be exercised before this warranty is used because the cost may be high in both contract price and in the administrative cost of maintaining records and controls over these items.

(B) Correction of Deficiencies. Under this type of warranty, the contractor agrees to correct any design, material, or workmanship deficiencies which become apparent during test or early operation and which result in the specific item performing below specification and contractual requirements. Such clauses in a weapon systems contract usually also apply to spare parts and any other supplies included in the contract.

(C) Supply Warranty. Under this warranty, the contractor is obligated to replace or reperform work on contract items if defects in material or workmanship existed at the time of acceptance. This clause usually gives the Government a specified period of time in which to discover the defect. Normally, there is very little increase in item price for this kind of warranty. It should be quite easy to make positive determination that a defect existed at time of acceptance if it is found when the item is drawn from supply for initial use. It

will be much more difficult to determine that the defect existed at time of original acceptance if the item has been installed and operating for some appreciable period of service and is then found defective.

(D) Service Warranty. Under such a warranty, the contractor agrees to reperform defective services if defects in workmanship existed at time of acceptance and are discovered within a specified time period. Here again, little is paid for this warranty because, unless the Government spots defective workmanship soon after return of overhauled or repaired items to service, it will be extremely difficult to conclude that the defect existed at time of acceptance. It may also be difficult to prove that the contractor performed the defective work.

(E) Construction Warranty. This warranty requires the contractor to remedy, at his own expense, any nonconformance of work to the contract specifications and any defect of material, workmanship, and contractor design.

3-19. ***Time of Defect.*** The Government assumes the burden of proving the liability of a contractor; therefore, it also has the burden of proving the existence of a defect within the time stated in the warranty clause. The clause usually provides that the contractor is liable for defects which either existed at the time of delivery to the Government, or which develop within a specified period of time (such as a specified number of days after delivery) or which developed after the occurrence of an event (such as a number of hours of operation).

3-20. If design specifications are emphasized in the contract (e.g., precision materials, tolerances, and test requirements), the contractor's liability under a warranty clause should be limited to defects existing at time of delivery. If performance specifications are contained in the contract, the contractor's liability for defects in the warranty clause should extend to a period beyond delivery.

3-21. ***Duration of the Warranty.*** How long should the warranty run? The starting point is normally the time of delivery. However, if items are delivered for storage and later use, the warranty usually provides for a starting time after delivery. Also, a later starting time would be required if actual use of the items is the only way to determine conformance with specifications. In any event, the length of the warranty period must be specified. For example, one year after delivery, or completion, or commencement of use, etc.

3-22. If there is a breach of warranty by a contractor, the Government must so advise the contractor before the notice period in the clause expires. Notice must be in writing, and must indicate that the Government's rights have been violated. It is not necessary that the defect be specifically identified if the result or consequence of the defect is stated.

3-23. If a contractor breaches a warranty, there are several alternative actions which may be taken; and the contracting officer has complete authority over the course of action chosen.

3-24. The contracting officer may require the contractor to correct or replace the nonconforming or defective supplies, or he may choose to keep the defective supplies and have the contractor repay a portion of the contract price.

3-25. If returning an item is impractical, the Government may correct the item or require the contractor to correct it in place. Either would be at the contractor's expense. Provision for this arrangement should be included in the contract.

3-26. When items are returned to the contractor, he is liable for expenses incident to transportation to his plant and return to the Government delivery point. Also, if the contractor refuses or fails to correct or replace defective items within a period specified in the contract, the Government may correct or replace the defective items with similar items at the contractor's expense. If the contractor does not furnish timely instructions regarding the disposition of the defective supplies, the Government may dispose of them and be reimbursed from the sale of the items for any expenses associated with the care and disposition of the items, plus excess costs of reprocurement.

3-27. The clause used in fixed price incentive contracts is similar to the suggested Supply Warranty clause except that an additional paragraph is used. The addition authorizes the inclusion of all warranty associated costs in the negotiated final price of the contract. However, after the establishment of the total final price, the contractor's compliance with the warranty clause is at his own expense.

3-28. The Correction of Deficiencies Clause was initially used in 1965 by the Air Force, and is now authorized by the DAR. It may be used "in fixed price type supply and service, and research and development contracts for systems and equipment where performance specifications or design are of major importance."

3-29. Its provisions cover contract-caused deficiencies discovered by either party within a specific time period. This period could be, for example, a number of months after delivery or acceptance, or after a number of hours of use, depending upon the contract.

3-30. If a deficiency is discovered by the Government after acceptance, and it is still within the allowed time period, written notice is given to the contractor who must then submit recommendations for corrections to the contracting officer. If the contractor detects a deficiency before Government acceptance, he must either correct it at his own expense or recommend corrections to the contracting officer.

3-31. After receiving a contractor's recommendations, the contracting officer must act within the time period included in the clause. He may give the contractor notice in writing to fully correct, partially correct, or not correct the deficiency. Corrections are at the contractor's expense. For partial or no corrections, the contract price is adjusted by negotiation.

3-32. Performance delays on the contract which are caused by correction of deficiencies are not an excusable delay; however, as in other contracts, the Government may grant a time extension for a consideration. Also, the contractor pays the transportation expenses and assumes responsibility for defective items in transit.

3-33. If a contractor does not submit recommendations for correction or comply with the Government's order to correct deficiencies, the contracting officer so advises the contractor in writing and establishes a time limit for contractor compliance. If the contractor does not "cure" the failure within the specified time, the contracting officer may then obtain recommendations elsewhere, correct or replace the items, and obtain the necessary data. All of the expense involved will be charged to the contractor.

3-34. A comparison of the Supply Warranty and the

Correction of Deficiencies clause is interesting. The Supply Warranty is authorized for insertion into fixed price and fixed price incentive supply contracts. In it, the contractor warrants that the supplies furnished will conform to contract specifications, be free from defects in material and workmanship, and will be properly packaged. Where the Government specifies the "design" of an item,

> and its precise measurements, tolerances, materials, tests or inspection requirements, the contractor's liability for defects or nonconformance should usually be limited to those in existence at the time of delivery.

3-35. On the other hand, where performance is the major concern, the contractor necessarily must warrant against defects which arise after delivery. The UCC most frequently makes its appearance in the arguments of counsel during litigation concerning the Supply Warranty. This is not surprising, since the subject matter of a fixed price supply contract (e.g., spare parts) falls squarely within the definition of "goods" provided in UCC 2-105(1).

3-36. The Correction of Deficiencies clause, on the other hand, is specifically authorized for insertion into both fixed price and fixed price incentive supply and service contracts, and research and development contracts "for systems and equipment where performance specifications or design are of major importance." However, it is actually applicable to almost every large dollar contract where the Supply Warranty clause could be used. As with the Supply Warranty, the contractor warrants that any supplies or services furnished by him will be in compliance with the requirements of the contract. Aside from this basic similarity, however, the Supply Warranty and the Correction of Deficiencies clauses differ in a number of significant respects.

3-37. Under the Supply Warranty, the burden is on the Government to find and prove a breach of warranty, while in the Correction of Deficiencies clause the contractor places himself under a positive duty to "promptly" report any discovered noncompliance of goods or services with contract requirements. This duty, it should be noted, extends to all goods and services regardless of whether they have been accepted under the Inspection and Acceptance clause.

3-38. Once a breach has been discovered under the Supply Warranty, the contracting officer may require either the "prompt correction or replacement" of nonconforming supplies, or retain the supplies and request an equitable adjustment in the contract price. These remedies are also available in the Correction of Deficiencies clause. However, the contracting officer has more flexibility under the latter clause since he has expressly reserved the option to require only partial correction of a deficiency and to seek a corresponding reduction in price.

3-39. The Correction of Deficiencies clause also contains a number of subsidiary Government rights which help to insure that the contracting officer's decision concerning a deficiency is economically well-grounded. If the contractor discovers a deficiency or if he is notified of such a deficiency by the Government, he is required to submit his recommendation for corrective action "together with supporting information in sufficient detail for the Contracting Officer to determine" what action should be undertaken. Moreover, if the contracting officer elects to require a deficiency correction, the contractor must also furnish the Government at no extra cost all data and reports available to the contractor, "including revisions and updating of all other affected data" called for under the contract. On the other hand, where the contracting officer determines to seek an equitable adjustment in price, the contractor is only required to furnish a technical and cost proposal for a contract amendment "to permit acceptance of the affected supplies or services in accordance with the revised requirements."

CHAPTER 10

Modification of Contracts

THE PURPOSE OF THIS CHAPTER is to discuss the modification of Government contracts. Typically, modification in Government contracts applies the "Changes" clause to post-award contract relationships. Considerable coverage is given to the Changes clauses used in various types of Government contracts, as well as other clauses and doctrines used.

2. A modification (amendment) is a new agreement; and it contains terms different from those which were agreed upon in the original contract. The definitized contract, though it is presumed to represent the intent of the parties, may be modified by them. The contracting officer with authority to enter into a contract for the Government has, by implication, the power to modify such a contract. Rather than rewrite the original document, a supplemental agreement is used for spelling out the modifications. It must contain the essential elements of a contract discussed earlier, such as offer, acceptance, consideration, etc. Thus, care must be used in entering into such arrangements. The supplemental agreement is a bilateral document, agreed to and executed by both the Government and the contractor. It may be used to enlarge or diminsh the obligations of the parties. New procurement authority may be necessary where the scope of the contract is increased. The supplemental agreement is employed whenever it is necessary or desirable to have the contractor's consent to a modification of the contract.

1. Changes and Change Orders

1-1. Contracts may be modified through the use of changes or change orders. A change is any alteration, within the scope of the contract, in the specifications, drawing, design, method of packing, shipment, time or place of delivery, quantity, or type of Government-furnished material. Further, in a fixed-price construction contract, time for performance may be accelerated. A change order is a written order signed by the contracting officer directing the contractor to make changes which the changes clause of the contract authorizes the contracting officer to order without the consent of the contractor.

1-2. Most contract modifications come about by unilateral action of the contracting officer. At common law, one party to a contract cannot unilaterally change the obligations of both parties; but the Government contract, by agreement of the parties, contains a changes clause, pursuant to which the contracting officer may order modifications—not only in the administrative details of Government contract administration, such as the cognizant finance office or the name of the contracting officer, but also in the important substantive matters of design and manufacturing methods, construction details, place of delivery, and packaging. The clause permits the Government to range widely in varying the technical aspects of the work statement, often with drastic effect on the contractor's production schedules, material purchases, engineering effort, and utilization of personnel. Drastic financial impact usually accompanies drastic changes, and an equitable adjustment of the contract price is provided for in the clause.

1-3. Justification for such an unusual power is found in the need of the Government for flexibility in meeting the changing military needs of our country. In this way, new technology may be incorporated into the contractor's effort during contract performance. Amended shipping instructions and packaging requirements add further flexibility, and permit quick response to changed or unanticipated circumstances. Without this right, procurement response to military requirements would be severely hampered.

1-4. The entire concept of changes rests upon the advance agreement between the Government and the successful contractor in the original contract, manifested by a Changes clause. It is only through contract agreement, therefore, that the unilaterial action by the contracting officer is authorized. The particular Changes clause inserted in a contract varies with the type of contract entered into by the Government and a contractor. In other words, the Changes clause in a fixed-price supply contract will differ slightly from the Changes clause in a cost-reimbursement supply contract. Notwithstanding, there is a common thread running through all Changes clauses. The essential (and common) elements of a Changes clause include the requirements that (1) a change must be within the scope of the contract, (2) the order to change must be in writing, and (3) the ordered change must be at the order of an authorized Government officer.

1-5. ***Types of Contracts and Changes Clauses.*** An analysis of the several Changes clauses now in use discloses a wide variety of legal ramifications. The words embodied in the clauses have evolved through years of use, and have been extensively interpreted by the administrative and judicial tribunals. An analysis of the clauses relative to changes in various types of Government contracts will illustrate the current application of the clauses.

1-6. ***Fixed-Price Supply Contract Clause.*** The clause presently included in fixed-price supply contracts (a required clause) is as follows (e.g., DAR 7-103.2; FPR 1-7.102-2):

The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes,

within the general scope of this contract, in any one or more of the following: (i) Drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for, the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change, provided, however, that the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Where the cost of property made obsolete or excess as a result of a change is included in the Contractor's claim for adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of such property. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

1-7. Changes under the clause are affected by the contracting officer, who is defined in the definitions portion of the contract. The definition as set out in the supply contract is:

> The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

1-8. It is important for the contractor to realize that not every Government official who appears at his plant or on a construction project is an authorized representative of the Contracting Officer for the purpose of directing changes. The contractor should beware of an overzealous engineer or inspector. When the contractor discovers that a Government representative with whom he made an agreement, or upon the basis of whose order he effected a change, was not authorized to do so, the contractor can contact the Contracting Officer who would have been authorized to make the change or agreement and who still has such authority and have him commence action to ratify the unauthorized act. It should be noted that there is no requirement that the Contracting Officer ratify any order or agreement effected by an unauthorized Government representative. It should also be noted that ratification authority may be controlled by local regulation, and could be restricted to levels of authority above the Contracting Officer.

1-9. In Plumley v. United States, 226 US 545 (1913), the Court held that there was a failure to reduce an oral change order to writing and that although substantial extra work was performed, the contractor could not recover as the extra work was not agreed upon in the manner set out in the contract. The requirement that the change must be by the written order of the Contracting Officer has been strictly enforced in numerous other Court of Claims and administrative tribunal decisions.

1-10. However, the Court of Claims in *Armstrong & Co. v. United States*, 98 Ct Cl 519 (1943) decided that performance of work without a written change order gave rise to an "implied contract to pay" when the Government received the benefit of the work and the change was performed at the oral direction of a responsible officer. The Court of Claims has held also that a change ordered by an unauthorized representative and later overruled by the responsible officer after the work was completed should be paid for by the Government under the theory of an "implied in fact" contract.

1-11. The administrative appeal boards have, under the circumstances of the case being considered, decided that the Contracting Officer has in fact issued an oral change order, and his refusal to put it in writing was an administrative error which the board was empowered to correct. They have also advanced the theory that they will regard as done that which should have been done, thereby giving the effect of a written order. This is sometimes referred to as the "constructive changes" doctrine. This doctrine has not been extended to the contractor who voluntarily performs work beyond that required by the contract without any direction by a representative of the Government.

1-12. The provision "without notice to the sureties" is in accordance with the performance bond under which the surety waives notice of modifications of the contract. The words are inserted to preserve full obligations of the surety under the performance bond even though notice of the change is not provided to the surety.

1-13. The general scope of the contract has been defined by the Supreme Court as what should be regarded as fairly and reasonably within the contemplation of the parties when the contract was entered into. The determination of what is within and what is without the "general scope" is a difficult one, dependent on the circumstances of the individual contract. A change involving a relatively high increase in cost may, nevertheless, be within the scope of the contract.

1-14. If the change ordered is within the scope of the contract, it is a change contemplated by the parties and thus binding upon the contractor. If, however, the change is not within the scope of work contemplated by the parties, it is extra work which the contractor could legally decline to perform. If the work requested is beyond the scope of the contract, both parties should insure that funds are available for the extra work, that the requisites of formal advertising are met, or authority for negotiation is obtained, and that any changes in required contract clauses are included in the agreement for additional work.

1-15. It has been held that the number of change orders is not nearly so important as the criteria of magnitude and quality in deciding whether a change comes within the scope of the contract.

1-16. The addition or deletion of units, i.e., the increase or decrease of a complete building in a construction contract has been held to be beyond the scope of the Changes clause (*General Contracting and Construction Co. v. United States* 84 Ct Cl 570 (1937)). The elimination of a building has been described as a "cardinal change," and should be treated as a partial termination of the contract rather than eliminated by

change order. The same rule applies generally when the scope of the contract is increased by the addition of one or more units.

1-17. The fixed-price supply contract Changes clause limits changes (1) to drawings, designs, or specifications where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (2) to the method of shipping and packing and (3) to the place of delivery.

1-18. These limitations affect changes which might be made to special items. It is not anticipated that changes to off-the-shelf items will include a change in drawings, designs, or specifications.

1-19. "If any such change causes an increase or decrease in the cost of, or the time required for, the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made." This clause defines the scope of costs which are to be considered in the computation of the equitable adjustment for a change to a supply contract. Note that the clause embodied in the supply contract includes the words, "whether changed or not changed by any such [change] order."

1-20. *United States v. Rice*, 317 US 61, (1942), has been considered the authority for limiting considerations of costs to the part of the contract which has been changed. This would relieve the Government from responsibility for additional costs relative to the unchanged portion of the contract. The Changes clause words "whether changed or not changed by any such [change] order," negate this rule.

1-21. The determination of an equitable adjustment has not been reduced to a science. The remuneration to the contractor should be equated to the reasonable cost or value of the goods and services obtained from the contractor as opposed to the actual costs incurred by the contractor. A full discussion of this subject is found later in this text.

1-22. "Any claim by the contractor for adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the contractor of the notification of change." When claims are filed by the contractor after the 30-day period, they will generally be considered by the courts and administrative boards if Government rights are not prejudiced. In certain situations where the Contracting Officer has considered the contractor's request for additional costs after the deadline date and then rejected the claim, his consideration of the claim has given new life to it. The Contracting Officer has exercised the permissive action granted to him in the Changes clause. After giving due consideration to, and then refusing the claim, he cannot argue in an appeal to the administrative appeals board that the contractor's claim was filed on an untimely basis. His actions have in effect reinstated the claim.

1-23. The situation differs, however, when a change order has been accepted and the adjustment, if any, agreed to by both parties. If neither party is able to show that agreement was obtained by fraud, duress, collusion or mutual mistake, the agreement is binding as to both the contractor and the Government.

1-24. Even the Contracting Officer has the limitation under the clause that precludes his consideration of claims after final payment. Final payment refers to payment under the entire contract. There is some support for the theory that final payment has not been made until claims can no longer be asserted under the contract. If the claim had not been stopped by a release or an accord and satisfaction, then the statute of limitations would finally eliminate the possibility of a claim.

1-25. "Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled 'Disputes'." The contractor's refusal to proceed under a change order would be a breach of contract if the change is within the general scope of the contract. A contractor could validly refuse to proceed if the change ordered was not within the scope of the contract. It would seem risky procedure on the part of the contractor to refuse to proceed even though damages might be enhanced if he could prove a breach of contract.

1-26. ***Cost-Reimbursement Supply Contract Clause.*** The clause presently in use (DAR 7-203.2; FPR 1-7.202-2) is mandatory, and reads as follows:

(a) The Contracting Officer may at any time, by a written order, and without notice to the sureties, if any, make changes, within the general scope of this contract, in any one or more of the following:

(i) Drawings, designs, or specifications, where supplies to be furnished are to be specially manufactured for the Government in accordance therewith;

(ii) method of shipment or packing; and

(iii) place of delivery.

(b) If any such change causes an increase or decrease in the estimated cost of, or the time required for, the performance of any part of the work under this contract, whether changed or not changed by any such order, or otherwise affects any other provision of this contract, an equitable adjustment shall be made:

(i) In the estimated cost or delivery schedule, or both;

(ii) In the amount of any fixed fee to be paid to the Contractor; and

(iii) in such other provisions of the contract as may be so affected, and the contract shall be modified in writing accordingly.

Any claim by the Contractor for adjustment under this clause must be asserted within thirty (30) days from the date of receipt by the Contractor of the notification of change; provided, however, that the Contracting Officer if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, except as provided in paragraph (c) below, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(c) Notwithstanding the provisions of paragraphs (a) and (b) above, the estimated cost of this contract and, if this contract is incrementally funded, the funds allotted for the performance thereof, shall not be increased or deemed to be increased except by specific written modification of the contract indicating the new contract estimated cost and, if this contract is incrementally funded, the new amount allotted to the contract. Until such modification is made, the Contractor shall not be obligated to continue performance or incur costs beyond the point established in the clause of this contract entitled "Limitation of Cost" or "Limitation of Funds."

1-27. You will note that the areas subject to change and the method of effecting changes are the same here as for fixed-price supply contracts. However, since the cost-reimbursement contracts are priced and funded on the basis of estimated costs, with or without a fee, the clause reflects this in the provisions for equitable adjustment. The clause provides that if the change causes an increase or decrease in the "estimated" cost or "otherwise affects any other provision of this contract," an equitable adjustment shall be made. The fixed-price contract clause provides for adjustment only to contract price or delivery schedule, or both. This clause provides for adjustment to the estimated cost, delivery schedule, amount of fee, and such other provisions of the contract as may be affected.

1-28. The provision in the fixed-price contract clause for the Contracting Officer to prescribe the manner of disposition of property made obsolete or excess as a result of a change is not considered necessary in a cost-reimbursement contract. The costs of such property would have already been charged to the contract.

1-29. The addition of paragraph (c) to the clause is necessary because all cost-reimbursement type supply contracts that are fully funded are required to use a Limitation of Cost clause, and all that are incrementally funded are required to use a Limitation of Funds clause. These clauses place restrictions on the Government's obligation to reimburse the contractor and on the contractor's obligation to perform beyond the limitation set forth in the contract schedule. To avoid possible work stoppages, adjustments in estimated cost or fund allocations should be made without undue delay after a change is ordered.

1-30. ***Research and Development Contracts.*** This section deals with two clauses that are important in Government Contract Law. The clauses outlined below are the current fixed-price clause and the clause for cost-reimbursement research and development contracts.

(1) Fixed-Price (DAR 7-304; FPR 1-7,304-1).

(a) The Contracting Officer may at any time, by a written order, and without notice to the sureties, if any, make changes, within the general scope of this contract, in any one or more of the following: (i) drawings, designs, or specifications; (ii) method of shipment or packing; and (iii) place of delivery, or acceptance. If any such change causes an increase or decrease in the cost of, or the time required for performance of, this contract, or otherwise affects any other provisions of this contract, whether changed or not changed by any such order, an equitable adjustment shall be made (i) in the Contract price or time of performance, or both, and (ii) in such other provisions of the contract as may be so affected, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within thirty (30) days from the date of receipt by the Contractor of the notification of change; provided, however, that the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(2) Cost-Reimbursement Research and Development Contracts (DAR 7-404.1; FPR 1-7.404-5).

(a) The Contracting Officer may at any time, by a written order, and without notice to the sureties, if any, make changes, within the general scope of this contract, in any one or more of the following:

(i) Drawings, designs, or specifications;

(ii) method of shipment or packing; and

(iii) place of inspection, delivery, or acceptance.

(b) If any such change causes an increase or decrease in the estimated cost of, or the time required for, the performance of any part of the work under this contract, whether changed or not changed by any such order, or otherwise affects any other provision of this contract, an equitable adjustment shall be made:

(i) In the estimated cost or delivery schedule, or both;

(ii) In the amount of any fixed fee to be paid to the Contractor; and

(iii) in such other provisions of the contract as may be affected, (and the) contract shall be modified in writing accordingly.

Any claim by the Contractor for adjustment under this clause must be asserted within thirty (30) days from the date of receipt by the Contractor of the notification of change; provided, however, that the Contracting Officer if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, except as provided in paragraph (c) below, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(c) Notwithstanding the provisions of paragraphs (a) and (b) above, the estimated cost of this contract and, if this contract is incrementally funded, the funds allotted for the performance thereof, shall not be increased or deemed to be increased except by specific written modification of the contract indicating the new contract estimated cost and, if this contract is incrementally funded, the new amount allotted to the contract. Until such modification is made, the Contractor shall not be obligated to continue performance or incur costs beyond the point established in the clause of this contract entitled "Limitation of Cost" or "Limitation of Funds."

1-31. The Changes clauses for Research and Development contracts are identified as "additional" clauses and not necessarily required. They may be inserted in accordance with Departmental procedures where the nature of the work justifies and lends itself to such change control. In many cases the "Description of Work" is not sufficiently definitive to provide a base upon which a change might be effected.

1-32. The requirement in supply contracts that drawing, design or specification changes be applicable only to supplies "specially manufactured for the Government in accordance therewith" is not applicable to R&D contracts where the work involved is on a Government program. Also, there is seldom any substantial production of supplies on a Research and Development contract; therefore, the Research and Development Changes clauses need not include the "specially manufactured for the Government" provision. One other feature of the Research and Development Changes clauses is

that changes are permitted in the place of inspection and acceptance as well as the place of delivery.

1-33. ***Construction Contracts (DAR 7-602.3; FPR 1-7.602.3).***

(a) The Contracting Officer may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any change in the work within the general scope of the contract, including but not limited to changes:

(i) in the specifications (including drawings and designs);

(ii) in the method or manner of performance of the work;

(iii) in the Government-furnished facilities, equipment materials, services, or site; or

(iv) directing acceleration in the performance of the work.

(b) Any other written order or an oral order (which terms as used in this paragraph (b) shall include direction, instruction, interpretation or determination) from the Contracting Officer, which causes any such change, shall be treated as a change order under this clause, provided that the Contractor gives the Contracting Officer written notice stating the date, circumstances, and source of the order and that the Contractor regards the order as a change order.

(c) Except as herein provided, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment hereunder.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly: Provided, however, that except for any claims based on defective specifications, no claim for any change under (b) above shall be allowed for any costs incurred more than 20 days before the Contractor gives written notice as therein required. And provided further, that in the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with such defective specifications.

(e) If the Contractor intends to assert a claim for an equitable adjustment under this clause, he must, within 30 days after receipt of a written change order under (a) above or the furnishing of a written notice under (b) above, submit to the Contracting Officer a written statement setting forth the general nature and monetary extent of such claim, unless this period is extended by the Government. The statement of claim hereunder may be included in the notice under (b) above.

(f) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract.

1-34. Paragraph (a), like a counterpart provision in the clause in fixed price supply contracts, establishes the authority of the Contracting Officer to make changes within the general scope of the work. The revised clause makes it clear, however, that the change may relate to any aspect of the work to be performed under the contract. To effect this clarification, the clause sets forth illustrative categories which embrace changes not only in the drawings, designs and specifications, but also changes in the method and manner of performance, in the provision of sites and services, or requiring acceleration in performance. These categories are intended to be descriptive of the kind of change actions which historically have been accommodated under the Changes clause. Deceleration actions not related to a change or unreasonable delay in the issuance of a change order were intentionally omitted since they are in the nature of a suspension, delay, or interruption covered by the Suspension of Work clause, which is now a mandatory clause.

1-35. It is not intended that the Changes clause cover actions which (1) are clearly denoted as a suspension order or (2) have as a primary purpose the effecting of a suspension, delay, or interruption of the work. While the Contracting Officer is authorized to make changes in any aspect of the work itself, the clause does not authorize him to alter any of the collateral aspects of contract performance, such as are covered by the payment and so-called "boilerplate" clauses.

1-36. Paragraph (b) of the clause (for which there is no counterpart provision in the clause in fixed-price supply contracts) concerns "constructive changes." This paragraph provides that other written or oral orders (including directions, instructions, interpretations, or determinations) from the Contracting Officer which cause a change within the general scope of the work will be treated as changes under the clause. However, as a prerequisite to the consideration of a claim based on a constructive change, the contractor must notify the Contracting Officer that he considers such order to be one directing a change in the work to be performed.

1-37. Paragraph (c) of the clause, (for which there is no counterpart provision in the clause in fixed-price supply contracts) provides that no order, statement, or conduct of the Contracting Officer shall be treated as a change, except as specifically provided for in the clause itself. With respect to constructive changes, accordingly, only those provided for in paragraph (b) may be considered under the Changes clause. This paragraph does not, of course, preclude the contractor from seeking such administrative relief as may be available under another clause contained in the contract, such as the Suspension of Work or a Government-furnished property clause. Likewise, it does not preclude the contractor from seeking judicial relief for breach of contract.

1-38. Paragraph (d), like a counterpart provision in the clause in fixed-price supply contracts, establishes the contractor's right to an equitable adjustment in situations involving the making of changes. More specifically, the paragraph states that if any change effected under the clause causes an increase or decrease in the cost of, or in the time required for, the performance of any part of the work, "whether or not changed by any order," an equitable adjustment is to be made.

1-39. A significant revision in the clause is the adoption of an additional text designed to eliminate the application of the "Rice" doctrine and has been accomplished primarily by adding the phrases "any part of the work" and "whether or not changed." (The "Rice" doctrine is the rule derived from the case *United States v. Rice*, 317 US 61 (1942) which limited consideration of costs to the part of the contract which had been changed.) These phrases first appeared in the Changes clause of the general provisions for standard supply contracts. An equitable adjustment clearly encompasses the effect of a

change order upon any part of the work, including delay expense; provided, of course, that such effect was the necessary, reasonable, and foreseeable result of the change.

1-40. Except for defective specifications, the Changes clause as revised will continue to have no application to any delay prior to the issuance of a change order. An adjustment for such type of delay, if appropriate, will be considered under the provisions of the Suspension of Work clause.

1-41. A further revision in the equitable adjustment provision in paragraph (d) has been made by reason of the recognition in the clause of constructive changes under paragraph (b). Under this revision, a contractor who seeks relief in a constructive change situation not involving defective specifications cannot recover for any costs arising more than 20 days prior to his furnishing an appraisal notice as prescribed under paragraph (b). Accordingly, a cost limitation which has heretofore been prescribed for suspensions arising under the Suspension of Work clause will now also be prescribed for constructive changes arising under the Changes clause. The 20-day limitation is not waiverable, and costs may not be recovered contrary to this limitation (*Merando, Inc.*, GSBCA No. 3300, 71-1 BCA paragraph 8892).

1-42. Notwithstanding the inapplicability of the 20-day incurrence limitation to constructive change orders involving defective specifications, the appraisal notice required by paragraph (b) must be given. Moreover, paragraph (d) limits the equitable adjustment to costs reasonably incurred in attempting to comply with defective specifications. Thus, the time of the notice in relation to when the contractor becomes aware of the defect could be a factor in determining reasonableness of costs. Of course, no adjustment is intended to be allowed in connection with defective specifications unless the Government is responsible.

1-43. Paragraph (c) requires the contractor to submit to the Contracting Officer a statement setting forth the general nature and monetary extent of his claim for an equitable adjustment within 30 days after the receipt of a written change order issued under paragraph (a) or within 30 days after the furnishing by the Contracting Officer of a written notice pursuant to paragraph (b). The paragraph also indicated that in a constructive change situation, arising under paragraph (b), the contractor may include his claim statement with his appraisal notice. Because the clause previously prescribed made no reference to the constructive change situation, that clause did not cover the furnishing in such a situation either of an appraisal notice or of a claim statement. In effect, the clause merely required the contractor to submit a notice of intent to assert a claim where a change order is issued. Also, there was no specific requirement to provide information on the nature and extent of the claim, based on either a change order or a constructive change. Such additional information will enable the Contracting Officer to evaluate a claim properly, particularly in a constructive change situation. A further revision concerns the authorization to extend the time for filing a claim. Under the text of the clause previously prescribed, the time for submitting a claim could be extended by the "Contracting Officer." Under the clause as revised, the time for the submission of the claim may be extended by the "Government," which includes a contract appeals board. Whether the Government would be prejudiced thereby is a consideration in granting an extension.

1-44. Paragraph (f), the subject matter of which appeared in the clause previously prescribed merely as a dependent phrase rather than as an independent statement, states that a claim for an equitable adjustment under the clause must be asserted prior to final payment.

1-45. The disputes provision, which appeared in the text of the clause previously prescribed, has been deleted. The existence of an administrative remedy is established by the Contract Disputes Act. Accordingly, there is no need to reiterate in clauses covering particular aspects of the contractual agreement the availability of that remedy. Deletion of a separate disputes provision from the Changes clause (or from the Differing Site Conditions clause or the Suspension of Work clause) does not alter or diminish in any respect the applicability of the Disputes clause or the jurisdiction of administrative boards, which will continue to be subject to the Contract Disputes Act.

1-46. The extra work or material provision which appeared in the final sentence of the clause previously prescribed has been deleted. The provision appears to be unnecessary because the revised clause will cover all applications for adjustment thereunder, whether based upon a change order or a constructive change.

1-47. ***Differing Site Conditions Clause.*** The clause presently in use (DAR 7-602.4; FPR 1-7.602-4) is required and reads as follows:

(a) The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

(b) No claim of the Contractor under this clause shall be allowed unless the Contractor has given the notice required in (a) above; provided, however, the time prescribed therefor may be extended by the Government.

(c) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under the contract.

1-48. A clause of this type is considered necessary in fixed price construction contracts because the contractor may encounter unknown and unanticipated physical conditions at the site of the project which may either delay performance or increase the costs, or both. One of the purposes of the clause is to eliminate the tendency of contractors to submit inflated bid prices based on the worst physical conditions that might be encountered, by providing a simple and quick relief for changed conditions. To assure close pricing and truly competitive bids, the Government assumes liability for what is described as naturally different or unknown physical conditions.

1-49. Other than the change in title, the major difference in

this clause and the previous "Changed Conditions" clause is the addition of the phrases, "any part of the work" and "whether or not changed." These phrases were added to conform with similar provisions of the revised Changes clause for construction contracts. Also, this clause provides for downward as well as upward adjustment in contract price and completion time, a point often overlooked.

1-50. **Examples of Changes.** At this point, a brief treatment of some typical situations in which change or at least the question of change invokes the application of a Changes clause is in order.

1-51. ***Changes in Specifications or Drawings.*** The question in each case is whether the change ordered by the Contracting Officer falls inside or outside the scope of the Changes clause. If the change is outside the scope of the contract clause, then, of course, the contractor will not receive the benefit of the equitable adjustment provided for by the clause. Some specification changes are so obvious that it is a mystery how a question as to compensability for the change could arise. Where additional work on a building is called for by the Government and the work called for was not required by the contract, such a specifications change would be within the scope of the Changes clause and compensable. Also, where the specifications provide for alternative methods of performance and after approval of one method the Government insists on the alternative method, such an order is a change falling within the scope of the Changes clause.

1-52. Some changes in specifications and drawings, however, are not so obviously within the scope of the clause. In the situation where an honest misinterpretation of the meaning or extent of the specifications occurs, the insistence by the Government on specifications not contained in the contract presents a problem. Ordinarily, where the misinterpretation is by the Government, the requirement that the contractor proceed on different specifications than those contained in the contract places the changes within the scope of the Changes clause, and any additional cost to the contract is compensable. On the other hand, where the contractor misinterprets the specifications, a different result usually follows and the change is not compensable under the equitable adjustment provision of the Changes clause. Exceptions are frequently made where the contractor's misinterpretation is reasonable under the circumstances.

1-53. Frequently, the change in the specifications occurs when materials or procedures are substituted. In the vast majority of cases, a change in either materials or procedures is a change falling within the scope of the Changes clause and is compensable where equity requires adjustment. It probably goes without saying that where the contractor requests a deviation in either material supply or procedure, an approval by an authorized Government representative is a change under the Changes clause.

1-54. ***Changes in Performance.*** Government orders to change either the method of packing or shipping items supplied under the contract are such changes where the contractor sustains increased costs. The same reasoning would apply where the place of delivery is changed by Government order and the contractor suffers additional expense.

1-55. ***Constructive Changes.*** A constructive change is also called a "change by implication." It occurs when the Government, by its actions, changes the contract without specifically going through the "Changes" clause formalities. A constructive change order has been defined as an oral or written act or omission by the Contracting Officer or other authorized Government official which is of such a nature that it is construed or inferred to have the same effect as a formal written change order under the Changes clause.

1-56. In Government Contract Law, the concept of constructive changes is well established. DAR Section 26, Part 8, and the concomitant "Notification of Changes" clause are relatively recent (1973) manifestations of recognition of such concept.

1-57. Board decisions have recognized that an informal requirement for performance of additional work, for example, is substantially equivalent to a formal requirement and must be governed by similar principles. The significance of constructive changes as a responsibility of the Government representative, and as a form of relief to the contractor, should be recognized and understood by both parties so that they may be able to better identify conduct and actions which may be interpreted as constructive change orders.

1-58. The 1968 revision to the Changes Clause for Construction Contracts includes a provision expressly designed to cover constructive changes, and is the first standard clause to do so. After identifying formally authorized changes to be made under the clause, a paragraph is added which provides that other written or oral orders including directions, instructions, interpretations, or determinations from the Contracting Officer which cause a change within the general scope of work will be treated as changes under the clause. As a prerequisite to the consideration of a claim based on a constructive change, however, the contractor must notify the Contracting Officer that he considers such order to be one directing a change in the work to be performed.

1-59. Erroneous interpretations by the Contracting Officer, or his representative, may lead to actions which constitute constructive changes. The insistence by an inspector that the contractor perform to a higher standard of quality than that called out in the contract specifications has been held to be a change. The inspector was considered to have acted as a representative of the Contracting Officer. An interpretation of the contract language by the Contracting Officer, either voluntarily or at the request of the Contractor, may be construed as a change if the interpretation calls for something more than the contract requires.

1-60. Defective specifications may lead to a finding of constructive change if the defect should have been corrected by a change. There is an implied warranty that if the Government's specifications are followed, the item produced will meet the contract requirements. Specifications may be considered defective because of simple error, inadequate detail, practical impossibility of performance, or a combination of these.

1-61. Since the Contracting Officer or his authorized representative has authority to issue change orders, it should not be too difficult for the Government to avoid most constructive changes if these individuals understand the problem and are alert to the implication of their actions. The prudent contractor, before he complies with directions from other Government representatives, will confirm such direction with the Contracting Officer. The Contracting Officer, on the other hand, should see that all Government personnel having

contact with the contractor recognize the limitations on authority and thus avoid wrongfully committing the Government. Furthermore, the Contracting Officer should recognize that the courts are likely to hold that silence on his part constitutes acquiescence to the change if it can be shown that he had knowledge of the directions or interpretations given to the contractor.

2. Modifications Other Than Under Changes Clause

2-1. Although most modifications fall under the category of Changes, many are generated under other contract clauses, including "Differing Site Conditions," already discussed. Also discussed elsewhere are modifications arising from "Government Furnished Property" matters, the Default clause, partial termination for convenience of the Government, and the settlement of Disputes by agreement. Many other types of modifications occur. Some of these modifications are presented in the following sections.

2-2. **Delays and Suspension of Work.** Government contracting, as with any commercial undertaking, may experience delays and suspension of work prior to accomplishing a contract objective. This section discusses how these problems may come about and how they may be treated once they are recognized.

2-3. A difficult problem in Government contracts is concerned with those delays in contract performance resulting from some act or failure to act on the part of the Government. Some of these delays are the result of the Government's failure to take timely action, such as delays in furnishing drawings and specifications, delays in ordering changes, or delays in furnishing Government property. Other delays may be directed by the Government in such cases as "Suspension of Work" or "Stop Work Orders."

2-4. Many clauses in Government contracts treat the problem of delays. Most of them recognize and provide for a time adjustment or an extension of time for performance of the contract work as a result of Government-caused delays. Not all of these clauses provide for a monetary adjustment because of such delays. If there is no remedy for delayed performance or increased cost of performance under the terms of the contract, the contractor must look to the courts for relief. In general, however, the courts have held that the Government is not liable for increased costs from delays to the contractor's performance unless there was an element of negligence on the part of the Government or unless the delays were unreasonable.

2-5. An example of a judicial ruling on delays can be seen in *Magoba Construction Co. v. United States*, 99 Ct Cl 662 (1943), where the court held that the Government had delayed the contractor in the process of ordering a number of changes but that the delay was reasonable under the terms of the Changes clause and hence there was no breach of contract. In *Chouteau v. United States*, 95 US 61 (1877), the court interpreted the Changes clause as contemplating some delay in ordering changes on a project when both parties knew there would be changes during the course of performance, and held that the Government was not liable for the increased cost incurred by the contractor because of reasonable delay by the Government in ordering changes.

2-6. The courts have emphasized that the basic question is the reasonableness of the delay and that the reasonableness must be determined on the basis of the facts of each contract. The rule seems to be firmly established now that an unreasonable delay in issuing changes is a breach of contract by the Government. In reviewing cases involving delay or failure to furnish material or Government property, the courts have looked primarily to whether the Government has made a reasonable effort to furnish the property. In the cases holding for the contractor, there has been some implication that the Government did not act with proper diligence. This would lead to the conclusion that compensation for delays will be allowed only when due to the fault or negligence of the Government.

2-7. ***Government Delay of Work Clause.*** This clause is required in all fixed-price research and development contracts and in fixed-price supply contracts, except that in the latter it is optional for use in contracts for commercial or modified commercial items. The clause provides for equitable adjustment for delays and interruptions caused by acts, or failures to act, of the Contracting Officer not otherwise specifically provided for in the contract. The clause charges the Contracting Officer with the affirmative duty to take whatever appropriate action is necessary to end or otherwise dispose of unordered delays or interruptions in the work. It does not authorize the Contracting Officer to delay, suspend, or interrupt the work, nor can it be used as a basis for such actions. The clause (DAR 7-104.77) is quoted below:

(a) If the performance of all or any part of the work is delayed or interrupted by an act of the Contracting Officer in the administration of this contract, which act is not expressly or impliedly authorized by this contract, or by his failure to act within the time specified in this contract (or within a reasonable time if no time is specified), an adjustment (excluding profit) shall be made for any increase in the cost of performance of this contract caused by such delay or interruption and the contract modified in writing accordingly. Adjustment shall be made also in the delivery or performance dates and any other contractual provision affected by such delay or interruption. However, no adjustment shall be made under this clause for any delay or interruption (i) to the extent that performance would have been delayed or interrupted by any other cause, including the fault or negligence of the Contractor, or (ii) for which an adjustment is provided or excluded under any other provision of this contract.

(b) No claim under this clause shall be allowed (i) for any costs incurred more than twenty (20) days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved; and (ii) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such delay or interruption, but not later than the date of final payment under the contract.

2-8. ***Suspension of Work Clause.*** A clause similar to the Government Delay in Work clause in mandatory for fixed-price construction contracts. A significant difference, however, is that the Suspension of Work clause expressly provides for suspension, delay, or interruption of the work at the Government's convenience as well as providing for constructive suspension, delay, or interruption by the Contracting Officer's failure to act where the contract requires such action. As in other "delay clauses," the clause establishes machinery for administrative settlement on a fair and speedy basis where the

contract does not otherwise specifically provide for equitable adjustment for delays and interruptions. The clause (DAR 7-602.46; FPR 1-7.602-32) is quoted below:

(a) The Contracting Officer may order the Contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of this contract, or by his failure to act within the time specified in this contract (or if no time is specified, within a reasonable time), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension, delay, or interruption and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent (1) that performance would have been so suspended, delayed, or interrupted by any other cause including the fault or negligence of the Contractor or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.

(c) No claim under this clause shall be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption, but not later than the date of final payment under the contract.

2-9. The provision for expressly ordering a suspension, delay, or interruption is intended for use under strict supervision, and for as limited a period as practicable. Such orders can result in the Government incurring costs by reason of standby time. If the Contracting Officer orders the contractor to stop work in a situation in which no delay amounting to a breach of contract occurs, the Government has given away one of its rights because the order is very likely to be construed as an actual suspension of work order. If, on the other hand, the Government has a contractual duty to act, failure to act may be construed as a constructive suspension of work. The Government representative must therefore be aware of his rights and duties under the contract and must carefully consider them before taking any action that will affect the contractor's time for performance.

2-10. The interpretation by the courts that reasonable delays are to be expected under the contract creates a dilemma for the Contracting Officer. If he issues an actual order to suspend the work, the contractor may take the order as an admission that the entire period subsequent to the order is unreasonable and that he is entitled to compensation for the full period of the suspension (*E. V. Lane Corp.*, ASBCA No. 7232 (1962)). On the other hand, if the Contracting Officer recognizes an actual need for stopping work, he should not allow the contractor to waste Government funds by continuing to work.

2-11. ***Concurrent Delays.*** A feature of the clause that deserves special mention is that pertaining to concurrent delays. It states that no adjustment shall be made for suspension, delay, or interruption to the extent that performance would have been suspended, delayed, or interrupted by any other cause, including the fault or negligence of the contractor. The determination of what delays warrant adjustment is a job for both the purchasing office and the contract administration office working together. Technical personnel along with production and contracting representatives must assist in arriving at which delays should be recognized. Program Evaluation Review Techniques and Critical Path Charts are useful when a large number of recurring delays are involved.

2-12. ***Delays Not Covered by Contract.*** Delay claims covered by contract clauses simply provide an administrative handling of what would otherwise be a contractor's claim for breach of contract by the Government. But does the Contracting Officer have authority to settle, by supplemental agreement, delay claims where no such clauses are included in the contract? The Court of Claims in the 1963 case of *Cannon Construction Co. v. United States*, 319 F 2d 173, specifically approved a settlement of a breach claim, citing the implied authority of the Contracting Officer to settle claims arising out of performance and stating:

> Significantly, plaintiffs have cited us no cases where this court has invalidated, on the ground of lack of authority, any agreement made by the Contracting Officer in the settlement of a claim for damages for breach of contract. On the contrary we have held on numerous occasions that compromise settlements were valid and binding on both parties.

The agreement, the court found, was an accord and satisfaction of the claim. This decision was followed by the same court in *Brock & Blevins Co., Inc., v. United States* 170 Ct Cl 52.343 F 2d 951 (1965) and has not been overruled.

2-13. Another approach would be to retreat to the contract document itself and insert language (with the contractor's approval) calling for administrative disposition of such claims generally, or perhaps insert belatedly a "Government Delay of Work" or "Suspension of Work" clause.

2-14. The Armed Services Board of Contract Appeals (ASBCA) has also recognized a letter from the Contracting Officer ordering work stoppage and calling for an equitable adjustment as providing an administrative alternative to suit where no clause was present (*Blount Brothers Construction Co.*, ASBCA NO. 5267, 60-2 BCA 2664).

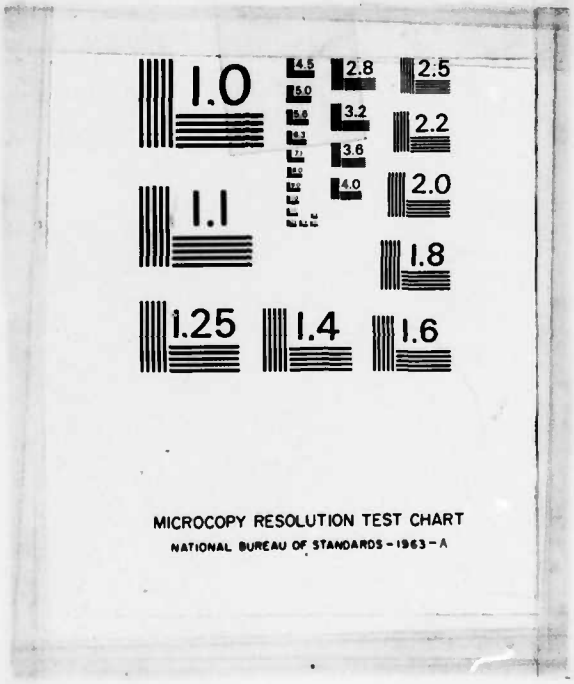
2-15. ***Stop Work Orders.*** Since fixed-price supply and research and development contracts no longer require a Suspension of Work clause, an "additional clause" may be used where a work stoppage is desirable for reasons such as realignment of programs or advancements in the state of the art. The use of Stop Work Orders is carefully circumscribed, however. For instance, such an order may be used pending a decision to terminate for convenience but it cannot be used pending a decision to terminate for default. Nor can a Stop Work Order be used in lieu of a termination notice after a decision to terminate has been made. Since Stop Work Orders may result in standby costs, prior approval of their issuance and cancellation is required at a level above the Contracting Officer. The clause as specified in DAR 7-105.3 is quoted below:

(a) The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of

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ninety (90)* days after the order is delivered to the Contractor, and for any further period to which the parties may agree. Any such order shall be specifically identified as a Stop Work Order issued pursuant to this clause. Upon receipt of such an order, the Contractor shall forthwith comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of ninety (90)* days after a Stop Work Order is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either—

(i) cancel the Stop Work Order, or

(ii) terminate the work covered by such order as provided in the "Default" or the "Termination for Convenience" clause of this contract.

(b) If a Stop Work Order issued under this clause is cancelled or the period of the order or any extension thereof expries, the Contractor shall resume work. An equitable adjustment shall be made in the delivery schedule or contract price, or both, and the contract shall be modified in writing accordingly, if—

(i) the Stop Work Order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract, and

(ii) the Contractor asserts a claim for such adjustment within thirty (30) days after the end of the period of work stoppage, provided that, if the Contracting Officer decides the facts justify such action, he may receive and act upon any such claim asserted at any time prior to final payment under this contract.

(c) If a Stop Work Order is not cancelled and the work covered by such order is terminated for the convenience of the Government, the reasonable costs resulting from the Stop Work Order shall be allowed in arriving at the termination settlement.

(d) If a Stop Work Order is not cancelled and the work covered by such order is terminated for default, the reasonable cost resulting from the Stop Work Order shall be allowed by equitable adjustment or otherwise.

2-16. **Acceleration.** Acceleration involves contractual speedups. They may occur in a number of ways, but the most common are (1) by the Government representative requiring delivery in advance of that specified in the contract, or (2) by the Government representative adding something in the way of additional performance, but failing to extend the delivery date in proportion to the additional work to be performed. Orders to speed up performance or perform by an earlier date than that required by the contract are rather unique in that they affect the time of performance rather than the work, and, therefore, are not normal changes to a contract. Also acceleration orders can be classified as being either actual orders or constructive orders.

2-17. ***Actual Acceleration Orders.*** If the clause specifically provides for changes in the time of completion or delivery, the parties have created the right in the Contracting Officer unilaterally to order an acceleration. Such cases, as might be expected, are comparatively rare.

2-18. Specifications are always subject to change under the Changes clause. If the specifications contain the completion or delivery schedule, an acceleration order may be allowed as a change under the Changes clause. This has occurred principally in construction contracts. Even where the schedule is not in the specification and the Changes clause does not cover changes in the schedule, the Board of Contract Appeals has allowed acceleration under the Changes clause. In *Ensign-Bickford Co.*, ASBCA NO. 6214, the Board accepted the fact that a direct acceleration order falls within the Changes clause even though the clause contains no specific provisions. It should be noted, however, in this case, both parties agreed to the order and the dispute was over the amount of the equitable adjustment.

2-19. The obvious answer, in the event an acceleration is required and no provision is present in the Changes clause, is to negotiate a bilateral agreement, adjusting the schedule. This, of course, permits the contractor to refuse to accelerate or to treat the order as a breach of contract. In either case, by unilateral order or bilateral agreement, the contractor is entitled to an equitable adjustment if the acceleration causes an increase in his costs.

2-20. ***Constructive Acceleration Orders.*** By far the greater number of accelerations involve constructive rather than actual acceleration orders. Probably the most common situation involves an order by the Contracting Officer to meet the original delivery schedule despite the fact there would have been intervening excusable delays. In such cases, the Contracting Officer should have determined a new and current schedule prior to ordering the accelerated effort. If the contractor is not given credit for the excusable delays, the Contracting Officer may be held to have constructively shortened this schedule by the period of the delays. This has the same effect as telling the contractor to reduce his time of performance.

2-21. It is sometimes difficult to identify a request or order of the Contracting Officer as a direct order to accelerate. In one case, the Board of Contract Appeals found that a statement by the Contracting Officer that work should proceed and that later consideration would be given to delays was not an acceleration order. The Contracting Officer, by his statement, did not insist upon compliance with the original schedules. In another case, the Board found no acceleration when the contractor increased speed because of fear of a termination. The evidence showed no direct threat of termination, but only some indication that the Contracting Officer was anxious to get the job completed. This would imply, however, that a threat of termination based on the original contract schedule would be construed as an acceleration if the contractor were entitled to a schedule adjustment because of excusable delays.

2-22. In still another case, *Mechanical Utilities, Inc.*, ASBCA No. 7345 (1962), the Board held that there was no acceleration order when the Contracting Officer notified the contractor that he intended to terminate for default because of failure to meet his progress schedule. The Contractor was behind schedule but he was entitled to some excusable delays which he had not requested. The Board interpreted the Contracting Officer's notice as a warning to the contractor to either request the excusable delays or catch up on his schedule. It is interesting to note that in this same case, after the contractor had requested the excusable delays, the Board found an order to meet the schedule to be an acceleration order.

2-23. In *Keco Industries, Inc.*, ASBCA No. 8900 (1963),

the Board held that a direct refusal to grant an excusable delay was an acceleration where large liquidated damages would be imposed on the contractor if he failed to meet delivery schedules. In another case, the Contracting Officer held his decision in abeyance until the work was completed. In that case the Board found that there was no direct order to accelerate and hence held that there was no acceleration by the Government. From these cases it would appear that for the Board to rule in favor of the contractor, it must be shown that the Contracting Officer knew of the acceleration and that the acceleration was at least related to the Government's refusal to grant excusable delays.

2-24. **Extras Clause.** The Extras Clause presently in use (DAR 7-103.3; FPR 1-7.102-3) reads as follows:

> Except as otherwise provided in this contract, no payment for extras shall be made unless such extras and the price therefor have been authorized in writing by the Contracting Officer.

2-25. This clause protects the Government against claims for work done voluntarily by the contractor or ordered by Government representatives not authorized to commit the Government. Extras clauses have traditionally been interpreted to require exact compliance, i.e., a written authorization by the Contracting Officer for the extras and a specification of the price to be paid the contractor for furnishing them.

2-26. As an illustration, a contractor agreed to produce a radar transmitter for the Government, and, in performing the contract, voluntarily included items not called for by the contract. The radar transmitter as received was a superior piece of equipment; however, the Board of Contract Appeals held that neither the Extras nor Changes clauses authorized a price increase. The Contracting Officer had not ordered the extra items.

2-27. While the Extras Clause prohibits increased compensation for extra items except under the conditions set forth, other clauses in the contract may, in this respect, afford a basis for relief. Both the Changes clause and the Variation in Quantity clause may permit the contractor to be reimbursed for items in the nature of extras over and above the original requirements of the contract. The Changes clause is, of course, operative when the Contracting Officer (or authorized representative) issues an order pursuant to its terms calling for changes in performance, including improvements in the originally specified contract item. The Variation in Quantity clause permits quantities different from the work statement only when such variation meets the conditions set forth in the standard clause or schedule of the contract.

2-28. **Variation in Quantity Clause.** The Variation in Quantity Clause presently in use (DAR 7-103.4; FPR 1-7.102-4) reads as follows:

> No variation in the quantity of any item called for by this contract will be accepted unless such variation has been caused by conditions of loading, shipping, or packing, or allowances in manufacturing processes, and then only to the extent, if any, specified elsewhere in this contract.

2-29. Variations in quantity of items, either a shortage or an overage, may be due to such factors as the mass production and machine packaging methods of modern manufacture; thus in some cases, variations in quantity may be a normal incident of production. For this reason, fixed-price supply contracts are required to contain the clause. While the clause recognizes that variations due to specified causes may occur, the clause itself is not sufficient to make Government acceptance of a shortage or overage in quantity due to such causes mandatory. In order to make the variation acceptable, the contract must provide elsewhere the extent of variation permissible.

2-30. The implementing provision, Extent of Quantity Variation, inserted in accordance with DAR 1-325, reads as follows:

> The permissible variation under the clause of the General Provisions entitled "Variation in Quantity" shall be limited to:
> Increase (Insert:_____% or None)
> Decrease (Insert:_____% or None)
> This increase or decrease shall apply to _____.*

2-31. **Miscellaneous Modifications.** There are several ways in which a contract may be modified as a result of cost, supplemental agreement, and other factors. The following paragraphs outline some of those factors.

2-32. ***Options.*** An option is a continuing offer. In Government contracts, it is an offer by the contractor in the initial contract to sell additional quantities of the items purchased in the initial contract, often at the same price and terms contained in that contract. The duration of this offer is spelled out, and the consideration to the contractor for keeping the offer open is included in the price of the original purchase quantities. The option is exercised only if it is determined that the requirement covered by the option fulfills an existing need of the Government, that funds are available, and that the exercise of the option is most advantageous to the Government, price and other factors considered (DAR Section 1, Part 15).

2-33. ***Deferred Ordering of Technical Data and Computer Software.*** The right to defer, up to two years, the ordering of the data to be delivered under the contract is negotiated into the original contract and the order is simply the exercise of that right. Payment for processing of data actually ordered is negotiated at the time of ordering. A contract modification results (DAR 9-502(b)).

2-34. ***Initial Provisioning.*** When a new item is introduced into the inventory, an initial purchase of spare items and spare parts is usually made as a part of the initial buy. Actual selection and ordering however, are implemented by supplemental agreement, the procedure for which is included in the initial contract.

2-35. ***Novation Agreements.*** Occasionally, a contractor's business is sold. Although the contractor cannot assign his contracts, the Government recognizes the successor in interest by entering into a novation agreement. When a corporation

*Insert in the blank the designation(s) to which the percentages apply, such as: (1) the total contract quantity; (2) item 1 only; (3) each quantity specified in the delivery schedule of the "Time of Delivery" clause; (4) the total item quantity for each destination; (5) the total quantity of each item without regard to destination. The Contracting Officer may specify different percentages because manufacturing, loading, shipping, or packing practices may be expected to affect each contract differently.

changes its name, the contract will usually be amended to recognize this fact.

2-36. ***Limitation of Cost.*** The Limitation of Cost clause, which effects a ceiling on cost-type contract obligations of the Government, also provides that the ceiling may be raised by the Contracting Officer. This results in a contract modification on a unilateral basis.

2-37. ***Contract Adjustment.*** Under authority of PL 85-804, the "Contract Adjustment Act," military services are empowered to modify contracts (as well as recognize other contract claims) on bases not cognizable by Contracting Officers. The act will receive more extensive treatment in a later chapter.

2-38. ***Value Engineering Changes.*** Another form of contract modification achieved by either a change order or supplemental agreement is the Value Engineering Change. Where appropriate clauses are included in the contract, the contractor may submit Value Engineering Change Proposals (VECPs) which, if accepted by the Procuring Contract Officer, are implemented into the contract as changes, and savings are shared as agreed in the contract. Details of such provisions may be found in DAR Section 1, Part 17.

CHAPTER 11

Equitable Adjustment

THIS CHAPTER will address itself to the consideration of various approaches to measuring equitable adjustment. In the absence of an objective standard, "equitable adjustment" has been left largely to the discretion of the Contracting Officer. Those cases where agreement cannot be reached with the contractor furnish the rule, the standard, or the measure with which the bulk of this chapter is concerned.

2. The concept of "equitable adjustment" is one of the larger unresolved issues in Government contracts. Although the phrase appears expressly or implicitly in the "adjustment clauses," e.g., "Changes," "Government Property," "Differing Site Conditions," et al, the determination of what constitutes an equitable adjustment has not been objectively qualified or quantified.

3. The term "equitable adjustment" is to be construed in the ordinary meaning—to connote a "fair," "reasonable," "just," or "right" arrangement or settlement. In Government contracts, this involves a determination as to the contract price, the period of performance, or both.

1. Historical Perspective

1-1. Equitable adjustment may be said to be a derivative of two early doctrines which acted as the basis of contract compensation. These early doctrines are explained in the following paragraphs as they relate to equitable adjustment.

1-2. **Common Law Background.** Under the common law, one was compensated for goods sold and delivered or services rendered under the equitable doctrines of "quantum meruit" or "quantum valebat."

1-3. ***Quantum Meruit.*** Literally translated, quantum meruit means "as much as he has deserved." The doctrine applied to situations where a person was employed to do work for another without an agreement as to compensation. In such case, the law would imply a promise from the employer to the workman that he would pay him "as much as he may merit." Under the common law pleading of "assumpsit" (simple contract), the workman would aver a promise to pay what he reasonably deserved and then aver that his effort was worth a certain sum of money.

1-4. ***Quantum Valebat.*** Quantum valebat, on the other hand, pertained to goods. The term means "as much as it was worth." When goods were sold without specifying a price, the law implied a promise by the buyer to pay the seller "as much as they were worth." The declaration (pleading) would then aver that the buyer promised to pay as much as the goods were worth, and that the goods were worth a certain sum which the buyer refused to pay.

1-5. These doctrines, it might be noted, have been incorporated into the substantive law, and recovery in equity on the theory of implied contract may still be made under either doctrine in present jurisdictions. Early Government contracts did not contain "Changes" clauses. When changes were ordered by an authorized agent of the Government, acting within the scope of his authority, compensation was due to the contractor under the equitable doctrines of the common law.

1-6. The earliest "Changes" clause, calling for what is now known as an "equitable adjustment," appeared in a contract for the construction of an ironclad vessel in 1863. A clause in the contract provided that "alterations" might be made while the vessel was under construction. In straightforward language, the clause stipulated that if the alterations "caused extra expense, that should be paid for, if they effected a reduction in cost, that should be subtracted from the contract price." The changes, under the circumstances of those times, were quite inevitable, for it can be noted that the Court of Claims had occasion to consider the claims under the contract.

1-7. Various "Changes" clauses used by the Departments of the Government were standardized by the Treasury Department, and since 1921 have been published in standard forms of contracts for use by the Executive Branch. The standard clauses have since that time required an "equitable adjustment" in the event of changes made within the scope of a contract.

1-8. Equitable adjustment is a two-way street. Depending on the circumstances, either the contractor or the Government may be entitled to an adjustment in price, period of performance, or both. It should be noted, also, that both parties may be entitled to some adjustment, depending on the nature of the change. In such case, the party suffering the final detriment, by the preponderance of proof, will be due an adjustment from the party finally benefiting. Or, as it often happens, the interchange of the benefit and detriment of a change may result in a "wash-out," wherein there is neither a gain nor a loss in the respective positions of the parties.

1-9. Entitlement is a prerequisite of equitable adjustment. Before the issue of quantum can arise, the conditions precedent to an equitable adjustment must exist. For example, is the change within the scope of the Changes (or other applicable) clause? Was the change made in fact? Were the procedural formalities of the clause observed? Is recovery precluded by "laches" or "estoppel?"

1-10. The concept of equitable adjustment closely approximates the legal doctrine of damages. In the case of

Hadley v. Baxendale, (9 Exchequer 341 (1854)), it was held that damages for breach of contract "such as may fairly and reasonably be considered arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable breach of it." The law refers to such damages as "direct." Those not arising naturally, or not having been "in the contemplation of both parties," are generally referred to as "consequential" damages. Direct damages are recoverable; consequential damages, as a rule, are not recoverable. The principle of the rule of *Hadley v. Baxendale* has been applied to equitable adjustments in distinguishing the costs arising therefrom, as we shall see later in this chapter.

1-11. Finally, one should at all times bear in mind that there is no ultimate correct technique for pricing-out a change. In the absence of determinative guidelines, the pricing of changes has been a recurrent problem. As a result of various Board of Contract Appeals and court decisions, certain rules have emerged which indicate that, in those particular circumstances, a given method is preferable to another. However, there appears to be no general agreement as to the basic method or approach that is to be used in pricing changes. Two schools of thought exist in this respect: the Reasonable Value or "objective" approach and the Specific Cost or "subjective" approach. Currently, the prevailing method appears to be a combination of the two.

2. Measurement

2-1. The incorporation of the word "equitable" in the various Changes clauses purports the connotation of equity to both the Government and the contractor. But what is "equitable" is generally a question of fact, which boils down to being a question of judgment. Judgments are normally substantiated by reference to accepted fundamentals, or by reasoned conclusions based on logical principles. In the absence of fundamental guidelines, the measurement of an equitable adjustment must rely upon the latter method. No preset formula is available to furnish a relatively simple answer to the problem of pricing a change. What constitutes an equitable adjustment remains a question to be decided on the facts of each case.

2-2. At this point, it might be noted that there is no objection to a predetermination of the method to be used to calculate an equitable adjustment. The parties may agree to such preset formula at the time of negotiating the basic contract where there may be reason to believe that fundamental conceptual difficulties may later arise.

2-3. **Approaches to Measuring Equitable Adjustment.** Basically, there are two fundamental concepts, and several approaches, to measuring an equitable adjustment. They can be so identified and so characterized because they are a matter of record, having been the subject of appeals and litigation: (1) the Reasonable Value or "Objective" Concept; (2) the Specific Cost or "Subjective" concept; (3) the Total Cost Approach; (4) the "Jury Verdict" Approach; and (5) the "Bruce Case" Rule.

2-4. ***The Reasonable Value Concept.*** The proponents of this approach point out that the appeals boards and courts have applied the standard of reasonable value or reasonable worth as the proper measure of compensation to many cases in which Changes clauses were at issue. The rule is that remuneration to the contractor should be equated with the reasonable value of goods and services obtained from the contractor. Restated in another way, the contractor is compensated on the basis of what the change should cost, rather than what it did (actually) cost.

2-5. Admittedly, the ascertainment of value is difficult. It is, for instance, far more difficult than the ascertainment of incurred costs. The term is used in different contexts; it means different things to different people. Its determination involves conjecture, opinion and judgment. It varies with time, place and circumstance.

2-6. In the eyes of the law, value is not equated with cost; the terms have quite different meanings. An itemized repair bill, for instance, is only some evidence of the value of damages suffered in an automobile collision. So it is with Government contracts. Many cases serve to illustrate that value is not tied to cost. For instance, in *S. N. Nielsen Company v. US*, (141 Ct Cl 793, 1958), a reduction in the contract price was approved, though the contractor established that the change had increased his costs. Conversely, in *Bruce Construction Corporation* (Eng. BCA 1959) the contractor was entitled to the difference in value of more expensive sand block required by a change order, though the contractors supplier did not charge for the increased cost of the block over that originally ordered under the contract. (But see the *Bruce* Case rule, *infra*, overturning this decision.)

2-7. The basic premise here is clear. It is that the determination of an equitable adjustment is an objective procedure which involves the determination of the reasonable value (or the reasonable costs of a prudent contractor similarly situated) of the work involved as opposed to the costs actually incurred by the contractor.

2-8. Proponents of the objective theory of equitable adjustment frequently cite the *Nielsen Co.* decision in support of their position. In that case, an erroneous bid of a subcontractor had misled the contractor into allocating only $22,000 to an item of work on its contract. By change order, the Government substituted a less expensive installation, decreasing the cost of the item of work to $19,000. However, the Government was able to prove that it would have cost the contractor some $60,000 to perform the item of work if it had not been changed. In a series of appeals, the Contracting Officer's contention that the Government was entitled to an equitable adjustment in the form of a price decrease of $41,000 was sustained. (See, also, *Keco Industries, Inc., v. US*, 176 Ct Cl 983 (1966) and *Pruitt, Inc.*, ASBCA 18344, 73-2 BCA Para. 10580.)

2-9. Such decisions are characterized as an unequivocal vote for the objective or reasonable value approach to a change. In a direct confrontation between the equities of affording the Government the savings which would normally be realized from such change and the contrasting need to spare the contractor a possible serious loss, the reasonable value approach was decisively applied.

2-10. These decisions, briefly summarized, stand for the principle that the determination of an equitable adjustment is the difference between what it would have reasonably cost to perform the work as originally required and what it reasonably

cost to perform the work as changed. Therefore, the reasonable cost to the contractor to perform the services had they not been changed, must he computed in order to arrive at a proper equitable adjustment. In such case, the contractor's cost estimates to perform the work as originally specified are subject to scrutiny by the Government. If the original estimates are considered unreasonable, the equitable adjustment will give effect to the difference between a reasonable estimate of the original cost, rather than the contractor's actual original cost estimates.

2-11. We note then, that the determination of an adjustment by the reasonable value approach does not preclude use of the contractor's cost estimates as a basis, at least for comparison purposes. We might also note, in passing, that the problem of properly computing an equitable adjustment is considerably simplified where the change and the pricing of the change are effected concurrently. There can be no question under this circumstance that the Government and the contractor have bargained for a price on an objective hasis, and that the price is the result of the value of the change as opposed to the actual cost of the change. The contractor's estimates have been subjected to a comparison with similar purchases and with, perhaps, the Government's independent estimates. The pricing of a change by this method is, of course, completely acceptable and is not subject to revision even though later cost information reflects that actual costs of the change are substantially lower or higher than the value established by the price negotiation.

2-12. In line with the philosophy of fixed-price contracting, forward-pricing of equitable adjustments is the preferred policy. Such forward-pricing, of course, involves the best estimates based on known data. In many instances, however, the circumstances may be such as to preclude a possibility of forward pricing. Equitable adjustments are often determined ex post facto when costs relevant to the change have already been incurred. The known costs, then, may be used in the determination of the reasonable value of the adjustment, if such is required.

2-13. It becomes quite apparent that actual costs, as incurred by the contractor, are generally considered to be a primary indicator of the value of the change. Even the proponents of the reasonable value approach to equitable adjustments concede that there is no better single indicator of value than actual costs. Decisions of the Boards and the Courts often refer to "actual cost of repairs" or "actual cost to the contractor." The line of reasoning in the decisions reflects, however, that even while recovery of costs per se is permitted, only those costs which are reasonable, necessary and unavoidable are allowed.

2-14. ***The Specific Cost Concept.*** In direct contrast with the theory of reasonable value, the subjective theory of "specific cost" propounds that the proper measure of an equitable adjustment is the actual cost of the change to the particular contractor affected. This theory rejects the elusive standard of "reasonable value" and sets up, instead, the standard of actual cost of the change as being the most equitable method of adjustment.

2-15. Reflection at this point will impress upon you the apparently irreconcilable conflict between the basic approaches. We have seen that the ascertainment of the "value" of a change may be quite difficult, since the legal concept of value is based on theory. To determine value, we often look to the contractor's cost estimates or his actual cost of work performed. For example, consider the pricing circumstances involved in a constructive change, or those involved in the so-called "two-part" change order. The latter involves the direction of a change by the Contracting Officer followed by a subsequent determination of the price of the change. In many instances, the work is completed prior to the price negotiation; and the contractor comes to the bargaining table armed with his actual costs. Would an acceptance of these costs, and an addition of a "reasonable and customary" profit constitute a cost-plus-percentage-of-cost procurement, a transaction prohibited by 10 USC 2306(a)?

2-16. Undoubtedly, some Contracting Officers have been reluctant to use actual costs incurred as a result of a change in the face of the cost-plus-percentage-of-cost prohibition. Would it be more prudent, then, to depart completely from a subjective analysis of the contractor's costs and scrutinize him objectively, comparing him with a manufacturer whose management is, possibly, more skillful or whose labor is more experienced in the same or similar task? Is it equitable to expect that the contract be performed as efficiently as it might be under the optimum conditions which the objective theory suggests?

2-17. The proponents of the subjective theory dispose, first, of the argument concerning possible cost-plus-percentage-of-cost implications. They suggest that the prohibition is directed toward predetermined arrangements granting additional profit in the event additional costs are incurred. After-the-fact pricing, they point out, gives no such guaranteed profit. This argument is sustained hy recent decisions of the Boards and the Courts. In *National Electronic Laboratories v. United States*, (148 Ct Cl 308, 180 F Supp 377, 1960) the court ruled that a redeterminable contract priced after the fact was not in violation of the cost-plus-percentage-of-cost prohibition. Hence, the Contracting Officer should use the best evidence available, including the latest costs incurred, when negotiating an equitable adjustment. And in a case involving a "Changed Conditions" clause, the Board clearly reiterated the distinction between an ex post facto determination of an equitable adjustment and a CPPC situation by stating:

> We think the differences between the allowance of any equitable adjustment and the cost-plus-a-percentage-of-cost system are substantial and obvious. Under the "Changed Conditions" article the contractor has no guarantee that historical costs will be allowed. . .Although profit may be expressed in terms of percentage, the "Changed Conditions" article does not contain a guaranteed percentage and this, too, is determined on the basis of the best evidence available. *E.V.Lane Corp.*, ASBCA Nos. 9741, 9920, and 9933, 65-2 BCA 5076 (1965).

2-18. The proponents of the subjective approach to equitable adjustments further point out that many of the "Changes" clauses were developed to provide administrative remedies to situations which would otherwise be breach of contract cases before the courts. The approach to administrative settlement should then be patterned after the treatment, generally accorded by courts, to claims for damages resulting from breach of contract. Therefore, the incurred cost approach, so common in damage claims, should also be followed in equitable adjustment cases.

2-19. Summarizing what we have thus far learned of the basic approaches to equitable adjustment, it can be briefly stated that the differences in theory are as follows: (1) the Reasonable Value Approach defines an equitable adjustment in terms of the objective determination of what it should cost a reasonable and prudent contractor in performing under optimum conditions; (2) the Specific Cost Approach, conversely, defines an equitable adjustment in terms of actual cost incurred by the particular contractor under the circumstances of his contract; and (3) under either theory, the contractor's cost—whether estimated, actual, or historical—may be used in the determination, the fundamental difference being in the probative value or evidentiary weight which each theory assigns to such costs.

2-20. ***The Total Cost Approach.*** Where actual or historical costs are submitted for the Government's consideration, the burden is upon the contractor to show that they were actually incurred. If he fails to prove this, but does show an entitlement to an equitable adjustment, a determination on quantum can nevertheless be made by either of two methods. The first is the "total cost" method.

2-21. The total cost of the change is the determination of the difference between the original contract price (unchanged) and the actual cost of performing the contract as changed. Simply, it is actual cost versus originally expected cost. This method is universally criticized as being the least preferable approach to an equitable adjustment on at least two grounds: (1) that the total costs include not only the costs properly attributable to the change, but also those which were incurred through the fault of the contractor, and (2) that the cost of performing the unchanged contract is frequently based on unrealistically low bids. The bail-out aspects of this method are quite apparent.

2-22. This method has been used when there is no better method available. The Court of Claims, for instance, has stated that the total cost approach has been used only as a last resort. In order to overcome the serious objections inherent in this approach, the Court has been careful to ascertain the contractor's experienced costs resulting from the change, and has reduced those costs by deducting costs attributable to the fault of the contractor. Thus, the first major criticism, *supra*, is eliminated. Next, the Court attempts to avoid the second major criticism by using an average estimate, derived from the estimates of the Government and the other bidders, in order to preclude the possibility of "getting well" on changes after a buy-in. The leading case on the use of the total cost approach is *Great Lakes Dredge and Dock Co. v. United States*, 119 Ct Cl 504 (1951), cert. denied, 342 US 953 (1952).

2-23. Conversely, the Court of Claims has expressed its distaste for this approach. The total-cost basis was specifically rejected in *F.H. McGraw & Co. v. United States*, 131 Ct Cl 501 (1955) and in *River Construction Corp. v. United States*, 159 Ct Cl 254 (1962). More recently, while reiterating its distaste for the approach, the court conceded that the total cost basis may be used under appropriate circumstances and when no other method is available. *J.D. Hedin Construction, Inc., v. United States* 171 Ct Cl 70 (1965)). The rationale of the Court may be summarized by the following quotations from this case:

> We are aware that we have on a number of occasions expressed our dislike for this method (total cost) of computing breaches of contract damages, and we do not intend to condone its use as a universal rule. However, we have used this method under proper safeguards where there is no other alternative, since we recognized that the lack of certainty as to the amount of damages should not preclude recovery. *Oliver-Finnie Co. v. United States*, 150 Ct Cl 189 279 F 2d 498 (1960); *MacDougald Construction Co. v. United States*, 122 Ct Cl 210 (1952); *The Great Lakes Dredge and Dock Co. v. United States*, 119 Ct Cl 504, 96 F Supp. 932 (1951), cert. denied, 342 US 953 (1952). In all these cases the fact of Government responsibility for damages was clearly established; the question was how to compute reasonable damages where no other method was available. *River Construction Corp. v. United States, supra*, at 271. We think this is such a case . . . The only possible method by which these damages can be computed is resort to the total cost method. Under such circumstances, as stated earlier, we think the Government should not be absolved of liability for damages which it has caused, because the precise amount of added costs cannot be determined. (Though the reference in this case is to damages, the same rationalization is used by the Court of Claims in computing equitable adjustments.)

2-24. The various Boards of Contract Appeals have exhibited less favor in the use of the total cost method. The ASBCA, for instance, has rejected this approach in substantially denying appeals in *Holly Corporation*, ASBCA No. 3626, 60-2 BCA 2685 (1960), *H.R. Henderson and Co.*, et al., ASBCA No. 5146, 60-1 BCA 2662 (1960), and *Air-A-Plane Corporation*, ASBCA No. 3842, 60-1 BCA 2547 (1960). The Board's views regarding equitable adjustments can be summarized in the following excerpts from the latter case:

> We do note that appellant's insistence on the total cost approach (without specifics as to the various changes, and without specifics as to their effect on such matters as direct labor, direct material, engineering, overhead, etc.) in and of itself presents what we believe to be an insurmountable obstacle to the allowance of the claimed equitable adjustment.
>
> We have held that the equitable adjustment in price under the changes article should be based on a comparison of the contractor's actual performance with the performance required under the original specifications, if the contractor acted reasonably in its choice of alternative methods of performance. See Appeal of *G.M. Co. Manufacturing, Inc.*, ASBCA No. 2883. See also Appeal of *Bostwick-Batterson Company*, ASBCA No. 4636. In so holding we have recognized that there are many factors to be considered in determining an equitable adjustment in price for a change order but that by far the most important factor is cost . . .
>
> Citing the Appeal of *S.N. Nielsen Company*, ASBCA No. 1990, sustained by the Court of Claims in 141 Ct Cl 793, the Board has held that a proper adjustment is the difference between what it would have reasonably cost to perform the work as originally required and what it reasonably cost to perform the work as changed, and that in order to make a proper equitable adjustment the Board must compute what would have reasonably been the cost to the contractor to perform the contract had it not been changed. See Appeal of *Modern Foods, Inc.*, ASBCA No. 2090.
>
> The Board has held that before a conclusion with respect to the proper amount of any equitable adjustment to which a contractor may be entitled can be arrived at either by a Contracting Officer or by the Board, appellant must show some sound basis for a determination of the amount and that such a determination may not be made in a vacuum or based on speculation. See Appeal of *Modern Foods, Inc.*, ASBCA No. 2090 and *Allegheny Sportswear Co.* ASBCA No. 4163.
>
> Thus, to arrive at an equitable adjustment the Board needs two figures. First, the actual cost. Second, the cost but for the changes.

2-25. In summary, it may be said that the various appeal boards have generally limited the use of the total-cost method to extreme cases when: (1) the contractor is known to be

competent, (2) the Government has not developed a reasonable alternative estimate, (3) there is no suggestion that the original price is not reasonable and realistic, (4) the increased costs resulted solely from the changes, (5) costs cannot be allocated to specific changes, and (6) there is no other way to determine an equitable adjustment. (For recent cases illustrating conditions for use of the "Total Cost" approach, see: *Continental Drilling Co.* ENGBCA 3455, 77-1 BCA, paragraph 12280 (1976; *Perini Corp.*, ENGBCA 3745, 78-1 BCA, paragraph 13191 (1978); *Ingals Shipbuilding Div., Litton Systems, Inc.*, ASBCA 17579, 78-1 BCA, paragraph 13216 (1978)).

2-26. *The "Jury Verdict" Approach.* Where costs cannot be segregated and identified, both the Government and the contractor may have to approach an equitable adjustment on the basis of estimates alone. In these cases where meaningful comparisons cannot be made from the available cost data, the Court and the Boards have permitted the use of expert opinion to estimate the cost of a change. From all of the evidence, including the opinions of qualified experts (e.g., estimators), the Court or Board then can determine what should be paid in the same manner as would a jury. This method, quite naturally, has become known as the "jury verdict" approach.

2-27. First advanced by the Court of Claims in *Western Contracting Corp. v. United States* , 144 Ct Cl 318 (1958), the method was later adopted in similar situations by the Boards in *Lake Union Drydock Co.*, ASBCA No. 3073, 59-1 BCA 2229 (1959) and *Henly Construction Co.*, IBCA No. 249, 61-2 BCA 3240 (1961).

2-28. In *Western Contracting*, the Court considered the opinions of qualified estimators regarding the reasonableness of the claimed costs, since they could not be substantiated in detail by the contractor's records, and determined the equitable adjustment on the basis of a "jury verdict". In *Lake Union Drydock*, the BCA had occasion to consider an adjustment to the contractor due to a delay by the Government in furnishing material for the construction of minesweepers. The following excerpts from the decision reflect the circumstances under which a "jury verdict" approach may be employed.

> 8. . . The amount of the claim was derived from estimates made by Appellant's experienced shipbuilders. In presenting the claim to the Board, Appellant's principal marine architect and engineer (highly qualified) testified in great detail as to the basis of the estimates and verified exhibits submitted in support thereof. Generally speaking, we find that Appellant's estimators are well qualified to make the estimates upon which this claim is founded and that those estimates were established as being basically sound.
>
> 9. . . On the other hand, the Government did not make a separate estimate of the proper price adjustment due to the delay attributable to it. Instead, in presenting the defense in this appeal, counsel for the Government probed into every element of Appellant's estimate . . . Thus, as presented, we have before us over two thousand pages of transcript of the hearing and over a thousand sheets of exhibits upon which to base a decision which, in most part, is one of the nature of a jury verdict. To discuss the many minor details in controversy seems unnecessary. May it suffice to say here, however, that the measure of the amount of the price adjustment to which appellant is entitled is not an exact science calling for a hard-and-fast rule, but is a determination based upon the facts and circumstances of this case. See *Needles v. United States*, 101 Ct Cl 535, 618; *Fern E. Chalendar v. United States*, 127 Ct Cl 557, 566; *Western Contracting Corporation v. United States*, No. 344-55 Ct Cl, decided December 3, 1958.

2-29. The same approach was used by a different Board in rendering a decision in *Henly Construction Co., supra.* It should be noted that despite the name of this method, a jury as such is not actually used. The expert testimony of both sides is weighed by the judges or by the Board, and the evidence is weighed as if by a trier of fact, (i.e., the jury).

2-30. ASBCA subsequently appeared to place a number of restrictions on this approach. In *Air-A-Plane Corp., supra,* it stated that this theory is applicable only in cases "where each side presents convincing but conflicting evidence as to what the amount of equitable adjustment should be; where, upon consideration of the evidence, neither side is entirely correct, and it is apparent that some allowance by the Board is proper, and where evidence is sufficient to permit the Board to make some reasonable decision as to a proper allowance . . ." And in *Planetronics, Inc.*, ASBCA No. 7202, 1962 BCA 3356, an additional requirement for "convincing proof of the nature and kinds of increased costs incurred" was added.

2-31. The basic difference between the "total cost" approach and the "jury verdict" approach is that in the latter, costs attributed to the change alone are used while in the former, the total contract costs are used. A severe criticism of the "jury verdict" method remains, in that despite the narrower area of consideration (i.e., the change alone) the computation still involves considerable speculation.

2-32. More recent cases, however, attest that the Court of Claims and the Boards continue to use this approach. For instance, in *J.G. Watts Construction Co. v. United States,* 174 Ct Cl 1, (1966), the Court reiterated use of the jury verdict basis where precise measurement of costs is not possible. The Boards, also, pursue the rationale of making their own estimate in a "jury verdict" where ". . . Even though presented with widely divergent positions by the parties before us, we cannot escape the necessity of bringing an end to the matter and determining a figure as the amount of an equitable adjustment." (For recent cases illustrating the wide discretion exercised by Boards of Contract Appeals in applying "Jury Verdict" techniques, see: *Sovereign Construction Co.*, ASBCA 17792, 75-1 BCA, paragraph 11251 (1975; *Greenwood Construction Co.*, AGBCA 75-127, 78-1 BCA, paragraph 12893 (1977); *J.W. Bateson Co.*, VACAB 1148, 79-1 BCA, paragraph 13573 (1978). For a very liberal Court of Claims approach, see *S.W. Electronics & Mfg. Corp. v. United States*, Ct Cl (July 1981).

2-33. As we have seen, the fundamental conceptual difference in the measurement of an equitable adjustment is between the objective (reasonable value) and subjective (actual cost) standards. We have also noted that an important element of a determination under either concept or, as a matter of fact, under the "total cost" and "jury verdict" approaches—is "cost."

2-34. An important recent development in defining this significant element of "cost" and, in effect, narrowing the area of controversy among the fundamentalists is the series of decisions involving the Bruce Construction Corporation.

2-35. The rule emanating from these cases is that the proper measure of value of an equitable adjustment is the *"contractor's costs, reasonably incurred"*. Emphasis is supplied here to impress the reader with the brevity and

simplicity of the rule, despite the magnitude of its pronouncement.

2-36. A second look will reveal that the rule is, in effect, a compromise between the objective and subjective concepts. The rule gives weight to the objective standard in that the costs must be reasonably incurred, but does not otherwise disturb the subjective fundamental of the contractor's costs. This appears to be the prevailing rule, and the quid pro quo whereby fundamental differences may be resolved in the interests of a workable standard for "equitable" adjustment.

2-37. The *Bruce* case involved a fixed-price construction contract for a number of buildings at Homestead Air Force Base, Florida. A fine-textured building block was required by the original specifications. After the contractor had ordered the building block, the requirement was changed to sand block. The sand block was more brittle than the concrete masonry block generally produced in that area, requiring a higher degree of care in its handling, and entailing a higher production cost. However, the contractor's supplier furnished the sand block at the same price as the originally required concrete block.

2-38. The issue arose when the contractor claimed $42,415.98 as the difference between the value of the sand block furnished and the value of the block originally specified, on the grounds that the fair market value of the sand block was greater than the purchase price and that the Government should not benefit from the contractor's bargain.

2-39. The Corps of Engineers accepted the contractor's contention that fair market value should be the measure of an equitable adjustment, and allowed the difference between the current fair market value of the two types of block. Upon appeal, since the Engineering Board of Contract Appeals had denied the larger part of the contractor's overall claim, the ASBCA accepted the fair market value measure, but denied the claim on the basis of failure of proof, i.e., that the contractor had failed to prove that the price paid for the original concrete block was not also the fair market value of the substituted sand block at the time of the transaction. The Board held that the fair market value at the time of purchase, not at some subsequent time, is to be used in considering the validity of the equitable adjustment, and that the fair market value at the time of purchase was not different from that of the substituted block.

2-40. Upon further appeal, the Court of Claims resolved the issue in *Bruce Construction Corp. v. United States*, 324 F 2d 516 Ct Cl (1963). The Court held that fair market value was not the proper measure of damages, that the proper measure is to be achieved by the application of objectivity (the reasonable cost test) to the contractor's actual or historical costs, and that the contractor's historical costs are presumptively reasonable and the burden of proof rests with the party contending otherwise.

2-41. Consider, for a moment, the implications of this decision in light of what we have thus far learned of equitable adjustments. The language of the Court may assist us in our reflection:

> But fair market value is not the measure of damages in this case. This is not to say that in all cases, historical cost is to be the gauge. The more proper measure would seem to be a "reasonable cost". The concept of "reasonable cost" is not new. Indeed it has been defined in the following manner:
>
> A cost is reasonable if in its nature or amount, it does not exceed that which would be incurred by an ordinary prudent person in the conduct of competitive business (ASPR 15-201.3 1960)

Use of the "reasonable cost" measure does not constitute "an objective and universal procedure, involving the determination of the reasonable value (or reasonable cost of any contractor similarly situated) of the work involved," but determination of reasonable cost required, in and of itself, an objective test. The particular situation in which a contractor found himself at the time the cost was incurred, appeal of *Wyman-Gordon Co.*, ASBCA 5100 (1959) and the exercise of the contractor's business judgment, *Walsh Construction Co.*, ASBCA 4014 (1957), are but two of the elements that may be examined before ascertaining whether a cost was "reasonable":

> (3) But the standard of reasonable cost "must be viewed in the light of a *particular* contractor's costs*** (Emphasis added), and not the universal, objective determination of what the cost would have been to other contractors at large."

2-42. It is clearly apparent that the Court rejected the purely objective "reasonable value" concept, and substituted the new test—a "modified subjective" one—of the application of the objective standard of "reasonableness" to the actual or historical costs under the contractor's particular circumstances (subjective).

2-43. The above statements in themselves would appear to be an accurate reflection of the practical aspects of equitable adjustment. Viewed in the light of the negotiations that normally accompany the determination of the quantum of a change, and the concessions normally made in the course of the discussions, the application of the standard of reasonableness is not at all strange. The Court's opinion at this point could be considered to be a not-too-distant departure from the practical (as viewed by the subjective and objective theorists) and an affirmation of the practicable (as viewed in light of the usual circumstances of an equitable adjustment).

2-44. The Court further held, however, that the contractor's "historical" costs are presumed reasonable and that the burden of proof rests with the party contending otherwise:

> To say that "reasonable cost" rather than "historical cost" should be the measure does not depart from the test applied in the past, for the two terms are often synonymous. And where there is an alleged disparity between "historical" and "reasonable" costs, the historical costs are presumed reasonable.
>
> Since the presumption is that a contractor's claimed cost is reasonable, the Government must carry the very heavy burden of showing that the claimed cost was of such a nature that it should not have been expended, or that the contractor's costs were more than were justified in the particular circumstance.

2-45. Note that, in this case, the burden of proof was upon Bruce, since its allegation was that the actual cost of the sand block was not reasonable. The court disposed of the *Bruce* Case in the following language:

> (4) Plaintiffs here have not been able to overcome the presumption that their actual costs were reasonable, hence they may not recover . . . evidence of the fair market value of an item some eighteen months after a transaction involving the item does not rebut the presumption that the cost of the item was reasonable at the time of the transaction.

2-46. Following the logic of the *Bruce* Case rule, it is clear that, in the usual controversy, the burden of proof will be on the Government to prove that the contractor's costs were not objectively reasonable. Actual or historical costs are now of prime importance; they are no longer just some evidence of reasonable cost. They are reasonable until the presumption is rebutted. (For a recent example of the difficulty in providing that the contractor's actual costs are unreasonable, see: *Bromley Constructing Co.*, ASBCA 20271, 77-2 BCA, paragraph 12715 (1977).

2-47. This, then, is the *Bruce* Case rule, widely adopted by the Boards as the guideline for a proper measure of an equitable adjustment. This "reasonable cost" test has been used consistently since its promulgation by the Court of Claims in 1963. For example, see *J. G. Watts Construction Co.* ASBCA 9454, 1964 BCA 4325, and *Hayes International Corp.*, ASBCA 9750, 65-1 BCA 4767 (1965). For a case denying the reasonableness of a contractor's actual costs, see *Blauner Construction Co.*, ASBCA 9436, 1964 BCA 4333.

3. Types of Includable Costs

3-1. Now that it is apparently settled that the *kind* of cost allowable in an equitable adjustment is "actual cost reasonably incurred," one other major issue remains. It concerns the *type* of cost which will be allowable within this definition.

3-2. The rule in *Hadley v. Baxendale*, we have noted, restricts the recovery to damages which are direct, not consequential. This same distinction has been applied to equitable adjustments. It is settled that where a breach does not arise "naturally", or was not "in the contemplation of both parties at the time they made the contract," the damages (or reasonable costs thereof) are considered consequential and are not recoverable. But when is a cost direct, and when is it consequential?

3-3. **Changed vs. Unchanged Work.** Two important cases merit our consideration at this point. In *Chouteau v. United States*, 95 US 61 (1877), the Supreme Court said;

> For the reasonable cost and expenses of the changes made in the construction, payment was to be made; but for any increase in the cost of the work not changed, no provision was made.

3-4. The Court quoted and agreed with this statement in a later "landmark" case involving standby costs on construction contracts. This was the case of *United States v. Rice*, 317 US 61 (1942), where the contractor alleged standby and other additional costs resulting from changes in specifications over a long period of time. In denying the claim, the Supreme Court stated:

> It seems wholly reasonable that "an increase or decrease in the amount due" should be met with an alteration in price, and "an increase or decrease . . . in the time required should be met with alteration of the time allowed for "increase or decrease of cost" plainly applies to the changes in cost due to structural change required by the altered specifications and not to consequential damages which might flow from delay taken care of in the "difference in time" provisions.

3-5. The language of these two decisions could be interpreted differently; as a result, there was a great deal of confusion as to the type of costs that could be included in an equitable adjustment.

3-6. The impact of the Rice Doctrine was ameliorated in 1957, so far as supply contracts were concerned, by the introduction of appropriate language in the Standard Form 32 "Changes" clause. The addition of the words "whether changed or not changed" would appear to have taken supply contracts out of the operative effect of the doctrine. Subsequent interpretations by the Boards, however, permitted recovery of the cost of delays after a change order was issued but not those incurred before the change order, on the grounds that the new Changes clause still provided for an adjustment in costs caused by the change and that costs incurred prior to a change could not have been caused by the change.

3-7. There are exceptions to this rule, however. For instance, costs incurred before the change order will not be excluded, if it can be proved that they were caused by the change. This distinction is principally involved in the area of defective specifications, where costs incurred before discovery of the defects are regularly included in the equitable adjustment. (See *Spencer Explosives, Inc.*, ASBCA 4800, 60-2 BCA (1960, and *R.C. Hedreen Co.*, ASBCA 20599, 77-1 BCA paragraph 12328 (1977).)

3-8. In Supply and Research and Development contracts, application of the Rice Doctrine generally limited recovery to subsequent delays caused by the change. Recovery for delays prior to the change, except for cases involving defective specifications, had to be affected under Stop Work Orders or Suspension of Work clauses rather than the Changes clause.

3-9. The greatest impact of the Rice Doctrine was in the area of construction contracts. A 1961 revision of Standard Form 23A, the Changes clause for construction contracts, contained substantially the same wording as SF32. However, the similarity did not obviate the operative effect of the doctrine. The omission of the words "any part of work . . . whether changed or not changed by any such order" was fatal. The Rice Doctrine continued to be fully applicable; there could be no adjustment in costs for the effect on other, unchanged work, and the only permissible adjustment was an extension in time.

3-10. This situation was drastically changed by revising the Changes clause to eliminate some of the problems which for years had plagued the administration of construction contracts. The revised clause (e.g., DAR 7-602.3; FPR 1-7.602-3) "Changes" (Feb. 1968) makes it clear that the change may relate to any aspect of the work to be performed under the contract. It embraces changes not only to drawings, designs, and specifications, but also changes in the method and manner of performance, the provision of sites and services, and those requiring acceleration in performance. Significantly, paragraph (b) of the new clause recognizes "constructive changes" by providing that any other written or oral orders from the Contracting Officer, including "direction, instruction, interpretation or determination," which cause a change within the general scope of the work shall be treated as changes under the clause.

3-11. In its provision for equitable adjustment, the revised clause now resembles the Supply and Research and Development Changes clauses in providing that " . . . If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance

of *any part of the work* under this contract, *whether or not changed* by any order, an equitable adjustment shall be made . . ." (Emphasis supplied.) The new wording, following the construction of the wording in supply and R & D contracts, will undoubtedly have the effect of eliminating the application of the Rice Doctrine to construction contracts. It appears clear that the contractor may now receive consideration not only for the costs of the changed work, but also for any increased costs in unchanged work incurred as a result of the change.

3-12. The clause also expressly provides for equitable adjustment in the case of defective specifications, removing any question as to the proper inclusion of prior costs which, we noted, had been regularly allowed as in *Spencer Explosives, Inc., supra.*

3-13. Significantly, the clause also provides for possible recovery of costs incurred prior to a change order, other than those resulting from defective specifications. Such recovery of other costs, however, is limited in that "except for claims based on defective specifications, no claim for any change . . . shall be allowed for any costs incurred more than 20 days before the Contractor gives written notice . . . "

3-14. ***"Impact" Costs; The "Ripple Effect."*** One of the most difficult types of claim to resolve is one based upon "impact" costs. The theory here is that a major change, or a number of such changes, have a "ripple effect" upon the remainder of the contract work. Where there is a compression of time or a significant addition of work without a concomitant extension of time, the impact may arise from a resultant loss of efficiency from abnormally long hours of premium time. This inefficiency may effect management and supervision, as well as direct labor. Further, when a change compresses the work required on a part of a project, such compression may affect the scheduling of the work on other parts of the project. In other words, a pyramidal effect is encountered, where the disturbance caused by a patent change will cause a "ripple effect" of smaller disturbances, perhaps latent, throughout the contract work. The allegation here is that such changes have a direct effect on costs. Scheduling is disrupted, learning is interrupted, and premium prices must often be paid for labor and materials.

3-15. The issue of whether such "impact" costs are recoverable as direct costs has been squarely presented. The contractor has been permitted to recover for loss of efficiency because of an acceleration requirement. In fact, the Court of Claims took judicial notice of the fact that a 12 hour work day and a six day work week tends to impair the efficiency of a contractor's labor. The ASBCA has also determined that such factors as an interruption to the work sequence, lack of a steady flow of work, and the unavoidable use of unskilled labor may seriously affect a contractor's efficiency. In fact, it appears that the ASBCA uses a figure of 30% as a general experience factor for loss of efficiency during winter weather, with the factor being reduced to 20% where a substantial part of the work is performed indoors. (For an illustrative case involving a method of reaching an equitable adjustment on a claim of loss of efficiency, see *T.C. Bateson Construction Co. v. United States*, 177 Ct Cl 1094 (1966). However, the cases reiterating claims of loss of efficiency must be supported by proof. (See *Hicks Corp.*, ASBCA 20760, 66-1 BCA 5469 (1966). The Boards appear to be more lenient on the requirement of proof than the courts. Contrast *Joseph Pickard's Sons Co. v. United States.*, 209 Ct Cl 643 (1976) with *California Shipbuilding & Dry Dock Co.*, ASBCA 21394, 78-1 BCA, para 13168 (1978).) The many examples of such "impact" costs establish that the trend of the decisions is to afford recognition to the "ripple effect" in treating such costs as being a direct and natural result of certain changes and, therefore, recoverable.

3-16. The result has not been the same where the contention was that the number of changes alone should be the criterion for an allowance of "impact" costs. The rule here seems to be that, rather than the number of changes, the important consideration is the effect of these changes, as a whole, upon the contract.

3-17. ***Indirect Expenses; Overhead.*** Thus far we have been considering "direct" costs in the legal sense. We now encounter the term "direct costs" in accounting terms. Such direct costs (e.g., direct labor, direct material, direct engineering(resulting from changes would normally be no problem. If it is established that they were reasonably incurred (Bruce Case Rule) as a direct result of change (*Hadley v. Baxendale*). the costs are recoverable in an equitable adjustment. However, the problem arises in the recovery of "indirect costs," again in accounting terms. These costs are generally referred to as "overhead" or "burden," and include such items as employee benefits, taxes, insurance, rent, etc. Overhead can further be broken down into costs that are fixed, variable, or semi-variable. Fully variable costs are those which increase (or decrease) in direct proportion to an increase (or decrease) in production. Fixed costs (e.g., rent or taxes) on the other hand, remain relatively constant regardless of fluctuations in production. It is apparent, for example, that a change may well increase direct labor costs without affecting overhead to any significant degree, since the fixed elements in overhead may not be affected at all.

3-18. What is the proper technique for pricing an equitable adjustment in this circumstance? Quite generally, contracting officers accept the contractor's standard accounting practice of applying overhead as a percentage of direct labor, as was done in the basic contract, though the change may have significantly altered the original contract circumstances. Be aware, then, that the application of such percentage overhead rates could result in an unintended profit (or loss) to the contractor.

3-19. There is apparently no agreement in this area of equitable adjustment, as reflected in BCA decisions. In *J.G. Watts Construction Co.*, ASBCA 9454, 1964 BCA 4171, recovery on the basis of the contractor's normal overhead rate was permitted, despite the Government's contention that the adjustment should include only those costs in overhead that were directly increased by the change. Conversely, in *B. J. Lucarelli Co.*, ASBCA 8768, 65-1 BCA 4655 (1965), the board rejected the contractor's claim of "normal overhead rate" for home office expense, where it was not proved that the added work actually increased such home office expense.

3-20. Since the cases furnish no guideline, a practical approach might be in order. Where minor changes are involved, a continual renegotiation of the overhead rate would be unduly burdensome. In this circumstance, the parties might prefer to consider possible fluctuations in overhead as normal business contingencies and allow any gain or loss to fall where it may. However, where a signifi-

cant change in overhead is indicated by the large number of direct labor hours involved in the equitable adjustment, the parties probably should negotiate a new rate to preclude the possibility of an unconscionable profit or loss.

4. Profits

4-1. The Boards have held that on changed work the contractor is entitled to reasonable additional costs actually incurred, plus overhead applicable thereto, and a fair profit. Before a profit can be allowed as part of an equitable adjustment, however, it must be clear that the contract permits such an allowance, either expressly or by necessary implication. For example, where the contract limited an equitable adjustment to the payment of costs, the Board denied recovery of profits. The "Suspension of Work" clause (DAR 7-602.46; FPR 1-7.602-32) is an example of a clause specifically excluding profit from any adjustment resulting from a suspension, delay, or interruption in work.

4-2. **Amount.** Since it appears settled that profit is allowable, only the question of amount remains. The situation here is similar to that encountered in the indirect cost area, *supra*: should the existing percentage profit factor be applied, or does the nature of the change require a separate negotiation of profit?

4-3. In computing the profit applicable to an equitable adjustment, we find that there is no absolute formula. In the case of minor changes, the pattern seems to be the application of the existing percentage profit factor, i.e., that profit percentage contained in the basic contract. In the case of major changes, however, the "Weighted Guidelines" approach, (e.g., DAR 3-808) would require the determination of profit specifically applicable to the change.

4-4. The better, and prevailing, view appears to be that profit is an allowable factor but that the amount of profit will be determined by the facts in each case. Profit, like any other factor in an equitable adjustment, is subject to negotiation and agreement between the parties. The amount of profit will be dependent upon the character of the work involved. Each case must be examined in light of its peculiar facts, and determination of the amount of profit involves a question of fact.

4-5. The profit included in an equitable adjustment need not necessarily be related to that established in the basic contract or in any previous equitable adjustments on that contract. The test is not whether the change is additive or deductive; it is the character of the change that is the determinative factor.

4-6. Normally, a contractor is not entitled to a higher rate of profit for increased work than he would have received had the work not been increased. However, where the circumstances so merit, the board has not been averse to awarding a higher profit or fee than existed in the original contract. For instance, in *American Pipe Steel Corp.*, ASBCA 7899, 1964 BCA 4058, the board sustained an increase in fee from 7 percent to 10 percent on the basis that the change required an increase in the level of effort. To reiterate its position that a profit allowance on changed work need not be limited by the profit factor in the original contract, the board allowed 10 percent on changed work when the original contract bore a profit factor of 6.92 percent. (Illustrating its flexibility in matters of profit, the Board in *Carvel Walker*, ENGBCA 3744,78-1 BCA, paragraph 13005 (1978), allowed a 12% profit factor while commenting that 10% had been customarily used in construction contracts. In another case, the Board merely reaffirmed the profit factors used by the Contracting Officer [*Space Dynamics Corp.*, ASBCA 19118, 78-1 BCA, paragraph 12885 (1978)].)

4-7. Conversely, where work is decreased by a change, a profit deduction is proper. The determination of profit on equitable adjustments resulting from changes that decrease work is made in the same manner as in added work, and the same principles used in pricing additive changes are applicable to deductive changes.

4-8. One other important point should be made in this discussion of profit. When the contractor cannot establish entitlement to an equitable adjustment under the terms of the contract, his only alternative for recovery is in a breach of contract action. Traditionally, the courts will allow recovery of anticipatory profit in successful suits for damages for breach of contract. The rationale is that the function of damages is to put the contractor in the position he would have enjoyed, but for the breach—to make him "whole", as it were. In the eyes of the law, damages are recoverable for the injury or loss suffered. Making the injured party pecuniarily "whole" includes awarding profit as an element of damages in order to preserve "the benefit of the bargain."

4-9. The fundamental rule of damages is of prime importance to both the Government and the contractor when the choice is between equitable adjustment under the contract or a breach of contract claim. Despite entitlement, the appropriate clause of the contract may, by its wording, preclude profit recovery as an element of the equitable adjustment. On the other hand, where the contractor may also have grounds for a breach of contract claim, a successful appeal to the courts could enhance his recovery to the extent of anticipatory profits. The possibility of a larger recovery, however, must always be considered in light of the additional time and costs involved. It is to the advantage of both the Government and the contractor to seek an equitable adjustment within the terms of the contract, or to resolve their differences by accord and satisfaction whenever possible. The contracting officer should always bear in mind this vital distinction between breach of contract and equitable adjustment.

CHAPTER 12

Patents and Data

IT IS ESSENTIAL to the fulfillment of contractual obligations arising under Government contracts that both Government and contractor have available the necessary technical information. In some situations, use of this information may be restricted by patents, trade secret rights, or copyrights. The purpose of this chapter is to explore policies and practices relating to acquisition and use of technical information in Government contracting.

2. In studying these materials, you should recognize that: (1) a complete understanding of the subject requires indepth knowledge of statutes, DAR, judicial decisions, and other information; and (2) when the contract situation contains elements involving these intangibles, the average contractor will do his utmost to maximize his position by delivery of the minimum amount of information. The development of intangibles is the result of research. The creative input of scientific personnel working for the contractor might be of incalculable value. Should ownership of inventions and data be retained by the contractor, even greater *potential benefits* may accrue to him. It has been said that contractors can and do spend more time in protecting and otherwise controlling these intangibles than in anything else.

3. Laws permitting patenting and copyrighting were enacted under the authority granted by the Constitution of the United States, Article 1, Section 8, which reads: "The Congress shall have the power . . . to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Thus, our laws have given an incentive to inventors and authors toward the acquisition of possible wealth, and to industry, a possible improvement of their competitive position. This, in turn, has done much toward stimulating the technological growth of our country. The incentive has been provided by our patent laws which grant to an inventor the privilege of preventing others from making, using, or selling his creation without his permission. It should be noted that trade secret protection evolves from the common law.

1. Patents

1-1. A patent is a statutory monopoly granted by the Federal Government for a limited time to an inventor to exclude others from making, using or selling the invention claimed in the patent—and the opportunity to enforce that control by court action against infringers. In return for the grant, the inventor gives the public the right to free and unrestricted use of his invention after the expiration of the life of a patent, which is 17 years. A patent cannot be renewed after its expiration. The inventor who holds the rights to a patent, in effect, holds a property right in his invention. Hence, he has a monopoly on its use, manufacture, or sale. This exclusive right is effective in the United States and its territories and possessions. In order to obtain protection in foreign countries, the inventor must make application in each country in which he seeks protection. The length of the grant in foreign countries varies from 10 to 20 years.

1-2. **Basis.** Patents are granted on new and useful processes, machines, manufacture or composition of matter, or on an improvement to one of the above. A distinct and new variety of (vegetable) plant may also earn a patent. A useless device, printed matter, a method of doing business, or an improvement to an existing device that is obvious to a person skilled in the art, will not warrant issue of a patent. Applications for patents on "Rube Goldberg" devices that provide action and amusement, but add little to man's storehouse of knowledge, are consistently rejected by the U.S. Patent Office.

1-3. The patent document is composed of the grant, an abstract, an introduction, the specifications, the claims and, if the invention can be illustrated, one or more drawings. The specifications and drawings must have sufficient detail so that persons skilled in the art involved will be able to duplicate the invention without excessive experimentation. An invention must be more than an idea. Before a patent is granted, the idea must have been embodied in some physical form (reduced to practice) which becomes a novel and useful device or process. This physical form does not have to be actual hardware. The Patent Office examiner will not grant a patent if it is not obvious to a person skilled in the art how to build the item from the specifications and drawings of the Patent Application. Normally, models and samples of the item are not submitted unless requested by the examiner.

1-4. ***The Patent Right.*** A patent is granted to the inventor only. A company or the Government may not be issued patents, but the inventor may sell or assign his patent to a company or the Government. He may grant licenses to manufacture and sell the invention, to practice the process, or to carry on any other activity which he can negotiate. This is the method used by Government and contractors to obtain title to an invention or the rights to use it.

1-5. The patent system does not automatically insure that the inventor will become wealthy once he receives his patent. The possibility of a monetary return depends primarily on how much the invention is needed. For example, a new and

useful buggy-whip may not bring large financial rewards because the market for buggy-whips is limited.

1-6. Just as the patent system does not automatically insure a dollar return, it also does not automatically insure protection against infringement. A person who receives a patent would normally acquire a secure feeling of protection. However, this feeling may quickly dissipate when he learns that someone has used or manufactured his patented device.

1-7. The law does not provide instant conviction of the infringer. The patent holder must seek an injunction and/or request damages by asking the court to confirm the validity of the patent as issued by the patent office. An inventor may promote his invention, or he may turn it over to another person, to a company, or to the Government. He may do this in several ways. He may license others to use his invention, and receive payment in the form of royalties; or he may sell his rights to the patent, and relinquish ownership. A seldom used alternative is to turn it over to the Government without payment, thus making his invention available for public use without the formality of licensing.

1-8. ***Defensive Publication.*** One who is involved with patents should become aware of a Patent Office procedure placed into effect in May 1968. The new procedure, called "defensive publication," permits briefs of new inventions to be published in the United States Patent Office *Official Gazette.*

1-9. If an inventor chooses this alternative, instead of filing for a patent under regular procedures, he will not get full patent rights. He must waive his rights to royalties, but he is assured that no one else will get a patent for this invention unless his published statement is successfully challenged within five years.

1-10. Defensive publication has another advantage: it becomes effective within weeks of filing. Big companies, seeking protection rather than royalties, are expected to benefit; individual inventors looking for royalties are not.

1-11. The Patent Office was expected to gain the most. It estimated that Defensive Publications would cut its workload by ten percent of the publications received each year. Statistics, however, seem to indicate that the use of the Defensive Publication is not as widespread as originally hoped.

1-12. ***Patent Policy in Government Contracting.*** The present patent policy in Government contracting has evolved from many years of controversy between Government and industry, as well as within the Government itself. The question has concerned the extent of rights to inventions the Government should acquire when it participates in the sponsorship of research and development with patents forthcoming. In its most usual form, the issue involves the question of whether the Government should obtain a license, or obtain title, to an invention developed by a contractor under conditions of sponsorship. Obtaining a license would imply that a contractor would be permitted to obtain a patent and market the invention as though it were an ordinary commercial item. At the same time, he would grant the Government a royalty-free "license" to use the invention. By obtaining title to the invention, the Government would own the patent, and could make it available to the public. On October 12, 1963, President Kennedy issued a memorandum which established the Patent Policy of the Government (28 Federal Register 10943). This was revised on August 23, 1971 when President Nixon issued a Statement of Government Patent Policy (36 Federal Register 16887, August 26, 1971). That policy establishes various categories that are afforded different patent rights treatment.

1-13. These various categories are defined for other than small business firms and nonprofit organizations by DAR 9-701.2 and FPR 1-9.107-3, as follows:

(a) The Government shall normally acquire or reserve the right to acquire the principal or exclusive rights throughout the world in and to any inventions made in the course of or under a contract when:

(i) a principal purpose of the contract is to create, develop, or improve products, processes, or methods which are intended for commercial use (or which are otherwise intended to be made available for use) by the general public at home or abroad, or which will be required for use by governmental regulations; or

(ii) a principal purpose of the contract is for exploration into fields which directly concern the public health, public safety, or public welfare; or

(iii) the contract is in a field of science or technology in which there has been little significant experience outside of work funded by the Government, or where the Government has been the principal developer of the field, and the retention of exclusive rights at the time of contracting might confer on the contractor a preferred or dominant position; or

(iv) the services of the contractor are:

(A) for the operation of a Government-owned research or production facility; or

(B) for coordinating and directing the work of others. In exceptional circumstances, the contractor may retain greater rights than a nonexclusive license at the time of contracting when the Secretary or his designee determines that such action will best serve the public interest. Greater rights may also be retained by the contractor after the invention has been identified when it is determined that the retention of such greater rights is consistent with the intent of this paragraph (a) and is either a necessary incentive to call forth private risk capital and expense to bring the invention to the point of practical application or that the Government's contribution to the invention is small compared to that of the contractor. When an identified invention made in the course of or under the contract is not directly related to a principal purpose of the contract, greater rights may also be retained by the contractor under the criteria of (c) below.

(b) In other situations, where the purpose of the contract is to build up existing knowledge or technology to develop information, products, processes, or methods for use by the Government, and the work called for by the contract is in a field of technology in which the contractor has acquired technical competence (demonstrated by factors such as know-how, experience, and patent position) directly related to an area in which the contractor has an established nongovernmental commercial position, the contractor shall normally retain the principal or exclusive rights throughout the world in and to any resulting inventions.

(c) When the commercial interests of the contractor are not sufficiently established to be covered by the criteria specified in (b) above, the allocation of rights shall be made by the contracting officer after the invention has been identified, in a manner deemed most likely to serve the public interest as

expressed in this policy, taking particularly into account the intentions of the contractor to bring the invention to a point of commercial application and the guidelines of (a) above. However, the Secretary or his designee may prescribe, by regulation, special situations where the public interest in the availability of the inventions would best be served by permitting the contractor to retain at the time of contracting greater rights than a nonexclusive license.

(d) In the situations specified in (b) and (c) above, when two or more potential contractors are judged to have presented proposals of equivalent merit, willingness to grant the Government principal or exclusive rights in resulting inventions will be an additional factor in the evaluation of the proposals.

(e) When the principal or exclusive rights in an invention remain in the contractor, he should agree to provide written reports at reasonable intervals, when requested by the Government, on the commercial use that is being made or is intended to be made of inventions made under Government contracts.

(f) When the principal or exclusive rights in an invention remain in the contractor, unless the contractor, his licensee, or his assignee has taken effective steps within 3 years after a patent issues on the invention to bring the invention to the point of practical application or has made the invention available for licensing royalty-free or on terms that are reasonable in the circumstances, or can show cause why he should retain the principal or exclusive rights for a further period of time, the Government shall have the right to require the granting of a nonexclusive or exclusive license to a responsible applicant(s) on terms that are reasonable under the circumstances.

(g) When the principal or exclusive rights to an invention are retained by the contractor, the Government shall have the right to require the granting of a nonexclusive or exclusive license to a responsible applicant(s) on terms that are reasonable in the circumstances (i) to the extent that the invention is required for public use by governmental regulations, or (ii) as may be necessary to fulfill health or safety needs, or (iii) for other public purposes stipulated in the contract.

(h) When the principal or exclusive rights to an invention remain in the contractor, the Government shall normally acquire:

(i) at least a nonexclusive, nontransferable, paid-up license to make, use, and sell the invention throughout the world by or on behalf of the Government of the United States (including any Government agency) and States and domestic municipal governments, unless the Secretary or his designee determines that it would not be in the public interest to acquire the license for the States and domestic municipal governments; and

(ii) the right to sublicense any foreign government pursuant to any existing or future treaty or agreement if the Secretary or his designee determines it would be in the national interest to acquire the right; and

(iii) the principal or exclusive rights to the invention in any country in which the contractor does not elect to secure patent.

(i) When the principal or exclusive rights in an invention are acquired by the Government, there normally will be reserved to the contractor a revocable, nonexclusive, royalty-free license for the practice of the invention throughout the world, the right to revoke such license being reserved in order to grant an exclusive license when it is determined that some degree of exclusivity may be necessary to encourage further development and commercialization of the invention. When the Government has a right to acquire the principal or exclusive rights to an invention and does not elect to secure a patent in a foreign country, the contractor may be permitted to retain such rights in any foreign country in which he elects to secure a patent, subject to the Government's rights set forth in (h) above.

(j) Nothing herein shall be construed to confer immunity upon any person from the antitrust laws or from a charge of patent misuse, and no person shall be immune from the operation of State or Federal law by reason of the retention and use of rights set forth herein.

1-14. The "Memorandum and Statement of Government Patent Policy" (published in the Federal Register, Vol. 36, No. 16.887, August 26, 1971) which was issued by President Nixon appears to agree in principle with President Kennedy's 1963 Memorandum (28 Federal Register 10943, October 12, 1963) while expanding some of the patent philosophy. The DOD and other Federal Agency policy is a reflection of this memorandum. In addition, it states:

> Section 2. Under regulations prescribed by the Administrator of General Services, Government-owned patents shall be made available and the technological advances covered thereby brought into being in the shortest time possible through dedication or licensing, either exclusive or nonexclusive, and shall be listed in official Government publications or otherwise.

1-15. In 1980, Patent Rights Under Contracts Involving Research and Development with Small Business Firms and Nonprofit Organizations, a new law, was created with respect to inventions made in the performance of work under a contract or subcontract entered into by or for the benefit of the Government with small business firms and nonprofit organizations. This work was to be performed within the United States under a contract or subcontract for experimental, developmental, or research tasks.

1-16. Public law 96-517 (35 USC 200 *et seq.*), December 12, 1980, governs the distribution of rights in inventions made by small business firms and nonprofit organizations under funding agreements with Federal agencies. This act takes precedence over any other acts which would require a disposition of rights in subject inventions of small business firms or nonprofit organizations in a manner inconsistent with the new act. Additionally, the new act will take precedence over any future act unless the future act cites the new act and provides that it will take precedence. DAR 9-702.1, effective 1 July 1981, implements this act and will be applicable to all contracts with small business firms and nonprofit organizations executed on or after that date which are to be performed within the United States. This DAR paragraph may also be made applicable by mutual agreement to any subject inventions which are "made" on or after 1 July 1981, in the performances of contracts which were awarded prior to 1 July 1981, to small business firms or nonprofit organizations, unless prohibited by law.

1-17. Each contract awarded to a small business firm or nonprofit organization, which is to be performed in the

United States, its possessions, or Puerto Rico, and has as a purpose the performance of experimental, developmental, or research work, shall contain the Patent Rights (Small Business Firm or Nonprofit Organization) (1981 JUL) clause set forth in DAR 7-302.23(h), except that the contract may provide otherwise:

(1) when the contract is for the operation of a Federally Funded Research and Development Center or a Government-owned production facility;

(2) in exceptional circumstances when it is determined by the Secretary that restriction or elimination of the right to retain title to any subject invention will better promote the policy and objectives of chapter 38 of Title 35 of the United States Code; or

(3) when it is determined by a Government authority which is authorized by statute or executive order to conduct foreign intelligence or counterintelligence activities that the restriction or elimination of the right to retain title to any subject invention is necessary to protect the security of such activities.

1-18. To qualify for the Patent Rights (Small Business Firm or Nonprofit Organization) clause, the small business firm or nonprofit organization must state in writing that it qualifies as a small business firm or nonprofit organization as defined in DAR 9-702.2(f) and (g).

1-19. ***Minimum Rights Given to Government Contractor.*** Paragraph (e) of the Patent Rights clause in DAR 7-302.23(h) specifies the minimum rights retained by the contractor in subject inventions. When the Federal Government acquires title to a subject invention, the contractor will retain a revocable, nonexclusive, royalty-free license throughout the world. The contractor's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the contractor is a part; and includes the right to grant sublicenses of the same scope to the extent the contractor was legally obligated to do so at the time contract was awarded. The license is transferable only with the approval of the contracting officer except when transferred to the successor of that part of the contractor's business to which the invention pertains.

1-20. The contractor's domestic license may be revoked or modified to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with departmental licensing regulations. This license will not be revoked in that field of use or the geographical areas in which the contractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. Before revocation or modification of the license, the contracting officer will furnish the contractor a written notice of intention to revoke or modify the license, and the contractor will be allowed 30 days (or such other time as may be authorized by the contracting officer for good cause shown by the contractor) after the notice to show cause why the license should not be revoked or modified. The contractor has the right to appeal, in accordance with the departmental licensing regulations, any decision concerning the revocation or modification.

1-21. The patent rights clause in DAR 7-302.23(h) will be included in all subcontracts, regardless of tier, with small business firms and nonprofit organizations having as a purpose of the subcontract the conduct of experimental, developmental, or research work within the United States. All subcontracts will include one of the patent rights clauses required by DAR 9-701. Contractors will not use their ability to award subcontracts as economic leverage to acquire rights for themselves in the inventions resulting from subcontracts.

1-22. Publication of information disclosing an invention by any party before the filing of a patent application may create a bar to a valid patent. When the contractor intends to file patent applications, the Government should use reasonable efforts to comply with any written request to restrict its publication of information disclosing the invention in order to protect the patent rights in the invention. The contractor must specify the reports and documents to be restricted and the period within which the patent application will be filed. As provided in 35 USC 205, Federal agencies are authorized to withhold information disclosing any subject invention in which the Federal Government owns or may own a right, title, or interest (including a nonexclusive license), for a reasonable time in order for a patent application to be filed.

1-23. The contracting activity may require the contractor to submit periodic reports on the utilization of a subject invention, or on efforts at obtaining utilization, that are being made by the contractor or its licensees or assignees. Non-use of a patent by the contractor may allow the Government to license the use of that patent to a third party in order to obtain public benefit. This "March-in Right" of the Government is established by 35 USC 203 and paragraph j of DAR Clause 7-302.23(h).

1-24. There appears to be a growing tendency in Congress to allow large businesses title to inventions developed under Federal research and development contracts. This would appear to correspond with some of the rights small business firms and nonprofit organizations presently have under Public Law 96-517 (December 12, 1980). On November 17, 1981, the House Science and Technology Committee approved of House Bill HR 4564, which is an initial step in accomplishing this legislation.

1-25. The purpose of the Authorization and Consent clause is to provide continuity of contract performance. It is readily conceivable that a patent infringement may result in a lawsuit with an injunction obtained against an infringer. In order to prevent delay of work on a Government contract, should such a situation arise, the Authorization and Consent clause is used to provide "authorization and consent" for a contractor to use any invention that was patented by others in the United States. In the event of an infringement, the patent owner's only legal remedy is to bring a suit for damages against the Government in the Court of Claims. The owner is thus assured of compensation for the Government's use of his invention, should his claim be a just one. The Authorization and Consent Clause for Supplies or Services is described in DAR 9-102.1. The Authorization and Consent Clause for Research and Development is described in DAR 9-102.2.

1-26. ***Patent Indemnity.*** Authorization and consent to the use of patented inventions does not mean that the Government necessarily accepts final liability for a patent infringement in all cases. Such liability may be shifted to the contractor if a Patent Indemnity Clause is included in the contract. This clause provides for the contractor to reimburse the Government

for claims paid due to patent infringement. The types of contracts that may include this clause are described in DAR 9-103. Generally, where the contractor performs work or provides supplies which are unique to the Government, the Government will assume the risk of infringement and omit the Indemnity Clause. Conversely, where the items are of "standard commercial" nature and have normally been sold or offered for sale to the public, the clause is generally included. The Patent Indemnity Clause used in Formally Advertised Contracts is set forth in DAR 9-103.1. The clause applicable to Negotiated Contracts is given by DAR 9-103.3.

1-27. In the event that it is desirable to waive one or more specified United States patents from the Patent Indemnity Clause in DAR 9-103.1, authority shall first be obtained from the Secretary concerned, or his authorized representative. The Waiver of Indemnity Clause of DAR 9-103.4 shall then be included in the contract.

1-28. ***Special Contracts.*** Department of Defense agencies may place unique types of contracts which are required to contain special patent clauses. Some special contracts and related clauses which are contained in DAR are: (1) Contracts to be performed outside the US (9-701.6); (2) Atomic energy contracts (9-701.7); (3) Contracts relating to space (9-701.9); and (4) Contracts placed for other Government Agencies (9-701.8). The selection of various Patent Rights Clauses is also shown by Federal Procurement Regulations (FPR) 1-9.107.4, 5, and 6 for domestic contracts. Clauses for foreign contracts are discussed by FPR 1-9.107.7.

1-29. A holder of a patent may grant another person the right to make, use, or sell the patented invention. This grant of "license" is normally paid for in the form of a "royalty." Government contractors frequently are licensees of patents governing items or processes used by the contractor while performing work on a Government contract. The royalties paid are normally passed on to the Government as part of the price. It is conceivable, however, that the Government may have already acquired a license and other rights to an invention. In this case, payment of royalty charges would be improper or inconsistent. It is also conceivable that excess or exorbitant royalty payments or payments on invalid patents may be charged. Therefore, to control these payments, the Government must determine whether royalties, anticipated or paid, are reasonable and proper in accordance with the Government's rights in the particular invention. This is accomplished through the use of a "Reporting of Royalties" provision in contracts requiring royalty payments. The provision to be used is set forth in DAR 9-110. Procedures for refund of royalties to a contractor or for adjustment of overpayment of royalties, are contained in DAR Sections 9-111 and 9-112.

1-30. Statements of Government Patent Policy by Presidents Kennedy and Nixon provide that every appropriate effort should be made to realize for the Government and the public the benefit of inventions and discoveries resulting from experimental contracts and from research and development contracts. "It is important that the Government be in a position to know and exercise its rights and to defend itself against unjustified claims and suits for patent infringement." Because of the complex, technical nature of patents, legal counsel must be depended upon for assistance in resolving problems of this nature.

1-31. There are several reasons why the contractor must submit invention disclosures, as well as other notices and reports. First, the invention made under a contract must be identified. Second, the Government needs information to decide how to administer its rights. Furthermore, legal and technical documents are needed to confirm Government licenses or to file and prosecute patent applications.

1-32. The Administrative Contracting Officer (ACO) is responsible for insuring the submission of these reports by the contractor. The ACO sends any such reports to the Patent Counsel of the procuring activity. If the required reports are not received, the ACO may authorize the disbursing office to withhold payment in accordance with the specific clauses involved.

1-33. ***The Patent Rights Clause.*** The Patent Rights Clause (DAR 9-107.2 and FPR 1-9.107.5) permits withholding of payments until the contractor furnishes specified reports and information. Five percent of the contract amount (or under a cost-reimbursement contract, the estimated cost) or $50,000, whichever is less, may be withheld at any time during the contract if the contractor fails to furnish invention disclosures or interim reports of inventions.

1-34. The receipt of a patent creates only a presumption of validity, not a guarantee of it. As a result, every attempt of a patent owner to extract a large royalty from the Government should be met by a thorough search of the patent to establish whether it is valid. Patent examiners are overworked, understaffed, and susceptible to the oft times brilliant verbiage put forth by the patent applicant's attorneys. As a reuslt, some patents are issued which are not deserving of any protection. Study of the examiner's files by efficient attorneys may provide a bonanza of free creations.

1-35. It should also be recognized that some contractors, bound by contractual commitments requiring the submission of patent information, sometimes fail to comply with these requirements. In order to enforce the maximum Government contract rights, a policy of close surveillance must be maintained. Blind adherence to the invention disclosures provisions of DAR may be insufficient to yield to the Government that to which it is entitled. Other devices, such as withholding of payments, are frequently of little effect in getting delivery of patent information from "slow" contractors. Tight control of a contractor through enforcement of the Government's contract rights may be the only thing the contractor understands when it comes to parting with intangibles.

2. Trade Secrets

2-1. A trade secret can be defined as a property right in information which is kept secret by the owner for the purpose of commercial advantage.

2-2. **Ownership.** The owner of a trade secret has a legal right not to have the secret made public by fraud, theft, a conspiracy, or other unlawful means. Relief may be based on the theory of "unfair competition" for which a civil suit for damages may be brought. An injunction may also be obtained as a matter of "equity." The owner of a trade secret may disclose his secret in confidence to another by means of an express or implied contract under which the other agrees to limit his use of the secret. If the secret is compromised, relief

may be sought by the owner's suing for breach of contract as well as obtaining an injunction in an action in equity. However, if the owner of a trade secret discloses it in other than secrecy, it constitutes public disclosure and the secret is lost; hence the protection is lost.

2-3. In recent years, trade secrets have assumed an important role in the field of "legally protectable ideas." Industry has shown a tendency to rely less upon patents; instead, it prefers to depend whenever possible upon the trade secret concept, relying on common law for protection. The reason for this is primarily based upon the stiffening of the standard of inventiveness required by the courts and the long delays frequently encountered between the filing of a patent application and subsequent granting of a patent. Contractors involved in Government contracting frequently prefer to keep their ideas secret. It is in this area of trade secrets that the Government has had considerable difficulty with industry regarding the Government's rights to those original ideas which may have originated under Government contracts. It is in this area that the buyer and contract administrator will frequently become uncomfortably involved.

2-4. An employee of the United States who publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties, which information concerns or relates to trade secrets, shall be fined not more than $1,000, or imprisoned not more than one year, or both. He shall also be removed from office or employment (18 USC 1905).

3. Technical Data

3-1. DAR Section 9-201 sets forth the following definitions of data and rights to data:

(a) Data means recorded information, regardless of form or characteristic.

(b) Technical Data means recorded information, regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental or engineering work; or be usable or used to define a design or process or to procure, produce, support, maintain, or operate materiel. The data may be graphic or pictorial delineations in media such as drawings or photographs; text in specifications or related performance or design documents; or computer print-outs. Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identifications and related information, and documentation related to computer software. Technical data does not include computer software or financial, administrative, cost and pricing, and management data, or other information incidental to contract administration.

(c) Limited Rights are the rights to use, duplicate, or disclose technical data in whole or in part, by or for the Government, with the express limitation that such technical data shall not, without the written permission of the party furnishing such technical data, be (a) released or disclosed in whole or in part outside the Government, (b) used in whole or in part by the Government for manufacture, or in the case of computer software documentation, for reproduction of the computer software, or (c) used by a party other than the Government, except for:

(i) emergency repair or overhaul work only, by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work, provided that the release or disclosure thereof outside the Government shall be made subject to a prohibition against further use, release or disclosure; or

(ii) release to a foreign government, as the interest of the United States may require, only for information or evaluation within such government or for emergency repair or overhaul work by or for such government under the conditions of (i) above.

(d) Unlimited Rights are the rights to use, duplicate, or disclose technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so.

3-2. **Significance.** The importance of technical data should not be minimized. Data are the physical embodiment—the documentation—of technical information. In the area of research and exploratory development, it can be forcibly argued that technical information is the end product of research and development. In addition, data are used to reorder, operate, and maintain equipment, as well as to make it possible for new sources of supply to reproduce a given piece of equipment accurately and in large quantities. Technical data, such as details of design or manufacture, can give a contractor a competitive advantage. Public disclosure by the Government would dissipate a contractor's protection of his trade secret under common law thus jeopardizing his competitive position.

3-3. DAR has been revised to reflect the desire of the Department of Defense to maintain the proper climate for the prompt and confident submission of contractors' proposals. DAR Section 3-507 encourages the submission of secret data for evaluation. Government recipients of this information must treat it confidentially even though the contractor may have neglected to place a restrictive legend on the document itself. (See DAR Section 4-913.)

3-4. A congressional subcommittee, in 1960, conducted a study of "Proprietary Rights and Data." The problems presented by industry to the committee are summarized as follows: (a) Delivery of manufacturing data to the Government whereby the contractor subjects himself to the gravest possible consequences caused by the Government, thereby making his trade secrets available to competitors, and (b) The taking without compensation, either by the Government or the prime contractor, of the manufacturer's proprietary data developed by him at great expense over long periods of time.

3-5. A corollary problem involves the amount of data demanded to fulfill a contract. Frequently, excessive amounts of data are "required," but not needed. The scope of this problem is reflected by the staggering amount of data in the possession of various Government Agencies. Each year, the Department of Defense adds about six million pieces of data to its overall inventory. This amounts to an expenditure of approximately $2 billion for technical data. In sheer volume alone, the additional data presents enormous problems of acquisition, storage, cataloging, and retrieval. The first action taken in DOD occurred when the Air Force attacked this problem in 1960 by gathering records on all the data

items of the different Air Force installations and activities. It found that it was using 9,000 different items. These were then spread out on the walls of airplane hangers and categorized, cross-checked, and consolidated until they were whittled down to 300 approved data items.

3-6. This brief exposure to the problems involved in the acquisition of data provides an insight into the Government's dilemma—obtaining just enough data for its needs and at the same time protecting the interests of industry. DAR Section 9, part 2, attempts to provide some of the answers by establishing a requirement for management as well as for negotiation for data. DAR 7-104.9 provides the clauses used to establish rights in data and computer software.

3-7. The Department of Defense tries to manage the entire process of data procurement in a positive manner. (DODI 5010.12)

3-8. The activity which has responsibility for preparing the Contract Data Requirements List shall insure participation by all parties having justifiable data requirements by utilizing a "Data Call" procedure or any other device deemed equally effective.

3-9. Personnel representing program management, engineering, procurement, training, maintenance, operations, supply and other functions shall integrate data requirements in their overall planning. These personnel shall be recipients of the "Data Call," to provide the opportunity for including their data requirements in the contractual document.

3-10. All data listed on DD Forms 1423, Contract Data Requirements List, shall be reviewed for essentiality. Personnel responsible for data management, as well as data requirements review boards, shall be utilized to the fullest extent practical to validate, screen, and integrate requirements for technical data.

3-11. Prior to soliciting proposals or prior to contract award, or both, appointed Technical Data Requirements Review Board(s) shall review for essentiality the contractual data requirements and estimated data prices, when applicable, as well as contract data clauses on all programs estimated to cost the Government $1,000,000 or more; and on other programs where data requirements are significant. Board procedures shall be established, and minutes maintained, by a central focal point. Membership of the Board shall include representation from those functional or organization units which have requested data as reflected on the Contract Data Requirements List (DD Form 1423). Board members shall validate data requirements in their areas of specialty or function, and assist the Chairman in integrating technical data requirements. The rationale for the deletion, addition, or modification of data requirements shall be made a matter of written record. In all instances, a thorough review of each data requirement is mandatory; and so is a review of the consolidated (total) data requirement for each contract to insure that no duplicate or unnecessary overlapping of data requirements exists. Pre-contract award reviews for essentiality on programs of lesser amounts shall be performed by the personnel responsible for data management, or by an individual or organizational element in a position to evaluate data requirements objectively.

3-12. Deferred ordering of data, deferred delivery, and deferred requisitioning shall be employed to the maximum practical extent in order to preclude the procurement of unnecessary data and the handling of revisions between the time of the data preparation and the time it is actually required for use.

3-13. Data shall be purchased in the contractor's format wherever practicable. The cost savings to be utilized from using the contractor's format shall be determined and evaluated prior to procuring data in a specified Government format.

3-14. **Identification.** All deliverable data requirements shall be listed on the Contract Data Requirements List. This list shall constitute the sole list of data requirements which the contractor will be obligated to deliver under the contract, with the exception of that data specifically required by standard DAR clauses.

3-15. The completed Contract Data Requirements List shall be made a part of research, development, engineering, and production contracts, military interdepartmental purchase requests (MIPRs), and all other contracts or agreements requiring deliverable data items. This list shall be signed by the responsible preparing and approval authorities.

3-16. Data products (items) included in the Contract Data Requirements List shall be selected from an Authorized Data List. Data requirements other than those permitted by an Authorized Data List will be included only through approval procedures of the DOD component. The Data Item Description, DD Form 1664, for each data product listed on the Contract Data Requirements List shall be provided with contracts, or otherwise made readily available to contractors, to insure the complete understanding of the requirement by the contractor.

3-17. Data Item Descriptions will be prepared on DD Forms 1664 for use in the DOD or DOD component Authorized Data Lists.

3-18. **Acquisition.** Where a requirement has been established for data to be used for procurement, such data shall be ordered as a line item on the Contract Data Requirements List (DD Form 1423). The procurement data package should include all data necessary for procurement of the item or items to which it pertains, e.g., engineering drawings, specifications, manufacturing information essential to production, and test procedures.

3-19. It is not intended that unnecessary manufacturing data such as flow charts, process sheets, tool designs, etc., be bought to support competitive procurement. However, there are cases where it may be necessary or desirable to make such data available to prospective bidders, to the extent that the Government has unlimited rights therein. If such need is established, the contract shall specifically reserve the Government's right to call for the data. Data of this type normally need not meet Government specifications, but should be provided in existing format at no more than the price of reproduction.

3-20. Special attention shall be devoted to the contractual requirements and procedures for assuring the adequacy of procurement data packages. Withholding of payment provisions, not exceeding ten percent of the contract price, should be incorporated into the contract. This could be invoked when contractors fail to fulfill data requirements (DAR 9-504).

3-21. Positive controls shall be established and maintained to assure that procurement data packages (and portions thereof) are updated and provided to the activity responsible for subsequent procurement of the items to which the data pertain.

3-22. Only that data shall be ordered at the time of placing a contract as has been determined to be required. Ordering of additional data and/or revisions shall be negotiated as necessary.

3-23. If it is possible to identify data which may be ordered at a later date, the contractor shall be so advised in order to assist his efficient planning.

3-24. Delivery of data shall be scheduled to be in phase with a requirement for a specific and planned use of the technical data.

3-25. When a delivery date cannot be determined at the time of ordering, delivery shall be deferred. In order to reserve the right to defer delivery of data which have been ordered, the appropriate clause set forth in DAR, Section 7-104.9(d) shall be inserted in all contracts in which the deferred delivery procedure is to be used.

3-26. DOD components shall specify that a contract shall serve as a data repository through the development and production phases of a contract, to the maximum extent practicable. When the contractor serves as the repository of engineering data, which may extend for the life of the materiel, arrangements shall be made with the contractor to have copies of data delivered on an "as needed" basis.

3-27. For many years the concept of "Proprietary Data" used by industry and the Government proved difficult to administer. It was a legal concept which required the contracting officer to make legal determinations as to whether the contractor had the "proprietary rights" that he claimed, and whether it could be supported in the courts. Also, the contractor tended to include a mass of material within his own definitions of proprietary data. Beginning in 1964, the proprietary data concept was discarded and the private-public expense concept was initiated.

3-28. In place of the "proprietary" test, the Department of Defense now considers the question of "who has paid for the development cost." The reasoning behind this is that a contractor financing the cost out of his own funds is not expected to furnish data that will permit someone else to manufacture a similar product using that data, unless he gives his consent and receives compensation. The contractor is therefore protected from being required to furnish to the Government unrestricted rights in design specifications and manufacturing data pertaining to items, components, or processes which he developed at his own expense, and which will permit his competitors to turn out a competitive item.

3-29. The private-public expense concept is relatively conclusive, since it may be best applied by asking "has the Government directly paid any of the costs for the development of the item, component, or process disclosed by the data?" If the answer is yes, then the Government gets unlimited use of the data. Data are developed at private expense only when the development is completed without any contribution whatsoever of money, time or materials (by the Government).

3-30. For items, components, and processes to be developed at private expense, it is necessary that the Government not participate directly in the project's financing, even though there may be some control over how the money is spent. An example might involve a contractor whose total business is with the Government. All his independent research may be indirectly financed by the Government through accounting allowance of costs to overhead or burden accounts. "It is Department of Defense policy that the Government acquires no rights in data when the data depicts an item, component, or process that was developed under the contractor's independent research and development program, even though the cost of the program is paid for at least in part by overhead charges to Government contracts." Where there is cost sharing on a research and development project, the Government plainly gets unlimited rights since the direct injection of Government funds into the project is clear.

3-31. **Classification.** Data rights may be classified as either unlimited or limited.

3-32. ***Unlimited Data Rights.*** These rights accrue automatically if data are developed at public expense and identified as a contract requirement. They may also be acquired outright by specific acquisition. What the Government obtains, in either instance, is the right to use the data for any Government purpose whatsoever. This includes follow-on use with other contractors. Hence, the Government is not tied to the creator of the data.

3-33. DAR 9-202.2(b) lists in detail the six types of data to be delivered with unlimited rights when specified in any contract as being required for delivery or subject to order under the contract:

(1) technical data resulting directly from performance of experimental development, or research work which was specified as an element of performance in a Government contract or subcontract;

(2) technical data necessary to enable others to manufacture end items, components and modifications, or to enable them to perform processes, when the end items, components, modifications or processes have been, or are being developed under Government contracts or subcontracts in which experimental, developmental or research work was specified as an element of contract performance, except technical data pertaining to items, components or processes developed at private expense;

(3) technical data prepared or required to be delivered under any Government contract or subcontract and constituting corrections or changes to Government-furnished data;

(4) technical data pertaining to end items, components or processes prepared or required to be delivered under any Government contract or subcontract, for the purpose of identifying sources, size, configuration, mating and attachment characteristics, functional characteristics and performance requirements ("form, fit and function" data, e.g., specification control drawings, catalog sheets, envelope drawings, etc.);

(5) manuals or instructional materials prepared or required to be delivered under a Government contract or subcontract for installation, operation, maintenance or training purposes; and

(6) technical data which is in the public domain or has been or is normally released or disclosed by the contractor or subcontractor without restriction or further disclosure. "In the public domain" means available to the public without copyright or other restriction of any kind.

3-34. ***Limited Data Rights.*** The Government may need certain unpublished technical data pertaining to items, components or processes developed at private expense. These data may be acquired with limited rights in accordance with DAR 7-104.9(a), paragraph (b)(2):

Those portions of this technical data indicated as limited rights data shall not, without the written permission of the above Contractor, be either (a) used, released or disclosed in whole or in part outside the Government, (b) used in whole or in part by the Government for manufacture or, in the case of computer software documentation, for preparing the same or similar computer software, or (c) used by a party other than the Government, except for: (i) emergency repair of overhaul work only, by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work, *provided* that the release or disclosure hereof outside the Government shall be made subject to a prohibition against further use, release or disclosure; or (ii) release to a foreign government, as the interest of the United States may require, only for information or evaluation within such government or for emergency repair or overhaul work by or for such government under the conditions of (i) above. This legend, together with the indications of the portions of this data which are subject to such limitations shall be included on any reproduction hereof which includes any part of the portions subject to such limitations.

This form of data rights should prove less expensive and can result in lower data costs, since the data should remain secret and the Government is tied to the contractor should the need for a follow-on arise.

3-35. DAR 9-202.2 defines the type of data which, if required under contract, will be obtained with limited and unlimited rights. However, the fact that the clause operates as of the time the data are delivered may lead to questions, disputes, and delays in identifying particular data in the unlimited and limited rights categories. DAR 9-202.2(d) provides a procedure for the predetermination of rights in data to help resolve these questions before contracting. The Government and the contractor enter into an agreement incorporated in the contract schedule. Thus, the types of data within the six categories to be furnished with unlimited rights and category are specifically listed and described, either individually or by class.

3-36. DAR 9-502(c) provides for deferring the selection of data specified in a contract until the actual requirements can be determined. This deferred selection procedure is another method of making sure that the Government acquires only needed data. The deferred requisitioning procedure gives the Government an option to specify data to be delivered during contract performance and for two years after termination of the contract or acceptance of all items (other than data), whichever is later (DAR 7-104.9(d)). Reimbursement to the contractor is based either on a prior contractual arrangement or on a negotiated adjustment.

3-37. It is conceivable that, for competitive procurement purposes, the Government may want to acquire unlimited rights to a contractor's "private expense" data. DAR 9-202.2(f) provides a procedure for doing this. It requires that the Head of the Procuring Activity or his designee determine that: (a) a clear need for reprocurement exists, (b) no suitable alternative item, component, or process is available, (c) the data to be purchased are adequate for use by other competent manufacturers, (d) the anticipated net savings to the Government from reprocurement will exceed the acquisition cost of the data and of the rights therein. However, if the economic value of the data to the owner is more than its value to the Government, the Government will not acquire the data with unlimited rights.

3-38. DAR 9-202.2(e) provides that the prime contractor and higher-tier subcontractors will not use their purchasing power as economic levers to acquire rights in data for themselves. The mechanism for doing this is to use the prime contract data clause, unchanged, in the subcontract, thereby providing rights in data to the Government only. The technique is referred to as the "flow down" procedure.

3-39. Another provision in DAR 9-202.2(e) protects subcontractors' rights by providing that subcontractors may transmit data that are subject to limited rights directly to the Government. The purpose of this clause is to protect subcontractors from data disclosure to potential competitors.

3-40. DAR provides that only a authorized restrictive legend may be placed on data delivered with limited rights. The contracting officer may permit the contractor to place the restrictive legend on data within six months of delivery if the contractor can show that the legend was omitted inadvertently, and if use of the legend is authorized by the contract (DAR 9-202.3(d)(2)). Conversely, if the contractor, or a subcontractor, has affixed an overly restrictive legend to data that should have been delivered with unlimited rights, adjusting action is required. When this appears to have happened, the Government policy is to initially treat this data like that with limited rights. A properly directed inquiry is then sent to the contractor to justify the "restrictive legend." The contractor must respond within sixty days, and it must show that the restriction was proper. If this is not done, the Government will obliterate the legend and notify the contractor (DAR 9-202.3(d)(3)).

3-41. When entering into license agreements with others, a contractor must make sure that his licensees are careful not to assess the Government any royalty or license charges at a later date on other Government contracts for the use of data in which the Government already has rights. This obligation applies to contracts with foreign governments that are funded with money from the United States Government, as well as to US Government contracts and subcontracts.

3-42. Failure to receive data in accordance with required schedules can have an adverse effect on logistics, training and other functions for which data are required. Timely delivery is especially important for follow-on competitive procurements. Thus, withholding of payment clauses may be inserted in contracts (DAR 9-504(a) and (b)). The contracting officer may, in many cases, withhold up to 10 percent of the contract price until delivery of the data, unless a lesser amount of the withholding is specified in the schedule. It should be recognized that the withholding of payment is a remedy utilized as a lever in order that a contractor in a breaching state may be encouraged to deliver contracted-for data. This device is of limited value in motivating delinquent contractors.

3-43. DAR 3-507 sets forth procedures for data submitted on a restrictive basis in support of a proposal or quotation. Proposing contractors may mark their proposal data with a legend, as prescribed in DAR 3-507. This will limit the Government's right to use that data for evaluation purposes only. If a contract is awarded to a contractor that has submitted such restricted-use data with its proposal, the contracting

officer will determine whether to attempt to acquire such data and what rights to obtain.

3-44. Procurement and administrative personnel should do their utmost to generate a proper recognition among all Government employees with respect to their obligation to contractors submitting confidential information. Whether data with limited rights, secret information, or disclosures involving pending patents, the contractor ethically and legally is entitled to strictly confidential use by the Government of the documents he submits. Failure to recognize this obligation cannot help but undermine Government objectives.

3-45. A meeting of data experts gave birth to the following list of data "problem areas": (1) misunderstanding of the meaning of terms, (2) misinterpretation by a Government activity or by a prime contractor of their respective obligations and duties under the established policies and procedures, (3) contract language requirements and procedures which make excessive demands for data from prime and subcontractors, (4) requirements for delivery of proprietary data as unlimited rights data if it falls in certain categories, regardless of whether the Government has need for unlimited rights in that data or whether delivered for that purpose, and (5) demands for data or data rights by a prime upon a subcontractor for his own use over and above the requirements of a prime contract under which he is ordering the data. The statements would seem to suggest the solutions to the problems they represent.

4. Copyrights

4-1. A copyright is similar to a patent from the standpoint that it is a grant of a monopoly which gives the author or the creator of an artistic work exclusive right to print, reprint, publish, copy, and sell the copyrighted work. By statute (Title 17, USC), the author is protected, as of January 1978, for the life of the author or creator plus 50 years.

4-2. Subject matter which may be copyrighted includes such things as "the writings of an author, books, periodicals, lectures, dramatic and musical compositions, works of art and their reproduction, scientific drawings or plastic works, photographs, prints and motion pictures." The protection given by copyright laws emphasizes encouragement of continued production of literary and artistic works. An author is able to protect his work from unauthorized reproduction, and is therefore encouraged to produce and publish literary, dramatic, musical and artistic works. It should be noted that the protection afforded by a copyright does not give a monopoly to ideas, but only to the expression of ideas. It is the words, or the way in which the words are put together, or the way an idea is embodied, that is copyrighted.

4-3. Although copyright grants an author a property right, the right is not absolute. The courts have long recognized that the public at large is entitled to make "fair use" of a copyrighted work for certain purposes and within reasonable limits. Under this "fair use" doctrine, liberal quotations may be made from a copyrighted work, but substantial portions may not generally be reproduced. One of the tests applied is the measure of commercial harm that may be suffered by the author.

4-4. **Policy.** The Government's copyright policy may best be described in terms of objectives. First, it seeks to avoid any liability for copyright infringement by unauthorized use of copyrighted material. Second, the rights of private creators or proprietors of copyrighted material are to be respected. Third, when the Government pays for the development of copyrighted material, it should be entitled to at least a royalty-free license for future use of that material.

4-5. These objectives are reflected by the data clauses (DAR 7-104.9). The Basic Data Clause and the Specific Acquisition Clause contain identical provisions about data covered by copyright. Although a contractor may copyright data originated under a Government contract, the Government obtains a royalty-free, nonexclusive and irrevocable license to reproduce, translate, publish and use this data. When data are copyrighted by a third person, the contractor must obtain permission from the owner before this data may be delivered to the Government. The clauses also provide that the contractor report to the Government any notice or claim of copyright infringement on data he provides to the Government.

4-6. Scientists and educators often wish to publish reports of research work performed under Government contracts in books and journals. At times, publishers will not accept such work because they want the exclusive publishing right, at least for a limited time. Since the Government recognizes that publication is vital to scientific advance, it may wish to facilitate such publication. Therefore, it often relinquishes its own publication rights by use of the contract provisions set forth in DAR 9-204.1. These provisions state that the contractor must publish the data for sale within a certain number of months specified in the contract schedule. This period may not exceed twenty-four months after final settlement of the contract. The limitation on the Contractor's rights to publish these data for sale lasts only as long as they are protected by copyright and are reasonably available to the public for purchase.

4-7. Motion pictures, histories, and other works relating to the Department of Defense are provided under defense contracts. The Government desires to retain complete ownership and sale rights in these types of data and thereby control their distribution. The clause containing this provision is found in DAR 7-104.9(e). It is used in contracts for the preparation of movie scripts, musical compositions, sound tracks, translations, and the like. The clause gives the Government sole rights in these data until they are released to the public. The Government obtains a royalty-free, nonexclusive, and irrevocable license, rather than full title to previous data that are incorporated in the works.

4-8. Off-the-shelf purchase by the Government of books and certain other existing works do not require use of a DAR prescribed data clause unless the Government requires the right to reproduce that data.

CHAPTER 13

Labor Law

THIS CHAPTER discusses labor law from five major standpoints. These standpoints deal with basic considerations of labor law, Government labor policy, statutory enactments reflecting Government labor policy, social laws and regulations, and administration. Each of these topics provides valuable information in studying and understanding the principles of Government Contract Law.

1. Basic Considerations

1-1. Among the basic issues to be considered in negotiating a contract are wages, fringe benefits, working hours, working conditions, and work shutdowns or strikes; and these are just a few of the issues.

1-2. Active administration of a Government contract demands major emphasis from the administration team (contractor as well as Government) on timely delivery of the product or service. A well-structured contract and a best contractor effort may fail to provide the required items when needed if a labor dispute shuts down production.

1-3. Negotiations between labor and management over higher wages, more fringe benefits, and better working conditions, have become a way of life as the cost of living rises. When negotiations break down, tempers flare or disputes erupt. Labor's most effective weapon, the strike, may be used. Whether the strike is well organized or of the "wildcat" variety, it may delay the contract effort. Since strikes impede the Government's logistics effort, it is in the Government's best interest to encourage good management-labor relations in order to avoid strikes where possible and to encourage prompt settlement when they do occur. At all times, however, the limitations of the role of the contract administrator should be remembered.

1-4. **The Role of the Government Contract Administrator.** The DOD contracting officer's role of non-intervention in a labor dispute is clearly delineated in the Department of Defense policy statement: "Military Departments shall remain impartial in, and refrain from, taking a position on the merits of any labor dispute, and shall refrain from the conciliation, mediation or arbitration of any such dispute." They shall, however, act to avoid or minimize the impact of labor disputes on important procurement by assuring, to the extent practicable, that the parties to the dispute utilize all available methods for resolving the dispute, including the services of the National Labor Relations Board, Federal Mediation and Conciliation Service, National Mediation Board, and other appropriate Federal, state, local, or private agencies.

1-5. DAR now requires that the National Office of the Federal Mediation and Conciliation Service be advised of proposed contract awards, or increases in existing contracts, totaling $5 million or more where an actual or imminent work stoppage exists. (DAR 12-101.1(f)).

1-6. Perhaps one of the areas where the utmost in restraint is required may be identified as inadvertent involvement. This occurs when a Government employee, attempting to acquire information to assist in settling a dispute, has his actions or statements distorted by one of the parties. The actions of the individuals may be innocent and well-meaning but, nevertheless, harmful.

1-7. ***Duty of Production.*** Contract fulfillment is the primary goal of the Contracting Officer. In the event of a threatened work stoppage due to a labor dispute, the Contracting Officer will assist the designated Department of Defense agency, according to departmental procedures, in obtaining voluntary agreements between management and labor.

1-8. It is not safe to assume that all organizations are the same. DCAS provides assistance from the regional office. while certain sensitive organizations have resident experts. Other Departments or Agencies may rely on the Department of Labor.

1-9. Although direct participation by a Government representative in settling a labor dispute is generally prohibited, certain specific actions are required in order to minimize the impact to the Government. In these actions the contracting officer, or administrator, serves as observer, reporter, and staff assistant to the responsible Government agencies.

1-10. This is particularly true in base procurement, where the Contracting Officer or his representative is required to visit the base job site on construction and services contracts. He is required to check to see that safe working conditions are maintained, and that prevailing area wage rates are paid, based on the actual job being performed and the hours expended.

1-11. ***Determination of Excusable Delay.*** The Government should always be alert to possible delays caused by a labor dispute. Although a delay may be excusable because of such a dispute, the contracting officer determines if the labor dispute or strike was reasonably avoidable. A question frequently asked is, "Has the contractor or subcontractor made a reasonable effort to prevent or to end the strike?" If the strike involves an unfair labor practice by the union, the contractor should file a charge with the National Labor Relations Board to seek a court injunction to prevent the strike. If the strike has started, the contractor or subcontractor should seek assistance from the appropriate Government agencies or from private organizations for the settlement of disputes.

Contractors should never be permitted to create a labor dispute in order to cover up or mask delays or other deficiencies.

1-12. The Government should attempt to determine if the parties do want to bargain legitimately, or if the union called the strike for other reasons. The Contracting Officer must make a careful evaluation of facts to determine whether the strike is legitimate. In all labor disputes, the contracting officer impresses upon the contractor that he will be held accountable for all delays that are reasonably avoidable. At the same time, the contracting officer is still required to stay aloof on the dispute issues; and he must avoid exerting pressure or the appearance of pressure on the contractor.

1-13. ***Reporting of Disputes.*** Any labor dispute affecting defense procurement will be reported by the Contract Administration Office (CAO). The CAO shall obtain and transmit information relating to potential or actual labor disputes which may interfere with performance of any contract within his cognizance. Labor disputes should be reported on DD Form 1507, Work Stoppage Report. An initial report should be submitted when a work stoppage due to a labor dispute is imminent or when such work stoppage occurs, and thereafter when a significant change occurs in the dispute situation (DAR 12-101.3).

1-14. ***Removal of Items from a Plant.*** When items in a struck plant are urgently needed by the Government, the contracting officer, or his representative, has an additional duty to perform. This duty involves the movement and removal of items from the plant. The policy of the Department of Defense is to avoid the use of force or the appearance of force, and to avoid incidents which may antagonize labor or management. The materials affected may be finished items, partially finished items, and raw materials which were produced or obtained for this Government contract. DAR, Section 12-101.5, provides specific procedures to be used in removal of items from a plant.

2. Government Labor Policy

2-1. There are a number of factors that must be considered in formulating Government labor policy. These deal with economics, social welfare, social protection, and other factors that are part of the free enterprise system.

2-2. **Formulation.** The Government's policy with respect to labor relations may be determined by reviewing the purposes behind the many and varied labor laws and regulations. Formulation of the policy also involves consideration of economics, social welfare of the individual, and social protection of institutions. Foremost is the philosophy of a high standard of living, provided for by an economic framework which best meets the political needs of our society. The free enterprise system has, from the beginning of our national independence, been promoted. Business activity has been considered a private matter between privately owned and operated businesses and the individual worker. To this end, legislation has taken the form of broad guidelines within which both industry and labor must function in order to arrive at mutually advantageous terms of employment. However, for various reasons, counterbalancing measures have been deemed necessary in order to provide a much narrower framework of discretion in the areas of working standards and conditions of employment. Legislation designed to prevent some labor and industrial abuses has been enacted, and has dictated the terms under which industry and labor arrive at the working agreement.

2-3. The basic authority for legislative enactments relating to labor-management relations is the commerce clause of the Federal Constitution. The Supreme Court of the United States has decreed that national labor legislation is constitutional to the extent that such measures bear on the question of the free flow of commerce. In a famous case, *Gibbons v. Ogden*, the Supreme Court stated: "The power of Congress over interstate commerce is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution . . ."

3. Statutory Enactments Reflecting Government Labor Policy

3-1. Several Acts provide considerable information concerning Government Labor Policy. These Acts, discussed here in some detail, provide insights on management, national labor relations, public contracts, and other areas of concern.

3-2. **Enactments of General Applicability.** In order to understand the available peace-making machinery at the disposal of the parties to a labor-management dispute, it is helpful to examine both the laws regarding labor-management relations and the Government agencies that could become involved.

3-3. ***National Labor Relations Act (Wagner Act 1935).*** The National Labor Relations Act (NLRA) has been described as the "Magna Carta" of labor. It protects labor's rights to engage in labor organization activity without fear of employer retaliation or discrimination. In addition to encouraging employees to form unions and bargain collectively, the Act specifically prohibits certain unfair labor practices by employers. These practices are summarized as: (1) interference with employee efforts to form or join unions; (2) domination of a labor organization (company union); (3) discrimination in hiring because of union membership; (4) discrimination for filing charges under the act; and (5) refusing to bargain collectively.

3-4. The Act directed the establishment of The National Labor Relations Board (NLRB), with the purpose of administering the provisions of the Wagner Act. The Board consists of five members, appointed for 5 years by the President with the approval of the Senate. Over twenty regional offices are established for convenience of administration. Although violations of the Act are investigated by the Board and orders are issued by the Board, its decisions are not binding on either party to a dispute. Enforcement of its order is accomplished by Board recourse to a Federal court for issue of an enforcing decree or a restraining (cease and desist) order.

3-5. ***Labor Management Relations Act (Taft-Hartley 1947 Act).*** In the post World War II period, widespread strikes and labor union activity caused a change in public opinion. Consumers were frustrated in their desire to obtain commodities. Management complained about the one-sidedness of the NLRA. Consequently, in 1947, the Labor Management Relations Act amended the Wagner Act. The 1947 Act tended to "equalize" the bargaining power of labor and management.

3-6. The significant changes are summarized as follows: (1) an employee's right to join a labor union was protected, as was his right not to join a union; (2) certain activities of unions were regulated—closed shops became illegal, checkoff of dues must have employee's consent, 60 days notice before terminating or renegotiating an agreement (cooling-off period), 30-day notice to the Federal Mediation and Conciliation Service, standards were established for union welfare funds; and (3) labor unions were not to engage in unfair labor practices—secondary boycotts, jurisdictional strikes, and attempts to compel an employer to bargain with a noncertified union were forbidden. In addition, excessive union entry fees, feather bedding, and refusal to engage in collective bargaining were included as union unfair labor practices.

3-7. This Act also set up a Federal Mediation and Conciliation Service. It is an independant agency completely separated from the Department of Labor. Its functions, as described in the Act, are " . . . to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties through conciliation and mediation." Several additional excerpts from the Act further describe its functions:

> (1) The Service may proffer its services in any labor dispute . . . either upon its motion or upon the request of one or more parties to the dispute, whenever in its judgement such dispute threatens to cause a substantial interruption of commerce.
>
> (2) If the Director is not able to bring parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to see other means of settling the dispute without resort to strike, lockout, or other coercion. It is noted that the Service cannot force or compel either party to see other means.
>
> (3) The Service was expected to get involved only in major disputes. In the settlement of grievances, or minor disputes, the Service was directed to make its conciliation and mediation services available in the settlement of such grievance only as a last resort and in exceptional cases.

3-8. Additional sources of relief are available. For example, the labor contract may contain a specific arbitration agreement to break negotiation stalemates with individuals or organizations designated as arbitrators in the labor contract. In the absence of such a clause in the contract, if arbitration is agreed to by both parties, private or public conciliation and mediation services may be called upon to select arbitrators of the dispute (such as the American Arbitration Association).

3-9. If the dispute or grievance involves a contractor violation of any Federal statute covering hours, wages, or working conditions and similar socially-oriented legislation, the contracting officer notifies the Department of Labor. The contracting officer should be alert to the possibility of a default termination in the event of a violation.

3-10. **Enactments Peculiar to Government Contracts.** Knowledge of specific laws concerning contract labor standards is essential. These laws are designed to achieve certain sociological ends prescribed by the Congress; and the Government contract may be used to achieve these ends.

3-11. ***Walsh-Healey Public Contract Act (1036) 41 USC 35-45.*** This Act protects employees of contractors who sell supplies to the Government in contracts exceeding $10,000. The contractor must be a manufacturer or regular dealer of the supplies to qualify for a contract, must pay minimum wages determined by the Secretary of Labor, must pay one and one-half times basic wage rate for work over eight hours per day or forty hours per week, must employ no minors or convict labor, and allow no work under unsanitary, hazardous, or dangerous conditions. The Act does not apply to subcontractors, however. In addition, the following transactions are exempt from the Act:

> (1) purchases of generally available commercial items, negotiated under DAR 3-202,
>
> (2) purchases of perishables, including dairy, livestock, and nursery products; and,
>
> (3) purchases of agricultural or farm products processed for sale by the original producers.

3-12. These terms are made part of the contract by using the DAR Clause, "Walsh-Healey Public Contracts Act" (DAR 7-103.17). Violations must be reported to the Department of Labor, the primary enforcing agency. Penalties for violation of the Act may result in: (1) termination for default with excess charges of repurchase levied against the contractor (41 USC 36); (2) payment for liquidated damages to the Government in the amount of $10.00 per day of each day that a contractor knowingly employs a child or a convict on the contract (41 USC 36); and (3) placement of the contractor on the list of Debarred, Ineligible and Suspended Contractors (41 USC 37). It should be noted that 41 USC 35(d), dealing with convict labor, was amended by Public Law 96-157 (December 27, 1979). This law states that convict labor may be used under certain conditions which satisfy 18 USC 1761(c).

3-13. ***Contract Work Hours and Safety Standards Act (1962).*** The purpose of the Act (40 USC 327-333) is to consolidate work-hour standards into one comprehensive statute. The Act applies to all Government contracts which employ laborers and mechanics. The Act requires overtime pay to laborers and mechanics at a rate of one and one-half times the basic rate for work in excess of eight hours a day, and forty hours in one week. The law also applies to all subcontracts, and is implemented into contracts by use of the DAR clause, "Contract Work Hours and Safety Standards Act—Overtime Compensation (DAR 7-103.16).

3-14. This Act provides for a variety of penalties and sanctions, depending upon who has responsibility for inspection and administration of the contract. Penalties for violation of the Act include: (1) payment to the employee of the underpayment (40 USC 328); (2) payment to the Government of $10.00 per day for each day of overtime work for which the employee was not fully paid (40 USC 328); and (3) criminal penalty of $1,000, 6 month inprisonment, or both (40 USC 332).

3-15. Beginning on June 12, 1964, it became illegal to discriminate in employment based on age. Employers are barred from discriminating against workers between 40 and 65 years of age in hiring, firing, wages, and working conditions (Executive Order No. 11141, dated 12 February 1964).

3-16. Violations of this Executive Order are handled informally, if possible (DAR 12-901). Contract termination may be accomplished only with approval of the Secretary of a department. The Secretary may recommend placement of the contractors on the barred list. It is also illegal to discriminate because of sex in most jobs unless there are bona fide occupational qualifications which require a specific sex (42 USC 2000e-12).

3-17. ***The Davis-Bacon Act (1931) As Amended (40 USC 27(a); 1970).*** The Davis-Bacon Act relates to wage floors for laborers and mechanics, and was intended to require payment of prevailing area wage rates to workers employed on Government construction contracts.

3-18. This Act provides that all Government contracts over $2,000 for construction, alterations, and/or repair, including painting and decorating, of public buildings or public works to be performed in the United States shall contain certain provisions:

> a. All laborers and mechanics employed directly upon the site of work shall be paid wages not less than those determined by the Secretary of Labor to be prevailing in the area, as set forth in the contract.
>
> b. Such wage payments will be made unconditionally, not less often than once a week, and without subsequent deductions or rebate on any account.
>
> c. The wage scale as determined by the Secretary of Labor shall be posted by the contractor in a prominent and easily accessible place at the work site.
>
> d. The contracting officer has a right to withhold from payments due the contractor such amounts as are necessary to correct violations. (These amounts will then be paid directly to the injured employees by the Comptroller General).
>
> e. If the contractor fails to pay the prescribed rates, the Government may terminate the contractor's right to proceed with the work or such part of the work as to which there has been a failure to pay the required wages, and the Government may charge the excess costs of completion to the contractor.

Breach of any of the duties on the contractor may result in the contractor being placed on the debarred bidders' list, rendering him ineligible to receive Government contracts for a period of three years.

3-19. The contract clause which is inserted into the contract per DAR 18-703.1 is set forth by DAR 7-602.23(a)(i), entitled "Davis-Bacon Act." Detailed procedures for administration of the Act are provided by DAR 18-704.

3-20. For a number of years, arguments have been made by industry and several Government studies that the 50 year old Davis-Bacon Act is inflationary and should be repealed. Many unions disagree with this approach, and have argued in favor of keeping the Act intact. As of January 1982, Labor Secretary Raymond Donovan has stated that the Reagan Administration does not plan on calling for a repeal of this Act.

3-21. ***The Copeland Anti-Kickback Act (1934) 41 USC 51, 18 USC 874 (1970).*** This Act is a criminal statute designed to prevent criminal acts from interfering with the orderly operation of the Government in the field of public works. It provides that:

> Whoever by force, intimidation or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecution, completion or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, to give up any part of the compensation to which he is entitled under his contract of employment, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

3-22. In accordance with DAR 18-703.1, the DAR clause to be inserted in the contract is reflected by DAR 7-602.23 (a)(c), entitled Compliance with Copeland Regulation.

3-23. ***Convict Labor Act (1887) 18 USC 436.*** This Act of 1887 aims to prevent the practice of utilizing prison labor. It is a criminal statute, and it prohibits Government agents from entering into contracts with any person or corporation to hire out the labor of any prisoners confined for any violation of a law of the United States by a judgment of a State or a municipal court. The prohibition against the use of convict labor does not extend to persons who have been pardoned or paroled or are on probation.

3-24. ***Fair Labor Standards Act (1938) As Amended 29 USC 201-219.*** The Fair Labor Standards Act of 1938 was enacted to improve the economic situation in which the nation found itself in the late thirties by spreading employment and preventing the payment of substandard wages. The Act is applicable to all contracts of employment and not just Government contracts. In summary, the Act covers the areas of a minimum wage, maximum working hours with provision for overtime pay, and prevention of oppressive child labor practices. The Fair Labor Standards Act does not require that its provisions be made a part of any Government contract and, as a result, the standard Government contract does not contain the clause supporting this law. This law, however, is still applicable to the Government contract. The Act provides for penalties that include recovery of differences in the required amount to be paid, liquidated damages in an additional amount, and reasonable attorney fees. Willful violations subject the violator to penalties of $10,000 and, for a second offense, fine and imprisonment not to exceed six months.

3-25. ***Service Contract Act (1965) 41 USC 351.*** This Act applies to workers on Government contracts which provide basic services. Contractors must observe minimum wage, safety and health standards. Generally, a service worker falls into the categories of janitor, gardener, basic craftsman, domestic or manual labor occupations.

3-26. This Act is applicable no matter what the dollar amount of the contract. There is, however, a dividing line which determines the amount of the hourly pay rate. A contractor on a contract totaling $2,500. or less must pay his employees no less than the currently prevailing minimum wage. Contracts for greater amounts require that the workers be paid the prevailing area wage rate. Violations are reported to the Department of Labor for enforcement, with provisions for withholding of appropriate sums by the contracting agency.

3-27. The Act requires inclusion of an appropriate clause in every contract entered into by Federal Agencies in excess of $2,500, the principal purpose of which is to furnish services in the United States through the use of service employees, except contracts identified in section 7 of the Act or those exempted by the Secretary of Labor under Section 4(b) of the Act. The proper contract clause to be used is specified by DAR 12-1004.

3-28. Other laws which might have applicability in certain situations are: Occupational Safety and Health Act (5 USC 5108, 15 USC 633, 18 USC 1114), which provides for safe and sanitary working conditions; Executive Order 11598, which requires the reporting of job openings to state employment agencies to help veterans needing work; Clean Air Act, which deals with contractors not complying with certain ecological regulations (42 USC 1857); Economic Stabilization Act (12 USC 1904), which requires reports on compliance with wage and price controls; and Defense Manpower Policy No. 4 and Economic Opportunity Act (42

USC 2701) by which contracts are to be channeled into areas of economic distress and high unemployment.

4. Social Laws and Regulations

4-1. In general, federal policy on social laws and regulations requires that each department or agency of the Government promote the full realization of equal employment opportunity through positive and continuing programs. Much has been done in promoting the Equal Employment Opportunity (EEO) Program.

4-2. EEO has been effectuated by an increasing number of laws, implementing regulations, and judicial decisions.

4-3. **Policy.** Executive Order No. 11246 of September 24, 1965 (30 FR 12319), Executive Order No. 11375 of October 13, 1967 (32 FR 14303), and the rules and regulations of the Secretary of Labor (41 CFR, Chapter 60) require that all Government contracting agencies include the Equal Opportunity clause in all nonexempt Government contracts; and they shall also act to insure compliance with the clause and the regulations of the Secretary of Labor to promote the full realization of equal employment opportunity for all persons, regardless of race, color, religion, sex or national origin. Disputes related to the Order shall be handled pursuant to the provisions of the appropriate Equal Opportunity clause (DAR 7-103.18) in Government contracts, agreements, and subcontracts. Paragraph 4 of that clause specifies that the contractor shall comply with the rules, regulations, and relevant orders of the Secretary of Labor. Those rules, regulations, and relevant orders prescribe particular procedures for handling disputed matters. No contract or modification involving new procurement shall be entered into, and no subcontract shall be approved, with a company which has been declared ineligible under, or found to be in noncompliance with, the Executive Order in accordance with paragraph 6 of this DAR clause. Exemption from Section XII, Part 8, of the DAR (Equal Employment Opportunity) might be obtained under rare situations from the Secretary of Labor (DAR 7-103.18(7)).

5. Administration

5-1. The Secretary of Labor is responsible for administration of Part II and III of Executive Order No. 11246, as amended by Executive Order 11375, and for adoption of such rules, regulations, and orders as he deems necessary and appropriate. The Secretary of Labor has established, within the Department of Labor, an Office of Federal Contract Compliance (OFCC) under a Director who has been delegated authority for carrying out the responsibilities assigned to the Secretary under the Order, except the power to issue rules and regulations of a general nature (DAR 12-804).

5-2. The Assistant Secretary of Defense (Manpower and Reserve Affairs), ASD(M&RA), has been designated Department of Defense Contract Compliance Officer. He is responsible for securing compliance with the provisions of Parts II and II of the Executive Order and the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by the Department of Defense. He is also responsible for exercising overall supervision of Department of Defense policies relating to Contract Compliance operations, for carrying out actions relating to the imposition of sanctions, and for promulgating within the Department of Defense the names of prime contractors and subcontractors who have been declared ineligible for Government contracts by the Director, OFCCP, or by an Agency.

5-3. Heads of Departments or Agencies which award or administer contracts are responsible for assuring that the provisions of these Regulations are carried out within their respective components and for cooperation with and assisting the Office of Federal Contract Compliance Programs (OFCCP) in fulfilling its responsibilities.

5-4. **Equal Opportunity Clauses (DAR 7-103.18).** The following clause shall be included in all Government contracts (and modifications thereof if the clause was not included in the original contract) unless exempted in accordance with DAR 12-808:

(If, during any twelve (12) month period (including the 12 months preceding the award of this contract), the Contractor has been or is awarded Federal contracts and/or subcontracts which have an aggregate value in excess of $10,000, the Contractor shall comply with (1) through (7) below. Upon request the Contractor shall provide information necessary to determine the applicability of this clause:)

During the performance of this contract, the Contractor agrees as follows:

(1) The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Contractor will take affirmative action to ensure the applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination, rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this Equal Opportunity clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding a notice to be provided by the agency Contracting Officer, advising the labor union or workers' representative of the contractor's commitments under this Equal Opportunity clause and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The Contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The Contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and by the rules, regulations, and orders of the Secretary of Labor or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

(6) In the event of the Contractor's noncompliance with the Equal Opportunity clause of this contract or with any of the said rules, regulations or orders, this contract may be canceled, terminated or suspended in whole or in part, and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The Contractor will include the provision of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

5-5. **Exemptions.** Certain types of contracts are exempt from the requirements of the EEO clause.

5-6. ***$10,000 or Less.*** Contracts and subcontracts not exceeding $10,000, other than Government bills of lading, are exempt from the requirements of the Equal Opportunity clause. In determining the applicability of this exemption to any Federally assisted construction contract, or subcontract thereunder, the amount thereof, rather than the amount of the Federal financial assistance, shall govern. Indefinite delivery type of contracts, and subcontracts thereunder, basic agreements and basic ordering agreements shall include the Equal Opportunity clause, except when the contracting officer (in the case of subcontractors, the prime contractor or subcontractors issuing the subcontract) determines that the amount to be ordered is not expected to exceed $10,000 in any single year. The applicability of the Equal Opportunity clause shall be determined by the contracting officer at the time of award for the first year, and annually thereafter for succeeding years, if any. No contracting officer, contractor, or subcontractor, shall procure supplies or services in less than usual quantities to avoid applicability of the Equal Opportunity clause.

5-7. ***Work Outside the United States.*** Contracts and subcontracts are exempt from the requirements of the Equal Opportunity clause if the work is to be performed outside the United States by employees who were not recruited within the United States. DAR 12-807.2(a)(1) provides procedures for cases where employees are recruited in the United States.

5-8. ***Contracts With State or Local Governments.*** The requirements of the clause in any contract or subcontract with a State or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract.

5-9. ***Contracts Exempted by the Secretary of Defense in the Interest of National Security.***

(1) Any requirement set forth in Section XII, Part 8 of DAR shall not apply to any contract or subcontract whenever the Secretary of Defense determines that such contract or subcontract is essential to the national security and that its award without complying with such requirement is necessary to that national security.

(2) Request for Exemption. The contracting officer shall prepare a detailed justification for such determination. The request for exemption shall be submitted through the proper channels to the Secretary of Defense for approval. The Director of OFCCP shall be notified within 30 days of that approval.

5-10. ***Specific contracts and facilities exempted by the Director, OFCCP (Office of Federal Contract Compliance Programs).***

(1) Specific contracts. The Director, OFCCP, may exempt an agency or person from requiring the inclusion of any or all of the Equal Opportunity clause in any specific contract or subcontract when he deems that special circumstances in the national interest so require. He may also exempt groups or categories of contracts or subcontracts of the same type where he finds it impractical to act upon each request individually or where group exemptions will contribute to convenience in the administration of the Order.

(2) Facilities Not Connected with Contracts. The Director, OFCCP, may exempt from the requirements of the clause any of a prime contractor's or a subcontractor's facilities which he finds to be in all respects separate and distinct from the activities of the prime contractor or subcontractor related to the performance of the contract or subcontract, provided that he also finds that such an exemption will not interfere with or impede the effectuation of the Order.

(3) Special Circumstances. The Director, OFCCP, may exempt a contract or subcontract when he finds that special circumstances indicate that use of either of the clauses in DAR 7-103.18 in the contract or subcontract would not be in the national interest.

(4) Request for Exemption. The contracting officer shall submit a detailed justification for omitting or modifying the clause under (1), (2) or (3) above in accordance with Departmental procedures.

(5) Withdrawal of Exemption by the Director, OFCCP. When any contract or subcontract is of a class exempted under DAR 12-808, the Director may withdraw the exemption for a specific contract, subcontract, or group of contracts or subcontracts when, in his judgement, such action is necessary or appropriate to achieve the purposes of the Executive Order. Such withdrawal shall not apply to contracts or

subcontracts awarded prior to the withdrawal. In contracts entered into by formal advertising or the various forms of restricted formal advertising, such withdrawal shall not apply unless the withdrawal is made more than 10 calendar days before the date set for the opening of the bids.

5-11. **Affirmative Action Programs.** Except as provided in DAR 12-808, each prime contractor and each subcontractor with 50 or more employees and a contract or subcontract of $50,000 or more is required to develop a written affirmative action compliance program for each of his establishments within 120 days from the commencement of his first such Government contract or sub contract (41 CFR 60-1.40(a) (1981); DAR 12-806.1). It should be noted that some members of Congress, in August 1981, advocated that the number of employees and the dollar figure be raised. Members of President Reagan's administration have suggested a requirement of 250 employees and a figure of 1 million dollars. It will warrant watching to see if these proposed changes take place.

5-12. An acceptable affirmative action program for construction contractors shall meet the requirements of 41 CFR (Code of Federal Regulations) 60-1.40, and the requirements of plans directed for application to specified areas or projects. Such plans may require prospective contractors on projects in certain geographic areas to state, in their bids or proposals, percentage goals for minority employment which they will endeavor to meet during contract performance. Local plans which have been approved and issued will be listed in Defense Procurement Circulars. Such plans will be sent to the principally affected procurement officers. Any procurement office contemplating a construction project in excess of $10,000 within geographic areas covered by an approved plan shall request instructions prior to issuance of a solicitation. Such requests shall be forwarded through procurement channels to: Labor Advisors, for the Army; the cognizant field office of the Naval Facilities Engineering Command of the Navy; Director of Contracting and Acquisition Policy, Headquarters, USAF, for the Air Force; Executive Director, Procurement, for the Defense Logistics Agency; the Director of Procurement, the National Security Agency; the Counsel, for the Defense Communications Agency; Director, Acquisition Manager, for the Defense Nuclear Agency; Staff Director of Logistics for the Defense Mapping Agency; and the Assistant Director for Administrative Services for the Defense Civil Preparedness Agency (DAR 12-806.2). The cognizant DOD Contract Compliance Officers shall be advised in writing by procurement officers whenever construction contracts of $10,000 or more are awarded in areas or on projects covered by approved plans. At the request of the cognizant DOD Contract Compliance Office, the procurement office will arrange a conference between the contractor and DOD Contract Compliance personnel to determine compliance with contract requirements.

5-13. **Compliance Reviews and Clearance.** The contracting officer shall request the appropriate compliance agency to determine whether a company is in compliance prior to the award of any contract, modification of an existing contract for new effort which would constitute a contract award, issuance of any basic ordering agreement, or award of any indefinite delivery contract or letter contract, the estimated or actual amount of which is or is expected to aggregate $1,000,000, or more, or increase the aggregate value of an existing contract to $1,000,000, or more. A preaward clearance shall also be requested for any first-tier subcontract of the types described herein in an estimated or actual amount of $1,000,000 or more when such subcontract requires the contracting officer's consent, or would require such consent were it not for an approved purchasing system.

5-14. ***Procedures for Requesting Preaward Clearance.***

(1) When the Department of Defense is the compliance agency, the contracting officer shall request preaward clearance for the prime contract and all known first-tier subcontracts of $1,000,000 or more from the appropriate regional Office of the Federal Contract Compliance Programs (OFCCP), Department of Labor.

(2) When contract work is to be performed outside the United States with employees recruited within the United States, the preaward review should be requested from the OFCCP regional office serving the area where the contractor's corporate home or branch office is located within the United States, or the corporate location where personnel recruiting is handled, if different from the foregoing. In cases where the proposed contractor has no corporate office or location within the United States, the preaward action should be based on the location of the recruiting agency, as defined in DAR 12-803(0), in the United States.

5-15. ***Time Limitations for Requesting Preaward Clearances.***

(1) As much time as feasible shall be provided, prior to award for the conduct of necessary reviews. As soon as the successful contractor can be determined, the contracting officer shall process a preaward clearance request in accordance with procedures established at DAR 12-807.2(a)(1), assuring, where possible, that the preaward clearance request is submitted to the OFCCP regional office at least 30 calendar days prior to the proposed award date.

(2) In the event that the Director has not made a final preaward clearance determination within 30 calendar days from submission of the clearance request, the contracting officer shall withhold award of the contract, for an additional 15 calendar days, or until clearance is received, whichever occurs first. If the additional 15 calendar days expire, and the Director has not found the contractor to be in compliance, or made a final written determination declaring the contractor ineligible for reasons of noncompliance, the award may be made to the contractor in question. The contracting officer shall notify the regional OFCCP of the award and, through the head of the contracting activity, the departmental labor advisor listed at DAR 12-606.

(3) When the procedures specified in (1) and (2) above would delay award of an urgent and critical contract beyond the time necessary for the Government to make awards, or beyond the time specified in the bid or proposal or extension thereof, the contracting officer shall immediately inform the servicing regional OFCCP as to the expiration date of the bid or proposal, of the required date of award, and request clearance be provided prior to that date. If the regional OFCCP advises that a clearance review cannot be completed by the required date, the contracting officer shall submit written justification for the award to the head of the contracting activity who, after informing the servicing regional OFCCP, may then approve the award without the preaward clearance.

If an award is made under this authority, the contracting officer shall immediately request a postaward review from the appropriate regional OFCCP.

(4) If, under the provisions of (3) above, postaward review determines the contractor to be nonawardable, the Director, OFCCP, may authorize the use of the enforcement procedures at DAR 12-810 against the noncomplying contractor.

5-16. ***Complaints***. Complaints alleging violation of the Equal Opportunity clause shall be referred immediately to the appropriate regional office of the Office of Federal Contract Compliance Procurement, Department of Labor (OFCCP). The complainant shall be advised in writing of the referral. The contractor shall not be advised in any manner or for any reason of the complainant's name, the nature of the complaint, or the fact that the complaint was received.

5-17. ***Sanctions and Penalties.*** At written direction of the Director, OFCCP, one or more of the following actions, including administrative sanctions and penalties, may be exercised against contractors found to be in violation of the Executive Order, the regulations of the Secretary of Labor, or the clauses and provisions in DAR 7-103.18:

(a) publication of the names of such contractors or their unions;

(b) cancellation, termination, or suspension of the contractor's contracts or portions thereof; and

(c) debarment from future Government contracts, or extensions or modifications of existing contracts until such contractors have established and carried out personnel and employment policies in compliance with the Executive Order and the regulation of the Secretary of Labor; and

(d) referral by the Director, OFCCP, of any matter arising under the Executive Order to the Department of Justice or to the Equal Employment Opportunity Commission (EEOC) for the institution of appropriate civil or criminal proceedings.

5-18. **Policy Regarding Nondiscrimination Because of Age.** It is the policy of the Executive Branch of the Government:

(1) that contractors and subcontractors engaged in the performance of Federal contracts shall not, in connection with the employment, advancement, or discharge of employees or in connection with the terms, conditions, or privileges of their employment, discriminate against persons because of their age, except upon the basis of a bona fide occupational qualification, retirement plan or statutory requirements; and

(2) that contractors and subcontractors, or persons acting on their behalf, shall not specify, in solicitation or advertisements for employees to work on Government contracts, a maximum age limit for such employment unless the specified maximum age limit is based upon a bona fide occupational qualification, retirement plan, or statutory requirement.

5-19. This policy is stated in Executive Order No. 11141 dated 12 February 1964. Any complaint regarding a concern's compliance with the foregoing policy should be brought to the attention of the concern by a communication (in writing, if appropriate) which states the policy, indicates that the concern's compliance with the policy has been questioned, and requests that the concern take any appropriate steps which may be necessary to comply with the policy.

5-20. **Miller Act.** The Miller Act (40 USC 270a) became law on August 24, 1935, with the purpose of assisting in the payment of those persons furnishing labor or material in the construction, alteration or repair of any public building or public work of the United States under contracts exceeding $2,000. The $2,000 amount was increased to $25,000 on November 2, 1978 by Public Law 95-585. This increase was made, according to the Senate Government Affairs Committee, on the premise that it would open up the types of contracts described above to increased competition from small firms by reducing the paperwork and contracting costs associated with conforming to the Act.

5-21. Prior to the passage of the Miller Act, if laborers or people supplying materials did not get paid for their labor or material from the Contractor, they normally would only have the option of trying to collect that money by means of a lawsuit against that contractor. If the contractor were bankrupt, or disappeared, collection of money due became impossible. Under the Miller Act, another option was opened for the collection of money due.

5-22. Under the Miller Act, before any contract exceeding $25,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person (contractor):

(a) a performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States;

(b) a payment bond with a surety or surties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in the contract for the use of each person. Whenever the total amount payable by the terms of the contract is not more than $1,000,000, the payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract is more than $1,000,000, and not more than $5,000,000, the payment bond shall be in a sum of 40 percent of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract is more than $5,000,000, the payment bond shall be in the sum of $2,500,000. Existence of the payment bond in contracts over $25,000 permits persons supplying labor and material to have another source, in addition to the contractor, where they can seek payment of money due them.

5-23. A person who furnished labor or material in the prosecution of the work provided for in a contract where payment bond is furnished under the Miller Act, and who has not been paid in full before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him, or material was furnished or supplied by him, for which a claim is made, shall have the right to sue on the payment bond for the amount due. Any person having direct contractual relationship with a subcontractor, but no direct contractual relationship, express or implied, with the contractor furnishing said payment bond, shall also have a right of action upon the payment bond. He must first give written notice to the contractor within ninety days from the date on which he performed the last of the labor, or furnished or supplied the last of the material for which such claim is

made, stating the amount claimed and the name of the party to whom the material was furnished or supplied, or for whom the labor was done or performed. This notice must be sent by registered mail to the contractor. Every suit instituted shall be brought in the name of the United States by the person suing in the United States District Court for any district in which the contract was to be performed and executed. No such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

5-24. The contracting officer is authorized to waive the requirement of a performance bond and payment bond for so much of the work under a contract as is to be performed in a foreign country, if he finds that it is impractable for the contractor to furnish such bonds.

5-25. Every performance bond required under this section shall specifically provide coverage for taxes which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. The United States must give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under the Internal Revenue Code. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given.

5-26. The Act has been liberally interpreted in favor of the suppliers of labor and materials to sue contractors and subcontractors in Federal courts for unpaid supplies or services. It was created in order to provide relief for the people furnishing labor or materials, since they cannot avail themselves of their normal remedy in obtaining liens through the state courts. The presence of the United States Government in the contracts prevents the use of state courts, since these courts have no jurisdiction over the Federal Government. Therefore, the payment bond under the Miller Act was created to provide the relief normally obtained by the use of liens under state law. Any legal action involving the Miller Act will be initiated in the Federal District Court.

5-27. If the surety (bonding company) on the Miller Act bond is insolvent and unable to pay the money due, the supplier of material or labor may have an equitable lien upon money the United States Government has as yet retained for the prime contract and which would normally be paid to the prime contractor. Rights under this "equitable" lien will be decided in the Federal District Court, if legal action is initiated.

5-28. Under certain conditions, it is possible for the Secretaries of the Army, Navy or Air Force to waive the provisions of the Miller Act (40 USC 270e). This could be done if the contract were a cost-plus-fixed-fee or other cost-type contracts for the construction, alteration, or repair of any public building or public work of the United States. Also, a secretarial waiver may be permitted in Government contracts for the manufacturing, producing, furnishing, construction, alteration, repair, processing, or assembling of vessels, aircraft, munitions, material, or supplies of any kind or nature for the Army, Navy, Air Force, or Coast Guard, respectively, regardless of the terms of the contract as to payment or title. In 1970, an amendment was made to USC 270a which allowed the Secretary of Commerce to waive the provisions of the Miller Act in contracts for the construction, alteration, or repair of vessels of any kind or nature entered into pursuant to the Merchant Marine Act of 1937 or the Merchant Ship Sales Act of 1946 (42 USC 270f; PL 91-469, Oct 21, 1970).

5-29. **Buy American Act.** The Buy American Act (41 USC 10 a-d) as implemented by Executive Order 10582, and DAR Section VI, requires, with certain exceptions, that in the procurement of supplies and services, only domestic end products be acquired for public use. The statute provides that only the end product and its components shall be considered in determining whether an end product is a domestic source end product. It should be borne in mind that this law applies whether or not the bidder is low; and even if it raises the cost of procurement.

5-30. Caution should be exercised by the administrator who is coming in contact with the Buy American Act for the first time. Due to the complexities of the law, the advice of experienced administrators and legal staff should be sought before making interpretations of the law.

5-31. Pertinent definitions (DAR 6-001) relevant to the use of the Buy American Act are as follows:

(a) End Products—articles, materials, and supplies, that are to be acquired for public use. As to a given contract, the end products are the items to be delivered to the Government, as specified in the contract, including supplies to be acquired by the Government for public use in connection with service contracts, but excluding installation and other services to be performed after delivery.

(b) Components—articles, materials, and supplies, which are directly incorporated in end products.

(c) Domestic end product—(1) an unmanufactured end product which has been mined or produced in the United States, or (2) an end product manufactured in the United States if the cost of its qualifying country components and its components which are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. The cost of components shall include transportation costs to the place of incorporation into the end product, and US duty (whether or not a duty-free entry certificate may be issued). A component shall be considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind (1) determined by the Government to be not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or (2) as to which the Secretary concerned has determined that it would be inconsistent with the public interest to apply the restrictions of the Buy American Act.

(d) Qualifying country end product—(1) a participating country end product; (2) a Foreign Military Sales (FMS)/Offset arrangement country end product when the applicable

Determination and Findings has been made waiving the Buy American Act restrictions; or (3) a defense cooperation country agreement listed item.

(e) Participating country end product—(1) an unmanufactured end product mined or produced in a participating country, or (2) an end product manufactured in a participating country if the cost of its qualifying country components and its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. The cost of components shall include transportation costs to the place of incorporation into the end product and any duty, whether or not duty is in fact paid. A participating country is a NATO country which has a Memorandum of Understanding (MOU) or similar agreement with the US and for which a blanket Determination and Finding was made by the Secretary of Defense waiving the Buy American Act Restrictions.

(f) Domestic concern—a concern incorporated in the United States or, if unincorporated, having its principal place of business in the United States. (In the context of this Section, "concern" refers to a prospective or actual contractor. Thus, a contract with a foreign subsidiary or foreign branch or business office of a United States corporation would not be a contract with a domestic concern. Conversely, a contract executed by a foreign salesman or agent on behalf of a domestic concern would nevertheless be a contract with a domestic concern, since the basic contractual and legal responsibility resides with the domestic concern.)

5-32. **Exceptions to the Buy American Act.** The following are exceptions to the mandatory requirements of the Buy American Act:

(a) Use Outside the United States. The restrictions of the Buy American Act do not apply to articles, materials, or supplies for use outside the United States. However, the Balance of Payments Program is not so restricted. In order to uniformly implement the Balance of Payments Program worldwide, the preferences and procedures of the Buy American Act for soliciting and awarding contracts for supplies and applicable services have been extended as a matter of policy to acquisitions of supplies and applicable services for use outside the United States.

(b) Nonavailability in the United States. The Buy American Act does not apply to (1) end products of a class or kind which the Government has determined are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or (2) components of end products manufactured in the United States or a qualifying country, if the component is of a class or kind determined by the Government to be not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

(c) Unreasonable Cost or Inconsistency with the Public Interest. The restrictions of the Buy American Act do not apply when it is determined by the Secretary concerned that the cost of a domestic end product would be unreasonable, or that acquisition of a domestic end product would be inconsistent with the public interest.

CHAPTER 14

Government Property

GOVERNMENT PROPERTY provided to contractors is often important in the performance of a Government contract. Such property may be provided for use in Government contract performance because of the Government's need for standardization, economy, stabilization of sources, broadening the industrial base, and other factors that support the national interest.

2. This chapter covers general characteristics of property, the concept of bailment, bailment in Government contracts, Government-furnished property, fixtures, and facilities. It also reviews prescribed contract clauses relating to property, showing how they refine and shape the legal positions of the parties in relation to the elements of ownership, use, and transfer of property.

1. General Characteristics

1-1. This section will discuss some aspects of property that are important in relation to Government property used or usable under Government contracts.

1-2. **The Concept.** The idea of property is one of the most difficult of all the notions found in Anglo-American Jurisprudence. It is a subject of law that is characterized by highly technical rules. Yet it is fundamental to the conduct of every day personal affairs and the affairs of state. A rudimentary understanding of the concept of property and of the principles by which it operates is essential to understanding and effectively managing Government property.

1-3. Property is commonly defined as "a collection or aggregate of rights guaranteed by the Government." This definition is less than useful, as are many such "common-sense" expressions. All legal rights are guaranteed to some extent by the Government, at least in the sense that they are enforced upon request to Government in its capacity as representative of the sovereign entity. The state or sovereign entity is the source of recognition and protection of legal and other rights.

1-4. Anglo-American theories of the law include the principle that the highest source of legal rights is basically "natural law" or the "Creator." The only recognized recipient of such rights is the individual. The role of the nation-state is to hold in trust and to exercise certain rights ceded to it by individuals, and to recognize and avoid encroachment upon the portion of such natural rights reserved to the people. The role of Government is simply to carry on the affairs of state. The right of property is clearly one of the basic natural rights. It is among the more basic of the rights that we characterize in our Declaration of Independence as "inalienable rights" with which the Creator endowed mankind.

1-5. The distinguishing characteristic of rights properly classifiable as "Property" is that they express relationships. The legal analyst approaches the subject of property in terms of relationships between persons or classes of persons with respect to things, ideas, and even other relationships. Reference is made to the property relation more than to the property right.

1-6. The particular relations expressed in the notion of property are exclusionary in nature. The essence of a property right or interest is the right to call upon the Government as an agent of the state to recognize, and to exclude other people from holding or interfering with, such relationships. The various kinds of relationships to things, places or other relationships are classified as "interests" in property. The legal power to use, transfer, destroy, preserve, abandon, control, exert dominion over, or enjoy a particular thing, and to prevent other people from doing so, is the gravamen of *interests recognized* and enforced in the property relation.

1-7. This analytic focus on "interests" rather than on the subjects of the property relation also accounts in substantial part for the notion of property that arises from equitable principles as opposed to recognized legal rights. The focus on interests goes to the heart of the human concerns expressed in the concept of property. The focus on the particular object of the various property claims, on the other hand, is rather like focusing on the ink and paper before you instead of on the content of this chapter.

1-8. Interests in property include use, enjoyment, alienation, destruction, dominion, and control.

1-9. The various interests in property are classified according to the number of persons or classes of persons whose claim may be recognized. They are also classified as to the time during which recognition is to be effective, and according to whether they are dominant or subordinate.

1-10. Interests in property may be either exclusive or concurrent. If one person has legal or equitable capacity to exclude all others from the particular interest or relation, it is thought of as an exclusive (or sole) interest. If a number of persons or classes of persons share the same interest at the same time, it is thought of as concurrent interest.

1-11. Concurrent interests in property may be either joint or common. If an interest is jointly held, each person or class of persons simultaneously holds the entire interest. Readily recognizable examples include property held by a partnership. Inasmuch as each partner has an interest in all aspects of partnership property, the unilateral action of any partner is

legally sufficient in dealing with the subject of the property relation. If the partnership is a bailee, then each partner is a bailee with respect to the bailed property.

1-12. If an interest in property is held in common with others, each holder has an interest in only a part of the property. Common examples include property held by an unincorporated association, a consortium, a joint venture, or a business trust. The action of any individual holder is ineffective as to the whole of the property interest unless it is joined in by all the other holders of that interest. Property bailed to such an entity is bailed in part to each of the constituents, and they may be held liable for only a portion of the value.

1-13. Interests in property may be either present or future. If they are currently exercisable, they are present interests. Future interests may be either reversionary or executory. Executory interests may be either vested or contingent. If vested, all prerequisites to the exercise or enjoyment thereof have been met except the mere passage of time. There can be no necessity to determine who will take the particular interest, when or whether any condition to its exercise remains unfilled. Otherwise, the interest is contingent.

1-14. A reversionary interest is one which either will or may revert back to the grantor or person who created the interest. The grant of the right to possession of a thing only for so long as it is used for a particular purpose, such as a Government contract, creates a reversionary interest in the possession of that thing. The right to possession reverts back to the grantor when the thing is no longer used for the designated purpose.

1-15. Contingent interests may be contingent upon conditions precedent or upon conditions subsequent. If subject to a condition precedent, then some intervening event must occur prior to the exercise of the interest. If subject to a condition subsequent, the right to exercise the interest may be lost upon the happening of some event.

1-16. An example of a future interest subject to a condition precedent is the right to modifications, improvements, or attachments to equipment bailed to another on condition that such modifications, improvements, or attachments are inspected and approved by the Government and are then included in allowable costs under the contract. The conditions precedent to exercising the interest in such modification, improvement, or attachment include in this example (a) inspection, (b) approval, and (c) including the cost thereof in allowable costs under the contract. Unless those conditions are met, the Government obtains no interest in such modifications.

1-17. An example of a future interest subject to a condition subsequent might be a provision to the effect that the Government shall have title to all improvements, modifications, or attachments which may be made or installed upon the equipment by the contractor unless, after inspecting the same within a designated period of time, the Government directs that the equipment be restored to its original condition.

1-18. In such event, the Government acquires a vested interest in ascertainable property, i.e., such improvements as may be made or installed. The interest may be lost, however, if the Government orders restoration of the equipment.

1-19. **Categories.** Property or, more accurately, the subject of property relations is categorized as either Real, Personal, or Mixed. Real Property is defined by description, i.e., it is land and buildings or other things permanently affixed thereto, or growing thereon. The concept of real property includes the area below the surface of land, even to the center of the earth. It also rises above the land to the limit of the property owner's right to reasonable use of it. The area of uses above the land is called air rights.

1-20. Personal Property is everything else in which legal interests may be held. It is further divided into two subcategories: tangible and intangible. Tangible personal property has physical existence, and can be moved and touched. It includes things such as cars, clothes, furniture, and jewelry. Intangible personal property may include ideas, creations, or information, as well as stocks, bonds, copyrights, and patents.

1-21. Mixed property is generally a personal property interest that is severed from, but depends for its existence upon, real property. Rentals under a real estate lease, royalties under natural resource leases, and contractors' indebtedness to the Government under facilities contracts or property management agreements, are examples. Generally, as long as the right or interest involved remains unsevered from the title to realty, it remains real property. When the realty is transferred, they run with it. Otherwise, they become personalty.

1-22. The real estate lease is an interest in the realty. It is an actual transfer of the realty for a specified or implied period of time. A conveyance of the realty remains subject to the interests of the leasee and those whose interests are derived from the leasee. The right to receive rentals or profits from the realty is part and parcel of the leasor's overall interests in the realty. On the other hand, the right to receive rents and profits may be severed from the lease by an assignment or conveyance to a third party, such as a creditor, lienholder, or mortgager.

1-23. When interests in property are severed from the bundle of aggregate interests therein, the law recognizes the creation of separate property. Rents or profits from real estate, once severed from the realty itself, become a property apart from the underlying realty. They can be bought, sold, or attached separately from the underlying realty. Nevertheless, they remain dependent upon the existence of interests in the underlying realty. The deed to the realty, and the right to rents and profits, may be transferred repeatedly. If, by condemnation or other legal proceedings, interests represented by the deed or title to the realty cease to exist, the right to rents and profits ceases to exist.

1-24. Thus, while the interest in rents and profits may be intangible personalty, they remain dependent upon the underlying interest in realty.

1-25. The interdependence of realty characteristics and personalty characteristics is the reason for the characterization of such property as mixed.

1-26. Classification of interests in property as real, personal, and mixed has important legal consequences. Effective management and protection of Government interests may, in some instances, depend upon such distinctions.

1-27. **Title.** Interests in property are further classified according to whether they are dominant or subordinate. Title represents the dominant interest. Any interest less than title is a subordinate interest. A license for use is, for example, subordinate to a right of possession. Custody may be

subordinate in interest to possession. Subordinate interests, while following dominant ones in priority, usually restrict dominant ones in some fashion.

1-28. When subordinate interests are severed from the dominant interest in title, what is left to the title holder is a remainder interest. The interest of the lessor under a real property or chattel lease is a remainder interest. It continues through the term of the lessee's possession during the lease. The Lessor's interest in possession, however, is a reversionary interest. It is actually conveyed to the lessee for the term of the lease. The principal distinction, for practical purposes, between a reversionary interest and a remainder is whether the particular right ever left the grantor or creator of the subordinate interest.

1-29. Both real and personal property have many legal characteristics. These may be absolute or qualified. Some of them are: dominion, control, use, consumption, possession, transfer, and abandonment. When one has all of these rights, we say he has title to the property.

1-30. The concept of title expresses recognition that the title holder's claims to interests in property are superior to the claims of all other persons. All subsequent holders of interests must relate their respective claims back to the recognized claim of superior right of a person who holds or held title to the property. The title holder has the unassailable right to prohibit or to grant to others the use, enjoyment, right to transfer, right to abandon, or even the right to destroy or change the nature of property.

1-31. Title may be either legal or equitable in nature. Legal title is held by a person or class of persons exclusively for their own purposes and benefit. It is unrestricted as to any of the interests represented in the title. Equitable title on the other hand, recognizes the situation where one person may hold title, but only for the purpose, benefit, use or enjoyment of another person or class of persons. The interest of the persons or class who have the sole right of use, benefit and enjoyment of property but not legal title is called equitable ownership and is indicated by equitable title. A Government contractor, operating a Government facility, who purchases supplies for its own account and the sole purposes of the Government, in the absence of an agreement otherwise, becomes the title holder of such property and the Government becomes the equitable owner thereof.

1-32. Equitable title is merely the beneficial use and enjoyment of the property. Use and enjoyment is limited by the nature of the property and by the arrangement for its use. The equitable owner has no right to dispose of the property, since the right is merely of use and possession, unless enlarged by action or agreement of the legal title holder. Ordinarily, when a person "owns" property we mean that he has legal title which includes equitable title.

2. Bailment

2-1. The word "bailment" comes from the French word "bailler," meaning "to deliver." Thus the term bailment relates to the delivery of tangible property or "chattels" only. It does not relate to intangible or to real property, neither of which can be delivered in a strict sense of the word. A bailment may be defined as a relationship between a person having a right to possession of tangible personal property and who has conveyed that right to another, and the person to whom the right was conveyed. This relationship involves the voluntary assumption of an absolute obligation to re-deliver the bailed chattel and a duty of reasonable prudence in caring for such chattel until redelivery occurs, along with the right of possession conferred. The person conferring the possessory right is referred to as a "bailor." The person upon whom the right of possession is conferred is referred to as a "bailee." The possessory right or interest conferred upon the bailee is a right or interest severed from the title to the bailed chattel. It exists only for a definite period of time determined by an agreement between bailor and bailee or determined by the demand of the bailor. During its existence, the right of possession is in and of itself "property," defensible by legal proceedings against everyone in the world including the bailor and the title holder. The bailee's duty to redeliver the bailed chattel and duty to exercise reasonable prudence in caring for it are corresponding rights of bailors, and are enforceable by legal processes. The bailee then holds the interest in possession of the chattel. The bailee's possessory interest is itself property exercisable against everyone including the bailor for a stated or reasonable period of time. The personalty is subject to return or disposal by the bailee at the end of the bailment term or as otherwise determined by agreement with the bailor or upon demand of the bailor.

2-2. The bailed property may be subject to use by the bailee in accordance with an agreement of the parties. Such use must be confined within the limitations of the nature of the chattel or the limitations set by the agreement. Return of the bailed property, if use is permitted, will usually be, subject to reasonable use (wear and tear), in its original form.

2-3. The bailee may not, without strict liability pledge, sell or destroy the bailed property. The bailee is obligated to use reasonable care to prevent the loss or destruction of bailed property. In some instances, the bailee's duty of reasonable care extends to the prevention of loss or destruction by the bailee's employees who may have custody of the bailed property. When there is to be an alteration in the property, the alteration needs to be expressly provided for in the bailment agreement. Government property furnished to or acquired by a contractor may be considered bailed property, whether it is delivered under a bailment contract or, more typically, delivered in accordance with the appropriate Government Property (GP) clause.

2-4. Three kinds of bailments are recognized. The most typical is a mutual bailment, which normally arises in a business or commercial setting. This is the type most often found in a Government contract. The second kind is a bailment for the exclusive benefit of the bailor. The third is a bailment for the exclusive benefit of the bailee. There are two reasons that we need to distinguish among the three kinds of bailments: (1) the difference in consideration needed by each type of bailment, and (2) the level of care that must be exercised by the bailee to prevent loss or destruction.

2-5. In a Mutual Bailment, the consideration required is the same as that normally found in commerce: the reciprocal promises of the parties. The standard of care is reasonable care. This means that the bailee is liable for his negligence in losing, damaging, or destroying the property bailed to him. In this situation, a bailee is liable only for his negligence; he is not an insuror. The operator of a common carrier, truck,

plane, or train, is a bailee, and since he serves the public at large, is an insuror of the goods he carries. Even when this is true, he is relieved from liability for loss, damage, or destruction of the property to the extent that such loss arose from excepted perils, acts of God, the State, a public enemy, an act of the bailor (improper packaging), or the nature of the goods.

2-6. In a bailment for the exclusive benefit of the bailor, the bailee has only a slight duty of care while the bailor has a heavy duty of care. The remaining type is a bailment for the benefit of the bailee. Here, the bailor has slight duty while the bailee has the much heavier duty, even more than that of reasonable care.

2-7. We need to distinguish between bailments and transactions involving personal property.

2-8. The word "loan" has two meanings in the law. It may be a bailment without payment by the bailee. This would be characterized as a bailment for the benefit of the bailee. It may also be the delivery by one party, and receipt by another, of money on agreement. This is not a bailment, since the recipient of the money does not have to return the same units of money furnished him.

2-9. In its early origin, "borrow" meant a gratuitous loan of personal property of some nature. When it spoke of money, it did not contemplate return of the identical coinage, but an equivalent value. Normally, the word "borrow" arises in money transactions.

2-10. The term "lend" means to put out for hire or compensation. That is, one parts with a thing of value to another for a time, either fixed or indefinite, to be used during that term by the borrower. Either the thing itself or its equivalent must be returned to the lender. It is clear that this term "lend" may be used to describe either gratuitous or mutual bailments, or an exchange. It is imprecise, and its use should be discouraged.

2-11. In a bailment, the identical thing is to be returned to the bailor. In a debt, an article of equal value is returned. In the event of loss or destruction of the chattel, a bailee is excused if it were not his fault. In debts, however, the obligor's fault is irrelevant; the debt *must* be paid according to its terms even if the chattels or choses-in-action are lost or destroyed through no fault of the obligor.

2-12. An exchange is giving or taking one thing for another.

2-13. In a sale, there is a transfer of title from the seller to the buyer; and the buyer returns to him money.

2-14. In a custody situation, the owner has no intent to relenquish control. In parking and locking a car in a commercial garage, the owner has parted with custody but not control.

3. Bailments in Government Contracts

3-1. The ultimate disposition of the property, upon completion of the work done on it by the bailee (contractor), should be provided for in the contract. Will the property be incorporated into an end product, returned to the Government, disposed of as scrap, turned over to another vendor, or abandoned in place? When the Government bails such property, it has the positive duty, as part of the agreement, to indicate the method of disposition at the end of bailment.

3-2. As earlier indicated, there are three types of bailments: mutual benefit, exclusively for the benefit of the bailor, or exclusively for the benefit of the bailee. The mutual bailment is most common. Here, a duty of reasonable care is imposed on the bailee-user. The bailee is not an insuror of the item, but is liable for his negligence. If the property in bailee's possession is destroyed by an act of God, and he has no insurance on it, he is not liable for that loss. The bailor bears the risk of loss under such a situation. However, if the bailee, through his own negligence, loses, damages or destroys the property, he is liable. Other types of bailments are those for the exclusive benefit of the bailor or for the exclusive benefit of the bailee. In the first instance, the bailee has a very slight duty to care for the property in his possession. The opposite is true in the second instance.

3-3. Sometimes, when the property involved is an aircraft, an additional clause complements the bailment clause. This is the "Ground and Flight Risk" clause, which provides for the use of, and acceptance of liability by the Government for, such bailed property. This clause requires that the bailed property be used by properly authorized personnel qualified for the type of flight and the type of aircraft involved, and that such contractor personnel operating the aircraft be in a current flight status. It relieves the contractor from negligence, and holds him responsible for loss, damage, or destruction, only if his conduct amounts to:

(1) lack of good faith, or

(2) willful misconduct, and that this conduct be manifested by his managerial personnel. (For definition and application of this concept, see "Appeal of Fairchild Hiller Corp, ASBCA No. 14,387(Dec 71).")

3-4. Conceptually, Government Property in the possession of contractors is simply a form of bailment. In practice, it differs in several respects, e.g., it sometimes involves real property (facilities). Risk of loss takes several forms, not just simple negligence. Consumption or loss of identity may occur, so that the Government Property is not always returnable in the same way as bailed property otherwise is; thus, the practice of separating discussion of Bailment and Government Furnished Property has developed.

4. Government Furnished Property

4-1. There are many classifications of property, and they are identified by definitions in Section 13 of the DAR. Section 13-101.4 defines material. Section 13-101.5 defines special tooling. Section 13-101.6 defines special test equipment, all of which, as well as military property are types of personal property. Facilities are defined in DAR 13-101.8, and facilities can be real estate within the normal context of property law.

4-2. Under the enabling legislation known as the "Federal Property and Administrative Services Act of 1949," 40 USC 471 *et seq.*, as amended, the General Services Administration has the exclusive right, power, and duty to deal with all Government property in the Federal establishment. This authority has been redelegated to the Department of Defense as to property used in its activities. All of the property, except for capital ships, is ultimately controlled by the General Services Administration.

4-3. **Policy.** Several reasons may prompt the Government to furnish property to a contractor performing a Government contract: to assist in its performance, to ensure proper security, to encourage standardization, to further broaden the industrial base, to increase competition or eliminate the need for large capital investment, or to improve manufacturing processes. Finally, the property may have no other use; and therefore the contractor has not been able to invest in it (the Government *must* provide it).

4-4. Property provided by the Government under the above law is furnished from Government Stores as Government Furnished Property, or is acquired by the contractor and becomes Government property. In either case, an extension of the concept of a bailment applies. Typically, it is provided under the appropriate Government Property clauses: DAR 104.24 for fixed-price contracts and DAR 7-203.21 for cost-type supply contracts. These clauses set out specifics of the relationships between the Government and the contractor. The Government is not allowed to sell the property to the contractor.

4-5. When the Government furnishes property directly from its stores, it is called GFP. When it is furnished through the contractor by commercial purchase, it is called contractor-acquired Property. When both of these categories are handled together, they are covered under the general heading of "Government Property."

4-6. Risk of loss is a consideration in providing Government property. Except in a fixed price advertised or competitive negotiated contract environment (where the contractor is an insuror of the property), the Government largely acts as a self-insuror of any Government property that is in the possession of contractors. Legally, the contractor as a bailee always remains liable for risk or loss to Government property in its possession. However, in cost-type contracts, except for the perils covered by commercial insurance on the contractor's commercial work, the Government bears virtually all of the economic risk of loss. To fix liability against the contractor, the Government must prove a very difficult case. Unless it can prove that the contractor actually knew of the particular risk that caused the loss or destruction of Government property, it must prove that the contractor's actions were either willful (not merely negligent), or so grossly indifferent as to amount to willfullness; and this behavior must be directly traced to the highest level. Executives may be presumed to have acted willfully when deficiencies in management, called to their attention by the Government, are ignored. According to risk of loss clause language, such a presumption is conclusive.

4-7. In an advertised fixed-price contract without progress payments, the Government usually takes title only to the end product at its point of delivery. In negotiated fixed-price, and cost-type contracts, where the contractor buys property for which he is reimbursed, title to that property passes to the Government. This occurs in the fixed-price type of contracts either upon issuing the property to production, or on payment of the invoice. In a cost-type contract, title is transferred to the Government upon acceptance from the supplier. Further, the Government has full rights to acquire title to special tooling or to abandon it by electing to do one or the other at the end of the contract term. While in the negotiated contract we can either take title or abandon it, in those cases where special tooling is deliverable as an end item, title automatically vests in the Government. The question of title to property furnished by the Government cannot arise because title is never divested from the Government. Even though the article furnished by the Government to the contractor becomes a part of a larger assembly which is redelivered to the Government, the incorporated component's title remains with the Government.

4-8. The distinction between full legal title and equitable title is largely a matter of academic interest. The reason for this is that in a seizure of the Government contractor's inventory, either in the warehouse or on the production floor, the Government by case law has a paramount lien claim to the inventory. This insulates the Government from taking only a pro rata share of any inventory that is to be seized to satisfy the contractor's creditors. The theory used is that since title has passed to the Government, it is not property that is thereafter subject to seizure. (See *Boeing Company v. United States* 168 Ct Cl 109, 338 F2d 343; Cert. denied 380 US 972 (1965).) This doctrine should not be counted on where the contractor acquires property that is encumbered by security interests or liens, since the Government can take no better title than the contractor had acquired.

4-9. Where the contractor furnishes property, which then becomes Government property upon a progress payment, the title that vests in the Government does not cause the Government to have the right to interfere with the contractor's production. The reason is that title is only used to protect the Government's interest against a paramount claim, should the contractor be exposed to hazards of seizure and other similar circumstances. Another reason is that, as the bailee, the contractor has the right to possession of the property and this right to possession is enforceable even against the bailor (the Government). The legal elements of possession are dominion and control. If the Government interferes with the contractor's control of the property, the contractor is divested of possession; and the contractor's responsibility as a bailee with respect to the property may thereby be diminished, unless there is an agreement to the contrary.

4-10. Under virtually all clauses, use of Government Property is limited to the contract under which it is either furnished by the Government or acquired by the contractor. The other aspect of use is the disposition of scrap. In most instances, the clauses indicate that the scrap belongs to the Government but that the contractor can sell it and deduct that sale as a charge against the contract, so that the cost to the Government is less than would otherwise be the case.

4-11. If the contractor uses material on a contract other than the one authorized, the contractor may have committed an act of conversion and may be liable for damages.

4-12. Contractor use of the Government's production equipment can occur under either a facilities contract or a supply contract. However, to the extent that facilities are furnished, they are limited to being used for the authorized contracts only. Should facilities be used for commercial work, the provisions of DAR 7-702.23 and Appendix B or C Sup. 3 provide for payment for such use.

4-13. If the contractor uses the equipment for his own benefit, the property administrator can charge him as though it were full time use in those situations where (a) the contractor was using such property without permission, and (b) where the contractor was not reporting it. This is true even though the contractor only used it occasionally. The formula for

charging the rentals on such facility's items is expressed in DAR 7-702.12.

4-14. The usage rate that entitles the contractor to keep property will be expressed in a given contract, or under a rate of use in a facilities contract. By conforming with the provisions of DAR Appendix B or C Supplement 3, and Section 702.23 of the DAR, he can then keep the equipment on a continuing basis, so long as he meets the minimum use requirement.

4-15. If production equipment becomes idle, the policy is to declare it supplus and forward it to DIPEC, either physically or symbolically, to be put under its jurisdiction for reutilization. DIPEC is the Defense Industrial Plant Equipment Center, headquartered in Memphis, Tennessee. That organization has responsibility for reutilization of production equipment that has been declared surplus by various activities.

4-16. The Government Property clause indicates the responsibilities the contractor has for Government Property. When the contractor does not conform to these requirements, he has in effect breached the contract. Such a breach gives the Government a right to terminate the contract for default, but this is seldom a practical remedy. A default termination is equally considered only as a last resort.

4-17. In addition to the question of liability for Government Property, two other legal issues may concern a contractor in the Government's administration of the contract: that the Government property is suitable for use by the contractor, and that such property is delivered on time.

4-18. Once delivery of GFP is made to a contractor, he is entitled to presume that it is in usuable condition; but he still has a duty to inspect it in enough time before production in order that the Government has the opportunity to authorize him to repair it or return it, should it be defective. Defective means that it will not function at the level of performance needed. A second category of suitability is that the property must be conforming as to type, i.e., as to the three elements of form, fit, and function. Nonconformance means that the GFP cannot be used without deviating from the normal manufacturing process then in use.

4-19. Late deliveries may give rise to a demand by the contractor for equitable adjustment, since this may cause a constructive change in the contract. However, this entitles him to an equitable adjustment only if late delivery impacts on his performance. If it causes him no economic or operational impact, he suffered no damages and is not entitled to any relief. The same is true of claims related to "suitability."

4-20. The next legal issue we are faced with is the meaning of the term "as is" when property is furnished in that manner. Essentially, it means that the Government has relieved itself from liability for unknown patent defects in its property that is to be provided to a contractor. It is up to the contractor to reasonably inspect Government property and discover defects which are not latent. The contractor takes the material, supplies, tooling, data, or equipment, subject to those defects. This situation usually provides the contractor with some opportunity to inspect. However, should the Government know of defects which may proximately cause delays as added expense in connection with the intended use of Government property, it must advise the contractor of them. In making a firm fixed-price contract, such notice should be included in the offer of Government property in the solicitation. If it is not, it may be unconscionable behavior on the part of the Government to refuse to allow an equitable adjustment for the contractor. This occurred in the *G. W. Galloway* Case, ASBCA Case No. 16656 (1973).

4-21. Care should be taken to distinguish the rights and obligations of the parties regarding defective Government Property in different situations. It is not clear that the Government is obliged to allow equitable adjustments in the case where the Government property is realty, where the defect is caused by the contractor, where the defect is reasonably discoverable upon inspection by the contractor, or where the Government property is acquired by the contractor from its sub-contractors. Such rights and obligations may vary according to the law of the place where the property is located, unless it is located at one of the relatively few places where Federal Law is applied exclusively.

4-22. Special tooling acquired as a line item under a fixed-price contract clearly belongs to the Government. However, in the type of contract where Special Tooling is not a line item, the Government considers itself an owner of the property with the right at the completion of the contract to (1) require the contractor to issue evidence of legal title in the Government, thus transferring it to the Government; (2) sell the tools to the contractor at fair market value, thus vesting title in the contractor; (3) have the contractor sell it to reimburse the Government account, thereby reducing the contract price; or (4) abandon the tools. If the Government abandons the tools by express act, they then become susceptible to being claimed by the contractor. In any cost-type contract environment, the Government completely owns all of the special tooling when the total cost for such items is included as part of the total contract cost.

4-23. Procured in a cost-type contract, Special Test Equipment clearly belongs to the Government. However, in a fixed-price negotiated contract where the contract does not specify any method of title transfer and the Government allows the contractor to buy special test equipment, its title passes to the Government as a function of a normal GFP clause.

4-24. The last legal issue about personal property in the Government contract arises with respect to residual inventories. In the fixed price negotiated environment, it is the duty of the ACO to claim the Government's ownership of this type of equipment and property if its cost has been a charge against the contract. This is done in the settlement agreement in order to have the price reduced appropriately. If the Government does not claim it, it leaves the question unresolved. The reason it is unresolved is that, without an overt act, it cannot be presumed that the Government abandons something. Where the Government leaves an item undetermined or unresolved by inaction, it does not amount to an abandonment. Thus, the condition of the residual inventory is clouded.

5. Fixtures

5-1. A fixture is an item of personal property that becomes real property by being attached in a permanent manner to realty or something already permanently affixed to realty. In order to determine whether an item has become permanently attached to real estate, we must examine (1) what is the item, (2) how is it attached, and (3) what was the intent of the parties when the attachment was made? This question of intention of

the parties is answered by either a presumption which is objective in its nature (what would normal people presume to be the result of attachment?), or by the express terms of the contract.

5-2. An example of a fixture is a boiler that is suitable for permanent attachment. A boiler that generates steam is typically permanently attached by being built into the building. It can be inferred that the builder intended it to become part of the realty. It is therefore a fixture, and cannot be removed.

5-3. When a fixture is for the furthering of a trade, it normally remains personal property because it is said to further the trade or activity in question. Hence, if it is designed to be unique and to improve the trade of the vendor, it is considered a trade fixture; and it is therefore removable, unless it would destroy the building in the process. However, the attachment which was meant to be an improvement of realty, e.g., a chimney, becomes a part of realty, and cannot be removed.

5-4. In the Government Furnished Property clause, there is a provision that says in effect, that an item of personal property furnished, even though affixed, does not lose its identity as a personal property for the purposes of the contract. This makes the intent of the parties clear, i.e., that this personal property does not lose its identity by attachment to real property, and does not become a fixture. When the contract is completed, the Government may remove the article if it chooses to so do. Also, it may abandon it in place by virtue of another clause. Here, the Government must do something in order to indicate the abandonment. When a fixture is removed in the commercial environment, the remover usually has the duty to refurbish and restore the property from which it was removed. In a Government contract, if the Government does remove a fixture, it has no responsibility to restore the premises to their former condition.

5-5. By special clause language, the Government avoids questions as to fixtures, abandonment, and restoration of premises on the removal of what otherwise would be fixtures.

6. Facilities

6-1. The last topic in the area of property is that class of property called facilities.

6-2. Facilities, as defined in DAR 13-101.8, means industrial property (other than material, special tooling, military property, and special test equipment) for production, maintenance, research, development, or test, including real property and rights therein; buildings, structures, improvements, and plant equipment. They are covered under relationships typically called Facilities Contracts.

6-3. A facilities contract is essentially a lease. The lease may be an interest in real estate, depending on the law in the jurisdiction where the property is located. Thus, in a facilities contract, the contractor can literally exclude Government personnel from the premises except to the extent provided for in the lease. Access is usually provided to check for normal repairs, etc. The reason for this exclusion is that his interest is exclusive and complete for the term of the lease, and he stands in the shoes of the original owner. The Government Facilities Contract expressly treats all of the important aspects the same way, as does a lease by its express language. Thus, regardless of what we call this document, the terms conform to the provisions found in a well-written lease.

6-4. It is important to recognize the difference between the Facilities items and other property furnished under the Government property clause, because transfer and accountability are handled in a different manner.

CHAPTER 15

Prescribed Contract Clauses

CERTAIN CLAUSES included in Government contracts contain prescribed terms and provisions. These terms or provisions reflect statutes, Executive Orders, and regulations which repudiate, confirm, or modify the operation of recognized legal concepts or principles. Use of such clauses is compulsory in some circumstances and optional in other situations.

2. It may be appropriate to obtain waivers of otherwise compulsory provisions. In other circumstances, it may be desirable to supplement such provisions with other terms. It is possible, through other contract provisions or through conduct, to waiver or sever the effectiveness of prescribed clauses.

3. Study of this chapter should enable you to choose from alternative clauses containing prescribed provisions for inclusion in Government contracts. It should help you to gauge, with confidence, the effect of various clauses on the rights and obligations of the parties to the contract, and on contractural objectives. You should be able to determine whether to seek waivers of particular clauses, or to seek to augment them. You should also be able to recognize situations having a risk of increasing or reducing the effect of such clauses. Once recognized, such situations can be either avoided or exploited.

4. If a particular clause, or the result obtained by use of a particular clause, is required by statute, regulations implementing the statute are likely to exist as well. Some such regulations may impose more specific requirements on the contracting parties than others. In such instances, analysis of, and strict compliance with, the regulation is necessary. If regulations compel inclusion of clauses containing prescribed provisions in the contract, no substitution provision may be used unless the regulation expressly permits such substitutions when it is necessary or appropriate to waive, supplement, or otherwise deviate from prescribed terms or provisions. Approval is necessary at organizational levels other than those at which contracting or purchasing occurs.

5. Where a statute by its terms prescribes a particular result, but the application of regulation or other provisions of the contract or interpretation of the conduct of the parties leads to another, the legal effect is not clear.

6. The termination for convenience clause, incorporated into the contract by law in the celebrated *G. L. Christian* case, was only indirectly based upon statute. The applicable statutory provision generally commends the adoption of regulations for Government purchasing. It does not compel a termination for convenience clause. The Truth in Negotiation Act specifically requires that contractors be compelled to submit cost or pricing data under certain circumstances, and that a provision to effect a contract price reduction in some circumstances be included in the contract. The Board of Contract Appeals, in the *Cutler-Hammer* case, refused to read the omitted clauses into the contract, notwithstanding the contractor's insistence that *Christian* required its inclusion.

7. It appears that inadvertence is the only element which distinguishes the two cases. In *Christian*, omission of the required clause was alleged to have been inadvertent. No such allegations were apparent in *Cutler-Hammer*. It would therefore appear that non-accidental waiver, substitution, or modification of the legal effect of prescribed provisions based upon statute will be ineffective. Inadvertent ones, on the other hand, may be effective. Thus, the Government may be able to accomplish accidentally what it cannot accomplish deliberately.

1. Vendor Cost or Pricing Data

1-1. This part examines the prescribed clauses relative to contractor supplied cost or pricing data. It surveys statutes, clauses, certificates, and compliance standards which relate to cost or pricing data provided by contractors. This discussion includes contracting officer functions, legal problem areas, and some possible remedies.

1-2. **The Truth in Negotiations Act.** Public Law 87-653 provides that, under certain circumstances, DOD and NASA prime and subcontractors shall be required to submit cost or pricing data, and to certify that such data are accurate, complete, and current. Although not covered by the statute, civilian agencies have adopted regulations requiring the submission of costs or the pricing data scheme as a matter of agency policy. All contracts or changes thereto which require such certification must also . . . "contain a provision that the price . . . shall be adjusted to exclude any significant sums by which . . . such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which . . . was inaccurate, incomplete or non-current."

1-3. The broad rule of law generally determinative of the relative right of the parties with respect to information supplied to buyers by sellers is expressed in the maxim *Caveat emptor*, "let the buyer beware." It was distilled by architects of both the civil law system and the common law system from thousands of years of commerce and jurisprudence experience.

1-4. The institutions of the law have historically operated to distinguish the legal consequences of seller representation concerning the *value* of the product or service offered from the consequence of such representation concerning the *quality*

of such goods or services. Though perhaps blurred in modern jurisprudence, the distinction fortunately survives and remains vital in the commercial practice of law today.

1-5. Seller representations or misrepresentations concerning value are, at worst, considered matters of nonfeasance as opposed to misfeasance. The concept of value is perhaps too inherently subjective. Different parties may reasonably hold widely divergent views concerning the value of a particular good or service. Indeed, the same party may attribute different values to a subject under different circumstances. The policy of legal decision makers, with respect to questions of value, is similar to that employed in questions of consideration. It is sufficient to ascertain that there is some value or consideration. No inquiry is made into the adequacy of either value or consideration.

1-6. Seller misrepresentations of quality, on the other hand, have always been actionable. In most instances, sellers fraudulently offering inferior quality were subject to punishment at the hands of public authority, as well as to recovery of private damages. Fraudulent representations of quality were clearly regarded as misfeasance.

1-7. The general rule that buyers are obliged to make their own determinations of value, and have no right to rely upon seller's representations in that regard should not be ignored. It places responsibility for buyer protection unequivocally upon the buyer. Buyers who choose to place reliance upon modern theories purporting to require some form of truth in dealing on questions of value choose a poor substitute for vigilance in commercial transactions.

1-8. Within the commercial market place, the buyer is left to make his own determination of value. There is no general remedy against sellers, where the buyer overestimates value and pays too much. If, on the other hand, a seller overcomes or sufficiently inhibits a buyer's authority to independently determine value, the seller may acquire some obligation to the buyer and the buyer may secure remedies against the seller.

1-9. Misrepresentation by seller of quality which induces a buyer to overestimate value leads to that result. Concealment of material facts, preventing buyer's discovery of such facts, or misrepresentation of such facts under circumstances where the buyer has a right to rely upon such misrepresentation may lead to similar results. Such results generally stem from the law of torts, however, rather than the law of contracts. The torts of deceit and fraud have always been available to protect both wary and unwary buyer. Such tort concepts have frequently been modified to protect the US Federal Government.

1-10. A broad spectrum of remedies is available to protect the Government against civil fraud, deceit, criminal fraud or, in some instances, mere misrepresentation. For example, 28 USC 2514 provides for forfeiture of fraudulent claims against the Government. 28 USC 371 provides for fine and imprisonment as a penalty for any conspiracy to defraud the United States Government. 18 USC 495 provides for a fine and imprisonment for making any false writing for the purpose of obtaining or receiving any sum of money from the United States Government. 18 USC 1001 provides a fine and imprisonment for knowingly or willfully falsifying, concealing, or covering up by any trick, scheme, or device, a material fact, or for making any false or fictitious representations in any manner within the jurisdiction of any department or agency in the United States. Furthermore, under the common law, and the laws of most states, a contracting party who makes material misrepresentations in the negotiation of a contract may be liable in damages, and the affected contract may be subject to an action for recission by the affected party.

1-11. PL 87-653, the Truth in Negotiations Act, is designed to provide a contractual, as distinguished from a legal, remedy in the case of erroneous information provided by seller to the Government—most importantly, negligent or inadvertent failure to make full disclosure of pertinent and significant facts in a proposal or during a negotiation. The statute seems to require something above and beyond the ordinary legal obligation placed upon a seller to disclose information to a prospective buyer. It is the sole basis for any right of the Government to rely upon information supplied by the contractor in determining price or value.

1-12. ***Contracts Covered by the Statute.*** The law extends to several types of contract actions:

(1) negotiated prime contracts over $100,000

(2) changes and other modifications over $100,000

(3) subcontracts over $100,000 where the prime and higher tier subcontractors were required to furnish certificates

(4) changes and other modifications over $100,000, to sub-contracts covered by (3) above

(5) changes and other modifications under $100,000 to prime and subcontractors as prescribed by the Head of the Agency.

1-13. ***Contracts Not Covered by the Statute.*** The Truth in Negotiations Act does not cover:

(1) prime contracts awarded by formal advertising procedures

(2) negotiated prime contracts under $100,000

(3) subcontracts under $100,000

(4) changes or modifications under $100,000 not prescribed by the head of the agency as covered (prime and subcontracts)

(5) negotiated prime and subcontracts where the price negotiated is based on:

a. adequate price competition

b. established catalog or market prices of commercial items sold in substantial quantities to the general public

c. prices set by law or regulation

d. exceptional cases where the head of the agency waives coverage.

Although the statute exempts the prime and subcontracts under $100,000 from coverage, DAR extends coverage below the $100,000 floor. Even though a contract is exempt from the Act, the Government may require pricing data.

1-14. ***The Clauses.*** DAR 3-807.5 and FPR 1-3.807-5 implement that portion of Public Law 87-653 which requires that certain contracts contain a provision for price reduction for defective pricing data. The rationale for such a clause seems to be effectively set out:

(a) Where any price to the Government, including profit or fee and including price adjustments, must be negotiated largely on the basis of cost or pricing data furnished by the contractor, it is essential that all data that might reasonably affect the price negotiations be disclosed and that such data be accurate, complete and current (see FPR 1-3.807-3 and 1-3.807-4). If such certified cost or pricing data is subsequently found to have been inaccurate, incomplete or non-current as

of the effective date of the certificate, the Government is entitled to an adjustment of the negotiated price, including profit or fee, to exclude any significant sum by which the price was increased because of the defective data. The clauses set forth in 7-104.29 (FPR 1-3.814-1) are designed to give the Government in such a case an enforceable contract right to a price adjustment, that is to a reduction in the price to what it demonstrably would have been if the contractor had not failed to disclose significant and reasonably available data or had not furnished defective data.

1-15. In order to implement the intent of the law, and the regulations, and to make these provisions binding upon contractors, there was a need to provide enabling contract clauses and require that such clauses be included in appropriate contracts. The first enabling clause, DAR 7-104.29 FPR 1-3.814-1, is the Price Reduction for Defective Costs or Pricing Data Clause. Essentially, this clause provides that the contract price shall be reduced if the contracting officer determines that the price was initially increased because the contractor furnished incomplete, inaccurate or non-current data. Failure of the contracting officer and the contractor to agree on a reduction shall be a dispute concerning a question of fact within the meaning of the Disputes clause of the contract.

1-16. To enable the Government to determine whether the cost or pricing data, as submitted, were accurate, complete and current, the regulations provide for audit clauses. Contracts exempted by the statute from this requirement includes those "where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases where the head of the agency determines that the requirements . . . may be waived . . ."

1-17. The current DAR 3.807-3 implements the statutory requirement and FPR 1-3.807-3 implements the civilian agency policy requirement as to circumstances under which a certificate of current cost or pricing data shall be necessary. The term "cost or pricing data" is explained. and it is emphasized that the reference here is to more than historical accounting data: "it also includes, where applicable, such factors as vendor quotations, non-recurring cost trends such as those associated with labor efficiency, and make or buy decisions or any other management decisions which could be reasonably expected to have a significant bearing on costs under the proposed contract. In short, cost or pricing data consist of all facts which can reasonably be expected to contribute to sound estimates of future costs as well as to the validity of costs already incurred."

1-18. DAR 3-807.4 and FPR 1-3.807-4 set forth the form and content of the required certificate of current cost or pricing data. The contractor must furnish this certificate, effective as of the date of agreement on price, affirmatively stating that the cost or pricing data are current, complete, and accurate as of that date. Failure of the Contracting Officer to obtain this certificate will defeat a price reduction action under the clause.

1-19. ***Contractor Compliance.*** To comply with the Truth in Negotiations Act, a contractor must:

(1) Submit cost or pricing data to support his proposal. This is normally done on a form DD 633.

(2) Certify that the data submitted are accurate, complete, and current.

(3) Agree to the inclusion in the contract of a Provision for price reduction to exclude any significant amounts by which the price was overstated because defective cost or pricing data were used.

(4) Agree to accept audit and subcontractor certification clauses in his contract.

1-20. ***Contracting Officer Functions.*** To achieve the objectives of the Truth in Negotiations Act, the Contracting Officer must:

(1) utilize the data submitted by the contractor in arriving at a fair and reasonable price;

(2) after negotiation, require the contractor to furnish the required certificate;

(3) place the appropriate clauses in the contract;

(4) document the files to assure "trackability"—that is, to assure that the record shows that the data the contractor submitted were (or were not) actually relied on by the Contracting Officer in negotiation.

1-21. ***Emerging Legal Problem Areas.*** As with any statute requiring administration, the Truth in Negotiations Act has resulted in differences of opinion in several areas. The principal questions in controversy are:

1. What are "data?"
2. When are data reasonably "available" to the contract?
3. When has the contractor "submitted" the data?
4. When is a defect "significant?"
5. When are data "relied on" by the Government?
6. Are "set-offs" in errors permitted?
7. What is "complete, current, and accurate?"

Disputes are submitted on appeal to the Boards of Contract Appeals.

1-22. In its first decision in this field, the Board considered the essential question in the resolution of any factual dispute: "Who has the burden of proof?"

1-23. In *American Bosch Arma*, ASBCA 10305 65-2 BCA para. 5380, the Board clearly held that the burden of proof was on the Government to establish each and every element of the then regulatory, but now statutory, grounds for recoupment.

1-24. As time has gone on, the Board has clearly indicated that it intends to leave this obligation on the Government, even in cases arising after the applicability of the Truth in Negotiation Statute. In *Defense Electronics*, which was decided by BCA within the framework of a statutory clause, the Board stated: "The Government has the burden of proving every element in the chain of proof necessary to substantiate its claim."

1-25. It is incumbent on the Government to show that the change order price adjustment was overstated because of the contractor's failure to disclose, or its improper disclosure of, data (*FMC Corp.*, 66-1 BCA 5483; *Defense Electronics*, 66-1 BCA 5604).

1-26. Later, the Board modified the above rule, to the extent that it held that the burden was not an overwhelming one, and would be satisfied by prima facie proof of each element of the statutory basis for recoupment (*Cutler-Hammer, Inc.*, ASBCA 10,900, 67-2 BCA 6432).

1-27. *American Bosch Arma* (*supra*) also set forth the elements of proof that must be established by the Government. There is every indication that the same sets of facts must be proven in cases arising under the clause implementing the

statute (Cf. *Defense Electronics, supra,* and *Sparton Electronics*, ASBCA 67-2 BCA 6439).

1-28. These elements are: (1) the contractor did in fact fail to furnish accurate, complete or current pricing "data" in connection with the negotiation of the contract at issue; (2) the data furnished or omitted "caused" an increase in the price; and (3) the dollar amount of the increase.

1-29. Perhaps the most difficult of the elements to be proven is the fact of "causation." This element may have a direct bearing on proof of the dollar amount of damage. The Board, in *American Bosch Arma, supra,* stated: "This case illustrates the difficulty of establishing that nondisclosure of pricing data concerning a specific cost element caused an increase in the negotiated total price when there was no agreement or understanding with respect to specific cost elements."

1-30. In almost all cases decided in the realm of defective pricing data, the Board has wrestled with this problem. In the absence of affirmative evidence from the Government contract negotiators, the Board has come perilously close to repeating the ancient cliche; "the courts will not write a contract for litigants."

1-31. One of the better statements of the Government's burden in this regard, and of the Board's dilemma, was enunciated by the Board in *Bell & Howell* (ASBCA No. 11999, 68-1 BCA 6993, 32, 349, 1968): "In determining the amount of the price reduction, our objective has been to carry out the purpose of the Truth in Negotiation Act by arriving at a fair, reasonable and realistic estimate of the amount by which nondisclosure of the data, viewed in the light of the facts and circumstances existing at the time of the negotiations, can be expected to have increased the negotiated price."

1-32. There appear to be two inescapable conclusions regarding proof of the elements of causation and dollar damages: (1) contract negotiators should maintain extensive logs or professsional diaries regarding the observed realities of each day that they are in the bargaining process (Otherwise, they must rely upon the subjective evaluations by the Board as to what a member of the Board would have done had he been a negotiator.); and (2) absent affirmative evidence as mentioned above, the Board will apply the "reasonable man" test to determine the impact of the nondisclosure.

1-33. The element of causation is closely related to the element of reliance generally essential to cases of misrepresentation or deceit. It is difficult to establish a causal link between the misrepresentation or omission and the resulting harm, unless it can be shown that the Government in fact relied upon the data submitted in arriving at a price.

1-34. While the statute provides a right to rely in cases where there is otherwise none, it does not establish a presumption of reliance. Where Government action is to obtain its own data by pre-award audit to challenge data submitted by the contractor, causation would appear more difficult to establish.

1-35. In general, the cases to date have arisen from the failure of the contractor to present information or data which, in hindsight, the Government believes would have resulted in a lower negotiated price. Three questions have to be answered by anyone who is called upon to make a decision under the defective pricing clauses:

1. What form of information is proper?

2. To whom may this disclosure be made so as to imputte knowledge to the negotiators?

3. What are the relevant time frames for this disclosure?

1-36. Under the pre-statutory clause, the contractor was required to disclose "significant and reasonably available" cost and pricing data. Under the 1963 edition, a price reduction is possible if the contract was increased by "any significant funds." At first impression, it appears as though the older criterion required the determination of older fraud cases, i.e., was the statement or omission of such a nature that a person would change his course of conduct predicated upon a belief in the truth of the statement? Superficially, the criterion set forth in the statutory clause seemed to set up a monetary value scheme, i.e., "The dollar value of the omitted data in relation to the total contract price is determinative of whether a case for recoupment exists."

1-37. The Board has labored long and hard with this problem, and neither of the two hypotheses set forth in the preceding paragraph has been accepted.

1-38. In *American Bosch Arma*, the Board expressly rejected the percentage approach to the significance of an omission: "Pricing data is significant if it would have any significant effect for its intended purpose, which (is) as an aid in negotiating."

1-39. The above approach has been followed in *FMC* and *Defense Electronics.* Thus, it has been applied both before and after the effectiveness of the Truth in Negotiations statute. Perhaps the most workable criterion has been supplied in *Bell & Howell* (*supra*). There, the vice-chairman of the Board (Mr. Shedd) stated (in relation to certain undisclosed data): "Under such circumstances it is unrealistic to say that knoweldge of these facts could not reasonably be expected to affect negotiations."

1-40. Assuming that Mr. Shedd's statement in *Bell & Howell* is to be taken as to the final view of the Board, it seems reasonable to conclude that presently an omission or a misstatement will be considered significant if reasonable persons of a certain degree of sophistication in the Governmental contractual field believe that the knowledge would have affected negotiations.

1-41. Also, *Bell and Howell* leads to the inference that shifts from "significant data" under the 1961 clause to the concept under the 1963 clause of "increased by any significant sum" will make very little difference in the administrative or legal impact of the clause.

1-42. The *FMC* decision also brought to the foreground, as a contractor's defense, DAR 3-807(e). That section sets forth, with considerable clarity, certain basic economic procurement data which must be disclosed. It then goes on to exempt from the reporting requirement, " . . . the accuracy of the contractor judgment as the estimated portion of future costs or projections." It should also be noted that the section goes further, and gratuitously states that "This distinction between fact and judgment should be clearly understood."

1-43. In *FMC*, the Government contended that it should have been supplied information on certain in-house experiments that were then in progress at *FMC*.

1-44. The Board recognized that FMC's in-house studies might have had a significant effect on the negotiations, had there been an attempt to achieve a target cost of a price-adjustable type of contract, but refused to give this omission

any importance in negotiations leading toward a fixed-price contract.

1-45. To a limited extent, it can be said that the Board avoided deciding the distinction between fact and judgment as assiduously as the philosophers of old avoided the debate about the distinction between shadow and substance. The Board did apply a hindsight or pragmatic evaluation, i.e., the end result in that situation was not harmed by the contractor's failure.

1-46. In *Bell & Howell*, the appellant sought to avoid the impact of his nondisclosure of certain quotes that had been received from prospective subcontractors on the basis that it did not, at the time of receipt of the quotations, intend to use those subcontractors. This, they contended, was a judgmental decision and was exempt from the requirements of the statute. The Board made short shrift of that argument. It held that the quotations were actual data whose revelation would have had an impact. The Contractor conceded that the determination not to use the would-be subcontractor was judgmental. Here, the Government prevailed.

1-47. This decision was essentially followed in the 1969 *Cutler-Hammer* case in the Court of Claims. However, in the 1973 ASBCA case of *Chu Associates, Inc.* (No. 15004), non-disclosures of vendor quotes were excused on the grounds that the contractor did not seriously consider using the undisclosed vendor at the time of certifying, and that only later circumstances caused the contractor to do so. Parts inventory was considered pricing data in *Hardie-Tynes Mfg. Co.*, 76-1 BCA 11,827 (1976), since a definite possibility existed that the parts would be used on the contract. Whether an estimate or pricing plan is pricing data, within the meaning of the statute and contract, is a question of fact in each case. (*E-Systems, Inc.* ASBCA No. 17557). Pure estimate is not, but factual data in the estimate are, cost or pricing data.

1-48. The two early cases deciding the time limits for the transference of knowledge from the contractor to the Government were *American Bosch* and *FMC*. Those were decided with the guidelines of the 1961 Defective Pricing Clause. That clause demanded such data as was "significant and reasonably available." Therefore, the Board held that to determine a "cut-in rate," it would look to see the earliest date that all data had been made available to an agent of the negotiating team. This included departmental auditors, who had been sent in on preaward survey. Any data received by those auditors on the date of their examination, or which was available to them, had been disclosed to the Government.

1-49. Those two cases also reached to the determination of a cut-off date. It was recognized that in any organizational structure, information does not flow with the speed of light. Therefore the Board applied a certain presumption of irregularity, or inefficiency factor, and reached back approximately a month behind the contract approval date to establish a cut-off date. The appellants were not held liable for data that entered their systems after those arbitrary cut-off dates. In *FMC*, the Board noted that its action, beneficial to the contractor, was predicated upon a lack of affirmative evidence of record. In other words, the Government could have overcome the presumption of inefficiency, if it had presented proper evidence.

1-50. The 1963 Clause has been applied in *Defense Electronics*. This clause provides for recoupment if the data are inaccurate "as of" the date of execution of the contractor's certification. The case is of limited significance, from the viewpoint of analyzing the time-frame requirements under the newer clause, because the Board spent much time berating the abilities of Government auditors to whom the contractor had opened his books. At most, it can be said that the concept of a "cut-in date" will be preserved, for the Board held the Government knowledgeable of the data that had been given to the auditor as of the date that he received it. Whether the Board will later establish a cut-off date based upon the "reasonably available" concept remains in doubt. Recent cases such as *Sylvania Electric Products, Inc.* v. US, 202 Ct Cl 16 (1973), and *M-R-S Mfg. Co.* v. United States 203 Ct Cl 551 (1974), indicate a refusal to allow a "time-lag" in data submission. In *Singer Co.*, ASBCA 17604, 75-2 BCA 11,401, the board held that, since the duty to furnish current data was a statutory one, the Government could not waive this duty by accepting pricing data it knew were non-current.

1-51. One further note should be made in the relationship of time. Few contractors have failed to defend the inaccuracy of data or the omissions of material matter without contending that pressure from the Government to expedite the quotations and allied data created the error. In nearly every case, they have prevailed to a degree in their contention that urgency was the condition precedent to the situation.

1-52. Under the pre-statutory clause relating to Defective Pricing, the Board was traveling an extremely sophisticated path in the allowance of off-sets to contractors. These arose out of mistakes that operated in the Government's favor which were alleged as grounds for diminution of the Government's demand for recoupment.

1-53. In *American Bosch*, apparently unrelated off-sets were allowed; but as the Board later noted, these were sanctioned primarily because counsel for the Government virtually stipulated that they were applicable (*Cutler-Hammer*, ASBCA 10900, 67-2 BCA Para. 6432).

1-54. In *Lockheed*, ASBCA No. 10453, 67-1 BCA 6356, the Board refused to allow equitable off-sets on the theory that they were not directly related to the items that were the basis of the claimed recoupment. In the latest of the cases decided under the pre-statutory clause, the Board allowed off-set on the theory that the off-set was simply a mathematical recomputation of the costs of the very item that had been the foundation of the Government's claim (*Sparton Corporation*, ASBCA 11363, 67-2 BCA 6539, and 68-1 BCA Para. 6730 (Reconsideration). The off-set allowed in *Sparton*, *supra*, could be justified on the theory that the mistake involved both price and quantity of the same item; i.e., tubes. The contractor had misstated price, but had failed to include the cost of a second tube in his cost proposal.

1-55. The *Lockheed* and *Cutler-Hammer* cases were appealed to the Court of Claims. After a detailed examination of the legislative history of Public Law 87-653, the court concluded that there was no reason why offsets should not be allowed, so long as there was no incentive to the contractor to increase profits by overstating cost. The question of line item relationship was not treated directly in the *Cutler-Hammer* decision. However, *Lockheed* allowed both direct and indirect off-sets, including in that case off-sets of royalty and development cost mistakes against defective subcontract data.

1-56. As a result of these cases, DAR was amended in 1970 to allow off-sets of items in the same pricing actions, e.g., initial pricing of the same contract or for pricing the same change order, up to the amount of the Government's claim for overstated cost or pricing data arising out of the same pricing action.

1-57. Nothing in the statute or ante-dating clause precludes a prime contractor from bringing an action before the Board in behalf of one of its subcontractors. In fact, the *Lockheed* decision (*supra*) was based upon such a situation. However, there is is nothing in the statute that makes action under the Defective Pricing Clause the exclusive remedy of the Government in an action against a subcontractor. In *Honeywell, Inc.*, ASBCA Nos. 12168, 12169, and 12170, 68-1 BCA, the subcontractor made such a contention, which was rejected by the Board.

1-58. Obviously, the simplest means for a contractor to limit the impact of this statute would be to limit as sharply as possible the scope of the inspection of records by the Comptroller General. One contractor attempted to argue that the Comptroller General had only the right to inspect the books and records dealing solely with the contract. The Ninth Circuit Court held otherwise. The court found that 10 USC 2312(b), which gives the Comptroller General the right to examine the books and records of the recipient of a negotiated contract, was far broader in scope and in fact authorized the examination of data relating to total production costs (*Hewlett-Packard, et al v. United States*, 382 F2 1013, 12 CCF 86,967).

1-59. As we have seen in these pages, administration of the Truth in Negotiations Act involves numerous decisions and actions on the part of both the Government and the contractor. With this elaborate structure in place, may the Government elect to pursue some other remedy, ignoring its Price-Reduction device?

1-60. In the *Honeywell, Inc.* case (*supra*), the Government did just this, electing to sue the contractor for civil fraud under 31 USC 231, the so-called False Claims Act. This act penalizes those who would make false claims against the Government by calling for a forfeiture of $2,000 for each claim, plus double the amount of the falsification. The Government claimed defective pricing data inflated the contract price and that therefore each voucher was over-priced, and to that extent each was a false claim. Suit was filed against the contractor in the US District Court. In moving to dismiss the suit, the contractor argued that the False Claims Act was never intended to apply to defective pricing situations, whereas the Truth in Negotiations Act specifically applied and should be followed. The Court rejected this contention, ruling that the False Claims Act was applicable. The case was settled and did not reach trial on the merits. Nevertheless this important precedent was established. Had the case been tried, the Government would have had to prove that the contractor knew the data were defective when the contract was negotiated. In other words, guilty knowledge of wrong-doing is an essential part of establishing liability under the False Claims Act, whereas the Truth in Negotiations Act permits price reduction, whether or not the contractor knew the data were defective.

1-61. The contractor in this case took his fight to the ASBCA, appealing the refusal of the contracting officer to give the contractor a final decision under the Price Reduction for Defective Pricing Data Clause and the Disputes Clause. The Board dismissed the appeal on the grounds that the Government, having two remedies for defective pricing, could elect whichever it cared to and could not be forced to pursue one or the other. This reinforced the court decision and provides a significant, if stringent, alternative to Price Reduction for Defective Pricing Data.

1-62. It appears that the *Sylvania* and *M-R-S* cases, *supra*, have resulted in stricter duties on the contractor, not only refusing to recognize "time-lag" in data submission, but also increasing data submission duties, de-emphasizing the need for proof of "reliance" by the Government, and emphasizing the Government's right to pricing data.

1-63. The ASBCA has ruled that the three-year Audit clause provision for audit of contractor record implicitly gives the Government the right to pursue a defective pricing claim during that period, even though the contract has been closed out and final payment made, thus creating an exception to the final payment rule (*Bailfield Industries, Division of A-T-O, Inc.*, ASBCA No. 19025 (1975)).

1-64. To support a price reduction, the defective data must have significantly increased the contract price. Contractors have defended using mathematics; e.g., that the defect represented a fraction of one percent of the contract price. Judges have rejected this argument, noting that amounts from $30,000 to $1,000,000 in defective pricing were involved. They have deemed the amounts "significant." Recently, however, a judge held $8,050 insignificant because it would cost the Government more than that to collect it (*Conrac Corp. v. United States* 22 CCF 80,403 (CT Cl Trial Div-1976)).

2. Subcontract Clauses

2-1. In the absence of a contractual relationship, the Government has no legal basis, except through the prime contract, to administer or control a subcontractor. The subcontracting effort, however, is essential to the ultimate success of the defense program, and the Government position is that it cannot afford to rely wholly on the prime contractor's effort to guarantee that subcontracted work will satisfy all Government requirements and policies.

2-2. **Privity.** The prime contractor is the party having a direct contractual relationship with the Government. There is no such relationship between the Government and the subcontractor, or as it is usually phrased, there is no privity of contract between the Government and the subcontractor. The fact that the prime contract requires advance Government consent of a subcontract does not remove the subcontractor from the operation of the no-privity rule. It applies, even where the subcontract is subject to all the terms and conditions of the prime contract.

2-3. The type of contract is not important in applying the no-privity rule. The fact that the prime contract is of the cost type should not raise a presumption that there is a direct contractual relationship between the Government and the party supplying the goods and services.

2-4. When the Government enters into a contract with an exclusive sales agent, and the contract expressly names the product of a particular supplier, the latter is still regarded as a subcontractor and has no "standing to sue" the United States for a breach of contract.

2-5. An exception to the no-privity rule can be found in the case where a prime contractor acts as an agent of the Government for the purpose of buying goods or services on behalf of, or in the name of, the Government. There is such a close relationship, contractually, between the vendor and the Government that it is doubtful the vendor could be classified as a subcontractor.

2-6. An unusual example of the no-privity rule occurred when a prime contractor asserted that, because he had no contract with the second-tier subcontractor, he had no control over the sub and could not be responsible for the default of the subcontractor. The Court of Claims agreed (*Schweigert, Inc., vs. United States* 338 F2d 697 (1967). The Government quickly plugged the loophole by revising the Default clause to include subcontractors, at any tier or level, as the responsibility of the prime contractor.

2-7. The relationship between the prime contractor and a subcontractor, and that between the Government and a subcontractor, are the same under a subcontract where consent is granted as under a subcontract not requiring consent. Such problems as subcontract prices that are not fair and reasonable, delays caused by the subcontractor, defective supplies furnished by the subcontractor, or a strike at the subcontractor's plant are treated in the same fashion, regardless of whether the subcontract required consent. It should be noted, however, that where the contract required consent of a proposed subcontract, any arbitrary or unreasonable delay on the part of the contracting officer in granting consent may be regarded as excusable to the contractor.

2-8. Consent by the contracting officer does not constitute approval of the terms and conditions of the subcontract. Nevertheless, consent should not be given to provision in the subcontract purporting to give the subcontractor the right of direct appeal to the Board of Contract Appeals (BCA). The Government is entitled to the management services of the prime contractor in adjusting disputes between himself and the subcontractors. The contracting officer should act only in disputes arising under the prime contract, and then only with and through the prime contractor, even if a subcontractor is affected by the dispute between the Government and the prime contractor.

2-9. The contracting officer should not refuse consent to a subcontract merely because it contains a clause giving the subcontractor, if he is affected by a dispute arising under the prime contract, an indirect appeal to the Board through prosecution of such an appeal by the prime contractor on behalf of the subcontractor. However, such a clause must not attempt to obligate the contracting officer or the Board to decide questions which do not arise between the Government and the prime contractor, or which are not recognized under the disputes Clause of the prime contract. Further, it must not attempt to obligate the contracting officer to notify or deal directly with the subcontractor. Such a clause may appropriately provide that the prime contractor and subcontractor will be equally bound by the contracting officer's or the Boards' decision on a dispute. The subcontractor's right to appeal under such a clause is not dependent on the prime contractor agreeing with the sub in the individual dispute. Even though the prime might agree with the Government, the sub can assert the right of appeal in the subcontract (*Aero Jet-General Corp.*, ASBCA No. 11739 (1967)).

2-10. The prime contractor and his subcontractor may agree to settle disputes by arbitration. The results of such arbitration, and the cost resulting therefrom, however, are no more binding on the Government than are the results of a judicial determination or a voluntary settlement; they are subject to independent review and approval under the prime contract. The contracting officer should not consent to provisions in subcontracts purporting to make the results of arbitration (or judicial determinations or voluntary settlements) binding on the Government.

2-11. Although it is the stated policy of the Government that the prime contractor is selected and paid for management ability, it is necessary in some procurement situations to include, in the contractual instruments, certain controls by the Government over subcontracting and the decision between make-or-buy. The purchasing activity, with the help of the field contract administration activities, must work through the prime contract to make certain that the appropriate subcontract policies are applied.

2-12. In fixed-price contracts, the clause set forth in DAR 7-104.23 (FPR 1-3.703-28) is inserted (see Appendix D for text). The clause is self-deleting in firm-fixed price and fixed-price-with-escalation contracts. However, the clause does apply to unpriced modifications under such contracts.

2-13. The Subcontract Clauses for supply and research and development cost-reimbursement contracts are similar but somewhat more restrictive than the clause quoted above for fixed-price contracts. In cost sharing contracts where the contractor's share is 25 percent or more, and in cost-plus-incentive fee (CPIF) contracts where the cost incentive provides for both a swing from target fee of at least plus or minus 3 percent and a contractor's overall cost share of at least 10 percent, a consent is not required for subcontracts (except subcontracts for research and development) coming under a contractor's procurement system which has been approved.

2-14. Under cost-reimbursement contracts, the contractor must obtain the contracting officer's consent to the placement of: (1) all cost-reimbursement, time-and-material, and labor-hours subcontracts; (2) fixed-price subcontracts that exceed $25,000 or 5 percent of the contract price; (3) any subcontract for special tooling in excess of $1,000; (4) any subcontract for facilities; and (5) any subcontract having experimental, developmental, or research work as one of its purposes. However, consent is not required for fixed-price subcontracts or subcontracts for special tooling, if the contractor's purchasing system has been approved in writing, and the subcontract is within the limitations of the approval.

2-15. The subcontract consent requirements enable the Government to review proposed subcontracts and the necessity for subcontracting, the technical capabilities of the prospective subcontractor, reasonableness of the costs, subcontract terms, type of subcontract, and scope of solicitation. The contracting officer's prior written consent is required for placement of any subcontract for experimental research or development. This provision is unique to Research and Development contracts and does not appear in cost-reimbursement supply contracts. Its twofold purpose is to prevent subcontracting of the work for which the prime contractor was selected and to provide close control over justified subcontracting. With regard to subcontracts for facilities, the requirement for consent of the contracting officer does not permit any facilities acquisi-

tion to be charged to the Government which is not otherwise specifically authorized. One purpose of the requirement for consent to subcontracts for facilities is to provide an opportunity for the screening of Government facilities, and review of necessity, where the contract authorizes the contractor to acquire certain facilities on the Government's account.

2-16. The Subcontract Clause for Time and Material and Labor-Hour Contracts, DAR 7-901.10, establishes requirements for subcontract approval:

Subcontracts (1964 Mar.)

(a) No contract shall be made by the contractor for the furnishing of any of the work herein contracted for without the written approval of the contracting officer. For the purpose of this clause, purchase of raw material or commercial stock items shall not be considered work.

(b) The contractor agrees that no subcontract placed under this contract shall provide for payment on a cost-plus-percentage-of-cost basis.

FPR covers these relationships in Section 1-7.402-8.

2-17. If, as a result of the contractor procurement system review (CPSR), the administrative contracting officer determines that the proposed subcontract action is unacceptable to the Government, he should refuse to grant consent, and so notify the prime contractor. Other arrangements must then be made for the proposed work. This may involve altering some of the terms of the subcontract, or it may require the selection of another subcontract source. This will depend, of course, on the particular reasons for denying consent.

2-18. The use of what is considered to be, under the circumstances, an inappropriate contractual instrument may be cause for refusing to grant consent. For example, in the Subcontracts clause of the prime contract, the contractor agrees that "no subcontract placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis." Obviously, then, a CPPC subcontract would not be approved by the administrative contracting officer under any circumstances. On the other hand, cost-reimbursement, time and material, and labor-hour subcontracts may be acceptable in many instances; but the administrative contracting officer should be hesitant to consent to repetitive or unduly protracted use of such types of subcontracts. Under those conditions where subcontractor cost or pricing data and certification are required (DAR 3-807.3), consent to the proposed subcontract should not be granted by the administrative contracting officer unless the required data and the Certificate of Current Cost or Pricing Data are obtained in the prescribed format.

2-19. Subcontracts should contain all clauses required by law and the prime contract. They should also contain any clauses needed to carry out the requirements of the prime contract, even though there is no specific "flow down" provision in the prime contract. For example, the contract should require subcontracts to provide that title to special tooling and capital items, fully paid for under the subcontract, and remaining in the possession of the subcontractors, will pass to the Government whenever the prime contract provides for the vesting of such title in the Government. Failure of the subcontract to contain such requirements would be a basis for refusal to consent.

2-20. The reasonableness of the subcontract price is determined by the presence of adequate price competition among potential subcontractors, or by price and cost analysis. Although an apparently unreasonable price may not be sufficient reason for the flat refusal to consent to a proposed subcontract, it may cause the contracting officer to question the contractor's basis for acceptance.

2-21. If, under the terms of the prime contract, data (as defined in DAR 9-201 (a)) are to be furnished to the Government, no clause of any subcontract thereunder will be consented to which has the effect of restricting whatever use the Government may have of such data.

2-22. The Administrative Contracting Officer (ACO) is responsible for screening the Joint Consolidated List of Debarred, Ineligible and Suspended Contractors to determine if the proposed subcontractor is listed. When a listed firm is proposed as a subcontractor, the administrative contracting officer should decline to consent to the subcontract. However, if the administrative contracting officer considers that the placement of the subcontract with the listed firm is in the best interests of the Government, he may make such a recommendation to the procuring contracting officer.

2-23. Determinations concerning prospective subcontractors' responsibility is generally considered a function to be performed by the prime contractor. However, the contracting officer, in reviewing proposed subcontracts, is expected to make use of all available sources of information in satisfying himself that proposed contractors are responsible. Knowledge of previous unsatisfactory performance by a proposed subcontractor, or evidence of questionable financial capability, may be sufficient reason to withhold consent—at least until the feasibility of employing alternate sources can be explored. An impending strike at the plant of the proposed subcontractor may also be cause for holding up consent pending a decision on availability of another responsible source.

2-24. Failure to include subcontract provisions for adequate protection and care of Government property that will come into the proposed subcontractor's control (DAR 13-102.2) would justify withholding consent until proper provisions are included. Other subcontract deficiencies that might cause the Administrative Contracting Officer to withhold his consent would be the failure to provide suitable implementation of Government requirements for Small Business and Labor Surplus Area programs, Equal Employment Opportunity Program, Buy American Act, Excess Profits (Vinson-Trammell Act), Davis-Bacon Act, Copeland Act, and other labor laws and regulations.

2-25. Consent to a subcontract, or relief from the requirement for obtaining consent by virtue of the approval of the contractor's procurement system, does not constitute a determination as to the acceptability of the subcontract price or the allowability of costs. However, it should minimize the requirement for retroactive review of subcontracts, except cost-reimbursement, unless there is some indication that the costs may be unreasonable. In all cases, costs resulting from such subcontracts will be subject to the test of allowability.

2-26. The written notice to the contractor should identify the subcontract, and advise the contractor of the contracting officer's consent or refusal. In the case of refusal, justification will be given. The contracting officer may, in his discretion, ratify, in writing, a subcontract already awarded. Such after-the-fact action constitutes the consent required by the Subcontracts clause.

2-27. When submission of information with respect to a prospective contractor's proposed make-or-buy program is required, the solicitation should so state, and should clearly set forth any special factors to be used in evaluating the program. The contractor should consider such factors as capability, capacity, availability of small business and labor surplus area concerns as subcontract sources, contract schedules, integration control, proprietary processes, and technical superiority or exclusiveness. Having considered these factors, the prospective contractor must identify, in his proposed make-or-buy program, that work which he or his affiliates, subsidiaries, or divisions (1) will perform as "must make," (2) will subcontract as "must buy," and (3) will perform or acquire by subcontract as "can make or buy." The prospective contractor must state the reasons for his recommendations of "must make" or "must buy" in sufficient detail for the contracting officer to determine that sound business and technical judgment have been applied to each major element of the program.

2-28. It frequently happens that the design status of the article being procured does not permit accurate precontract identification of major items that should be included in the make-or-buy program. When this is the case, and the make-or-buy program is to be incorporated into the contract, the prospective contractor should be notified that such items must be added to the program, when identifiable, under the "Changes to Make-or-Buy Program."

2-29. The contractor has basic responsibility for make-or-buy decisions; therefore, the contractor's recommendations should be accepted unless they adversely affect the Government's interests or are inconsistent with Government policy. Evaluation of "must make" and "must buy" items should normally be confined to that necessary to assure that the items are properly categorized.

2-30. If the Government directs placement of a subcontract and the sub fails to perform, the prime is likely to attempt to disavow responsibility, since it had no choice in suppliers and was directed by the Government to the named subcontractor. This argument is successful in court in cases where the Government imposed the sole source situation after award of the contract. However, when the sole source sub is named in the solicitation, the contractor assumes the risk and is not excused from the default of the sub (*Aerokits, Inc.*, ASBCA No. 12324 (1968)).

3. Miscellaneous Clauses

3-1. Among the various clauses of Government contracts, several are classified as miscellaneous. These clauses range from state and local taxes, and military security, to contract gratuities and liability insurance. In this section, we shall examine some of these clauses in order to gain a better understanding of their importance in contract law.

3-2. **State and Local Taxation.** The Federal Government may not be taxed by State and Local subdivisions, and it resists indirect taxation in the form of taxes levied on contractors for doing business with the Government. Tax problems are essentially legal problems, and contracting officers should request the assistance of legal counsel with this specialty. The tax provisions used in fixed-price contracts are set forth in DAR Section XI, and FPR Section 1-11. Broadly speaking, they provide that all applicable Federal, State, and Local taxes be included in the total contract price except where exemptions are available at the inception of the contract or where otherwise stated in the contract. The clauses provide for issuance of exemption certificates, when appropriate. They also provide procedures to be followed if an included or reimbursable tax is levied, removed, or changed after the effective date of the contract.

3-3. Ordinarily, there are no tax clauses, as such, in cost-reimbursement contracts. However, under DAR Section XV, FPR Section 1-15, "Contract Cost Principles," taxes paid or accrued by the contractor in the performance of the contract and according to generally accepted accounting principles are allowable items of cost if tax exemptions are not available. Exceptions to this rule include federal income taxes and excess profit taxes; taxes related to financing, refinancing, and refunding operations; and special assessments on land representing capital improvements.

3-4. If state tax authorities refuse to allow legitimate tax exemptions, a contractor should immediately report the matter to the contracting officer. The contracting officer usually requires a contractor to preserve his administrative and legal remedies by paying the tax under protest or, if necessary, by withholding payment pending disposition of his appeal.

3-5. **Officials Not to Benefit.** The "Officials Not to Benefit" clause (DAR 7-103.19; FPR 1-7.102-17) is the oldest mandatory contract clause required by statute on this subject (Title 41 USC 22). It applies to all Government contracts. The clause provides that no member of, or Delegate to, Congress, or any Resident Commissioner, shall receive any benefit from a Government contract. This is designed to prevent "jobbing," seeking private gain through public service.

3-6. The clause expressly states that it does not apply to a contract made with a corporation for the corporations' general benefit. This permits the Government to contract with a corporation whose president happens to be a Member of Congress.

3-7. The statute (Title 18 USC 431 and 432) has civil and criminal aspects. In case of violation, both parties are subject to fine. Any prohibited agreement between them is void. If procurement personnel find a situation covered by the statute, they should notify the contracting officer for further referral of the matter to higher authority.

3-8. **Contract Gratuities Clause.** A gratuities clause is included in Defense contracts, except those for personal services. This clause is required by law (Title 10 USC Section 2207). The clause (DAR 7-104.16) gives the Government special rights to terminate the contract, and special remedies against the contractor. Termination is allowed if it is found, after a hearing, that a contractor offered or gave any gratuity to any employee of the Government to influence the contract process. Gratuities include entertainment and gifts of any type. The clause applies if the intent was to secure favorable treatment in the awarding of the contract, or the making of any determination relating to contract performance. Violation of the Gratuities clause is also a ground for contractor debarment under DAR 1-604.

3-9. DAR, Appendix D, establishes procedures for notice to the contractor of alleged violation of the Gratuities clause. It also sets up procedures for the conduct of the hearing before the Secretary of a Military Department or his designee. If

termination is warranted, the Government has these remedies: (a) breach of Contract (contractor default); (b) exemplary damages (damages in excess of those measured by the actual harm to the Government), from three to ten times the cost of the gratuities to the contract; or (c) any other remedies provided by law or by the contract.

3-10. Bribery, graft, and conflict of interest are widely regulated by law. Congress has passed criminal statutes that prohibit a Government employee from: (a) accepting money or anything of value to influence an official act (bribery or graft); (b) participating personally on behalf of the Government in official dealings with a firm in which he has a financial interest; and (c) participating as agent or attorney or receiving payment for prosecuting a claim against the United States.

3-11. Title 18 USC 203 bars Government officers and agents from directly or indirectly soliciting, receiving, or agreeing to receive any payment for services relating to any Government contract, claim or other matter in which the United States is interested. The penalty is a maximum fine of $10,000, imprisonment for two years, and mandatory disqualification from Federal office. Section 203 dos not apply to retired military officers who are not on active duty or otherwise in Government employ.

3-12. Part-time consultants (special employees who work for the Government not more than 130 days in any period of 365 consecutive days) are treated separately under the section. They are subject to it in two matters: those in which they have participated personally and substantially in their Government capacities, and those pending in the Department or agency in which they serve. The second restriction does not apply, however, if the part-time employee has served no more than 60 days in the preceding 365-day period.

3-13. Title 18 USC 205 prohibits officers and employees from two activities: (1) they must not act as agents or attorneys for, or aid or assist in the prosecution of, any claim against the United States; and (2) they must not represent any person or agent as attorney before the Government in any matter of Government interest.

3-14. Special part-time employees are treated as they are in Section 203, above. They are subject to Section 205 only in matters in which they have participated personally and substantially in a Government capacity. If the employee has served in his agency more than sixty days during the year, the section covers all matters pending before that agency. Limited waivers of the section are possible for part-time employees (upon certification by the head of the agency and publication in the Federal Register).

3-15. **Covenant Against Contingent Provisions.** Department of Defense contracts contain a clause entitled "Covenant Against Contingent Fees" (DAR 7-103.20). The clause is intended to prevent the use of purchased influence in obtaining Government contracts. It requires a warranty from the contractor that he did not employ any person to solicit or secure the contract for a commission, percentage, brokerage, or contingent fee. It is included in contracts, as directed by the Defense Acquisition Regulation, in accordance with Title 10 USC 2306(b) and Executive Order 9001. The clause is required in all contracts (except construction contracts under $10,000) placed by formal advertising which use Standard Form 19 or 19a; but it does not apply to bona fide employees or bona fide established commercial or selling agencies maintained by the contractor to secure business. The clause also prohibits contingent fees for information leading to a contract. No matter what the payment is called, it falls within the clause if it depends partly or wholly upon success in getting the contract.

3-16. Appropriate action is taken when a violation is discovered. If discovered before award, the bid or offer may be rejected. During contract performance, the Government can annul the contract without liability; or it can recover the contingent fees paid by the contractor. Violation of the covenant also justifies debarment of a contractor under DAR 1-604. It may warrant referral of the case to the Department of Justice.

3-17. Differences as to "bona fide employees" and "bona fide established commercial or selling agencies" have made enforcement difficult at times. To promote uniformity, DAR 1-505.3 and 1-505.4 set forth criteria for deciding the question:

> "Bona Fide Employee" means an individual, including a corporate officer, employed by a concern in good faith to devote his full time to such concern and no other and over whom the concern has the right to exercise supervision and control as to time, place, and manner of performance of work.

3-18. The Defense Acquisition Regulation recognizes that some concerns, especially small business, may employ individuals who represent other concerns; and makes allowances for them. A person may be a bona fide employee whether his compensation is a fixed salary, a percentage, a commission, or other contingent basis when customary in the trade; but his employment must indicate some continuity, and it must not be related to obtaining specific Government contracts.

3-19. Neither an individual nor an agency is a bona fide employer if he or it seeks to obtain a contract through improper influence. Nor is it bona fide if it claims to be able to obtain contracts in that manner. Improper influence means influence, direct or indirect, that tends to induce a Government employee to consider the award of a contract on other than the merits of the matter.

3-20. Solicitations for bids in advertised procurements contain a representation that the bidder must make with regard to contingent fees. Similar representations are obtained from the contractor in negotiated procurements. A form is available for inclusion in the solicitation. It states that the bidder represents that he has, or has not, employed any company or person, other than a full-time bona fide employee working solely for the bidder, to solicit or secure the contract. The form also requires the bidder to state whether he has, or has not, paid or agreed to pay any person other than a full-time bona fide employee working solely for the bidder, any fee or other payment contingent on, or to result from, award of the contract.

3-21. Note that the representation the bidder makes in this form is broader than the coverage of the covenant. As explained above, it is not essential that selling agencies be employed full time to avoid a violation; yet the representation requires an affirmative statement whenever such employment occurs. This is intended to reveal the possibility of a violation. The contracting officer can then follow up preliminary information by a request for more detailed data.

3-22. If an offeror or bidder fills in either part of the representation in the affirmative, he is required to submit

Standard Form 119, "Statement on Contingent Fees." Submission is usually required only from successful bidders and contractors. Information on whether the covenant against contingent fees would be violated may also be requested.

3-23. An offeror or bidder who has previously completed the form may be allowed to reaffirm it. He does this by submitting a signed statement: (a) telling when the form was submitted; (b) identifying, by number, the invitation or contract that was involved; and (c) representing that the information previously submitted is still true and applicable.

3-24. In advertised procurements, contract award need not be delayed pending receipt of Standard Form 119 (or the substitute statement). In negotiated procurements, it should be delayed unless the Secretary, or his representative, determines that the interests of the Government require otherwise. Delay in furnishing the information is not treated as refusal. Refusal requires rejection of the bid or offer.

3-25. **Military Security Requirements.** A contract with the Government may involve "classified" military information, or matter which the contractor must keep safe against unlawful dissemination, duplication, or observation in the interest of national security. This includes not only plans and specifications, or any other documents containing such information, but also oral information and recordings, and all materials from which they are made and the processes involved in their manufacture. All contracts which are classified by a Department as "Confidential" or higher, and any other contracts whose performance will require access to classified information or material, must contain a Military Security clause. The contractor undertakes to safeguard all classified elements of the contract, and to maintain a system of security controls in accordance with Government prescribed standards.

3-26. Representatives of the military departments having security responsibility over the facility, and representatives of the contracting military departments, have the right to inspect, at reasonable intervals, the procedures, methods, and facilities utilized by the contractor in complying with the security requirements under the contract.

3-27. If, subsequent to the date of the contract, the security classifications or security requirements under the contract are changed by the Government, and the security costs under the contract are thereby increased or decreased, the contract price is subject to an equitable adjustment by reason of such increased or decreased costs. This equitable adjustment is accomplished in the same manner as if such changes were directed under the Changes clause in the contract.

3-28. The contractor is required to insert, in all of his subcontracts that involve access to classified information, provisions which conform substantially to the language of the clause discussed herein. The contractor also agrees to submit for security clearance any subcontractor proposed by him for furnishing supplies and services which will involve access to classified information.

3-29. The contract clause permitting "Assignment of Claims" states that in no event shall copies of the contract or of any plans, specifications, or other documents relating to the work under the contract, if marked "Top Secret," "Secret," or "Confidential," be furnished to any assignee thereunder without prior written authorization by the contracting officer. Even apart from the contractual obligation, unauthorized disclosure of classified information might subject a contractor to criminal penalties under the Espionage Act.

3-30. **Liability Insurance.** The cost-reimbursement contract contains a provision that the contractor shall procure and maintain such bonds and insurance in such forms, in such amounts, and for such length of time as the contracting officer may require; and that the contractor will be reimbursed for such bonds and insurance. It also provides that the contractor shall give the contracting officer notice of any suit begun or claim made against him arising out of the performance of the contract, the cost of which is reimbursable to the contractor and the risk of which is uninsured, or in which the amount claimed exceeds the limits of the coverage under his insurance policies. The contractor is required to furnish the Government all pertinent papers received. In certain cases, the contractor will assign to the Government all his rights arising out of the asserted claims (except those against the Government). If required, the contractor will authorize representatives of the Government to settle or defend the claim, and to represent or take charge of any litigation affecting the contractor, to the extent that third party claims against the contractor are covered by insurance. Such claims, however, do not generally concern the Department of Defense, since it has no liability in that regard. However, in the absence of such insurance, or in the case of excess liability, the settlement of claims of third parties caused by employees of the contractor in the performance of the contract, as well as compensation to employees for industrial injuries or occupational diseases suffered in the performance of the contract, might well be items of allowable costs.

3-31. Normally, in fixed-price contracts, the Government is not concerned about insurance coverage maintained by the contractor, or even the lack of it. However, in some cases, where the Government work is separable from the contractor's other activity, the Government assumes the risks, or makes available special insurance policies, in order to eliminate or reduce prohibitively high insurance costs. Examples are (1) the practice of excusing contractors under a Flight Risk clause from responsibility for loss or damage to aircraft resulting from flight testing, and (2) blanket accident insurance covering employees exposed to extra hazards (made available at preferential cost).

3-32. The principle of assumption of risk by the Government can be extended to cover the whole performance of a contract in cases where the contractor, contemplating hazardous work for the Department of Defense, finds liability and property damage insurance extremely expensive, or impossible to obtain. When the contractor insists on getting a broader indemnification than is permitted by the standard DAR clause referred to above, it is sometimes necessary to resort to special statutory authority.

3-33. If a contractor is not chargeable with any breach of his contractual duties and obligations under a cost-reimbursement type contract, he may be reimbursed for losses or damages incurred in the performance of the contract as an element of his actual costs.

CHAPTER 16

The Disputes Procedure

THIS CHAPTER will concern itself with the disputes process in the Government contract context. We will study the nature of the process, both old and new. The Contract Disputes Act of 1978 (hereafter the CDA) has significantly changed the historical disputes procedure by introducing a statutory process having major differences for resolving conflicts arising under a Government contract.

1. "Dispute" Defined

1-1. A "dispute" must be more than a mere disagreement between the contracting parties. To launch the disputes process and to put an end to the discussions concerning the disagreement, a final decision by the Contracting Officer is required.

1-2. Once such final decision is made, we are thereafter engaged in the "verbal controversy" which is the dictionary definition of "dispute." Although another dictionary definition of "dispute" is to "argue irritably or with irritating persistence," the disputes process is intended to put an end to such arguing.

1-3. A dispute is an honorable proceeding. Honest disputes over performance and interpretation of contract provisions can arise in even the smoothest contract situations, and honest differences do not indicate bad faith. Even the clearest contract terms and conditions can give rise to the necessity of interpretation. Resolution by mutual agreement is frequently possible. When agreement is not possible, statutory or regulatory resolution is provided. Such resolution takes the form of administrative or judicial remedies.

1-4. Historically, administrative remedies were provided for by contract, e.g., the Disputes Clause. Judicial remedies, provided for by statute, were available in certain cases where the Government waived its sovereign immunity and consented to be sued. The principle that "one must exhaust one's administrative remedies before seeking a judicial remedy" prevailed until the passage of the CDA.

2. The Pre-CDA Disputes Clause

2-1. The standard pre-CDA Disputes Clause was contained in the General Provisions of the fixed-price supply contract.

Disputes

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; *provided*, that nothing in this contract shall be construed as making final the decision on any administrative official, representative, or board on a question of law.

2-2. A thorough understanding of this clause is necessary for two reasons: (1) disputes arising prior to the effective date of the CDA (1 March 1979) may still be in the process of resolution under this provision; and (2) the new Disputes Clause under the CDA (which follows, infra) presumes knowledge of the disputes process as more clearly defined by the historical provision, above.

2-3. Since this clause is of more than historical significance, a further study of its provisions is in order. An analysis of its provisions follows:

(a) "Except as otherwise provided in this contract . . ." This phrase suggests that other methods of resolution provided by the contract, e.g., liquidated damages, may be in order.

(b) ". . . any dispute concerning a question of fact arising under this contract which is not disposed of by agreement. . . ." This administrative resolution is concerned with the disposition of issues of fact. We also note that disposal of disputes by agreement between parties is emphasized and encouraged by reference to such disposition.

(c) ". . . shall be decided by the Contracting Officer. . . ." At this point, the realities of contracting with the Government strike home. The uninitiated contractor may be shocked to learn that the so-called equal bargaining positions of the parties seem to be contradicted by a provision permitting a unilateral decision by the Government's agent on questions of paramount importance.

(d) ". . . who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor." This is the first element of due process-fair notice. There must be a writing and the writing must be furnished the Contractor.

(e) "The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary." This portion of the clause does not mean what it purports to say. The 30-day limitation, though firm in the opinion of the ASBCA (*Maney Aircraft Parts, Inc.*, ASBCA 14363, 70-1 BCA ¶8076) was considered by the Court of Claims to be contractual, not jurisdictional, and therby waivable for "good cause" or "justifiable excuse" (Ct Cl 191-70, June 20, 1973). Further, appeals addressed to the Contracting Officer were considered proper by virtue of the law of agency whereby notice to the agent is imputed to the principal.

(f) "The decision of the secretary . . . , etc., . . . " is probably the most noteworthy portion of the clause, since it embodies the Anti-Wunderlich Acts (see infra) grounds for appeal of administrative determinations on questions of fact: ". . . fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence." The student of Administrative Law will recognize these grounds as being in common and general use in the administrative appeals process. Unfortunately, the latest disputes provision (which follows) does not call out these elements, referring only to the CDA which continues to recognize these Anti-Wunderlich standards. Of great significance to both the Government and the contractor, the parties are now imputed with knowledge of these standards by operation of law, since they are included in the statute (CDA) even though no longer in the regulation (Disputes Clause).

(g) "In connection with any appeal proceeding under this clause, the contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal." This is the other element of due process: an opportunity to be heard. This portion of the clause is cursory and incomplete. Offering evidence in support of an appeal is only part of the story. Everything required by administrative due process is included, e.g., a fair hearing in proper forum, a good record, the opportunity to cross-examine, proper rules of procedure, etc.

(h) "Pending final decision of a dispute hereunder, the contractor shall proceed diligently with the performance of the contract in accordance with the Contracting Officer's decision." Here, again, we squarely face the unilateral authority of the sovereign in making a decision binding the contractor to continued performance, though he may vehemently disagree with such decision. The penalty for failure to continue performance would be a breach of contract and a total termination by default.

(i) The balance of the clause (sub-paragraph (b)) reiterates the Anti-Wunderlich Act caveat that questions of *law*, though considered in the administrative adjudication, can only be finally resolved under judicial function.

There we have it—administrative adjudication explained in brief. This "old" clause is still operative. It contains elements which the "new" clause omits; it appears to be more definitive and precise in its terminology; it is the fundament for a thorough understanding of the disputes procedure, whether historical or current. It must be thoroughly understood and digested by the serious student of administrative procedure.

3. The Disputes Process in Historical Perspective

3-1. An important part of understanding the disputes process is a study of the major historical events leading up to the CDA of 1978.

(a) *United States v. Wunderlich* (342 US 98, 1951). The contractor sued in the Court of Claims, following a disagreement with the contracting officer's decisions on various disputes during performance of a contract to build a dam. The Court of Claims granted relief on the basis that the departmental decision was "arbitrary," "capricious," and "grossly erroneous." Fraud was not alleged nor proved. The Supreme Court held that the finality of the department head's decision must be upheld unless it were founded on fraud, alleged and proved. Citing cases upholding the finality of departmental decision-making (*United States v. Moorman*, 338 US 457) and the necessity of proving fraud (*United States v. Colorado Anthracite Co.*, 225 US 219, 226) or at least gross mistake implying bad faith (*Ripley v. United States*, 223 US 695, 704), in order to gain relief, the only ameliorating factor of what otherwise could be considered a harsh anti-contractor position was the Court's statement. . . "If the standard of fraud that we adhere to is too limited, that is a matter for Congress."

(b) *The Administrative Disputes Act of 1954* (Anti-Wunderlich Act), 41 USC Sec 321 and 322, May 11, 1954. By this Act, Congress acted to ameliorate the impact of the decision in the *Wunderlich* case. Simply stated, four new grounds for relief from administrative decisions on questions of fact were added to the court-mandated standard of fraud: "capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

(c) *United States v. Carlo Bianchi & Co., Inc.*, 373 US 709 (1963). In another construction contract involving the building of a diversionary tunnel, the contractor sought relief under the Changed Conditions (now Differing Site Conditions) article of the contract. Following the denial of its appeal before the Board of Claims and Appeals of the Corps of Engineers (1948), the contractor appealed to the Court of Claims (1954) under the new Anti-Wunderlich standards. The Court's Commissioner (now Trial Judge) allowed the introduction of new evidence (de novo) despite the Government's position that the review should be made on the administrative record. Citing *Volentine and Littleton v. United States*, 136 Ct Cl 638, the Court held that trial in the Court of Claims should not be limited to the administrative record, but should be de novo. The Government appealed to the US Supreme Court. That Court reversed, the majority upholding the principle that appeals should be made on the administrative record. The contractor, however, was ultimately victorious wherein by Private Law 91-234 (January 2, 1971) the case was reviewed by ENGBCA which decided some 27 years (August 30, 1973) after the contract was initiated that the contractor was entitled to his claim. Knowledgeable contracting personnel still refer to protracted, long-continuing, and still unresolved matters by the epitaph "Shades of Bianchi's ghost!"

(d) *United States v. Utah Construction and Mining Co.*, 384 US 394 and *United States v. Anthony Grace & Sons Inc.*, 384 US 424 (1966). These cases, heard on the same day by the

Supreme Court, reaffirmed the importance of the administrative remedy and the exhaustion of such remedy before seeking judicial relief. It was reiterated that the record made before the Board was the record upon which an appeal would be made. There would be no trial de novo except in certain exceptional situations. Once again, the Supreme Court resoundingly reaffirmed its support for the administrative process.

(e) *S & E Contractors, Inc. v. United States*, 406 US 1, (1972). A construction contractor with the AEC was refused payment for certain claims upon which the parties in privity were agreed. The Comptroller General and, later, the Department of Justice refused to recognize the accord and took a position contra both the AEC and S&E. The Government, in fact, was appealing its own decision! Was this a "dispute" within the purview of the Disputes Clause? The matter was resolved when the Supreme Court took the Comptroller General out of the contract appeals process, and denied the Department of Justice's claim of the right to represent the Government in appealing a decision of an administrative agency in cases other than those involving fraud. Attempts to interpret and clarify the provisions of the Administrative Disputes Act of 1954 (Anti-Wunderlich Act) continued, leading to the CDA of 1978.

4. The Contract Disputes Act of 1978 (PL 95-563; 92 Stat 2382)

4-1. The Act, following certain reforms proposed by the Commission on Government Procurement (1972), provides for significant changes in Government contract remedies. It "judicializes" the disputes process to a high degree. It provides for procedures that shall be followed in all contracts entered into since 1 March 1979.

4-2. The CDA in its entirety can be found under Chapter 16 of Appendix F in this text. However, a brief summary of its most pertinent provisions is in order:

(1) It confers jurisdiction in Boards of Contract Appeals on "all claims arising under (or related to) the contract." The Boards thereafter have had authority to hear and decide not only the usual historically disputed claims, (e.g., constructive changes; equitable adjustments), but also claims involving reformation, rescission, or breach of contract.

(2) The formerly 30-day appeal period following a Contracting Officer's final decision is now extended 90 days.

(3) A certification requirement has been added. The Contractor must now certify that its claim is accurate and complete to the best of the Contractor's knowledge and belief, and that the claim is made in good faith.

(4) The Office of Federal Procurement Policy (OFPP) gains additional stature by becoming involved in the organization of Boards of Contract Appeals, and in issuing rules of procedure in administrative adjudication by such boards.

(5) The Contractor now has the option of choosing an administrative remedy or a judicial remedy. It may now appeal to a BCA or directly to the Court of Claims.

(6) The Government now can seek judicial review of board decisions (contra S&E, supra).

(7) Interest on Contractor claims now accrues from the date the claim is received rather than from the date of the Contracting Officer's decision.

(8) Stiff anti-fraud provisions on contractor claims are now operative.

(9) Except for TVA cases, District Courts no longer have jurisdiction over Contractor appeals.

(10) BCA personnel are subject to a careful selection process, and board status and prestige is futher enhanced.

4-3. As a result of the CDA, Boards of Contract Appeals now appear to have the status and jurisdictional authority of "administrative courts." This is not surprising in that the entire history of the administrative process, as reviewed in the significant procedural events in the historical perspective of the disputes process, above, has favored the establishment of such adjudicatory bodies.

4-4. In summary, we now have statutory authority supporting the process of settlement of disputes on Government contracts. With the enhancement of the status of jurisdictional authority of Boards of Contract Appeals under the CDA, we can expect continued growth in significant decisions affecting Government contract relationships.

5. The "New" Disputes Clause

5-1. The CDA of 1978 was the "enabling" act. It remained for the regulation (DAR) to implement the ACT by incorporating its provisions, in part, in the "new" Disputes Article.

5-2. At least two "temporary" or "interim" disputes clauses were tried and discarded. Implementing the Act by regulatory provisions became no small task. The clause at this writing (January 1982) bears the same type of analysis which we afforded the "old" Disputes Clause earlier in this chapter. First, however, the clause in its entirety:

(a) This contract is subject to the Contract Disputes Act of 1978 (PL 95-563).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved in accordance with this clause.

(c) (1) As used herein, "claim" means a written demand or assertion by one of the parties seeking, as a matter of right, the payment of money, adjustment, or interpretation of contract terms, or other relief, arising under or relating to this contract. However, a written demand by the Contractor seeking the payment of money in excess of $50,000 is not a claim until certified in accordance with (d) below.

(2) A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim for the purposes of this Act. However, where such submission is subsequently disputed either as to liability or amount or not acted upon in a reasonable time, it may be converted to a claim pursuant to the Act by complying with the submission and certification requirements of this clause.

(3) A claim by the Contractor shall be made in writing and submitted to the Contracting Officer for decision. A claim by the Government against the Contractor shall be subject to a decision by the Contracting Officer.

(d) For contractor claims of more than $50,000, the Contractor shall submit with the claim a certification that the claim is made in good faith; the supporting data are accurate and complete to the best of the contractor's knowledge and belief; and the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable. The certification shall be executed by the Contractor if an individual. When the Contractor is not an individual, the

certification shall be executed by a senior company official in charge at the Contractor's plant or location involved, or by an officer or general partner of the Contractor having overall responsibility for the conduct of the Contractor's affairs.

(e) For contractor claims of $50,000 or less, the Contracting Officer must, if requested in writing by the contractor, render a decision within 60 days of the request. For contractor-certified claims in excess of $50,000, the Contracting Officer must decide the claim within 60 days or notify the Contractor of the date when the decision will be made.

(f) The Contracting Officer's decisions shall be final unless the Contractor appeals or files a suit as provided in the Act.

(g) Interest on the amount found due on a contractor claim shall be paid from the date the Contracting Officer receives the claim, or from the date payment otherwise would be due, if such date is later, until the date of payment.

(h) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

(End of Clause)

(b) The following paragraph shall be substituted for paragraph (h) of the clause in (a) above as required under the circumstances described in 1-314(k)(2) and (3).

(h) The contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or related to the contract, and comply with any decision of the Contracting Officer. (1980 JUNE)

5-3. An agency instruction illustrating the use of the alternate (h) paragraph, referred to in the Disputes Clause above, follows:

DAR 1-314(k)(2). In general, prior to passage of the Act, the obligation to continue performance applied only to claims arising under a contract. However, Section 6(b) of the Act authorizes contracting agencies to include a provision requiring a contractor to continue performance of a contract in accordance with the contracting officer's decision pending final decision on a claim relating to the contract. In unusual circumstances the performance of some contracts may be so vital to the national security or to the public health and welfare that performance must be guaranteed even in the event of a dispute that may be characterized as a claim relating to, as opposed to arising under, the contract. In recognition of this fact, an alternative provision is provided for paragraph (h) of the Disputes Clause at 7-103.12 (b).

(3) The acquisitions of aircraft, naval vessels, missiles, tracked combat vehicles, and related electronic systems shall include the alternate provision at 7-103.12(b). In addition, the alternate provision at 7-103.12(b) may also be used in those contracts or classes of contracts where it has been determined, in accordance with Department procedures, that it is essential because of the unusual circumstances described in (k) (2) above. The determination to use the alternate provision at 7-103.12(b) in other situations shall be made by the head of the contracting activity responsible for the acquisition involved. Examples of the types of unusual circumstance where continued performance may be determined to be vital to the national security or public health and welfare include the acquisition of weapons, support systems, and related components other than those listed above, or other essential supplies or services whose timely reprocurement from other sources would be impracticable. In all contracts employing the alternate provision at 7-103.12(b), in the event of a dispute not arising under but relating to the contract, agencies should consider providing, through appropriate departmental procedures, financing of the continued performance, provided that the Government's interests are properly secured.

5-4. Following is a brief analysis of the provisions of this new Disputes Clause.

(a) "This Contract is subject to the Contract Disputes Act of 1978." This sentence simply affirms the statutory nature of the disputes process. One involved in Government contracts is presumed to know the content and requirements of the CDA.

(b) "Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved in accordance with this clause." This broad grant of authority reaffirms that the act applies to *all* disputes on matters "arising under or relating to" the contract. Thus, BCA's now have all of their old authority as well as the new authority to decide disputes "relating to" the contract. The agency boards now have the same powers as the Court of Claims to grant relief in respect to claims arising under the Act. Since relief may be granted in "all disputes," it may extend to cases involving breach of contract and certain kinds of relief formerly available only under PL 85-804, i.e., rescission or reformation for mutual mistake. Note, however, that not all requests for relief under PL 85-804 are considered claims under the CDA. Note, also, that contracts with foreign governments, international organizations, or agencies thereof, are exempted if the Secretary determines that such exception is in the public interest.

(c) The clause carefully defines certain significant terms in subparagraph (c), e.g., "claim," "voucher, invoice, or other routine request for payment . . ." The clause states that a written demand by the Contractor seeking payment is not a claim until certified under the provision below. The Act clearly does not require certification of all claims at the time such claims are made. Subparagraph (c)(iii) continues to require a writing and a Contracting Officer's decision.

(d) "For contractor claims of more than $50,000, the contractor shall submit . . . a certification . . ." This subparagraph requires a certification of the Contractor's claim. Since the Act specifies penalties for fraudulent claims, the certification cannot be taken lightly. Mixed views about such certification prevail, but certification is here to stay. Quaere: After certifying a firm claim, can the Contractor accept a lower settlement without becoming vulnerable to charges of fraudulent claim? What impact will this provision have vis a vis contractor notification of claims (DAR Section XXVI) and the economic consequences of early submittal where interest on such claim is concerned?

(e) "For contractor claims of $50,000 or less, the Contracting Officer must . . . render a decision within 60 days . . ." Here we have an attempt to "deadline" Contracting Officer's decision-making. It should be understood that the reasonableness of the specified time periods will depend on many relevant factors, e.g., the adequacy of supporting data; the size and complexity of the claim, etc.

(f) "The Contracting Officer's decision shall be final unless the contractor appeals or files a suit as provided in the Act. Once again, the contractor is presumed to know what the Act requires. No longer do the Anti-Wunderlich grounds (i.e., fraudulent, or capricious, or arbitrary . . . etc.) appear in the clause (though retained in the Act). DAR 1-314(i)(2) is of some help, but the novice Contractor will undoubtedly need considerable assistance in prosecuting his appeal under the CDA.

(g) "Interest on the amount found due on a contractor claim . . ." Interest on Contractors' claims now has a statutory basis. It shall be paid from the date of receipt of the claim by the Contracting Officer, or from the date payment otherwise would be due until the date payment is made. The interest rate shall be at rates periodically fixed by the Secretary of the Treasury.

(h) The (h) and alternate (h) clauses require the Contractor to continue performance pending resolution of any appeal, claim, action, or request for relief. Subparagraph (h) deals with such matters "arising under the contract; alternate (h) extends to action "arising under or related to" the contract. It is clear that the purpose of adjudication under this clause, whether administrative or judicial, is to render relief that is quick, inexpensive, and expedient while the parties in privity continue performance, if such remains. Alternate (h) recognizes that performance of some contracts may be so vital to national security or to the public health and welfare that such performance must be guaranteed regardless of the nature of the dispute or claim.

5-5. At this point, a general comment concerning the purpose of the Act is in order. Foremost, the Government's policy continues to be to resolve disputes by mutual agreement. Informal discussions seeking to resolve troublesome issues are encouraged. The Contracting Officer continues to be the central figure in the disputes process and is authorized, within his or her warrant, to decide or settle all claims relating to the contract. However, such authority does not extend to a claim or dispute for penalties or forfeitures which another agency, by statute, is authorized to determine or to any claim involving fraud. It is obvious that the CDA enhanced the authority of the BCAs and that of the Contracting Officer.

6. The Federal Courts Improvement Act of 1982 (HR 4482)

6-1. A new law, of considerable importance in any study of the Disputes procedure, was effective 1 October 1982. Following the "Court of Appeals for the Federal Circuit Act of 1981," which established the Thirteenth (Federal) Circuit, the Court of Claims and the Court of Customs and Patent Appeals were merged into a US Court of Appeals for the Federal Circuit by the Federal Courts Improvement Act of 1982.

6-2. The new Federal Circuit Court will have jurisdiction over appeals in contract and patent infringement cases, in certain international trade and tariff matters, and from decisions of the Merit Systems Protection Board.

6-3. The Trial Division of the present US Court of Claims will become the "US Claims Court," and will conduct trials in matters within the jurisdiction of the new Federal Circuit Court. It will have exclusive jurisdiction to grant injunctive relief, declaratory judgments, and any extraordinary or equitable relief deemed to be proper in pre-contract award matters. Further, this Claim Court is authorized to provide an entire remedy (e.g., restoration to office; correction of records), and may exercise the power to remand in appropriate cases. Specifically in regard to the CDA of 1978, the Claims Court shall have jurisdiction in "direct access" cases.

6-4. The careful student of Government contracts will note that: (1) the US Court of Appeals for the Federal Circuit will exercise appellate jurisdiction in CDA cases; (2) The US Claims Court will act as trial court, with exclusive jurisdiction in certain pre-award matters, and (3) on 1 October 1982, the jurisdiction and the name of the former US Court of Claims were significantly altered concurrent with the addition of the new Federal Circuit Court of Appeals.

7. Summary

7-1. Now that we have dissected the disputes articles, old and new, and have absorbed the administrative adjudicatory process in historical perspective, a quick-reference summary of changes is in order.

7-2. The table that follows contains the action or event (in order of its appearance in the CDA), the result or requirement under the "old" (pre-CDA) disputes process, and finally, the result or requirement under the CDA of 1978.

THE DISPUTES PROCESS

	PRE-CDA	*CDA OF 1978*
1. Fraudulent claims	Not covered as such	Contractor liable for amount equal to unsupported part of claims plus costs for up to 6 years from commission.
2. Time limit on Contracting Officer's decisions	Reasonable time	Up to $50,000-60 days. Over $50,000-60 days or notice of additional time required.
3. Claims certification	Not required	Required over $50,000
4. Appeal to BCA	30 days	90 days
5. BCAs	Established and regulated by agency	Statutory coverage; OFPP/Agency
6. Accelerated procedure	Up to $25,000	Up to $50,000 at Contractor's option; 180 day deadline for decision
7. Appeal of BCA decisions to Court of Claims:		
Contractor	6 years	120 days
Government	No right of appeal	120 days with HCA and Attorney General approval
8. US District Courts	Juris up to $10,000	No juris. (except in TVA cases)
9. Small claims	Covered under accelerated procedure above	Up to $10,000, non-appealable decision required within 120 days
10. Direct access to Court of Claims by Contractor	Only on pure questions of law	Up to 12 months from Contracting Officer's decision
11. Court of Claims action upon appeal of BCA decision	Limited to review of the record	May take additional evidence
12. BCA finality	Only on questions of fact; Anti-Wunderlich Act standards apply	Same
13. BCA jurisdiction	Questions of fact arising under the contract	"All claims" arising under (or related to) the contract
14. BCA subpoena power	None	Authorized; enforceable through USDC
15. Interest on Contractor claims	Payable from date of Contracting Officer's Decision	Payable from date Contracting Officer receives claim

CHAPTER 17

Remedies of the Contractor

An analysis of contractor remedies, exclusive of those available under the Disputes Clause, is presented in this chapter. Disputes between the Government and contractor should be avoided by both parties, but this is possible only if an agreement can be negotiated. The Disputes Clause of the contract provides a framework within which most disputes can be resolved, but there may be some differences which will be determined by reference to other avenues of relief.

1. Claims to the Comptroller General

1-1. The Comptroller General has an important role in the settlement of claims in Government contracts. Besides being a principal party in the settling of claims, the Comptroller General also serves in an advisory capacity to agencies of the Government. However, his primary duties are centered around the monitoring of Government expenditures.

1-2. **Authority.** The authority of the Comptroller relative to the settlement of claims is contained in the Budget and Accounting Act of 1921 (31 USC 71): "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." In addition to settlement powers, the Comptroller General gives advisory opinions to heads of Government agencies relative to contemplated disbursements.

1-3. In effect, the statutory authority given to the Comptroller results in control of the public purse strings by the legislative branch of Government. While the executive branch of Government commits the Government to expenditures, the actual payment is monitored by the legislative branch through the Comptroller General.

1-4. **Procedure.** The Comptroller General usually does not have adequate information about the facts and, therefore, requires that claims be filed with the department involved. If claims cannot be disposed of administratively by the department, they are then forwarded to the General Accounting Office's Claims Division. In a very real sense, the procuring activity which cannot resolve the claim supplies its files and the data so that the Comptroller General can settle the claim. However, the contractor may, and frequently does, submit evidence of his own to the General Accounting Office's Claims Division. The Comptroller General does not normally require hearings and oral arguments. A Comptroller General decision rests solely on the written record in the vast majority of cases.

1-5. The Comptroller General in the past has limited his review of BCA decisions to those exceptions of the Wunderlich Act enumerated in the Disputes Clause, and for errors of law. The Contract Disputes Act of 1978 precludes the Comptroller General from any review of board decisions. Further, a Federal Court judgment in a particular case is "res judicata," and binds the Comptroller General.

1-6. Under the Contract Disputes Act of 1978, contract-related claims shall be submitted to the Contracting Officer, formally determined by him (if agreement is not reached), and either appealed by the Contractor to the agency Board of Contract Appeals or sued on in the Court of Claims. No other choices are provided. Thus, by omission, the Comptroller General is excluded. This would not diminish his authority to render opinions on the legality or propriety of awards, however, under his authority to entertain protests of award.

1-7. The Dockery Act (31 USC 74) makes Comptroller General decisions on claims binding on the Executive Agencies.

1-8. If, prior to the rendering of a final decision in a dispute, the contracting officer requests a decision of the Comptroller General, the contractor may yet appeal under the disputes procedure. The BCA is not deprived of jurisdiction, since the contractor has a right—under the contract—to the Board's determination.

1-9. Requests for reformation or rescission of contracts constitute a large part of the cases coming before the Comptroller General. Quite frequently, the unilateral mistake situation comes up for review before the award is made. As a general rule, the Comptroller General is very strict in his allowance of reformation or rescission as a form of relief.

1-10. Another frequent example involving determinations by the Comptroller General is the liquidated damages remission. The Comptroller General has the power to remit liquidated damages, as assessed against a contractor. This authority stems from the Armed Services Procurement Act of 1947. In addition, the Comptroller General has the authority to settle a claim involving unliquidated damages for breach of contract.

2. Relief Under Public Law 85-804

2-1. Public Law 85-804, August 28 1958, as implemented by Executive Order 10789, dated 14 November 1958, and amended by Executive Order 11051, dated September 27 1962, provides relief to contractors in certain extraordinary situations (50 USC 1431-1435). The Act empowers the President to permit agencies concerned with national defense to enter into or to modify contracts without regard to other provisions of law. By Executive Order, the President authorizes the Secretaries of the Army, Navy, and Air Force to exercise his authority under the Act. Relief under the Act requires a formal determination

that it facilitates the national defense. (See DAR Section XVII and FPR 1-17.101.)

2-2. An essential difference exists between the relief made possible by Public Law 85-804 and any action taken under the Disputes Clause. The Disputes Clause provides for settlement of disagreements having to do with the contract as written. Public Law 85-804 authorizes relief outside the provisions of the contract; the original agreement itself may be changed. Stringent restraints contained in the law prevent abuse of this extraordinary remedy.

2-3. **Types of Contract Modification Under the Act.** There are three main types of relief under the Act: amendments without consideration, amendments correcting mistakes and ambiguities, and formalization of informal commitments. (Ref. FPR 1-17.103).

2-4. ***Amendments Without Consideration.*** Traditionally, no officer or employee of the Government may amend a contract without obtaining some additional contract benefit (consideration) for the Government. Under Public Law 85-804, this principle gives way to the concept that the interests of national defense may justify an amendment without consideration.

2-5. The finding that the national defense will be facilitated by an amendment depends on two factors: (1) an actual or threatened loss of vital supplies or services under a defense contract, or (2) an impairment (caused by such loss) of the productive ability of a contractor whose continued operation is essential to the national defense. Relief is limited to what is actually required to avoid impairment. The anticipated loss cannot be merely a reduction of expected profits; the Act does not afford a method of relieving a contractor from general financial difficulties.

2-6. ***Mistakes and Ambiguities.*** Mutual mistakes are the second category permitting relief under the Act. Three examples of these are:

(1) A mistake or ambiguity consisting of the failure to express (or to express clearly in a written contract) the agreement as both parties understood it.

(2) A contractor's mistake so obvious that it was, or should have been, apparent to the contracting officer.

(3) A mutual mistake about a material fact.

The concept of mutual mistake usually excludes correction of mistakes caused by faulty business judgment. Thus, if the time or costs of a given contract were underestimated, the contractor may not be entitled to this type of relief; but relief on some other basis (an amendment without consideration, for example) might be granted.

2-7. ***Formalization of Informal Commitments.*** A written authorization by the Contracting Officer is the only basis for a valid Government contract. Sometimes, however, a contractor may act without formal authorization. For example, he may furnish property or services to the Government following oral instructions from a government official. This may or may not have been done in connection with an existing government contract. In either case, to obtain payment, the contractor may request that the commitment be formalized under Public Law 85-804.

2-8. No informal commitment may be formalized, unless a request for payment has been filed within six months after arranging to furnish, or furnishing, property or services in reliance upon the commitment; and unless it was found that it was impracticable to use normal procurement procedures at the time the commitment was made (DAR 17-205.1(d); FPR 1-27.205-1(d)).

2-9. **Authority to Grant Relief.** The Secretary of each Department has established a Contract Adjustment Board to make decisions under Public Law 85-804. Each Board consists of a chairman and not less than two nor more than six other members. It may approve, authorize, and direct appropriate action in all cases submitted to it. A Board's decision is final, although it may modify, reverse, or correct any of its findings.

2-10. DAR delegates authority to certain other officers and officials to act in Public Law 85-804 cases. Redelegation of this authority may be made with written approval of the appropriate Secretary. However, the law limits this redelegation of authority. For example, a Secretary cannot delegate authority to approve actions that would obligate the Government for more than $50,000 (DAR 17-205.2; FPR 1-17.205-2).

2-11. The processing of a claim begins when the contractor makes his request for relief in a letter addressed to the contracting officer. All pertinent data must accompany the letter. The contracting officer then prepares a preliminary record and forwards it through channels to the cognizant officer of the approving authority. He does this within thirty days after the close of the month in which the record was prepared.

2-12. In his letter forwarding a case to the Contract Adjustment Board, the contracting officer states the nature of the case, the basis for authority to act, and the findings of fact (cross-referenced to any supporting enclosures). He also states conclusions based on the facts and the disposition he recommends. When remedial action is recommended, the contracting officer states that the action will facilitate the national defense. He also includes copies of the contractor's request, evidence, endorsements and reports, and comments of cognizant Government officials with this forwarding letter. After the Board has disposed of a case, the chairman signs a Memorandum of Decision approving or denying the request.

2-13. Sometimes a case may interest more than one Department. In this situation, the Department primarily involved with the contractor's request for relief maintains liaison with the others. When appropriate, Departments may take joint action. When funds from other Departments may be involved, the procuring Department does not approve the request for relief without determining that the other Departments will be able to make the necessary funds available.

2-14. Procurement personnel should make every effort to prevent situations that require this form of relief. It is available only as a last resort, and was not intended to create any legal rights. Relief under it is purely a matter of grace.

3. Judicial Remedies

3-1. In this section, we shall review judicial remedies for contract claims from three standpoints: (1) lawsuits against the Government; (2) procedure following board decisions; and (3) statute of limitations on contractor claims.

3-2. **Lawsuits Against the Government.** Contractors may sue the Government in the Court of Claims because the Government has consented to this by the Tucker Act (28 USC 1491) and by the new Contract Disputes Act of 1978. The new Act gives a contractor the option of going directly to court with any claim relating to the contract.

3-3. The only administrative action required is that the contractor first submit his claim in writing to the Contracting Officer, who must formally rule on it. The contractor may then sue in the Court of Claims. The US District Courts no longer may entertain contract suits against the Government (except Tennessee Valley Authority cases).

3-4. ***Procedure Following Board Decisions.*** Several choices are open to the parties after a Board decision. The contracting officer need take no further action if the Board affirms his decision. The contractor, on the other hand, may wish to appeal to the United States Court of Appeals under standards prescribed by the Wunderlich Statute (41 USC 321) and the Contract Disputes Act of 1978. Either party may file a motion for reconsideration by the Board within thirty days of notice of a decision. When the Board does not uphold his decision, the contracting officer must take action to implement its ruling; he may have to "equitably adjust" the contract, if the Board so directs.

3-5. The agency head, with the prior approval of the Attorney General, may appeal to the Court of Appeals if the Board decision was fraudulent, capricious, arbitrary, so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. The contractor may exercise the same right of appeal. Prejudicial error on rulings of law will also furnish a basis for appeal. On appeal to the Court of Claims, that court will review the Board record, possibly take additional evidence, and affirm or reverse the Board, or remand to the Board for further proceedings.

3-6. ***Statute of Limitations on Contractor Claims.*** Lawsuits must be taken to court within 12 months of the date of receipt by the contractor of the Contracting Officer's decision. If, instead, he appeals to the BCA, he has 90 days to do so. Appeals from Board decisions must be taken within 120 days of his receipt of the Board decision. Agency appeals from Board decisions must also be taken within 120 days.

4. Private Bills by Congress

4-1. When all else fails, the contractor may seek relief by attempting passage of a private bill by Congress. Such a bill may appropriate an amount in full satisfaction of the contractor's claim, it may direct the Court of Claims to take jurisdiction over the case (where a statute of limitations has already barred the contractor's claim), or it may direct the Comptroller General to settle and adjust the claim.

5. Subcontractor Remedies

5-1. The situation of a subcontractor presents a different problem. It is a fundamental legal concept that before one has a cause of action against another in contract, there must be privity of contract. This is defined as a contractual relationship, and it prevents a suit by one party against another unless both are bound together in contract. Ordinarily, subcontracts do not have disputes articles or any other provision which would provide a remedy for the subcontractor before a Board of Contract Appeals. Of course, where a subcontract does have a disputes article or where the subcontractor signs the prime contract, the courts have found the necessary privity of contract to enable enforcement of nonjudicial and judicial remedies by the subcontractor.

5-2. The prime contractor may sponsor an appeal on behalf of the subcontractor, but the appeal is taken in the name of the prime contractor. The Court of Claims held in *Severin v. United States*, 99 Ct Cl 435, (1943) that a prime contractor in a suit against the Government is restricted to recovery of the damages he himself has suffered, and cannot recover losses of his subcontractor where the subcontract contains an exculpatory clause absolving the prime contractor from liability to the subcontractors for breaches of contract committed by the Government. Accordingly, if the prime has no legal liability to reimburse the subcontractor, there is no reason for the Government to do so. This rule has not been extended to "equitable adjustment" situations, such as found in Changes, Delay or Suspension of Work clauses, where the prime has not disclaimed a pecuniary interest through an exculpatory clause in the subcontract. *Blount Bros. Construction Co. v. United States* 348 F2d., 471 (1965).

5-3. If the subcontract contains a Disputes Clause in which the prime agrees to lend its name to subcontractor appeals, or to actively prosecute the appeal, he must do so. The subcontractor could then appeal in the name of the prime. Provisions in subcontracts for direct appeal by the subcontractor in its own name are not generally approved by contracting officers.

5-4. The various boards and Court of Claims will not entertain claims arising out of disputes between the prime and sub themselves, regardless of inclusion of a Disputes Clause in the subcontract, because the matter in dispute is one which does not directly involve any obligation of the Government and the Government does not arbitrate such disputes. The subcontractor is left with his common law right to sue for breach of contract in state court or, in some cases, a US District Court on its private contract with the prime contractor.

6. Freedom of Information

6-1. The 1966 revision of the public information section (Sec. 3) of the Administrative Procedure Act (5 USC 552), effective July 4 1967, is known as the Freedom of Information Act (FOIA). It generally provides that Government information be made available to the public with certain exceptions. In November of 1974, Congress enacted Public Law 93-502, adding many new provisions that are designed to provide fuller and more prompt compliance with its requirements. DAR 1-329 provides guidance in the release of procurement information to the public.

6-2. **Purpose and Scope.** Public Law 89-487 (as codified by Public Law 90-23 in Section 552 of Title 5, United States Code and amended by Public Law 93-502) provides that information is to be made available to the public either by (a) publication in the Federal Register, (b) providing an opportunity to read and copy records at convenient locations, or (c) upon request, providing a copy of a reasonably described record. Materials to be published or made available under (b) and (c) above will be determined in accordance with applicable provisions of Appendix L to DAR (DOD Directive 5400.7) and implementing Departmental regulations. General policy guidelines and procedures to be followed in responding to public requests for procurement records are contained in this paragraph and Appendix L.

6-3. The key requirement of the Public Law is the making available of "information" as contained in "records." Accordingly, when a request is received for items not preserved for informational value or as evidence of agency functions, dissemination thereof is not governed by this Section or by Appendix L to DAR, but by appropriate Directives and Instructions concerning the particular item in question. Examples of such items include formulae, designs, drawings, research data, computer programs, and technical data packages.

6-4. While there is no authority in the statutory provisions to disregard a request for access to records not properly addressed in accordance with Departmental procedures, such requests should be sent to the procuring contracting officer for records relating to specific contracts or solicitations and to the Head of the Contracting Activity (HCA) for multi-contract records or for procurement type records not specifically related to a particular contract or group of contracts. When a request for records is received by personnel not in possession of such records, care should be taken to forward the request in accordance with Departmental procedures to the proper person without delay.

6-5. **Release of Records—General Considerations.** The Act imposes upon the various Government agencies the obligation of making information available to the public to the greatest extent possible while at the same time recognizing the need for providing specific exemptions to protect certain categories of information. The Department of Justice has stated with respect to the passage of this law:

> This law was initiated by Congress and signed by the President with several key concerns:
> (1) that disclosure be the general rule, not the exception;
> (2) that all individuals have equal rights of access;
> (3) that the burden be on the Government to justify the withholding of a document, not on the person who requests it;
> (4) that individuals improperly denied access to documents have a right to seek injunctive relief in the courts;
> (5) That there be a change in Government policy and attitude."

Accordingly, Appendix L to DAR states that it is the policy of the Department of Defense to make the maximum amount of information concerning its operations and activities available to the public.

6-6. Procurement records requested and reasonably described by any member of the public must be made available, unless they come within any of the specific categories of matters which are exempt from public disclosure under DAR 1-329.3. However, a record which is otherwise exempt from disclosure should nevertheless be made available when (i) disclosure is not inconsistent with statutory requirements, with security classification requirements, or with other requirements of law, and (ii) a competent official charged with this responsibility determines that no significant and legitimate governmental purpose would be served by withholding the record. The person making the request need not have a particular interest in its subject matter, nor must he provide justification for the request.

6-7. In deciding whether a particular record may be released, the request must be reviewed in accordance with Appendix L to DAR and Departmental implementation thereof to determine whether the document or material requested qualifies as a "record" and, if so, whether it falls within an exemption under Section VI of Appendix L of DAR as further implemented by this paragraph. Except for the establishment of procedures for the review of requests, the Departments and their subordinate organizations shall not, pursuant to DAR 1-108, issue instructions or regulations establishing standards for determining the release of procurement records without prior approval of the offices listed in DAR 1-108 (a)(v). The integrity of the procurement process requires the Contracting Officer to ensure that the legitimate interests of the Government and contractors are protected, as well as the public's right to procurement records under 5 USC 552, as amended. It is therefore essential that action upon requests for procurement records or information derived from them, be taken after consultation with the cognizant procuring activity contracting officer. This will ensure that the advice of the contracting officer is utilized in determining whether a significant and legitimate Government purpose, from a procurement standpoint, will be served by denying release in the circumstances involved in each request.

6-8. **Exemptions.** The law does not provide an automatic self-executing formula for determining whether a particular record is appropriate for release. Rather, nine general categories of exemptions were established to provide the framework within which judgment must be exercised in deciding whether a particular record is exempt from disclosure. In compliance with Appendix L of DAR, records or reasonably segregable portions of them should be made available upon the request of any member of the public if no significant and legitimate governmental purpose would be served by withholding them under an applicable exemption, provided disclosure is not prohibited by executive order (see DAR 1-329.3(c)(1)), by a statute, or by regulations authorized by, or in implementation of, a statute. In determining whether a procurement record not specifically discussed here should be released, the Department of Defense policy regarding the release of information contained in Appendix L to DAR shall govern. The nine categories of exemptions are discussed below.

(1) Matters that are "specifically authorized under criteria established by Executive Order to be kept secret in the interest of the national defense or foreign policy and are in fact properly classified pursuant to such an Executive Order." Examples of such matters are those classified pursuant to Executive Order 11652, "Classification and Declassification of National Security Information and Material" and implemented by regulations such as DOD Directive 5200.1, "DOD Information Security Program," June 1 1972 and DOD Regulation 5200.1-R, "DOD Information Security Program Regulation," November 15 1973.

(2) Matters that are "related solely to the internal personnel rules and practices of an agency." These matters include materials which are intended for the guidance of agency personnel only, including internal rules and practices which cannot be disclosed to the public with prejudice to the proper and efficient performance of an agency function. Examples are operating rules, guidelines, and manuals of procedures for Government investigators, and examiners. Other examples are circumstances under which an unannounced inspection or spot-audit of a transaction will be conducted to determine compliance with regulatory requirements and negotiating or bargaining techniques, positions, or limitations.

(3) Matters that are "specifically exempted from disclosure by statute." Examples of such statutes include 18 USC 1905

for trade and financial information provided in confidence to an officer or employee of the Government; Public Law 86-36 (50 USC 402) for National Security Agency information; the Atomic Energy Act of 1954, as amended (42 USC 2231); and 35 USC 181-188 (Patent Secrecy).

(4) Matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." This exemption covers documents containing information which is customarily privileged or confidential and is released to the Government on that basis by an individual, private or public organization, State or local government, foreign government, or international organization. The applicability of this exemption does not depend upon whether the Department obtains the information directly from a person concerned with preserving the confidential nature of the information, such as in the case where a prime contractor submits information from a subcontractor. It may encompass business statistics, inventory and customer lists, scientific and manufacturing processes and developments, and trade secrets. Such information is generally received in confidence in connection with the receipt of bids, loans, contracts, and proposals, solicited or unsolicited, and in the course of negotiations. It would also include statistical data or information concerning contract performance, income, profits, losses and expenditures, if offered and received in confidence from contractors or potential contractors. To receive the protection of the exemption, material must be received in confidence or not made generally available by the party furnishing it to the Government. The following are examples of documents which would normally be exempt under this provision: cost and pricing data submitted by contractors, as described in DAR 3-807; documents or data appropriate for renegotiation purposes; price analyses based on contractor submitted data (see DAR 3-811); documents supporting advance and progress payments; documents received from contractors relating to compliance with labor policies (e.g., records of compliance checks; payrolls or certified excerpts); settlement proposals; rejected engineering change proposals; inventory reports or disclosures; and value engineering proposals. Formulae, designs, drawings and specifications and research data are considered exploitable resources to be utilized in the best interest of all the public and not preserved for informational value or as evidence of agency functions. Their release is governed by other DOD Directives and Departmental regulations.

(5) Matters that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." This exemption is intended to recognize that full and frank exchange of opinions would be impossible if all internal communications were required to be made public. The exemption does not contemplate indiscriminate administrative secrecy, and any internal memoranda which would routinely be disclosed to a private party through the discovery process in litigation should be available for release to members of the public. The following are examples of documents and information, part or all of which are not normally available to the public under this exemption: cost and price analysis as described in DAR memoranda; procurement management reviews, such as Contract Performance Evaluation Reports; Government price estimates; pre-award surveys and other advisory documents considered by contracting officers in determining contractor responsibility for award purposes and other documents containing staff advice preliminary to an award of a contract; records of Source Selection Boards, Contract Review Boards, etc.; advisory documents regarding termination actions; advisory records concerned with contract administration, such as production surveillance, quality assurance and inspection reports; and renegotiation reports (see DAR 1-319). Records which are received or generated by a department and which are preliminary to a decision or action, should not be released until such time as disclosure would not be detrimental to the authorized and appropriate purpose for which they are being used. For example, a copy of an IFB intended for public release at a particular time should not be released prematurely, although the document is in final form and ready for distribution. Similarly, advance information on proposed plans to procure, lease, or otherwise acquire or dispose of materials, real estate, facilities, or functions, should not be released when such information would provide undue or unfair competitive advantage to private personal interests (see DAR 1-1007).

(6) Matters that are "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." A citizen has a right to be secure in his personal affairs when such affairs have no bearing or effect on the general public. This exemption is intended to exclude from disclosure requirements not only personnel and medical files, but also all private, personal, financial, or business information contained in other files which, if disclosed to the public, would constitute a clearly unwarranted invasion of personal privacy. An example of such similar files are those compiled to evaluate candidates for security clearance—civilian, military and industrial, or for access to particularly sensitive classified information.

(7) Matters that are contained in "investigative records compiled for the purpose of enforcing civil, criminal, or military law, including the implementation of Executive Order or regulations validly adopted pursuant to law," and then only to the extent that their release would: interfere with enforcement proceedings; deprive a person of the right to a fair trial or an impartial adjudication; constitute an unwarranted invasion of personal privacy; disclose the identity of a confidential source; disclose confidential information furnished only from a confidential source obtained by a criminal law enforcement authority in a criminal investigation or by an agency conducting a lawful national security intelligence investigation; disclose investigative techniques and procedures not already in the public domain and requiring protection against public disclosure to insure their effectiveness; or endanger the life or physical safety of law enforcement personnel. This exemption would include reports under 1-111 for suspected criminal conduct, noncompetitive practices, and other procurement irregularities or reports on identical bids under 1-114. It would also encompass Inspector General reports on procurement matters, where reports were compiled for possible law enforcement action. These reports are often generated by specific allegations of procurement irregularities on the part of contractors or Government personnel. Examples include: statements of witnesses and other material developed during the course of the investigation and all materials prepared in connection with related government litigation or adjudicative proceedings; the identity of firms or individuals suspended from contracting with the Department of Defense or being investigated for alleged

irregularities when no indictment has been obtained nor any civil action filed against them by the United States; information obtained in confidence, express or implied, in the course of a criminal investigation by a criminal law enforcement agency or office within a component, or lawful national security intelligence investigation conducted by an authorized agency or office within a component for the purpose of obtaining affirmative or counter intelligence information, or background investigation information needed to determine suitability for employment or eligibility for access to classified information; or information received in connection with investigations conducted pursuant to Executive Order 11246 (Equal Opportunity). The right of individual litigants to investigative records currently available by law is not diminished. When the party who is the subject of an investigative record is the requester of that record, it may be withheld only in accordance with regulations implementing the Privacy Act of 1974 (Public Law 93-579). The identity of the source of information obtained in confidence may be withheld in accordance with an implied or express promise of confidentiality given prior to 27 September 1975 and in accordance with an express promise of confidentiality after that date. Information from which the confidential source can be deduced may also be withheld.

(8) Matters "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions."

(9) Matters involving "geological and geophysical information and data (including maps) concerning wells."

6-9. **Requests for Procurement Records.** Requests for copies of procurement records shall be reviewed in accordance with Departmental procedures issued in accordance with DOD Directive 5400.7. Requests for copies, or for the inspection of procurement records should be addressed to the procuring activity, purchasing office, or other appropriate activity having cognizance of the information or document desired by the party making the request.

6-10. **Reverse FOIA Suits.** Contractors have sued to prevent the release of material they felt was protected from release under the Act. The US Supreme Court has now declared such suits improper, ruling that exemptions under the Act mean only exemption from mandatory disclosure—that contractors have no right to protection under this act. Interestingly, however, the Court pointed out that the Trade Secrets Act (18 USC 1905) may be used as a basis for preventing disclosure, unless disclosure is authorized by law (*Chrysler Corp. v. Brown, Sec'y of Defense*, 26 CCF Pars. 83, 181 (1979).

CHAPTER 18

Default Termination

THIS CHAPTER discusses the rights of the Government to terminate the contract when the contractor fails to perform. The effect on the contractual relationship is also discussed.

1. Breach of Contract

1-1. Traditionally and historically, when one party to a contract fails to perform, the other party has been permitted the remedy of recovering money damages for the breach. Frequently, the injured party may elect any of several remedies. A common definition of breach is "a nonperformance of any contractual duty of immediate performance." When the contractor has failed to perform, the Government may terminate the contract for default, on the basis of the appropriate clause inserted into the contract, and collect damages.

1-2. A breach of contract may be either actual or anticipatory. Actual breach is a currently existing failure to perform the terms of the contract. Anticipatory breach is a prospective failure to perform the terms of the contract which is manifested by expression or conduct of one of the parties to the contract prior to the time set for the performance.

1-3. **Actual Breach.** When a contractor fails to perform the contract according to its terms, he is in breach and the Government has the right to terminate the contract for default. This right is included in standard provisions (in Government contracts) which have been given the general classification of "default." At common law, the same rights were available to the non-breaching party under the theory that there was a nonoccurrence of a condition precedent to his performance.

1-4. Substantial performance or compliance by the contractor will defeat the Government's right to terminate for default. With regard to construction contracts, the doctrine has been held to be applicable when the Government construction project is complete to the point that the government can use and enjoy the substantially completed facility. This delivery to the Government has been called "Beneficial Occupancy." This doctrine is equivalent to the civil law theory of "Substantial Performance."

1-5. In the area of supply contracts, the courts and boards have frequently stated that the Government is entitled to "strict compliance" and that failure of the contractor to deliver exactly what is called for by the specifications is a basis for rejection of the tendered item and, of course, the basis for a default termination. The Court of Claims has recently relaxed the harshness of this rule by stating that when a tendered item contains "minor deficiencies" the contractor must be given an opportunity to correct these deficiencies. The word "minor" has come to mean "any discrepancy which can be cured within a short period of time, such as the standard ten-day cure period." This rule has been extended by the ASBCA to tendered first articles. As stated, this recently adopted rule is a departure from the established law relating to the delivery of defective supplies. However, the rule is consistent with the remedy available to the Government under the Inspection Clause (to accept nonconforming supplies at a reduced price).

1-6. **Anticipatory Breach.** Generally speaking, a contract is not breached until the time set for performance has arrived. Under modern contract law, a breach of contract may occur prior to the time set for performance. In such a case, the breach is called anticipatory. In theory, the anticipatory breach gives a remedy when one party has repudiated his contract obligations. Underlying this theory is the idea that it is unjust to require a party who is ready, willing, and able to perform his obligation under a contract to stand by, perhaps to his detriment, under circumstances where the other party has clearly manifested his intention not to perform. This remedy is available to the Government to the same extent that it is available to private parties, and is employed when the contractor "fails to make progress so as to endanger the delivery schedule."

1-7. The elements constituting an anticipatory breach are: (1) a positive intention not to perform; (2) communication of the intent (by word or action) to the other contracting party; and (3) action by the aggrieved party in reliance upon the notice of intent to repudiate. Equivocal statements that the contract "might not" be performed are not sufficient.

1-8. In determining whether an anticipatory breach has occurred, the Government may take the contractor at his word and accept his statement that he does not intend to perform the contract. In such a case, a "ten-day notice" prior to terminating for default is not necessary. An anticipatory breach can also result from the contractor's conduct. A voluntary petition in bankruptcy could establish such a breach, as could abandonment of the work.

1-9. In order to make the breach complete, the complaining party must act in reliance upon the anticipated breach. Continuing to urge performance is inconsistent with a later claim that the Government relied upon the contractor's repudiation of his obligations under the contract. Further, the anticipatory breach may be repudiated by the guilty party any time until the aggrieved party has changed his position.

2. Default

2-1. The Default clauses are permissive in that the Government may terminate but is not necessarily required to

do so. This affords the Government the opportunity to view its contracts from a total concept of what is best in its overall interests. In one important case, the Court of Claims held that the contracting officer must affirmatively elect the "Default" alternative or the Default is invalid.

2-2. **Fixed-Price Supply Contracts.** Several factors will be examined in this section on fixed-price supply contracts. These factors deal with defaults, termination of contract variables, notices, and other important issues that are pertinent to this type of contract.

2-3. Default termination provisions in fixed-price supply contracts (Default Clause (DAR 7-103.11)) permit the Government to terminate all or any part of the contract if the contractor (1) fails to make delivery within the time specified in his contract, (2) fails to make progress so as to endanger performance of the contract, or (3) fails to perform any other provision of the contract.

2-4. If the contractor fails to make delivery, at what point in time may the Government terminate the contract for default? What prior notices of termination action must be given? The general rule is that a contractor already in default is not entitled to any prior notice, unless there is a contract provision requiring such notice, and the contract may be terminated immediately.

2-5. This rule has been stated as follows:

> the contract . . . if it was to be terminated, reasonable notice had to be given. This principle is well established (12 Am Jur, Contracts, Section 305). But the doctrine is not pertinent where the contract . . . contains language providing for termination at any time for unsatisfactory performance . . . Department was not required to give any advance notice of the termination of the contract. Such was the agreement of the parties.

2-6. The government has the right, therefore, to terminate immediately without prior notice if the contractor fails to deliver within the time specified. This is true regardless of how slight the delay might be. This is not to suggest that the Government will terminate immediately; however, it does have the "right" to do so if it so desires. In a leading case, the ASBCA upheld a default termination taken on Monday when the required date was the preceding Friday (*Nuclear Research Associates, Inc.*, ASBCA 13,563 (1970). Furthermore, it should be noted that the Government has the right to accept goods already shipped but not yet accepted at the time of termination.

2-7. Where the contractor fails to make progress, or fails to perform any other provision of the contract, the question also arises as to when the Government may terminate for default. Under these conditions, the clause provides that the contractor must first be given notice of his failure and an opportunity to cure the defect within 10 days, or such longer period as the contracting officer may authorize.

2-8. A termination for default action is improper when the "notice" and opportunity to "cure" are required, but not given. An "oral" notice is insufficient and not effective. It must be in writing.

2-9. Should the so-called "cure notice" provide for less than the 10-day minimum, the requirement of the clause may not be satisfied and a termination for default could be improper. It should be noted that if the amount of time remaining for delivery is less than 10 days, the advisability of any notice is questionable. The notice should never direct the contractor's manner of performance.

2-10. The Armed Services Board of Contract Appeals has repeatedly required the Government to adhere strictly to the notice provision of the clause where the time available prior to delivery is greater than 10 days. For example, it has held:

> In the instant case the contracting officer terminated the contract even before 10 days had elapsed from the 18 August . . . letter . . . the contracting officer's termination of the contract is found to be without authority under the provisions of . . . the "Default" article

2-11. Although there is a requirement that a "Cure Notice" be issued, if it is determined that time equal to or greater than a realistic cure period does not remain in the schedule, a "Cure Notice" should not be issued. Under these circumstances, the so-called "Show Cause" notice may be issued. The "Show Cause" notice in effect directs the contractor to show why the contract should not be terminated for default.

2-12. The "Show Cause" notice insures that the contractor understands his predicament, and his answer can be used in evaluating whether circumstances justify default action. The "Show Cause" notice is not mandatory, but it is generally considered advisable since the existence of an excusable cause would result in a default termination being changed to a convenience termination. A central question in every default situation is, "Is the contractor's delay excusable?" The natures of such "excusable clauses" are set forth in paragraph (c) of the supply contract Default clause and paragraph (d) of the standard construction contract Default clause.

2-13. Except for anticipatory breach, or if the contractor "so fails to make progress as to endanger performance," the Government may not terminate a contract for default on the basis of failure to deliver before the time for performance has expired. If it terminates even one day early, a termination for convenience will apply.

2-14. Once the contract has been terminated for default, the contractor must continue performance on the contract to the extent it is not terminated. The Government can require preservation and protection of its property in the possession of the contractor, and it may require transfer of title and delivery of material which the contractor has produced or acquired to the extent directed by the contracting officer. The contractor will be paid a price to be agreed upon. A failure to agree is subject to the "Disputes" clause.

2-15. The contractor has the right to appeal the termination, and is entitled to payment at the contract price for items accepted by the Government. The contractor may also question later assessed excess costs, or he may appeal the assessment of excess costs and question the propriety of the default at that time.

2-16. One of the principal rights acquired by the Government under the default clause is the right to repurchase the item elsewhere and charge excess costs to the defaulting contractor. There is a duty imposed upon the Government in general to act reasonably to minimize the damages, otherwise it may lose its right to assess excess costs. Conditions imposed upon repurchase action generally are: (1) repurchase must be made within a reasonable time after termination; (2) repurchased items must be as similar as practicable to the defaulted items in quality, units and specifications; and (3) repurchase contract terms should essentially be the same as the original contract

terms. The contracting officer has considerable latitude and discretion in effecting the repurchase. Repurchase contracts are not subject to statutory advertising requirements, and the contracting officer may let contracts by whichever means he deems to be reasonable and in the best interests of the Government. The contracting officer is not arbitrarily required to accept the lowest offer received. He may consider time of delivery, and qualifications and capacity of the bidder. He must not abuse this discretion, and must use diligence to obtain the lowest price available.

2-17. Excess costs are generally assessed as the difference between the original contract price and the repurchase price. Other costs are also recoverable. The Comptroller General has ruled that the defaulting contractor becomes liable for whatever reasonable damages were occasioned. The measure is the amount that will compensate for the loss which fulfillment of the contract would have prevented. Some examples of these costs are: (1) moving Government furnished property to the replacement contractor's place of business; (2) expenses of added inspection; and (3) added freight charges.

2-18. The Default Clause provides:

> The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

Consequently, it must be borne in mind that the right to recover "excess costs" is an inclusive and not an exclusive remedy. The Government may also recover other damages, to the extent that they can be established.

2-19. There are cases wherein a contractor may not be terminated for default when the failure to perform is due to "excusable" causes. These causes are listed in the next section.

2-20. In order to qualify as an excusable cause relating to the prime contractor, the cause must be beyond the control and without the fault of negligence of the contractor. Causes listed in the Default clause as excusable include, but are not restricted to, (1) acts of God, (2) acts of the public enemy, (3) acts of Government (either sovereign or contractual), (4) fires, (5) floods, (6) epidemics, (7) quarantine restrictions, (8) strikes, (9) freight embargoes, and (10) unusually severe weather.

2-21. An "excusable cause" must be "beyond the contractor's control," and "without his negligence." Even though a snow storm is beyond the contractor's control, it will not constitute an excusable delay if it did not constitute "unusually" severe weather. If such an occurrence is a common one during certain times of the year in the locale in which the contractor is situated, it would be possible for him to "forsee" this result and make plans accordingly. A pre-existing strike, for example, is "forseeable."

2-22. With respect to failure due to default of the subcontractor, an "excusable cause" must be beyond the control and without the fault or negligence of "both" the prime contractor and the subcontractor. Even if this requirement is met, the cause will not be excusable if the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the contractor to meet the delivery schedule.

2-23. It should also be noted that the Court of Claims has adopted a very strict interpretation of the term "subcontractor" in Government contracts. "Subcontractor" was held to include only those in contractual privity with the contractor (*Schweigert, Inc. v. United States*, 181 Ct Cl 1183 (1967)). This case effectively limited default actions to the fault of the prime or first tier subcontractor. The Department of Defense has now taken action to redefine "subcontractor" as used in the Default clauses to include all tiers. Thus the contractor is now responsible for all subcontractors.

2-24. If the case is determined to be excusable and if the contract contains a "Termination for Convenience" clause, the rights and obligations of the parties will be determined in accordance with that clause. If the "Convenience" clause is not included, the default clause provides for an equitable adjustment to compensate the contractor for the termination. In this latter event, the adjustment shall be a question of fact under the disputes clause. In any event, since the "Termination of Convenience" clause is a mandatory clause, there is every reason to believe the contractor would be required to follow the convenience procedures (*G.L. Christian & Associates v. United States*, 312 F2d 418 Ct Cl 1963).

2-25. Several courses of action in lieu of termination for default are available when it is determined to be in the best interest of the Government: (1) permit the contractor, his surety, or guarantor to continue performance under a revised delivery schedule; (2) permit the contractor to continue performance by means of subcontract, or other business arrangement with an acceptable third party; or (3) if the requirement for the supplies or services no longer exists and the contractor is not liable to the Government for damages, execute a no-cost termination settlement agreement.

2-26. The provision permitting the contractor to continue performance under an extended delivery schedule must be accompanied by some consideration, monetary or otherwise, flowing from the contractor to the Government. This requirement arises out of the general rule that a Government agent, such as a contracting officer, is without authority to waive a vested right of the Government without receiving consideration therefor. The right of the Government to require performance, within the period provided in the contract, constitutes such a vested right.

2-27. Another course of action open to the Government, where the supplies or services are delivered but are defective, arises out of the Inspection Clause. That clause provides, among other things, that the Government may accept the defective items and require a downward equitable adjustment in price.

2-28. Forbearance and waiver have some similar characteristics, but they have differences also. Whereas a waiver may relinquish a right altogether, forbearance does not. It does provide for reflecting on a decision concerning a right.

2-29. Default action for failure to perform is permissive, and it is unusual for the Government to immediately take action to default a contractor upon his failure to perform. Since "termination" causes a cessation of performance, the Government usually pauses and reflects before taking such drastic action. In so doing, it determines whether such action is in its best interest.

2-30. Many matters must be considered in arriving at a determination of whether to "terminate" the contract: (1) the existence, if any, of an excusable cause of delay; (2) the nature of the item and its availability from other sources; (3) time constraints based on need of the item; and (4) contractor's ability to perform if the contract is not terminated. Frequently, the Government takes no immediate action; and the contractor

often continues to perform even though the original performance period has passed. If the Government does ultimately decide to terminate, it may be faced with a situation where it has effectively "waived" its rights to terminate for default. This "waiver"is sometimes called an "Election" by the Government to allow the contractor to continue performance, notwithstanding the passage of the delivery period.

2-31. Because of the gravity and consequences of a decision to terminate for default, the BCAs and courts generally recognize that the Government is entitled to some period of time beyond scheduled performance during which it may pause and reflect upon such action. This period is generally referred to as "forbearance," which means that the Government, rather than waiving its right, is merely refraining from the execution of its right.

2-32. Waiver has been defined as "the intentional or voluntary relinquishment of a known right." The period of forbearance must be a reasonable one, otherwise the inaction can constitute a "waiver." In the latter case, the Government is legally presumed to have elected to permit the contractor to continue performance.

2-33. In addition to a lapse of time, actions by the Government may constitute a waiver rather than a "forbearance." The exact period of time and the specific actions constituting a waiver are not too clearly defined by available court decisions. The "period of time" is dependent upon the facts of the case. Forbearance periods ranging from one week to over three months have been held not a waiver, while periods of 48 days to 4 months have been determined to constitute a waiver (*Devito v. United States* 188 Ct Cl 979 (1969)).

2-34. Government actions which have been determined to constitute a waiver are: (1) urging the contractor to continue; (2) accepting samples and preproduction models; (3) performing an acceptance inspection; (4) accepting deliveries; and (5) issuing change orders and supplemental agreements. It is clear that when the Government encourages and induces a contractor to continue, and the contractor does continue, a waiver will be found.

2-35. Actions which have not constituted a waiver are: (1) discussing progress with the contractor; (2) failure to answer the contractor's request for more time; (3) accepting partial delivery; and (4) limited tests by Government inspectors. If the action of the Government does constitute a "waiver" of its right to terminate, however, a new delivery schedule must be established. Such new schedule must be reasonable in light of all the facts.

2-36. Fixed-price construction contract default termination provisions (e.g., DAR 7-602.5) permit the Government to terminate the contractor's rights to proceed with the work, or any "separable" part, if (1) the contractor refuses or fails to prosecute the work with such diligence as will insure its completion within the time specified in the contract, or (2) fails to complete the work within the time specified in the contract. These provisions are closely akin to the "failure to make progress" and "failure to deliver" provisions of the Fixed-Price Supply Contracts.

2-37. Once a contract has been terminated, the Government may take over the work and complete it or have it completed by another contractor. The Government may take possession of and use any materials, appliances, and plant that may be on the work-site and necessary for contract completion. Also, the contractor is liable to the Government for any damages caused by its failure to complete the work on time. This is true whether the contract is terminated or not. The surety may enter into a takeover agreement and complete the contract, whereas in a supply or services contract, such takeover would have to be before default.

2-38. Fixed-Price Research and Development Contract default provisions (DAR 7-302.9) permit the Government to terminate for (1) failure to perform within the time specified, (2) failure to perform the work so as to endanger performance, or (3) failure to perform any other provision of the contract.

2-39. The "Default" clause for fixed-price Research and Development contracts is quite similar to the Fixed-Price Supply Contract clause, not only regarding the reasons for default, but also with respect to the 10-day "cure notice," "repurchase and excess costs," and "excusable cause" provisions.

2-40. Although the Defense Acquisition Regulation does not contain procedures for default of Research and Development contracts, it is assumed that the procedures for supply contracts (including show-cause notice) are applicable. This assumption is based upon the similarities noted above, and is further supported by Section 1-8.605 of the Federal Procurement Regulation. That regulation states that the procedures and guidelines governing supply contracts should be used in defaults of Research and Development contracts.

2-41. **Cost-Reimbursement Type Contracts.** Cost-Reimbursement type default termination provisions permit the Government to terminate the contract, in whole or in part, for actual default or failure to make progress such as would endanger performance and result in default (e.g., DAR 7-203.10).

2-42. A 10-day "cure notice" is required by both the clause itself and by DAR 8-407. If the delivery is less than 10 days away, the courts have stated that a cure notice of less than 10 days is improper (appeal of *Michloritz* ASBCA 5102, 58-2 BCA (1958)); but a notice is still required.

2-43. In the event of termination, the contractor shall be reimbursed his allowable costs in accordance with the clause, and an appropriate reduction shall be made in the total fee, if any. No provision is included for recovery of "excess costs" of reprocurement after termination. However, in those Cost-Reimbursement Supply Contracts which include an "Inspection of Supplies and Correction of Defect" clause, the situation is somewhat different.

2-44. The latter clause provides that at any time within performance, but not later than 6 months after acceptance, the Government can require correction or replacement of defective supplies. These costs are paid for by the Government. However, if the contractor fails to proceed with "reasonable promptness" to replace or correct the supplies, the Government may repurchase and charge any excess costs to the contractor, or equitably reduce the fee.

2-45. "Excusable causes" are recognized to the same extent as in Fixed-Price Supply Contracts, with some variation regarding failure of a subcontractor to perform or make progress. If the supplies or services are obtainable from other sources, an excusable cause will still exist unless the Government orders the contractor, in writing, to obtain them from the other source and the contractor fails to "reasonably comply" with that order.

2-46. Excusable causes for Cost-Reimbursement Type Contracts are set forth in a special clause titled "Excusable

Delays." It contains a requirement for revision of the delivery schedule to accommodate any "excusable delay." This requirement does not appear in the provisions for "excusable cause" included in other termination for default clauses.

CHAPTER 19

Termination for Convenience

THIS CHAPTER presents the authority and reasons for, and the procedures and applications of, the remedy entitled "Termination for Convenience"; with a view toward understanding and justifying such an action in the best interests of the United States. Not infrequently, the termination accrues to the benefit of the contractor as well.

2. The right to terminate the contract for the convenience of the Government is, simply stated, the right of the Government to refuse to continue with contract performance—to stop the work and settle with the contractor at the point of termination. The word termination ordinarily means ended; but within the context of Government contracts, it has a more restricted meaning. Termination results only from an action by the contracting officer.

3. In Government contracts, there are two types of terminations—default and convenience. The difference between the two types of termination can be stated to rest on fault. In a default termination, the action by the Government is taken because of failure on the part of the contractor to live up to his contractual obligations. A termination for convenience promotes the best interests of the Government, and it does not result from any fault on the part of the contractor.

4. The Government may terminate contracts, in whole or part, for its convenience, at any time during contract performance. This termination authority gives procurement planning an essential flexibility. Changes in military strategic planning—the development of new weapons—new attitudes on disarmament, budgeting and funding—any of these may eliminate the need for part or all of an existing contract. When this happens, termination proceedings work to save the Government's funds. This termination may also be effectively used to relocate vital materials, manpower, and facilities.

1. Right to Terminate

1-1. The Government's right to terminate for its convenience is supported by three theories: (1) Inclusion of a termination clause by agreement of the parties; (2) Inclusion of a termination clause "by operation of law"; and (3) breach of contract.

1-2. In Government contracts, the right to terminate for convenience (of the Government) arises because the parties to the contract agree to this right through incorporation of the appropriate clause into the contract. In addition to the legal concepts that (1) the four corners of the contract contain the legal obligations of the parties and (2) the Government obtains the right to terminate for convenience, two other concepts must be recognized—incorporation by operation of law, and breach of contract.

1-3. Even though the required clause under DAR is omitted, the right of termination for convenience may yet bind the parties "by operation of law." In the landmark case of *G.L. Christian and Associates v. United States*, (1963) 312 F2d 418, the court so held, finding that: (1) DAR governed the contract, (2) DAR was promulgated pursuant to law (The Armed Services Procurement Act of 1947, 10 USC 2301, *et seq.*), (3) DAR therefore has the force and effect of law, (4) DAR required the clause, and (5) no authorized deviation was granted. The court therefore concluded that the clause is operative as though physically incorporated in the contract. The import of this decision continues to evolve. It is not to be assumed, however, that such clauses need no longer be incorporated into the contract. Government policy and good business practice dictate incorporation. In addition, it should also be noted that more recent legal decisions appear to be weakening the so called "Christian Doctrine" (see *Chamberlain Manufacturing Corporation*, 18 Oct 1973, ASBCA 18103; *Carrier Corporation v. United States*, 7 Nov 1975, Court of Claims No. 267-74; and *Toke Cleaners*, 10 May 1974, IBCA No. 1008-10-73).

1-4. Had the court ruled otherwise in the Christian case, the Government would have been liable for breach of contract damages, including all lost profits, for terminating with no clause in the contract. Even if the Government had no termination for convenience concept, the Government has the power to "walk away" from its contract. Of course, this would constitute a breach of contract; and damages including costs to date plus the entire contract profit (anticipatory profit) would have to be paid. Under the termination for convenience clause, profits recovery is limited to those profits earned to the date of termination.

1-5. The breach of contract concept is not dependent on statute. In the early case of *United States v. Corliss Steam Engine Company*, 91 US 321 (1875), the U.S. Supreme Court held that the Secretary of the Navy could stop the work, thereby breaching the contract, as no termination clause was present. The court found the Secretary had authority to settle the resulting breach claim as if it were an ordinary commercial contract. Our termination for convenience procedures are an outgrowth of this common law breach concept and are a substitute for it, though some statutory treatment has appeared over the years.

1-6. The contracting officer should justify his actions. Practically speaking, however, the contractor would have great difficulty in disputing the right to terminate because the grant of authority under the clause is very broad. In commercial contracts, termination is normally possible only by mutual consent of the parties or else a breach of contract is present.

Rarely is a unilateral right provided as is given to the Government in Government contracts.

2. Termination for Convenience Clauses

2-1. The Defense Acquisition Regulation (DAR) and Federal Procurement Regulations (FPR) prescribe various clauses for incorporation in contracts for termination for the convenience of the Government. These clauses are designed to apply to various procurements.

(a) DAR 8-701: Termination Clause for Fixed-Price Contracts.

(1) Except as otherwise permitted by 8-705, the clause in 7-103.21(b) shall be used in any fixed-price contract in excess of $10,000 for supplies or experimental, developmental, or research work with educational or non-profit institutions, when no profit is contemplated. The clause in 7-602.29(a) shall be used in all fixed-price construction contracts in excess of $10,000.

(2) The clause in 7-607.4 covering terminations for convenience and terminations for default shall be included in all fixed-price architect-engineer contracts.

(3) In accordance with E-621, the last sentence of paragraph (j) of the clauses in 7-103.21(b) and 7-602.29(a) may be deleted in contracts with agencies of the United States Government, foreign governments or agencies thereof, state or local governments or agencies thereof, or nonprofit contracts with nonprofit educational or research institutions.

(b) FPR 1-8.700-2(a)(1). Termination Clause for Cost-Reimbursement Type Contracts.

(1) The clause set forth in FPR 1-8.701 shall be used except as otherwise permitted by FPR 1-8.700-2(a)(2), in any fixed price contract in excess of $10,000 for supplies, or experimental, developmental, or research work where a profit is contemplated when the contract is entered into by formal advertising or by negotiation.

(c) DAR 8-702: Termination Clause for Cost-Reimbursement Contracts.

(1) The clause in DAR 7-203.10 shall be used in any cost-reimbursement type contract as defined in DAR 3-405, for supplies and experimental, developmental, or research work other than experimental, developmental, or research work with educational or nonprofit institutions where no fee is contemplated. The clause in 7-605.26 shall be used in all cost-reimbursement type construction contracts.

(2) In any contract for Architect-Engineer services where the clause in 7-203.10 is used, the term "Architect-Engineer" shall be substituted for the term "Contractor" wherever that term appears in the clause. Paragraph (e)(i)(D)(II) shall be deleted, and the following clause substituted therefor:

(II) In the event of the termination of this contract for the default of the Architect-Engineer, the total fee payable shall be such proportionate part of the fee as the weighted value of the actual working drawings completed bears to the weighted value of the working drawings required or contemplated by the contract; (1970 JUL)

(3) In accordance with E-621, the last sentence of paragraph (j) of the clauses in DAR 7-203.10 and DAR 7-605.26 may be deleted in contracts with agencies of the United States Government, foreign governments or agencies thereof, state or local governments or agencies thereof, or nonprofit contracts with nonprofit educational or research institutions.

(d) FPR 1-8.700-2(a)(3). Research and Development Contracts with Educational and Other Nonprofit Institutions.

(1) The clause set forth in FPR 1-8.702 shall be used in any cost-reimbursement type contract for (i) supplies, or (ii) experimental, developmental, or research work where a fee is contemplated, whenever the procuring activity considers it necessary or desirable to provide for termination of the contract for the convenience of the Government. The clause shall be used in all cost-reimbursement type construction contracts in excess of $10,000, and, when so used, the text paragraph (e)(1)(iv)(B) shall be deleted and the following shall be substituted therefor:

In the event of the termination of this contract for default, the total fee payable shall be such proportionate part of the fee as the acceptable work in place bears to the total work in place required by the contract.

(e) DAR 8-704.1. Termination Clause.

(1) The clause in DAR 7-302.10(b) shall be used in any contract for experimental, developmental, or research work (whether fixed price or cost reimbursement type) with an educational institution when such contract is placed on a no-fee or no-profit basis except that in the case of organizations other than educational institutions, paragraph (d) shall be deleted and the paragraph in 7-302.10(c) shall be used.

(2) The clause in DAR 7-302.10(c) shall be used in contracts with a nonprofit organization other than an educational institution.

(f) DAR 8-704.2. Suggested Clause for Subcontracts.

(1) The clause in DAR 7-302.10(b), suitably altered to indicate the relationship between the prime contractor and subcontractor, is suggested for uses in subcontracts placed with educational or nonprofit institutions; provided, such subcontracts incorporate, or are negotiated on the basis of the cost principles set forth in Section XV of DAR; and provided further, such subcontracts are placed on the no-fee or no-profit basis.

(g) FPR 1-8.700-2(a)(4). Short Form Termination Clauses for Fixed-Price Type Contracts.

(1) The clause set forth in FPR 1-8.704-1 shall be used in any fixed-price type contract for experimental, developmental, or research work placed with an educational or nonprofit institution on a no-fee or no-profit basis. The clause also shall be used in any cost-reimbursement type contract for experimental, developmental, or research work placed with an educational or nonprofit institution on a no-fee or no-profit basis, whenever the procuring activity considers it desirable to provide for termination of the contract for the convenience of the Government.

(h) DAR 8-705.1. Supply and Service Contracts.

(1) To facilitate the handling of purchases under fixed-price supply or service contracts not to exceed $10,000, the short form termination clause in DAR 7-103.21(a) is authorized for use in lieu of any other clause providing for termination for the convenience of the Government; provided, such contracts obligate the Government to order or otherwise to be liable for a minimum quantity.

(2) To facilitate the obtaining of services where it can reasonably be determined that the kind and volume of service required would not, in the event of termination for convenience

of the Government, present a basis for a termination claim other than for services rendered (such as, but not limited to, most contracts for rental of unreserved garage space, meals for inductees, or laundry and drycleaning services), the short form termination clause in DAR 7-1902.16(b) is authorized for use in such service contracts, regardless of dollar value, in lieu of any other clause providing for termination for the convenience of the Government.

(3) Where DD 1155 is utilized for purchases not in excess of $10,000 and the additional general provisions are incorporated, clause 19 of that form shall be used in lieu of those specified in (a) and (b) above.

(i) FPR 1-8.700-2(a)(2). Supply Contract.

(1) The short-form termination clause set forth in FPR 1-8.705-1 is authorized for use in any fixed-price contract for supplies which is not in excess of $100,000 in lieu of any other clause providing for termination for the convenience of the Government. The short-form clause is also authorized for use in any contract for services where it is determined that because the successful bidder will not have incurred substantial charges in preparation for and carrying out the contract a termination claim will not be made in the event of termination for the convenience of the Government.

(j) DAR 8-705.2. Construction Contracts.

(1) Generally there is no need for a termination clause in construction contracts not in excess of $10,000. However, when the contracting officer determines that a termination clause should be included in such a contract, the clause in DAR 7-602.29 (b) shall be used, except where DD Form 1155 is utilized. Clause 19 of that form shall be used in lieu of the clause in DAR 7-602.29(b).

(k) FPR 1-8.700-2(a)(b). Construction Contracts.

(1) The short-form termination clause set forth in FPR 1-8.705-2 is authorized for use in any fixed-price construction contract which is not in excess of $100,000 in lieu of any other clause providing for termination for the convenience of the Government. The clause also is authorized for use in contracts in excess of $100,000 when modified in the following manner: Designate the text of the clause prescribed in 1-8.705-2 as paragraph (a) and add a paragraph (b) as follows:

(b) If this contract exceeds $100,000, the clause in 1-8.703 of the Federal Procurement Regulations (41 CFR 1-8.703) in effect on the date of this contract shall apply in lieu of the provisions set forth in (a) above, such clause being hereby incorporated by reference as fully as if set forth at length herein.

2-2. Additional clauses are prescribed for contracts for the use of facilities (DAR 7-702.24), and for time and material and labor-hour contracts (DAR 7-901.4).

3. The Decision to Terminate

3-1. In this section, we shall examine the who, what and how factors in contract termination. The who is explained in terms of the responsibility for termination. The what shows the factors to be considered in termination. The how is indicated through implementation of the termination decision.

3-2. The decision to terminate contracts is made by the contracting officer having appropriate authority. Awareness of the need for convenience termination often comes from technical and engineering personnel. These personnel should continuously review outstanding contracts to make sure that a requirement for the supplies or services involved still exists. If not, a termination for convenience action may be necessary. Postponing this consideration can cause needless expense to the Government.

3-3. As a rule, a termination request (or a similar document) submitted by technical or engineering personnel—with necessary approvals, provides the authority for termination action by the contracting officer. Termination is actually made when the contracting officer delivers a notice of termination to the contractor.

3-4. There are a number of factors which the contracting officer must consider before effecting a termination. Some of these are: (1) technological advances in the state of the art; (2) budgetary consideration; (3) effect of the termination on subsidiary or related procurements; and (4) requirements of other activities and the estimated costs of termination.

3-5. Making the termination effective involves planning a notice of termination, and certain obligations on the part of the contractor and of the Government.

3-6. Whatever the nature of the program or contract, sound pre-termination planning is essential. Sound planning will ensure that the notice of termination serves its intended purposes. It will also expedite the processing of the termination. It should be noted that after the decision to terminate is made, all necessary administrative action must be completed as soon as possible. In this way, there is no delay in issuing the notice of termination; and delay in sending the notice can waste Government funds.

3-7. DAR 8-801 and FPR 1-8.801 set forth approved forms of notice of termination. As a rule, notice is first given by telegraph and confirmed thereafter by letter. Letter notice alone may be used. In any case, the notice should clearly state: (1) the effective date of the termination; (2) whether all work is to be stopped; and (3) the specific work to be terminated, if the termination is partial. The notice may also include special instructions about the continuation of certain work, disposition of inventory, or other matters. For example, production of a main equipment item may be completely terminated. The Government, however, may want to order spare parts and other supply support items for delivered equipments. These supply support items are often subject to ordering under special contract provisions (on the option of the Government). Thus, special requirements may be reflected in the notice of termination. In addition, the notice of termination must contain recommended actions that minimize subcontract expenses.

3-8. The Government may also wish to have certain inventory items (contractor fabricated components and equipments that are completed or nearing completion, for instance) as well as items of special tooling. Special instructions may identify such property and require its delivery to the Government. However, the Government usually acquires such property through post-termination screening of the contractor's inventory schedules.

3-9. The termination notice drastically affects the contractor's operations, and the notice may not be rescinded or modified without his consent. Provision is also made for the contractor to initiate modification requests to this notice.

3-10. The notice of termination and the terms of the Termination Clause define the contractor's obligations upon

termination. In addition, DAR 8-205 and FPR 1-8.204 list the duties of the prime contractor after issuance of the Termination notice. As soon as he receives the notice, the contractor must stop work under the contract. He continues terminated work beyond the stage authorized by the notice of termination at his own risk. The contractor's obligations also require him to: (1) terminate all unperformed or partially performed subcontracts and purchase orders relating to the terminated portion of the prime contract, and, (2) settle, with the approval of the contracting officer, all outstanding liabilities and claims arising from such terminations. As the contracting officer directs, the contractor must assign to the Government all interest in the terminated purchase orders; thus, the contractor may take the position that it was impossible for him to stop work immediately. In settling the termination, his actions should nevertheless be reviewed in order to determine whether he acted prudently and reasonably under all circumstances.

3-11. The contractor must protect and preserve any property related to the contract in which the Government may acquire an interest. He must also deliver to the Government, to the extent that he is directed to do so, any completed, or partially completed materials produced or acquired in connection with the terminated work. In addition, he must deliver any completed or partially completed plans or drawings that would have been required had the contract been completed. Transfer of title must accompany such delivery. As directed by the contracting officer, the contractor must use his best efforts to sell any undelivered property. He must also complete any portion of the contract not terminated. Finally, he must promptly submit his claim for compensation for the terminated work.

3-12. There are several practical problems to be considered in connection with the above. For one, there is the period of time the contractor needs to stop work and terminate subcontracts. This will vary with the nature and complexity of the terminated work and the volume of his other work at the time of termination. He will not, naturally, want to completely stop work on subcontracts and orders that relate to both terminated and continued work. As a result, the contractor may have to screen subcontracts, purchase orders, bills of material, and continuing work requirements before he can issue termination notices; and it may be impossible for him to discontinue certain costs and expenses at once. But it is usually true that continuation of the work beyond the time specified in the notice of termination is done at the contractor's own risk. The impact on the contractor's personnel, if the termination will contribute to a significant reduction of the work force, must be considered.

3-13. DAR 8-206 and FPR 1-8.205 list the contracting officer's duties after issuance of the termination notice. Among other duties, the contracting officer arranges a meeting with the contractor to develop a definite plan for effecting the termination settlement. The discussion covers all topics related to the principles, policies, and procedures governing the settlement. Among these are: the extent of the termination; the status of plans, drawings, and other data; the status of the continuing work; the contractor's termination of subcontracts; interim financing; and the schedule for the contractor's and subcontractor's submission of the settlement proposal, inventory schedules, and accounting data.

3-14. In some Departments, the contracting officer has a field representative visit the contractor's plant. This is done promptly after issuance of the termination notice. The field representative determines compliance with the termination notice, and reports to the contracting officer. No matter how they are organized and scheduled, meetings with the contractor have one common purpose—protecting the Government's interest in the termination settlement.

4. The Termination Inventory

4-1. Termination inventory means any items of physical property purchased, supplied, manufactured, furnished, or otherwise acquired for performance of the terminated contract and properly allocable to the terminated portion of the contract. The term does not include any facilities, special test equipment material, or special tooling, which are subject to a separate contract or a special contract provision governing the use or disposition thereof. Termination inventory may include contractor-acquired property and Government furnished property as defined in DAR 8-101.4 and 8-101.8.

4-2. Conducting the termination inventory includes: (1) preparation of inventory schedules by the contractor; (2) verification and screening of the inventory; (3) withdrawal of needed items from the inventory; (4) inventory screening within the Department of Defense and other agencies; (5) plant clearance; and (6) the handling of subcontractor inventories.

4-3. The contractor must submit his termination inventory schedules promptly after termination. Inventory schedules serve many purposes: (1) they support the contractor's termination charges; (2) they provide information for plant clearance; (3) they make it possible to screen the material for use within the Government; and (4) they help with the disposition of items that are surplus to Government requirements.

4-4. DAR Section XXIV presents detailed instructions for the preparation, presentation, and acceptance of inventory schedules. FPR Section 1-8.5 provides detailed information on the disposition of Termination Inventory. The contractor is responsible for preparation and submission of the required schedules, but the contracting officer must review and approve the schedules. Thus, the contracting officer sees that the contractor receives information and advice.

4-5. On fixed-price contract terminations, the contractor must exclude common items of contractor-acquired property from his inventory schedules. Common items are those that he can use without loss on other Government or commercial work. The contractor may receive either Government or commercial work after termination schedules have been prepared (but before final action on the termination inventory) on which he knows the items can be used without loss. In this case, the inventory schedule should be amended to exclude those items. The contractor is expected to make every reasonable effort to return items to suppliers for full credit (minus the supplier's normal restocking charge or 25 percent of cost, whichever is less). The contractor may also exclude and retain, at cost, other termination inventory—if not directed to transfer it to the Government.

4-6. On termination of a cost-reimbursement contract, all items of termination inventory (including common items

previously reimbursed under the contract) must be included in the contractor's inventory schedules. The contracting officer (or authorized representative) must approve the exclusion, and may require adjustment of previously reimbursed costs. With the exception of this approval requirement, contractor withdrawal of common items and return of items to suppliers is expected in cost-reimbursement contracts (as it is in fixed-price contracts).

4-7. Upon receipt of the inventory schedules, the contracting officer (or authorized representative) notes the date of receipt. He then reviews the schedules to see that:

(1) The forms have been prepared in accordance with applicable instructions;

(2) The descriptive data are satisfactory for redistribution and disposal purposes;

(3) The inventory schedule certificates have been properly signed by the contractor.

A schedule which meets the above requirements receives a notation that it is satisfactory in form for redistribution and disposal purposes. Schedules that do not meet these requirements are so designated. They, or unsatisfactory parts thereof, must be returned to the contractor within fifteen days. If this is not done then, the final phase of the plant clearance period begins as of the date the schedules were filed.

4-8. After initial approval, the schedules are screened and verified. Verification includes review of location, quantities, condition, and allocability of the property. It is frequently necessary to refer to source documents when determining allocability. These documents include bills of materials, purchase orders, shipping documents, warehouse and storeroom forms, and production and process charts. Verification also includes a review to see that the contractor has excluded common items of inventory. A check is made, as necessary, to insure maximum protection of the Government's interests. After verification, contractors are advised to remove from their claims items of inventory that are unallocable. They must also correct any other deficiencies.

4-9. The Government may not wish to acquire items or material in termination inventory. If it does not, the preferred method of disposition is purchase or retention by the contractor or subcontractor at cost. Withdrawal of inventory items at cost, at any time before final disposition, is authorized and encouraged so long as procedural requirements governing withdrawal are met. There is, however, the following limiting consideration: withdrawal of items under cost-reimbursement type contracts and of any Government-furnished property is subject to approval by the contracting officer. All withdrawals will require adjustments in the schedules and in the settlement proposal. These adjustments can be made without submission of new forms. The contracting officer and the disposal activity require immediate notice of the contractor's intention to withdraw items from the inventory schedule. The contractor will often withdraw the items and use them while the withdrawal notice is being proposed or is in transit. The contractor may, for instance, urgently need an item currently being processed for sale by the property disposal activity. The contractor may withdraw this item and use it, notifying the disposal activity. The disposal activity, in turn, will modify the sale prospectus.

4-10. There is another reason why inventory schedules should be submitted promptly: the opportunity it gives to contractors to reappraise their decisions to retain or schedule items in termination inventory. Much time may pass before the final disposition of listed items. During this screening and disposal period, the Government can reassess the allocability of items. And the contractor can withdraw items or include items not originally scheduled. DAR 8-206 details the contracting officer's duty to review inventory schedules after disposition but before final settlement. The disposition of inventory shall not affect the Government's rights, before final settlement, to require additional information, to contest allocability, or to exclude items from the settlement on any proper grounds. The practical application of these rights may involve matters of judgment that are best resolved in the early stages of settlement. Thus these provisions do not minimize the need for careful review and verification of schedules and inventory.

4-11. Screening the termination inventory involves checking inventory schedules (before disposal outside the Government activities). Contracting officers shall cause to be verified, to the extent practicable, the physical count and condition of inventories, including Government-furnished property, listed on the contractor's inventory schedules (FPR 1-8.503-7). Serviceable or usable property is screened within the procuring or requiring Department which has first priority on retention of desired items. This Department then forwards schedules of the items it has not retained to the General Services Administration. If aeronautical or electronic material is involved within the Department of Defense, copies of the schedules are forwarded also to the other Department of Defense Departments. Certain items, such as work in process, special tooling or perishable items do not have to be screened by the General Services Administration. All Department of Defense requirements for industrial plant equipment are screened by the Defense Industrial Plant Equipment Center. The Defense Logistics Services Center circulates lists of excess equipment to other activities and foreign countries eligible for military assistance. Special screening considerations exist in the case of construction contracts. DAR 18-615 assigns specific screening responsibility within each Military Department. Furthermore, the Government may take title to a termination inventory by issuing shipping instructions to the contractor, entering into a storage agreement with the contractor, or taking possession of the inventory.

4-12. Surplus termination inventory within the Department of Defense is disposed of by the following methods: (1) local screening for transfer to Department of Defense activities in the area; (2) sales, including purchase or retention at less than cost by the contractor or subcontractor; (3) donation; and (4) abandonment or destruction. Disposition is subject to limitations imposed by military security requirements.

4-13. Local screening makes sure that no Department of Defense needs are overlooked. Disposition by sale is provided for by the contract terms. The Contract Termination clause requires the contractor to use his best efforts to sell termination inventory as the contracting officer directs. It also permits the contractor to acquire inventory items, under conditions established by the contracting officer and at prices approved by him. The contractor conducts the sales under the supervision of the disposal activity. Generally, at least three bids are required. Advance notice of the sale must be given to ensure fair and reasonable prices. Retention by the contractor at less

than cost may be authorized when it will help to reach a fair and prompt settlement (provided, as always, that the Government's interests are adequately protected). The Defense Acquisition Regulation also authorizes retention in special cases. For example, retention might be permitted of certain low-value items and scientific equipment on terminated research contracts with educational institutions. The proceeds of any sale or acquisition are deducted from the amount to be paid in settlement of the termination claim, or they are credited to the Government in other ways.

4-14. Whenever scrap is purchased from termination inventory, the buyer must give a scrap warranty. FPR 1-8.504.2 discusses scrap warranties:

(a) If any termination inventory is sold as scrap, a scrap warranty, substantially as set forth in FPR 1-8.805, shall be obtained.

(b) Releases from liability under scrap warranties may be granted on behalf of the Government by the contracting officer if, as consideration for the release, the Government is paid the difference between (1) the price for which the material was sold as scrap, and (2) an amount approved by the contracting officer, not less than that which the material would bring if it were sold at a fair and reasonable price for purposes other than use as scrap. Such releases shall be granted by the Government, and the consideration paid to the Government, even though the contract containing the warranty was not made directly with the Government.

(c) In the event of resale of any material subject to a scrap warranty, the seller is required to obtain an appropriate scrap warranty from the purchaser thereof. Upon tender of the warranty to the Government, the seller shall be released by the Government from liability under his own warranty.

4-15. Surplus termination inventory may also be donated to educational, public health, or civil defense programs. This is done by the Department of Health and Human Services (HHS) with the approval of the General Services Administration. Each Department within the Department of Defense furnishes to HHS a directory of its activities that maintain files of property eligible for donation. Termination inventory that has no value beyond the costs of handling it (or that constitutes a danger to public health, safety, or welfare) may be destroyed or abandoned. This is carried out as directed by the regulations of the Procuring Department and the General Services Administration. No property should be abandoned on the premises of the contractor without his consent. It should be noted, however, that the Government-Furnished Property (GFP) clause of the contract authorizes the abandonment of Government Property at no cost to the Government.

4-16. Each Procuring Activity has one or more Property Disposal Review Boards. These Boards review and authorize disposals exceeding set dollar limitations. They also review sales made without competitive bids; releases from scrap warranties; proposals to abandon or destroy property; and determination that property is scrap.

4-17. Most termination clauses include a provision for plant clearances which begins with the effective date of termination and ends ninety days after the contractor submits acceptable inventory schedules. Inventory schedules are considered to be acceptable (for purposes of starting the final phase of the plant clearance period) unless the contracting officer notifies the contractor within fifteen days that they are not. At any time after that, the contractor may ask the Government to enter into a storage agreement for inventory not covered by disposition instructions. Storage agreements usually provide for contractor storage at a negotiated price.

4-18. Subcontractors at all tiers prepare inventory schedules. The prime contractor and each subcontractor are primarily responsible for the disposition of the termination inventory of their next lower-tier subcontractors, but all such disposals are subject to review by the contracting officer (or his representative). Subcontractor inventory schedules are prepared in accordance with DAR 24-212 and FPR 1-8.513-2.

5. Settlement of Terminations (DAR 8-210.7 and FPR 1-8.203)

5-1. Settlement of cost-reimbursement type contracts and of fixed-price type contracts terminated for convenience may be effected by (a) negotiated agreement, (b) determination by the contracting officer, (c) costing out under proper invoices or vouchers (in the case of costs under cost-reimbursement type contracts), or (d) a combination of these methods. Every effort shall be made to reach a fair and prompt settlement with the contractor. The negotiated agreement is the most expeditious and most satisfactory method of settling termination claims, and shall be used whenever feasible. Settlement by determination shall be used only when a termination claim cannot be settled by agreement.

5-2. **Fixed-Price Contract Termination Settlements.** Settlements of fixed-price contracts may be based on either total cost or inventory. While each of the methods of settlement has its advantages, the individual settlement case would dictate the better method to be used. As will be shown in the following paragraphs, both methods include some of the same items of expenses in the settlement claims.

5-3. Fixed-Price contracts are settled on the basis of either inventory or total cost. The inventory basis is preferred unless the particular situation makes it impossible (FPR 1-8.307-2). Use of the total-cost basis must be specifically approved by the contracting officer in advance. Any other method of settlement (such as percentage of physical completion) is most rare. It requires prior approval of the Secretary concerned.

a. Inventory Basis. Under the inventory method of settlement, the contractor lists only costs applicable to the terminated part of the contract. Inventory is priced and listed in the settlement proposal at purchase or manufacturing cost. Other proper charges are added. These include initial costs allocable to the terminated part of the contract (to the extent they are not included in inventory value); general and administrative expenses; settlement expenses; settlements with subcontractors; and profit or adjustment for loss. End items that were completed but not delivered at the time of termination are paid for at contract price. The total of these amounts is the contractor's gross termination claim. Inventory disposal credits and unliquidated progress or advance payments are deducted from this figure.

(1) The inventory basis of settlement has decided advantages. For one thing, only the costs relating to the terminated part of the contract have to be considered. For another, inventory costs lists on the inventory schedule are priced at purchase or manufacturing costs at the time of termination. Any special costs, such as initial costs allocable to the termi-

nated part of the contract have to be specifically identified as such.

(2) Under the total-cost basis, on the other hand, the entire contract must be reviewed and audited. This may be done in some cases because the contractor's accounting system may not permit segregation of costs applicable to the terminated part of the contract, or the contract may have been in its early stages at the time of termination, with only preparatory costs incurred. Under these circumstances, the total cost basis might be the best method of settlement.

b. Total-Cost Basis. When the total-cost basis is used under a complete termination, all costs incurred to the date of termination are itemized, plus the costs of settlements with subcontractors and applicable settlement expenses. At this point, adjustment is made for profit or loss. The contract price for accepted end items and other known payments and credits are then deducted from this total.

(1) The use of the total-cost basis of settlement on a partial termination requires the contractor to defer submission of his settlement proposal until after completion of the continued portion of the contract. All costs incurred under the contract are then totaled. These include costs applicable to the continued portion. In other respects, the settlement is similar to the settlement of a complete termination on a total-cost basis.

(2) The Termination Contracting Officer (TCO) must approve the total-cost method before it can be used by a contractor. Situations may be approved by TCO: (i) if production has not commenced and the accumulated costs represent planning and preproduction of "get ready" expenses; (ii) if the contractor's accounting system will not readily lend itself to the establishment of unit costs for work in process and finished products; (iii) if the contract does not specify unity prices; or (iv) if the termination is complete and involves a letter contract.

5-4. The primary objective in negotiating a settlement of a fixed-price contract is to agree on an amount that will compensate the contractor fairly and fully for the work that he has done and the preparation that he has made for the terminated part of the contract. A reasonable allowance for profit is also included. Cost and accounting data provide guides for determining fair compensation. They are not, however, rigid measures. Effective negotiation requires the ability to apply standards of business judgment (as distinguished from strict accounting principles). The contracting officer should, of course, be guided by standard policy on the types of costs ordinarily considered.

5-5. DAR Section XV, "Contract Cost Principles, and Procedures," applies to termination settlements. Costs may be estimated, differences resolved, and questions settled by agreement. The contracting officer should use judgment in applying all available data. DAR Section XV describes the following costs as requiring special treatment on termination:

> Costs of common items that the contractor can use on other work; costs continuing after termination; initial costs, including starting load and preparatory costs; loss of useful value of special tools, special machinery, and equipment; rental costs under unexpired leases; settlement expenses; subcontractor's claims.

5-6. The following discussion of costs is based on DAR Section XV. Part 2 of this section applies to contracts with commercial concerns. Part 3 applies to contracts with educational institutions. Part 4 covers Construction and Architect-Engineer contracts. Part 5 applies to contracts for industrial facilities.

5-7. Direct costs include material and labor which are directly allocable to the terminated part of the contract. In certain cases, however, direct costs might also include items that are usually classified as indirect. As was discussed above, common items are excluded from the contractor's settlement claim. And, as mentioned above, the contractor should return as much material as possible to suppliers, and obtain credit for it. The costs of such material, and other items excluded from inventory, are not part of the settlement proposal. However, reasonable restocking charges by suppliers, handling costs, and transportation costs relating to such material may be included in the proposal as "other costs." When the cost proposal is submitted on the inventory basis, direct labor will be included in inventory value. But some elements of direct labor costs may be included in other costs—such as allocable initial costs. On the total-cost basis, direct labor costs will be set forth as such in the proposal.

5-8. A contractor's settlement proposal will normally include items of indirect cost. They may be submitted as overhead applied to factory or engineering labor, or they may be general and administrative expenses applied to all other cost elements. There should, of course, be no duplication of costs, direct or indirect. And certain costs (such as bad debt expense and certain entertainment costs) are not considered.

5-9. The Defense Acquisition Regulation (DAR) cost principles give special consideration to initial costs. These include start-up and preparatory costs. When a settlement proposal is being submitted on the inventory basis, unabsorbed initial costs should be segregated; but they may be allocated on the basis of the total contract end items called for at the time of termination. If it were done another way, the settlement might depend on its ability to spread starting-load costs over a large volume of production. Starting-load costs include one-time labor and material costs and related overhead arising in the early stages of production. These costs are not fully absorbed because of the termination. They may be caused by inexperienced labor, employee training expenses, or idle time resulting from testing and changes in processing methods. Preparatory costs might include costs for plant rearrangement and production planning to perform the terminated contract.

5-10. It is quite likely that costs incurred in continuing work after termination will not be considered. This will apply if they arise because the contractor neglected or deliberately failed to discontinue work as directed. If termination causes loss of the useful value of special tooling, or special machinery or equipment, these costs may be taken into account under certain conditions. So, too, may the rental value of certain unexpired leases. Termination settlement expenses are allowed. They include the costs of the contractor's preparation of the settlement claim and of protecting or disposing of property allocable to the contract. Plant reconversion costs (money spent to restore the contractor's facilities to the condition that existed before the terminated contract) are not usually permitted as part of a settlement. This is consistent with the treatment of preparatory expenses for plant rearrangement mentioned above. Reconversion costs usually have to be charged to succeeding contracts, commercial or

military. In effect, they are normally treated as consequential damages that are not part of a termination settlement. Reconversion costs for the removal of Government property are taken into account, as are rehabilitation costs specifically caused by such removal. There may also be special treatment of plant reconversion costs by prior contractual agreement.

5-11. In a termination settlement, a contractor should be allowed profit on preparations made and work done for the terminated part of the contract. Anticipatory profits (the expected profit on that terminated part of the contract for which no preparations were made and no work done) are not allowed. Nor may profits include an allowance for post-termination and settlement expenses. These include expenses incurred in protecting termination inventory and in the settlement of subcontracts. There is no hard-and-fast rule for determining the profit that should be allowed, but there are many guides. One is the rate of profit that the parties agreed on or contemplated when the contract was negotiated. Another is the rate that the contractor would have earned if the contract had been completed, but this computation can take a great deal of time and may not be accurate—especially if the contract performance is in the early stages. Usually, a fair settlement can be reached more quickly by comparing the work done on the terminated part of the contract to the amount of work contemplated by the entire contract. The comparison should be expressed as a percentage; the percentage should then be applied to the amount of profit contemplated when the contract was written. For example, in fixed-price contracts the factors specified in DAR 8-303 are also taken into consideration along with the fact that the contractor's risks may have been reduced. Costs incurred are not by themselves a suitable guide as they often do not accurately reflect the amount or difficulty of the work already performed by the contractor.

5-12. If it appears that the contractor would have suffered a loss on the entire contract, no profit is allowed (FPR 1-8.304). Instead, the settlement figure should be adjusted to reflect the indicated rate of loss. On a total cost basis, the actual cost to date (exclusive of settlement expenses) is reduced by multiplying it by the ratio of (1) the total contract price to (2) the contractor's actual costs plus the estimated cost to complete the entire contract. For example, a $10,000 fixed-price contract with $9,000 spent and $3,000 additional required to complete the contract, would result in:

$$\text{Actual Cost} \times \frac{\text{Total K. Price}}{\text{Actual Cost} + \text{Cost to Complete}}$$

$$\$9{,}000 \times \frac{\$10{,}000}{\$9{,}000 + \$3{,}000} = \$7{,}500 \text{ Allowable Cost}$$

5-13. This formula is reflected by DAR 8-304. Settlement expenses are usually added to this, however. The regulation itself is clear. The difficulty lies in deciding whether and to what extent a loss situation exists. The termination settlement may not be used to compensate the contractor on the basis of a higher contract price than that originally agreed on.

5-14. A subcontractor has no contractual rights against the Government upon the termination of a prime contract (FPR 1-8.208-1), but the Government does have the right to settle a subcontractor's claim directly. The prime contractor and each subcontractor are responsible for settling with their immediate subcontractors and suppliers. These settlements are included in the settlement with the contractor. They are also subject to approval or ratification by the contracting officer (except as noted below). As a general rule, the DAR policies governing termination settlements with prime contractors also apply to the settlements with subcontractors.

5-15. There is an important exception to the requirement of contracting officer approval of settlements with subcontractors. To expedite overall settlement, prime contractors may be delegated authority to settle with subcontractors up to a specified amount (DAR 8-209.4 and FPR 1-8.208-4) not in excess of $10,000.

5-16. Virtually all termination settlements are arrived at by negotiation. However, the Government and contractor may fail to agree. In that situation, DAR clause 7-103.21 for fixed-price contracts and FPR 1-8.209-7 set forth procedures for settlement by determination of the contracting officer. Generally speaking, the contractor is paid for goods already accepted under the contract. In addition, if the contractor is not in a loss position, profits shall be determined by the Contracting Officer in accordance with the factors set forth in DAR 8-303.

5-17. **Cost Reimbursement Type Contract Settlement.** Settling a cost-reimbursement contract is different from settling a fixed-price type contract (FPR 1-8.4).

5-18. The settlement of cost-type contracts should be easier than that of fixed-type contracts. This is because the contractor in a cost-type contract has been reimbursed on a cost basis from the beginning of the contract.

5-19. Where the contract has been completely terminated, the contractor may continue to voucher out costs incurred after termination just as he vouchered out pretermination costs; but he may not continue to voucher out costs after the last day of the sixth month following the month when the termination became effective. He may also elect to discontinue vouchering at any time before the six-month mandatory date (DAR 8-402). Vouchered costs include costs for work done before termination and not previously vouchered, and costs relating to termination (expenses of settling subcontracts, the costs of preparing the settlement claim, expenses incurred in protecting and disposing of property allocable to the contract, and so on). As in the case of fixed-price contracts, settlements with subcontractors require review and approval by the contracting officer. This is necessary even when the contractor elects to voucher out his costs. If costs are vouchered out, settlement negotiations are limited to adjusting the fee only. If costs are partially vouchered, the termination settlement will include unvouchered costs and fee.

5-20. As a rule, the settlement of a partial termination must be confined to the fee. Costs with respect to the partially terminated work are vouchered out. Costs may be included in the settlement of a partial termination only if the terminated portion of the contract is clearly severable from the rest of the contract. They may also be included if performance of the contract is virtually complete.

5-21. When the contractor discontinues vouchering (as discussed above), he must submit all his claimed unvouchered costs in the form of a settlement proposal (including claim for fee, if any). His proposal may not include any vouchered

costs that have been finally disallowed, nor any costs that are the subject of a reclaim voucher.

5-22. When the contractor vouchers out his costs, applicable DAR XV cost principles are used in ascertaining the allowability of the costs. These principles are also the basis of negotiation when costs are included in the negotiated settlement. Negotiating techniques are applied here, and agreement is not necessary on each separate element of cost; but the overall settlement cannot reimburse the contractor for costs that are clearly not allowable under the provisions of the contract.

5-23. The amount of the negotiated fixed-fee adjustment is based on the percentage of completion of the contract work. This requires consideration of the extent and difficulty of the work done, as compared with the total work required. The most difficult phases of the work may not involve the highest costs. For this reason, the ratio of costs incurred to total estimated costs should not be the only guide. The contracting officer should draw on the judgment and experience of all members of the procurement team in determining the percentage of completion. Because of the special nature of architect-engineer contracts, DAR 18-607 sets forth special methods for arriving at an equitable fee adjustment. If the parties fail to reach a negotiated settlement, the contracting officer unilaterally determines the amount due (FPR 1-8.209-7).

5-24. There may be an audit of the contract prior to a settlement agreement.

a. DAR 8-208. Audit. Any settlement proposal of a prime contractor to an agency of the Department of Defense in an amount of $10,000 or over must be referred to the cognizant Defense Contract Audit Agency. The Defense Acquisition Regulation also requires Government accounting review of subcontractors' proposals involving $25,000 or more, or of lesser amounts if the contracting officer deems necessary. The contracting officer is not bound by the audit report, but he is expected to give it careful consideration.

b. Settlement Agreement. When all approvals have been obtained on a proposed settlement, the next action is the execution of a settlement agreement. Prescribed forms for settlement agreements are set forth in DAR 8-805. Under the agreement, the contractor certifies that all termination inventory has been properly accounted for. He assigns to the Government any interest in the subcontract inventory that is not otherwise accounted for. The contractor further certifies to the following facts: (1) all items were properly allocable to the terminated part of the contract; (2) the items were not in excess of requirements; (3) they could not have been used on other work; (4) any large changes in the status of such items between the date of the inventory schedule and the date of the agreement have been reported. Where the contractor has not previously made such payments, he agrees to pay all subcontractors and suppliers within ten days of receipt of the payment provided for by the agreement.

c. Federal Procurement Regulations (FPR) on Review and Approval of Proposed Settlements. FPR 1-8.211 provides for submission to a settlement review board for settlements involving $50,000.00 or more.

(1) FPR Settlement Review Board—Each agency shall provide for review of proposed settlements as required in FPR 1-8.211-2 (a) and (b). The review shall be by a settlement review board (or other group created for that purpose) established on a permanent or temporary basis. More than one such board may be established if settlements are to be made at different locations, if personnel with different qualifications are needed for different contracts, or if for other reasons the establishment of more than one board is considered desirable. Each settlement review board should be composed of at least three qualified and disinterested employees. The membership of each board should include at least one lawyer and one accountant.

(2) FPR Required Review and Approval Per FPR 1-8.211-2. (a) When required. Prior to executing a settlement agreement, or issuing a determination of the amount due under the termination clause of a contract, or approving or ratifying a subcontract settlement, the contracting officer shall submit each such settlement or determination for review and approval by a settlement review board if: (1) the amount of settlement, by agreement or determination, involves $50,000 or more; (2) the settlement or determination is limited to adjustment of the fee of a cost-reimbursement contract or subcontract and (i) in the case of a complete termination, the fee, as adjusted, is $50,000 or more; or (ii) in the case of a partial termination, the fee, as adjusted, with respect to the terminated portion of the contract or subcontract, is $50,000 or more; (3) the head of the procuring activity concerned determines that a review of a specific case or class of cases is desirable; or (4) the contracting officer, in his discretion, desires review by the settlement review board. (b) Level of review. When the amount of settlement, by agreement or determination, is in excess of $1,000,000, review and approval of the settlement shall be by a board at or above the level of the head of the procuring activity.

5-25. The amount to be paid the contractor is set forth in a settlement agreement. The method of computing it is shown by a statement of the gross amount of the settlement. Progress or advance payments, property disposal credits, or other amounts due the Government are deducted from this amount. The agreement reserves certain rights and liabilities of the parties with respect to patents, royalties, guarantees, and Government-furnished property stored by the contractor. The reservation of rights and liabilities need not follow a set pattern, but the contracting officer should be sure that this part of the agreement is adequate. There may be rights or liabilities not normally covered that require special treatment. If so, he should see to it that an appropriate provision is inserted in the agreement. If no agreement is reached on a settlement figure, the contracting officer makes a determination of the amount due. The contractor may appeal from this determination, under the Disputes Clause, to the proper Board of Contract Appeals.

6. Termination Financing

6-1. Termination halts regular payments to the contractor under the contract. Yet the contractor will often have considerable money tied up in finished and unfinished products, materials, and labor. Many of his accounts payable may become due before settlement agreement is reached. So, most termination clauses provide a means of interim financing through partial payments to the contractor.

6-2. In accordance with FPR 1-8.212-1 and DAR 8-213.1, the contracting officer may make partial payments to a terminated fixed-price contractor or (if the settlement is to

include costs) to a cost-type contractor. The contractor may apply for such payments in writing at any time after he submits his interim or final settlement proposals. With the approval of the contracting officer, an amount up to 100 percent of the contract unit price may be paid for undelivered acceptable items completed before or after the termination date. A subcontract settlement made by the prime contractor and approved by the Government may also be paid in full. The contractor may receive in partial payment an amount up to 90 percent of the direct cost of termination inventory. This amount includes costs of raw materials, purchased parts, supplies, and direct labor. A reasonable amount (not more than 90 percent) may also be paid for other allocable costs; but no partial payments may be made toward profit or fixed-fee of the terminated portion of the contract, except for finished products.

6-3. Partial payments that might impair or modify any valid assignment of a claim under a contract may not be made without the consent of the parties. Adequate security should be obtained to protect the interests of the Government. Partial payment may be made for complete articles of termination inventory. The Government's interests are protected by transfer of title, by a lien in its favor, or by other means considered necessary.

6-4. In determining the amount of partial payment, a deduction is made for any unliquidated balance of progress and advance payments (including interest thereon) that have been made to the contractor. A deduction is also made for all credits from the sale or retention of property whose costs are included in the measure of the payments. The total amount of the partial payments should not exceed the total settlement amount due the contractor because of the termination. If partial payments should exceed the final settled claim, the excess must be repaid to the Government on demand. Interest at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (running from the date the excessive payment was made to the date of repayment) is charged for any such overpayment, but no interest is charged if the excess was caused by a reduction in the termination claim because of retention or other disposition of termination inventory. In the latter case, the difference should be repaid to the Government without interest. This must be done within ten days after notice to the contractor that the payments were excessive. If the amount is not repaid within that period, the Government may then demand interest.

7. Equitable Adjustment on the Continued Portion of the Contract

7-1. The standard termination clauses of fixed-price contracts allow the contractor—in the event of a partial termination—to file a request for an equitable adjustment of the contract price or prices for the continuing portion of the contract. This adjustment results from termination. It is not part of the termination settlement. Its purpose is to provide any increase in the unit cost of the continued items that have come about because the quantity of items to be manufactured has decreased. For instance, start-up costs may not have been fully amortized at the time of the termination; or (with a significant decrease in volume) the average labor hours necessary to produce each unit may have increased; or still other factors may justify an increase in the price of continued items under the contract; but partial termination, like complete termination, is a normal risk of doing business with the Government. The Government is normally not responsible for increased overhead costs incurred by the contractor because his regular facilities have been made idle by the termination.

7-2. The negotiation of any claimed equitable adjustment of the continued portion of the contract should be coordinated with the settlement negotiation. The negotiations overlap, although they result in separate agreements.

8. Conversion of "Termination for Default" to "Termination for Convenience".

8-1. Where the contractor has a valid and legal excuse for being delayed, termination for default is regarded as a termination for convenience. If it is determined that the contractor was not in default, the standard "Default" clause provides that the rights of the parties shall be determined under the "Termination for Convenience" clause. If the contract does not contain a "Termination for Convenience" clause, it shall be equitably adjusted to compensate for the termination.

CHAPTER 20

Remedies of the Government

THROUGHOUT THE LIFE CYCLE of a contract, and even after completion, various remedies are available to the Government contracting officer. These remedies provide necessary flexibility. Terminations were covered in the two preceding chapters. This chapter presents some additional actions which may be taken by the Government for its protection.

2. Generally, Government remedies other than terminations can be classified by reference to the activity to which they relate. Remedies may be connected with pricing, modifications, contractor progress, inspections, warranties, debt, deductions, damages, voluntary refunds, renegotiation, mandatory injunction, and contract fraud.

1. Debarment

1-1. The reasons for debarment are set forth in DAR 1-604: (1) firms or individuals may be debarred by a Department Secretary if the contractor is convicted of fraud, criminal offense, violating antitrust laws, falsifying records, or any other offense that raises a question of business integrity, including failure to comply with the "Buy American" Act; (2) the Secretary may also debar firms or individuals for violation of contract provisions, such as full failure to perform, a history of unsatisfactory performance, or violations of the Covenant Against Contingent Fees or the Gratuities Clause; and (3) contractors may also be debarred "for any other clause of such serious and compelling nature, affecting responsibility as a Government contractor or subcontractor, as may be determined by the Secretary of the Department concerned to justify debarment." Such an action would be conviction (by the Department of Labor) for violating contract labor provisions.

1-2. As long as a contractor appears on the Debarred List, he may not be issued a procurement solicitation or be considered for an award of a prime or subcontract. Note, however, that certain exceptions may be made. The duration of a debarment should be a reasonable, specified period of time depending on the seriousness of the offense. Generally, this period is not more than three years; however, this period may be extended in certain circumstances.

1-3. A contractor may be suspended from contracting with the Government when there is "adequate evidence" of commission of contract fraud or "for other cause of such serious and compelling nature, affecting responsibility as a Government contractor" (DAR 1-605.1). Suspension shall last "for a temporary period pending the completion of investigation and such legal proceedings as may ensue," but generally shall not exceed 12 months (DAR 1-605.2 c). Suspensions are often effected when a contractor is indicted for contract fraud activities, but this need not be the only occasion when the remedy is used. "Adequate evidence" may be obtained from ongoing investigations by the FBI, OSI, Justice, or the US Attorney. Some of these groups may be reluctant to provide evidence out of a concern that it may be disclosed to a contractor in an administrative proceeding and thereby prejudice a future civil or criminal action. DAR 1-605.2, however, provides for specific procedures protecting against such prejudicial disclosures. The leading case discussing suspension procedures, *Horne Bros. Inc. v. Laird,* 463 F2d 1268 (DC Cir. 1972) indicates a real sensitivity towards this premature disclosure problem. *Horne Bros.* also provides an excellent discussion of the "adequate evidence standard," comparing it to "the probable cause necessary for an arrest, a search warrant, or a preliminary hearing." Finally, in a more recent case, *Stanko Packing Co., Inc. v. Bergland,* 489 F. Supp. 947 (DCDC 1980), the Court held that sworn statements of two employees of a suspended contractor constituted adequate evidence.

1-4. In contrast, "clear and convincing evidence" of violation of contract provisions, or a court conviction, is required before debarring a contractor from doing business with the Government for three years (DAR 1-604.1). Debarment may include all known affiliates of a concern or individual, and the fraud or criminal conduct may be imputed to the business firm with which he or she is connected (DAR 1-604.2 b). A major case reviewing debarment procedures is *Gonzales v. Freeman*, 334 F2d 570 (DC Cir. 1964).

1-5. Each Military Department, as well as the Defense Logistics Agency (DLA) and the Defense Contract Administration Service (DCAS), maintains a list of individuals and firms that it has debarred or suspended. Contracts may not be awarded to these firms, nor may bids or proposals be solicited from them, or subcontractors approved (DAR 1-601). Department lists must contain certain information and, as a minimum, must show names, basis of authority for the action, extent of restriction, and termination date for the debarred firm or person. This information is later consolidated for the Departments into a Joint Consolidated List.

1-6. The Joint Consolidated List is issued by the Army, by agreement among the military departments. The list also includes firms listed by other Government agencies. Each Department furnishes the information necessary for updating the list by adding, deleting or modifying. Thus, in the Government's effort to deal only with responsible contractors, application of the Debarred, Ineligible, and Suspended

Contractors List to the contracting effort tends to accomplish this end.

2. Remedies in the Area of Contract Pricing

2-1. The Government utilizes safeguards against various types of negligence, fraud, and criminal offenses that may occur in negotiated contracts. These safeguards will be reviewed with reference to specific types of offenses.

(A) Public Law 87-653 (Truth in Negotiations Act). In order for negotiation to produce the best results, the price of property and services acquired under negotiation must be based on accurate, complete, and current information supplied by the contractors. To accomplish this, Public Law 87-653 was passed on September 10, 1962. This Act is also known as the "Truth-in-Negotiations Act," and is found in 10 USC 2306(f). Price reductions taken pursuant to this Act during contract administration are remedial to the Government, and are more fully discussed earlier in this text.

(B) Civil Fraud. Title 31 USC 231 is called the "False Claims Act." It has been utilized in the area of prosecuting for intentionally falsified pricing data, with each "inflated" voucher considered a separate false claim. The act is broad, and is not limited to original contract pricing situations. Any person not in military service who makes a false claim against the Government, knowing it to be false, shall forfeit $2,000 plus double the amount of damages caused the United States.

(C) Criminal Fraud. Whoever knowingly and willfully makes a false statement or submits a fraudulent document to a Government agency, knowing it to be so, shall be fined not more than $10,000 or imprisoned for not more than five years, or both. Such action is considered a federal crime according to Title 18 USC 1001. False representation in Government bids and negotiations are covered by the act.

(D) Price Redetermination. No discussion of statutory redetermination can be held without a consideration of contractual price redetermination or repricing. Many contracts provide for price adjustment under stated conditions. Such a provision works to the benefit of both parties to the contract. Contractual price redetermination applies as follows:

(1) Redetermination takes place under a contract when the parties have agreed to it in advance.

(2) In redetermination, prices may be either increased or decreased.

(3) Redetermination takes place on individual contracts rather than on an overall fiscal year basis.

3. Changes and Modifications

3-1. Contract modifications were dealt with extensively in a preceding chapter. A brief reference to the underlying principle should emphasize the remedial nature of these actions.

3-2. The "Changes" Clause of the contract gives the Government a remedy for those situations which demonstrate that the item being procured is no longer the item required to meet the mission requirement. The right to order "Changes" is unilateral to the Government. The contractor is protected by that portion of the clause which provides for an "equitable adjustment" in the price of the contract.

3-3. **Stop Work and Suspension of Work Provisions.** Sometimes, the Government finds that it must greatly alter a procurement. Realignment of programs, and advances in the state of the art, often make changes necessary. A change may be so substantial that it would be wasteful to continue to work on the original procurement. The Government therefore includes a contract clause permitting the contracting officer to stop work while the matter is being considered. Two standard clauses are authorized—the Stop Work Order Clause and the Suspension Work Clause. The former is used in negotiated supply and research and development contracts, both fixed-price and cost-reimbursement. Its use is restricted to contracts where work stoppages might be necessary for reasons such as advances in the state of the art, or production engineering breakthroughs.

3-4. ***Stop Work Clauses.*** Stop work orders are not permitted unless the contract contains this clause. In fact, their improper use may be a breach of contract by the Government. Even when the contract contains the clause, stop work orders are specifically prohibited when a decision to terminate has been made. Before the order may be issued, prior approval at a level higher than the contracting officer is required (Ref DAR 7-105.3 for negotiated fixed-price contracts). While the order is in effect, the contractor must take all reasonable steps to minimize costs. The stop work period may be extended by agreement of the parties. Within the ninety-day period (or any extension thereof), the contracting officer must either (a) cancel the stop work order or (b) terminate the contract for convenience. If the stop work order is cancelled, the contractor must resume work.

3-5. ***Suspension of Work Provisions.*** Work on construction contracts may be suspended under the provisions of the clause set forth in DAR 7-602.46 (Suspension of Work). No limit is placed on the suspension period, but the contractor is entitled to an equitable adjustment, excluding profit, for the unreasonable portion of the period during which work was suspended. The clause is inapplicable to delays recognized by other contract clauses, and to delays that are attributable to the contractor. The clause requires the contractor to give notice of any action which he regards as falling within the coverage of the clause, even though no "actual" order has been issued by the Contracting Officer. In these "Constructive Suspension" situations, the contractor will be barred from recovery of costs incurred more than 20 days prior to the date on which notice was given in writing. In the cases where an actual suspension order is given, or where the contractor has given timely notice of a "Constructive Suspension", the contractor must submit his claim as soon as practicable after termination of the suspension but not later than the date of final payment.

4. Warranties and Inspection

4-1. The Warranties Clause protects the Government from the cost of correcting defects in the supplies it receives from contractors. The Inspection Clause gives the Government the right to reject supplies and services which do not conform to the quality demanded by the contract.

4-2. **Warranty Provisions.** Either to relieve the Government of the need for extensive and expensive test and inspection, or to assure a certain minimum performance and useful life, a warranty provision (Ref DAR 7-105.7) extending

beyond the contract performance period may provide a post-contractual remedy of great value.

4-3. Almost all warranties or guarantees cost money because they leave with the contractor a contingent liability for replacement, correction, or other adjustment. In certain situations, however, the additional contract cost can be overcome if the supplier is motivated by the provision to hold his own liability to a minimum. Field failures have a ripple effect on total life cycle costs. Defective aircraft equipment must be removed, crated, shipped, documented, and, after repair, put back into the inventory. It is evident that the administrative costs and some out-of-pocket expense must be borne by the Government—despite any warranty provision.

4-4. **Inspection Clause.** To provide a remedy for imperfection in work effort or finished items (where default is not the answer), the Inspection Clause of the contract provides the right to inspect at appropriate times and places (including the contractor's plant) during the manufacturing process—and to require correction of defects.

4-5. The right to grant deviations from specifications where there is no material adverse affect on quantity, quality, reliability, interchangeability, maintainability, or performance characteristics, serves as a remedy for expediting contract performance by eliminating undesirable rework or relieving production scheduling problems.

4-6. A "Correction of Deficiencies" Clause provides a remedy for the Government in fixed-price supply and service contracts for systems and equipment when performance specifications or designs are of major importance. The contractor must correct deficiencies, either before or after acceptance by the Government, at his expense. Transportation costs for the supplies are borne by the contractor, at least up to an amount equalling commercial rates. The clause provides detailed provisions for handling the transaction. This optional clause is found at DAR 7-105.7(c).

5. Debts, Deductions, and Damages

5-1. There are several ways in which the government handles situations involving debt, deductions, and damages. These situations are examined, beginning with the policy concerning debts.

5-2. **Debts.** The United States has a creditor's right to sue for debt. The US District Court is the forum provided. The administrative collection of debt is provided for in Appendix E-600 of DAR. The contracting officer is the person, together with the disbursing officer, who takes collection action, by set-off against contract monies due the contractor. The contracting officer may, if a contract debt occurs from assessment of excess costs following default termination, seek out other contracting officers or Government agencies who owe money to the contractor in order to set-off his claim against that Government debt to the contractor. This self-help idea is as old as debt itself, and the Government is said to have the right to refuse payment until it is paid what is owed it. DAR calls for a "Hold-up List" as a cross-control of inter-office claims.

5-3. The Assignment of Claims Act (studied earlier) prevents set-off where the claim arises outside the contract and the contract right to payment was assigned by the contractor in accordance with the Act.

5-4. The Comptroller General entertains claims from the Government under Section 71 of the Budget and Accounting Act (31 USC 71). In fact, the Comptroller General prefers that his office be utilized by contracting officers whose claim against the contractor is unliquidated (not formally established).

5-5. **Deductions.** When the claim is uncontested as to both existence and amount, and time is of the essence, the Comptroller General may unilaterally approve withholding of final payment from a contractor. When the parties to the contract agree on the settlement claim, a supplemental agreement reflecting such agreement is valid.

5-6. Deduction may arise from the terms of the contract itself. Thus, we see actions taken under the Price Reduction for Defective Pricing Clause, the Technical Data-Withholding of Payment Clause, and the Reporting of Patentable Inventions Clause, to name a few. If contested before the ASBCA, the Government will be obliged to prove that its action was correct.

5-7. In the service contract area, the ASBCA has specifically approved deducting from payments due a contractor on the theory that the Government is not required to pay for services not rendered, and says that, strictly speaking, this is not a deduction, but a simple refusal to pay for services not furnished. Documentation of the failure to perform is necessary.

5-8. Although deductions pursuant to contract clauses or the DAR debt collection procedures are commonly used, the unilateral withholding of contract monies by the contracting officer on unliquidated damage claims is likely to draw a protest from contractors who assert that they must be paid the contract price. Although the contracting officer is charged with protecting the interests of the Government under the contract, it is suggested that legal counsel be consulted where unilateral withholding is contemplated.

5-9. **Damages.** As discussed in Chapter Eighteen, damages for breach of the contract by the contractor are a Government remedy. Even though no default termination is contemplated, damages may be pursued. Acceptance of contract performance is not a waiver of breach of contract claims. The prudent contracting officer will, however, if such a claim is contemplated, send the contractor a letter referencing receipt and acceptance of supplies but reserving breach claims.

5-10. Damages take two forms: liquidated and unliquidated. Unliquidated damages are those which are not determined in amount. There has been no agreement by the parties, and no court or board determination has been made. These arise when the contractor fails in some substantial respect to perform the contract as written, and harm to the Government results. In other words, damages "flow from the breach," and are measured by the amount of money necessary to make the Government "whole."

5-11. Measuring damages of this type is a difficult task. If the contractor is late in delivery—the most common breach—what harm has been done? If we buy to fill warehouses, what does it matter if schedules are missed? On the other extreme, catastrophic damage claims are also untenable. Such liability, if invoked, would drive substantially all contractors out of Government work. In between, we find yardsticks to measure damages. The question is: "What loss was suffered?" In construction contracts, loss of the use of buildings may be measured by rental values involved. Administrative handling

costs are sometimes recoverable as a consequence of the breach.

5-12. The second form of damages is "liquidated damages," i.e., damages that are pre-set by agreement of the parties, and are contingent on the happening of a named event—usually late delivery by the contractor. The courts favor resolution of disputes, and so uphold such clauses. However, the courts abhor penalty provisions in contracts and will not enforce them. Thus, if the liquidated damages only penalize the contractor rather than compensate the Government for actual damage anticipated, the clause will be unenforceable. The test of reasonableness is not "what damage occurred", but rather, what factors were employed in the selection of the damage figure at the time of negotiations? Were the parties reasonable?

5-13. DAR 1-310 expresses DOD policy on liquidated damages. The approved clause may be used in both formally advertised and negotiated contracts when: (1) the time of delivery or performance is such an important factor that the delivery or performance is delinquent, and (2) the extent or amount of such damages would be difficult or impossible to ascertain or prove.

6. Voluntary Refunds

6-1. A contractor may voluntarily refund contract monies to the Government. It may be spontaneous, or it may be solicited by the Government. Legal counsel should be consulted to determine whether other Government rights may be involved. Refunds should be solicited (pursuant to DAR 1-312) when the Government has been overcharged or inadequately compensated for use of Government-furnished property. The decision to solicit a voluntary refund must be made by the Secretary involved. Refunds obtained are credited to the applicable appropriation cited in the contract, and the contract price is reduced accordingly. Checks received should be made payable to the office designated for contract administration, and should be forwarded to the comptroller of the appropriate Department.

7. Renegotiation

7-1. On March 23, 1951, Congress enacted the Renegotiation Act (50 USC App. 1211). The underlying theory of the Renegotiation Act is that no one should be permitted to take unconscionable advantage of the nation's troubled situation.

7-2. Renegotiation is the process of determining what part, if any, of the profits realized from the specified contracts and subcontracts is excessive. Such excessive profits are to be returned to the Government in the form of refunds. The 1951 Act, and many of the earlier Acts, prescribed certain factors which were to be taken into consideration in determining the excessiveness of profits; and directed that all excessive profits so determined be eliminated.

7-3. On September 30, 1976, the Renegotiation Act of 1951 expired, and the Vinson-Trammel Act (48 Stat 503, current version at 10 USC 2382 and 7300, dated 1970) came into general effect. The Vinson-Trammel Act establishes profit ceilings on certain prime contracts for the construction or manufacture of military aircraft and naval vessels, and on subcontracts thereunder. This Act, with its limited coverage, was unpopular with many in both government and industry. The Treasury Department, anticipating repeal of Vinson-Trammel, has been slow to adopt regulations for administration of the Act. Congress, to clear the air, has exempted recent fiscal year appropriations from coverage of the Act; and the 97th Congress, in December 1981, repealed the Act. Reserved to the President, however, was authority to invoke limitations on profits during war or national emergency. At this writing, we have no effective statutory requirement for renegotiation.

8. Mandatory Injunction

8-1. In a period of war or national emergency, a US District Court may order a contractor to complete its Government contract under authority of the Defense Production Act of 1950. This most stringent of Government remedies is sought only in rare instances.

9. Fraudulent Contract Claims

9-1. The new Contract Disputes Act, discussed in Chapters 16 and 17, provides that contractor claims not supportable due to misrepresentation or fraud will require the contractor to pay the Government an amount equal to the fraudulent claim or fraudulent portion thereof, plus the Government's cost in handling the claim. This entirely new Government remedy is aimed at contractors who play "fast and loose" with claims, and is intended to stop the deliberate inflation of claims. Determinations under this clause are made by the Justice Department, with investigative assistance furnished by departmental investigative agencies and by the Federal Bureau of Investigation.

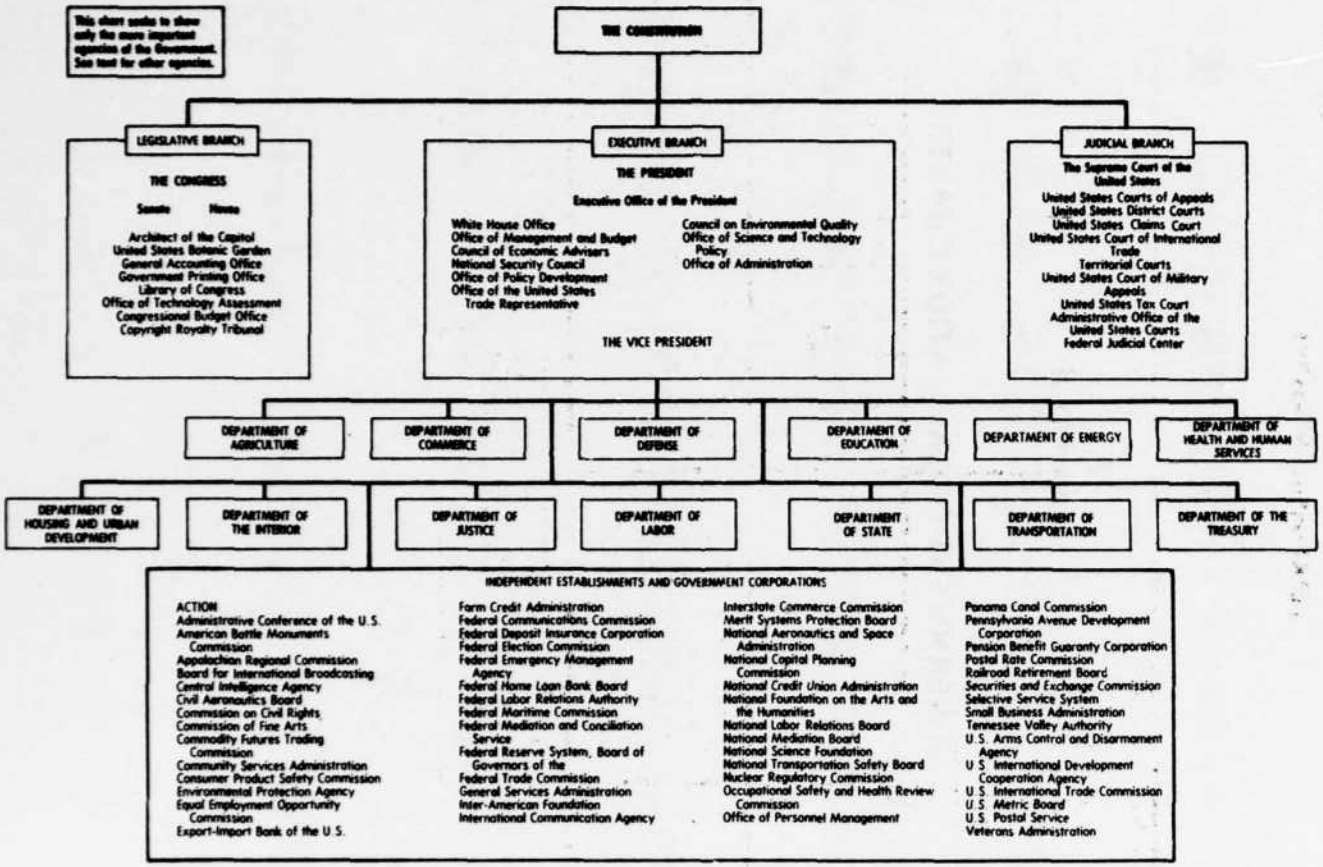
APPENDIXES

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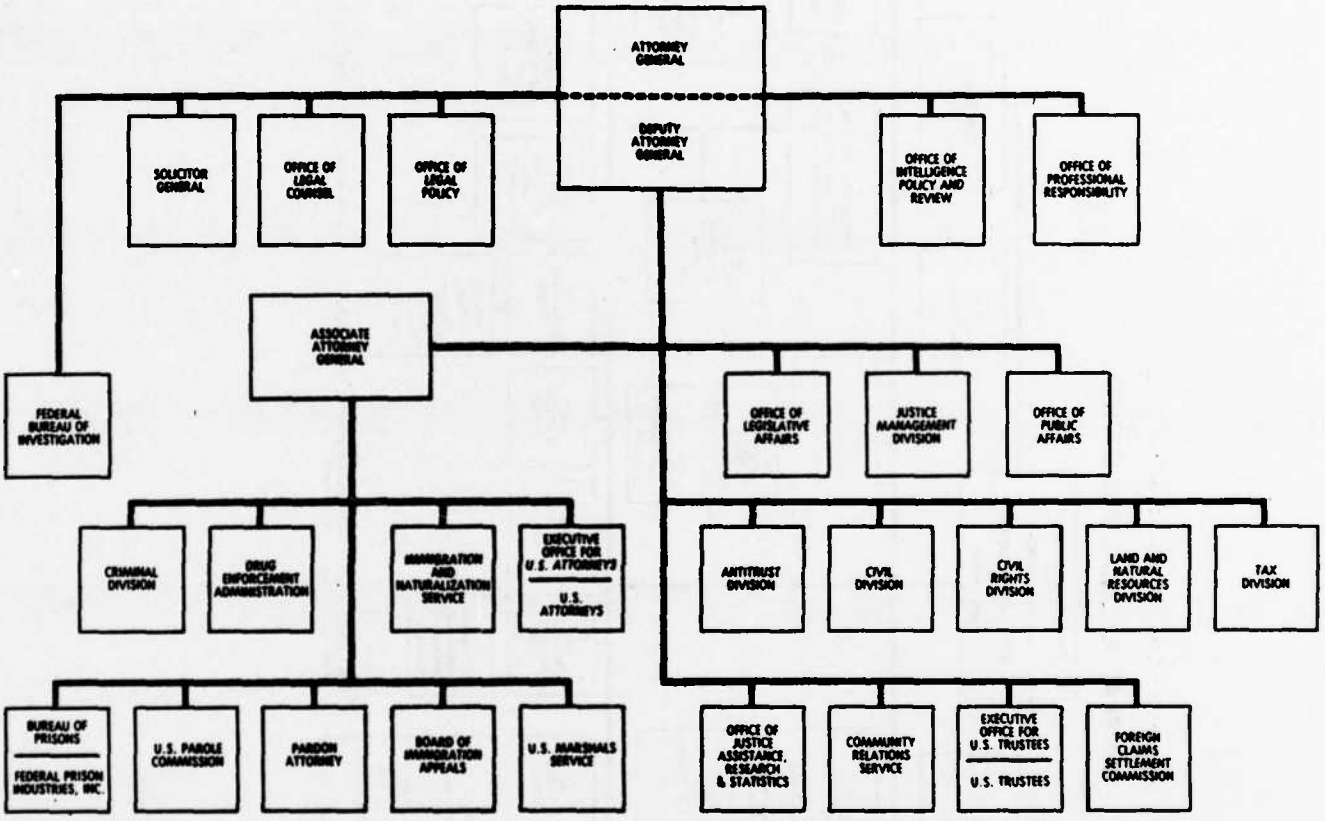
Appendix A

GOVERNMENT ORGANIZATION CHARTS

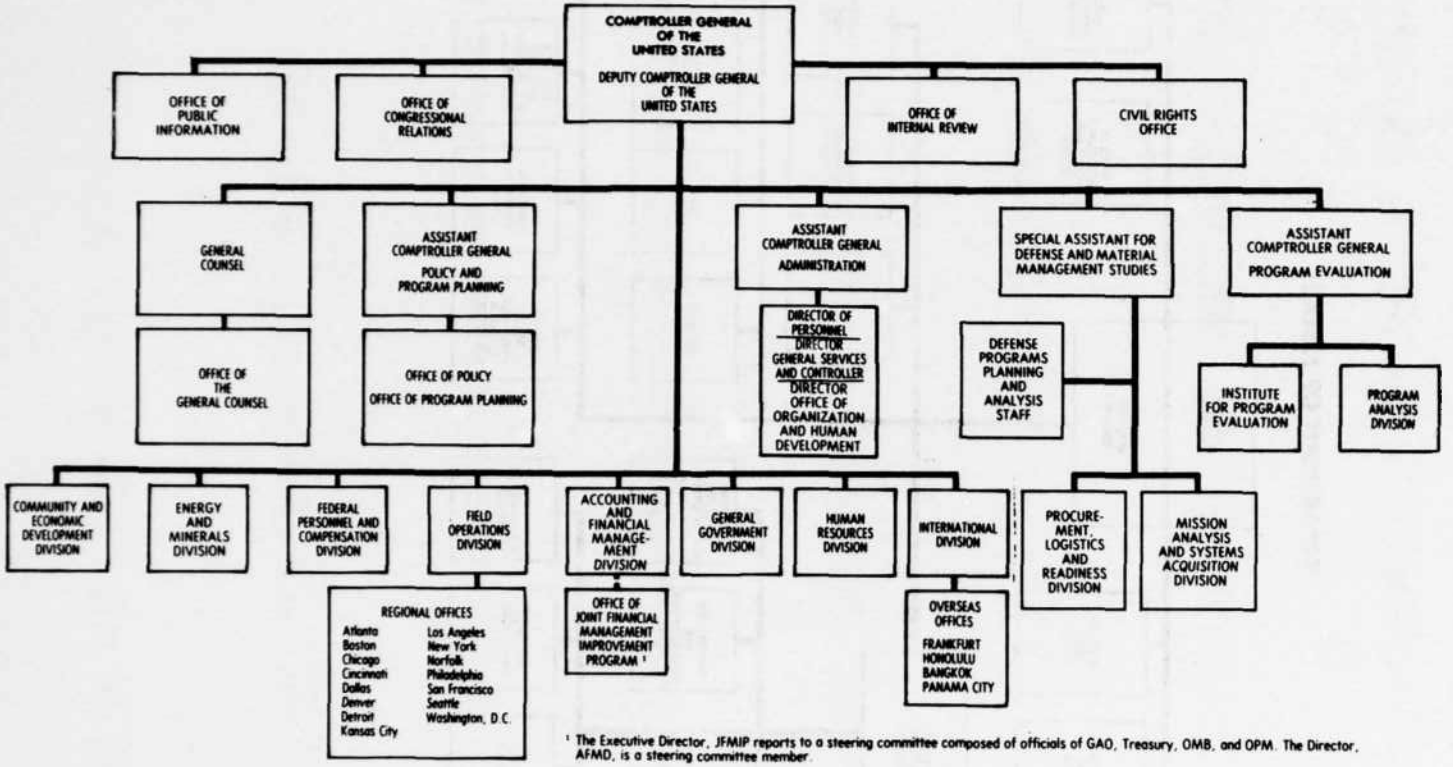
THE GOVERNMENT OF THE UNITED STATES



DEPARTMENT OF JUSTICE



GENERAL ACCOUNTING OFFICE



[1] The Executive Director, JFMIP reports to a steering committee composed of officials of GAO, Treasury, OMB, and OPM. The Director, AFMD, is a steering committee member.

Appendix B

GLOSSARY OF LEGAL TERMS

GLOSSARY OF LEGAL TERMS

Literary

citation	the case number or volume and page number used to identify a case or statute.
e.g.	for example.
et al	and others.
et seq.	and as follows.
ibid	in the same place.
i.e.	that is.
infra	referenced hereafter.
supra	referenced above.
syllabus	editorial headnote to a reported case, giving the law of the case.

General

action ex contractu	suit arising out of contract.
action ex delicto	suit arising independent of contract resulting from breach of a positive legal duty.
civil law	law of the Roman Empire—Justinian "corpus juris civilis" 533 A.D.
civil liability	liability to be sued for infringing on the rights of other individuals, as opposed to offenses against the public.
common law	sometimes called the "unwritten law"—based on custom, usage, and reason and reflected in judicial pronouncements (English-US).
criminal liability	liability to prosecution for offenses against the public.
equity	that portion of remedial justice which is exclusively administered by a court of equity, as distinguished from court of common law. (Law and equity jurisdiction are now combined.)
incorporeal hereditament	an intangible right collateral to tangible personal property or real estate; e.g., real estate rentals.
law	the whole body or system of rules of conduct, including both decisions of court and legislative acts.
principal	adj.—most important, consequential or influential.
principle	n.—a fundamental law, doctrine or assumption.
specious	adj.—having a false look of truth or genuineness.
statutory law	laws enacted by a legislature, as contrasted with common law.
tort	a wrong committed against the person or property of another—one of the two classes of civil actions, the other being contract actions.

Contract

acceptance	assent to an offer by the one to whom it was made.
agent	one employed to transact business for another.
apparent authority	that authority which, though not actually granted, the principal knowingly permits his agent to exercise, or which he holds him out as possessing.
bailment contract	an agreement for the delivery of personal property in trust for a specific purpose, to be returned when the specific purpose is accomplished.
bilateral contract	one formed by a "promise for a promise" (offer and acceptance)
breach of contract	failure to perform as agreed.
change order	an order by one party to a contract, modifying it pursuant to authority contained in the contract.

contract damages	financial losses resulting from breach of contract.
consideration	something of value exchanged by the parties, making the contract enforceable; the inducement to a contract; the cause, motive, price, or impelling influence which induces a contracting party to enter into a contract.
counter-offer	a counter-proposal made by the offeree to the offeror.
executed contract	a contract completely performed; also, a signed contract.
executory contract	a contract not yet performed.
express authority	authority expressly conferred upon an agent to bind the principal.
express contract	a contract wherein there are express promises to do something or to refrain from doing something.
implied authority	authority incidental to express authority necessary to the exercise of the authority actually granted.
implied in fact contract	a contract existing by virtue of the actions of the parties rather than express promises.
liquidated damages	damages established as to liability and amount.
mutuality of obligation	that element of a bilateral contract by virtue of which both of the parties are bound or neither is bound; a duty of each party to do something in consideration of the other party's act or promise.
nudum pactum	a naked promise—one not supported by a consideration and therefore unenforceable.
offer	a proposal by one person to another which is intended of itself to create legal relations on acceptance by the person to whom it is made.
offeree	one to whom an offer is made.
offeror	one making an offer.
past consideration	value received prior to the present contract—generally insufficient to support a promise.
principal	one who employs an agent to transact business for him.
privity of contract	The relation of contract status and that connection, mutuality of will, and interaction between the parties which they must occupy toward each other in order to form either an express or implied contract.
quantum meruit	at common law, an action for the reasonable value of services rendered.
quantum valebat	at common law, an action for the reasonable value of goods sold and delivered.
quasi-contract	contract implied in law—a creation of the courts to prevent unjust enrichment of one party by another.
supplemental agreement	an agreement supplementing the principal contract.
ultra vires contract	a contract of a corporation which is not within the express or implied powers conferred upon the corporation by the instrument of its creation.
undisclosed principal	a principal whose agent contracts in his own name, without disclosing the fact of his agency, and without the third party's knowledge of the fact.
unilateral contract	a contract formed by an offer or a promise on one side for an act to be done on the other, and the doing of the act by the other constitutes acceptance of the offer.
unlawful contract	unenforceable because performance violates the law.
unliquidated damages	damages not established either as to liability or amount.
voidable contract	one which may be avoided or disavowed by one of the parties, e.g., contracts by minors.
void contract	a nullity—of no legal effect, therefore unenforceable.

Parties

appellant	one who appeals to a higher tribunal the decision of a tribunal.
appellee	on appeal, the party prevailing in the lower tribunal.
defendant	one against whom a law suit is instituted.
grantee	one to whom title to real estate is conveyed.
grantor	one who conveys title to real estate.
lessee	one to whom real estate is leased.
lessor	owner of real estate who leases same.

plaintiff	one who institutes a law suit.
relator	one upon whose "relation" a quasi-criminal suit is instituted.
respondent	the "accused" person in a quasi-criminal suit.
vendee	buyer, particularly in a contract to sell real estate.
vendor	seller, particularly in a contract to sell real estate.

Trial and Appeal

affirm	to uphold on appeal the lower court's ruling.
answer	the pleading in which defendant states his defense.
appeal	the procedure by which a cause is taken to a higher tribunal.
brief	written argument submitted on trial or appeal in support of pleadings.
burden of proof	the responsibility for proving allegations made.
case in point	a case with facts and issues similar to the one in question.
certiorari	an order by a superior court ordering up a court record of an inferior court.
decision	the ruling of the court on a motion or pleading.
dictum	that part of a judge's opinion other than the ruling or findings.
journal entry	the written, signed record of orders of the court.
motion	the means by which a party requests a particular action by the court in the disposition of a suit.
petition	the pleading by which a law suit is initiated.
precedent	prior rulings in similar cases, used as authority for ruling in the case at bar.
prima facie case	evidence sufficient to support a favorable verdict if not rebutted by the other side.
remand	to return a matter to a lower court with instructions to that court for further proceedings.
reply	plaintiff's response to new matters raised in defendant's answer.
reverse	to overturn on appeal the lower court's ruling.
trial de novo	a new trial.

Defenses

accord and satisfaction	agreement as to amount owed and payment thereof.
counterclaim	a cause of action existing in favor of defendant against plaintiff, which, if established, will defeat, qualify, or reduce plaintiff's right to recover; usually a matter arising out of the same transaction.
estoppel	precludes a person, due to his past actions, from asserting anything contrary thereto, though true.
improper venue	suit brought in wrong territorial jurisdiction, e.g., wrong country.
laches	common law defense barring actions not timely initiated.
lack of jurisdiction	where the court is without authority to hear the case; goes to subject matter or parties.
set-off	reduction of one demand by an opposite one, usually ascertained in amount and unrelated to the original claim.
statute of fraud	requires certain contracts to be in writing to be enforceable.
statute of limitation	bars actions commenced beyond a statutory time limit.

Latin

ab initio	"from the beginning"
contra proferentum	against the party who proffers or puts forward a thing.
damnum absque injuria	damage without the violation of a legal right.
ejusdem generis	"of the same kind." A rule of construction. Where general words follow a designation of particular subjects, the meaning of the general words will ordinarily be presumed to be restricted by the particular designation, and to include only things of the same kind, class, or nature as those specifically enumerated, unless there is a clear manifestation of a contrary purpose.

en banc	Fr.-"in bank"-wherein all judges are in attendance, as opposed to hearings by one judge of a court.
ex parte	a legal proceeding where only one party is heard.
ex post facto	"from past fact" - descriptive of laws given retroactive effect. May not be used to render illegal an act legal when performed.
in pari materia	descriptive of matters which are related and should be considered together; e.g.; two statutes bearing on the same situation.
quid pro quo	"something for something" - descriptive of the requirement of consideration in contracts.
res ipsa loquitur	"the thing speaks for itself" - (law of torts) descriptive of facts so self-evident as to make a prima facie case.
res gestae	(law of torts) - peripheral matters so closely connected with a transaction and necessary to a proper understanding of it as to become a part thereof.
stare decisis	"let the decision stand." The principle that prior decisions of court should stand as precedent for future guidance.

Appendix C

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Appendix D

"CLAUSES"

General Provisions (Supply Contract)

General Provisions (Construction Contract)

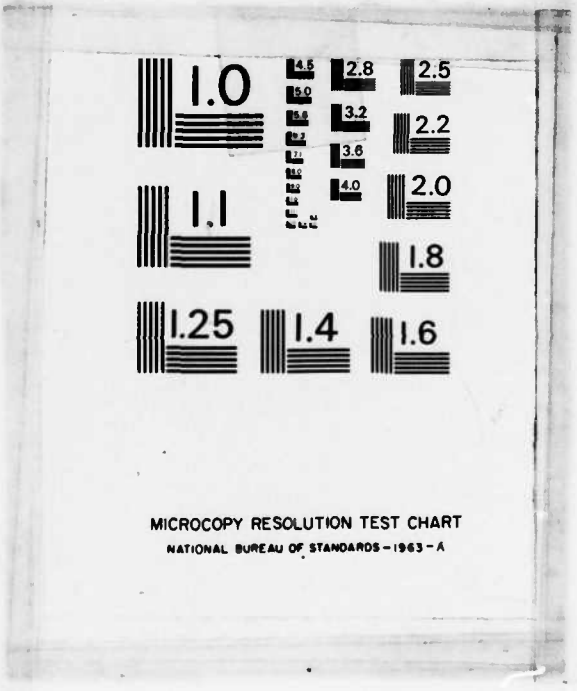
Clauses for Fixed-Price Supply Contracts, Government Property

Clauses for Fixed-Price Supply Contracts, Government Property Furnished "As Is"

AD-A139 143 GOVERNMENT CONTRACT LAW TEXTBOOK - 1982 EDITION(U) AIR FORCE INST OF TECH WRIGHT-PATTERSON AFB OH SCHOOL OF SYSTEMS AND LOGISTICS J O MAHOY ET AL. MAR 82 3/5

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GENERAL PROVISIONS

(Supply Contract)

SF 32 Rev. 4-75

1. DEFINITIONS

As used throughout this contract, the following terms shall have the meaning set forth below:

(a) The term "head of the agency" or "Secretary" as used herein means the Secretary, the Under Secretary, any Assistant Secretary, or any other head or assistant head of the executive or military department or other Federal agency; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the head of the agency or the Secretary.

(b) The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

(c) Except as otherwise provided in this contract, the term "subcontracts" includes purchase orders under this contract.

2. CHANGES

The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: (i) Drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for, the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change: provided, however, That the contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Where the cost of property made obsolete or excess as a result of a change is included in the Contractor's claim for adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of such property. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

3. EXTRAS

Except as otherwise provided in this contract, no payment for extras shall be made unless such extras and the price therefor have been authorized in writing by the Contracting Officer.

4. VARIATION IN QUANTITY

No variation in the quantity of any item called for by this contract will be accepted unless such variation has been caused by conditions of loading, shipping, or packing, or allowances in manufacturing processes, and then only to the extent, if any, specified elsewhere in this contract.

5. INSPECTION

(a) All supplies (which term through this clause includes without limitation raw materials, components, intermediate assemblies, and end products) shall be subject to inspection and test by the Government, to the extent practicable, at all times and places including the period of manufacture and in any event prior to acceptance.

(b) In case any supplies or lots of supplies are defective in material or workmanship or otherwise not in conformity with the requirements of this contract, the Government shall have the right either to reject them (with or without instructions as to their disposition) or to require their correction. Supplies or lots of supplies which have been rejected or required to be corrected shall be removed, or if permitted or required by the Contracting Officer, corrected in place by and at the expense of the Contractor promptly after notice, and shall not thereafter be tendered for acceptance unless the former rejection or requirement of correction is disclosed. If the Contractor fails promptly to remove such supplies or lots of supplies which are required to be removed, or promptly to replace or correct such supplies or lots of supplies, the Government either (i) may by contract or otherwise replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby, or (ii) may terminate this contract for default as provided in the clause of this contract entitled "Default." Unless the Contractor corrects or replaces such supplies within the delivery schedule, the Contracting Officer may require the delivery of such supplies at a reduction in price which is equitable under the circumstances. Failure to agree to such reduction of price shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(c) If any inspection or test is made by the Government on the premises of the Contractor or a subcontractor, the Contractor without additional charge shall provide all reasonable facilities and assistance for the safety and convenience of the Government inspectors in the performance of their duties. If Government inspection or test is made at a point other than the premises of the Contractor or a subcontractor, it shall be at the expense of the Government except as otherwise provided in the contract: Provided, That in case of rejection the Government shall not be liable for any reduction in value of samples used in connection with such inspection or test. All inspections and tests by the Government shall be performed in such a manner as not to unduly delay the work. THe Government reserves the

right to charge to the Contractor any additional cost of Government inspection and test when supplies are not ready at the time such inspection and test is requested by the Contractor or when reinspection or retest is necessitated by prior rejection. Acceptance or rejection of the supplies shall be made as promptly as practicable after delivery, except as otherwise provided in this contract; but failure to inspect and accept or reject supplies shall neither relieve the Contractor from responsibility for such supplies as are not in accordance with the contract requirements nor impose liability on the Government therefor.

(d) The inspection and test by the Government of any supplies or lots thereof does not relieve the Contractor from any responsibility regarding defects or other failures to meet the contract requirements which may be discovered prior to acceptance. Except as otherwise provided in this contract, acceptance shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud.

(e) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the supplies hereunder. Records of all inspection work by the Contractor shall be kept complete and available to the Government during the performance of this contract and for such longer period as may be specified elsewhere in this contract.

6. RESPONSIBILITY FOR SUPPLIES

Except as otherwise provided in this contract, (i) the Contractor shall be responsible for the supplies covered by this contract until they are delivered at the designated delivery point, regardless of the point of inspection; (ii) after delivery to the Government at the designated point and prior to acceptance by the Government or rejection and giving notice thereof by the Government, the Government shall be responsible for the loss or destruction of or damage to the supplies only if such loss, destruction, or damage results from the negligence of officers, agents, or employees of the Government acting within the scope of their employment; and (iii) the Contractor shall bear all risks as to rejected supplies after notice of rejection, except that the Government shall be responsible for the loss, or destruction of, or damage to the supplies only if such loss, destruction, or damage results from the gross negligence of officers, agents, or employees of the Government acting within the scope of their employment.

7. PAYMENTS

The Contractor shall be paid, upon the submission of proper invoices or vouchers, the prices stipulated herein for supplies delivered and accepted or services rendered and accepted, less deductions, if any, as herein provided. Unless otherwise specified, payment will be made on partial deliveries accepted by the Government when the amount due on such deliveries so warrants; or, when requested by the Contractor, payment for accepted partial deliveries shall be made whenever such payment would equal or exceed either $1,000 or 50 percent of the total amount of this contract.

8. ASSIGNMENT OF CLAIMS

(a) Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15), this contract for monies

due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Unless otherwise provided in this contract, payments to an assignee of any monies due or to become due under this contract shall not, to the extent provided in said Act, as amended, be subject to reduction or setoff. (The preceding sentence applies only if this contract is made in time of war or national emergency as defined in said Act and is with the Department of Defense, the General Services Administration, the Energy Research and Development Administration, the Federal Aviation Administration, or any other department or agency of the United States designated by the President pursuant to Clause 4 of the proviso of section 1 of the Assignment of Claims Act of 1940, as amended by the Act of May 15, 1951, 65 Stat. 41.)

(b) In no event shall copies of this contract or of any plans, specifications, or other similar documents relating to work under this contract, if marked "Top Secret," "Secret," or "Confidential," be furnished to any assignee of any claim arising under this contract or to any other person not entitled to receive the same. However, a copy of any part or all of this contract so marked may be furnished, or any information contained therein may be disclosed, to such assignee upon the prior written authorization of the Contracting Officer.

9. ADDITIONAL BOND SECURITY

If any surety upon any bond furnished in connection with this contract becomes unacceptable to the Government or if any such surety fails to furnish reports as to his financial condition from time to time as requested by the Government, the Contractor shall promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by this contract.

10. EXAMINATION OF RECORDS BY COMPTROLLER GENERAL

(a) This clause is applicable if the amount of this contract exceeds $10,000 and was entered into by means of negotiation, including small business restricted advertising, but is not applicable if this contract was entered into by means of formal advertising.

(b) The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of 3 years after final payment under this contract or such lesser time specified in either Appendix M of the Defense Acquisition Regulation or the Federal Procurement Regulations Part 1-20, as appropriate, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor involving transactions related to this contract.

(c) The Contractor further agrees to include in all his subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of 3 years after final payment under the subcontract or such lesser time specified in either Appendix M of the Defense Acquisition Regulation or the Federal Procurement Regulation Part 1-20, as appropriate, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor, involving transactions related to the subcontract. The term "subcontract" as used in this clause excludes (1) purchase orders not exceeding $10,000 and (2) subcontracts or purchase orders for public utility services rates established for uniform applicability to the general public.

(d) The periods of access and examination described in (b) and (c), above, for records which relate to (1) appeals under the "Disputes" clause of this contract, (2) litigation or the settlement of claims arising out of the performance of this contract, or (3) costs and expenses of this contract as to which exception has been taken by the Comptroller General or any of his duly authorized representatives, shall continue until such appeals, litigation, claims, or exceptions have been disposed of.

11. DEFAULT

(a) The Government may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:

(i) If the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(ii) If the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

(b) In the event the Government terminates this contract in whole or in part as provided in paragraph (a) of this clause, the Government may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated, and the Contractor shall be liable to the Government for any excess costs for such similar supplies or services: Provided, That the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.

(c) Except with respect to defaults of subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such cases may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe

weather; but in every case the failure to perform must be beyond the control of both the contractor and subcontractor, and without the fault or negligence of either of them. The Contractor shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

(d) If this contract is terminated as provided in paragraph (a) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. Payment for completed supplies delivered to and accepted by the Government shall be at the contract price. Payment for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property shall be in an amount agreed upon by the Contractor and Contracting Officer; failure to agree on such amount shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes". The Government may withhold from amounts otherwise due to Contractor for such completed supplies or manufacturing materials such sum as the Contracting Officer determines to be necessary to protect the Government against loss because of outstanding liens or claims of former lien holders.

(e) If, after notice of termination of this contract under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or that the default was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the Government, be the same as if the notice of termination had been issued pursuant to such clause. If, after notice of termination of this contract under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, and if this contract does not contain a clause providing for termination for convenience of the Government, the contract shall be equitably adjusted to compensate for such termination and the contract modified accordingly; failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes".

(f) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law under this contract.

(g) As used in paragraph (c) of this clause, the terms "subcontractor" and "subcontractors" means subcontractor(s) at any tier.

12. DISPUTES

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce this decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above: Provided, That nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

13. NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT

The provisions of this clause shall be applicable only if the amount of this contract exceeds $10,000.

(a) The Contractor shall report to the Contracting Officer, promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this contract of which the Contractor has knowledge.

(b) In the event of any claim or suit against the Government on account of any alleged patent or copyright infringement arising out of the performance of this contract or out of the use of any supplies furnished or work or services performed hereunder, the Contractor shall furnish to the Government, when requested by the Contracting Officer, all evidence and information in possession of the Contractor pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Government except where the Contractor has agreed to indemnify the Government.

14. BUY AMERICAN ACT

(a) In acquiring end products, the Buy American Act (41 U.S. Code 10 a-d) provides that the Government give preference to domestic source end products. For the purpose of this clause:

(i) "Components" means those articles, materials, and supplies, which are directly incorporated in the end product;

(ii) "End Products" means those articles, materials, and supplies, which are to be acquired under this contract for public use;

(iii) A "domestic source end product" means (A) an unmanufactured end product which has been mined or produced in the United States and (B) an end product manufactured in the United States if the cost of the components thereof which are mined, produced or manufactured in the United States exceeds 50 percent of the cost of all its components. For the purposes of the (a)(iii)(B), components of foreign origin of the same type or kind as the products referred to in (b)(ii) or (iii) of this clause shall be treated as components mined, produced, or manufactured in the United States.

(b) The Contractor agrees that there will be delivered under this contract only domestic source end products, except end products:

(i) Which are for use outside the United States;

(ii) Which the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality;

(iii) As to which the Secretary determines the domestic preference to be inconsistent with the public interest; or

(iv) As to which the Secretary determines the cost to the Government to be unreasonable. (The foregoing requirements are administered in accordance with Executive Order NO. 10582, dated December 17, 1954.)

15. CONVICT LABOR

In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment at hard labor except as provided by Public Law 89-176, September 10, 1965 (18 U.S.C. 4082(c)(2)) and Executive Order 11755, December 29, 1973.

16. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT--OVERTIME COMPENSATION

This contract, to the extent that it is of a character specified in the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333), is subject to the following provisions and to all other applicable provisions and exceptions of such Act and the regulations of the Secretary of Labor thereunder.

(a) Overtime Requirements. No Contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers, mechanics, apprentices, trainees, watchmen, and guards shall require or permit any laborer, mechanic, apprentice, trainee, watchman or guard in any workweek in which he is employed on such work to work in excess of eight hours in any calendar day or in excess of forty hours in such workweek on work subject to the provisions of the Contract Work Hours and Safety Standards Act unless such laborer, mechanic, apprentice, trainee, watchman, or guard receives compensation at a rate not less than one and one-half times his basic rate of pay for all such hours

worked in excess of eight hours in any calendar day or in excess of forty hours in such workweek, whichever is the greater number of overtime hours.

(b) Violation; Liability for Unpaid Wages; Liquidated Damages. In the event of any violation of the provisions of paragraph (a), the Contractor and any subcontractor responsible therefor shall be liable to any affected employee for his unpaid wages. In addition, such Contractor and subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer, mechanic, apprentice, trainee, watchman, or guard employed in violation of the provisions of paragraph (a) in the sum of $10 for each calendar day on which such employee was required or permitted to be employed on such work in excess of eight hours or in excess of his standard workweek of forty hours without payment of the overtime wages required by paragraph (a).

(c) Withholding for Unpaid Wages and Liquidated Damages. The Contracting Officer may withhold from the Government Prime Contractor, from any monies payable on account of work performed by the Contractor or subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of such Contractor or subcontractor for unpaid wages and liquidated damages as provided in the provisions of paragraph (b).

(d) Subcontracts. The Contractor shall insert paragraphs (a) through (d) of this clause in all subcontracts, and shall require their inclusion in all subcontracts of any tier.

(e) Records. The Contractor shall maintain payroll records containing the information specified in 29 CFR 516.2(a). Such records shall be preserved for three years from the completion of the contract.

17. WALSH-HEALEY PUBLIC CONTRACTS ACT

If this contract is for the manufacture or furnishing of materials, supplies, articles, or equipment in an amount which exceeds or may exceed $10,000 and is otherwise subject to the Walsh-Healey Public Contracts Act, as amended (41 U.S. Code 35-45), there are hereby incorporated by reference all representations and stipulations required by said Act and regulations issued thereunder by the Secretary of Labor, such representations and stipulations being subject to all applicable rulings and interpretations of the Secretary of Labor, such representations and stipulations being subject to all applicable rulings and interpretations of the Secretary of Labor which are now or may hereafter be in effect.

18. EQUAL OPPORTUNITY

(The following clause is applicable unless this contract is exempt under the rules, regulations, and relevant orders of the Secretary of Labor (41 CFR, ch. 60).) During the performance of this contract, the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national

origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting Officer setting forth the provisions of the Equal Opportunity clause.

(b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will recieve consideration for employment without regard to race, color, religion, sex, or national origin.

(c) The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency Contracting Officer, advising the labor union or workers' representative of the Contractor's commitments under this Equal Opportunity clause, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The Contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended by regulations, and relevant orders of the Secretary of labor.

(e) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No., 11375 of October 13, 1967, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Contractor's noncompliance with the Equal Opportunity clause of this contract or with any of the said rules, regulations, or orders, this contract may be cancelled, terminated, or suspended, in whole or in part, and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(g) The Contractor shall include the provisions of paragraphs (a) through (g) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, so that such provisions will be binding upon each subcontract or vendor. The Contractor will take such

action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, That in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the United States to enter into such litigation to protect the interest of the United States.

19. OFFICIALS NOT TO BENEFIT

No member of or delegate to Congress, or resident Commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefits.

20. COVENANT AGAINST CONTINGENT FEES

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor or for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

21. UTILIZATION OF SMALL BUSINESS CONCERNS

(a) It is the policy of the Government as declared by the Congress that a fair proportion of the purchases and contracts for supplies and services for the Government be placed with small business concerns.

(b) The Contractor agrees to accomplish the maximum amount of subcontracting to small business concerns that the Contractor finds to be consistent with the efficient performance of this contract.

22. UTILIZATION OF LABOR SURPLUS AREA CONCERNS

(a) It is the policy of the Government to award contracts to labor surplus area concerns that (1) have been certified by the Secretary of Labor (hereafter referred to as certified-eligible concerns with first or second preferences) regarding the employment of a proportionate number of disadvantaged individuals and have agreed to perform substantially (i) in or near sections of concentrated unemployment or underemployment or in persistent or substantial labor surplus areas or (ii) in other areas of the United States, respectively, or (2) are noncertified concerns which have agreed to perform substantially in persistent or substantial labor surplus areas, where this can be done consistent with the efficient performance of the contract and at prices no higher than are obtainable elsewhere. The Contractor agrees to use his best efforts to place his subcontracts in accordance with this policy.

(b) In complying with paragraph (a) of this clause and with paragraph (b) of the clause of this contract entitled "Utilization of Small Business Concerns" the Contractor in placing his subcontracts shall observe the following order of preference: (1) Certified-eligible concerns with a first preference which are also small business concerns; (2) other certified-eligible concerns with a first preference; (3) certified-eligible concerns with a second preference which are also small business concerns; (4) other certified-eligible concerns with a second preference; (5) persistent or substantial labor surplus area concerns which are also small business concerns; (6) other persistent or substantial labor surplus area concerns; and (7) small business concerns which are not labor surplus area concerns.

23. UTILIZATION OF MINORITY BUSINESS ENTERPRISES

(a) It is the policy of the Government that minority business enterprises shall have the maximum practicable opportunity to participate in the performance of Government contracts.

(b) The Contractor agrees to use his best efforts to carry out this policy in the award of his subcontracts to the fullest extent consistent with the efficient performance of this contract. As used in this contract, the term "minority business enterprise" means a business at least 50 percent of which is owned by minority group members or, in case of publicly-owned businesses, at least 51 percent of the stock of which is owned by minority group members. For the purposes of this definition, minority group members are Negroes, Spanish-speaking American persons, American-Orientals, American-Indians, American-Eskimos, and American Aleuts. Contactors may rely on written representations by subcontractors regarding their status as minority business enterprises in lieu of an independent investigation.

24. PRICING OF ADJUSTMENTS

When costs are a factor in any determination of a contract price adjustment pursuant to the Changes clause or any other provision of this contract, such costs shall be in accordance with the contract cost principles and procedures in Part 1-15 of the Federal Procurement Regulations (41 CFR 1-15) or Section XV of the Defense Acquisition Regulation, as applicable, which are in effect on the date of this contract.

25. PAYMENT OF INTEREST OF CONTRACTORS' CLAIMS

(a) If an appeal is filed by the Contractor from a final decision of the contracting Officer under the Disputes clause of this contract, denying a claim arising under the contract, simple interest on the amount of the claim finally determined owed by the Government shall be payable to the Contractor. Such interest shall be payable to the Contractor. Such interest shall be at the rate determined by the Secretary of the Treasury pursuant to Public Law 92-41, 85 Stat. 97, from the date the Contractor furnishes to the Contracting Officer his written appeal under the Disputes Clause of this contract, to the date of (1) a final judgment by a court of competent jurisdiction, or (2) mailing to the Contractor of a supplement agreement for execution either confirming completed negotiations between the parties or carrying out a decision of a board of contract appeals.

(b) Notwithstanding (a), above, (1) interest shall be applied only from the date payment was due, if such date is later than the filing of appeal and (2) interest shall not be paid for any period of time that the Contracting Officer determines the Contractor has unduly delayed in pursuing his remedies before a board of contract appeals or a court of competent jurisdiction.

GENERAL PROVISIONS

(Construction Contract)

SF 23A-Rev. 4-75

1. Definitions

(a) The term "head of the agency" or "Secretary" as used herein means the Secretary, the Under Secretary, any Assistant Secretary, or any other head or assistant head of the executive or military department or other Federal agency; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the head of the agency or the Secretary.

(b) The term "Contracting Officer" as used herein means the persons executing this contract on behalf of the Government and includes a duly appointed successor or authorized representative.

2. Specifications and Drawings

The Contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be a like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In case of discrepancy either in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without such a determination shall be at his own risk and expense. The Contracting Officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided.

3. Changes

(a) The Contracting Officer may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any change in the work within the general scope of the contract, including but not limited to changes:

(1) In the specifications (including drawings and designs); (2) In the method or manner of performance of the work; (3) In the Government-furnished facilities, equipment, materials, services, or site; or (4) Directing acceleration in the performance of the work.

(b) Any other written order or an oral order (which terms as used in this paragraph (b) shall include direction, instruction, interpretation, or determination) from the Contracting Officer, which causes any such change, shall be treated as a change order under this clause, provided that the Contractor gives the Contracting Officer written notice stating the date, circumstances, and source of the order and that the Contractor regards the order as a change order.

(c) Except as herein provided, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment hereunder.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly: Provided, however, That except for claims based on defective specifications, no *claim* for any change under (b) above shall be allowed for any costs incurred more than 20 days before the Contractor gives written notice as therein required: And provided further, That in the case of defective specification for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with such defective specifications.

(e) If the Contractor intends to assert a claim for an equitable adjustment under this clause, he must, within 30 days after receipt of a written change order under (a) above or the furnishing of a written notice under (b) above, submit to the Contracting Officer a written statement setting forth the general nature and monetary extent of such claim, unless this period is extended by the Government. The statement of claim hereunder may be included in the notice under (b) above.

(f) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract.

4. Differing Site Conditions

(a) The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (1) Subsurface or latent physical conditions at the site differing materially from those

indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do materially so differ and cause an increase or decrease in the Contractor's cost of or the time required for performance of any part of the work under this contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

(b) No claim of the Contractor under this clause shall be allowed unless the Contractor has given the notice required in (a) above; provided, however, the time prescribed thereof may be extended by the Government.

(c) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract.

5. Termination for Default-Damages for Delay-Time Extensions

(a) If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contractor or otherwise, and may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. Whether or not the Contractor's right to proceed with the work is terminated, he and his sureties shall be liable for any damage to the Government resulting from his refusal or failure to complete the work within the specific time.

(b) If fixed and agreed liquidated damages are provided in the contract and if the Government so terminates the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Government in completing the work.

(c) If fixed and agreed liquidated damages are provided in the contract and if the Government does not so terminate the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until work is completed or accepted.

(d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

(1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers; and

(2) The Contractor, within 10 days from the beginning of any such delay (unless the Contracting Officer grants a further period of time before the date of final payment under the contract), notifies the Contracting Officer in writing of the causes of delay.

The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension, and his findings of fact shall be final and conclusive of the parties, subject only to appeal as provided in Clause 6 of these General Provisions.

(e) If, after notice of termination of the Contractor's right to proceed under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or that the delay was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the Government, be the same as if the notice of termination had been issued pursuant to such clause. If, in the foregoing circumstances, this contract does not contain a clause providing for termination for convenience of the Government, the contract shall be equitably adjusted to compensate for such termination and the contract modified accordingly; failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(f) The rights and remedies of the Government provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

(g) As used in Paragraph (d) (1) of this clause, the term "subcontractors or suppliers" means subcontractors or suppliers at any tier.

6. Disputes

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of

receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his 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. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This Disputes clause does not preclude consideration of questions of law in connection with decisions provided for in paragraph (a) above. Nothing in this contract, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

7. Payments to Contractor

(a) The Government will pay the contract price as hereinafter provided.

(b) The Government will make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates approved by the Contracting Officer. If requested by the Contracting Officer, the Contractor shall furnish a breakdown of the total contract price showing the amount included therein for each principal category of the work, in such detail as requested, to provide a basis for determining progress payments. In the preparation of estimates the Contracting Officer, at his discretion, may authorize material delivered on the site and preparatory work done to be taken into consideration. Material delivered to the Contractor at locations other than the site may also be taken into consideration (1) if such consideration is specifically authorized by the contract and (2) if the Contractor furnishes satisfactory evidence that he has acquired title to such material and that it will be utilized on the work covered by this contract.

(c) In making such progress payments, there shall be retained 10 percent of the estimated amount until final completion and acceptance of the contract work. However, if the Contracting Officer, at any time after 50 percent of the work has been completed, finds that satisfactory progress is being made, he may authorize payment in full of each progress payment for work performed beyond the 50 percent stage of completion. Also, whenever the work is substantially complete, the Contracting Officer, if he considers the amount retained to be in excess of the amount adequate for the protection of the Government, at his discretion, may release to the Contractor all or a portion of such excess amount. Furthermore, on completion and acceptance of each separate building, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made therefor without retention of a percentage.

(d) All materials and work covered by progress payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work or as waiving the right of the Government to require the fulfillment of all of the terms of the contract.

(e) Upon completion and acceptance of all work, the amount due the Contractor under this contract shall be paid upon the presentation of a properly executed voucher and after the Contractor shall have furnished the Government with a release of all claims against the Government arising by virtue of this contract, other than claims in stated amounts as may be specifically excepted by the Contractor from the operation of the release. If the Contractor's claim to amounts payable under the contract has been assigned under the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15), a release may also be required of the assignee.

8. Assignment of Claims

(a) Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15), if this contract provides for payments aggregating $1,000 or more, claims for monies due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Unless otherwise provided in this contract, payments to an assignee of any moneys due or to become due under this contract shall not, to the extent provided in said Act, as amended, be subject to reduction or setoff. (The preceding sentence applies only if this contract is made in time of war or national emergency as defined in said Act; and is with the Department of Defense, the General Services Administration, the Energy Research and Development Administration, the National Aeronautics and Space Administration, the Federal Aviation Administration, or any other department or agency of the United States designated

by the President pursuant to Clause 4 of the provision of section 1 of the Assignment of Claims Act of 1940, as amended by the Act of May 15, 1951, 65 Stat. 41.)

(b) In no event shall copies of this contract or of any plans, specifications, or other similar documents relating to work under this contract, if marked "Top Secret," "Secret," or "Confidential," be furnished to any assignee of any claim arising under this contract or to any other person not entitled to receive the same. However, a copy of any part or all of this contract so marked may be furnished, or any information contained therein may be disclosed, to such assignee upon the prior written authorization of the Contracting Officer.

9. Material and Workmanship

(a) Unless otherwise specifically provided in this contract, all equipment, material, and articles incorporated in the work covered by this contract are to be new and of the most suitable grade for the purpose intended. Unless otherwise specifically provided in this contract, reference to any equipment, material, article, or patented process, by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition, and the Contractor may, at his option, use any equipment, material, article, or process, which, in the judgment of the Contracting Officer, is equal to that named. The Contractor shall furnish to the Contracting Officer for his approval the name of the manufacturer, the model number, and other identifying data and information respecting the performance, capacity, nature, and rating of the machinery and mechanical and other equipment which the Contractor contemplates incorporating in the work. When required by this contract or when called for by the Contracting Officer, the Contractor shall furnish the Contracting Officer for approval full information concerning the material or articles which he contemplates incorporating in the work. When so directed, samples shall be submitted for approval at the Contractor's expense, with all shipping charges prepaid. Machinery, equipment, material, and articles installed or used without required approval shall be at the risk of subsequent rejection.

(b) All work under this contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may, in writing, require the Contractor to remove from the work any employee the Contracting Officer deems incompetent, careless or otherwise objectionable.

10. Inspection and Acceptance

(a) All work (which term includes but is not restricted to materials, workmanship, and manufacture and fabrication of components) shall be subject to inspection and test by the Government at all reasonable times and at all places prior to acceptance. Any such inspection and test is for the sole benefit of the Government and shall not relieve the Contractor of the responsibility of providing quality control measures to assure that the work strictly complies with the contract requirements. No inspection or test by the Government shall be construed as constituting or implying acceptance. Inspection or test shall not relieve the Contractor of responsibility for damage to or loss of the material prior to acceptance, nor in any way affect the continuing rights of the Government after acceptance of the completed work under the terms of paragraph (f) of this clause, except as herein above provided.

(b) The Contractor shall, without charge, replace any material or correct any workmanship found by the Government not to conform to the contract requirements, unless in the public interest the Government consents to accept such material or workmanship with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.

(c) If the Contractor does not promptly replace rejected material or correct rejected workmanship, the Government (1) may, by contract or otherwise, replace such material or correct such workmanship and charge the cost thereof to the Contractor, or (2) may terminate the Contractor's right to proceed in accordance with the clause of this contract entitled "Termination for Default-Time Extensions."

(d) The Contractor shall furnish promptly, without additional charge, all facilities, labor, and material reasonably needed for performing such safe and convenient inspection, and tests by the Government shall be performed in such matter as not unnecessarily to delay the work. Special, full size, and performance tests shall be performed as described in this contract. The Government reserves the right to charge to the Contractor any additional cost of inspection or test when material or workmanship is not ready at the time specified by the Contractor for inspection or test or when reinspection or retest is necessitated by prior rejection.

(e) Should it be considered necessary or advisable by the Government at any time before acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the Contractor shall, on request, promptly furnish all necessary facilities, labor, and material. If such work is found to be defective or nonconforming in any material respect, due to the fault of the Contractor or his subcontractor, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, an equitable adjustment shall be made in the contract price to compensate the Contractor for the additional services involved in such examination and reconstruction and, if completion of the work has been delayed thereby, he shall, in addition, be granted a suitable extension of time.

(f) Unless otherwise provided in this contract, acceptance by the Government shall be made as

promptly as practicable after completion and inspection of all work required by this contract, or that portion of the work that the Contracting Officer determines can be accepted separately. Acceptance shall be final and conclusive except as regards latent defects, fraud, or such gross mistakes as may amount to fraud, or as regards the Government's rights under any warranty or guarantee.

11. Superintendence by Contractor

The Contractor, at all times during performance and until the work is completed and accepted, shall give his personal superintendence to the work or have on the work a competent superintendent, satisfactory to the Contracting Officer and with authority to act for the Contractor.

12. Permits and Responsibilities

The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any applicable Federal, State, and municipal laws, codes, and regulations, in connection with the prosecution of the work. He shall be similarly responsible for all damages to persons or property that occur as a result of his fault or negligence. He shall take proper safety and health precautions to protect the work, the workers, the public, and the property of others. He shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire construction work, except for any completed unit of construction thereof which theretofore may have been accepted.

13. Conditions Affecting the Work

The Contractor shall be responsible for having taken steps reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work or the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work without additional expense to the Government. The Government assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of this contract, unless such understanding or representations by the Government are expressly stated in the contract.

14. Other Contracts

The Government may undertake or award other contracts for additional work, and the Contractor shall fully cooperate with such other contractors and Government employees and carefully fit his own work to such additional work as may be directed by the Contracting Officer. The Contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor or by Government employees.

15. Shop Drawings

(a) The term "shop drawings" includes drawings, diagrams, layouts, schematics, descriptive literature, illustrations, schedules, performance and test data, and similar materials furnished by the Contractor to explain in detail specific portions of the work required by the contract.

(b) If this contract requires shop drawings, the Contractor shall coordinate all such drawings, and review them for accuracy, completeness, and compliance with contract requirements and shall indicate his approval thereon as evidence of such coordination and review. Shop drawings submitted to the Contracting Officer without evidence of the Contractor's approval may be returned for resubmission. The Contracting Officer will indicate his approval or disapproval of the shop drawings and if not approved as submitted shall indicate his reasons therefor. Any work done prior to such approval shall be at the Contractor's risk. Approval by the Contracting Officer shall not relieve the Contractor from responsibility for any errors or omissions in such drawings, nor from responsibility for complying with the requirements of this contract, except with respect to variations described and approved in accordance with (c) below.

(c) If shop drawings show variations from the contract requirements, the Contractor shall describe such variations in writing, separate from the drawings, at the time of submission. If the Contracting Officer approves any such variation(s), he shall issue an appropriate contract modification, except that, if the variation is minor and does not involve a change in price or in time of performance, a modification need not be issued.

16. Use and Possession Prior to Completion

The Government shall have the right to take possession of or use any completed or partially completed part of the work. Prior to such possession or use, the Contracting Officer shall furnish the Contractor an itemized list of work remaining to be performed or corrected on such portions of the project as are to be possessed or used by the Government, provided that failure to list any item of work shall relieve the Contractor of responsibility for compliance with the terms of the contract. Such possession or use shall not be deemed an acceptance of any work under the contract. While the Government has such possession or use, the Contractor, notwithstanding the provisions of the clause of this a contract entitled "Permits and Responsibilities," shall be relieved of the responsibility for the loss or damage to the work resulting from the Government's possession or use. If such prior possession or use by the Government delays the progress

of the work or causes additional expense to the Contractor, an equitable adjustment in the contract price or the time of completion will be made and the contract shall be modified in writing accordingly.

17. Suspension of Work

(a) The Contracting Officer may order the Contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of this contract, or by his failure to act within the time specified in this contract (or if no time is specified, within a reasonable time), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension, delay, or interruption and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent (1) that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.

(c) No claim under this clause shall be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption, but not later than the date of final payment under the contract.

18. Termination for Convenience of the Government

If not physically incorporated elsewhere, the clause in Section 1-8.703 of the Federal Procurement Regulation, as applicable, in effect on the date of this contract is hereby incorporated by reference as fully as if set forth at length herein.

19. Payment of Interest on Contractor's Claims

(a) If an appeal is filed by the Contractor from a final decision of the Contracting Officer under the Disputes clause of this contract, denying a claim arising under the contract, simple interest on the amount of the claim finally determined owed by the Government shall be payable to the Contractor. Such interest shall be at the rate determined by the Secretary of the Treasury pursuant to Public Law 92-41, 85 Stat. 97, from the date the Contractor furnishes to the Contracting Officer his written appeal under the Disputes clause of this contract, to the date of (1) a final judgment by a court of competent jurisdiction; or (2) mailing to the Contractor of a supplemental agreement for execution either confirming completed negotiations between the parties or carrying out a decision of a board of contract appeals.

(b) Notwithstanding (a) above, (1) interest shall be applied only from the date payment was due, if such date is later than the filing of appeal; and (2) interest shall not be paid for any period of time that the Contracting Officer determines the Contractor has unduly delayed in pursuing his remedies before a board of contract appeals or a court of competent jurisdiction.

20. Pricing of Adjustments

When costs are a factor in any determination of a contract price adjustment pursuant to the Changes clause or any other provision of this contract, such costs shall be in accordance with the contract cost principles and procedures in Part 1-15 of the Federal Procurement Regulations, (41 XFR 1-15), or Section XV of the Armed Services Procurement Regulation, as applicable, which are in effect on the date of this contract.

21. Payment Indemnity

Except as otherwise provided, the Contractor agrees to indemnify the Government and its officers, agents, and employees against liability, including costs and expenses, for infringement upon any Letters Patent of the United States (except Letters Patent issued upon an application which is now or may hereafter be, for reasons of national security, ordered by the Government to be kept secret or otherwise withheld from issue) arising out of the performance of this contract or out of the use or disposal by or for the account of the Government of suppliers furnished or construction work performed hereunder.

22. Additional Bond Security

If any surety upon any bond furnished in connection with this contract becomes unacceptable to the Government, or if any such surety fails to furnish reports as to his financial condition from time to time as requested by the Government, or if the contract price is increased to such an extent that the penal sum of any bond becomes inadequate in the opinion of the Contracting Officer, the Contractor shall promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by this contract.

23. Examination of Records by Comptroller General

(a) This clause is applicable if the amount of this contract exceeds $10,000 and was entered into by

means of negotiation, including small business restricted advertising, but is not applicable if this contract was entered into by means of formal advertising.

(b) The contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of 3 years after final payment under this contract or such lesser time specified in either Appendix M of the Armed Services Procurement Regulation or the Federal Procurement Regulations Part 1-20, as appropriate, have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor involving transactions related to this contract.

(c) The Contractor further agrees to include in all subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of 3 years after payment under the subcontract or such lesser time specified in either Appendix M of the Armed Services Procurement Regulation or the Federal Procurement Regulations Part 1-20, as appropriate, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor, involving transactions related to the subcontractor. The term "subcontractor" as used in this clause excludes (1) purchase orders not exceeding $10,000 and (2) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

(d) The periods of access and examination described in (b) and (c), above, for records which relate to (1) appeals under the "Disputes" clause of this contract, (2) litigation or the settlement of claims arising out of the performance of this contract, or (3) costs and expenses of this contract as to which exception has been taken by the Comptroller General or any of his duly authorized representatives, shall continue until such appeals, litigation, claims, or exceptions have been disposed of.

24. Buy American

(a) *Agreement.* In accordance with the Buy American Act (41 U.S.C. 10a-10d), and Executive Order 10582, December 17, 1954 (3 CFR. 1954-58 Comp. p. 230), as amended by Executive Order 11051, September 27, 1962 (3 CFR, 1959-63 Comp. p. 635), the Contractor agrees that only domestic construction material will be used (by the Contractor, subcontractors, materialmen, and suppliers) in the performance of this contract, except for nondomestic material listed in the contract.

(b) *Domestic construction material.* "Construction material" means any article, material, or supply brought to the construction site for incorporation in the building or work. An unmanufactured construction material is a "domestic construction material" if it has been manufactured in the United States and if the cost of its components which have been mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. "Components" means any article, material, or supply directly incorporated in a construction material.

(c) *Domestic component.* A component shall be considered to have been "mined, produced, or manufactured in the United States" (regardless of its source in fact) if the article, material, or supply in which it is incorporated was manufactured in the United States and the component is of a class or kind determined by the Government to be not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

25. Equal Opportunity

(The following clause is applicable unless this contract is exempt under the rules, regulations, and relevant orders of the Secretary of Labor (41 CFR, ch. 60).)

During the performance of this contract, the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this Equal Opportunity clause.

(b) The Contractor, will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(c) The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency Contracting Officer, advising the labor union or workers' representative of the contractor's commitments under this Equal Opportunity clause, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The Contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(e) The Contractor will furnish all information and reports required by Executive Order No. 11246 of

September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Contractor's noncompliance with the Equal Opportunity clause of this contract or with any of the said rules, regulations, or orders, this contract may be cancelled, terminated, or suspended, in whole or in part, and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11357 of October 13, 1967, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(g) The Contractor will include the provisions of paragraphs (a) through (g) in every subcontract or purchase order unless exempted by rule, regulation, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, that in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

26. Covenant Against Contingent Fees

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

27. Officials Not to Benefit

No member of or delegate to Congress or resident Commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

28. Convict Labor

In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment at hard labor except as provided by Public Law 89-176, September 10, 1965 (18 U.S.C. 4082(c) (2)) and Executive Order 11755, December 29, 1973.

29. Utilization of Small Business Concerns

(a) It is the policy of the Government as declared by the Congress that a fair proportion of the purchases and contracts for suppliers and services for the Government be placed with small business concerns.

(b) The Contractor agrees to accomplish the maximum amount of subcontracting to small business concerns that the Contractor finds to be consistent with the efficient performance of this contract.

30. Utilization of Minority Business Enterprises

(a) It is the policy of the Government that minority business enterprises shall have the maximum practicable opportunity to participate in the performance of Government contracts.

(b) The Contractor agrees to use his best efforts to carry out his policy in the award of his subcontracts to the fullest extent consistent with the efficient performance of this contract. As used in this contract, the term "minority business enterprise" means a business, at least 50 percent of which is owned by minority group members or, in case of publicly-owned businesses, at least 51 percent of the stock of which is owned by minority group members. For the purposes of this definition, minority group members are Negroes, Spanish-speaking American persons, American-Orientals, American-Indians, American-Eskimos, and American-Aleuts. Contractors may rely on written representations by subcontractors regarding their status as minority business enterprises in lieu of an independent investigation.

31. Federal, State, and Local Taxes

(a) Except as may be otherwise provided in this contract, the contract price includes all applicable Federal, State, and local taxes and duties.

(b) Nevertheless, with respect to any Federal excise tax or duty on the transactions or property covered by this contract, if a statute, court decision, written ruling, or regulation takes effect after the contract date, and-

(1) Results in the Contractor being required to pay or bear the burden of any such Federal excise tax or duty or increase in the rate thereof which would not otherwise have been payable on such transactions or property, the contract price shall be increased by the amount of such tax or duty or rate increase: Provided, That the Contractor if requested by the Contracting Officer, warrants in writing that no amount for such newly imposed Federal excise tax or duty or rate increase was included in the contract price as a contingency reserve or otherwise; or

(2) Results in the Contractor not being required to pay or bear the burden of, or in his obtaining a refund or drawback of, any such Federal excise tax or duty which would otherwise have been payable on such transactions or property or which was the basis of an increase in the contract price, the contract price shall be decreased by the amount of the relief, refund, or drawback, or that amount shall be paid to the Government, as directed by the Contracting Officer. The contract price shall be similarly decreased if the Contractor, through his fault or negligence or his failure to follow instructions of the Contracting Officer, is required to pay or bear the burden of, or does not obtain a refund or drawback of, any such Federal excise tax or duty.

(c) No adjustment pursuant to paragraph (b) above will be made under this contract unless the aggregate amount thereof is or may reasonably be expected to be over $10,000.

(d) As used in paragraph (b) above, the term "contract date" means the date set for the bid opening, or if this is a negotiated contract, the date of this contract. As to additional supplies or services procured by modification to this contract, the term "contract date" means the date of such modification.

(e) Unless there does not exist any reasonable basis to sustain an exemption, the Government, upon request of the Contractor, without further liability, agrees, except as otherwise provided in this contract, to furnish evidence appropriate to establish exemption from any taxes which the Contractor warrants in writing were excluded from the contract price. In addition, the Contracting Officer may furnish evidence to establish exemption from any tax that may, pursuant to this Clause, give rise to either an increase or decrease in the contract price. Except as otherwise provided in this contract, evidence appropriate to establish exemption from duties will be furnished only at the discretion of the Contracting Officer.

(f) The Contractor shall promptly notify the Contracting Officer of matters which will result in either an increase or decrease as directed by the Contracting Officer.

CLAUSES FOR FIXED-PRICE SUPPLY CONTRACTS

Government Property (Fixed Price) (1968 Sep) DAR 7-104.24(a)

(a) **Government-Furnished Property.** The Government shall deliver to the Contractor, for use in connection with and under the terms of this contract, the property described as Government-furnished property in the Schedule or specifications, together with such related data and information as the Contractor may request and as may reasonably be required for the intended use of such property (hereinafter referred to as "Government-furnished property"). The delivery or performance dates for the supplies or services to be furnished by the Contractor under this contract are based upon the expectation that Government-furnished property (1) suitable for use (except for such property furnished "as is") will be delivered to the Contractor (2) at the times stated in the Schedule or, if not so stated, in sufficient time to enable the Contractor to meet such delivery or performance dates. In the event that Government-furnished property is not delivered to the Contractor by such time or times, the Contracting Officer shall, upon timely written request made by the Contractor, make a determination of the delay, if any, occasioned the Contractor thereby, and shall equitably adjust the delivery or performance dates or the contract price, or both, and any other contractual provision affected by any such delay, in accordance with the procedures provided for in the clause of this contract entitled "Changes." Except for Government-furnished property furnished "as is," in the event of Government-furnished property is received by the Contractor in a condition not suitable for the intended use the Contractor shall, upon receipt thereof, notify the Contracting Officer of such fact and, as directed by the Contracting Officer, either (i) return such property at the Government's expense or otherwise dispose of the property, or (ii) effect repairs or modifications. Upon the completion of (i) and (ii) above, the Contracting Officer, upon written request of the Contractor, shall equitably adjust the delivery or performance dates or the contract price, or both, and any other contractual provision affected by the rejection or disposition, or the repair or modification, in accordance with the procedures provided for in the clause of this contract entitled "Changes." The foregoing provisions for adjustment are exclusive and the Government shall not be liable to suit for breach of contract by reason of any delay in delivery of Government-furnished property or delivery of such property in a condition not suitable for its intended use.

(b) **Changes in Government-Furnished Property.**

(1) By notice in writing, the Contracting Officer may (i) decrease the property provided or to be provided by the Government under this contract, or (ii) substitute other Government-owned property for property to be provided by the Government or to be acquired by the Contractor for the Government, under this contract. The Contractor shall promptly take such action as the Contracting Officer may direct with respect to the removal and shipping of property covered by such notice.

(2) In the event of any decrease in or substitution of property pursuant to subparagraph (1) above, or any withdrawal of authority to use property provided under any other contract or lease, which property the Government had agreed in the Schedule to make available for the performance of this contract, the Contracting Officer, upon the written request of the Contractor (or, if the substitution of property causes a decrease in the cost of performance, on his own initiative), shall equitably adjust such contractual provisions as may be affected by the decrease, substitution, or withdrawal, in accordance with the procedures provided for in the "Changes" clause of this contract.

(c) **Title.** Title to all property furnished by the Government shall remain in the Government. In order to define the obligations of the parties under this clause, title to each item of facilities, special test equipment, and special tooling (other than that subject to a "Special Tooling" clause) acquired by the Contractor for the Government pursuant to this contract shall pass to and vest in the Government when its use in the performance of this contract commences, or upon payment therefor by the Government, whichever is earlier, whether or not title previously vested. All Government-furnished property together with all property acquired by the Contractor, title to which vests in the Government under this paragraph, is subject to the provisions of this clause and is hereinafter collectively referred to as "Government property." Title to Government property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government property, or any part thereof, be or become a fixture or lose its identity as personality by reason of affixation to any realty.

(d) **Property Administration.** The Contractor shall comply with the provisions of Appendix B, Armed Services Procurement Regulation, as in effect on the date of the contract, which is hereby incorporated by

reference and made a part of this contract. Material to be furnished by the Government shall be ordered or returned by the Contractor, when required, in accordance with the "Manual for Military Standard Requisitioning and Issue Procedure (MILSTRIP) for Defense Contractors" (Appendix H, Armed Services Procurement Regulation) as in effect on the date of this contract, which Manual is hereby incorporated by reference and made a part of this contract.

(e) **Use of Government Property.** The Government property shall, unless otherwise provided herein or approved by the Contracting Officer, be used only for the performance of this contract.

(f) **Utilization, Maintenance and Repair of Government Property.** The Contractor shall maintain and administer, in accordance with applicable provisions of Appendix B, a program for the utilization, maintenance, repair, protection, and preservation of Government property until disposed of by the Contractor in accordance with this clause. In the event that any damage occurs to Government property the risk of which has been assumed by the Government under this contract, the Government shall replace such items or the Contractor shall make such repair of the property as the Government directs; provided, however, if the Contractor cannot effect such repair within the time required, the Contractor shall dispose of such property in the manner directed by the Contracting Officer. The contract price includes no compensation to the Contractor for the performance of any repair or replacement for which the Government is responsible, and an equitable adjustment will be made in any contractual provisions affected by such repair or replacement of Government property made at the direction of the Government, in accordance with the procedures provided for in the "Changes" clause of this contract. Any repair or replacement for which the Contractor is responsible under the provisions of this contract shall be accomplished by the Contractor at his own expense.

(g) **Risk of Loss.** Unless otherwise provided in this contract, the Contractor assumes the risk of, and shall be responsible for, any loss of or damage to Government property provided under this contract upon its delivery to him or upon passage of title thereto to the Government as provided in paragraph (c) hereof, except for reasonable wear and tear and except to the extent that such property is consumed in the performance of this contract.

(h) **Access.** The Government, and any persons designated by it, shall at all reasonable times have access to the premises wherein any Government property is located, for the purpose of inspecting the Government property.

(i) **Final Accounting and Disposition of Government Property.** Upon the completion of this contract, or at such earlier dates as may be fixed by the Contracting Officer, the Contractor shall submit, in a form acceptable to the Contracting Officer, inventory schedules covering all items of Government property not consumed in the performance of this contract (including any resulting scrap) or not theretofore delivered to the Government, and shall prepare for shipment, deliver f.o.b. origin, or dispose of the Government property, as may be directed or authorized by the Contracting Officer. The net proceeds of any such disposal shall be credited to the contract price or shall be paid in such other manner as the Contracting Officer may direct.

(j) **Restoration of Contractor's Premises and Abandonment.** Unless otherwise provided herein, the Government:

(i) May abandon any Government property in place, and thereupon all obligations of the Government regarding such abandoned property shall cease; and (ii) has no obligation to the Contractor with regard to restoration or rehabilitation of the Contractor's premises, neither in case of abandonment (paragraph (j) (i) above), disposition on completion of need or the contract (paragraph (i) above), nor otherwise, except for restoration or rehabilitation costs which are properly included in an equitable adjustment under paragraph (b) above.

(k) **Communications.** All communications issued pursuant to this clause shall be in writing or in accordance with the "Manual for Military Standard Requisitioning and Issue Procedure (MILSTRIP) for Defense Contractors" (Appendix H, Defense Acquisition Regulation).

CLAUSES FOR FIXED-PRICE SUPPLY CONTRACTS

Government Property Furnished "As Is"

(1978 Sep)-DAR 7-104.24

(a) The Government makes no warranty whatsoever with respect to Government property furnished "as is" except that the property is in the same condition when placed at the f.o.b. point specified in the solicitation as when inspected by the Contractor, as when last available for inspection under the solicitation.

(b) The Contractor may repair any property made available to him "as is." Such repair will be at the Contractor's expense except as otherwise provided in this clause. Such property may be modified at the Contractor's expense, but only with the written permission of the Contracting Officer. Any repair or modification of property furnished "as is" shall not affect the title of the Government.

(c) If there is any change in the condition of Government property furnished "as is" from the time inspected or last available for inspection under the solicitation to the time placed on board at the location specified in the solicitation, and such change will adversely affect the Contractor, the Contractor shall, upon receipt of the property, notify the Contracting Officer of such fact, and, as directed by the Contracting Officer, either (i) return such property at the Government's expense or otherwise dispose of the property, or (ii) effect repairs to return the property to its condition when inspected under the solicitation, or if not inspected, last available for inspection under the solicitation upon completion of (i) or (ii) above, the Contracting Officer upon written request of the Contractor shall equitably adjust any contractual provisions affected by the return, disposition or repair, in accorance with the procedures provided for in the "Changes" clause of this contract. The foregoing provisions for adjustment are exclusive and the Government shall not be liable for any delivery of Government property furnished "as is" in a condition other than that in which it was originally offered.

(d) Except as otherwise provided in this clause, Government property furnished "as is" shall be governed by the "Government Property" clause of this contract.

(g) Risk of Loss. DAR 7-104.24(c)

(1) The contractor shall not be liable for loss or destruction of or damage to the Government property provided under this contract except as proved in (2) below. If the Contractor transfers Government property to the possession and control of a subcontractor, the transfer shall not affect the liability of the Contractor for loss or destruction of or damage to the property as set forth above. However, the Contractor shall require the subcontractor to assume the risk of, and be responsible for, any loss or destruction of or damage to property while in the latter's possession or control, except to the extent that the subcontract with the prior approval of the Contracting Officer, provides for the relief of the subcontractor from such liability. In the absence of such approval, the subcontract

shall contain appropriate provisions requiring the return of all Government property in as good condition as when received, except for reasonable wear and tear or for the utilization of the property in accordance with the provisions of the prime contract.

(2) The Contractor shall be responsible for any loss or damage (i) to the extent specifically provided in the clause or clauses of this contract designated in the schedule, or (ii) which result from:

(A) willful misconduct or lack of good faith of any of the Contractor's managerial personnel; or

(B) a failure on the part of the Contractor, due to willful misconduct or lack of good faith of the Contractor's managerial personnel,

(i) to maintain and administer the program for maintenance, repair, protection, and preservation of the Government property as required by paragraph (f) hereof, or (ii) to establish, maintain and administer a system for control of Government property as required by paragraph (d) of this clause.

Any failure of the Contractor to act, as provided in this (B), shall be conclusively presumed to be a failure resulting from willful misconduct, or lack of good faith on the part of one of the Contractor's managerial personnel if the Contractor is notified by the Contracting Officer by registered or certified mail addressed to one of the Contractor's managerial personnel, of the Government disapproval, withdrawal of approval, or non-acceptance of the Contractor's program or system. In such event, it shall be presumed that any loss of damage to Government property resulted from such failure. The Contractor shall be liable for such loss or damage unless he can establish by clear and convincing evidence that such loss or damage did not result from his failure to maintain an approved program or system, or occurred during such time as an approved program or system for control of Government property was maintained.

The term "Contractor's managerial personnel" as used herein means the Contractor's directors, officers and any of his managers, superintendents, or other equivalent representatives who have supervision or direction of:

(i) all or substantially all of the Contractor's business;

(ii) all or substantially all of the Contractor's operation at any one plant or separate location at which the contract is being performed; or

(iii) a separate and complete major industrial operation in connection with the performance of this contract.

(3) The Contractor represents that he is not including in the price hereunder, and agrees that he will not hereafter include in any price to the Government, any charge or reserve for insurance (including any self insurance funds or reserve) covering loss or destruction of or damage to the Government property.

(4) Upon the happening of loss or destruction of or damage to any Government property caused by an excepted peril, the Contractor shall notify the Contracting Officer thereof, and shall communicate with the Loss and Salvage Organization, if any, now or hereafter designated by the Contracting Officer, and with the assistance of the Loss and Salvage Organization so designated (unless the Contracting Officer has directed that no such organization be employed), shall take all reasonable steps to protect the Government property from further damage, separate the damaged and undamaged Government property, put all the Government property in the best possible order, and furnish to the Contracting Officer a statement of:

(i) the lost, destroyed, and damaged Government property;

(ii) the time and origin of the loss, destruction, or damage;

(iii) all known interests in commingled property of which the Government property is a part; and

(iv) the insurance, if any, covering any part of the interest in such commingled property.

The Contractor shall be entitled to an equitable adjustment in the contract price for the expenditures made by him in performing his obligations under this subparagraph (4)(including charges made to the Contractor by the Loss and Salvage Organization, except any of such charges the payment of which the Government has, at its option, assumed directly), in accordance with the procedures provided for in the "Changes" clause of this contract.

(5) With the approval of the Contracting Officer after loss or destruction of or damage to Government property; and subject to such conditions and limitations as may be imposed by the Contracting Officer, the Contractor may, in order to minimize the loss to the Government or in order to permit resumption of business or the like, sell for the account of the Government any item of Government property which has been damaged beyond practicable repair, or which is so commingled or combined with property of others, including the Contractor, the separation is impracticable.

(6) In the event the Contractor is reimbursed or compensated for any loss or destruction of or damage to the Government property, he shall equitably reimburse the Government. The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any such loss, destruction or damage and, upon the request of the Contracting Officer, shall at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery. In addition, where a subcontractor has been relieved from liability for any loss or destruction of or damage to the Government property, the Contractor shall enforce the liability of the subcontractor for such loss or destruction of or damage to the Government property for the benefit of the Government.

(7) If this contract is for the development, production, modification, maintenance, or overhaul of aircraft, or otherwise involves the furnishing

of aircraft by the Government, the "Ground and Flight Risk" clause of this contract shall control, to the extent it is applicable, in the case of loss or destruction of, or damage to, aircraft. (1978 Sep)

GOVERNMENT PROPERTY (COST REIMBURSEMENT)

Risk of Loss Provision DAR 7-203.21 (1970 Sep)

(g) RISK OF LOSS.

(1) The Contractor shall not be liable for any loss or damage to the Government property, or for expenses incidental to such loss or damage, except that the Contractor shall be responsible for any such loss or damage (including expenses incidental thereto):

(i) which results from willful misconduct or lack of good faith on the part of any one of the Contractor's directors or officers, or on the part of any of his managers, superintendents, or other equivalent representatives, who has supervision or direction of-

(A) all or substantially all of the Contractor's business; or

(B) all or substantially all of the Contractor's operations at any one plant or separate location, in which this contract is being performed; or

(C) a separate or complete major industrial operation in connection with the performance of this contract;

(ii) due to the willful misconduct or lack of good faith on the Contractor, due to the willful misconduct or lack of good faith on the part of any of his directors, officers, or other respresentatives mentioned in subparagraph (i) above-

(A) to maintain and administer, in accordance with sound industrial practice, the program for utilization, maintenance, repair, protection and preservation of Government property as required by paragraph (f) hereof, or to take all reasonable steps to comply with any appropriate written direction of the Contracting Officer under paragraph (f) hereof; or

(B) to establish, maintain and administer, in accordance with (d) above, a system for control of Government property;

(iii) for which the Contractor is otherwise responsible under the express terms of the clause or clauses designated in the Schedule;

(iv) which results from a risk expressly required to be insured under this contract, but only to the extent of the insurance so required to be procured and maintained, or to the extent of insurance actually procured and maintained, whichever is greater; or

(v) which results from a risk which is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the exent of such insurance or reimbursement.

Any failure of the Contractor to act, as provided in subparagraph (ii) above, shall be conclusively presumed to be a failure resulting from willful misconduct, or lack of good faith on the part of such directors, officers, or other representatives mentioned in subparagraph (i) above, if the Contractor is notified by the Contracting Officer by registered or certified mail addressed to one of such directors, officers, or other representatives, of the Government's disapproval, withdrawal of approval, or nonacceptance of the Contractor's program or system. In such event it shall be presumed that any loss or damage to Government property resulted from such failure. The Contractor shall be liable for such loss or damage unless he can establish by clear and convicing evidence that such loss or damage did not result from his failure to maintain an approved program or system, or occurred during such time as an approved program or system for control of Government property was maintained.

If more than one of the above exceptions shall be applicable in any case, the Contractor's liability under any one exception shall not be limited by any other exception. If the Contractor transfers Government property to the possession and control of a subcontractor, the transfer shall not affect the liability of the Contractor for loss or destruction of or damage to the property as set forth above. However, the Contractor shall require the subcontractor to assume the risk of, and be responsible for, any loss or destruction of or damage to the property while in the latter's possession or control, except to the extent that the subcontract, with the prior approval of the Contracting Officer, provides for the relief of the subcontractor from such liability. In the absence of such approval, the subcontract shall contain appropriate provisions requiring the return of all Government property in as good condition as when received, except for reasonable wear and tear or for the utilization of the property in accordance with the provisions of the prime contract.

(2) The Contractor shall not be reimbursed for, and shall not include as an item of overhead, the cost of insurance or any provision for a reserve, covering the risk of loss of or damage to the Government property, except to the extent that the Government may have required the Contractor to carry such insurance under any other provisions of this contract.

(3) Upon the happening of loss or destruction of or damage to the Government property, the Contractor shall notify the Contracting Officer thereof, and shall communicate with the Loss and Salvage Organization, if any, now or hereafter designated by the Contracting Officer, and with the assistance of the Loss and Salvage Organization so designated (unless the contracting officer has designated that no such organization be employed), shall take all reasonable steps to protect the Government property from further damage, separate the damaged and undamaged Government property, put all the Government property in the best possible order, and furnish to the Contracting Officer a statement of-

(i) the lost, destroyed and damaged Government property;

(ii) the time and origin of the loss, destruction or damage;

(iii) all known interests in commingled property of which the Government property is a part; and

(iv) the insurance, if any, covering any part of or interest in such commingled property.

The Contractor shall make repairs and renovations of the damaged Government property or take such other action, as the Contracting Officer directs.

(4) In the event the Contractor is indemnified, reimbursed, or otherwise compensated for any loss or destruction of or damage to the Government property, he shall use the proceeds to repair, renovate or replace the Government property involved, or shall credit such proceeds against the cost of the work covered by the contract, or shall otherwise reimburse the Government, as directed by the Contracting Officer. The Contractor shall do nothing to prejudice the Government's right to recover against third parties for any such loss, destruction, or damage and, upon the request of the Contracting Officer, shall, at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery. In addition, where the subcontractor has not been relieved from liability from any loss or destruction of or damage to Government property, the Contractor shall enforce the liability of the subcontractor for such loss or destruction of or damage to the Government property for the benefit of the Government.

*(5) If this contract is for the development, production, modification, maintenance, or overhaul of aircraft, or otherwise involves the furnishing of aircraft by the Government, the clause of this contract entitled "Flight Risks" shall control, to the extent it is applicable, in the case of loss or destruction of, or damage to, aircraft. (*This sub-paragraph may be omitted where it is clearly inapplicable.)***

SUBCONTRACTS (1977 Apr) DAR 7-104.23

***(The provisions of this cluase do not apply to firm fixed-price contracts and fixed-price contracts with economic price adjustment provisions. However, the clause does apply to unpriced modifications under such contracts.)

(a) As used in this clause, the term "subcontract" includes purchase orders.

(b) The Contractor shall notify the Contracting Officer reasonably in advance of entering into any subcontract if any Contractor's procurement system has not been approved by the Contracting Officer and if the subcontract:

(i) is to be a cost-reimbursement, time and materials, or labor-hour contract which it is estimated will involve an amount in excess of ten thousand dollars ($10,000) including any fee;

(ii) is proposed to exceed one hundred thousand dollars ($100,000); or

(iii) is one of a number of subcontracts, under this contract with a single subcontractor for the same or related suppliers or services

which, in the aggregate, are expected to exceed one hundred thousand dollars ($100,000).

c. The advance notification required by paragraph (b) above shall include:

(i) a description of the supplies or services to be called for by the subcontract;

(ii) identification of the proposed subcontractor and an explanation of why and how the proposed subcontractor was selected, including the competition obtained;

(iii) the proposed subcontract price, together with the Contractor's cost or price analysis thereof;

(iv) the subcontractor's current, complete, and accurate cost or pricing data and Certificate of Current Cost or Pricing Data, when such data and certificates are required, by other provisions of this contract, to be obtained from the subcontractor.

(v) identification of the type of subcontract to be used;

(vi) a memorandum of negotiation which sets forth; the principal elements of the subcontract price negotiations. A copy of this memorandum shall be retained in the contractor's file for the use of Government reviewing authorities. The memorandum shall be in sufficient detail to reflect the most significant considerations controlling the establishment of initial or revised prices. The memorandum should include an explanation of why cost or pricing data was or was not required, and if it was not required in the case of any price negotiation in excess of $100,000, a statement of the basis for determining that the price resulted from or was based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation. If cost or pricing data was submitted and a current Certificate of Cost or Pricing Data was required, the memorandum shall reflect the extent of which reliance was not placed upon the factual cost or pricing data submitted and the extent of which this data was not used by the contractor in determining the total price objective and in negotiating the final price. The memorandum shall also reflect the extent to which it was recognized in the negotiation that any cost or pricing data submitted by the subcontractor was not accurate, complete, or current; the action taken by the contractor and the subcontractor as a result; and the effect, if any, of such defective data on the total price negotiated. Where the total price negotiated differs significantly from the contractor's total objective, the memorandum shall explain this difference:

(vii) when incentives are used, the memorandum of negotiation shall contain an explanation of the incentive fee profit plan identifying each critical performance element, management decisions used to quantify each incentive element, reasons for incentives on particular performance characteristics, and a brief summary of trade-off possibilities considered as to cost, performance, and time; and

(viii) the Subcontractor's Disclosure Statement or Certificate relating to Cost Accounting Standards when such data are required by other provisions of this contract to be obtained from the subcontractor.

(d) The Contractor shall not enter into any subcontract for which advance notification to the Contracting Officer is required by this clause, without the prior written consent of the Contracting Officer; provided that the Contracting Officer, in his discretion, may ratify in writing any subcontract. Such ratification shall constitute the consent of the Contracting Officer required by this paragraph.

(e) Neither consent by the Contracting Officer to any subcontract or any provisions thereof nor approval of the Contractor's procurement system shall be construed to be a determination of the acceptability of any subcontract price or of any amount paid under any subcontract or to relieve the Contractor of any responsibility for performing this contract, unless such approval or consent specifically provides otherwise.

(f) The Contractor agrees that no subcontract placed under this contract shall provide for payment of a cost-plus-a-percentage-of-cost basis.

(g) The Government reserves the right to perform contractor procurement systems reviews as set for in DAR Section XXIII.

DISPOSAL OF SURPLUS PROPERTY

(supervision and direction)

Sec. 203. (a) Except as otherwise provided in this section, the administrator shall have supervision and direction over the disposition of surplus property. Such property shall be disposed of to such extent, at such time in such areas, by such agencies, at such terms and conditions, and in such manner, as may be prescribed in or pursuant to this act.

DISPUTES CLAUSE (1 Jun 80)(OFPP)

(a) This contract is subject to the Contract Disputes Act of 1978 (P.L. 95-563).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved in accordance with this clause.

(c) (i) As used herein, "claim" means a written demand or assertion by one of the parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or relating to this contract.

(ii) A voucher, invoice, or request for payment that is not in dispute when submitted is not a claim for the purposes of the Act. However, where such submission is subsequently not acted upon in a reasonable time, or disputed either as to liability or amount, it may be converted to a claim pursuant to the Act.

(iii) A claim by the contractor shall be made in writing and submitted to the contracting officer for decision. A claim by the Government against the contractor shall be subject to a decision by the Contracting Officer.

(d) For contractor claims of more than $50,000, the contractor shall submit with the claim a certification that the claim is made in good faith; the supporting data are accurate and complete to the best of the contractor's knowledge and belief; and the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable. The certification shall be executed by the contractor if an individual. When the contractor is not an individual, the certification shall be executed by a senior company official in charge at the contractor's plant or location involved or by an officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

(e) For contractor claims of $50,000 or less, the Contracting Officer must render a decision within 60 days. For contractor claims in excess of $50,000, the Contracting Officer must decide the claim within 60 days or notify the contractor of the date when the decision will be made.

(f) The Contracting Officer's decision shall be final unless the contractor appeals or files a suit as provided in the Act.

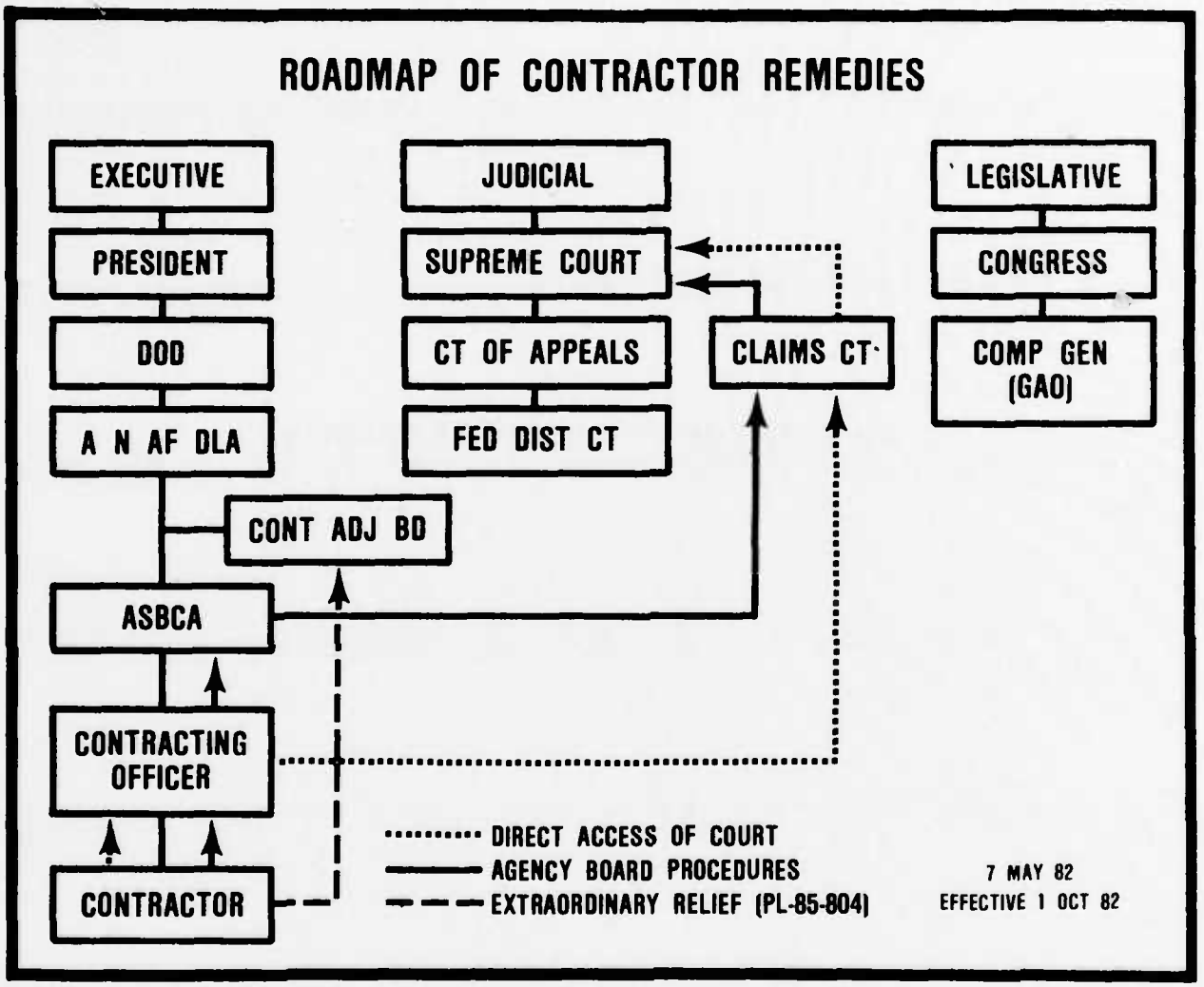
(g) The authority of the Contracting Officer under the Act does not extend to claims or disputes which by statute or regulation other agencies are expressly authorized to decide.

(h) Interest on the amount found due on a contractor claim shall be paid from the date the claim is received by the Contracting Officer until the date of payment.

(i) Except as the parties may otherwise agree, pending final resolution of a claim by the contractor arising under the contract, the contractor shall proceed diligently with the performnce of the contract in accordance with the contracting officer's decision.

Appendix E

ROADMAP OF CONTRACTOR REMEDIES


ROADMAP OF CONTRACTOR REMEDIES
EXECUTIVE
PRESIDENT
DOD
A N AF DLA
JUDICIAL
SUPREME COURT
CT OF APPEALS
FED DIST CT
CLAIMS CT
LEGISLATIVE
CONGRESS
COMP GEN (GAO)
CONT ADJ BD
ASBCA
CONTRACTING OFFICER
CONTRACTOR
DIRECT ACCESS OF COURT
AGENCY BOARD PROCEDURES
EXTRAORDINARY RELIEF (PL-85-804)
7 MAY 82
EFFECTIVE 1 OCT 82

Appendix F

STATUTES

CHAPTER ONE

TITLES OF UNITED STATES CODE

1. General Provisions.
2. The Congress.
3. The President.
4. Flag and Seal, Seat of Government, and the States.
5. Executive Departments and Government Officers and Employees.
6. Official and Penal Bonds.
7. Agriculture.
8. Aliens and Nationality.
9. Arbitration.
10. Armed Forces.
11. Bankruptcy.
12. Banks and Banking.
13. Census.
14. Coast Guard.
15. Commerce and Trade.
16. Conservation.
17. Copyrights.
18. Crimes & Criminal Procedure.
19. Customs Duties.
20. Education.
21. Food and Drugs.
22. Foreign Relations and Intercourse.
23. Highways.
24. Hospitals, Asylums, and Cemeteries.
25. Indians.
26. Internal Revenue Code.
27. Intoxicating Liquors.
28. Judiciary and Judicial Procedure.
29. Labor.
30. Mineral Lands & Mining.
31. Money and Finance.
32. National Guard.
33. Navigation and Navigable Waters.
34. Navy (See Title 10, Armed Forces).
35. Patents.
36. Patriotic Societies and Observances.
37. Pay and Allowances of the Uniformed Services.
38. Veterans' Benefits.
39. The Postal Service.
40. Public Buildings, Property, and Works.
41. Public Contracts.
42. The Public Health and Welfare.
43. Public Lands.
44. Public Printing and Documents.
45. Railroads.
46. Shipping.
47. Telegraphs, Telephones, and Radiotelegraphs.
48. Territories and Insular Possessions.
49. Transportation.
50. War and National Defense.

DEPARTMENT OF ENERGY

42 USC § 7101, et seq
Pub L. 95—91, Aug 4, 1977

SUBCHAPTER I—DECLARATION OF FINDINGS AND PURPOSES

§ 7111. Congressional findings

The Congress of the United States finds that—

(1) the United States faces an increasing shortage of nonrenewable energy resources;

(2) this energy shortage and our increasing dependence on foreign energy supplies present a serious threat to the national security of the United States and to the health, safety and welfare of its citizens;

(3) a strong national energy program is needed to meet the present and future energy needs of the Nation consistent with overall national economic, environmental and social goals;

(4) responsibility for energy policy, regulation, and research, development and demonstration is fragmented in many departments and agencies and thus does not allow for the comprehensive, centralized focus necessary for effective coordination of energy supply and conservation programs; and

(5) formulation and implementation of a national energy program require the integration of major Federal energy functions into a single department in the executive branch.

Pub L. 95—91, Title I, § 101, Aug 4, 1977, 91 Stat 567.

§ 7112. Congressional declaration of purpose

The Congress therefore declared that the establishment of a Department of Energy is in the public interest and will promote the general welfare by assuring coordinated and effective administration of Federal energy policy and programs. It is the purpose of this chapter—

(1) to establish a Department of Energy in the executive branch;

(2) to achieve, through the Department, effective management of energy functions of the Federal Government, including consultation with the heads of other Federal departments and agencies in order to encourage them to establish and observe policies consistent with a coordinated energy policy, and to promote maximum possible energy conservation measures in connection with the activities within their respective jurisdictions;

(3) to provide for a mechanism through which a coordinated national energy policy can be formulated and implemented to deal with the short-, mid- and long-term energy problems of the Nation; and to develop plans and programs for dealing with domestic energy production and import shortages;

(4) to create and implement a comprehensive energy conservation strategy that will receive the highest priority in the national energy program;

(5) to carry out the planning, coordination, support, and management of a balanced and comprehensive energy research and development program, including—

(A) assessing the requirements for energy research and development;

(B) developing priorities necessary to meet those requirements;

(C) undertaking programs for the optimal development of the various forms of energy production and conservation; and

(D) disseminating information resulting from such programs, including disseminating information on the commercial feasibility and use of energy from fossil, nuclear, solar, geothermal, and other energy technologies;

(6) to place major emphasis on the development and commercial use of solar, geothermal, recycling and other technologies utilizing renewable energy resources;

(7) to continue and improve the effectiveness and objectivity of a central energy data collection and analysis program within the Department;

(8) to facilitate establishment of an effective strategy for distributing and allocating fuels in periods of short supply and to provide for the administration of a national energy supply reserve;

(9) to promote the interests of consumers through the provision of an adequate and reliable supply of energy at the lowest reasonable cost;

(10) to establish and implement through the Department, in coordination with the Secretaries of State, Treasury, and Defense, policies regarding international energy issues that have a direct impact on research, development, utilization, supply, and conservation of energy in the United States and to undertake activities involving the integration of domestic and foreign policy relating to energy, including provision of independent technical advice to the President on international negotiations involving energy resources, energy technologies, or nuclear weapons issues, except that the

Secretary of State shall continue to exercise primary authority for the conduct of foreign policy relating to energy and nuclear nonproliferation, pursuant to policy guidelines established by the President;

(11) to provide for the cooperation of Federal, State, and local governments in the development and implementation of national energy policies and programs;

(12) to foster and assure competition among parties engaged in the supply of energy and fuels;

(13) to assure incorporation of national environmental protection goals in the formulation and implementation of energy programs, and to advance the goals of restoring, protecting, and enhancing environmental quality, and assuring public health and safety;

(14) to assure, to the maximum extent practicable, that the productive capacity of private enterprise shall be utilized in the development and achievement of the policies and purposes of this chapter;

(15) to provide for, encourage, and assist public participation in the development and enforcement of national energy programs;

(16) to create an awareness of, and responsibility for, the fuel and energy needs of rural and urban residents as such needs pertain to home heating and cooling, transportation, agricultural production, electrical generation, conservation, and research and development;

(17) to foster insofar as possible the continued good health of the Nation's small business firms, public utility districts, municipal utilities, and private cooperatives involved in energy production, transportation, research, development, demonstration, marketing, and merchandising; and

(18) to provide for the administration of the functions of the Energy Research and Development Administration related to nuclear weapons and national security which are transferred to the Department by this chapter.

Pub L. 95—91, Title I, § 102, Aug 4, 1977, 91 Stat 567.

§ 7113. Relationship with States

Whenever any proposed action by the Department conflicts with the energy plan of any State, the Department shall give due consideration to the needs of such State, and where practicable, shall attempt to resolve such conflict through consultations with appropriate State officials. Nothing in this chapter shall affect the authority of any State over matters exclusively within its jurisdiction.

Pub L. 95—91, Title 1, § 103, Aug 4, 1977, 92 Stat 569

SUBCHAPTER II—ESTABLISHMENT OF THE DEPARTMENT

§ 7181. Establishment

There is hereby established at the seat of government an executive department to be known as the Department of Energy. There shall be at the head of the Department a Secretary of Energy (hereinafter in this Act referred to as the "Secretary"), who shall be appointed by the President by and with the advice and consent of the Senate. The Department shall be administered, in accordance with the provisions of this chapter, under the supervision and direction of the Secretary.

Pub L. 95—91, Title II, § 201 Aug 4, 1977, 91 Stat 569.

§ 7132. Principal officers

(a) There shall be in the Department a Deputy Secretary, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall be compensated at the rate provided for level II of the Executive Schedule under section 5313 of Title 5. The Deputy Secretary shall act for and exercise the functions of the Secretary during the absence or disability of the Secretary or in the event the office of Secretary becomes vacant. The Secretary shall designate the order in which the Under Secretary and other officials shall act for and perform the functions of the Secretary during the absence or disability of both the Secretary and Deputy Secretary or in the event of vacancies in both of those offices.

(b) There shall be in the Department an Under Secretary and a General Counsel, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall perform such functions and duties as the Secretary shall prescribe. The Under Secretary shall bear primary responsibility for energy conservation. The Under Secretary shall be compensated at the rate provided for level III of the Executive Schedule under section 5314 of Title 5, and the General Counsel shall be compensated at the rate provided for level IV of the Executive Schedule under section 5315 of Title 5.

Pub L. 95—91, Title II, § 202, Aug 4, 1977, 91 Stat 569.

§ 7133. Assistant Secretaries; appointment and confirmation; identification of responsibilities

§ 7134. Federal Energy Regulatory Commission; compensation of Chairman and members

There shall be within the Department a Federal Energy Regulatory Commission established by subchapter IV of this chapter (hereinafter referred to in this chapter as the "Commission"). The Chairman shall be compensated at the rate provided for level III of the Executive Schedule under section 5314 of Title 5. The other members of the Commission shall be compensated at the rate provided for level IV of the Executive Schedule under section 5315 of Title 5. The Chairman and members of the Commission shall be individuals who, by demonstrated ability, background, training, or experience, are specially qualified to assess fairly the needs and concerns of all interests affected by Federal energy policy.

Pub. L. 95—91, Title II, § 204, Aug 4, 1977, 91 Stat 571.

§ 7135. Energy Information Administration

(a)(1) There shall be within the Department an Energy Information Administration to be headed by an Administrator who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall be compensated at the rate provided for in level IV of the Executive Schedule under section 5315 of Title 5. The Administrator shall be a person who, by reason of professional background and experience, is specially qualified to manage an energy information system.

(2) The Administrator shall be responsible for carrying out a central, comprehensive, and unified energy data and information program which will collect, evaluate, assemble, analyze, and disseminate data and information which are relevant to energy resource reserves, energy production, demand, and technology, and related economic and statistical information, or which are relevant to the adequacy of energy resources to meet demands in the near and longer term future for the Nation's economic and social needs.

(b) The Secretary shall delegate to the Administrator (which delegation may be on a nonexclusive basis as the Secretary may determine may be necessary to assure the faithful execution of his authorities and responsibilities under law) the functions vested in him by law relating to gathering, analysis, and dissemination of energy information (as defined in section 796 of Title 15) and the Administrator may act in the name of the Secretary for the purpose of obtaining enforcement of such delegated functions.

(c) In addition to, and not in limitation of the functions delegated to the Administrator pursuant to other subsections of this section, there shall be vested in the Administrator, and he shall perform, the functions assigned to the Director of the Office of Energy Information and Analysis under subchapter II of chapter 16B of Title 15, and the provisions of sections 790b(d) and 790h of Title 15 shall be applicable to the Administrator in the performance of any function under this chapter.

(d) The Administrator shall not be required to obtain the approval of any other officer or employee of the Department in connection with the collection or analysis of any information; nor shall the Administrator be required, prior to publication, to obtain the approval of any other officer or employee of the United States with respect to the substance of any statistical or forecasting technical reports which he has prepared in accordance with law.

(e) The Energy Information Administration shall be subject to an annual professional audit review of performance as described in section 790d of Title 15.

(f) The Administrator shall, upon request, promptly provide any information or analysis in his possession pursuant to this section to any other administration, commission, or office within the Department which such administration, commission, or office determines relates to the functions of such administration, commission, or office.

(g) Information collected by the Energy Information Administration shall be cataloged and, upon request, any such information shall be promptly made available to the public in a form and manner easily adaptable for public use, except that this subsection shall not require disclosure of matters exempted from mandatory disclosure by section 552(b) of Title 5. The provisions of section 796d of Title 15, and section 5916 of this title, shall continue to apply to any information obtained by the Administrator under such provisions.

§ 7136. Economic Regulatory Administration; appointment of Administrator; compensation; qualificatins; function.

(a) There shall be within the Department an Economic Regulatory Administration to be headed by an Administrator, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall be compensated at a rate provided for level IV of the Executive Schedule under section 5315 of Title 5. Such Administrator shall be, by demonstrated ability, background, training, or experience, an individual who is specially qualified to assess fairly the needs and concerns of all interests affected by Federal energy policy. The Secretary shall by rule provide for a separation of regulatory and enforcement functions assigned to, or vested in, the Administration.

(b) Consistent with the provisions of subchapter IV OF this chapter, the Secretary shall utilize the Econmic Regulatory Administration to administer such functions as he may consider appropriate.

Pub L. 95—91, Title II, § 206, Aug 4, 1977, 91 Stat 574.

§ 7137. Functions of Comptroller General

The functions of the Comptroller General of the United States under section 771 of Title 15 shall apply with respect to the monitoring and evaluation of all functions and activities of the Department under this chapter or any other Act administered by the Department.

Pub L. 95—91, Title II, § 207, Aug 4, 1977, 91 Stat 574.

§ 7138. Office of Inspector General

(a)(1) There shall be within the Department an Office of Inspector General to be headed by an Inspector General, who shall be appointed by the President, by and with the advice and consent of the Senate, solely on the basis of integrity and demonstrated ability and without regard to political affiliation. The Inspector General shall report to, and be under the general supervision of, the Secretary or, to the extent such authority is delegated, the Deputy Secretary, but shall not be under the control of, or subject to supervision by, any other officer of the Department.

(2) There shall also be in the Office a Deputy

Inspector General who shall be appointed by the President, by and with the advice and consent of the Senate, solely on the basis of integrity and demonstrated ability and without regard to political affiliation. The Deputy shall assist the Inspector General in the administration of the Office and shall, during the absence or temporary incapacity of the Inspector General, or during a vacancy in that Office, act as Inspector General.

(3) The Inspector General or the Deputy may be removed from office by the President. The President shall communicate the reasons for any such removal to both Houses of Congress.

§ 7139. Office of Energy Research; establishment; apointment of Director; compensation; duties

(a) There shall be within the Department an Office of Energy Research to be headed by a Director, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall be compensated at the rate provided for level IV of the Executive Schedule under section 5315 of Title 5.

(b) It shall be the duty and responsibility of the Director—

(1) to advise the Secretary with respect to the physical research program transferred to the Department from the Energy Research and Development Administration;

(2) to monitor the Department's energy research and development programs in order to advise the Secretary with respect to any undesirable duplication or gaps in such programs;

(3) to advise the Secretary with respect to the well-being and management of the multipurpose laboratories under the jurisdiction of the Department, excluding laboratories that constitute part of the nuclear weapons complex;

(4) to advise the Secretary with respect to education and training activities required for effective short- and long-term basic and applied research activities of the Department;

(5) to advise the Secretary with respect to grants and other forms of financial assistance required for effective short- and long-term basic and applied research activities of the Department; and

(6) to carry out such additional duties assigned to the Office by the Secretary relating to basic and applied research, including but not limited to supervision or support of research activities carried out by any of the Assistant Secretaries designated by section 7133 of this title, as the Secretary considers advantageous.

Pub L. 95—91, Title II, § 209, Aug 4, 1977, 91 Stat 577.

§ 7140. Leasing Liaison Committee; establishment; composition

There is hereby established a Leasing Liaison Committee which shall be composed of an equal number of members appointed by the Secretary and the Secretary of the Interior.

Pub L. 95—91, Title II, § 210, Aug 4, 1977, 91 Stat 577.

§ 7141. Office of Minority Economic Impact

(a) There shall be established within the Department an Office of Minority Economic Impact. The Office shall be headed by a Director, who shall be appointed by the President, by and with the advice and consent of the Senate. The Director shall be compensated at the rate provided for level IV of the Executive Schedule under section 5315 of Title 5.

(b) The Director shall have the duty and responsibility to advise the Secretary on the effect of energy policies, regulations, and other actions of the Department and its components on minorities and minority business enterprises and on ways to insure that minorities are afforded an opportunity to participate fully in the energy programs of the Department.

SUBCHAPTER III—TRANSFERS OF FUNCTIONS

§ 7151. General transfers

(a) Except as otherwise provided in this chapter, there are hereby transferred to, and vested in, the Secretary all of the functions vested by law in the Administrator of the Federal Energy Administration or the Federal Energy Administration, the Administrator of the Energy Research and Development Administration or the Energy Research and Development Administration; and the functions vested by law in the officers and components of either such Administration.

(b) Except as provided in subchapter IV of this chapter, there are hereby transferred to, and vested in, the Secretary the function of the Federal Power Commission, or of the members, officers, or components thereof. The Secretary may exercise any power described in section 7172(a)(2) of this title to the extent the Secretary determines such power to be necessary to the exercise of any function within his jurisdiction pursuant to the preceding sentence.

Pub L. 95—91, Title III, § 301, Aug 4, 1977, 91 Stat 577.

§ 7151a. Jurisdiction over matters transferred from Energy Research and Development Administration

Notwithstanding any other provision of law, jurisdiction over matters transferred to the Department of Energy from the Energy Research and Development Administration which on the effective date of such transfer were required by law, regulation, or administrative order to be made on the record after an opportunity for an agency hearing may be assigned to the Federal Energy Regulatory Commission or retained by the Secretary at his discretion.

Pub L. 95—238, Title I, § 104(a), Feb 25, 1978, 92 Stat 53.

§ 7152. Transfers from Department of the Interior

(a)(1) There are hereby transferred to, and vested in, the Secretary all functions of the Secretary of the Interior under section 825s of Title 16, and all other functions of the Secretary of the Interior, and officers and compnents of the Department of the Interior, with respect to—

(A) the Southeastern Power Administration;

(B) the Southwestern Power Administration;

(C) the Alaska Power Administration;

(D) the Bonneville Power Administration including but limited to the authority contained in the Bonneville Project Act of 1937 and the Federal Columbia River Transmission System Act;

(E) the power marketing functions of the Bureau of Reclamation, including the construction, operation, and maintenance of transmission lines and attendant facilities; and

(F) the transmission and disposition of the electric power and energy generated at Falcon Dam and Amistad Dam, international storage reservoir projects on the Rio Grande, pursuant to the Act of June 18, 1954, as amended by the Act of December 23, 1963.

(2) The Southeastern Power Administration, the Southwestern Power Administration, the Bonneville Power Administration, and the Alaska Power Administration shall be preserved as separate and distinct organizational entities within the Department. Each such entity shall be headed by an Administrator appointed by the Secretary. The functions transferred to the Secretary in paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) shall be exercised by the Secretary, acting by and through such Administrators. Each such Administrator shall maintain his principal office at a place located in the region served by his respective Federal power marketing entity.

(3) The functions transferred in paragraphs (1)(E) and (1)(F) of this subsection shall be exercised by the Secretary acting by and through a separate and distinct Administration within the Department which shall be headed by an Administrator appointed by the Secretary. The Administrator shall establish and shall maintain such regional offices as necessary to facilitate the performance of such functions. Neither the transfer of functions effected by paragraph (1)(E) of this subsection nor any changes in cost allocation or project evaluation standards shall be deemed to authorize the reallocation of joint costs of multipurpose facilities heretofore allocated unless and to the extent that such change is hereafter approved by Congress.

(b) There are hereby transferred to, and vested in, the Secretary the functions of the Secretary of the Interior to promulgate regulations under the Outer Continental Shelf Lands Act, the Mineral Lands Leasing Act, the Mineral Leasing Act for Acquired Lands, the Geothermal Steam Act of 1970, and the Energy Policy and Conservation Act, which relate to the—

(1) fostering of competition for Federal leases (including, but not limited to, prohibition on bidding for development rights by certain types of joint ventures);

(2) implementation of alternative bidding systems authorized for the award of Federal leases;

(3) establishment of diligence requirements for operations conducted on Federal leases (including, but not limited to, procedures relating to the granting or ordering by the Secretary of the Interior of suspension of operations or production as they relate to such requirements);

(4) setting rates of production for Federal leases; and

(5) specifying the procedures, terms, and conditions for the acquisition and disposition of Federal royalty interests taken in kind.

(c) There are hereby transferred to, and vested in, the Secretary all the functions of the Secretary of the Interior to establish production rates for all Federal leases.

(d) There are hereby transferred to, and vested in, the Secretary those functions of the Secretary of the Interior, the Department of the Interior, and officers and components of that Department under the Act of May 15, 1910, and other authorities, exercised by the Bureau of Mines, but limited to—

(1) fuel supply and demand analysis and data gathering;

(2) research and development relating to increased efficiency of production technology of solid fuel minerals, other than research relating to mine health and safety and research relating to the environmental and leasing consequences of solid fuel mining (which shall remain in the Department of the Interior); and

(3) coal preparation and analysis.

Pub L. 95—91, Title III, § 302, Aug 4, 1977, 91 Stat 578.

§ 7153. Administration of leasing transfers

(a) The Secretary of the Interior shall retain any authorities not transferred under section 7152(b) of this title and shall be solely responsible for the issuance and supervision of Federal leases and the enforcement of all regulations applicable to the leasing of mineral resources, including but not limited to lease terms and conditions and production rates. No regulation promulgated by the Secretary shall restrict or limit any authority retained by the Secretary of the Interior under section 7152(b) of this title with respect to the issuance or supervision of Federal leases. Nothing in section 7152(b) of this title shall be construed to affect Indian lands and resources or to transfer any functions of the Secretary of the Interior concerning such lands and resources.

(b) In exercising the authority under section 7152(b) of this title to promulgate regulations, the Secretary shall consult with the Secretary of the Interior during the preparation of such regulations and shall afford the Secretary of the Interior not less than thrity days, prior to the date on which the Department first publishes or otherwise prescribes regulations, to comment on the content and effect of such regulations.

(c)(1) The Secretary of the Interior shall afford the Secretary not less than thirty days, prior to the date on which the Department of the Interior first publishes or otherwise prescribes the terms and conditions on which a Federal lease will be issued, to disapprove any term or condition of such lease which relates to any matter with respect to which the Secretary has authority to promulgate regulations under section 7152(b) of this title. No such term or condition may be included in such a lease if it is disapproved by the Secretary. The Secretary and the Secretary of the Interior may by agreement define circumstances under which a reasonable opportunity of less than thirty days may be afforded the Secretary to disapprove such terms and conditions.

(2) Where the Secretary disapproves any lease, term, or condition under paragraph (1) of this subsection he shall furnish the Secretary of the Interior with a detailed written statement of the reasons for his disapproval, and of the alternatives which would be acceptable to him.

(d) The Department of the Interior shall be the lead agency for the purpose of preparation of an environmental impact statement required by section 4332(2)(C) of this title for any action with respect to the Federal leases taken under the authority of this section, unless the action involves only matters within the exclusive authority of the Secretary.

Pub L. 95—91, Title III, § 303, Aug 4, 1977, 91 Stat 579.

§ 7154. Transfers from Department of Housing and Urban Development.

(a) There is hereby transferred to, and vested in, the Secretary the functions vested in the Secretary of Housing and Urban Development pursuant to section 6833 of this title, to develop and promulgate energy conservation standards for new buildings. The Secretary of Housing and Urban Development shall provide the Secretary with any necessary technical assistance in the development of such standards. All other responsibilities, pursuant to title III of the Energy Conservation and Production Act, shall remain with the Secretary of Housing and Urban Development, except that the Secretary shall be kept fully and currently informed of the implementatin of the promulgated standards.

(b) There is hereby transferred to, and vested in, the Secretary the functions vested in the Secretary of Housing and Urban Development pursuant to section 1701z-8 of Title 12.

Pub L. 95—91, Title III, § 304, Aug 4, 1977, 91 Stat 580.

§ 7155. Transfer from Interstate Commerce Commission

Except as provided in subchapter IV of this chapter, there are hereby transferred to the Secretary such functions set forth in the Interstate Commerce Act and vested by law in the Interstate Commerce Commission or the Chairman and members thereof as relate to transportation of oil by pipeline.

Pub L. 95—91, Title III, § 306, Aug 4, 1977, 91 Stat 581

§ 7156. Transfers from Department of the Navy

There are hereby transferred to and vested in the Secretary all functions vested by chapter 641 of Title 10 in the Secretary of the Navy as they relate to the administration of and jurisdiction over—

(1) Naval Petroleum Reserve Numbered 1 (Elk Hills), located in Kern County, California, established by Executive order of the President, dated September 2, 1912;

(2) Naval Petroleum Reserve Numbered 2 (Buena Vista) located in Kern County, California, established by Executive order of the President, dated December 13, 1912;

(3) Naval Petroleum Reserve Numbered 3 (Teapot Dome) located in Wyoming, established by Executive order of the President, dated April 30, 1915;

(4) Oil Shale Reserve Numbered 1, located in Colorado, established by Executive order of the President, dated December 6, 1916, as amended by Executive order dated June 12, 1919;

(5) Oil Shale Reserve Numbered 2, located in Utah, established by Executive order of the President, dated December 6, 1916; and

(6) Oil Shale Reserve Numbered 3, located in Colorado, established by Executive order of the President, dated September 27, 1924.

In the administration of any of the functions transferred to, and vested in, the Secretary by this section the Secretary shall take into consideration the requirements of national security.

Pub L. 95—91, Title III, § 307, Aug 4, 1977, 91 Stat 581.

§ 7157. Transfers from Department of Commerce.

There are hereby transferred to, and vested in, the Secretary all functions of the Secretary of Commerce, the Department of Commerce, and officers and components of that Department, as relate to or are utilized by the Office of Energy Programs, but limited to industrial energy conservation programs.

Pub L. 95—91, Title III, § 308, Aug 4, 1977, 91 Stat 581.

§ 7158. Naval reactor and military application programs

(a) The Division of Naval Reactors established pursuant to section 2035 of this title, and responsible for research, design, development, health, and safety matters pertaining to naval nuclear propulsion plants and assigned civilian power reactor programs is transferred to the Department under the Assistant Secretary to whom the Secretary has assigned the function listed in section 7133 (a)(2)(E) of this title, and such organizational unit shall be deemed to be an organizational unit established by this chapter.

(b) The Division of Military Application, established

by section 2035 of this title and the functions of the Energy Research and Development Administration with respect to the Military Liaison Committee, established by section 2037 of this title, are transferred to the Department under the Assistant Secretary to whom the Secretary has assigned those functions listed in section 7133(a)(5) of this title, and such organizational units shall be deemed to be organizational units established by this chapter.

Pub L. 95—91, Title III, § 309, Aug 4, 1977, 91 Stat 581.

§ 7159. Transfer to Department of Transportation

Notwithstanding section 7151(a) of this title, there are hereby transferred to, and vested in, the Secretary of Transportation all of the functions vested in the Administrator of the Federal Energy Administration by section 6361(b)(1)(B) of this title.

Pub L. 95—91, Title III § 310, Aug 4, 1977, 91 Stat 582.

SUBCHAPTER IV—FEDERAL ENERGY REGULATORY COMMISSION

§ 7171. Appointment and administration

(a) There is hereby established within the Department an independent regulatory commission to be known as the Federal Energy Regulatory Commission.

(b) The Commission shall be composed of five members appointed by the President, by and with the advice and consent of the Senate. One of the members shall be designated by the President as Chairman. Members shall hold office for a term of four years and may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. The terms of the members first taking office shall expire (as designated by the President at the time of appointment), two at the end of two years, two at the end of three years, and one at the end of four years. Not more than three members of the Commission shall be members of the same political party. Any Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. A Commissioner may continue to serve after the expiration of his term until his successor has taken office, except that he may not so continue to serve for more than one year after the date on which his term would otherwise expire under this subsection. Members of the commission shall not engage in any other business, vocation, or employment while serving on the Commission.

(c) The Chairman shall be responsible on behalf of the Commission for the executive and administrative operation of the commission, including functions of the Commission with respect to (1) the appointment and employment of hearing examiners in accordance with the provisions of Title 5, (2) the selection, appointment, and fixing of the compensation of such personnel as he deems necessary, including an executive director, (3) the supervison of personnel employed by or assigned to the Commission, except that each member of the Commission may select and supervise personnel for his personal staff, (4) the distribution of business among personnel and among administrative units of the Commission, and (5) the procurement of services of experts and consultants in accordance with section 3109 of Title 5. The Secretary shall provide to the Commission such support and facilities as the Commission determines it needs to carry out its functions.

(d) In the performance of their functions, the members, employees, or other personnel of the Commission shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent of any other part of the Department.

(e) The Chairman of the Commission may designate any other member of the Commission as Acting Chairman to act in the place and stead of the Chairman during his absence. The Chairman (or the Acting Chairman in the absence of the Chairman) shall preside at all sessions of the Commission and a quorum for the transaction of business shall consist of at least three members present. Each member of the Commission, including the Chairman, shall have one vote. Actions of the commission shall be determined by a majority vote of the members present. The Commission shall have an official seal which shall be judicially noticed.

PART C—GENERAL ADMINISTRATIVE PROVISIONS

§ 7251. General authority

To the extent necessary or apropriate to perform any function transferred by this chapter, the Secretary or any officer or employee of the Department may exercise, in carrying out the function so transferred, any authority or part thereof available by law, including appropriation Acts, to the official or agency from which such function was transferred.

Pub L. 95—91, Title VI § 641, Aug 4, 1977, 91 Stat 598

§ 7252. Delegation

Except as otherwise expressly prohibited by law, and except as otherwise provided in this chapter, the Secretary may delegate any of his functions to such officers and employees of the Department as he may designate, and may authorize such successive redelegations of such functions within the Department as he may deem to be necessary or appropriate.

Pub L. 95—91, Title VI § 642, Aug 4, 1977, 91 Stat 599.

§ 7253. Reorganization

The Secretary is authorized to establish, alter, consolidate or discontinue such organizational units or components within the Department as he may deem to be necessary or appropriate. Such authority shall not extend

to the abolition of organizational units or compnents established by this chapter, or to the transfer of functions vested by this chapter in any organizational unit or component.

Pub L. 95—91, Title VI§ 643, Aug 4, 1977, 91 Stat 599.

§ 7254. Rule and regulations

The Secretary is authorized to prescribe such procedural and administrative rules and regulations as he may deem necessary or appropriate to administer and manage the functions now or hereafter vested in him.

Pub L. 95—91, Title VI, § 644, Aug 4, 1977, 91 Stat 599.

§ 7255. Subpoena

For the purpose of carrying out the provisions of this chapter, the Secretary, or his duly authorized agent or agents, shall have the same powers and authorities as the Federal Trade Commission under section 49 of Title 15 with respect to all functions vested in, or transferred or delegated to, the Secretary or such agents by this chapter. For purposes of carrying out its responsibilities under the Natural Gas Policy Act of 1978, the Commission shall have the same powers and authority as the Secretary has under this section.

Pub L. 95—91, Title VI, § 645, Aug 4, 1977, 91 Stat 599, amended Pub L. 95—621, Title V, § 508(a), Nov 9, 1978, 92 Stat 3408.

§ 7256. Contracts, leases, etc., with public agencies and private organizations and persons

(a) The Secretary is authorized to enter into and perform such contracts, leases, cooperative agreements, or other similar transactions with public agencies and private organizations and persons, and to make such payments (in lump sum or installments, and by way of advance or reimbursement) as he may deem to be necessary or appropriate to carry out functions now or hereafter vested in the Secretary.

(b) Notwithstanding any other provision of this subchapter, no authority to enter into contracts or to make payments under this subchapter shall be effective except to such extent or in such amounts as are provided in advance in appropriation Acts.

Pub L. 95—91, Title VI, § 646, Aug 4, 1977, 91 Stat 599.

§ 7257. Acquisition, construction, etc., of laboratories, research and testing sites, etc.

The Secretary is authorized to acquire (by purchase, lease, condemnation, or otherwise), construct, improve, repair, operate, and maintain laboratories, research and testing sites and facilities, quarters and related accommodations for employees and dependents of employees of the Department, personal property (including patents), or any interest therein, as the Secretary deems necessary; and to provide by contract or otherwise for eating facilities and other necessary facilities for the health and welfare of employees of the Department at its installations and purchase and maintain equipment therefor.

Pub L. 95—91, Title VI, § 647, Aug 4, 1977, 91 Stat 599.

§ 7258. Facilities construction

(a) As necessary and when not otherwise available, the Secretary is authorized to provide for, construct, or maintain the following for employees and their dependents stationed at remote locations:

(1) Emergency medical services and supplies;

(2) Food and other subsistence supplies;

(3) Messing facilities;

(4) Audio-visual equipment, accessories, and supplies for recreation and training;

(5) Reimbursement for food, clothing, medicine, and other supplies furnished by such employees in emergencies for the temporary relief of distressed persons;

(6) Living and working quarters and facilities; and

(7) Transportation of school-age dependents of employees to the nearest appropriate educational facilities.

(b) The furnishing of medical treatment under paragraph (1) of subsection (a) of this section and the furnishing of services and supplies under paragraphs (2) and (3) of subsection (a) of this section shall be at prices reflecting reasonable value as determined by the Secretary.

(c) Proceeds from reimbursements under this section shall be deposited in the Treasury and may be withdrawn by the Secretary to pay directly the cost of such work or services, to repay or make advances to appropriations of funds which will initially bear all or a part of such cost, or to refund excess sums when necessary. Such payments may be credited to a working capital fund otherwise established by law, including the fund established pursuant to section 7263 of this title, and used under the law governing such fund, if the fund is available to use by the Department for performing the work or services for which payment is received.

Pub L. 95—91, Title VI, § 648, Aug 4, 1977, 91 Stat 600.

§ 7259. Use of facilities

(a) With their consent, the Secretary and the Federal Energy Regulatory Commission may, with or without reimbursement, use the research, equipment, and facilities of any agency or instrumentality of the United States or of any State, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States, or of any political subdivision thereof, or of any foreign government in carrying out any function now or hereafter vested in the Secretary or the Commission.

(b) In carrying out his functions, the Secretary, under such terms, at such rates, and for such periods not exceeding five years, as he may deem to be in the public interest, is authorized to permit the use by public and private agencies, corporations, associations, or other organizations or by individuals of any real property, or any facility, structure, or other improvement thereon, under the custody of the Secretary for Department purposes. The Secretary may require permitees under this section to recondition and maintain, at their own expense, the real property, facilities, structures, and improvements involved to a satisfactory standard. This section shall not apply to excess property as defined in 472(e) of Title 40.

(c) Proceeds from reimbursements under this section shall be deposited in the Treasury and may be withdrawn by the Secretary or the head of the agency or instrumentality of the United States involved, as the case may be, to pay directly the costs of the equipment, or facilities provided, to repay or make advances to appropriations or funds which do or will initially bear all or a part of such costs, or to refund excess sums when necessary, except that such proceeds may be credited to a working capital fund otherwise established by law, including the fund established pursuant to section 7263 of this title, and used under the law governing such fund, if the fund is available for use for providing the equipment or facilities involved.

Pub L. 95—91, Title VI, § 649, Aug 4, 1977, 91 Stat 600.

§ 7260. Field offices

The Secretary is authorized to establish, alter consolidate or discontinue and to maintain such State, regional, district, local or other field offices as he may deem to be necessary to carry out functions vested in him.

Pub L. 95—91, Title VI, § 650, Aug 4, 1977, 91 Stat 601

§ 7261. Acquisition of copyrights, patents, etc.

The Secretary is authorized to acquire any of the following described rights if the property acquired thereby is for use by or for, or useful to, the Department:

(1) copyrights, patents, and applications for patents, designs, processes, and manufacturing data;

(2) licenses under copyrights, patents, and applications for patents; and

(3) releases, before suit is brought, for past infringement of patents or copyrights.

Pub L. 95—91, Title VI, § 651, Aug 4, 1977, 91 Stat 601.

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§ 7269. Transfer of funds

The Secretary, when authorized in an appropriation Act, in any fiscal year, may transfer funds from one appropriation to another within the Department, except that no appropriation shall be either increased or decreased pursuant to this section by more than 5 per centum of the appropriation for such fiscal year.

Pub L. 95—91, Title VI, § 659, Aug 4, 1977, 91 Stat 604.

§ 7270. Authorization of appropriations

Appropriations to carry out the provisions of this chapter shall be subject to annual authorization.

Pub L. 95—91, Title VI, § 660, Aug 4, 1977, 91 Stat 604.

§ 7271. Common defense and security program requests of single authorization of appropriations

The Secretary shall submit to the Congress for fiscal year 1980, and for each subsequent fiscal year, a single request for authorizations for appropriations for all programs of the Department of Energy involving scientific research and development in support of the armed forces, military applications of nuclear energy, strategic and critical materials, necessary for the common defense, and other programs which involve the common defense and security of the United States.

Pub L. 95—509, Title II, § 208, Oct 24, 1978, 92 Stat 1779.

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SUBCHAPTER X—SUNSET PROVISIONS

§ 7351. Submission of compehensive review

Not later than January 15, 1982, the President shall prepare and submit to the Congress a comprehensive review of each program of the Department. Each such review shall be made available to the committee or committees of the Senate and House of Representatives having jurisdiction with respect to the annual authorization of funds, pursuant to section 7270 of this title, for such programs for the fiscal year beginning October 1, 1982.

Pub L. 95—91, Title X, § 1001, Aug 4, 1977, 91 Stat 612.

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CENTRAL INTELLIGENCE AGENCY PROCUREMENT AUTHORITY

Procurement Authorities

SEC. 3. (a) In the performance of its functions the Central Intelligence Agency is authorized to exercise the authorities contained in sections 2 (c) (1), (2), (3), (4), (5), (6), (10), (12), (15), (17), and sections 3, 4, 5, 6, and 10 of the Armed Services Procurement Act of 1947 (Public Law 413, Eightieth Congress, second session).

(b) In the exercise of the authorities granted in subsection (a) of this section, the term "Agency head" shall mean the Director, the Deputy Director, or the Executive of the Agency.

(c) The determinations and decisions provided in subsection (a) of this section to be made by the Agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (d) of this section, the Agency head is authorized to delegate his powers provided in this section, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the Agency.

(d) The power of the Agency head to make the determinations or decisions specified in paragraphs (12) and (15) of section 2 (c) and section 5 (a) of the Armed Services Procurement Act of 1947 shall not be delegable. Each determination or decision required by paragraphs (12) and (15) of section 2(c), by section 4 or by section 5 (a) of the Armed Services Procurement Act of 1947, shall be based upon written findings made by the official making such determinations, which findings shall be final and shall be available within the Agency for a period of at least six years following the date of the determination (50 U.S. Code 403c).

TITLE 41
PUBLIC CONTRACTS
CHAPTER 7—OFFICE OF FEDERAL PROCUREMENT POLICY

§ 401. Congressional declaration of policy

It is declared to be the policy of Congress to promote economy, efficiency, and effectiveness in the procurement of property and services by and for the executive branch of the Federal Government by—

(1) promoting the use of full and open competition in the procurement of products and services:

(2) establishing policies, procedures, and practices which will require the Government to acquire property and services of the requisite quality and within the time needed at the lowest reasonable cost;

(3) improving the quality, efficiency, economy, and performance of Government procurement organizations and personnel, and eliminating fraud and waste in the procurement process;

(4) avoiding or eliminating unnecessary overlapping or duplication of procurement and related activities;

(5) avoiding or eliminating unncecessary or redundant requirements placed on contractor and Federal procurement officials;

(6) identifying gaps, omissions, or inconsistencies in procurement laws, regulations, and directives and in other laws, regulations, and directives, relating to or affecting procurement;

(7) achieving greater uniformity and simplicity, whenever appropriate, in procurement procedures;

(8) otherwise promoting economy, efficiency, and effectiveness in Government procurement organizations and operation;

(9) coordinating procurement policies and programs of the several departments and agencies;

(10) minizing possible disruptive effects of Government procurement on particular industries, areas, or occupations;

(11) improving understanding of Government procurement laws and policies within the Government and by organizations and individuals doing busines. with the Government; and

(12) promoting fair dealing and equitable relationships among the parties in Government contracting. P.L. 96-83, Oct.10, 1979, 93 Stat. 648; P.L. 93-400, Aug 30, 1974, 88 Stat. 796.

§ 402. Congressional findings and purpose

(a) The Congress finds that economy, efficiency, and effectiveness in the procurement of property and services by the executive agencies will be improved by establishing an office to exercise responsibility for procurement policies, regulations, procedures, and forms.

(b) The purpose of this chapter is to establish an Office of Federal Procurement Policy in the Office of Management and Budget to provide overall direction of procurement policies, regulations, procedures, and forms for executive agencies in accordance with applicable laws.

Pub L. 93—400, § 3, Aug 30, 1974, 88 Stat 796.

§ 403. Definition

(a) As used in this chapter, the term "executive agency" means an executive department, a military department, and an independent establishment within the meaning of sections 101, 102, and 104(1), respectively, of Title 5, and also a wholly owned Government corporation within the meaning of section 846 of Title 31.

(b) As used in this chapter, the term "procurement" includes all stages of the acquisition process, beginning with the process for determining a need for property and services through to the Federal Government's disposition of such property and services.

As amended Pub L. 96—83, Oct 10, 1979, 93 Stat 648.

§ 404. Establishment of Office of Federal Procurement Policy; appointment of Administrator

(a) There is established in the Office of Management and Budget an office to be known as the Office of Federal Procurement Policy (hereinafter referred to as the "Office").

(b) There shall be at the head of the Office an Administrator for Federal Procurement Policy (hereinafter referred to as the "Administrator"), who shall be appointed by the President, by and with the advice and consent of the Senate.

Pub L. 93—400, § 5, Aug 30, 1974, 88 Stat 797.

§ 405. Authority and functions of the Administrator—Development and implementation of procurement policies and program coordination for personnel performance improvement

(a) The Administrator shall provide overall leadership in the development and implementation of procurement policies and the coordination of programs to improve the quality and performance of procurement personnel. The Administrator shall develop for submission under section 407(a) of this Title a uniform procurement system which shall, to the extent he considers appropriate and with due regard to the program activities of the executive agencies, include uniform policies, regulations, procedures, and forms to be followed by executive agencies—

(1) in the procurement of—

(A) property other than real property in being;

(B) services, including research and development; and

(C) construction, alteration, repair, or maintenance of real property; and

(2) in providing for procurement by recipients of Federal grants or assistance of items specified in clauses (1)(A), (1)(B), and (1)(C) of this subsection, to the extent required for performance thereof

(b) Nothing in subsection (a)(2) of this section shall be construed—

(1) to permit the Administrator to authorize procurement or supply support, either directly or indirectly, to recipients of Federal grants or assistance; or

(2) to authorize any action by recipients contrary to State and local laws, in the case of programs to provide Federal grants or assistance to States and political subdivisions.

(c) The Administrator shall develop and propose a central management system consisting of the Office of Management and Budget, the General Services Administration, and procurement offices in executive agencies to implement and enforce the uniform procurement system described in subsection (a) of this section.

(d) The functions of the Administrator shall include—

(1) reviewing the recommendations of the Commission on Government Procurement to determine those recommendations that should be completed, amended, or rejected, and to propose the priority and schedules for completing the remaining recommendations;

(2) developing a system of simplified and uniform procurement policies, regulations, procedures, and forms;

(3) establishing criteria and procedures for an effective and timely method of soliciting the viewpoints of interested parties in the development of procurement policies, regulations, procedures, and forms;

(4) promoting and conducting research in procurement policies, regualtions, procedures, and forms, through the Federal Acquisition Institute, which shall be located within the Office and directed by the Administrator;

(5) establish, through the Federal Procurement Data Center, which shall be located in the General Services Administration and acting as executive agent for the Administrator, a computer-based information system for collecting, developing, and disseminating procurement data which takes into account the needs of the Congress, the executive branch, and the private sector;

(6) recommending and promoting, through the Federal Acquisition Institute, programs of the Office of Personnel Management and executive agencies for recruitment, training, career development, and performance evaluation of procurement personnel;

(7) developing, for inclusion in the uniform procurement system to be submitted under section 407(a) of this title, standard contracts and contract language in order to reduce the Government's cost of procuring goods and services as well as the private sector's cost of doing business with the Government; and

(8) providing leadership and coordination in the formulation of executive branch positions on legislation relating to procurement.

(e) In the development and implementation of the uniform procurement system the Administrator shall consult with the executive agencies affected, including the Small Business Administration and other executive agencies promulgating policies, regulations, procedures and forms affecting procurement. To the extent feasible, the Administrator may designate an executive agency or agencies, establish interagency committees, or otherwise use agency representatives or personnel to solicit the views and the agreement, so far as possible, of executive agencies affected on significant changes in policies, regulations, procedures and forms.

(f) The authority of the Administrator under this chapter shall not be construed to—

(1) impair or interfere with the determination by executive agencies of their need for, or their use of, specific property, services, or construction, including particular specifications thereof; of

(2) interfere with the determination by executive agencies of specific actions in the award or administration of procurement contracts.

(g) Except as otherwise provided by law, no duties,

functions, or responsibilities, other than those expressly assigned by this chapter, shall be assigned, delegated, or transferred to the Administrator.

Pub L. 93—400, § 6, Aug 30, 1974, 88 Stat 797.

(h)(1) Until the effective date of legislation implementing a uniform procurement system, the Administrator may, with the concurrence of the Director of the Office of Management and Budget, issue policy directives, in accordance with existing law, for the purpose of promoting the development and implementation of the uniform procurement system or for the purpose of promoting the policies set forth in paragraphs (1) through (8) of section 401 of this title. Such policy directives shall be followed by executive agencies.

(2) Any policy directives issued pursuant to paragraph (1) may require executive agencies to issue implementing regulations which shall be in accord with the criteria and standards set forth in such policy directives.

(i) Until the effective date of legislation implementing a uniform procurement system, the Director of the Office of Management and Budget shall deny or rescind the promulgation of any final rule or regulation of any executive agency relating to procurement if the Director determines that such rule or regulation is inconsistent with the policies set forth in paragraphs (1) through (8) of section 401 of this title or is inconsistent with any policy directives issued pursuant to subsection (h) of this section.

(j) Nothing in this chapter shall be construed—

(1) to impair or affect the authorities or responsibilities conferred by the Federal Property and Administrative Services Act of 1949 with respect to the procurement of automatic data processing and telecommunications equipment and services or of real property; or

(2) to limit the current authorities and responsibilities of the Director of the Office of Management and Budget.

§ 405a. Uniform Federal procurement regulations and procedures

The Administrator of the Office of Federal Procurement Policy is authorized and directed, pursuant to the authority conferred by this chapter and subject to the procedures set forth in such chapter, to promulgate a single, simplified, uniform Federal procurement regulation and to establish procedures for insuring compliance with such provisions by all Federal agencies. In formulating such regulations and procedures the Administrator of the Office of Federal Procurement Policy shall, in consultation with the Small Business Administration, conduct analyses of the impact on all business concerns resulting from revised procurement regulations, and incorporate into revised procurement regulations simplified bidding, contract performance, and contract administration procedures for small business concerns.

Pub L. 95—507, Title II, § 222, Oct 24, 1978, 92 Stat 1771.

§ 406. Administrative powers

Upon the request of the Administrator, each executive agency is directed to—

(1) make its services, personnel, and facilities available to the Office to the greatest practicable extent for the performance of functions under this chapter; and

(2) except when prohibited by law, furnish to the Administrator and give him access to all information and records in its possession which the Administrator may determine to be necessary for the performance of the functions of the Office.

Pub L. 93—400, § 7, Aug 30, 1974, 88 Stat 798.

§ 407. Responsiveness to Congress—Annual reports on activities; proposals for uniform procurement system, etc.

a.(1) The Administrator shall keep the Congress and its duly authorized committees fully and currently informed of the major activities of the Office of Federal Procurement Policy, and shall submit a report thereon to the House of Representatives and the Senate annually and at such othe times as may be necessary for this purpose.

(2) At the earliest practicable date, but in no event alter than one year after October 10, 1979, the Administrator shall transmit to the House of Representatives and the Senate his proposal for a uniform procurement system. Such proposal shall include a full description of the proposed system, projected costs and benefits of the system as proposed, and short- and long-term plans for implementation of the system, including schedules for implementation. At the same time, the Administrator shall transmit a report on the recommendations of the Commission on Government Procurement specified in section 405(d)(1) of this title.

(3) At the earliest practicable date, but in no event later than one year after presentation of the proposal described in paragraph (2) of this subsection, the Administrator shall propose to the House of Representatives and the Senate recommended changes in legislation relating to procurement by executive agencies. If the Administrator deems it necessary, these recommendations shall include a proposal for a consolidated statutory base for procurement by executive agencies.

(4) At the earliest practicable date, but in no event later than the submission of the legislative recommendations described in paragraph (3) of this subsection, the Administrator shall present a proposal for a management system described in section 405(c) of this title to implement and enforce the uniform procurement system.

(b) At least 30 days prior to the effective date of any policy prescribed under section 405(h) of this title, the Administrator shall transmit to the Committees on Government Operations of the House of Representatives and of the Senate a detailed report on the proposed policy. Such report shall include—

(1) a full description of the policy;
(2) a summary of the reasons for the issuance of such policy; and
(3) the names and positions of employees of the Office who will be made available, prior to such effective date, for full consultation with such Committees regarding such policy.

(c) In the case of an emergency, the President may waive the notice requirement of subsection (b) of this section by submitting in writing to the Congress his reasons therefor at the earliest practicable date on or before the effective date of any policy.

§ 408. *Applicability of existing laws*

The authority of an executive agency under any other law to prescribe policies, regulations, procedures, and forms for procurement is subject to the authority conferred in section 405 of this title.

Pub L. 93—400, § 9, Aug 30, 1974, 88 Stat 799.

§ 409. Effect on existing regulations

Procurement policies, regulations, procedures, or forms in effect as of October 10, 1979, shall continue in effect, as modified from time to time by the issuing offices on their own initiative or in response to policy directives issued under section 405(h) of this title until repealed, amended, or superseded pursuant to the adoption of the uniform procurement system described in section 405 of this title.

§410. Authorization of appropriations

There are authorized to be appropriated to carry out the provisions of this chapter, and for no other purpose, $4,000,000 for the fiscal year ending September 30, 1980, and for each of the three succeeding fiscal years; and one-third of the funds appropriated for any such fiscal year shall be made available to the Federal Acquisition Institute for the performance of its functions under this chapter. Any subsequent legislation to authorize appropriations to carry out the purposes of this chapter shall be referred in the Senate to the Committee on Governmental Affairs.

§ 411. Delegation of authority by Administrator

(a) The Administrator may delegate, and authorize successive redelegations of, any authority, function, or power under this chapter, other than his basic authority to provide overall leadership in the development of Federal procurement policy, to any other executive agency with the consent of such agency or at the direction of the President.

(b) The Administrator may make and authorize such delegations within the Office as he determines to be necessary to carry out the provisions of this chapter.

§ 412. *Comptroller General's access to information* from Administrator; rule making procedure

(a) The Administrator and personnel in his Office shall furnish such information as the Comptroller General may require for the discharge of his responsibilities. For this purose, the Comptroller General or his representatives shall have access to all books, documents, papers, and records of the Office.

(b) The Administrator shall, by regualtion, require that formal meetings of the Office, as designated by him, for the purpose of developing procurement policies and regualtions shall be open to the public, and that public notice of each such meeting shall be given not less than ten days prior thereto.

NOTE: Sections 401, 403, 405, 406, and 409 to 412 of this Title are as amended by PL 96-83, the Office of Federal Procurement Policy Act Amendments of 1979.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

2472. (a) There is hereby established the National Aeronautics and Space Administration (hereinafter called the "Administration"). The Administration shall be headed by an Administrator who shall be appointed from civilian life by the President by and with the advice and consent of the Senate. Under the supervision and direction of the President, the Administrator shall be responsible for the exercise of all powers and the discharge of all duties of the Administration, and shall have authority and control of all personnel and activities thereof.

DEPUTY ADMINISTRATOR: APPOINTMENT AND DUTIES

(b) There shall be in the Administration a Deputy Administrator, who shall be appointed from civilian life by the President by and with the advice and consent of the Senate and shall perform such duties and exercise such powers as the Administrator may prescribe. The Deputy Administrator shall act for, and exercise the powers of, the Administrator during his absence or disability.

RESTRICTION ON ENGAGING IN ANY OTHER BUSINESS, VOCATION OR EMPLOYMENT

(c) The Administrator and the Deputy Administrator shall not engage in any other business, vocation, or employment while serving as such. (P.L. 88-426, Aug. 14, 1964, 78 Stat. 423; 42 U.S.C. 2472)

FUNCTIONS OF THE ADMINISTRATION

2473. (a) The Administration, in order to carry out the purpose of this chapter, shall--

(1) plan, direct, and conduct aeronautical and space activities,

(2) arrange for participation by the scientific community in planning scientific measurements and observations to be made through use of aeronautical and space vehicles, and conduct or arrange for the conduct of such measurements and observations, and

(3) provide for the widest practicable and appropriate dissemination of information concerning its activities and the results thereof.

(b) (1) The administration shall, to the extent of appropriated funds, initiate, support, and carry out such research, development, demonstration, and other related activities in ground propulsion technologies as are provided for in sections 4 through 10 of the Electric and Hybrid Vehicle Research, Development, and Demonstration Act of 1976.

(2) The Administration shall initiate, support, and carry out such research, development, demonstrations, and other related activities in solar heating and cooling technologies (to the extent that funds are appropriated therefor) as are provided for in sections 5, 6, and 9 of the Solar Heating and Cooling Demonstration Act of 1974.

(c) In the performance of its functions the Administration is authorized--

(1) to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of its operations and the exercise of the powers vested in it by law;

(2) to appoint and fix the compensation of such officers and employees as may be necessary to carry out such functions. Such officers and employees shall be appointed in accordance with the civil service laws and their compensation fixed in accordance with the Classification Act of 1949, except that (A) to the extent the Administrator deems such action necessary to the discharge of his responsibilities, he may appoint not more than four hundred and twenty-five of the scientific, engineering, and administrative personnel of the Administration without regard to such laws, and may fix the compensation of such personnel not in excess of the highest rate of grade 18 of the General Schedule of the Classification Act of 1949, as amended, and (B) to the extent the Administrator deems such action necessary to recruit specially qualified scientific and engineering talent, he may establish the entrance grade for scientific and engineering personnel without previous service in the Federal Government at a level up to two grades higher than the grade provided for such personnel under the General Schedule established by the Classification Act of 1949, and fix their compensation accordingly;

(3) to acquire (by purchase, lease, condemnation, or otherwise), construct, improve, repair, operate, and maintain laboratories, research and testing sites and facilities, aeronautical and space vehicles, quarters and related accommodations for employees and dependents of employees of the Administration, and such other real and personal property (including patents), or any interest therein, as the Administration deems necessary within and outside of the continental United States; to acquire by lease or otherwise, through the Administrator of General Services, buildings or parts of buildings in the District of Columbia for the use of the Administration for a period not to exceed ten years without regard to the Act of March 3, 1877 (40 U.S.C. 34); to lease to others such real and personal property; to sell and otherwise dispose of real and personal property (including patents and rights thereunder) in accordance with the provisions of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 471 et seq.); and to provide by contract or otherwise for cafeterias and other necessary facilities for the welfare of employees of the Administration at its installations and purchase and maintain equipment therefor;

(4) to accept unconditional gifts or donations of services, money, or property, real, personal, or mixed; tangible or intangible;

(5) without regard to section 3648 of the Revised Statutes, as amended (31 U.S.C. 529), to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate, with any agency or instrumentality of the United States, or with any State, Territory, or possession, or with any political subdivision thereof, or with any person, firm, association, corporation, or educational institution. To the maximum extent practicable and consistent with the accomplishment of the purpose of

this Act, such contracts, leases, agreements, and other transactions shall be allocated by the Administrator in a manner which will enable small-business concerns to participate equitably and proportionately in the conduct of the work of the Administration.

(6) to use, with their consent, the services, equipment, personnel, and facilities of Federal and other agencies with or without reimbursement, and on a similar basis to cooperate with other public and private agencies and instrumentalities in the use of services, equipment, and facilities. Each department and agency of the Federal Government shall cooperate fully with the Administration in making its services, equipment, personnel, and facilities available to the Administration, and any such department or agency is authorized, notwithstanding any other provision of law, to transfer to or to receive from the Administration, without reimbursement, aeronautical and space vehicles, and supplies and equipment other than administrative supplies or equipment;

(7) to appoint such advisory committees as may be appropriate for purposes of consultation and advice to the Administration in the performance of its functions;

(8) to establish within the Administration such offices and procedures as may be appropriate to provide for the greatest possible coordination of its activities under this Act with related scientific and other activities being carried on by other public and private agencies and organizations;

(9) to obtain services as authorized by section 3109 of Title 5, United States Code, but at rates for individuals not to exceed the per diem rate equivalent to the rate for GS-18;

(10) when determined by the Administrator to be necessary, and subject to such security investigations as he may determine to be appropriate, to employ aliens without regard to statutory provisions prohibiting payment of compensation to aliens;

(11) to provide by concession, without regard to section 321 of the Act of June 30, 1932 (47 Stat. 412; 40 U.S.C 303b), on such terms as the Administrator may deem to be appropriate and to be necessary to protect the concessioner against loss of his investment in property (but not anticipated profits) resulting from the Administration's discretionary acts and decisions, for the construction, maintenance, and operation of all manner of facilities and equipment for visitors to the several installations of the Administration and in connection therewith, to provide services incident to the dissemination of information concerning its activities to such visitors, without charge or with a reasonable charge therefor (with this authority being in addition to any other authority which the Administration may have to provide facilities, equipment, and services for visitors to its installations). A concession agreement under this paragraph may be negotiated with any qualified proposer following due consideration of all proposals received after reasonable public notice of the intention to contract. The concessioner shall be afforded a reasonable opportunity to make a profit commensurate with the capital invested and the obligations assumed, and the consideration paid by him for the concession shall be based on the probable value of such opportunity and not on maximizing revenue to

the United States. Each concession agreement shall specify the manner in which the concessioner's records are to be maintained and shall provide for access to any such records by the Administration and the Comptroller General of the United States for a period of five years after the close of the business year to which such records relate. A concessioner may be accorded a possessory interest, consisting of all incidents of ownership except legal title (which shall vest in the United States), in any structure, fixture, or improvement he constructs or locates upon land owned by the United States; and, with the approval of the Administration, such possessory interest may be assigned, transferred, encumbered, or relinquished by him, and unless otherwise provided by contract, shall not be extinguished by the expiration or other termination of the concession and may not be taken for public use without just compensation;

(12) with the approval of the President, to enter into cooperative agreements under which members of the Army, Navy, Air Force, and Marine Corps may be detailed by the appropriate Secretary for services in the performance of functions under this Act to the same extent as that to which they might be lawfully assigned in the Department of Defense.

(13) (A) to consider, ascertain, adjust, determine, settle, and pay, on behalf of the United States, in full satisfaction thereof any claim of $5,000 or less against the United States for bodily injury, death, or damage to or loss of real or personal property resulting from the conduct of the Administration's functions as specified in subsection (a) of this section, where such claim is presented to the Administration in writing within two years after the accident or incident out of which the claim arises; and

(B) if the Administration considers that a claim in excess of $5,000 is meritorious and would otherwise be covered by this paragraph, to report the facts and circumstances thereof to the Congress for its consideration. (P.L. 86-20, May 13, 1959, 73 Stat. 21; P.L. 86-481, June 1, 1960, 74 Stat. 153 P.L. 87-367, Oct. 4, 1961; 75 Stat. 791; P.L. 87-584, Aug. 14, 1962, 76 Stat. 384; P.L. 87-793, Oct. 11, 1962, 76 Stat. 864; P.L. 88-426, Aug. 14, 1964, 78 Stat. 429; P.L. 88-448, Aug. 19, 1964, 78 Stat. 495, effective Dec. 1, 1964; P.L. 91-646, Jan. 2, 1971, 84 Stat. 1903; P.L. 93-74, July 23, 1973, 87 Stat. 171; P.L. 93-316, June 22, 1974, 88 Stat. 243; P.L. 93-409, Sept. 3, 1974, 88 Stat. 1069; Sept. 17, 1976; P.L. 94-413, 90 Stat. 1270; Sept. 30, 1978, P.L. 95-401, 92 Stat. 860; 42 U.S. Code 2473.)

CHAPTER TWO

No Statutes

CHAPTER THREE

TITLE 10

Chapter 131, Planning and Coordination

Sec. 2202, *Obligation of Funds: Limitation*

Notwithstanding any other provision of law, an officer or agency of the Department of Defense may obligate funds for procuring, producing, warehousing, or distributing supplies, or for related functions of supply management, only under regulations prescribed by the Secretary of Defense. The purpose of this section is to achieve the efficient, economical, and practical operation of an integrated supply system to meet the needs of the military departments without duplicate or overlapping operations or functions. Aug. 10, 1956, ch. 1041, 70A Stat. 120.

ARMED SERVICES PROCUREMENT ACT

Chapter 137 -- Procurement Generally

Sec. 2301. Declaration of Policy

(a) (1) The Congress finds that in order to ensure national defense preparedness, to conserve fiscal resources, and to enhance defense production capability, it is in the interest of the United States to acquire property and services for the Department of Defense in the most timely, economic, and efficient manner. It is therefore the policy of the Congress that services and property (including weapon systems and associated items) for the Department of Defense be acquired by any kind of contract, other than cost-plus-a-percentage-of-cost contracts, but including multiyear contracts, that will promote the interest of the United States. Further, it is the policy of the Congress that such contracts, when practicable, provide for the purchase of property at times and in quantities that will result in reduced costs to the Government and provide incentives to contractors to improve productivity through investment in capital facilities, equipment, and advanced technology.

(2) It is also the policy of the Congress that contracts for advance procurement of components, parts, and materials necesssary for manufacture or for logistics support of a weapon systems should, if feasible and practicable, be entered into in a manner to achieve economic-lot purchases and more efficient production rates.

(b) It is also the policy of Congress that a fair proportion of the purchases and contracts made under this chapter be placed with small business concerns. (Aug. 10, 1956, ch. 1041, sec. 1, 70A Stat. 127). Dec. 1, 1981, Pub. L. 97-86, 95 Stat. 1118.

Sec. 2301. Definitions

In this chapter--

(1) "Head of an agency" means the Secretary, the Under Secretary, or any Assistant Secretary, of the Army, Navy, or Air Force; the Secretary of the Treasury; or the Administrator of the National Aeronautics and Space Administration.

(2) "Negotiated" means made without formal advertising.

(3) "Formal advertising" means advertising as prescribed by section 2305 of this title. Aug. 10, 1956, c. 1041, sec. 1, 70A Stat. 127, amended July 29, 1958, Pub L 85-568, Title III, sec. 301(b), 72 Stat. 432, Sept 2, 1958, Pub L 85-861, sec. 1 43A, 72 Stat. 1457.

Sec. 2303. Applicability of Chapter

(a) This chapter applies to the purchase, and contract to purchase, by any of the following agencies, for its use or otherwise, of all property names in subsection (b), and all services, for which payment is to be made from appropriated funds:

(1) The Department of the Army

(2) The Department of the Navy

(3) The Department of the Air Force

(4) The Coast Guard

(5) The National Aeronautics and Space Administration.

(b) This chapter does not cover land. It covers all other property including --

(1) public works;

(2) buildings;

(3) facilities;

(4) vessels;

(5) floating equipment;

(6) aircraft;

(7) parts;

(8) accessories;

(9) equipment; and

(10) machine tools.

(c) the provisions of this chapter that apply to the procurement of property apply also to contracts for its installation or alternation. Aug. 10, 1956, c. 1041 sec. 1, 70A Stat. 128, amended July 29, 1958, Pub L 85-568, Title III, Sec. 301(b) 72 Stat. 432.

Sec. 2304. Purchase and Contracts: Formal Advertising; Exceptions

(a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising in all cases in which the use of such method is feasible and practicable under the existing conditions and circumstances. If use of such method is not feasible and practicable, the head of an agency, subject to the requirments for determinations and findings in section 2310, may negotiate such a purchase or contract, if--

(1) it is determined that such action is necessary in the public interest during a national emergency declared by Congress or the President;

(2) the public exigency will not permit the delay incident to advertising;

(3) the aggregate amount involved is not more than $25,000;

(4) the purchase or contract is for personal or professional services;

(5) the purchase or contract is for any service by a university, college, or other educational institution;

(6) the purchase or contract is for property or services to be procured and used outside the United States, and the Territories, Commonwealths, and possessions;

(7) the purchase or contract is for medicine or medical supplies;

(8) the purchase or contract is for property for authorized resale;

(9) the purchase or contract is for perishable or nonperishable subsistence supplies;

(10) the purchase or contract is for property or services for which it is impracticable to obtain competition;

(11) the purchase or contract is for property or services that he determines to be for experimental, developmental, or research work, or for making or furnishing property for experiment, test, development or research;

(12) the purchase or contract is for property or services whose procurement he determines should not be publicly disclosed because of their character, ingredients, or components;

(13) the purchase or contract is for equipment that he determines to be technical equipment whose standardization and the interchangeability of whose parts are necessary in the public interest and whose procurement by negotiation is necessary to assure standardization and interchangeability;

(14) the purchase or contract is for technical or special property that he determines to require a substantial initial investment or an extended period of preparation for manufacture, and for which he determines that formal advertising would be likely to result in additional cost to the Government by reason of duplication of investment or would result in duplication of necessary preparation which would unduly delay the procurement of the property;

(15) the purchase or contract is for property or services for which he determines that the bid prices received after formal advertising are unreasonable as to all or part of the requirements, or were not independently reached in open competition, and for which (A) he has notified each responsible bidder of intention to negotiate and given him reasonable opportunity to negotiate; (B) the negotiated price is lower than the lowest rejected bid of any responsible bidder, as determined by the head of the agency; and (C) the negotiated price is the lowest negotiated price offered by any responsible supplier;

(16) he determines that (A) it is in the interest of national defense to have a plant, mine or other facility, or a producer, manufacturer, or

other supplier, available for furnishing property or services in case of a national emergency, or (B) the interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved; or

(17) negotiation of the purchase or contract is otherwise authorized by law.

(b) The data respecting the negotiation of each purchase or contract under clauses (1) and (7) - (17) of subsection (a) shall be kept by the contracting agency for six years after the date of final payment on the contract.

(c) This section does not authorize

(1) the negotiation of a contract to construct or repair any building, road, sidewalk, sewermain, or similar item, unless--

(A) it is made under clauses (1) - (3), (10) - (12), or (15) or subsection (a); or

(B) it is to be performed outside the United States; or

(2) the erection, repair or furnishing of any public building or public improvement.

(d) Whenever the head of the agency determines it to be practicable, such advance relevant considerations shall be given for a period of at least 15 days before making a purchase of or contract for property, or a service, under clause (7) or (8) of subsection (a) involving more than $10,000.

(e) A report shall be made to Congress, on May 19 and November 19 of each year, of the purchases and contracts made under clauses (11) and (16) of subsection (a) during the period since the date of the last report. The report shall--

(1) name each contractor;

(2) state the amount of each contract; and

(3) describe, with consideration of the national security, the property and services covered by each contract.

(f) For the purposes of the following laws, purchases or contracts negotiated under this section shall be treated as if they were made with formal advertising:

(1) Sections 35-45 of title 41.

(2) Sections 276a-276a-5 of title 40.

(3) Sections 324 and 325a of title 40.

Aug. 10, 1956, c. 1041, sec. 1, 70A Stat. 128, amended Aug. 28, 1958, Pub. L. 85-800 sec. 8, 72 Stat. 967; Sept 2, 1958, Pub. L. 85-861, sec. 33(a)(12), 72 Stat. 1565.

(g) In all negotiated procurements in excess of $25,000 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered: that the requirements of this subsection with respect to written or oral discussions need not be applied to procurements in implementation of authorized set-aside programs or to procurements where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion would result in fair and reasonable prices and where the request for proposals notifies all offerors of the possiblility that award may be made without discussion.

(b) Except in a case where the Secretary of Defense determines the military requirements necessitate specification of container sizes, no contract for the carriage of Government property in other than Government-owned cargo containers shall require carriage of such property in cargo containers of any stated length, height, or width.

Sec. 2305. Formal Advertisements for Bids; Time; Opening; Award; Rejection

(a) Whenever formal advertising is required under section 2304 of this title, the advertisement shall be made a sufficient time before the purchase or contract. The specifications and invitations for bids shall permit such free and full competition as is consistent with the procurement of the property and services needed by the agency concerned.

(b) The specifications in invitations for bids must contain the necessary language and attachments, and must be sufficiently descriptive in language and attachments, to permit full and free competition. If the specifications in an invitation for bids do not carry the necessary descriptive language and attachments, or if those attachments are not accessible to all competent and reliable bidders, the invitation is invalid and no award may be made.

(c) Bids shall be opened publicly at the time and place stated in the advertisement. Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered. However, all bids may be rejected if the head of the agency determines that rejection is in the public interest.

(d) If the head of the agency considers that any bid received after formal advertising evidences a violation of the antitrust laws, he shall refer the bid to the Attorney General for appropriate action. Aug. 10, 1956, c. 1041, sec. 1 70A Stat. 130, amended Sept. 2, 1958, Pub. L. 85-861, sec. 1(44), 72 Stat. 1457.

Sec. 2306. Kinds of Contracts.

(a) The cost-plus-a-percentage-of-cost system of contracting may not be used. Subject to this limitation and subject to subsections (b)-(f), the head of an agency may, in negotiating contracts under section 2304 of this title, make any kind of contract that he considers will promote the best interests of the United States.

(b) Each contract negotiated under section 2304 of this title shall contain a warranty, determined to be suitable by the head of the agency, that the contractor has employed or retained no person or selling agency to solicit or obtain the contract under an understanding or agreement for a commission, percentage, brokerage, or contingent fee, except a bona fide employee or established commercial or selling agency maintained by him to obtain business. If a contractor breaks such a warranty the United States may annul the contract without liability or may deduct the commission, percentage, brokerage, or contingent fee from the contract price or consideration.

(c) No cost contract, cost-plus-a-fixed-fee contract, or incentive contract may be made under section 2304 of this title, unless the head of the agency determines that such a contract is likely to be less costly to the United States than any other kind of contract or that it is impracticable to obtain property or services of the kind or quality required except under such a contract.

(d) The fee for performing a cost-plus-a-fixed-fee contract for experimental, developmental, or research work may not be more than 15 percent of the estimated cost of the contract, not including the fee. The fee for performing a cost-plus-a-fixed-fee contract for architectural or engineering services for a public work or utility plus the cost of those services to the contractor may not be more than 6 percent of the estimated cost of that work or project, not including fees. The fee for performing any other cost-plus-a-fixed-fee contract may not be more than 10 percent of the estimated cost of the contract, not including the fee. Determinations under this subsection of the estimated costs of a contract or project shall be made by the head of the agency at the time the contract is made.

(e) Each cost contract and each cost-plus-a-fixed-fee contract shall provide for notice to the agency by the contractor before the making, under the prime contract, of--

(1) a cost-plus-a-fixed-fee subcontract; or

(2) a fixed-price subcontract or purchase order involving more than $25,000 or 5 percent of the estimated cost of the prime contract.

(f) (1) A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of his knowledge and belief, the cost or pricing data he submitted was accurate, complete and current--

(A) prior to the award of any negotiated prime contract under this title where the price is expected to exceed $500,000;

(B) prior to the pricing of any contract change or modification for which the price adjustment is expected to exceed $500,000, or such lesser amount as may be prescribed by the head of the agency;

(C) prior to the award of a subcontract at any tier, where the prime contractor and each higher tier subcontractor have been required to furnish such a certificate, if the price of such subcontract is expected to exceed $500,000; or

(D) prior to the pricing of any contract change or modification to a subcontract covered by clause (C), for which the price adjustment is expected to exceed $500,000, or such lesser amount as may be prescribed by the head of the agency.

(2) Any prime contract or change or modification thereto under which such certificate is required shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the head of the agency that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the negotiated price as is practicable), was inaccurate, incomplete, or noncurrent: Provided, That the requirements of this subsection need not be applied to contracts or subcontracts where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases, where the head of the agency determines that the requirements of this subsection may be waived and states in writing his reasons for such determination.

(3) For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this subsection, any authorized representative of the head of the agency who is an employee of the United States Government shall have the right, until the expiration of three years after final payment under the contract or subcontract, to examine all books, records, documents, and other data of the contractor or subcontractor related to the negotiation, pricing, or performance of the contract or subcontract.

(g) (1) The head of an agency may enter into contracts for periods of not more than five years for the following types of services (and items of supply related to such services) for which funds would otherwise be available for obligation only within the fiscal year for which appropriated--

(A) operation, maintenance and support of facilities and installations;

(B) maintenance or modification of aircraft, ships, vehicles, and other highly complex military equipment;

(C) specialized training necessitating high quality instructor skills (for example, pilot and other aircrew members; foreign language training); and

(D) base services (for example, ground maintenance; in-plane refueling; bus transportation; refuse collection and disposal);

whenever he finds that--

(i) there will be a continuing requirement for the services consonant with current plans for the proposed contract period;

(ii) the furnishing of such services will require a substantial initial investment in plant or equipment, or the incurrence of substantial contingent liabilities for the assembly, training, or transportation of a specialized work force; and

(iii) the use of such a contract will promote the best interests of the United States by encouraging effective competition and promoting economies in operation.

(2) In entering into such contracts, the head of the agency shall be guided by the following principles:

(A) The portion of the cost of any plant or equipment amortized as a cost of contract performance should not exceed the ratio between the period of contract performance and the anticipated useful commercial life of such plant or equipment. Useful commercial life, for this purpose, means the commercial utility of the facilities rather than the physical life thereof, with due consideration given to such factors as location of facilities, specialized nature thereof, and obsolescence.

(B) Consideration shall be given to the desirability of obtaining an option to renew the contract for a reasonable period not to exceed three years, at prices not to include charges for plant, equipment and other nonrecurring costs, already amortized.

(C) Consideration shall be given to the desirability of reserving in the agency the right, upon payment of the unamortized portion of the cost of the plant or equipment, to take title thereto under appropriate circumstances.

(3) In the event funds are not made available for the continuation of such a contract into a subsequent fiscal year, the contract shall be canceled or terminated, and the costs of cancellation or termination may be paid from--

(A) appropriations originally available for the performance of the contract concerned;

(B) appropriations currently available for procurement of the type of services concerned, and not otherwise obligated; or

(C) funds appropriated for those payments.

(h) (1) To the extent that funds are otherwise available for obligation, the head of an agency may make multiyear contracts (other than contracts described in paragraph (6)) for the purchase of property,

including weapon systems and items and services associated with weapon systems (or the logistics support thereof), whenever he finds--

(A) that the use of such a contract will promote the national security of the United States and will result in reduced total costs under the contract;

(B) that the minimum need for the property to be purchased is expected to remain substantially unchanged during the contemplated contract period in terms of production rate, procurement rate, and total quantities;

(C) that there is a reasonable expectation that throughout the comtemplated contract period the Department of Defense will request funding for the contract at the level required to avoid contract cancellation;

(D) that there is a stable design for the property to be acquired and that the technical risks associated with such property are not excessive; and

(E) that the estimates of both the cost of the contract and the anticipated cost avoidance through the use of a multiyear contract are realistic.

(2) (A) The Secretary of Defense shall prescribe defense acquisition regulations to promote the use of multiyear contracting as authorized by paragraph (1) in a manner that will allow the most efficient use of multiyear contracting.

(B) Such regulations may provide for cancellation provisions in such multiyear contracts to the extent that such provisions are necessary and in the best interests of the United States. Such cancellation provisions may include consideration of both recurring and nonrecurring costs of the contractor associated with the production of the items to be delivered under the contract.

(C) In order to broaden the defense industrial base, such regulations shall provide that, to the extent practicable--

(i) multiyear contracting under paragraph (1) shall be used in such a manner as to seek, retain, and promote the use under such contracts of companies that are subcontractors, vendors, or suppliers; and

(ii) upon accrual of any payment or other benefit under such a multiyear contract to any subcontractor, vendor, or supplier company participating in such contract, such payment or benefit shall be delivered to such company in the most expeditious manner practicable.

(D) Such regulations shall also provide that, to the extent practicable, the administration of this subsection, and of the regulations prescribed under this subsection, shall not be carried out in a manner to preclude or curtail the existing ability of agencies in the Department of Defense to--

(i) provide for competition in the production of items to be delivered under such a contract; or

(ii) to provide for termination of a prime contract the performance of which is deficient with respect to cost, quality, or schedule.

(3) Before any contract described in paragraph (1) that contains a clause setting forth a cancellation ceiling in excess of $100,000,000 may be awarded, the head of the agency concerned shall give written notification of the proposed contract and of the proposed cancellation ceiling for that contract to the Committees on Armed Services and on Appropriations of the Senate and House of Representatives, and such contract may not then be awarded until the end of a period of 30 days beginning on the date of such notification.

(4) Contracts made under this subsection may be used for the advance procurement of components, parts, and materials necessary to the manufacture of a weapon system, and contracts may be made under this subsection for such advance procurement, if feasible and practical, in order to achieve economic-lot purchases and more efficient production rates.

(5) In the event funds are not made available for the continuation of a contract made under this subsection into a subsequent fiscal year, the contract shall be canceled or terminated, and the costs of cancellation or termination may be paid from--

(A) appropriations originally available for the performance of the contract concerned;

(B) appropriations currently available for procurement of the type of property concerned, and not otherwise obligated; or

(C) funds appropriated for those payments.

(6) This subsection does not apply to contracts for the construction, alteration, or major repair of improvements to real property or contracts for the purchase of property to which section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759) applies.

(7) This subsection does not apply to the Coast Guard or the National Aeronautics and Space Administration.

(8) For the purposes of this subsection, a multiyear contract is a contract for the purchase of property or services for more than one, but not more than five, program years. Such a contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds and (if it does so provide) may provide for a cancellation payment to be made to the contractor if such appropriations are not made. (Sept. 10, 1962, P. L. 87-653, 76 Stat. 528; July 5, 1968, P. L. 90-378, 82 Stat. 289; Sept. 25, 1968, P. L. 90-512, 82 Stat. 863; Dec. 12, 1980, P. L. 96-513, 94 Stat. 2927; P. L. 97-86, Dec. 1, 1981, 95 Stat. 1117.)

Sec. 2307. Advance Payments

(a) The head of any agency may--

(1) make advance, partial, progress, or other payments under contracts for property or services made by the agency; and

(2) insert in bid solicitations for procurement of property or services a provision limiting to small business concerns advance or progress payments.

(b) Payments made under subsection (a) may not exceed the unpaid contract price.

(c) Advance payments made under subsection (a) may be made only if the contractor gives adequate security and after a determination by the head of the agency that to do so should be in the public interest. Such security may be in the form of a lien in favor of the United States on the property contracted for, on the balance of an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien is paramount to any other liens. Aug. 10, 1956, C. 1041, Sec. 1, 70A Stat. 131, amended Aug. 28, 1958, Publ. L. 85-800, sec. 9, 72 Stat. 967.

(d) Payments under subsection (a) in the case of any contract, other than partial, progress, or other payments specifically provided for in such contract at the time such contract was initially entered into, may not exceed $25,000,000 unless the Committees on Armed Services of the Senate and the House of Representatives have been notified in writing of such proposed payments and 60 days of continuous session of Congress have expired following the date on which such notice was transmitted to such Committees and neither House of Congress has adopted, within such 60-day period, a resolution disapproving such payments. For purposes of this section, the continuity of a session of Congress is broken only by an adjournment of the Congress, sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of such 60-day period. (P.L. 85-800, Aug. 28, 1958, 72 Stat. 967; P.L. 93-155, Nov. 16, 1973, 87 Stat. 616)

Sec. 2308. Assignment and Delegation of Procurement Functions and Responsibilities

Subject to section 2311 of this title, to facilitate the procurement of property and services covered by this chapter by each agency named in section 2303 of this title for any other agency, and to facilitate joint procurement by those agencies--

(a) the head of an agency may, within his agency, delegate functions and assign responsibilities relating to procurement;

(b) the heads of two or more agencies may by agreement delegate procurement functions and assign procurement responsibilties from one agency to another of those agencies, or to an officer or civilian employee of another of those agencies; and

(c) the heads of two or more agencies may create joint or combined offices to exercise procurement functions and responsibilities. (Aug. 10, 1956, ch. 1041, sec. 1, 70A Stat. 131.)

Sec. 2309. Allocation of Appropriations

(a) Appropriations available for procurement by an agency named in section 2303 of this title may, through administrative allotment, be made available for obligation for procurement by any other agency in amounts authorized by the head of the allotting agency and without transfer of funds on the books of the Department of the Treasury.

(b) A disbusing officer of the alloting agency may make any disbursement chargeable to an allotment under subsection (a) upon a voucher certified by an officer or civilian employee of the procuring agency. (Aug. 10, 1956, ch. 1041, sec. 1, 70A Stat. 132.)

Sec. 2310. Determinations and Decisions

(a) Determinations and decisions required to be made under this chapter by the head of an agency may be made for an individual purchase or contract or for a class of purchases or contracts. Such determination or decision is final.

(b) Each determination or decision under clauses (11)(16) of section 2304(a), section 2306(c) section 2306(g)(1), section 2307 (c), or section 2313(c) of this title and a decision to negotiate contracts under clauses (2), (7), (8), (10), (12), or for property or supplies under clause (11) or section 2304(a), shall be based on a written finding by the person making the determination or decision, which finding shall set out facts and circumstances that (1) are clearly illustrative of the conditions described in clauses (11)(16) of section 2304(a), (2) clearly indicate why the type of contract selected under section 2306(c) is likely to be less costly than any other type or that it is impracticable to obtain property or services of the kind or quality required except under such a contract, (3) support the findings required by section 2306(g)(1), (4) clearly indicate why advance payments under section 2307(c) would be in the public interest, (5) clearly indicate why the application of section 2313(b) to a contract or subcontract with a foreign contractor or foreign subcontractor would not be in the public interest, or (6) clearly and convincingly establish with respect to the use of clauses (2), (7), (8), (10), (12), and for property or supplies under clause (11) of section 2304(a), that formal advertising would have been feasible and practicable. Such a finding is final and shall be kept available in the agency for at least six years after the date of the determination or decision. A copy of the findings shall be submitted to the General Accounting Office with each contract to which it applies.

As amended Sept. 10, 1962, Pub. L. 87-653, 1(f), 76 Stat. 529; Sept. 27, 1966, Pub. L. 89-607, 1(1), 80 Stat. 850; July 5, 1968, Pub. L. 90-378, 2 82 Stat. 290.

Sec. 2311. Delegation

The head of an agency may delegate, subject to his direction, to any other officer or official of that agency, any power under this chapter except the power to make determinations and decisions under clauses (11)-(16) of section 2304(a) of this title. However, the power to make a determination or decision under section 2304(a)(11) of the title may be

delegated to any other officer or official of the agency who is responsible for procurement, and only for contracts requiring the expenditure of not more than $5,000,000.

As amended Sept. 20, 1963, Pub. L. 87-653 1(g), 76 Stat. 529; July 5, 1968, Pub. L. 90-378, 3, 82 Stat. 290, Pub. L. 97-86, Dec. 1, 1981.

Sec. 2312. Remission of Liquidated Damages

Upon the recommendation of the head of any agency, the Comptroller General may remit all or part, as he considers just and equitable, of any liquidated damages accessed for delay in performing a contract, made by that agency, that provides for such damages. (Aug. 10, 1956, ch. 1041, sec. 1, 70A Stat. 132.)

Sec. 2313. Examination of Books and Records of Contractor

(a) An agency named in section 2303 of this title is entitled, through an authorized representative, to inspect the plant and audit the books and records of--

(1) A contractor performing a cost or cost-plus-a-fixed-fee contract made by that agency under this chapter; and

(2) a subcontractor performing any subcontract under a cost or cost-plus-a-fixed-fee contract made by that agency under this chapter.

(b) Except as provided in subsection (c), each contract negotiated under this chapter shall provide that the Comptroller General and his representatives are entitled, until the expiration of three years after final payment, to examine any books, documents, papers, or records of the contractor, or any of his subcontractor, that directly pertain to, and involve transactions relating to, the contract or subcontract.

(c) Subsection (b) does not apply to a contract or subcontract with a foreign contractor or foreign subcontractor if the head of the agency determines, with the concurrence of the Comptroller General or his designee, that the application of that subsection to the contract or subcontract would not be in the public interest. However, the concurrence of the Comptroller General or his designee is not required--

(1) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its books, documents, papers, or records available for examination; and

(2) where the head of the agency determines, after taking into account the price and availability of the property or services from United States sources, that the public interest would be best served by not applying subsection (b).

If subsection (b) is not applied to a contract or subcontract based on a determination under clause (2), a written report shall be furnished to the Congress. As amended Sept. 27, 1966, Pub. L. 89-607, 1(2), 80 Stat. 850.

Section 2314. Laws Inapplicable to Agencies Named in Section 2303 of This Title

Sections 3709 and 3735 of the Revised Statues (41 U.S.C. 5 and 13) do not apply to the procurement of property or services by the agencies named in section 2303 of this title. (Aug 10, 1956, ch. 1041, sec. 1, 70A Stat. 133.) (P.L. 96-513, Dec. 12, 1980)

Section 2315. Law Inapplicable to the Procurement of Automatic Data Processing Equipment and Services for Certain Defense Purposes

(a) Section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 795) is not applicable to the procurement by the Department of Defense of automatic data processing equipment or services if the function, operation, or use of the equipment or services--

(1) involves intelligence activities;

(2) involves cryptologic activities related to national security;

(3) involves the command and control of military forces;

(4) involves equipment that is an integral part of a weapon or weapons system; or

(5) subject to subsection (b), is critical to the direct fulfillment of military or intelligence missions.

(b) Subsection (a)(5) does not include procurement of automated data processing equipment or services to be used for routine administrative and business applications (including payroll, finance, logistics, and personnel management applications). (Pub. L. 97-86, Dec. 1, 1981.)

FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949

40 U.S.C. 471, et seq. (abridged)

Act of June 30, 1949, 63 Stat. 378, P.L. 152, effective July 1, 1949, as amended. An Act to simplify the procurement, utilization, and disposal of Government property, to reorganize certain agencies of the Government, and for other purposes.

Short Title (Sec. 1). This Act may be cited as the "Federal Property and Administrative Services Act of 1949."

DECLARATION OF POLICY

Sec. 2. It is the intent of the Congress in enacting this legislation to provide for the Government an economical and efficient system for--

(a) the procurement and supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, issue, specifications, property identification and classification, transportation and traffic management, establishment of pools or systems for transportation of Government personnel and property by motor vehicle within specific areas, management of public utility services, repairing and converting, establishment of inventory levels, establishment of forms and procedures, and representation before Federal and State regulatory bodies;

(b) the utilization of available property;

(c) the disposal of surplus property; and

(d) records management (P.L. 766, Sept. 1, 1954, 68 Stat. 1126; 40 U.S. Code 471.)

DEFINITIONS

Sec. 3 As used in titles I through VI of this Act--

(a) The term "executive agency" means any executive department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation.

(b) The term "Federal agency" means any executive agency or any establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction).

(c) The term "Administrator" means the Administrator of General Services provided for in Title I hereof.

(d) The term "property" means any interest in property except (1) the public domain; lands reserved or dedicated for national park purposes; minerals in lands and portions of lands so withdrawn or reserved which the Secretary of the Interior, with the concurrence of the Administrator, determines are not suitable for return to the public domain for disposition under

the general public-land laws because such lands are substantially changed in character by improvements or otherwise; (2) naval vessels of the following categories: battleships, cruisers, aircraft carriers, destroyers, and submarines; and (3) records of the Federal Government.

(e) The term "excess property" means any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof.

(f) The term "foreign excess property" means any excess property located outside the States of the Union, the District of Columbia, Puerto Rico, American Samoa, Guam, the Trust Territory of the Pacific Islands, and the Virgin Islands.

(g) The term "surplus property" means any excess property not required for the needs and discharge of the responsibilities of all Federal agencies, as determined by the Administrator.

(h) the term "care and handling" includes completing, repairing, converting, rehabilitation, operating, preserving, protecting, insuring, packing, storing, handling, conserving, and transporting excess and surplus property, and in the case of property which is dangerous to public health or safety, destroying or rendering innocuous such property.

(i) The term "person" includes any corporation, partnership, firm, association, trust, estate, or other entity.

(j) the term "nonpersonal services" means such contractual services, other than personal and professional services, as the Administrator shall designate.

(k) The term "contractor inventory" means (1) any property acquired by and in the possession of a contractor or subcontractor under a contract pursuant to the terms of which title is vested in the Government, and in excess of the amounts needed to complete full performance under the entire contract; and (2) any property which the Government is obligated or has the option to take over under any type of contract as a result either of any changes in the specifications or plans thereunder or of the termination of such contract (or subcontract thereunder), prior to completion of the work, for the convenience or at the option of the Government.

(l) The term "motor-vehicle" means any vehicle, self-propelled or drawn by mechanical power, designed and operated principally for highway transportation of property or passengers, exclusive of any vehicle designed or used for military field training, combat, or tactical purposes, or used principally within the confines of a regularly established military post, camp, or depot, and any vehicle regularly used by an agency in the performance of investigative, law enforcement, or intelligence duties if the head of such agency determines the exclusive control of such vehicle is essential to the effective performance of such duties. (P.L. 754, Septembe 5, 1950, 64 Stat. 590; P.L. 522, July 12, 1952, 66 Stat. 593, P.L. 766, September 1, 1954, 68 Stat. 1129; P.L. 388, August 12, 1955, 69 Stat. 722; P.L. 85-337, February 28, 1958, 72 Stat. 29; P.L. 86-70, June 25, 1959, 73 Stat. 148; P.L. 86-624, July 12, 1960, 74 Stat. 418; P.L. 93-594, January 2, 1975, 88 Stat. 1926; 40 U.S. Code 472.)

TITLE 1 - ORGANIZATION

General Services Administration

Sec. 101. (a) There is hereby established an agency in the executive branch of the Government which shall be known as the General Services Administration.

(b) There shall be at the head of the General Services Administration an Administrator of General Services who shall be appointed by the President by and with the advice and consent of the Senate, and perform his functions subject to the direction and control of the President.

(c) There shall be in the General Services Administration a Deputy Administrator of General Services who shall be appointed by the Administrator of General Services. The Deputy Administrator shall perform such functions as the Administrator shall designate and shall be Acting Administrator of General Services during the absence or disability of the Administrator and, unless the President shall designate another officer of the Government, in the event of a vacancy in the office of Administrator. (40 U.S. Code 751).

General Supply Fund

Sec. 109. (a) There is authorized to be set aside in the Treasury a special fund which shall be known as the General Supply Fund. Such fund shall be composed of the assets of the general supply fund (including any surplus therein) created by section 3 of the Act of February 27, 1929 (45 Stat. 1342; 41 U.S.C. 7c), and transferred to the Administrator by section 102 of this Act such sums as may be appropriated thereto, and the value, as determined by the Administrator, of inventories of personal property from time to time transferred to the Administrator by other executive agencies under authority of section 201(a)(2) to the extent that payment is not made or credit allowed therefor, and the fund shall assume all of the liabilities, obligations, and commitments of the general supply fund created by such Act of February 27, 1929. The General Supply Fund shall be available for use by or under the direction and control of the Administrator (1) for procuring personal property (including the purchase from or through the Public Printer, for warehouse issue, of standard forms, blankbook work, standard specifications, and other printed material in common use by Federal agencies not available through the Superintendent of Documents) and nonpersonal services for the use of Federal agencies in the proper discharge of their responsibilities, and (2) for paying the purchase price, transportation of supplies and services, and the cost of personal services employed directly in the repair, rehabilitation, and conversion of personal property.

Payments of Requisitioning Agencies

(b) Payment by requisition agencies shall be at prices fixed by the Administrator. Such prices shall be fixed at levels so as to recover so far as practicable the applicable purchase price, the transportation cost, inventory losses, the cost of personal services employed directly in the repair, rehabilitation, and conversion of personal property, and the cost of amortization, and repair of equipment utilized for lease or rent to executive agencies. Requisitioning agencies shall pay by advance of funds in all cases where it is determined by the Administrator that there is insufficient capital otherwise available in the General Supply Fund. Advances of funds may also by made by agreement between the requisitioning agencies and the Administrator. Where an advance of funds is not made, the General Services Administration shall be reimbursed promptly out of funds of the requisitioning agency in accordance with accounting procedures approved by the Comptroller General: Provided, That in any case where payment shall not have been made by the requisitioning agency within forty-five days after the date of billing by the Administrator or the date on which an actual liability for supplies or services is incurred by the Administrator, whichever is the later, reimbursement may be obtained by the Administrator by the issuance of transfer and counterwarrants, or other lawful transfer documents supported by itemized invoices.

Credits to Fund

(c) The General Supply Fund shall be credited with all reimbursments, advances of funds, and refunds or recovering relating to personal property or services procured through the fund, including the net proceeds of disposal of surplus supplies procured through the fund and receipts from carriers and others for loss of, or damage to, supplies procured through the fund; and the same are reappropriated for the purposes of the fund.

(d) (Repealed August 24, 1962, P.L. 87-600, 76 Stat. 401.)

Annual Audit; Surplus; Report to Congress

(e) (1) As of June 30 of each year, there shall be covered into the United States Treasury as miscellaneous receipts any surplus in the General Supply Fund, all assets, liabilities, and prior losses considered, above the amounts transferred or appropriated to establish and maintain said fund.

(2) The Comptroller General shall make audits of the General Supply Fund in accordance with the provisions of the Accounting and Auditing Act of 1950 and make reports on the results thereof.

Additional Uses of Fund

(f) Subject to the requirements of subsections (a) to (e), inclusive, of this section, the General Supply Fund also may be used for the procurement of personal property and nonpersonal services authorized to be acquired by mixed-ownership Government corporations, or by the municipal government of the District of Columbia, or by a requisitioning non-Federal agency when the function of a Federal agency authorized to procure for it is transferred to the General Services Administration.

Material Tests; Fees; Disposition of Fees

(g) Whenever any producer or vendor shall tender any article or commodity for sale or lease to the General Services Administration or to any procurement authority acting under the direction and control of the Administrator pursuant to this Act, the Administrator is authorized in his discretion, with the consent of such producer or vendor, to cause to be conducted, in such manner as the Administrator shall specify, such tests as he shall prescribe either to determine whether such article or commodity conforms to prescribed specifications and standards; or to aid in the development of contemplated specifications and standards. When the Administrator determines that the making of such tests will serve predominantly the interest of such producer or vendor, he shall charge such producer or vendor a fee which shall be fixed by the Administrator in such amount as will recover the cost of conducting such tests, including all components of such cost, determined in accordance with accepted accounting principles. When the Administrator determines that the making of such tests will not serve predominantly the interest of such producer or vendor, he shall charge such producer or vendor such fee as he shall determine to be reasonable for the furnishing of such testing service. All such fees collected by the Administrator may be deposited in the General Supply Fund to be used for any purpose authorized by subsection 109(a) of this Act. (P.L.754, September 5, 1950, 64 Stat. 578; P.L. 522, July 12, 1952, 66 Stat. 593; P.L. 86-591, July 5, 1960, 74 Stat. 330; P.L. 87-372, October 4, 1961, 75 Stat. 802; P.L. 87-600, August 24, 1962, 76 Stat. 401; P.L. 93-604, January 2, 1975, 88 Stat. 1963; 40 U.S.C. 756.)

Automatic Data Processing Equipment

Sec. 111. (a) The Administrator is authorized and directed to coordinate and provide for the economic and efficient purchase, lease, and maintenance of automatic data processing equipment by Federal agencies.

Procurement Authority

(b)(1) Automatic data processing equipment suitable for efficient and effective use by Federal agencies shall be provided by the Administrator through purchase, lease, transfer of equipment from other Federal agencies, or otherwise, and the Administrator is authorized and directed to provide by contract or otherwise for the maintenance and repair of such equipment. In carrying out his responsibilities under this section the Administrator is authorized to transfer automatic data processing equipment between Federal agencies, to provide for joint utilization of such equipment by two or more Federal agencies, and to establish and operate equipment pools and data processing centers for the use of two or more such agencies when necessary for its most efficient and effective utilization.

(2) The Administrator may delegate to one or more Federal agencies authority to operate data processing equipment pools and automatic data processing centers, and to lease, purchase, or maintain individual automatic data processing systems or specific units of equipment, including such equipment used in automatic data processing pools and automatic data processing centers, when such action is determined by the Administrator to be necessary for the economy and efficiency of operations, or when such action is essential to national defense or national security. The Administrator may delegate to one or more Federal agencies authority to lease, purchase, or maintain automatic data processing equipment to the extent to which he determines such action to be necessary and desirable to allow for the orderly implementation of a program for the utilization of such equipment.

Establishment of Revolving Fund

(c) There is hereby authorized to be established on the books of the Treasury an automatic data processing fund, which shall be available without fiscal year limitation for expenses, including personal services, other costs, and the procurement by lease, purchase, transfer, or otherwise of equipment, maintenance and repair of such equipment by contract or otherwise, necessary for the efficient coordination, operation, and utilization of such equipment by and for Federal agencies: Provided, That a report of equipment inventory, utilization, and acquisitions, together with an account of receipts, disbursements, and transfers to miscellaneous receipts under this authorization shall be made annually in connection with the budget estimates to the Director of the Office of Management

and Budget and to the Congress, and the inclusion in appropriation acts of provisions regulating the operation of the automatic data processing fund, or limiting the expenditures therefrom, is hereby authorized.

Appropriations to Fund

(d) There are authorized to be appropriated to said fund such sums as may be required which, together with the value, as determined by the Administrator, of supplies and equipment from time to time transferred to the Administrator, shall constitute the capital of the fund: Provided, That said fund shall be credited with (1) advances and reimbursements from available appropriations and funds of any agency (including the General Services Administration), organization, or contractor utilizing such equipment and services rendered them, at rates determined by the Administrator to approximate the costs thereof met by the fund (including depreciation of equipment, provision for accrued leave, and for amortization of installation costs, but excluding, in the determination of rates prior to the fiscal year 1967, such direct operating expenses as may be directly appropriated for, which expenses may be charged to the fund and covered by advances or reimbursements from such direct appropriations) and (2) refunds or recoveries resulting from operations of the fund, including the net proceeds of disposal of excess or surplus personal property and receipts from carriers and others for loss of or damage to property: Provided further, That following the close of each fiscal year any net income, after making provisions for prior year losses, if any, shall be transferred to the Treasury of the United States as miscellaneous receipts.

Nonapplicability of Other Sections

(e) The proviso following paragraph (4) in section 201(a) of this Act and the provisions of section 602(d) of this Act shall have no application in the administration of this section. No other provision of this Act or any other Act which is inconsistent with the provisions of this section shall be applicable in the administration of this section.

Scientific and Technological Advisory Service

(f) The Secretary of Commerce is authorized (1) to provide agencies, and the Administrator of General Services in the exercise of the authority delegated in this section, with scientific and technological advisory services relating to automatic data processing and related systems, and (2) to make appropriate recommendations to the President relating to the establishment of uniform Federal automatic data processing standards. The Secretary of Commerce is authorized to undertake the necessary research in the sciences and technologies of automatic data processing computer and related systems, as may be required under provisions of this subsection.

Limitations on Authority

(a) The authority conferred upon the Administrator and the Secretary of Commerce by this section shall be exercised subject to direction by the President and to fiscal and policy control exercised by the Office of Management and Budget. Authority so conferred upon the Administrator shall not be so construed as to impair or interfere with the determination by agencies of their individual automatic data processing equipment requirements, including the development of specifications for and the selection of the types and configurations of equipment needed. The Administrator shall not interfere with, or attempt to control in any way, the use made of automatic data processing equipment or components thereof by any agency. The Administrator shall provide adequate notice to all agencies and other users concerned with respect to each proposed determination specifically affecting them or the automatic data processing equipment or components used by them. In the absence of mutual agreement between the Administrator and the agency or user concerned, such proposed determinations shall be subject to review and decision by the Office of Management and Budget unless the President otherwise directs. (P.L. 89-306, October 30, 1965, 79 Stat. 1127; 40 U.S. Code 759).

TITLE II — PROPERTY MANAGEMENT

Procurement, Warehousing, and Related Activities

Sec. 201. (a) The Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned—

(1) subject to regulations prescribed by the Administrator for Federal Procurement Policy pursuant to the Office of Federal Procurement Policy Act, prescribe policies and methods of procurement and supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, issue, property identification and classification, transportation and traffic management, management of public utility services, and repairing and converting; and

(2) operate, and after consultation with the executive agencies affected, consolidate, take over, or arrange for the operation by any executive agency

of warehouses, supply centers, repair shops, fuel yards, and other similar facilities; and

(3) procure and supply personal and nonpersonal services for the use of executive agencies in the proper discharge of their responsibilities, and perform functions related to procurement and supply as those mentioned above in subparagraph (1): *Provided*, That contracts for public utility services may be made for periods not exceeding ten years; and

(4) with respect to transportation and other public utility services for the use of executive agencies, represent such agencies in negotiations with carriers and other public utilities and in proceedings involving carriers or other public utilities before Federal and State regulatory bodies; *Provided,* That the Secretary of Defense may from time to time, and unless the President shall otherwise direct, exempt the Department of Defense from action taken or which may be taken by the Administration under clauses (1), (2), (3), and (4) above whenever he determines such exemption to be in the best interests of national security.

(b) The Administrator shall as far as practicable provide any of the services specified in subsection (a) of this section to any other Federal agency, mixed ownership corporation (as defined in the Government Corporation Control Act), or the District of Columbia, upon its request.

(c) In acquiring personal property, any executive agency, under regulations to be prescribed by the Administrator, subject to regulations prescribed by the Administrator for Federal Procurement Policy pursuant to the Office of Federal Procurement Policy Act, may exchange or sell similar items and may apply the exchange allowance or proceeds of sale in such cases in whole or in part payment for the property acquired: *Provided,* That any transaction carried out under the authority of this subsection shall be evidenced in writing.

(d) In conformity with policies prescribed by the Administrator under subsection (a), any executive agency may utilize the services, work, materials, and equipment of any other executive agency, with the consent of such other executive agency, for the inspection of personal property incident of the procurement thereof, and notwithstanding section 3678 of the Revised Statutes (31 U.S.C. 628) or any other provision of law such other executive agency may furnish such services, work, materials, and equipment for that purpose without reimbursement or transfer of funds.

(e) Whenever the head of any executive agency determines that the remaining storage or shelf life of any medical materials or medical supplies held by such agency for national emergency purposes is of too short duration to justify their continued retention for such purposes and that their transfer or disposal would be in the interest of the United States, such material or supplies shall be considered for the purposes of section 483 of this title to be excess property. In accordance with the regulations of the Administrator, such excess materials or supplies may thereupon be transferred to or exchanged with any other Federal agency for other medical materials or supplies. Any proceeds derived from such transfers may be credited to the current applicable appropriation or fund of the transferor agency and shall be available only for the purchase of medical materials or supplies to be held for national emergency purposes. If such materials or supplies are not transferred to or exchanged with any other Federal agency, they shall be disposed of as surplus property. To the greatest extent practicable, the head of the executive agency holding such medical materials or supplies shall make the determination provided for in the first sentence of this subsection at such times as to insure that such medical materials or medical supplies can be transferred or otherwise disposed of in sufficient time to permit their use before their shelf life expires and they are rendered unfit for human use. (P.L. 216, August 10, 1949, 63 Stat. 591; P.L. 754, September 5, 1950, 64 Stat. 591; P.L. 85-781, August 27, 1958, 72 Stat. 936; P.L. 91-426, September 26, 1970, 84 Stat. 883; P.L. 93-400, August 30, 1974, 88 Stat. 796; 40 U.S.C. 481. cent 1 41 M.S.C. 251, et. seq.)

TITLE III — PROCUREMENT PROCEDURE

Declaration of Purpose

Sec. 301. The purpose of this title is to facilitate the procurement of property and services. (P.L. 522, July 12, 1952, 66 Stat. 594; 41 U.S. Code 251.)

Application and Procurement Methods

Sec. 302. (a) Executive agencies shall make purchases and contracts for property and services in accordance with the provisions of this title and implementing regulations of the Administrator; but this title does not apply—

(1) to the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration; or

(2) when this title is made inapplicable pursuant to section 602(d) of this Act or any other law, but when this title is made inapplicable by any such provisions of law sections 3709 and 3710 of the Revised Statutes, as amended (41 U.S.C. 5 and 8), shall be applicable in the absence of authority conferred by statute to procure without advertising or without regard to said section 3709.

(b) It is the declared policy of the Congress that a fair proportion of the total purchases and contracts

for property and services for the Government shall be placed with small-business concerns. Whenever it is proposed to make a contract or purchase in excess of $10,000 by negotiation and without advertising, pursuant to the authority of paragraph (7) or (8) of section 302(c) of this title, suitable advance publicity, as determined by the agency head with due regard to the type of supplies involved and other relevant considerations, shall be given for a period of at least fifteen days, wherever practicable, as determined by the agency head.

(c) All purchases and contracts for property and services shall be made by advertising, as provided in section 303, except that such purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

(2) the public exigency will not admit of the delay incident to advertising;

(3) the aggregate amount involved does not exceed $10,000;

(4) for personal or professional services;

(5) for any service to be rendered by any university, college, or other educational institution;

(6) the property or services are to be procured and used outside the limits of the United States and its possessions;

(7) for medicines or medical property;

(8) for property purchased for authorized resale;

(9) for perishable or nonperishable subsistence supplies;

(10) for property or services for which it is impracticable to secure competition;

(11) the agency head determines that the purchase or contract is for experimental, developmental, or research work, or for the manufacture or furnishing of property for experimentation, development, research, or test.

(12) for property or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;

(13) for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in special situations or in particular localities in order to assure standardization of equipment and interchangeability of parts and that such standardization and interchangeability is necessary in the public interest;

(14) for property or services as to which the agency head determines that bid prices after advertising therefor are not reasonable (either as to all or as to some part of the requirements) or have not been independently arrived at in open competition: *Provided*, That no negotiated purchase or contract may be entered into under this paragraph after the rejection of all or some of the bids received unless (A) notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head to each responsible bidder and (B) the negotiated price is the lowest negotiated price offered by any responsible supplier; or

(15) otherwise authorized by law, except that section 304 shall apply to purchases and contracts made without advertising under this paragraph.

(d) If in the opinion of the agency head bids received after advertising evidence any violation of the antitrust laws he shall refer such bids to the Attorney General for appropriate action.

(e) This section shall not be construed to (A) authorize the erection, repair, or furnishing of any public building improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items to be negotiated without advertising as required by section 303, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraph (1), (2), (3), (10), (11), (12), or (14) of subsection (c) of this section.

(f) No contract for the carriage of Government property in other than Government-owned cargo containers shall require carriage of such property in cargo containers of any stated length, height, or width. (P.L. 522, July 12, 1952, 66 Stat. 594; P.L. 85-800, August 28, 1958, 72 Stat. 966; P.L. 89-343, November 8, 1965, 79 Stat. 1303; P.L. 89-348, November 8, 1965, 79 Stat. 1310; P.L. 90-268, March 16, 1968, 82 Stat. 50; P.L. 93-356, July 25, 1974, 88 Stat. 390; 41 U.S. Code 252.

Advertising Requirements

Sec. 303. Whenever advertising is required—

(a) The advertisement for bids shall be made a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of property and services necessary to meet the requirements of the agency concerned. No advertisement or invitation to bid for the carriage of Government property in other than Government-owned cargo containers shall specify carriage of such property in cargo containers of any stated length, height, or width.

(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided*, That all bids may be rejected when the agency head determines that it is in the public interest so to do. (P.L. 522, July 12, 1952, 66 Stat. 594; P.L. 90-268, March 16, 1968, 82 Stat. 49; U.S. Code 253.)

Requirements of Negotiated Contracts

Sec. 304. (a) Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 302(c) may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 302(c) shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

(b) The cost-plus-a-percentage-of-cost system of contracting shall not be used, and in the case of a cost-plus-a-fixed-fee contract the fee shall not exceed 10 per centum of the estimated cost of the contract, exclusive of the fee, as determined by the agency head at the time of entering into such contract (except that a fee not in excess of 15 per centum of such estimated cost is authorized in any such contract for experimental, developmental, or research work and that a fee inclusive of the contractor's costs and not in excess of 6 per centum of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project). Neither a cost nor a cost-plus-a-fixed-fee contract nor an incentive-type contract shall be used unless 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 property or services of the kind or quality required without the use of a cost or cost-plus-a-fixed-fee contract or an incentive-type contract. All cost and cost-plus-a-fixed-fee contracts shall provide for advance notification by the contractor to the procuring agency of any subcontract thereunder on a cost-plus-a-fixed-fee basis and of any fixed-price subcontract or purchase order which exceeds in dollar amount either $25,000 or 5 per centum of the total estimated cost of the prime contract; and a procuring agency, through any authorized representative thereof, shall have the right to inspect the plans and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a cost or cost-plus-a-fixed-fee contract.

(c) All contracts negotiated without advertising pursuant to authority contained in this Act shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. Under regulations to be prescribed by the Administrator however, such clause may be omitted from contracts with foreign contractors or foreign subcontractors if the agency head determines with the concurrence of the Comptroller General of the United States or his designee, that the omission will serve the best interests of the United States. However, the concurrence of the Comptroller General of the United States or his designee is not required for the omission of such clause—

(1) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its books, documents, papers, or records available for examination; and

(2) where the agency head determines, after taking into account the price and availability of the property or services from United States sources, that the public interest would be best served by the omission of the clause. If the clause is omitted based on a determination under clause (2) a written report shall be furnished to the Congress. The power of the agency head to make the determination specified in the preceding sentences shall not be delegable. (P.L. 245, October 30, 1951, 65 Stat. 700; P.L. 522, July 12, 1952, 66 Stat. 594; 41 U.S. Code 254.)

Advance Payments

Sec. 305. (a) Any executive agency may—

(1) make advance, partial, progress or other payments under contracts for property or services made by the agency; and

(2) insert in bid solicitations for procurement of property or services a provision limiting to small business concerns advance or progress payments.

(b) Payments made under subsection (a) may not exceed the unpaid contract price.

(c) Advance payments under subsection (a) may be made only upon adequate security and a determination by the agency head that to do so would be in the public interest. Such security may in the form of a lien in favor of the Government on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien shall be paramount to all other liens. (P.L. 522, July 12, 1952, 66 Stat. 594; P.L. 85-800, August 28, 1958, 72 Stat. 966; 41 U.S. Code 255.)

Waiver of Liquidated Damages

Sec. 306. (Sec. 306 was repealed by Sec. 10(b) of P.L. 754, September 5, 1950, 64 Stat. 591, and Sec. 10(a) of that law substituted.)

Sec. 10(a). Whenever any contract made on behalf of the Government by the head of any Federal Agency, or by officers authorized by him so to do, includes a provision for liquidated damages for delay, the Comptroller General upon recommendation of such head is authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable. (41 U.S. Code 256a.)

Administrative Determinations and Delegations

Sec. 307(a). The determinations and decisions provided in this title to be made by the Administrator or other agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, and except as provided in section 205(d) with respect to the Administrator, the agency head is authorized to delegate his powers provided by the title, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

(b) The power of the agency head to make the determinations or decisions specified in paragraphs (12) and (13) of section 302 (c) shall not be delegable, and the power to make the determinations or decisions specified in paragraph (11) of section 302 (c) shall be delegable only to a chief officer responsible for procurement and only with respect to contracts which will not require the expenditure of more than $25,000.

(c) Each determination or decision required by paragraphs (11), (12), (13), or (14) of section 302 (c), by section 304 or by section 305 (c) shall be based upon written findings made by the official making such determination, which findings shall be final and shall be available within the agency for a period of at least six years following the date of the determination. A copy of the findings shall be submitted to the General Accounting Office with the contract.

(d) In any case where any purchase or contract is negotiated pursuant to the provisions of section 302 (c), except in a case covered by paragraphs (2), (3), (4), (5), or (6) thereof, the data with respect to the negotiation shall be preserved in the files of the agency for a period of six years following final payment on such contract. (P.L. 85-800, August 28, 1958, 72 Stat. 967; P.L. 89-343, November 8, 1965, 79 Stat. 1303; 41 U.S. Code 257.)

Statutes Continued in Effect

Sec. 308. No purchase or contract shall be exempt from the Act of June 30, 1936 (49 Stat. 2036, as amended; 41 U.S.C. 35 to 45) or from the Act of March 3, 1931 (46 Stat. 1494, as amended; 40 U.S.C. 276a to 276a-6), solely by reason of having been entered into pursuant to section 302(c) hereof without advertising, and the provisions of said Acts and of the Act of June 19, 1912 (37 Stat. 137, as amended; 40 U.S.C. 324 and 325a), if otherwise applicable, shall apply to such purchases and contracts. (41 U.S. Code 258.)

Definitions

Sec. 309. As used in this title—

(a) The term "agency head" shall mean the head of any assistant head of any executive agency and may at the option of the Administrator include the chief official of any principal organizational unit of the General Services Administration. (P.L. 522, July 12, 1952, 66 Stat. 593; 41 U.S. Code 259.)

Statutes Not Applicable

Sec. 310. Sections 3709, 3710, and 3735 of the Revised Statutes, as amended (41 U.S.C. 5, 8 and 13), shall not apply to the procurement of property or services made by an executive agency pursuant to this title. Any provision of law which authorizes an executive agency (other than an executive agency which is exempted from the provisions of this title by section 302(a) of this Act), to procure any property or services without advertising or without regard to said section 3709, shall be construed to authorize the procurement of such property or services pursuant to section 302(c)(15) of this Act without regard to the advertising requirements of sections 302(c) and 303 of this Act. (P.L. 522, July 12, 1952, 66 Stat. 594; P.L. 85-800, August 28, 1958, 72 Stat. 967; P.L. 89-343, November 8, 1965, 79 Stat. 1303 41 U.S. Code 260.)

TITLE IV — FOREIGN EXCESS PROPERTY

Disposal of Foreign Excess Property

Sec. 401. Each executive agency having foreign excess property shall be responsible for the disposal thereof: *Provided*, That (a) the head of each such executive agency shall, with respect to the disposition of such property, conform to the foreign policy of the United States; (b) the Secretary of State shall have the authority to use foreign currencies and credits acquired by the United States under section 402 (b) of this Act in order to effectuate the purpose of section 32 (b) (2) of the Surplus Property Act of 1944, as amended, and the Foreign Service Buildings Act of May 7, 1926, as amended (including Public Law 547, Seventy-ninth Congress (60 Stat. 663)), and for the purpose of paying any other governmental expenses payable in local currencies, and the authority to amend, modify, and renew agreements in effect on the

effective date of this Act; (c) any foreign currencies or credits acquired by the Department of State pursuant to such agreements shall be administered in accordance with procedures that may from time to time be established by the Secretary of the Treasury and, if and when reduced to United States currency shall be covered into the Treasury as miscellaneous receipts; and (d) the Department of State shall, except to such extent as the President shall otherwise determine, continue to perform other functions with respect to agreements for the disposal of foreign excess property in effect on the effective date of this Act. (40 U.S. Code 511.)

Methods and Terms of Disposal

Sec. 402(a) Foreign excess property not disposed of under subsections (b) and (c) of this section may be disposed of (1) by sale, exchange, lease, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the head of the executive agency concerned deems proper; but in no event shall any property be sold without a condition forbidding its importation into the United States, unless the Secretary of Agriculture (in the case of any agricultural commodity, food, or cotton or woolen goods) or the Secretary of Commerce (in the case of any other property) determines that the importation of such property would relieve domestic shortages or otherwise be beneficial to the economy of this country, (2) for foreign currencies or credits, or substantial benefits or the discharge of claims resulting from the compromise or settlement of such claims by any executive agency in accordance with the law, whenever the head of the executive agency concerned determines that it is in the interest of the United States to do so. Such property may be disposed of without advertising whenever the head of the executive agency concerned finds so doing to be most practicable and to be advantageous to the Government. The head of each executive agency responsible for the disposal of foreign excess property may execute such documents for the transfer of title or other interest in property and take such other action as he deems necessary or proper to dispose of such property; and may authorize the abandonment, destruction, or donation of foreign excess property under his control which has no commercial value or the estimated cost of care and handling of which would exceed the estimated proceeds from its sale.

(b) Any executive agency having in any foreign country any medical materials or supplies not disposed of under subsection (c) of this section, which, if situated within the United States, would be available for donation pursuant to section 484 of this title, may donate such materials or supplies without cost (except for costs of care and handling), for use in any foreign country, to nonprofit medical or health organizations, including those qualified to receive assistance under sections 2174(b) and 2357 of Title 22.

(c) Under such regulations as the Administrator shall prescribe pursuant to this subsection, any foreign excess property may be returned to the United States for handling as excess of surplus property under the provisions of sections 483, 484(j), and 484(l) of this title, whenever the head of the executive agency concerned or the Administrator after consultation with such agency head, determines that return of the property to the United States for such handling is in the interest of the United States: *Provided,* That regulations prescribed pursuant to this subsection shall require that the transportation costs incident to such return shall be borne by the Federal agency, State agency, or donee.

TITLE IX — SELECTION OF ARCHITECTS AND ENGINEERS

Definitions

Sec. 901. As used in this title—

(1) The term "firm" means any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the Professions of architecture or engineering.

(2) The term "agency head" means the Secretary, Administrator, or head of a department, agency, or bureau of the Federal Government.

(3) The term "architectural and engineering services" includes those professional services of an architectural or engineering nature as well as incidental services that members of these professions and those in their employ may logically or justifiably perform. (P.L. 92-582, Oct 27, 1972, 86 Stat. 1278; 40 U.S.C. 541.)

Policy

Sec. 902. The Congress hereby declares it to be the policy of the Federal Government to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices. (P.L. 92-582, Oct 27, 1972, 86 Stat. 1279; 40 U.S.C. 542.)

Requests for Data on Architectural and Engineering Services

Sec. 903. In the procurement of architectural and engineering services, the agency head shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The agency head, for each proposed project, shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services and then shall select therefrom, in order of preference, based upon criteria established and published by him, no less than three of the firms deemed to be the most highly qualified to provide the services required. (P.L. 92-582, Oct. 27, 1972, 86 Stat. 1279; 40 U.S.C. 543.)

Negotiation of Contracts for Architectural and Engineering Services

Sec. 904. (a) The agency head shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Government. In making such determination, the agency head shall take into account the estimated value of the services to be rendered, the scope, complexity, and professional nature thereof.

(b) Should the agency head be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price he determines to be fair and reasonable to the Government, negotiations with that firm should be formally terminated. The agency head should then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the agency head should terminate negotiations. The agency head should then undertake negotiations with the third most qualified firm.

(c) Should the agency be unable to negotiate a satisfactory contract with any of the selected firms, he shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached. (P.L. 92-582, Oct 27, 1972, 86 Stat. 1279; 40 U.S.C. 544.)

CHAPTER FOUR

(See Also Chapter Three Statutes)

CONTRACTING WITH SMALL BUSINESS ADMINISTRATION

SECTION 8a OF THE SMALL BUSINESS ACT

15 USC §637(a)

Sec. 8. (a)(1) It shall be the duty of the Administration and it is hereby empowered, whenever it determines such action is necessary or appropriate--

(A) to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the Administration to furnish articles, equipment, supplies, services, or materials to the Government or to perform construction work for the Government. In any case in which the Administration certifies to any officer of the Government having procurement powers that the Administration is competent and responsible to perform any specific Government procurement contract to be let by any such officer, such officer shall be authorized in his discretion to let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer. Whenever the Administration and such procurement officer fail to agree, the matter shall be submitted for determination to the Secretary or the head of the appropriate department or agency by the Administrator;

(B) to enter into contracts with such agency, as shall be designated by the President within 60 days after the effective date of this paragraph, to furnish articles, equipment, supplies, services, or materials, or to perform construction work for such agency. In any case in which the Administration certifies to any officer of such agency having procurement powers that the Administration is competent and responsible to perform any specific procurement contract to be let by any such officer, such officer shall let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer. If the Administration and such procurement officer fail to agree on such terms and conditions, either the Administration or such procurement officer shall promptly notify, in writing, the head of such agency. The head of such agency shall have five days (exclusive of Saturdays, Sundays, and legal holidays) to establish the terms and conditions upon which such procurement contract may be let to the Administration,

and shall communicate in writing to the Administration the terms and conditions so established. Within five days (exclusive of Saturdays, Sundays, and legal holidays) after the receipt of such written communication, the Administration shall decide whether to perform such procurement contract or withdraw its prior certification that the Administration is competent and responsible to perform such contract; and

(C) to arrange for the performance of such procurement contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns for construction work, services, or the manufacture, supply, assembly of such articles, equipment, supplies, materials, or parts thereof, or servicing or processing in connection therewith or such management services as may be necessary to enable the Administration to perform such contracts.

No contract may be entered into under subparagraph (B) after September 30, 1981.

(2) Notwithstanding subsections (a) and (c) of the first section of the Act entitled "An Act requiring contracts for the construction, alteration, and repair of any public building or public work of the United States to be accompanied by a performance bond protecting the United States and by additional bond for the protection of persons furnishing material and labor for the construction, alteration, or repair of said public buildings or public work," (Miller Act, ¶28,511) approved August 24, 1935 (49 Stat. 793), no small business concern shall be required to provide any amount of any bond as a condition of receiving any subcontract under this subsection if the Administrator determines that such amount is inappropriate for such concern in performing such contract: Provided, That the Administrator shall exercise the authority granted by the paragraph only if--

(A) the Administration takes such measures as it deems appropriate for the protection of persons furnishing materials and labor to a small business receiving any benefit pursuant to this paragraph;

(B) the Administration assists, insofar as practicable, a small business receiving the benefits of this paragraph to develop, within a reasonable period of time, such financial and other capability as may be needed to obtain such bonds as the Administration may subsequently require for the successful completion of any program conducted under the authority of this subsection;

(C) the Administration finds that such small business is unable to obtain the requisitive bond or bonds from a surety and that no surety is willing to

issue such bond or bonds subject to the guarantee provisions of Title IV of the Small Business Investment Act of 1958; and

(D) the small business is determined to be a start-up concern and such concern has not been participating in any program conducted under the authority of this subsection for a period exceeding one year.

This paragraph shall not apply after September 30, 1981.

(3) Any small business concern selected by the Administration to perform any Federal Government procurement contract to be let pursuant to this subsection shall, when practicable, participate in any negotiation of the terms and conditions of such contract.

(4) For purposes of this section, the term "social and economically disadvantaged small business concern" means any small business concern--

(A) which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

(B) whose management and daily business operations are controlled by one or more of such individuals.

(5) Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

(6) Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. In determining the degree of diminished credit and capital opportunities the Administration shall consider, but not be limited to, the assets and net worth of such socially disadvantaged individuals.

(7) No small business concern shall be deemed eligible for any assistance pursuant to this subsection unless the Administration determines that with contract, financial, technical, and management support the small business concern will be able to perform contracts which may be awarded to such concern under paragraph (1)(C) and has reasonable prospects for success in competing in the private sector.

(8) All determinations made pursuant to paragraph (5) with respect to whether a group has been subject to prejudice or bias

shall be made by the Administrator after consultation with the Associate Administrator for Minority Small Business and Capital Ownership Development. All other determinations made pursuant to paragraphs (4), (5), (6), and (7) shall be made by the Associate Administrator for Minority Small Business and Capital Ownership Development under the supervision of, and responsible to, the Administrator.

(9) Within ninety days after the effective date of this paragraph, the Administration shall publish in the Federal Register rules setting forth those conditions or circumstances pursuant to which a firm previously deemed eligible by the Administration may be denied assistance under the provisions of this subsection: Provided, That no such firm shall be denied total participation in any program conducted under the authority of this subsection without first being afforded a hearing on the record in accordance with chapter 5 of title 5, United States Code.

(10) The Administration shall develop and implement an outreach program to inform and recruit small business concerns to apply for eligibility for assistance under this subsection.

(11) To the maximum extent practicable, construction subcontracts awarded by the Administration pursuant to this subsection shall be awarded within the county or State where the work is to be performed.

(12) To the mixiumum extent practicable the Associate Administrator for Minority Small Business and Capital Ownership Development shall submit, no less frequently than annually, a yearly estimate of the dollar amounts and types of contracts required for the efficient use of any program conducted under the authority of this subsection, to each agency which may participate in such program.

PROHIBITION AGAINST DOING BUSINESS WITH CERTAIN OFFERORS OR CONTRACTORS

10 U.S.C. 2393

(a)(1) Except as provided in paragraph (2), the Secretary of a military department may not solicit an offer from, award a contract to, extend an existing contract with, or when approval by the Secretary of the award of a subcontract is required, approve the award of a subcontract to, an offeror or contractor which to the Secretary's knowledge has been debarred or suspended by another Federal agency unless--

(A) in the case of a debarment, the debarment of the offeror or contractor by all other agencies has been terminated or the period of time specified for such debarment has expired; and

(B) in the case of a suspension, the period of time specified by all other agencies for the suspension of the offeror or contractor has expired.

(2) Paragraph (1) does not apply in any case in which the Secretary concerned determines that there is a compelling reasons to solicit an offer from, award a contract to, extend a contract with, or approve a subcontract with such offeror or contractor.

(b) Whenever the Secretary concerned makes a determination described in subsection (a)(2), he shall at the time of the determination, transmit a notice to the Administrator of General Services describing the determination. The Administrator of General Services shall maintain each such notice in a file available for public inspection.

(c) In this section:

(1) "Debar" means to exclude, pursuant to established administrative procedures, from Government contracting and subcontracting for a specified period of time commensurate with the seriousness of the failure or offense or the inadequacy of performance.

(2) "Suspend" means to disqualify, pursuant to established administrative procedures, from Government contracting and subcontracting for a temporary period of time because a concern or individual is suspected of engaging in criminal, fraudulent or seriously improper conduct. (P.L. 97-86, Dec. 1, 1981, 95 Stat. 1125.)

THE MAYBANK AMENDMENT

PROHIBITION ON USE OF FUNDS TO RELIEVE ECONOMIC DISLOCATIONS

10 U.S.C. 2392

(a) In order to help avoid the uneconomic use of Department of Defense funds in the procurement of goods and services, the Congress finds that it is necessary to prohibit the use of such funds for certain purposes.

(b) No funds appropriated to or for the use of the Department of Defense may be used to pay, in connection with any contract awarded by the Department of Defense, a price differential for the purpose of relieving economic dislocations. (P.L. 97-86, Dec. 1, 1981, 95 Stat. 1123.)

TRADE AGREEMENTS ACT OF 1979

ACT OF JULY 26, 1979, P.L. 96-39,93 STAT. 236-242.

TITLE III--GOVERNMENT PROCUREMENT

SEC. 301. GENERAL AUTHORITY TO MODIFY DISCRIMINATORY PURCHASING REQUIREMENTS.

(a) Presidential Waiver of Discriminator Purchasing Requirements.--The President may waive, in whole or in part, with respect to eligible products of any foreign country or instrumentality designated under subsection (b), and suppliers of such products, the application of any law, regulation, procedure, or practice regarding Government procurement that would, if applied to such products and suppliers, result in treatment less favorable than that accorded--

(1) the United States products and suppliers of such products; or

(2) to eligible products of another foreign country or instrumentality which is a party to the Agreement and suppliers of such products.

(b) Designation of Eligible Countries and Instrumentalities.--The President may designate a foreign country or instrumentality for purposes of subsection (a) only if he determines that such country or instrumentality--

(1) is a country or instrumentality which (A) has become a party to the Agreement, and (B) will provide appropriate reciprocal competitive government procurement opportunities to United States products and suppliers of such products;

(2) is a country or instrumentality, other than a major industrial country, which (A) will otherwise assume the obligations of the Agreement, and (B) will provide such opportunities to such products and suppliers;

(3) is a country or instrumentality, other than a major industrial country, which will provide such opportunities to such products and suppliers; or

(4) is a least developed country.

(c) Modification or Withdrawal of Waivers and Designations.--The President may modify or withdraw any waiver granted pursuant to subsection (a) or designation made pursuant to subsection (b). (19 U.S. Code 2511.)

SEC. 302. AUTHORITY TO ENCOURAGE RECIPROCAL COMPETITIVE PROCUREMENT PRACTICES.

(a) Authority to Bar Procurement From Non-Designated Countries.--With respect to procurement covered by the Agreement, the President, in order to encourage additional countries to become parties to the Agreement and to

provide appropriate reciprocal competitive government procurement opportunities to United States products and suppliers of such products--

(1) shall prohibit the procurement, after the date on which any waiver under section 301(a) first takes effect, of products (A) which are products of a foreign country or instrumentality which is not designated pursuant to section 301(b), and (B) which would otherwise be eligible products; and

(2) may take such other actions within his authority as he deems necessary.

(b) Deferrals and Waivers.--Notwithstanding subsection (a), but in furtherance of the objective of encouraging countries to become parties to the Agreement and provide appropriate reciprocal competitive government procurement opportunities to United States products and suppliers of such products, the President may--

(1) delay, for a period not to exceed two years, the prohibition of procurement, required pursuant to subsection (a)(1), of products of a foreign country or instrumentality which is not designated pursuant to section 301(b), except that no such delay shall be granted with respect to the procurement of products of any major industrial country;

(2) authorize agency heads to waive, subject to interagency review and general policy guidance by the organization established under section 242(a) of the Trade Expansion Act of 1962 (19 U.S.C. 1872(a)), such prohibition on a case-by-case basis when in the national interest; and

(3) authorize the Secretary of Defense to waive, subject to interagency review and policy guidance by the organization established under section 242(a) of the Trade Expansion Act of 1962 (19 U.S.C. 1872(a)), such prohibition for products of any country or instrumentality which enters into a reciprocal procurement agreement with the Department of Defense.

(c) Report on Impact of Restrictions.--

(1) Impact on the Economy.--On or before July 1, 1981, the President shall report to the Committee on Ways and Means and the Committee on Government Operations of the House of Representatives and the to Committee on Finance and the Committee of Governmental Affairs of the Senate on the effects on the United States economy (including effects on employment, production, competition, costs and prices, technological development, export trade, balance of payments, inflation, and the Federal budget) of the refusal of developed countries to allow the Agreement to cover the entities of the governments of such countries which are the principal purchasers of goods and equipment in appropriate product sectors.

(2) Recommendations for Attaining Reciprocity.--The report required by paragraph (1) shall include an evaluation of alternative means to obtain equity and reciprocity in such product

sectors, including (A) prohibiting the procurement of products of such countries by United States entities not covered by the Agreement, and (B) modifying the application of title III of the Act of March 3, 1933 (41 U.S.C. 10a et seq.), commonly referred to as the Buy American Act. The report shall include an analysis of the effect of such alternative means on the United States economy (including effects on employment, production, competition, costs and prices, technological development, export trade, balance of payments, inflation, and the Federal budget), and on successful negotiations on the expansion of the coverage of the Agreement pursuant to section 304(a) and (b), other trade negotiating objectives, the relationship of the Federal Government to State and local governments, and such other factors as the President deems appropriate.

(3) Consultation.--In the preparation of the report required by paragraph (1) and the evaluation and analysis required by paragraph (2), the President shall consult with representatives of the public, industry, and labor, and make available pertinent, nonconfidential information obtained in the course of such preparation to the advisory committees established pursuant to section 135 of the Trade Act of 1974.

(1) Presidential Report.--On or before October 1, 1981, the President shall prepare and transmit to the congressional committees referred to in subsection (c)(1) a report which describes the actions he deems appropriate to establish reciprocity with major industrialized countries in the area of Government procurement.

(2) Procedures.--

(A) Presidential Determination.--If the President determines that any changes in existing law or new statutory authority are required to authorize or to implement any action proposed in the report submitted under paragraph (1), he shall, on or after January 1, 1982, submit to the Congress a bill to accomplish such changes or provide such new statutory authority. Prior to submitting such a bill, the President shall consult with the appropriate committees of the Congress having jurisdiction over legislation involving subject matters which would be affected by such action, and shall submit to such committees a proposed draft of such bill.

(B) Congressional Consideration.--The appropriate committee of each House of the Congress shall give a bill submitted pursuant to subparagraph (A) prompt consideration and shall make its best efforts to take final committee action on such bill in an expeditious manner. (19 U.S. Code 2512.)

SEC. 303. WAIVER OF DISCRIMINATORY PURCHASING REQUIREMENTS WITH RESPECT TO PURCHASES OF CIVIL AIRCRAFT.

The President may waive the application of the provisions of title III of the Act of March 3, 1933 (41 U.S.C. 10a et seq.), propularly referred to

as the Buy American Act, in the case of any procurement of civil aircraft and related articles of a country or instrumentality which is a party to the Agreement on Trade in Civil Aircraft. The President may modify or withdraw any waiver granted pursuant to this section. (19 U.S. Code 2513.)

SEC. 304. EXPANSION OF THE COVERAGE OF THE AGREEMENT.

(a) Overall Negotiating Objective.--The President shall seek in the renegotiations provided for in part IX, paragraph 6, of the Agreement more open and equitable market access abroad, and the harmonization, reduction, or elimination of devices which distort trade or commerce related to Government procurement, with the overall goal of maximizing the economic benefit to the United States through maintaining and enlarging foreign markets for products of United States agriculture, industry, mining, and commerce, the development of fair and equitable market opportunities, and open and nondiscriminatory world trade. In carrying out the provisions of this subsection, the President shall consider the assessment made in the report required under section 306(a).

(b) Sector Negotiating Objectives.--The President shall seek consistent with the overall objective set forth in subsection (a) and to the maximum extent feasible, with respect to appropriate product sectors, competitive opportunities for the export of United States products to the developed countries of the world equivalent to the competitive opportunities afforded by the United States, taking into account all barriers to, and other distortions of, international trade affecting that sector.

(c) Independent Verification Objective.--The President shall seek to establish in the renegotiation provided for in part IX, paragraph 6, of the Agreement a system for independent verification of information provided by parties to the Agreement to the Committee on Government Procurement pursuant to part VI, paragraph 9, of the Agreement.

(d) Reports on Negotiations.--

(Text Omitted)

(e) Extension of Nondiscrimination and National Treatment.--Before exercising the waiver authority in section 301 for procurement not covered by the Agreement on the date of enactment of this Act, the President shall follow the consultation provisions of section 135 and chapter 6 of title I of the Trade Act of 1974 for private sector and congressional consultations. (19 U.S. Code 2514.)

SEC. 308. DEFINITIONS.

As used in this title--

(1) Agreement.--The term "Agreement" means the Agreement on Government Procurement referred to in section 2(c) of this Act, as submitted to the Congress, but including rectifications, modifications, and amendments which are accepted by the United States.

(2) Civil Aircraft.--The term "civil aircraft and related articles" means--

(A) all aircraft other than aircraft to be purchased for use by the Department of Defense or the United States Coast Guard;

(B) the engines (and parts and components for incorporation therein) of such aircraft;

(C) any other parts, components, and subassemblies for incorporation in such aircraft; and

(D) any ground flight simulators, and parts and components thereof, for use with respect to such aircraft, whether to be purchased for use as original or replacement equipment in the manufacture, repair, maintenance, rebuilding, modification, or conversion of such aircraft, and without regard to whether such aircraft or articles receive duty-fee (sic) treatment pursuant to section 601(A)(2).

(3) Developed Countries.--The term "developed countries" means countries so designated by the President.

(4) Eligible Products.--

(A) In General.--The term "eligible product" means, with respect to any foreign country or instrumentality, a product or service of that country or instrumentality which is covered under the Agreement for procurement by the United States.

(B) Rule of Origin.--An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

(5) Instrumentality.--The term "instrumentality" shall not be construed to include an agency or division of the government of a country, but may be construed to include such arrangements as the European Economic Community.

(6) Least Developed Country.--The term "least developed country" means any country on the United Nations General Assembly list of least developed countries.

(7) Major Industrial Country--The term "major industrial country" means any such country as defined in section 126 of the Trade Act of 1974 and any instrumentality of such a country. (19 U.S. Code 2518.)

CHAPTER FIVE

(See Chapter Three Statutes)

CHAPTER 6

BUDGET & ACCOUNTING ACT OF 1921

(31 USC §1)

DEFINITIONS

§1. *Short Title*

This chapter and sections 71, 471, 581, and 581a of this title may be cited as the "Budget and Accounting Act, 1921." June 19, 1921, c. 18, Title I§1, 42 Stat. 20.

§2. *Definitions*

When used in this chapter and sections 71, 471, 581, and 581a of this title—The terms "department and establishment" and "department or establishment" mean any executive department, independent commission, board, bureau, office, agency, or other establishment of the Government, including any independent regulatory commission or board and the municipal government of the District of Columbia, but do not include the legislative branch of the Government or the Supreme Court of the United States;

The term "the Budget" means the Budget required by section 11 of this title to be transmitted to Congress;

The term "bureau" means the Bureau of Budget;

The term "director" means the Director of the Bureau of the Budget; and the term "deputy director" means the Deputy Director of the Bureau of the Budget.

The term "appropriations" includes, in appropriate context, funds and authorizations to create obligations by contract in advance of appropriations, or any other authority making funds available for obligation or expenditure. June 19, 1921, c. 18, Title 1, §2, 42 Stat. 20; Apr. 3, 1939, c. 36 Title II, §201, 53 Stat. 565; Sept. 12, 1950, c. 946, Title I, Pt. 1, §101, 64 Stat. 832; July 31, 1953, c. 302, Title I, §101, 67 Stat. 299.

The Budget

§11. President to Transmit Budget to Congress

Contents

(a) The President shall transmit to Congress during the first fifteen days of each regular session, the Budget, which shall set forth his Budget message, summary data, and text, and supporting detail. The Budget shall set forth in such form and detail as the President may determine—

(1) functions and activities of the Government;

(2) at such times as may be practicable, information on programs costs and accomplishments;

(3) any other desirable classifications of data;

(4) a reconciliation of the summary data on expenditures with proposed appropriations;

(5) estimated expenditures and proposed appropriations necessary in his judgment for the support of the Government for the ensuing fiscal year and projections for the four fiscal years immediately following the ensuing fiscal year, except that estimated expenditures and proposed appropriations for such years for the legislative branch of the Government and the Supreme Court of the United States shall be transmitted to the President on or before October 15 of each year, and shall be included by him in the Budget without revision;

(6) estimated receipts of the Government during the ensuing fiscal year and projections for the four fiscal years immediately following the ensuing fiscal year, under (1) laws existing at the time the Budget is transmitted and also (2) under the revenue proposals, if any, contained in the Budget;

(7) actual appropriations, expenditures, and receipts of the Government during the last completed fiscal year;

(8) estimated expenditures and receipts, and actual or proposed appropriations of the Government during the fiscal year in progress;

(9) balanced statements of (1) the condition of the Treasury at the end of the last completed fiscal year, (2) the estimated condition of the Treasury at the end of the fiscal year in progress, and (3) the estimated condition of the Treasury at the end of the ensuing fiscal year if the financial proposals contained in the Budget are adopted;

(10) all essential facts regarding the bonded and other indebtedness of the Government;

(11) such other financial statements and data as in his opinion are necessary or desirable in order

to make known in all practicable detail the financial condition of the Government.

(12) with respect to each proposal in the Budget for new or additional legislation which would create or expand any function, activity, or authority, in addition to those functions, activities, and authorities then existing or as then being administered and operated, a tabulation showing—

(A) the amount proposed in the Budget for appropriation and for expenditure in the ensuing fiscal year on account of such proposals; and

(B) the estimated appropriation required on account of such proposal in each of the four fiscal years, immediately following that ensuing fiscal year, during which such proposal is to be in effect; and

(13) an allowance for additional estimated expenditures and proposed appropriations for the ensuing fiscal year, and an allowance for unanticipated, uncontrollable expenditures for the ensuing fiscal year.

Transmittal of Supplemental Summary to Congress

(b) The President shall transmit to the Congress, on or before July 15 of each year, a supplemental summary of the Budget for the ensuing fiscal year transmitted to the Congress by the President under subsection (a) of this section. Such supplemental summary—

(1) shall reflect with respect to that ensuing fiscal year—

(A) all substantial alterations in or reappraisals of estimates of expenditures and receipts, and

(B) all substantial obligations imposed on that budget after its transmission to the Congress;

(2) shall contain current information with respect to those matters covered by subparagraph (8) and clauses (2) and (3) of subparagraph (9) of subsection (a) of this section; and

(3) shall contain such additional information, in summary form, as the President considers necessary or advisable to provide the Congress with a complete and current summary of information with respect to that Budget and the then currently estimated functions, obligations, requirements, and financial condition of the Government for that ensuing fiscal year.

Transmittal of Estimated Expenditure Summaries to Congress

(c) The President shall transmit to the Congress, on or before July 15 of each year, in such form and detail as he may determine—

(1) summaries of estimated expenditures, for the first four fiscal years following the ensuing fiscal year for which the Budget was transmitted to the Congress by the President under subsection (a) of this section, which will be required under continuing programs which have a legal commitment for future years or are considered mandatory under existing law; and

(2) summaries of estimated expenditures, in fiscal years following such ensuing fiscal year, of balances carried over from such ensuing fiscal year.

Separate Statement of Enumerated Items

(d) The Budget transmitted pursuant to subsection (a) of this section for each fiscal year shall set forth separately the items enumerated in section 1322(a)(1)-(5) of this title.

Levels of Tax Expenditures

(e) The Budget transmitted pursuant to subsection (a) of this section for each fiscal year shall set forth the levels of tax expenditures under existing law for such fiscal year (the tax expenditure budget), taking into account projected economic factors, and any changes in such existing levels based on proposals contained in such Budget. For purposes of this subsection, the terms "tax expenditures" and "tax expenditures budget" have the meanings given to them by section 1302(a)(3) of this title.

Comparison, Analysis, and Explanation

(f) The Budget transmitted pursuant to subsection (a) of this section for each fiscal year shall contain—

(1) a comparison, for the last completed fiscal year, of the total amount of outlays estimated in the Budget transmitted pursuant to subsection (a) of this section for each major program involving uncontrollable or relatively uncontrollable outlays and the total amount of outlays made under each such major program during such fiscal year;

(2) a comparison, for the last completed fiscal year, of the total amount of revenues estimated in the Budget transmitted pursuant to subsection (a) of this section and the total amount of revenues received during such year, and, with respect to each major revenue source, the amount of revenues estimated in the Budget transmitted pursuant to subsection (a) of this section and the amount of revenues received during such year; and

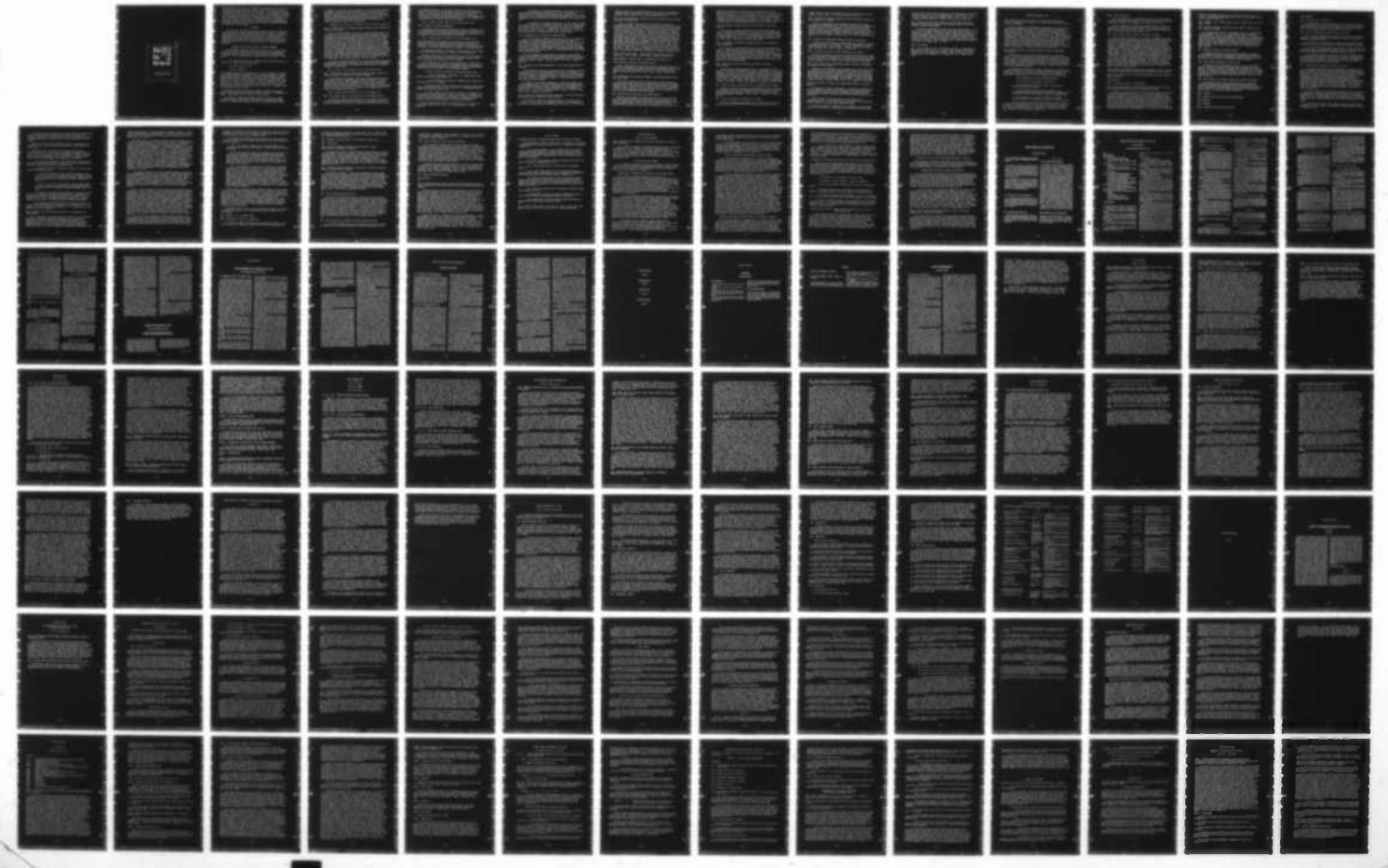
(3) an analysis and explanation of the difference between each amount set forth pursuant to paragraphs (1) and (2) as the amount of outlays or revenues estimated in the Budget submitted under subsection (a) of this section for such fiscal year and the corresponding amount set forth as the amount of outlays made or revenues received during such fiscal year.

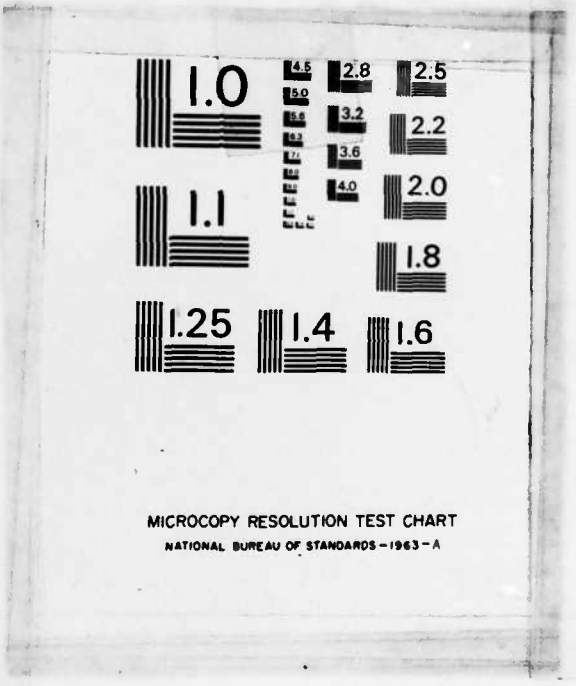
Transmittal of Presidential Statement to Congress

(g) The President shall transmit to the Congress, on or before April 10 and July 15 of each year, a statement of all amendments to or revisions in the budget authority requested, the estimated outlays, and the estimated receipts for the ensuing fiscal year set forth in the Budget transmitted pursuant to subsection (a) of this section (including any previous amendments or revisions proposed on behalf of the executive branch) that he deems necessary and appropriate based on the most current information available.

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Such statement shall contain the effect of such amendments and revisions on the summary data submitted under subsection (a) of this section and shall include such supporting detail as is practicable. The statement transmitted on or before July 15 of any year may be included in the supplemental summary required to be transmitted under subsection (b) of this section during such year. The Budget transmitted to the Congress pursuant to subsection (a) of this section for any fiscal year, or the supporting detail transmitted in connection therewith, shall include a statement of all such amendments and revisions with respect to the fiscal year in progress made before the date of transmission of such Budget.

ESTIMATES

(h) The Budget transmitted pursuant to subsection (a) of this section for each fiscal year shall include information with respect to estimates of appropriations for the next succeeding fiscal year of grants, contracts, or other payment under any program for which there is an authorization of appropriations for such succeeding fiscal year and such appropriations are authorized to be included in an appropriation Act for the fiscal year preceding the fiscal year in which the appropriation is to be available for obligation.

NATIONAL NEEDS, AGENCY MISSIONS, AND BASIC PROGRAMS

(i) The Budget transmitted pursuant to subsection (a) of this section for each fiscal year, beginning with the fiscal year ending September 30, 1979, shall contain a presentation of budget authority, proposed budget authority, outlays, proposed outlays, and descriptive information in terms of--

(1) a detailed structure of national needs which shall be used to reference all agency missions and programs;

(2) agency missions, and

(3) basic programs.

To the extent practicable, each agency shall furnish information in support of its budget requests in accordance with its assigned missions in terms of Federal functions and subfunctions, including mission responsibilities of component organizations, and shall relate its programs to agency missions. June 10, 1921, c. 18, Title II, §201(a), 42 Stat. 20, Sept 12, 1950, c. 946, Title I, pt I, §102(a), 64 Stat. 832, Aug 1, 1956, c. 814, §1(a), 70 Stat. 782; Aug. 25, 1958, Pub. L. 85-759, §1, 72 Stat. 852, Oct 26, 1970, Pub. L. 91-510, Title II, §221, 84 Stat. 1169; July 12, 1974, Pub. L. 93-344, Title VI, §§501-604, 88 Stat. 323, 324.

Concurrent transmittal of budget estimate or request by Interstate Commerce Commission to Congress and to President or Office of Management and Budget: free communication by Commission with Congress.

(j) Whenever the Interstate Commerce Commission submits any budget estimate or request, other budget information (including manpower needs), legislative recommendations prepared testimony for congressional hearings,

or comments on legislation, to the President or to the Office of Management and Budget, it shall concurrently transmit a copy of such estimate or request to the Congress. No officer or agency of the United States shall have any authority to prohibit, impose conditions on, or in any way impair the free communications by such Commission with the Congress, its committees, or any of the Members of the Congress with respect to any budget, estimate or request of the Commission.

As amended Feb 5, 1976, Pub. L. 94-210, Title III, §311, 90 Stat. 60.

§11a. Estimated outlays and proposed budget authority; annual submittal to Congress by President.

(a) On or before November 10 of each year (beginning with 1975), the President shall submit to the Senate and the House of Representatives the estimated outlays and proposed budget authority which would be included in the Budget to be submitted pursuant to section 11 of this title for the ensuing fiscal year if all programs and activities were carried on during such ensuing fiscal year at the same level as the fiscal year in progress and without policy changes in such programs and activities. The estimated outlays and proposed budget authority submitted pursuant to this section shall be shown by function and subfunctions (in accordance with the classifications in the budget summary table entitled "Budget Authority and Outlays by Function and Agency"), by major programs within each such function, and by agency. Accompanying these estimates shall be the economic and programmatic assumptions underlying the estimated outlays and proposed budget authority, such as the rate of inflation, the rate of real economic growth, the unemployment rate, program caseloads, and pay increases.

(b) The Joint Economic Committee shall review the estimated outlays and proposed budget authority so submitted, and shall submit to the Committees on the Budget of both Houses an economic evaluation thereof on or before December 31 of each year.

Pub. L. 93-344, Title VI, §607, July 12, 1974, 88 Stat. 325.

§11b. Congressional studies of provisions exempting Federal agencies or agency activities or outlays from inclusion in Budget.

The Committees on the Budget of the House of Representatives and the Senate shall study on a continuing basis those provisions of law which exempt agencies of the Federal Government, or any of their activities or outlays, from inclusion in the Budget of the United States Government transmitted by the President under section 11 of this title. Each committee shall, from time to time, report to its House its recommendations for terminating or modifying such provisions.

Pub. L. 93-344, Title VI, §606, July 12, 1974, 88 Stat. 325.

§11c. Year-ahead requests for authorization of new budget authority.

Notwithstanding any other provision of law, any request for the enactment of legislation authorizing the enactment of new budget authority to continue a program or activity for a fiscal year (beginning with the fiscal

year commencing October 1, 1976) shall be submitted to the Congress not later than May 15 of the year preceding the year in which such fiscal year begins. In the case of a request for the enactment of legislation authorizing the enactment of new budget authority for a new program or activity which is to continue for more than one fiscal year such request shall be submitted for at least the first 2 fiscal years.

Pub. L. 93-344, Title VI, §607, July 2, 1974, 88 Stat. 325.

§11d. Changes in functional categories.

Any change in the functional categories set forth in the Budget of the United States Government transmitted pursuant to section 11 of this title shall be made only in consultation with the Committees on Appropriations and the Budget of the House of Representatives and Senate.

Pub. L. 93-344, Title VIII, §802, July 12, 1974, 88 Stat. 330.

§12. With respect to each proposal in the Budget for new or additional legislation which would create or expand any function, activity, or authority, in addition to those functions, activities, and authorities then existing or as then being administered and operated, a tabulation showing--

(A) the amount proposed in the Budget for appropriation and for expenditure in the ensuing fiscal year on account of such proposal; and

(B) the estimated appropriation required on account of such proposal in each of the four fiscal years, immediately following the ensuing fiscal year, during which such proposal is to be in effect.

(b) The President shall transmit to the Congress, on or before June 1 of each year, beginning with 1972, a supplemental summary of the Budget for the ensuing fiscal year transmitted to the Congress by the President under subsection (a) of this section. Such supplemental summary--

(1) shall reflect with respect to that ensuing fiscal year--

(A) All substantial alterations in or reappraisals of estimates of expenditures and receipts, and

(B) all substantial obligations imposed on that budget after its transmission to the Congress;

(2) shall contain current information with respect to those matters covered by subparagraph (8) and clauses (2) and (3) of subparagraph (9) of subsection (a) of this section; and

(3) shall contain such additional information, in summary form, as the President considers necessary or advisable to provide the Congress with a complete and current summary of information with respect to the Budget and the then current estimated functions, obligations, requirements, and financial condition of the Government for the ensuing fiscal year.

(c) The President shall transmit to the Congress, on or before June 1 of each year, beginning with 1972, in such form and detail as he may determine--

(1) summaries of estimated expenditures for the first four fiscal years following the ensuing fiscal years for which the Budget was transmitted to the Congress by the President under subsection (a) of this section, which will be required under continuing programs which have a legal commitment for future years and are considered mandatory under existing law; and

(2) summaries of estimated expenditures, in fiscal years following such ensuing fiscal year, of balances carried over from such ensuing fiscal year. June 10, 1921, c. 18, Title II, §201(a), 42 Stat. 20, amended Sept. 12, 1950, c. 946, Title I, Pt. I, §102(a), 64 Stat. 832; Aug. 1, 1956, c. 814, §1(a), 70 Stat. 782; Aug. 25, 1958, Pub. L. 85-759, §1, 72 Stat. 852; Oct. 26, 1970, Pub. L. 91-510, Title II, §221, 84 Stat. 1169.

§13. Recommendations of President Accompanying Budget.

(a) If the estimated receipts for the ensuing fiscal year contained in the Budget, on the basis of laws existing at the time the Budget is transmitted, plus the estimated amounts of the Treasury at the close of the fiscal year in progress, available for expenditure in the ensuing fiscal year are less than the estimated expenditures for the ensuing fiscal year contained in the Budget, the President in the Budget shall make recommendations to Congress for new taxes, loans, or other appropriate action to meet the estimated deficiency.

(b) If the aggregate of such esimated receipts and such estimated amounts in the Treasury is greater than such estimated expenditures for the ensuing fiscal year, he shall make such recommendations as in his opinion the public interests require. June 10, 1921, c. 18, Title II, §202, 42 Stat. 21.

§14. Transmittal of Proposed Supplemental or Deficiency Appropriations by President.

(a) The President from time to time may transmit to Congress such proposed supplemental or deficiency appropriations as in his judgement (1) are necessary on account of laws enacted after the transmission of the Budget, or (2) are otherwise in the public interest. He shall accompany such proposals with a statement of the reasons therefor, including the reasons for their omission from the Budget.

(b) Whenever such proposed supplemental or deficiency appropriations reach an aggregate which, if they had been contained in the Budget, would have required the President to make a recommendation under subsection (a) of section 13 of this title, he shall thereupon make such recommendations. June 10, 1921, c. 18, Title II, §203, 42 Stat. 21; Sept. 12, 1950, c. 946, Title I, Pt. I, §102(b), 64 Stat. 833.

§15. Estimates or Requests for Appropriations, etc., Not to Be Submitted by Department Officers or Employees Except by Request.

No estimate of request for an appropriation and no request for an increase in an item of any such estimate or request, and no recommendations as to how the revenue needs of the Government should be met, shall be sub-

mitted to Congress or any committee thereof by any officer or employee of any department or establishment, unless at the request of either House of Congress. June 10, 1921, c. 18, Title II, §206, 42 Stat. 21.

§16. Office of Management and Budget; Director and Deputy Director; Duties; Preparation of Budget, etc.

There is in the Executive Office of the President an Office of Management and Budget. There shall be in the Office a Director and a Deputy Director, both of whom shall be appointed by the President, by and with the advice and consent of the Senate. The Deputy Director shall perform such duties as the Director may designate, and during the absence or incapacity of the Director or during a vacancy in the office of Director he shall act as Director. The Office, under such rules and regulations as the President may prescribe, shall prepare the Budget; and any proposed supplemental or deficiency appropriations, and to this end shall have authority to assemble, correlate, revise, reduce, or increase the requests for appropriations of the several departments or establishments. June 10, 1921, c. 18, Title II, §207, 42 Stat. 22; 1939 Reorg. Plan No. I, §1, eff. July 1, 1939, 4 F.R. 2727, 53 Stat. 1423; Apr. 28, 1942, c. 247, Title III, 56 Stat. 234; Sept. 12, 1950, c. 946, Title I, pt. I, §102(e), 64 Stat. 833; July 31, 1953, c. 302, Title I, §101, 67 Stat. 299; 1970 Reorg. Plan No. 2, eff. July 1, 1970, 35 F.R. 7959, 84 Stat. 2085; Mar. 2, 1974, Pub. L. 93-250, 1 §88 Stat. 11.

§16(a), Assistant Directors. Two positions of Assistant Director are authorized. July 31, 1956, c. 804, Title I, §106(a), 70 Stat. 737.

§16(b) Repealed. June 18, 1955, c. 189, §12(c)(10), 69 Stat. 181.

§16(c) Additional position of Assistant Director.

There is established one additional position of Assistant Director in the Office of Management and Budget, for which the compensation shall be the same as is now or may hereafter be provided for the two such positions authorized by section 16a of this title. Aug. 1, 1956, c. 838, 70 Stat. 887.

§17. Attorneys and Other Employees Expenses, 1970 Reorganization Plan No. 2, 84 Stat. 2085.

The Director, under such rules and regulations as the President may prescribe, shall appoint attorneys and other employees and shall make expenditures for rent in the District of Columbia, printing, binding, telegrams, telephone service, law books, books of reference, periodicals, stationery, furniture, office equipment, other supplies, and necessary expenses of the office, within the appropriations made therefor.

§18. Detailed Study of Departments and Establishments.

The Office of Management and Budget, when directed by the President, shall make a detailed study of the departments and establishments for the purpose of enabling the President to determine what changes (with a view of securing greater economy and efficiency in the conduct of the public service) should be made in (1) the existing organization, activities, and

methods of business of such departments or establishments, (2) the appropriations therefore, (3) the assignment of particular activities to particular services, or (4) the regrouping of services. The results of such study shall be embodied in a report or reports to the President, who may transmit to Congress such report or reports or any part thereof with his recommendations on the matters covered thereby. June 10, 1921, c. 18, Title II, §209, 42 Stat. 22, 1970 Reorganization Plan No. 2, 84 Stat. 2085.

§18a. Development of improved plans for administraiton of executive agencies.

The President, through the Director of the Office of Management and Budget, is authorized and directed to evaluate and develop improved plans for the organization, coordination, and management of the executive branch of the Government with a view to efficient and economical service. Sept. 12, 1950, c. 946, Title I, Pt. I, §103, 64 Stat. 834, Reorganization Plan No. 2, eff. July 1, 1970; 35 F.R. 7959, 84 Stat. 2085.

§18b. Development of programs for preparing statistical information by executive agencies.

The President, through the Director of the Office of Management and Budget, is authorized and directed to develop programs and to issue regulations and orders for the improved gathering, compiling, analyzing, publishing, and disseminating of statistical information for any purpose by the various agencies in the executive branch of the Government. Such regulations and orders shall be adhered to by such agencies. Sept. 12, 1950, c. 946, Title I, pt. I §103, 64 Stat. 834; 1970 Reorg. Plan No. 2, eff. July 1, 1970, 35 F.R. 7979, 84 Stat. 2805.

§18c. Executive agency action respecting accounting and budget classifications.

The head of each executive agency shall, in consultation with the Director of the Office of Management and Budget, take whatever action may be necessary to achieve, insofar as is possible, (1) consistency in accounting and budget classification, (2) synchronozation between accounting and budget classifications and organizational structure, and (3) support of the budget justifications by information on performance and program costs by organizational units. Sept. 12, 1950, c. 946, Title I, Pt. I, §106, as added Aug. 1, 1956, c. 814, §2(a), 70 Stat. 782, 1970 Reorg. Plan No. 2, 84 Stat. 2085.

§19. Powers and duties transferred to Office of Management and Budget.

The powers and duties relating to the compiling of estimates conferred and imposed upon the Division of Bookkeeping and Warrants of the Office of the Secretary of the Treasury on June 10, 1921, are transferred to the Office of Management and Budget. June 10, 1921, c. 18, Title II, §211, 42 Stat. 22.

§20. Aid and information for committees of Congress.

The Office of Management and Budget shall, at the request of any committee of either House of Congress having jurisdiction over revenue or

appropriations, furnish the committee such aid and information as it may request. June 10, 1921, c. 18, Title II, §212, 42 Stat. 23.

§21. Information for Bureau by Departments and Establishments; Access to Books, Papers, etc., Thereof.

Under such regulations as the President may prescribe, (1) every department and establishment shall furnish to the office such information as the office may from time to time require and (2) the director and the assistant director, or any employee of the office when duly authorized, shall, for the purpose of securing such information, have access to, and the right to examine, any books, documents, papers, or records of any such department or establishment. June 10, 1921, c. 18, Title II, §213, 42 Stat. 23.

§22. Preparation of Departmental Requests by Heads of Departments.

The head of each department and establishment shall prepare or cause to be prepared in each year his requests for regular, supplemental, or deficiency appropriations. June 10, 1921, c. 18, Title II, §214, 42 Stat. 23; Sept. 12, 1950, c. 946, Title I, §102(f), 64 Stat. 833.

§22a. Availability of Funds for Field Examination of Estimates.

Funds made available in any Act shall hereafter be available for examination of estimates of appropriations in the field and the use of such funds for such purpose shall be subject only to regulations by the standing committees concerned. Aug. 7, 1953, c. 340, ch XIII, §1314, 67 Stat. 438.

§23. Time for Submission of Departmental Request to Office of Management and Budget; Failure to Submit.

The head of each department and establishment shall submit his requests for appropriations to the Office of Management and Budget on or before a date which the President shall determine. In case of his failure to do so, the President shall cause such requests to be prepared as are necessary to enable him to include such requests with the Budget in respect to the work of such department or establishment. June 10, 1921, c. 18, Title II, §215, 42 Stat. 23; Sept. 12, 1950, c. 946, Title I, Pt. I, §102(g), 64 Stat. 834.

§24. Form and Manner of Submission of Departmental Requests; Cost-Based Budgets.

(a) Requests for regular, supplemental, or definciency appropriations which are submitted to the Office of Management and Budget by the head of any department or establishment shall be prepared and submitted as the President may determine in accordance with the provisions of section 11 of this title.

(b) The requests of the departments and establishments for appropriations shall, in such manner and at such times as may be determined by the President, be developed from cost-based budgets.

(c) For the purposes of administration and operation, such cost-based budgets shall be used by all departments and establishments and their sub-

ordinate units. Administrative subdivision of appropriations or funds shall be made on the basis of such cost-based budgets. June 20, 1921, c. 18, Title II, §216(a), 42 Stat. 23, amended Sept. 12, 1950, c. 946, Title I, Pt. I, §102(h), 64 Stat. 834; Aug. 1, 1956, c. 814, §1(b), 70 Stat. 782.

§25. Preparation of horizontal budget for Congress showing totality of programs for meteorology, aspects of program and funding, and estimated goals and financial requirements.

The Office of Management and Budget shall provide the Congress, in connection with the budget presentation for fiscal year 1964 and each succeeding year thereafter, a horizontal budget showing (a) the totality of the programs for meteorology and of the national climate program established under the National Climate Program Act, (b) the specific aspects of the program and funding assigned to each agency, and (c) the estimated goals and financial requirements. Pub. L. 87-843, Title III, §304, Oct. 18, 1962, 76 Stat. 1097. P.L. 95-367, Sept. 17, 1978.

§26. Text Omitted.

§27. Federal Budget Ceiling. The Congress reaffirms its commitment that beginning with Fiscal Year 1981, the total budget outlays of the Federal Government shall not exceed its receipts. Pub. L. 95-435, §7, Oct. 10, 1978, 92 Stat. 1053, amended Pub. L. 96-389, §3, Oct. 7, 1980, 94 Stat. 1553.

§41. Creation; control and direction of; certain offices abolished; officers, employees, books, papers, etc., transferred to General Accounting Office; seal thereof.

There is created an establishment of the Government to be known as the General Accounting Office, which shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States. The offices of Comptroller of the Treasury and Assistant Comptroller of the Treasury are abolished. All other officers and employees of the office of the Comptroller of the Treasury shall be officers and employees in the General Accounting Office at their grades and salaries on July 1, 1921, and all books, records, documents, papers, furniture, office equipment and other property of the office of the Comptroller of the Treasury shall be the property of the General Accounting Office. The Comptroller General is authorized to adopt a seal for the General Accounting Office. June 10, 1921, c. 18, Title III, §301, 42 Stat. 23.

§42. Comptroller General and Deputy Comptroller General; appointment, vacancies, etc.

(a) There shall be in the General Accounting Office a Comptroller General of the United States and a Deputy Comptroller General of the United States, who shall be appointed by the President with the advice and consent of the Senate. The Deputy comptroller General shall perform such duties as may be assigned to him by the Comptroller General, and during the absence or incapacity of the Comptroller General, or during a vacancy in that office shall act as Comptroller General.

(b)(1) Whenever, after April 3, 1980, a vacancy occurs in the Office of Comptroller General or in the Office of Deputy Comptroller General, there is established a commission to recommend individuals to the President for appointment to the vacant office. Any such commission shall consist of--

(A) the Speaker of the House of Representatives,

(B) the President pro tempore of the Senate,

(C) the majority and minority leaders of the House of Representatives and the Senate,

(D) the chairman and ranking minority member of the Committee on Government Operations of the House of Representatives and of the Committee on Governmental Affairs of the Senate, and

(E) in the case of a vacancy in the Office of Deputy Comptroller General, the Comptroller General of the United States.

(2) Any commission established under paragraph (1) shall submit to the President for consideration the names of not less than three persons for the Office of Comptroller General. The President, within his discretion, may request that additional names be submitted. As amended Apr. 3, 1980, Pub. L. 96-226, Title I, §104(a), 94 Stat. 314.

§42a. Same; Compensation.

(a) The compensation of the Comptroller General of the United States shall be at the rate which is equal to the rate for positions at level II of the Executive Schedule of subchapter II of chapter 53 of Title 5.

(b) The compensation of the Deputy Comptroller General of the United States shall be at the rate which is equal to the rate for positions at level III of such Executive Schedule, Pub. L. 88-426 (1964); 90-206 (1967. Pub. L. 42-51, §101, July 9, 1971, 85 Stat. 143.

§43. Same. Terms of Office; removal from office; retirement

Except as otherwise provided in this section, the Comptroller General shall hold office for fifteen years and the Deputy Comptroller General shall hold office from the date of his appointment until the date on which an individual is appointed to fill a vacancy in the Office of Comptroller General. The Deputy Comptroller General may continue to serve until his successor is appointed. The Comptroller General shall not be eligible for reappointment. The Comptroller General or the Deputy Comptroller General may be removed at any time by joint resolution of Congress after notice and hearing, when, in the judgement of Congress, the Comptroller General or Deputy Comptroller General has become permanently incapacitated or has been inefficient, or guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause and in no other manner except by impeachment. Any Comptroller General or Depty Comptroller General removed in the manner provided in this section shall be ineligible for reappointment to that office. When a Comptroller General or Deputy Comtroller General attains the age of seventy years, he shall be retired from his office.

§43a. Same; acting Comptroller General during temporary vacancy in offices of Comptroller General and Assistant Comptroller General. (Text Omitted)

§43b. Survivorship benefits of widows and dependent children of Comptroller General--Election

(Text Omitted)

§43c. Increase of annuites. (Text Omitted)

§44. Certain powers and duties transferred to General Accounting Office; conclusiveness of balances certified by Comptroller General

All power and duties which on June 20, 1921, were conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department, and the duties of the Division of Bookkeeping and Warrants of the Office of the Secretary of the Treasury relating to keeping the personal ledger accounts of disbursing and collecting officers, shall, so far as not inconsistent with this chapter and sections 71, 471, 581, and 581a of this title, be vested in and imposed upon the General Accounting Office and be exercised without direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the exective branch of the Government. The revision by the Comptroller

General of settlements made by the six auditors shall be discontinued, except as to settlements made before July 1, 1921. June 10, 1921, c. 18, Title III, §304, 42 Stat. 24.

§45. Repealed. Pub. L. 86-682, §12(c), Sept. 2, 1960, 74 Stat. 722, eff. Sept. 1, 1960

§46. Law Governing General Accounting Office; Copies of Books, Records, etc., Thereof as Evidence

All laws relating generally to the administration of the departments and establishments shall, so far as applicable, govern the General Accounting Office. Copies of any books, records, papers, or documents and transcripts from the books and proceedings of the General Accounting Office, when certified by the Comptroller General or the Deputy Comptroller General under its seal, shall be admitted as evidence with the same effect as the copies and transcripts referred to in sections 661 and 665 of Title 28. June 10, 1921, c. 18, Title III, §305, 42 Stat. 24. As amended July 9,

§46a. Omitted

§47. Payment of Adjusted Accounts and Claims

The Comptroller General may provide for the payment of accounts or claims adjusted and settled in the General Accounting Office through disbursing officers of the several departments and establishments, instead of by warrant. June 10, 1921, c. 18, Title III, §307, 43 Stat. 25.

§48. Same; Regulating Payment of Arrears of Pay

The Comptroller General may prescribe rules to govern the payment of arrears of pay due to any petty officer, seaman, or other person not an officer, on board any vessel in the employ of the United States, which has been sunk or destroyed, in case of the death of such petty officer, seaman, or person, to the person designated by law to receive the same. R.S. §274; July 31, 1894, c. 174, §4, 28 Stat. 205; June 10, 1921, c. 18, Title III, §304, 42 Stat. 24.

§49. Forms, Systems, and Procedure Prescribed by Comptroller General

The Comptroller General shall prescribe the forms, systems and procedure for administrative appropriation and fund accounting in the several departments and establishments, and for the administrative examination of fiscal officers' accounts and claims against the United States. June 10, 1921, c. 18, Title III, §309, 42 Stat. 25.

§49a. Omitted

§50. Forms for Use in Offices for Collecting Customs

(Text Omitted)

§51. Repealed.

§51-1. General Accounting Office building.

(Text Omitted)

§51a. General Counsel; compensation.

The compensation of the General Counsel of the United States General Accounting Office shall be at an annual rate which is equal to the rate for positions at level IV of the Executive Schedule. Pub. L. 88-426 (1964); Pub. L. 90-206, §225(L)(1969). Aug. 9, 1975, 89 Stat. 421.

§52. Officers and employees of General Accounting Office

(a) The Comptroller General shall appoint, fix the pay of, and remove employees of the General Accounting Office under the General Accounting Office Personnel Act of 1980.

(b) All officers and employees of the General Accounting Office shall perform such duties as may be assigned to them by the Comptroller General.

(c) All official acts performed by such officers or employees specially designated therefor by the Comptroller General shall have the same force and effect as through performed by the Comptroller General in person.

(d) The Comptroller General shall make such rules and regulations as may be necessary for carrying on the work of the General Accounting Office, including rules and regulations concerning the admission of attorneys to practices before such office. June 10, 1921, c. 18, Title III, §311, 42 Stat. 25; Oct. 28, 1949, c. 782, 63 Stat. 973.

§53. Investigations and Reports by Comptroller General

(a) The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and to Congress at the beginning of each regular session, a report in writing of the work of the General Accounting Office, containing recommendations concerning the legislation he may deem necessary to faciliate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement, and application of public funds as he may think advisable. In such regular report, or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures.

(b) He shall make such investigations and reports as shall be ordered by either House of Congress or by any committee of either House having jurisdiction over revenue, appropriations, or expenditures. The Comptroller General shall also, at the request of any such committee, direct assistants from his office to furnish the committee such aid and information as it may request.

(c) The Comptroller General shall specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law.

(d) He shall submit to Congress reports upon the adequacy and effectiveness of the administrative examination of accounts and claims in the respective departments and establishments and upon the adequacy and effectiveness of departmental inspection of the offices and accounts of fiscal officers.

(e) He shall furnish such information relating to expenditures and accounting to the Office of Management and Budget as it may request from time to time.

(f)(1) No portion of any draft report prepared by the General Accounting Office shall be submitted to any agency for comment thereon for a period in excess of thirty days unless the Comptroller General determines upon a showing by such agency, that a longer period is necessary and is likely to result in improvement in the accuracy of such report.

(2) Failure of an agency to return comments by the conclusion of the comment period established under paragraph (1) of this subsection shall not result in the delayed delivery of any such report.

(3) Whenever an agency is requested to comment on a draft report, the Comptroller General shall--

(A) in the case of any report initiated, pursuant to subsection (b) of this section or otherwise, at the request of either House of Congress or by any committee or member thereof, make such draft report available on request to such House, committee, or member; or

(B) in the case of any other report, make such draft report available on request to the Committee on Governmental Affairs of the Senate and to the Committee on Governmental Operations of the House.

(4) The Comptroller General shall prepare and issue with the final version of any report of the General Accounting Office a statement of (A) any significant changes, from any prior drafts of such report, in the findings, conclusions, or recommendations which were based on an agency's comments on such a draft, and (B) the reasons for making such changes.

(5) Procedures followed pursuant to this subsection shall be subject to statutory and Executive order guidelines for the handling and storage of classified information and material. (P.L. 96-226, Apr. 3, 1980, 94 Stat. 314; 31 U.S. Code 53.)

§54. Information Furnished to Comptroller General by Departments and Establishments

(a) All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions and methods of business of their respective offices as he may from time to time require of them; and the Comptroller General, or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have

access to and the right to examine any books, documents, papers, or records of any such department, or establishment. The authority contained in this section shall not be applicable to expenditures made under the provisions of section 107 of this title.

(b)(1) When access to any books, documents, papers or records of any department or establishment is not made available within a reasonable period of time, the Comptroller General in his discretion may make a written request to the head of the department or establishment concerned. Any such request shall set forth any authority in addition to subsection (a) for such access and the reasons such access is desired. The head of the department or establishment concerned shall have a period of twenty days from the date of receipt to respond to the written request of the Comptroller General. The response shall describe any books, documents, papers, or records withheld and the reasons therefor. If within such twenty-day period full access to such books, documents, papers, or records has not been afforded the Comptroller General or any of his designated assistants or employees, the Comptroller General may file a written report of the matter with the President of the United States, the Director of the Office of Management and Budget, the Attorney General, the head of the department or establishment concerned, and with the Speaker of the House of Representatives and the President of the Senate.

(2) Subject to subsection (d) the Comptroller General, through any attorney designated by him in writing, may, after twenty calendar days after the filing of a written report under paragraph (1), apply to the United States District Court for the District of Columbia for any order requiring the head of the department or establishment concerned to produce the material withheld. The Attorney General is authorized to represent the defendant official in such proceedings. Any failure to obey an order of the court under this subsection may be treated by the court as a contempt thereof.

(c)(1) Subject to subsection (d) the Comptroller General may require by subpena the production of books, records, correspondence, memoranda, papers, and documents of contractors, subcontractors, or other non-Federal persons to which he has access by law or by agreement of the non-Federal person from whom access is sought. Subpenas may be issued under the signature of the Comptroller General and shall identify the material sought and the authority on which access is based. Service of a subpena issued under this subsection may be made by anyone authorized by the Comptroller General (A) by delivering a copy thereof to the person named therein, or (B) by mailing a copy thereof by certified or registered mail, return receipt requested, addressed to such person at his residence, or principal place of business. A verified return by the person so serving the subpena setting forth the manner of service or in the case of service by certified or registered mail, the return post office receipt signed by the person so served, shall be proof of service.

(2) In the case of contumacy or refusal to obey a subpena issued under paragraph (1) of this subsection, by any person who resides, is found, or transacts business within the jurisdiction of any district court of the United States, such court, upon application made by the Comptroller General through any attorney designated by him in writing, shall have jurisdiction

to issue to such person an order requiring such person to produce the matter requested. Any failure of any such person to obey such order of the court may be treated by the court as a contempt thereof.

(d) The Comptroller General may not bring an action under subsection (b) for an order or issue of subpena under subsection (c) requiring the production of material--

(1) if such material relates to activities designated by the President as being foreign intelligence or foreign counterintelligence activities;

(2) If such material is specifically exempted from disclosure to the Comptroller General by statute provided that such statute (A) requires that the material be withheld from the Comptroller General in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding from the Comptroller General or refers to particular types of matters to be withheld from the Comptroller General; or

(3) if the President or the Director of the Office of Management and Budget within twenty days after the filing of a report under subsection (b)(1), certifies in writing to the Comptroller General, the Speaker of the House of Representatives, and the President of the Senate, that (A) such material consists of matters which could be withheld from disclosure under section 552(b)(5) or 552(b)(7), of title 5, United States Code and (B) the disclosure of such material to the Comptroller General could reasonably be expected to substantially impair the operations of the Federal Government. Such certification shall be nondelegable by the President or by the Director of the Office of Management and Budget and shall be accompanied by a full explanation of the rationale therefore.

(e) Any written information, books, documents, papers, or records made available to the Comptroller General pursuant to this section shall be subject to the same level of confidentiality as is required of the agency from which obtained. The officers and employees of the General Accounting Office shall be subject to the same penalties prescribed by statute for unauthorized disclosure or use as the officers or employees of the agency from which such material was obtained. Information described in section 552(b)(6) of title 5 of the United States Code obtained by the Comptroller General shall be maintained in a manner designed to prevent unwarranted invasions of personal privacy.

(f) Nothing in this section shall be construed as authority to withhold information from Congress. (P.L. 96-226, Apr. 3, 1980, 94 Stat. 312, 31 U.S. Code 54.)

§55. Repealed. Pub. L. 89-554 (1966)

§56. Designation of Person to Sign Warrants

The Comptroller General is authorized to designate such person or persons in his office as may be required from time to time to countersign in

his name such classes of warrants as he may direct. Mar. 4, 1909, c. 297, §1, 35 Stat. 866; May 29, 1920, c. 214, §1, 41 Stat. 647; June 10, 1921, c. 18, Title III, §304, 42 Stat. 24.

§57. Repealed. June 28, 1955, c. 189, §12(c)(4). 69 Stat. 180.

§58. Transferred.

§59. Studies by Comptroller General of Restrictions in General Appropriation Acts; Reports to Congress

The Comptroller General is authorized and directed to make a full and complete study of restrictions placed in general appropriation Acts limiting the expenditure of specified appropriations therein, with a view to determining the cost to the Government incident to complying with such restrictions, and to report to the Congress his estimate of the cost of complying with such restrictions and such other recomendations with respect thereto as he deems necessary or desirable. Aug. 2, 1946, c. 753, Title II, §205, 60 Stat. 837.

§60. Analyses of Executive Agencies' Expenditures by Comptroller General; Reports to Congressional Committees.

The Comptroller General is authorized and directed to make an expenditure analysis of each agency in the executive branch of the Government (including Government corporations), which, in the opinion of the Comptroller General, will enable Congress to determine whether public funds have been economically and efficiently administered and expended. Reports on such analyses shall be submitted by the Comptroller General, from time to time, to the Committees on Government Operations, to the Appropriations Committee, and to the legislative committees having jurisdiction over legislation relating to the operations of the respective agencies, of the two Houses. Aug. 2, 1946, c. 753, Title II, §206, 60 Stat. 837.
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§67. Duty of General Accounting Office.

(a) Except as otherwise specifically provided by law, the financial transactions of each executive, legislative, and judicial agency, including but not limited to the accounts of accountable officers, shall be audited by the General Accounting Office in accordance with such principles and procedures and under such rules and regulations as may be prescribed by the Comptroller General of the United States. In the determination of auditing procedures to be followed and the extent of examination of vouchers and other documents, the Comptroller General shall give due regard to generally accepted principles of auditing, including consideration of the effectiveness of accounting organizations and systems, internal audit and control, and related administrative practices of the respective agencies.
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§71. Public Accounts to be Settled in General Accounting Office.

All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the

United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office. R.S. §236; June 10, 1921, c. 18, Title III, §305, 42 Stat. 24.

§71a. Same; Limitation of Time on Claims and Demands.

(1) Every claim or demand (except a claim or demand by any State, Territory, possession or the District of Columbia against the United States cognizable by the General Accounting Office under sections 71 and 236 of this title shall be forever barred unless such claim, bearing the signature and address of the Claimant or of an authorized agency or attorney, shall be received in said office within six years after date such claim first accrued; Provided, That when a claim of any person serving in the military or naval forces of the United States accrues in time of war, or when war intervenes within five years after its accrual, such claim may be presented within five years after peace is established.

(2) Whenever any claim barred by subsection (1) of this section shall be received in the General Accounting Office, it shall be returned to the claimant, with a copy of this section, and such action shall be complete response without further communication. Oct. 9, 1940, c. 788, §1, 2, 54 Stat. 1061. Jan. 2, 1975, P.L. 93-604, 88 Stat. 1965.

§72. Same; Settlement of Accounts.

(Text Omitted)
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§74. Certified Balances of Public Accounts; Conclusiveness; Suspension of Items; Preservation of Adjusted Accounts; Decision Upon Questions Involving Payments.

Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the executive branch of the Government, except that any person whose accounts may have been settled, the head of the exective department, or of the board, commission, or establishment not under the jurisdiction of an executive department, to which the account pertains, or the Comptroller General of the United States, whose decision upon such revision shall be final and conclusive upon the executive branch of the Government. Nothing in this chapter shall prevent the General Accounting Office from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement. The General Accounting Office shall preserve all accounts which have been finally adjusted, together with all vouchers, certificates and related papers, until disposed of as provided by law.

Disbursing officers, or the head of any executive department, or other establishment not under any of the executive departments, may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement. July 31, 1894, c. 174, §8, Stat. 207; June 10, 1921, c. 18, Title III, §304, 42 Stat. 24; Oct. 25, 1951, c. 562, §3(1), 65 Stat. 639.

Documentary Evidence of Obligations-Requirement; Character of Evidence.

(a) After August 26, 1964, no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of--

(1) a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be performed; or

(2) a valid loan agreement, showing the amount of the loan to be made and the terms of repayment thereof; or

(3) an order required by law to be placed with a Government agency; or

(4) an order issued pursuant to a law authorizing purchases without advertising when necessitated by public exigency or for perishable subsistence supplies or within specific monetary limitations; or

(5) a grant or subsidy payable (i) from appropriations made for payment of or contributions toward sums required to be paid in specific amounts fixed by law or in accord with formulae prescribed by law, or (ii) pursuant to agreement authorized by, or plans approved in accord with and authorized by, law; or

(6) a liability which may result from pending litigation brought under authority of law; or

(7) employment or services of persons or expenses of travel in accord with law, and services performed by public utilities; or

(8) any other legal liability of the United States against an appropriation or fund legally available therefor.
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Aug. 26, 1954, 68 Stat. 830; July 8, 1959, P.L. 86-79, 73 Stat. 167; 1970 Reorg. Plan No. 2, eff. July 1, 1970, 35, F.R. 7959, 84 Stat. 2085

ANTI-DEFICIENCY ACT

(31 U.S.C. SEC. 665-665A)

§665. Appropriations--Expenditures or Contract Obligations in Excess of Funds Prohibited.

(a) no officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

Voluntary Service Forbidden

(b) no officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.

Apportionment of Appropriations: Reserves: Distribution, Review

(c)(1) Except as otherwise provided in this section, all appropriations or funds available for obligation for a definite period of time shall be so apportioned as to prevent obligation or expenditure thereof in a manner which would indicate a necessity for deficiency or supplemental appropriations for such period; and all appropriations or funds not limited to a definite period of time, and all authorizations, shall be so apportioned as to achieve the most effective and economical use thereof. As used hereafter in this section, the term "appropriation" means appropriations, funds, and authorizations to create obligations by contract in advance of appropriations.

(2) In apportioning any appropriation, reserves may be established solely to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements or greater efficiency of operations. Whenever it is determined by an officer designated in subsection (d) of this section to make apportionments and reapportionments that any amount so reserved will not be required to carry out the full objectives and scope of the appropriation concerned, he shall recommend the rescission of such amount in the manner provided in the Budget and Accounting Act, 1921, for estimates of appropriations. Except as specifically provided by particular appropriations Acts or other laws, no reserves shall be established other than as authorized by this subsection. Reserves established pursuant to this subsection shall be reported to the Congress in accordance with the Impoundment Control Act of 1974.

(3) Any appropriation subject to apportionment shall be distributed by months, calendar quarters, operating seasons, or other time periods, or by activities, functions, projects or objects, or by a combination thereof as may be deemed appropriate by the officers designated in subsection (d) of this section to make apportionments and reapportionments. Except as otherwise specified by the officer making the

apportionment amounts so apportioned shall remain available for obligation, in accordance with the terms of the appropriation on a cumulative basis unless reapportioned.

(4) Apportionments shall be reviewed at least four times each year by the officers designated in subsection (d) of this section to make apportionments and reapportionments, and such reapportionments made or such reserves established, modified, or released as may be necessary to further the effective use of the appropriation concerned, in accordance with the purposes stated in paragraph (1) of this subsection.

Officers Controlling Apportionment or Reapportionment

(d)(1) Any appropriation available to the legislative branch, the judiciary, or the District of Columbia, which is required to be apportioned under subsection (c) of this section, shall be apportioned or reapportioned in writing by the officer having adminstrative control of such appropriation. Each such appropriation shall be apportioned not later than thirty days before the beginning of the fiscal year for which the appropriation is available or not during the thirty days after approval of the Act by which the appropriation is made available, whichever is later.

(2) Any appropriation available to an agency, which is required to be apportioned under subsection (c) of this section, shall be apportioned or reapportioned in writing by the Director of the Bureau of the Budget. The head of each agency to which any such appropriation is available shall submit to the Bureau of the Budget information, in such form and manner and at such time or times as the Director may prescribe, as may be required for the apportionment of such appropriation. Such information shall be submitted not later than forty days before the beginning of any fiscal year for which the appropriation is available, or not more than thirty days after the approval of the Act by which such appropriation is made available, whichever is later. When used in this section, the term "agency" means any executive department, agency, commission, authority, administration, board, or other independent establishment in the executive branch of the Government, including any corporation wholly or partly owned by the United States which is an instrumentality of the United States. Nothing in this subsection shall be so construed as to interfere with the initiation, operation, and administration of agricultural price support programs and no funds (other than funds for administrative expenses) available for price support, surplus removal, and available under section 612(c) of title 7, with respect to agricultural commodities shall be subject to apportionment pursuant to this section. The provisions of this section shall not apply to any corporation which obtains funds for making loans, other than paid in capital funds, without legal liability on the part of the United States.

Apportionment Necessitating Deficiency or Supplemental Estimates

(e)(1) No apportionment or reapportionment, or request therefor by the head of an agency, which in the judgment of the officer making or the agency head requesting such apportionment or reapportionment, would indicate a necessity for a deficiency or supplemental estimate shall be made except upon a determination by such officer or agency head, as the case may be, that such action is required because of (A) any laws enacted subsequent to the transmission to the Congress of the estimates for an appropriation which

require expenditures beyond administrative control; or (B) emergencies involving the safety of human life, the protection of property, or the immediate welfare of individuals in cases where an appropriation has been made to enable the United States to make payment of, or contributions toward, sums which are required to be paid to individuals either in specific amounts fixed by law or in accordance with formulae prescribed by law.

(2) In each case of an apportionment or a reapportionment which, in the judgment of the officer making such apportionment or reapportionment, would indicate a necessity for a deficiency or supplemental estimate such officer shall immediately submit a detailed report of the case to the Congress. In transmitting any deficiency or supplemental estimates required on account of any such apportionment or reapportionment, reference shall be made to such report.

Exemption of Trust Funds and Working Funds Expenditures from Apportionment

(f)(1) The officers designated in subsection (d) of this section to make apportionments and reapportionments may exempt from apportionments trust funds and working funds expenditures from which have no significant effect on the financial operations of the Government, working capital and revolving funds established for intragovernmental operations, receipts from industrial and power operations available under law and any appropriation made specifically for--

(1) interest on, or retirement of, the public debt;

(2) payment of claims, judgments, refunds, and drawbacks;

(3) any item determined by the President to be of a confidential nature;

(4) payment under private relief Acts or other laws requiring payments to designated payees in the total amount of such appropriation;

(5) Grants to the States under subchapter I, IV, or X of chapter 7 of Title 42, or under any other public assistance subchapter in such chapter.

(2) The provisions of subsection (c) of this section shall not apply to appropriations to the Senate or House of Representative or to any Member, committee, Office (including the Office of the Architect of the Capitol), officer, or employee thereof.

Administrative Division of Apportionment; Simplification of System for Subdividing Funds

(g) Any appropriation which is apportioned or reapportioned pursuant to this section may be divided and subdivided administratively within the limits of such apportionments or reapportionments. The officer having administrative control of any such appropriation available to the legislative branch, the judiciary, the United States International Trade Commission, or the District of Columbia, and the head of each agency, subject to the approval of the Director of the Office of Management and Budget, shall prescribe, by regulation, a system of administrative control (not

inconsistent with any accounting procedures prescribed by or pursuant to law) which shall be designed to (A) restrict obligations or expenditures against each appropriation to the amount of apportionments or reapportionments made for each such appropriation, and (B) enable such officer or agency head to fix responsibilities for the creation of any obligation or the making of any expenditure in excess of an apportionment or reapportionment. In order to have a simplified system for the administrative subdivision of appropriations or funds, each agency shall work toward the objective of financing each operating unit, at the highest practical level, from not more than one administrative subdivision for each appropriation or fund affecting such unit. As amended Aug. 1, 1956, c. 814, §3, 70 Stat. 783; Aug. 28, 1957, Pub. L. 85-170, ch. XIV, §1401, 71 Stat. 440.

Expenditures in Excess of Apportionment Prohibited; Penalities

(h) No officer or employee of the United States shall authorize or create any obligation or make any expenditure (A) in excess of an apportionment or reapportionment, or (B) in excess of the amount permitted by regulations prescribed pursuant to subsection (g) of this section.

Administrative Discipline; Reports on Violations

(i) (1) In addition to any penalty or liability under other law, any officer or employee of the United States who shall violate subsections (a), (b), or (h) of this section shall be subjected to appropriate administrative discipline, including, when circumstances warrant, suspension from duty without pay or removal from office; and any officer or employee of the United States who shall knowingly and willfully violate subsections (a), (b), or (h) of this section shall, upon conviction, be fined not more than $5,000 or imprisioned for not more than two years, or both.

(2) In the case of a violation of subsections (a), (b), or (h) of this section by an officer or employee of an agency, or the District of Columbia, the head of the agency concerned or the Commissioners of the District of Columbia, shall immediately report to the President, through the Director of the Bureau of the Budget, and to the Congress all pertinent facts together with a statement of the action taken thereupon. R.S. §3679; Mar 3, 1905, c. 1484, §4, 33 Stat. 1257; Feb. 27, 1906, c. 510, §3, 34 Stat. 48; Sept. 6, 1950, c. 896, c. XII, §1211, 64 Stat. 765; Aug. 1, 1956, c. 814, §3, 70 Stat. 783; Aug. 28, 1957, P.L. 85-170, 71 Stat. 440, 1970 Reorg. Plan No. 2, eff. July 1, 1970, 35 F.R. 7959, 84 Stat. 2085; July 12, 1974, P.L. 93-344, 88 Stat. 332; Jan. 3, 1975, P.L. 93-618, 88 Stat. 2011.

§665a. Same: Basis of Apportionment; Need for Funds for Increased Compensation for Wage-Board Employees.

After June 5, 1957, any appropriation required to be apportioned pursuant to section 665 of this Title, may be apportioned on a basis indicating the need for a supplemental or deficiency estimate of appropriation to the extent necessary to permit payment of such pay increases as may be granted those employees (commonly known as wage-board employees) whose compensation is fixed and adjusted from time to time in accordance with prevailing rates (section 1082(7) of Title 5). Pub. L. 85-48, Title II, §210, June 5, 1957, 71 Stat. 55.

LIMITATIONS ON CONTRACTING

41 USC §11 et seq.

§11. No Contracts or Purchases Unless Authorized or Under Adequate Appropriation; Report to Congress

(a) No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Departments of the Army, Navy, and Air Force, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies which, however, shall not exceed the necessities of the current year.

(b) The Secretary of Defense shall immediately advise the Congress of the exercise of the authority granted in subsection (a) of this section, and shall report quarterly on the estimated obligations incurred pursuant to the authority granted in subsection (a) of this section. As amended October 15, 1966, Pub. L. 89-687, Title VI, §612(e), 80 Stat. 993.

§12. No Contract to Exceed Appropriation

No contract shall be entered into for the erection, repair, or furnishing of any public building, for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose. R.S. §3733.

§13. Contracts Limited to One Year

Except as otherwise provided, it shall not be lawful for any of the executive departments to make contracts for stationery or other supplies for a longer term than one year from the time the contract is made. R.S. §3735.

31 U.S.C. Sec. 487

§487. Proceeds of Sales of Material

All proceeds of sales of old material, condemned stores, supplies, or other public property of any kind, except the proceeds of the sale or leasing of marine hospitals, or of the sales of commissary stores to the officers and enlisted men of the Army, or of materials, stores, or supplies sold to officers and soldiers of the Army or of the sale of condemned Navy clothing, or of sales of materials, stores, or supplies to any exploring or surveying expedition authorized by law, or as provided in section 485 of Title 40, or in other law, shall be deposited and covered into the Treasury as miscellaneous receipts on account of "proceeds of Government property," and shall not be withdrawn or applied, except in consequence of a subsequent appropriation made by law. Under such regulations as the Secretary of the Army may prescribe, the commanding officers of mounted units of the National Guard may sell all stable refuse and empty grain sacks and containers at public or private sale and apply the proceeds derived therefrom to the purchase of feed, supplementing the regular allowance and issue for the animals of the said units, and for the purchase of stable equipment, and horseshoers', saddlers', blacksmiths', and wagoners' tools not an article of issue to such organizations. R.S. §3618; Feb. 27, 1877, c. 69, §1, 19 Stat. 249; Oct. 14, 1940, c. 875, §4, 54 Stat. 1136; July 26, 1947, c. 343, Title II, §205(a), 61 Stat. 501; Aug. 4, 1949, c. 393, §20, 63 Stat. 561; Oct. 31, 1951, c. 654, §4(3), 65 Stat. 708.

§628. Application of Moneys Appropriated.

Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others. R.S. §3678.

IMPOUNDMENT CONTROL ACT OF 1974

31 USC 1400-1407

CHAPTER 26-Impoundment Control

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1400. Disclaimer

Nothing contained in this Act, or in any amendments made by this Act, shall be construed as—

(1) asserting or conceding the constitutional powers or limitations of either the Congress or the President;

(2) ratifying or approving any impoundment heretofore or hereafter executed or approved by the President or any other Federal officer or employee, except insofar as pursuant to statutory authorization then in effect;

(3) affecting in any way the claims or defenses of any party to litigation concerning any impoundment; or

(4) superceding any provision of law which requires the obligation of budget authority or the making of outlays thereunder.

Pub. L. 93-344, Title X, §1001, July 12, 1974, 88 Stat. 332.

1401. *Definitions*

For purposes of this chapter—

(1) "deferral of budget authority" includes—

(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or

(B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law;

(2) "Comptroller General" means the Comptroller General of the United States.

(3) "rescission bill" means a bill or joint resolution which only rescinds in whole or in part, budget authority proposed to be rescinded in a special message transmitted by the President under section 1402 of this title, and upon which the Congress completes action before the end of the first period of 45 calendar days of continuous session of the Congress after the date on which the President's message is received by the Congress;

(4) "impoundment resolution" means a resolution of the House of Representatives or the Senate which only expresses its disapproval of a proposed deferral of budget authority set forth in a special message transmitted by the President under section 1403 of this title; and

(5) continuity of a session of the Congress shall be considered as broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain shall be excluded in the computation of the 45-day period referred to in paragraph (3) of this section and in section 1402 of this title, and the 25-day periods referred to in sections 1406 and 1407(b)(1) of this title. If a special message is transmitted under section 1402 of this title during any Congress and the last session of such Congress adjourns sine die before the expiration of 45 calendar days of continuous session (or a special message is so transmitted after the last session of the Congress sine die), the message shall be deemed to have been retransmitted on the first day of the succeeding Congress and the 45-day period referred to in paragraph (3) of this section and in section 1402 of this title (with respect

to such message) shall commence on the day after such first day.

Pub. L. 93-344, Title X, § 1011, July 12, 1974, 88 Stat. 333.

1402. *Rescission of Budget Authority*

Transmittal of special message

(a) Whenever the President determines that all or part of any budget authority will not be required to carry out the full objectives or scope of programs for which it is provided or that such budget authority should be rescinded for fiscal policy or other reasons (including the termination of authorized projects or activities for which budget authority has been provided), or whenever all or part of budget authority provided for only one fiscal year is to be reserved from obligation for such fiscal year, the president shall transmit to both Houses of Congress a special message specifying—

(1) the amount of budget authority which he proposes to be rescinded or which is to be so reserved;

(2) any account, department, or establishment of the Government to which such budget authority is available for obligation, and the specific project or governmental functions involved;

(3) the reasons why the budget authority should be rescinded or is to be so reserved;

(4) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the proposed rescission or of the reservation; and

(5) all facts, circumstances, and considerations relating to or bearing upon the proposed rescission or the reservation and the decision to effect the proposed rescission or the reservation, and to the maximum extent practicable, the estimated effect of the proposed rescission or the reservation upon the objects, purposes, and programs for which the budget authority is provided.

Requirement to make available for obligation

(b) Any amount of budget authority proposed to be rescinded or that is to be reserved as set forth in such special message shall be made available for obligation unless, within the prescribed 45-day period, the Congress has completed action on a rescission bill rescinding all or part of the amount proposed to be rescinded or that is to be reserved.

Pub. L. 93-344, Title X, § 1012, July 12, 1974, 88 Stat. 333.

1403. *Disapproval of proposed deferrals of budget authority*

Transmittal of special message

(a) Whenever the President, the Director of the Office of Management and Budget, the head of any department or agency of the United States, or any officer or employee of the United States proposes to defer any budget authority, provided for a specific purpose or project, the President shall transmit to the House of Representatives and the Senate a special message specifying—

(1) the amount of the budget authority proposed to be deferred;

(2) any account, department, establishment, of the Government to which such budget authority is available for obligation, and the specific projects or governmental functions involved;

(3) the period of time during which the budget authority is proposed to be deferred;

(4) the reasons for the proposed deferral, including any legal authority invoked by him to justify the proposed deferral;

(5) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the proposed deferral; and

(6) all facts, circumstances, and considerations relating to or bearing upon the proposed deferral and the decision to effect the proposed deferral, including an analysis of such facts, circumstances, and considerations in terms of their application to any legal authority and specific elements of legal authority invoked by him to justify such proposed deferral, and to the maximum extent practicable, the estimated effect of the proposed deferral upon the objects, purposes, and programs for which the budget authority is provided.

A special message may include one or more proposed deferrals of budget authority. A deferral may not be proposed for any period of time extending beyond the end of the fiscal year in which the special message proposing the deferral is transmitted to the House and the Senate.

Requirements to make available for obligation

(b) Any amount of budget authority proposed to be deferred, as set forth in a special message transmitted under subsection (a) of this section, shall be made available for obligation if either House of Congress passes an impoundment resolution disapproving such proposed deferral.

Exception

(c) The provisions of this section do not apply to any budget authority proposed to be rescinded or that is to be reserved as set forth in a special message required to be transmitted under section 1402 of this title.

Pub. L. 93-344, Title X, § 1013, July 12, 1974, 88 Stat. 334.

1404. *Transmission of Messages; Publication*

Delivery to House and Senate

(a) Each special message transmitted under section 1402 or 1403 of this title shall be transmitted to the

House of Representatives and the Senate on the same day, and shall be delivered to the Clerk of the House of Representatives if the House is not in session, and to the Secretary of the Senate if the Senate is not in session. Each special message so transmitted shall be referred to the appropriate committee of the House of Representatives and the Senate. Each such message shall be printed as a document of each House.

Delivery to Comptroller General

(b) A copy of each special message transmitted under section 1402 or 1403 of this title shall be transmitted to the Comptroller General on the same day it is transmitted to the House of Representatives and the Senate. In order to assist the Congress in the exercise of its functions under sections 1402 and 1403 of this title, the Comptroller General shall review each such message and inform the House of Representatives and the Senate as promptly as practicable with respect to—

(1) in the case of a special message transmitted under section 1402 of this title, the facts surrounding the proposed rescission or the reservation of budget authority (including the probable effects thereof); and

(2) in the case of a special message transmitted under section 1403 of this title, (A) the facts surrounding each proposed deferral of budget authority (including the probable effects thereof) and (B) whether or not (or to what extent), in his judgement, such proposed deferral is in accordance with existing statutory authority.

Transmission of supplementary messages

(c) If any information contained in a special message transmitted under section 1402 or 1403 of this title is subsequently revised, the President shall transmit to both Houses of Congress and the Comptroller General a supplementary message stating and explaining such revision. Any such supplementary message shall be delivered, referred, and printed as provided in subsection (a) of this section. The Comptroller General shall promptly notify the House of Representatives and the Senate of any changes in the information submitted by him under subsection (b) of this section which may be necessitated by such revision.

Printing in Federal Register

(d) Any special message transmitted under section 1402 and 1403 of this title, and any supplementary message transmitted under subsection (c) of this section, shall be printed in the first issue of the Federal Register published after such transmittal.

Cumulative reports of proposed rescissions, reservations and deferrals of budget authority

(e)(1) The President shall submit a report to the House of Representatives and the Senate, not later than the 10th day of each month during a fiscal year, listing all budget authority for that fiscal year with respect to which, as of the first day of such month—

(A) he has transmitted a special message under Section 1402 of this title with respect to a proposed rescission or a reservation; and

(B) he has transmitted a special message under section 1403 of this title proposing a deferral.

Such report shall also contain, with respect to each such proposed rescission or deferral, or each such reservation, the information required to be submitted in the special message with respect thereto under section 1402 or 1403 of this title.

(2) Each report submitted under paragraph (1) shall be printed in the first issue of the Federal Register published after its submission. Pub. L. 93-344, Title X, § 1014, July 12, 1974, 88 Stat. 335.

1405. *Reports by Comptroller General*

Failure to transmit special message

(a) If the Comptroller General finds that the President, the Director of the Office of Management and Budget, the head of any department or agency of the United States, or any other officer or employee of the United States—

(1) is to establish a reserve or proposes to defer budget authority with respect to which the President is required to transmit a special message under section 1402 or 1403 of this title; or

(2) has ordered, permitted, or approved the establishment of such a reserve or a deferral of budget authority;

and that the President has failed to transmit a special message with respect to such reserve or deferral, the Comptroller General shall make a report on such reserve or deferral and any available information concerning it to both Houses of Congress. The provisions of this part shall apply with respect to such reserve or deferral in the same manner and with the same effect as if such report of the Comptroller General were a special message transmitted by the President under section 1402 or 1403 of this title, and, for purposes of this chapter, such report shall be considered a special message transmitted under section 1402 or 1403 of this title.

Incorrect classification of special message

(b) If the President has transmitted a special message to both Houses of Congress in accordance with section 1402 or 1403 of this title, and the Comptroller General believes that the President so transmitted the special message in accordance with one of those sections when the special message should have been transmitted in accordance with the other of those sections, the Comptroller General shall make a report to both Houses of the Congress setting forth his reasons. Pub. L. 93-344, Title X, § 1015, July 12, 1974, 88 Stat. 336.

If, under section 1402(b) or 1403(b), of this title, authority is required to be made available for obligation and such budget authority is not made available for obligation, the Comptroller General is hereby, expressly empowered, through attorneys of his own selection, to bring a civil action in the United States District Court for the District of Columbia to require such budget authority to be made available for obligation, and such court is hereby expressly empowered to enter in such civil action, against any department, agency, officer, or employee of the United States, any decree, judgment, or order which may be necessary or appropriate to make such budget authority available for obligation. The courts shall give precedence to civil actions brought under this section, and to appeals and writs from decisions in such actions, over all other civil actions, appeals, and writs. No civil action shall be brought by the Comptroller General under this section until the expiration of 25 calendar days of continuous session of the Congress following the date on which an explanatory statement by the Comptroller General of the circumstances giving rise to the action contemplated has been filed with the Speaker of the House of Representatives and the President of the Senate.

Pub. L. 93-344, Title X, § 1016, July 12, 1974, 88 Stat. 336.

1407. *Procedure in House of Representatives and Senate*

Referral

(a) Any rescission bill introduced with respect to a special message or impoundment resolution introduced with respect to a proposed deferral of budget authority shall be referred to the appropriate committee of the House of Representives or the Senate, as as the case may be.

Discharge of committee

(b)(1) If the committee to which a rescission bill or impoundment resolution has been referred has not reported it at the end of 25 calendar days of continuous session of the Congress after its introduction, it is in order to move either to discharge the committee from further consideration of the bill or resolution, or to discharge the committee from further consideration of any other rescission bill with respect to the same special message or impoundment resolution with respect to the same proposed deferral, as the case may be, which has been referred to the committee.

(2) A motion to discharge may be made only by an individual favoring the bill or resolution, may be made only if supported by one-fifth of the Members of the House involved (a quorum being present), and is highly privileged in the House and privileged in the Senate (except that it may not be made after the committee has reported a bill or resolution with respect to the same special message or the same proposed deferral, as the case may be); and debate thereon shall be limited to not more than 1 hour, the time to be divided in the House equally between those favoring and those opposing the bill or resolution, and to be divided in the Senate equally between, and controlled by, the majority leader and the minority leader or their designees. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

Floor consideration in House

(c)(1) When the committee of the House of Representatives has reported, or had been discharged from further consideration of, a rescission bill or impoundment resolution, it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the bill or resolution. The motion shall be highly privileged and not debatable. An amendment to the motion shall not be in order, nor shall it be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(2) Debate on a rescission bill or impoundment resolution shall be limited to not more than 2 hours, which shall be divided equally between those favoring and those opposing the bill or resolution. A motion further to limit debate shall not be debatable. In the case of an impoundment resolution, no amendment to, or motion to recommit, the resolution shall be in order. It shall not be in order to move to reconsider the vote by which a rescission bill or impoundment resolution is agreed to or disagreed to.

(3) Motions to postpone, made with respect to the consideration of a rescission bill or impoundment resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(4) All appeals from the decisions of the Chair relating to the application of the Rules of the House of Representatives to the procedure relating to any rescission bill or impoundment resolution shall be decided without debate.

(5) Except to the extent specifically provided in the preceding provisions of this subsection, consideration of any rescission bill or impoundment resolution and amendments thereto (or any conference report thereon) shall be governed by the Rules of the House of Representatives applicable to other bills and resolutions, amendments, and conference reports in similar circumstances.

Floor consideration in Senate

(d)(1) Debate in the Senate on any rescission bill or impoundment resolution, and all amendments thereto (in the case of a rescission bill) and debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours. The time shall be equally

divided between, and controlled by, the majority leader and the minority leader or their designees.

(2) Debate in the Senate on any amendment to a rescission bill shall be limited to 2 hours, to be equally divided between, and controlled by, the mover and the manager of the bill. Debate on any amendment to an amendment to such a bill and debate on any debatable motion or appeal in connection with such a bill or an impoundment resolution shall be limited to 1 hour, to be equally divided between, and controlled by, the mover and the manager of the bill or resolution, except that in the event the manager of the bill or resolution is in favor of any such amendment, motion, or appeal, the time in opposition thereto shall be controlled by the minority leader or his designee. No amendment that is not germane to the provisions of a rescission bill shall be received. Such leaders, or either of them, may, from the time under their control in the passage of a rescission bill or impoundment resolution, allot additional time to any Senator during the consideration of any amendment, debatable motion, or appeal.

(3) A motion to further limit debate is not debatable. In the case of a rescission bill, a motion to recommit (except a motion to recommit with instructions to report back within a specified number of days, not to exceed 3, not counting any day on which the Senate is not in session) is not in order. Debate on any such motion to recommit shall be limited to one hour, to be equally divided between, and controlled by, the mover and the manager of the concurrent resolution. In the case of an impoundment resolution, no amendment or motion to recommit is in order.

(4) The conference report or any rescission bill shall be in order in the Senate at any time after the third day (excluding Saturdays, Sundays, and legal holidays) following the day on which such a conference report is reported and is available to Members of the Senate. A motion to proceed to the consideration of the conference report may be made even though a previous motion to the same effect has been disagreed to.

(5) During the consideration in the Senate of the conference report on any rescission bill, debate shall be limited to 2 hours, to be equally divided between, and controlled by, the majority leader and minority leader or their designees. Debate on any debatable motion or appeal related to the conference report shall be limited to 30 minutes, to be equally divided between, and controlled by, the mover and the manager of the conference report.

(6) Should the conference report be defeated, debate on any request for a new conference and the appointment of conferees shall be limited to one hour, to be equally divided between, and controlled by, the manager of the conference report and the minority leader or his designee, and should any motion be made to instruct the conferees before the conferees are named, debate on such motion shall be limited to 30 minutes, to be equally divided between, and controlled by, the mover and the manager of the conference report. Debate on any amendment to any such instructions shall be limited to 20 minutes, to be equally divided between, and controlled by, the mover and the manager of the conference report. In all cases where the manager of the conference report is in favor of any motion, appeal, or amendment, the time in opposition shall be under the control of the minority leader or his designee.

(7) In any case in which there are amendments in disagreement, time on each amendment shall be limited to 30 minutes, to be equally divided between, and controlled by, the manager of the conference report and the minority leader or his designee. No amendment that is not germane to the provisions of such amendments shall be received.

Pub. L. 93-344, Title X, § 1017, July 12, 1974, 88 Stat. 337.

EXECUTIVE ORDER NO. 11845

Mar. 24, 1975, 40 F.R. 13299

Delegation of Certain Reporting Functions to Director of Office of Management and Budget

By virtue of the authority vested in me by the Impoundment Control Act of 1974 (Public Law 93-344) 88 Stat. 332, hereinafter referred to as the Act (this chapter), and section 301 of title 3 of the United States Code (section 301 of Title 3, The President), the Director of the Office of Management and Budget is hereby designated and empowered to exercise, as of October 1, 1974 without ratification or other action of the President (1) the functions required by sections 1014(b) and 1014(d) of the Act (subsecs. (b) and (d) of this section) of transmitting to the Comptroller General of the United States and to the Office of the Federal Register copies of special messages transmitted pursuant to section 1012 or 1013 of the Act (sections 1402 and 1403 of this title); and (2) the function conferred upon the President by section 1014(e) of the Act (subsec. (e) of this section) of submitting to the Congress cumulative reports of proposed rescissions, reservations, and deferrals of budget authority.

Gerald R. Ford

CHAPTER SEVEN

THE ASSIGNMENT OF CLAIMS ACT OF 1940

(31 USC §203, 41 USC §15, et seq.)

203. Assignments of claims; set-off against assignee

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them before an officer having authority to take acknowledgements of deeds, and shall be certified by the officer; and it must appear on the certificate that the officer, at the time of the acknowledgement, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent to post-office quarters made by postmasters to duly authorized agents of the lessors.

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: provided,

1. That in the case of any contract entered into prior to October 9, 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

2. That in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bonds or bond, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section shall constitute a valid assignment for all purposes.

In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitutions, refund, or repayment to the United States of any amount theretofore since July 1, 1950, or hereafter received under the assignment.

Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or set-off, and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any

department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of (1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract, (2) fines, (3) penalties (which the assignor in accordance with or for failure to comply with the terms of the contract), or (4) taxes, social security contributions, or the withholding or nonwithholding of taxes or social security contributions, whether arising from or independently of such contract.

Except as herein otherwise provided, nothing in this section shall be deemed to affect or impair rights or obligations heretofore accrued. R.S. 3477; May 27, 1908, c. 206, 35 Stat. 411; Oct. 9, 1940, c. 779, 1, 54 Stat. 1029; May 15, 1951, c. 75,65 Stat. 41.

Title 41

15. Transfers of contracts; assignments of claims; set-off against assignee

No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: *Provided* (1) That in the case of any contract entered into prior to October 9, 1940, no claim shall be assigned without the consent of the head of the department or agency concerned; (2) That in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment; (3) That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing; (4) That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section, shall constitute a valid assignment for all purposes. In any case in which monies due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or thereafter received under the assignment.

Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or set-off, and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of (1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract, (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract), or (4) taxes, social security contributions, whether arising from or independently of such contract.

Except as herein otherwise provided, nothing in this section, shall be deemed to affect or impair rights or obligations heretofore accrued. R.S. 3737; Oct. 9, 1940, c. 779, 1, 54 Stat. 1029; May 15, 1951, c. 75, 65 Stat. 41.

COST ACCOUNTING STANDARDS ACT

50 APP. U.S.C. 2167

2167. **Uniform Cost Accounting Standards**

The Comptroller General, in cooperation with the Secretary of Defense and the Director of the Bureau of the Budget, shall undertake a study to determine the feasibility of applying uniform cost accounting standards to be used in all negotiated prime contract and subcontract defense procurements of $100,000 or more. In carrying out such study the Comptroller General shall consult with representatives of the accounting profession and with representatives of that segment of American industry which is actively engaged in defense contracting. The results of such study shall be reported to the Committees on Banking and Currency and the Committees on Armed Services of the Senate and House of Representatives at the earliest practicable date, but in no event later than 18 months after the date of enactment of his section. (July 1, 1968, P.L. 90-370, 82 Stat. 279.)

2168. **Cost-Accounting Standards Board**

(A) There is established, as an agent of the Congress, a Cost-Accounting Standards Board which shall be independent of the executive departments and shall consist of the Comptroller General of the United States who shall serve as Chairman of the Board and four members to be appointed by the Comptroller General. Of the members appointed to the Board, two, of whom one shall be particularly knowledgeable about the cost accounting problems of small business, shall be from the accounting profession, one shall be representative of industry, and one shall be from a department or agency of the Federal Government who shall be appointed with the consent of the head of the department or agency concerned. The term of office of each of the appointed members of the Board shall be four years, except that any member appointed to fill a vacancy in the Board shall serve for the remainder of the term for which his predecessor was appointed. Each member of the Board appointed from private life shall receive compensation at the rate of one two-hundred-sixtieth of the rate prescribed for level IV of the Federal Executive Salary Schedule for each day (including travel time) in which he is engaged in the actual performance of duties vested in the Board.

(B) The Board shall have the power to appoint, fix the compensation of, and remove an executive secretary and two additional staff members without regard to chapter 51, subchapters III and VI of chapter 53, and chapter 75 of title 5, United States Code, and those provisions of such title relating to appointment in the competitive service. The executive secretary and the two additional staff members may be paid compensation at rates not to exceed the rates prescribed for levels IV and V of the Federal Executive Salary Schedule respectively.

(C) The Board is authorized to appoint and fix the compensation of such other personnel as the Board deems necessary to carry out its functions.

(D) The board may utilize personnel from the Federal Government (with the consent of the head of the agency concerned) or appoint personnel from private life without regard to chapter 51, subchapters III and VI chapter 53, and chapter 75 of title 5, United States Code, and those provisions of such title relating to appointment in the competitive service, to serve on advisory committees and task forces to assist the Board in carrying out its functions and responsibilities under this section.

(E) Except as otherwise provided in subsection (a), members of the Board and officers or employees of other agencies of the Federal Government utilized under this section shall receive no compensation for their services as such but shall continue to receive the compensation of their regular positions. Appointees under subsection (d) from private life shall receive compensation at rates fixed by the Board, not to exceed one two-hundred-sixtieth of the rate prescribed for level V in the Federal Executive Salary Schedule for each day (traveltime) in which they are engaged in actual performance of their duties as prescribed by the Board. While serving away from their homes or regular place of business, Board members and other appointee serving on an intermittent basis under this section shall be allowed travel expenses in accordance with section 5703 of title 5, United States Code.

(F) All departments and agencies of the Government are authorized to cooperate with the Board to furnish information, appropriate personnel with or without reimbursement, and such financial and other assistance as may be agreed to between the Board and the department or agency concerned.

(G) The Board shall from time to time promulgate cost-accounting standards designed to achieve uniformity and consistency in the cost-accounting principles followed by defense contractors and subcontractors under Federal contracts. Such promulgated

standards shall be used by all relevant Federal agencies and by defense contractors and subcontractors in estimating, accumulating, and reporting costs in connection with the pricing, administration and settlement of all negotiated prime contract and subcontract national defense procurements with the United States in excess of $100,000, other than contracts or subcontracts where the price negotiated is based on (1) established catalog or market prices of commercial items sold in substantial quantities to the general public, or (2) prices set by law or regulation. In promulgating such standards the Board shall take into account the probable costs of implementation compared to the probable benefits.

(H) (1) The Board is authorized to make, promulgate, amend, and rescind rules and regulations for the implementation of cost-accounting standards promulgated under subsection (G). Such regulations shall require defense contractors and subcontractors as a condition of contracting to disclose in writing their cost-accounting principles, including methods of distinguishing direct cost from indirect costs and the basis used for allocating indirect costs, and to agree to a contract price adjustment, with interest, for any increased costs paid to the defense contractor by the United States because of the defense contractor's failure to comply with duly promulgated cost-accounting standards or to follow consistently his disclosed cost-accounting practices in pricing contract proposals, and in accumulating and reporting contract performance cost data. Such interest shall not exceed seven per centum per annum measured from the time such payments were made to the contractor or subcontractor to the time such price adjustment is effected. If the parties fail to agree as to whether the defense contractor or subcontractor has complied with cost-accounting standards, the rules and regulations relating thereto, and cost adjustments demanded by the United States, such disagreement will constitute a dispute under the contract dispute clause.

(2) The Board is authorized, as soon as practicable after the date of enactment of this section, to prescribe rules and regulations exempting from the requirements of this section such classes or categories of defense contractors or subcontractors under contracts negotiated in connection with national defense procurements as it determines, on the basis of the size of the contracts involved or otherwise, are appropriate and consistent with the purposes sought to be achieved by this section.

(3) Cost-accounting standards promulgated under subsection (G) and rules and regulations prescribed under this subsection shall take effect not earlier than the expiration of the first period of sixty calendar days of continuous session of the Congress following the date on which a copy of the proposed standards, rules, or regulations is transmitted to the Congress; if, between the date of transmittal and the expiration of such sixty-day period, there is not passed by the two Houses a concurrent resolution stating in substance that the Congress does not favor the proposed standards, rules, or regulations. For the purposes of this subparagraph, in the computation of the sixty-day period there shall be excluded days in which either House is not in session because of adjournment of more than three days to a day certain or an adjournment of the Congress sine die. The provisions of this paragraph do not apply to modifications of cost accounting standards, rules, or regulations which have become effective in conformity with those provisions.

(I) (1) Prior to the promulgation under this section of rules, regulations, cost-accounting standards, and modifications thereof, notice of the action proposed to be taken, including a description of the terms and substance thereof, shall be published in the Federal Register. All parties affected thereby shall be afforded a period of not less than thirty days after such publication in which to submit their views and comments with respect to the action proposed to be taken. After full consideration of the views and comments so submitted the Board may promulgate rules, regulations, cost-accounting standards, and modifications thereof which shall have the full force and effect of law and shall become effective not later than the start of the second fiscal quarter, beginning after the expiration of not less than thirty days after publication in the Federal Register.

(2) The functions exercised under this section are excluded from the operation of sections 551, 553-559, and 701-706 of title 5, United States Code.

(3) The provisions of paragraph (A) of this subsection shall not be applicable to rules and regulations prescribed by the Board pursuant to subsection (H)(2).

(J) For the purpose of determining whether a defense contractor or subcontractor has complied with duly promulgated cost-accounting standards and has followed consistently his disclosed cost-accounting practices, any authorized representative of the head of the agency concerned, of the Board, or of the Comptroller General of the United States shall have the right to examine and make copies of any documents, papers, or records of such contractor or subcontractor relating to compliance with such cost-accounting standards and principles.

(K) The Board shall report to the Congress, not later than twenty-four months after the date of enactment of this section, concerning its progress in promulgating cost-accounting standards under subsection (G) and rules and regulations under subsection (H). Thereafter, the Board shall make an annual report to the Congress with respect to its activities and operations, together with such recommendations as it deems appropriate.

(L) There are authorized to be appropriate such as may be necessary to carry out the provisions of this section. (Aug. 15, 1970, P.L. 91-379; Dec. 16, 1975, P.L. 94-152, 89 Stat. 820).

CHAPTER EIGHT

No Statutes

CHAPTER NINE

No Statutes

CHAPTER TEN

No Statutes

CHAPTER ELEVEN

No Statutes

CHAPTER TWELVE

PATENTS

35 U.S.C. 100,101

§100. Definitions

When used in this title unless the context otherwise indicates—

(a) The term "invention" means invention or discovery.

(b) The term "process" means process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material.

(c) The terms "United States" and "this country" mean the United States of America, its territories and possessions.

(d) The word "patentee" includes not only the patentee to whom the patent was issued but also the successors in title to the patentee. July 19, 1952, c. 950, §1, 66 Stat. 797.

§101. Inventions Patentable

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title. July 19, 1952, c. 950, §1, 66 Stat. 797.

TITLE 10

Chapter 141. Miscellaneous Procurement

Sec. 2386. **Copyrights, patents, designs, etc.; acquisition**

Funds appropriated for a military department available for making or procuring supplies may be used to acquire any of the following if the acquisition relates to supplies or processes produced or used by or for, or useful to, that department:

(1) Copyrights, patents, and applications for patents.

(2) Licenses under copyrights, patents, and applications for patents.

(3) Designs, processes, and manufacturing data.

(4) Releases, before suit is brought, for past infringement of patents or copyrights. As amended Sept. 8, 1960, Pub. L. 86-726, §3, 74 Stat. 855.

PATENT INFRINGEMENT

28 U.S.C. §1498

§1498. **Patent and copyright cases.**

(a) Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture.

For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

The court shall not award compensation under this section if the claim is based on the use or manufacture by or for the United States of any article owned, leased, used by, or in the possession of the United States prior to July 1, 1918.

A Government employee shall have the right to bring suit against the Government under this section except where he was in a position to order, influence, or induce use of the invention by the Government. This section shall not confer a right of action on any patentee or any assignee of such patentee with respect to any invention discovered or invented by a person while in the employment or service of the United States, where the invention was related to the official functions of the employee, in cases in which such functions included research and development, or in the making of which Government time, materials or facilities were used.

(b) Hereafter, whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the Government, the exclusive remedy of the owner of such copyright shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages as set forth in section 584(c) of title 17, United States Code: *Provided,* That a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the copyrighted work by the Government: *Provided, however,* That this subsection shall not confer a right of action on any copyright owner or any assignee of such owner with respect to any copyrighted work prepared by a person while in the employment or service of the United States, where the copyrighted work was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: *And provided further,* That before such action against the United States has been instituted the appropriate corporation owned or controlled by the United States or the head of the appropriate department or agency of the Government, as the case may be, is authorized to enter into an agreement with the copyright owner in full settlement and compromise for the damages accruing to him by reason of such infringement and to settle the claim administratively out of available appropriations. Except as otherwise provided by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than three years prior to the filing of the complaint or counterclaim for infringement in the action except that the period between the date of receipt of a written claim for compensation by the Department or agency of the Government or corporation owned or controlled by the United States, as the case may be, having authority to settle such claim and the date of mailing by the Government of a notice to the claimant that his claim has been denied shall not be counted as a part of the three years, unless suit is brought before the last-mentioned date.

(c) The provisions of this section shall not apply to any claim arising in a foreign country. As amended Oct. 31, 1951, c. 655, §50(c), 65 Stat. 727; July 17, 1952, c. 930, 66 Stat. 757; Sept. 8, 1960, Pub. L. 86-726, §§1, 4, 74 Stat. 855, 856.

(d) Hereafter, whenever a plant variety protected by a certificate of plant variety protection under the laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization and consent of the Government, the exclusive remedy of the owner of such certificate shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation as damages for such infringement: *Provided,* That a Government employee shall have a right of action against the Government under this subsection except where he was in a position

to order, influence, or induce use of a protected plant variety by the Government: Provided, however, That this subsection shall not confer a right of article in any certificate owner or any assignee of such owner with respect to any protected plant variety made by a person while in the employment or service of the United States, where such variety was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: And provided further, That before such action against the United States has been instituted, the appropriate corporation owned or controlled by the United States or the head of the appropriate agency of the Government, as the case may be, is authorized to enter into an agreement with the certificate owner in full settlement and compromise for the damages accrued to him by reason of such infringement and to settle the claim administratively out of available appropriations.

June 25, 1948, c. 646, 62 Stat. 941; May 24, 1949, c. 139, §87, 63 Stat. 103; Oct. 31, 1951, c. 655, §50(c), 65 Stat. 727; July 17, 1952, c. 930, 66 Stat. 757; Sept. 8, 1960, Pub. L. 86-726, §§1, 4, 74 Stat. 333, 856; Dec. 24, 1970, Pub. L. 91-577, Title III, §143(d), 84 Stat. 1339.

THE MILLER ACT

(40 U.S.C. §270)

§270a. Bonds of Contractors for Public Buildings or Works; Waiver of Bonds Covering Contract Performed in Foreign Country

(a) Before any contract, exceeding $25,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor" (P.L. 95-585, Nov. 2, 1978):

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of contract. Whenever the total amount payable by terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section. Aug 24, 1935, c. 642, §1, 49 Stat. 793.

(d) Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under the Internal Revenue Code of 1954. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit

shall be commenced after the expiration of one year after the day on which such notice is given. (P.L. 89-719, Title I, §105(b), Nov. 2, 1966, 80 Stat. 1139; P.L. 95-585, Nov. 2, 1978, 92 Stat. 2484)

§207b. Same; Rights of Persons Furnishing Labor or Material.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgement for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States Marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit. As amended Aug 4, 1959, Pub. L. 86-135, §1, 73 Stat. 279.

§270c. Same; Right of Person Furnishing Labor or Material to Copy of Bond.

The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given which copy shall be prima facie evidence of the contents execution, and delivery of the original. Applicants shall pay for such certified copies such fees as the Comptroller General fixes to cover the cost of preparation thereof. As amended Aug. 4, 1959, Pub. L. 86-135, §2, 73 Stat. 279.

§270d. Same; definition of "Person" in Section 270a, 270b, and 270c.

The term "person" and the masculine pronoun as used in section 270a-270c of this title shall include all person whether individuals, associations, copartnerships, or corporations. Aug. 24, 1935, c. 642, §4, 49 Stat. 794.

§270e. Same; Waiver of Sections 270a-270d with respect to Army, Navy, Air Force, or Coast Guard Contracts.

The Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Treasury may waive sections 270a-270d of this title with respect to cost-plus-a-fixed fee and other cost-type contracts for the construction, alteration, or repair of any public building or public work of the United States and with respect to contracts for the manufacturing, producing, furnishing, construction, alteration, repair, processing, or assembling of vessels, aircraft, munitions, material, or supplies of any kind or nature for the Army, Navy, Air Force, or Coast Guard, respectively, regardless of the the terms of such contracts as to payment or title. As amended June 3, 1955, c. 129, 69 Stat. 83.

DAVIS-BACON ACT

40 U.S.C. §276a

§276a. RATE OF WAGES FOR LABORERS AND MECHANICS.

(a) The advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alterations, and/or repair, including painting and decorating of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union, or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less that those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work; and the further stipulation that there may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rate of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractor, or their agents.

(b) As used in section 276a to 276a-5 of this title the terms "wages" and "prevailing wages" shall include--

(1) the basic hourly rate of pay; and

(2) the amount of--

(A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected, for medical or hospital care, pensions or retirements or death, compensation for injuries or illness resulting from

occupational activity, or insurance to provide any of the foregoing, for employment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any of such benefits; Provided, that the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the Secretary of Labor, insofar as sections 276a-5 of this title and other Acts incorporating sections 276a to 276a-5 of this title by reference are concerned, may be discharged by the making of payments in cash, by the making of contributions of a type referred to in paragraph (2)(A), or by the assumption of an enforcable commitment to bear the costs of a plan or program of a type referred to in paragraph (2)(B), of any combination thereof, where the aggregate of any such payments, contributions, and costs is not less than the rate of pay described in pararaph (1) plus the amount referred to in paragraph (2).

In determining the overtime pay to which the laborer or mechanic is entitled under any Federal law, his regular or basic hourly rate of pay (or other alternative rate upon which premium rate of overtime compensation is computed) shall be deemed to be the rate computed under paragraph (1), except that where the amounts of payments, contributions, or costs incurred with respect to him exceeds the prevailing wage applicable to him under section 276a to 276a-5 of this title, such regular or basic hourly rate pay (or other alternative rate) shall be arrived at by deducting from the amount of payments, contributions, or costs actually incurred with respect to him, the amount of contributions or costs of the types described in paragraph (2) actually incurred with respect to him, or the amount determined under paragraph (2) but not actually paid, whichever amount is the greater. As amended July 12, 1960, Pub. L. 86-624, §26, 74 Stat. 418; July 2, 1964, Pub. L. 88-349, §1, 78 Stat 238.

§276a-1 TERMINATION OF WORK ON FAILURE TO PAY AGREED WAGES: COMPLETION OF WORK BY GOVERNMENT.

Every contract within the scope of section 276a to 276a-5 of this title shall contain the further provisions that in the event it is found by the contracting officer that any laborer or mechanic on the site of the work covered by the contract has been, or is being, paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and to prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby. Mar. 3, 1931, c. 411 §2, as added Aug. 30, 1935, c. 825, 49 Stat. 1011.

§276a-2 PAYMENT OF WAGES BY COMPTROLLER GENERAL FROM WITHHELD PAYMENTS; LISTING CONTRACTORS VIOLATING CONTRACTS.

(a) The Comptroller General of the United States is authorized and directed to pay directly to laborers and mechanics from any accrued

payments withheld under the terms of the contract any wages found to be due laborers and mechanics pursuant to section 276a and 276a-5 of this title; and the Comptroller General of the United States is further authorized and is directed to contribute a list of all departments of the Government giving the names of persons or firms whom he has found to have disregarded their obligation to employees and subcontractors. No contract shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have an interest until three years have elapsed from the date of publication of the list containing the names of such persons or firms.

(b) If the accrued payments withheld under the terms of the contract, as aforesaid, are insufficient to reimburse all the laborers and mechanics with respect to whom there has been a failure to pay the wages required pursuant to section 276a-5 of this title, such laborers and mechanics shall have the right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds. Mar. 3, 1931, c. 411, §3, as added Aug. 30, 1935, c. 825, 49 Stat. 1011.

§276a-3. EFFECT ON OTHER FEDERAL LAWS.

Sections 276a to 276a-5 of this title shall not be construed to supercede or impair any authority otherwise granted by Federal law to provide for the establishment of specific wage rates. Mar. 3, 1931, c. 411, §4, as added Aug. 30, 1935, c. 825, 49 Stat. 1011.

§276a-4. EFFECTIVE DATE OF SECTIONS 276a to 276a-5.

Sections 276a to 276a-5 of this title shall take effect thirty days after August 20, 1935, but shall not affect any contract then existing or any contract that may thereafter be entered into pursuant to invitations for bids that are outstanding on August 30, 1935. Mar. 3, 1931, c. 411, §5, as added Aug. 30, 1935, c. 825, 49 Stat. 1011.

§276a-5. SUSPENSION OF SECTIONS 276a to 276a-5 DURING EMERGENCY.

In the event of a national emergency the President is authorized to suspend the provisions of sections 276a to 276a-5 of this title. Mar. 3, 1931, c. 411, §6, as added Aug. 30, 1935, c. 825, 49 Stat. 1011.

§276a-6. APPROPRIATION.
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§276a-7. APPLICATION OF SECTIONS 276a TO 276a-5 TO CONTRACTS ENTERED INTO WITHOUT REGARD TO SECTION 5 OF TITLE 41.

The fact that any contract authorized by any Act is entered into without regard to section 5 of Title 41, or upon a cost-plus-a-fixed-fee basis or otherwise without advertising for proposals, shall not be construed to render inapplicable the provisions of sections 276a to 276a-5 of this title, if such Act would otherwise be applicable to such contract. Mar. 23, 1941, 12 Noon, c. 26, 55 Stat. 53; Aug 21, 1941, c. 395, 55 Stat. 658.

ANTI-KICKBACK ACTS

(18 U.S.C. 874)

(18 U.S.C. 1001)

(41 U.S.C. 51-54)

18 U.S.C. 874. KICKBACKS FROM PUBLIC WORKS EMPLOYEES.

Whoever, by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecution, completion, or repair of any public building, public work, or building or work financed in whole or part by loans or grants from the United States, to give up any part of the compensation to which he is entitled under his contract of employment, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 740.

18 U.S.C. 1001. STATEMENTS OR ENTRIES GENERALLY.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

41 U.S.C. 51. FEES OR KICKBACKS BY SUBCONTRACTORS OR NEGOTIATED CONTRACTS; RECOVERY BY UNITED STATES; CONCLUSIVE PRESUMPTIONS; WITHHOLDING OF PAYMENTS.

The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly by or on behalf of a subcontractor, as defined in section 52 of this title, (1) to any officer, partner, employee, or agency of a prime contractor holding a negotiated contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever; or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contractor to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgement of a subcontract or order previously awarded, is prohibited. The amount of any such fee, commission, or compensation or the cost or expense of any such gratuity or gift, whether heretofore or hereafter paid or incurred by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor or higher tier subcontractor. The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by

setoff of moneys otherwise owing to the subcontractor either directly by the United States, or by a prime contractor under any contract or by any action in an appropriate court of the United States. Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor or of another higher tier subcontractor, in connection with the award of a subcontract or order thereunder it shall be conclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States. Upon the direction of the contracting department or agency or of the General Accounting Office, the prime contractor shall withhold from sums otherwise due a subcontractor any amount reported to have been found to have been paid by a subcontractor as a fee, commission, or compensation or as a gift or gratuity to an officer, partner, employee, or agent of the prime contractor or another higher tier subcontractor. As amended Sept. 2, 1960, Pub. L. 86-695, 74 Stat. 740.

41 U.S.C. 52. SAME; DEFINITIONS.

For the purpose of sections 51-54 of this title, the term "subcontractor" is defined as any person, including a corporation, partnership, or business association of any kind, who holds an agreement or purchase order to perform all or any part of the work or to make or furnish any article or service required for the performance of a negotiated contract or of a subcontract entered thereunder; the term "person" shall include any subcontractor, corporation, association, trust, joint-stock company, partnership, or individual; and the term "negotiated contract" means made without formal advertising. As amended Sept. 2, 1960, Pub. L. 86-695, 74 Stat. 740.

41 U.S.C. 53. SAME; POWER OF GENERAL ACCOUNTING OFFICE.

For the purpose of ascertaining whether such fees, commissions, compensation, gifts, or gratuities have been paid or granted by a subcontractor, the General Accounting Office shall have the power to inspect the plants and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a negotiated contract, as amended Sept. 2, 1960, Pub. L. 86-695, 74 Stat. 741.

41 U.S.C. 54. SAME; PENALTIES.

Any person who shall knowingly directly, or indirectly, make or receive any such prohibited payment shall be fined not more than $10,000 or be imprisoned for not more than two years or both. As amended Sept. 2, 1960, Pub. L. 86-695, 74 Stat. 741.

THE WALSH-HEALEY PUBLIC CONTRACTS ACT

41 U.S.C. §35, et. seq.

§35. CONTRACTS FOR MATERIALS, ETC., EXCEEDING $10,000; REPRESENTATIONS AND STIPULATIONS.

In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000 there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of indutries currently operating in the locality in which the material, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week: Provided, that the provisions of this subsection shall not apply to any employer who shall have entered into an agreement with his employees pursuant to the provisions of paragraphs (1) or (2) of subsection (b) of section 207 of Title 29;

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract, except that this section, or any other law or Executive order containing similar prohibitions against purchase of goods by the Federal Government, shall not apply to convict labor which satisfies the conditions of section 1761(c) of Title 18, (as amended Pub. L. 90-351, Title I, §827(b), as added Dec. 27, 1979, Pub. L. 96-157, §2, 93 Stat. 1215.)

(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufctured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings or surroundings or under work conditions which are unsanitary or hazardous or dangerous to the health and safety of employees

engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the state in which the work or part thereof is to be performed shall be prima facie evidence of compliance with this subsection. June 30, 1936, c. 881, §1, 49 Stat. 2036; May 12, 1942, c. 306, 56 Stat. 277.

§36. SAME: LIABILITY FOR BREACH; CANCELLATION, COMPLETION BY GOVERNMENT AGENCY; EMPLOYEE'S WAGES.

Any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 35 of this title shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 35 of this title may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered; Provided, that no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America. June 30, 1936, c. 881, §2, 49 Stat. 2037.

§37. SAME; DISTRIBUTION OF LIST OF PERSONS BREACHING CONTRACT; FUTURE CONTRACTS PROHIBITED.

The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by sections 35-45 of this title. Unless the Secretary of Labor otherwise recommends, no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred. June 30, 1936, c. 881, §3, 49 Stat. 2037.

§38. SAME; ADMINISTRATION; OFFICERS AND EMPLOYEES; APPOINTMENT; INVESTIGATIONS; RULES AND REGULATIONS.

The Secretary of Labor is authorized and directed to administer the provisions of sections 35-45 of this title and to utilize such Federal officers and employees as he may find necessary to assist in the administration of said sections and to prescribe rules and regulations with respect thereto. The Secretary shall appoint, without regard to the provisions of the civil-service laws but subject to the Classification Act of 1949, an administrative officer and such attorneys and experts, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of sections 35-45 of this title. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as provided in sections 35-45 of this title, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of sections 35-45 of this title. June 30, 1936, c. 881, §4, 49 Stat. 2038; Oct. 28, 1949, c. 782, Title XI, §1106, (a), 63 Stat. 972.

§39. SAME; HEARINGS BY SECRETARY OF LABOR; WITNESS FEES; FAILURE TO OBEY ORDERS; PUNISHMENT.

Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of sections 35-45 of this title, and on complaint of a breach or violation of any representation or stipulation as provided in said sections, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the United States District Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or a representative designated by him to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be furnished by said court as a contempt thereof and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is authorized, to make such decisions based upon findings of fact, as are deemed to be necessary to enforce the provisions of section 35-45 of this title, June 30, 1936, c. 881 §5, 49 Stat. 2038; June 25, 1948, c. 646, §32(b), 62 Stat. 991; May 24, 1949, c. 139, §127, 63 Stat. 107.

§40. SAME; EXCEPTIONS; MODIFICATION OF CONTRACTS VARIATIONS; OVERTIME; SUSPENSION OF REPRESENTATIONS AND STIPULATIONS.

Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 35 of this title will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendations of the contracting agency and the contract, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secretary of Labor may provide reasonable limitations and may make rules and regulations to and from any or all provisions of sections 35-45 of this title respecting minimum rates of pay and maximum hours of labor or the extent of the application of said sections to contractors; as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rates shall be not less than one and one-half times the basic hourly rate received by an employee affected: Provided, that whenever in his judgment such course is in the public interest, the President is authorized to suspend any or all of the representations and stipulations contained in section 35 of this title. June 30, 1936, c. 881, §6, 49 Stat. 2038; June 28, 1940, c. 440, Title I, §13, 54 Stat. 681.

§41. SAME; "PERSON" DEFINED.

Whenever used in sections 35-45 of this title, the word "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under Title 11, or receivers. As amended Nov. 6, 1978, Pub. L. 95-598, Title III, §326, 92 Stat. 2679.

§42. SAME; EFFECT OF SECTION 35-45 ON OTHER LAWS.

The provisions of sections 35-45 of this title shall not be construed to modify or amend title III of the act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved May 3, 1933 (commonly known as the Buy American Act), nor shall the provisions of sections 35-45 of this title be construed to modify or amend sections 276a to 276a-5 of Title 40, nor the labor provisions of Title II of the National Industry Recovery Act, approved April 8, 1935 as extended, or of section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935; nor shall the provisions of sections 35-45 of this title be construed to modify or amend sections 744a-744n of Title 18, June 30, 1936, c. 881, §8, 49 Stat. 2039.

§43. SAME, SECTIONS 35-45 NOT APPLICABLE TO CERTAIN CONTRACTS.

Sections 35-45 of this title shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; nor shall they apply to perishables, including dairy,

livestock and nursery products, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. Nothing in said sections shall be construed to apply to carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line where published tariff rates are in effect or to common carriers subject to the Communications Act of 1934. June 30, 1936, c. 881 §9, 49 Stat. 2039.

§43a. SAME; APPLICABILITY OF ADMINISTRATIVE PROCEDURE ACT; WAGE DETERMINATION; ADMINISTRATIVE REVIEW; JUDICIAL REVIEW.

(a) Notwithstanding any provision of section 1003 of Title 5, sections 1001-1010 of Title 5, shall be applicable in the administration of section 35-39 and 41-43 of this title.

(b) All wage determinations under section 35(b) of this title shall be made on the record after opportunity for a hearing. Review of any such wage determination, or of the applicability of any such wage determination, may be had within ninety days after such determination is made in the manner provided in section 1009 of Title 5 by any person adversely affected or aggrieved thereby, who shall be deemed to include any manufacturer of, or regular dealer in, materials, supplies, articles or equipment purchased or to be purchased by the Government from any source, who is in any industry to which such wage determination is applicable.

(c) Notwithstanding the inclusion of any stipulations required by any provision of sections 35-45 of this title in any contract subject to said sections any interested person shall have the right to judicial review of any legal question which might otherwise be raised, including, but not limited to wage determinations and the interpretations of the terms "locality," "regular dealer," "manufacturer," and the "open market." June 30, 1936, 881, §10, as added June 30, 1952, 9:36 a.m., E.D.T., c. 530, Title III, §301, 66 Stat. 308.

§44. SAME; SEPARABILITY OF PROVISIONS.

If any provision of sections 35-45 of this title, or the application thereof to any persons or circumstances, is held invalid, the remainder of said sections, and the application of such provisions to other persons or circumstances, shall not be affected thereby. June 30, 1936, c. 881, §11, 49 Stat. 2039, renumbered June 30, 1952, 9:36 a.m. E.D.T., c. 530, Title III, §301, 66 Stat. 308.

§45. SAME; EFFECTIVE DATE; EXCEPTION AS TO REPRESENTATIONS WITH RESPECT TO MINIMUM WAGES.

Sections 35-45 of this title shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from June 30, 1936; Provided, however, that the provisions, requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor. June 30, 1936, c. 881, §12, 49 Stat., 2039, renumbered June 30, 1952, 9:36 a.m. E.D.T. c. 530, Title III, §301, 66 Stat. 308.

THE BUY AMERICAN ACT

41 U.S.C. §10a-10d

10a. AMERICAN MATERIALS REQUIRED FOR PUBLIC USE.

Notwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use. This section shall not apply with respect to articles, materials, or supplies for use outside the United States, or if articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. Mar. 3, 1933, c. 212, Title III, §2, 47 Stat. 1520.

§10b. CONTRACTS FOR PUBLIC WORKS; SPECIFICATION FOR USE OF AMERICAN MATERIALS; BLACKLISTING CONTRACTORS VIOLATING REQUIREMENTS.

(a) Every contract for the construction, alteration, or repair of any public building or public work in the United States growing out of an appropriation heretofore made or hereafter to be made shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States substantially all from articles, materials, or supplies, mined, produced, or manufactured, as the case may be, in the United States except as provided in section 10a of this title: Provided, however, that if the head of the department or independent establishment making the contract shall find that in respect to some particular articles, materials, or supplies it is impracticable to make such requirements or that it would unreasonably increase the cost, an exception shall be noted in the specifications as to the particular article, material, or supply, and a public record made on the findings which justified the exception.

(b) If the head of a department, bureau, agency, or independent establishment which has made any contract containing the provision required by subsection (a) of this section finds that in the performance of such contract there has been a failure to comply with such provisions, he shall make public findings, including herein the name of the contractor obligated under such contract, and no other contract for the construction, alteration, or repair of any public building or public work in the United States or elsewhere shall be awarded to such contractor, subcontractors, material men, or supplies with which such contractor is associated or affiliated, within a period of three years after such finding is made public. Mar. 3, 1933, c. 212, Title III, §3, 47 Stat. 1520.

§10c. DEFINITION OF TERMS USED IN SECTIONS 10a AND 10b.

WHEN USED IN SECTIONS 10a AND 10b OF THIS TITLE--

(a) The term "United States," when used in a geographical sense, includes the United States and any place subject to the jurisdiction thereof;

(b) the terms "public use", and "public building", and "public work" shall mean use by, public building of, and public work of, the United States, the District of Columbia, Puerto Rico, American Samoa, the Canal Zone, and the Virgin Islands. As amended June 25, 1959, Pub. L. 86-70, §43, 73 Stat. 151; July 12, 1960, Pub. L. 86-624, §28, 74 Stat. 419.

§10d. CLARIFICATION OF CONGRESSIONAL INTENT REGARDING SECTIONS 10a AND 10b(a).

In order to clarify the original intent of Congress, hereafter, section 10a of this title and that part of section 10b(a) of this title preceding the words "Provided, However", shall be regarded as requiring the purchase, for public use within the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, unless the head of the department or independent establishment concerned shall determine their purchase to be inconsistent with the public interest or their cost to be unreasonable. Oct. 29, 1949, c. 787, Title VI, §633, 63 Stat. 1024.

WORK HOURS AND SAFETY ACT OF 1962

40 U.S.C. §§327, et. seq.

§327. MEANING OF SECRETARY.

As used herein the term "Secretary" means the Secretary of Labor, United States Department of Labor. Pub. L. 87-581, Title I, §101, Aug. 13, 1962, 76 Stat. 357.

§328. EIGHT-HOUR DAY AND FORTY-HOUR WEEK; OVERTIME COMPENSATION; CONTRACTUAL CONDITIONS; LIABILITY OF EMPLOYERS FOR VIOLATION; WITHHOLDING FUNDS TO SATISFY LIABILITIES OF EMPLOYERS.

(a) Notwithstanding any other provision of law, the wages of every laborer and mechanic employed by any contractor or subcontractor in his performance of work on any contract of the character specified in section 329 of this title shall be computed on the basis of a standard work-day of eight hours and a standard workweek of forty hours, and work in excess of such standard workday or workweek shall be permitted subject to the provisions of this section. For each workweek in which any such laborer or mechanic is so employed, such wages shall include compensation, at a rate not less than one and one-half times the basic rate of pay, for all hours worked in excess of eight hours in any calendar day or in excess of forty hours in the workweek, as the case may be.

(b) The following provision shall be a condition of every contract of the character specified in section 329 of this title and of any obligation of the United States, any territory, or the District of Columbia in connection therewith:

(1) No contractor or subcontractor controlling for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any laborer or mechanic, in any workweek in which he is employed on such work, to work in excess of eight hours in any calendar day or in excess of forty hours in such workweek except in accordance with the provisions of this Act; and,

(2) In the event of violation of the provisions of paragraph (1), the contractor and any subcontractor responsible therefor shall be liable to such affected employee for his unpaid wages and shall, in addition, be liable to the United States (or, in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory) for liquidated damages as provided therein. Such liquidated damages shall be computed with respect to each individual employed as a laborer or mechanic in violation of any provisions of this Act, in the sum of $10 per day for each calendar day on which such individual was required or permitted to work in excess of eight hours or in excess of the standard workweek of forty hours without payment of the overtime wages required by this Act. The Governmental agency for which the contract work is done or by which financial assistance for the work is provided may withhold, or cause to be withheld, subject to the provisions of section 330 of this title, from any moneys payable on account of work performed by a contractor or subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of such contractor or subcontractor

for unpaid wages and liquidated damages as herein provided. Pub. L. 87-581, Title I, §102, Aug. 13, 1962, 76 Stat. 357.

§329. CONTRACTS AND EMPLOYEES COVERED; EXCEPTIONS.

(a) The provisions of sections 327-332 of this title shall apply, except as otherwise provided, to any contract which may require or involve the employment of laborers or mechanics upon a public work of the United States, of any territory, or of the District of Columbia, and to any other contract which may require or involve the employment of laborers or mechanics if such contract is one (1) to which the United States or any agency or instrumentality thereof, any territory, or the District of Columbia is a party, or (2) which is made for or on behalf of the United States, any agency or instrumentality thereof, any territory, or the District of Columbia, or (3) which is a contract for work financed in whole or in part by loans or grants from, or loans insured or guaranteed by, the United States or any agency or instrumentality thereof under any statute of the United States providing wage standards for such work; Provided, That the provisions of section 328 of this title, shall not apply to work where the assistance from the United States or any agency or instrumentality as set forth above is only in the nature of a loan guarantee, or insurance. Except as otherwise expressly provided, the provisions of the Act shall apply to all laborers and mechanics, including watchmen and guards, employed by any contractor or subcontractor in the performance of any part of the work contemplated and mechanics shall include workmen performing services in connection with dredging or rock excavation in any river or harbor of the United States or any territory of the District of Columbia, but shall not include any employee as a seaman.

(b) Sections 327-332 of this title shall not apply to contracts for transportation by land, air, or water, or for the transmission of intelligence, or for the purchase of supplies or materials or articles ordinarily available in the open market. Sections 327-332 of this title shall not apply with respect to any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act. Pub. L. 87-581, Title I, §103, Aug. 13, 1962, 76 Stat. 358.

§330. VIOLATIONS AND WITHHOLDINGS OF FUNDS FOR UNPAID WAGES AND LIQUIDATED DAMAGES.

(a) Any officer or person designated as inspector of the work to be performed under any contract of the character specified in section 329 of this title or to aid in the enforcement or fulfillment thereof shall, upon observation or investigation, forthwith report to the proper officer of the United States of any territory or possession, or of the District of Columbia, all violations of the provisions of this Act occurring in the performance of such work, together with the name of each laborer or mechanic who was required or permitted, to work in violation of such provisions and the day or days of such violation. The amount of unpaid wages and liquidated damages owing under the provisions of this act shall be administratively determined and the officer or person whose duty it is to approve the payment of moneys by the United States, the territory, or the District of Columbia in connection with the performance of the contract work shall direct the amount of such liquidated damages to be withheld for

the use and benefit of the United States, said territory, or said District, and shall direct the amount of such unpaid wages to be withheld for the use and benefit of the laborers and mechanics who were not compensated as required under the provisions of this act. The Comptroller General of the United States is authorized and directed to pay directly to such laborers and mechanics, from the sums withheld on account of underpayments of wages, the respective amounts administratively determined to be due, if the funds withheld are adequate, and if not, an equitable proportion of such amounts.

(b) If the accrued payments withheld under the terms of the contracts, as foresaid, are insufficient to reimburse all the laborers and mechanics with respect to whom there has been a failure to pay the wages required pursuant to this act, such laborers and mechanics shall, in the case of a department or agency of the Federal Government, have the rights of action and/or intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds.

(c) Any contractor or subcontractor aggrieved by the withholding of a sum as liquidated damages as provided in this act shall have the right, within sixty days thereafter, to appeal to the head of the agency of the United States or of the territory for which the contract work is done or by which financial assistance for the work is provided, or to the Commissioner of the District of Columbia in the case of liquidated damages withheld for the use and benefit of said District. Such agency head or Commissioner, as the case may be, shall have authority to review the adminstrative determination of liquidated damages and to issue a final order affirming such determination; or, if it is found that the sum determined is incorrect or that the contractor or subcontractor violated the provisions of this act inadvertently notwithstanding the exercise of due care on his part and that of his agents, recommendations may be made to the Secretary that an appropriate adjustment in liquidated damages be made, or that the contractor or subcontractor be relieved of liability for such liquidated damages. The Secretary shall review all pertinent facts in the matter and may conduct such investigations as he deems necessary, so as to affirm or reject the recommendation. The decision of the Secretary shall be final. In all such cases in which a contractor or subcontractor may be aggrieved by a final order for the withholding of liquidated damages as hereinbefore provided, such contractor or subcontractor may, within sixty days after such final order, file a claim in the Court of Claims; Provided, however, That final orders of the agency head, the Commissioner of the District of Columbia or the Secretary, as the case may be, shall be conclusive with respect to findings of fact if such findings are supported by substantial evidence.

§331. LIMITATIONS, VARIATIONS, TOLERANCES, AND EXEMPTIONS.

The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment of the conduct of Government business. Pub. L. 87-581, Title I, §105, Aug. 13, 1962, 76 Stat. 359.

§332. VIOLATIONS; PENALTIES.

Any contractor or subcontractor whose duty it shall be to employ, direct or control any laborer or mechanic employed in the performance of any work contemplated by any contract to which this act applies, who shall intentionally violate any provision of such section, shall be deemed guilty of a misdemeanor, and for each and every such offense shall, upon conviction, be punished by a fine of not to exceed $1,000 or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof. Pub. L. 87-581, Title I, §106, Aug. 13, 1962, 76 Stat. 359.

HEALTH AND SAFETY STANDARDS (IN BUILDING AND CONSTRUCTION INDUSTRY)

(40 USC 333)

(a) It shall be a condition of each contract which is entered into under legislation subject to Reorganization Plan Numbered 14 of 1950 (64 Stat. 1267), and is for construction, alteration, and/or repair, including painting and decorating, that no contractor or subcontractor contracting for any part of the contract work shall require any laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health or safety, as determined under construction safety and health standards promulgated by the Secretary by regulation based on proceedings pursuant to section 553 of title 5, United States Code, provided that such proceedings include a hearing of the nature authorized by said section. In formulating such standards, the Secretary shall consult with the Advisory Committee created by subsection (e).

(b) The Secretary is authorized to make such inspections, hold such hearings, issue such orders, and make such decisions based on findings of fact, as are deemed necessary to gain compliance with this section and any health and safety standard promulgated by the Secretary under subection (a) of this section, and for such purposes the Secretary and the United States district courts shall have the authority and jurisdiction provided by sections 4 and 5 of the Act of June 30, 1936 (41 U.S.C. 38, 39). In the event that the Secretary of Labor determines noncompliance under the provisions of this section after an opportunity for the adjudicatory hearing by the Secretary of any condition of a contract of a type described in clause (1) or (2) of section 103(a) of this act (40 U.S.C. 329(a)), the Governmental agency for which the contract work is done shall have the right to cancel the contract, and to enter into other contracts for the completion of the contract work, charging any additional cost to the original contractor. In the event of noncompliance as determined by the Secretary after an opportunity for an adjudicatory hearing by the Secretary, of any condition of a contract of a type described in clause (3) of section 103(a) (40 U.S.C. 329(a)), the governmental agency by which financial guarantee, assistance, or insurance for the contract work is provided shall have the right to withhold any such assistance attributable to the performance of the contract. Section 104 of this Act shall not apply to the enforcement of this section.

(c) The United States district courts shall have jurisdiction for cause shown, in any actions brought by the Secretary, to enforce compliance with the construction safety and health standard promulgated by the Secretary under subsection (a).

(d)(1) If the Secretary determines on the record after an opportunity for an agency hearing that, by repeated willful or grossly negligent violations of this Act (40 U.S.C. 327-333), a contractor or subcontractor has demonstrated that the provisions of subsections (b) and (c) are not effective to protect the safety and health of his employees, the Secretary shall make a finding to all interested persons and transmit the name of such contractor or subcontractor to the Comptroller General.

(2) The Comptroller General shall distribute each name so transmitted to him to all agencies of the Government. Unless the Secretary otherwise recommends, no contract subject to this section shall be awarded to such contractor or subcontractor or to any person in which such contractor or subcontractor has a substantial interest until three years have elapsed from the date the name is transmitted to the Comptroller General. If, before the end of such three-year period, the Secretary, after affording interested persons due notice and opportunity for hearing, is satisfied that a contractor or subcontractor whose name he has transmitted to the Comptroller General will thereafter comply responsibly with the requirements of this section, he shall terminate the application of the preceding sentence to such contractor or subcontractor (and to any person in which the contractor or subcontractor has a substantial interest); and when the Comptroller General is informed of the Secretary's action he shall inform all agencies of the Government thereof.

(3) Any person aggrieved by the Secretary's action under subsection (b) or (d) may, within sixty days after receiving notice thereof, file with the appropriate United States court of appeals a petition for review of such action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary, who shall thereupon file in the court the record upon which he based his action, as provided in section 2112 of title 28, United States Code. The findings of fact by the Secretary, if supported by substantial evidence, shall be final. The court shall have power to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, the order of the Secretary of the appropriate Government agency. The judgement of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(e)(1) The Secretary shall establish in the Department of Labor an Advisory Committee on Construction Safety and Health (hereinafter referred to as the "Advisory Committee") consisting of twelve members appointed, without regard to the civil service laws, by the Secretary. The Secretary shall appoint one such member as Chairman. Three members of the Advisory Committee shall be persons representative of contractors to whom this section applies, three members shall be persons representative of employees to whom this section applies, three members shall be persons representive of employees primarily in the building trades and construction industry engaged in carrying out contracts to which this section applies, and three members shall be public representatives who shall be selected on the basis of their professional and technical competence and experience in the construction health and safety field.

(2) The Advisory Committee shall advise the Secretary in the formulation of construction safety and health standards and other regulations, and with respect to policy matters arising in the administration of this section. The Secretary may appoint such special advisory and technical experts or consultants as may be necessary to carry out the functions of the Advisory Committee.

(3) Members of the Advisory Committee shall, while serving on the business of the Advisory Committee, be entitled to receive compensation at

rates fixed by the Secretary, but not exceeding $100 per day, including travel time; and while so serving away from their homes or regular places of business, they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5 of the United States Code of persons in the Government service employed intermittently.

(f) The Secretary shall provide for the establishment and supervision of programs for the education and training of employees in the recognition, avoidance, and prevention of unsafe working conditions in employments covered by the Act, and to collect such reports and data and to consult with and advise employers as to the best means of preventing injuries. P.L. 91-54, August 9, 1969, 83 Stat. 96.

SERVICE CONTRACT ACT OF 1965

41 U.S. Code 351, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as the "Service Contract Act of 1965."

351. REQUIRED CONTRACT PROVISIONS

(a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500, except as provided in section 7 of this Act (41 U.S.C. 356), whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b).

(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe benefit increases provided for in such agreement as a result of arm's length negotiations. Such fringe benefits shall include medical or hospital care, pensions, on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay; costs of apprenticeship or other similar programs and other bona-fide fringe benefits not otherwise required by Federal, State, or local law are to be provided by the contractor or subcontractor. The obligation under this paragraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

(3) A provision that no part of the services covered by this Act will be performed in buildings or surroundings or under working conditions, provided by or under the control of supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.

(4) A provision that on the date a service employee commences work on a contract to which this Act applies, the contractor or subcontractor will deliver to the employee a notice of the compensation required under paragraphs (1) and (2) of this subsection, on a form prepared by the Federal agency, or will post a notice of the required compensation in a prominent place at the worksite.

(5) A statement of the rates that would be paid by the Federal agency to the various classes of service employees if section 5341 or section 5332 of title 5, United States Code, were applicable to them. The Secretary shall give due consideration to such rates in making the wage and fringe benefit determinations specified in this section.

(b)(1) No contractor who enters into any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees and no subcontractor thereunder shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)), as amended (52 Stat. 1060; 29 U.S.C. 201, et seq.)

(2) The provisions of sections 3, 4, and 5 of this Act (41 U.S.C. 352-354) shall be applicable to violations of this subsection. (P.L. 92-473, §1, 2, Oct. 9, 1972, 86 Stat. 789; P.L. 94-489, Oct. 13, 1976, 90 Stat. 2358§).

352. VIOLATIONS, PENALTIES

(a) Any violation of any of the contract stipulations required by section 2(a)(1) or (2) or section 2(b) of this Act (41 U.S.C. 351(a)(1), (2), (b)) shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. So much of the accrued payment due on the contract or any other contract between the same contractor and the Federal Government may be withheld as is necessary to pay such employees. Such withheld sums shall be held in a deposit fund. On order of the Secretary, any compensation which the head of the Federal agency or the Secretary has found to be due pursuant to this Act shall be paid directly to the underpaid employees from any accrued payments withheld under this Act.

(b) In accordance with regulations prescribed pursuant to section 4 of this Act (41 U.S.C. 353), the Federal agency head or the Secretary is hereby authorized to carry out the provisions of this section.

(c) In addition, when a violation is found of any contract stipulation, the contract is subject upon written notice to cancellation by the contracting agency. Whereupon, the United States may enter into other contracts or arrangements for the completion of the original contract, charging any additional cost to the original contractor. Pub. L. 89-286, §3, Oct. 22, 1965, 79 Stat. 1035.

353. ENFORCEMENT AUTHORITY

(a) Sections 4 and 5 of the Act of June 30, 1936 (49 Stat. 2036), as amended (41 U.S.C. 38, 39), shall govern the Secretary's authority to enforce this Act, make rules and regulations, issue orders, hold hearings, and make decisions based upon findings of fact, and take other appropriate action hereunder.

(b) The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exceptions to and from any or all provisions of this Act, other than section 10 (41 U.S.C. 358), but only in special circumstances where he determines that such limitation, variation, tolerance, or exception is necessary and proper in the public interest or to avoid the serious impairment of Government business, and is in accordance with the remedial purpose of this Act to protect prevailing labor standards.

(c) No contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract; Provided, that in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

(d) Subject to limitations in annual appropriation Acts but notwithstanding any other provision of law, contracts to which this Act applies may, if authorized by the Secretary, be for any term of years not exceeding five, if each such contract provides for the periodic adjustment of wages and fringe benefits pursuant to future determinations, issued in the manner prescribed in section 2 of this Act (41 U.S.C. 351) no less often than once every two years during the term of the contract, covering the various classes of service employees. P.L. 92-473, §3, Oct. 9, 1972, 86 Stat. 789.

354. LIST OF VIOLATORS

(a) The Comptroller General is directed to distribute a list of all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this Act. Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms. Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later than ninety days after a hearing examiner has made a finding of a violation of this Act, forward to the Comptroller General the name of the individual or firm found to have violated the provisions of this act.

(b) If the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to this Act, the United States may bring action against the contractor, subcontractor, or any sureties in any court of the competent jurisdiction to recover the remaining amount of underpayments. Any sums recovered by the United States shall be held in the deposit fund and shall be paid, on order of the Secretary, directly to the underpaid employee or employees, any sum not paid to an employee because of inability to do so within three years shall be covered into the Treasury of the United States as miscellaneous receipts. P.L. 92-473, §4, Oct. 9, 1972, 86 Stat. 790.

355. OVERTIME PAY

In determining any overtime pay to which such service employees are entitled under any Federal law, the regular or basic hourly rate of pay of such an employee shall not include any fringe benefit payments computed hereunder which are excluded from the regular rate under the Fair Labor Standards Act by provisions of section 7(d) thereof. (29 U.S.C. 207(d)).

356. EXEMPTIONS

This Act shall not apply to--

(1) any contract of the United States or District of Columbia for construction, alteration and/or repair, including painting and decorating of public buildings or public works;

(2) any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (49 Stat 2086);

(3) any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect;

(4) any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934;

(5) any contract for public utility service, including electric light and power, water, steam, and gas;

(6) any employment contract providing for direct services to a Federal agency by an individual or individuals; and

(7) any contract with the United States Postal Service, the principal purpose of which is the operation of postal contract stations. Pub. L. 89-286, §7, Oct. 22, 1965, 79 Stat. 1035.

357. DEFINITIONS

For the purpose of this Act--

(a) "Secretary" means Secretary of Labor.

(b) the term "service employee" means any person engaged in the performance of a contract entered into by the United States and not exempted under section 7, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations); and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

(c) The term "compensation" means any of the payments or fringe benefits described in section 2 of this Act (41 U.S.C. 351).

(d) The term "United States" when used in a geographical sense shall include any State of the United States, the District of Columbia, Puerto Rico, the Virgin Island, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston Island and Canton Island, but shall not include any other territory under the jurisdiction of the United States or any United States base or possession within a foreign country. P.L. 93-57, §1, July 6, 1973, 87 Stat. 140; P.L. 94-489, §3, Oct. 13, 1976, 90 Stat. 2358.

358. WAGES, FRINGE BENEFITS

It is the intent of the Congress that determinations of minimum monetary wages and fringe benefits for the various classes of service employees under the provision of paragraph (1) and (2) of section 2 (41 U.S.C. 351) should be made with respect to a ll contracts subject to this Act, as soon as it is administratively feasible to do so. In any event, the Secretary shall make such determinations with respect to at least the following contracts subject to this Act which are entered into during the applicable fiscal year:

"(1) For the fiscal year ending June 30, 1973, all contracts under which more than twenty-five service employees are to be employed.

"(2) For the fiscal year ending June 30, 1974, all contracts under which more than twenty service employees are to be employed.

"(3) For the fiscal year ending June 30, 1975, all contracts under which more than fifteen service employees are to be employed.

"(4) For the fiscal year ending June 30, 1976, all contracts under which more than ten service employees are to be employed.

"(5) On or after July 1, 1976, and for each fiscal year thereafter, all contracts under which more than five service employees are to be employed." P.L. 92-473, §5, Oct. 9, 1972, 86 Stat. 790; P.L. 94-273, §29, Apr. 21, 1976, 90 Stat. 380.

SOCIAL AND ECONOMIC PROGRAMS

(Source: Report of Commission on Government Procurement; submitted to the Congress December 1972)

Program	Authority	Purpose
Restrictions on Foreign vs. Domestic Sources		
1. Buy American Act (1933)	41 U.S.C. 10a-10d	To provide preference for domestic materials over foreign materials.
2. Preference for United States Food, Clothing, and Fibers (Berry Amendment)	Public Law 91-171, sec. 624	To restrict the Department of Defense from purchasing specified classes of commodities of foreign origin.
3. Preference for United States Manufacturers	16 U.S.C. 560a	To restrict US Forest Service from purchasing twine manufactured from materials of foreign origin.
4. Labor Surplus Area Concerns (1952)	Defense Manpower Policy No. 4, 32A CFR 33 (Supp. 1972)	To provide preference to concerns performing in areas of concentrated unemployment or underemployment.
5. Required Source for Jewel Bearings	ASPR 7-104.37	To preserve a mobilization base for manufacture of jewel bearings.
6. Prohibition of Construction of Naval Vessels in Foreign Shipyards	Public Law 91-171 (DOD Appropriation Act of 1970), title IV	To prohibit use of appropriated funds for the construction of any Navy vessel in foreign shipyards.
7. Acquisition of Foreign Buses	Public Law 90-500, (DOD Appropriation Act of 1969), sec. 404	To restrict use of appropriated funds to purchase, lease, rent, or otherwise acquire foreign-manufactured buses.
8. Required Source for Aluminum Ingot	ASPR 1-327, FPR subpart 1-5.10	To eliminate excess quantity of aluminum in the national stockpile.
9. Preference for United States Manufacturers	22 U.S.C. 295a	To provide preferences for domestic manufacturers in construction of diplomatic and consular establishments.
10. Preference for United States Products (Military Assistance Programs)	22 U.S.C. 2354(a)	To require the purchase of US end products for the military assistance program.
11. International Balance of Payment	ASPR 6-805.2, FPR 1-6.8	To limit purchase of foreign end products and services for use abroad.
12. Preference to US Vessels	10 U.S.C. 2631, 46 U.S.C. 1241	To require the shipment of all military and at least half of other goods in US vessels.
13. Purchases in Communist Areas	ASPR 6-401 et seq.	To prohibit acquisition of supplies from sources within Communist areas.
14. Nonuse of Foreign Flag Vessels Engaged in Cuban and North Vietnam Trade	ASPR 1-1410	To prohibit contractor from shipping any supplies on foreign flag vessel that has called on Cuban or North Vietnamese port after specific dates.
15. Duty-free Entry of Canadian Supplies	ASPR 6-605	To further economic cooperation with Canada and continental defense.
16. Use of Excess and Near Excess Currency	ASPR 6-000 et seq. FPR 1-6.804-806	To provide preference in award to bidders willing to be paid in excess or near-excess foreign currency.
Restrictions Governing Supplier Type or Location		
17. Small Business Act	15 U.S.C. 631-647; see also 41 U.S.C. 252(b) and 10 U.S.C. 2301	To place fair portion of Government purchases and contracts with small business concerns.
18. Prison-made Supplies	18 U.S.C. 4124	To require mandatory purchase of specific supplies from Federal Prison Industries, Inc.
19. Blind-made Products	41 U.S.C. 46-48	To make mandatory purchase of products made by blind and other handicapped persons.
20. Prohibition of Price Differential	Public Law 83-179, sec. 644	To prohibit use of appropriated funds for payment of price differential on contracts made to relieve economic dislocation.
Employment Opportunity Considerations		
21. Equal Employment Opportunity (1965)	Exec. Order 11246, Exec. Order 11375	To prohibit discrimination in Government contracting.
22. Employment Openings for Veterans	Exec. Order 11598, 41 CFR 50-250, ASPR 12-1102	To require contractors to list suitable employment openings with State employment system to assist veterans in obtaining jobs.

23. Vietnam Veterans Readjustment Act	Public Law 92-540	To give employment preference to disabled veterans and veterans of the Vietnam era.
24. Convict Labor Act (1905)	Exec. Order 325A, ASPR 12-201 et seq.	To prohibit employment on Government contracts of persons imprisoned at hard labor.
Wages, Benefits, and Working Conditions		
25. Walsh-Healey Public Contracts Act (1936)	41 U.S.C. 36-45	To prescribe minimum wage, hours, age, and working conditions for supply contracts.
26. Davis-Bacon Act (1931)	40 U.S.C. 276a-1-5	To prescribe minimum wages, benefits and working conditions on construction contracts in excess of $2,000.
27. Service Contract Act of 1965 (1965)	41 USC 351-357	To prescribe wages, fringe benefits, and work conditions for service contracts.
28. Contract Work Hours and Safety Standards Act	40 U.S.C. 328-332	To prescribe eight-hour day, forty-hour week, and health and safety standards for laborers and mechanics on public works.
29. Fair Labor Standards Act of 1938 (1938)	29 U.S.C. 201-219	To establish minimum wage and maximum hours standards for employees engaged in commerce or the production of goods for commerce.
Pursuit of Other National Objectives		
30. Officials Not to Benefit	41 U.S.C. 22	To prohibit members of Congress from benefiting from any Government contract.
31. Copeland "Anti-Kickback" Act (1934)	18 U.S.C. 874, 40 U.S.C. 276c	To prohibit kickbacks from employees on public works.
32. Covenant Against Contingent Fees	41 CFR 1-1.500-509	To void contract obtained by broker for a contingent fee.
33. Gratuities	32 CFR 7.104-16	To provide Government with right to terminate if gratuity is given to a Government employee to obtain contract of favorable treatment.
34. Clean Air Act of 1970	42 U.S.C. 1857h-4	To prohibit contracting with a company convicted of criminal violation of air pollution standards.
35. Release of Product Information to Consumers	Exec. Order 11566	To encourage dissemination of Government documents containing product information of possible use to consumers.
36. Care of Laboratory Animals	ASPR 7-303.44	To require humane treatment in use of experimental or laboratory animals.
37. Humane Slaughter Act	7 U.S.C. 1901-1906	To purchase meat only from suppliers who conform to humane slaughter standards.
38. Miller Act (1935)	40 U.S.C. 270a-d	To require contractor to provide payment and performance bonds on Government construction contracts.
39. Economic Stabilization Act of 1970	12 U.S.C. 1904 note	To stabilize prices, rents, wages, salaries, dividends, and interest.

CHAPTER FOURTEEN

No Statutes

CHAPTER FIFTEEN

LIABILITY OF PERSONS MAKING FALSE CLAIMS

Chapter 6

31 USC §231

Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier sailor, officer, or other person not having the lawful right to pledge or sell the same, shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit. R.S. §§3490, 5438.

Same; Suits; Procedure

Chapter 6

31 USC §232

(A) The several district courts of the United States, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

CHAPTER SIXTEEN

"THE ADMINISTRATIVE DISPUTES ACT OF 1954"
(The Anti-Wunderlich Act)

(41 U.S.C. §§321-322)

§321. LIMITATION OF PLEADING CONTRACT-PROVISIONS RELATING TO FINALITY; STANDARDS OF REVEIW:

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 pledged in any suit now filed or 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 fradulent (so in original. Probably should read "fraudulent"), capricious, or arbitrary or so grossly erroneous as necessary to imply bad faith, or is not supported by substantial evidence. May 11, 1954, c. 199, §1, 68 Stat. 81.

§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. May 11, 1954, c. 199, §2, 68 Stat. 81.

CONTRACT DISPUTES ACT OF 1978 P.L. 95-563

(41 USC §601)

As Amended by the Federal Courts Improvement Act of 1982, HR 4482.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Contracts Disputes Act of 1978".

Definitions

Sec 2. As used in this Act--

(1) the term "agency head" means the head and any assistant head of an executive agency, and may "upon the designation by" the head of an executive agency include the chief official of any principal division of the agency;

(2) the term "executive agency" means an executive department as defined in section 101 of title 5, United States Code, an independent establishment as defined by section 104 of title 5, United States Code (except that it shall not include the General Accounting Office) a military department as defined by section 102 of title 5, United States Code, and a wholly owned Government corporation as defined by section 846 of title 31, United States Code, the United States Postal Service, and the Postal Rate Commission;

(3) the term "contracting officer" means any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and make determinations and findings with respect thereto. The term also includes the authorized representative of the contracting officer, acting within the limits of his authority;

(4) the term "contractor" means a party to a Government contract other than the Government;

(5) the term "Administrator" means the Administrator for Federal Procurement Policy appointed pursuant to the Office of Federal Procurement Policy Act;

(6) the term "agency board" means an agency board of contract appeals established under section 8 of this Act; and

(7) the term "misrepresentation of fact" means a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

Applicability of Law

Sec 3. (a) Unless otherwise specifically provided herein, this Act applies to any express or implied contract (including those of the non-appropriated fund activities described in sections 1346 and 1491 of title 28, United States Code) entered into by an executive agency for--

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair or maintenance of real property; or

(4) the disposal of personal property.

(b) With respect to contracts of the Tennessee Valley Authority, the provisions of this Act shall apply only to those contracts which contain a disputes clause requiring that a contract dispute be resolved through an agency administrative process. Notwithstanding any other provision of this Act, contracts of the Tennessee Valley Authority for the sale of fertilizer or electric power or related to the conduct or operation of the electric power system shall be excluded from the Act.

(c) This Act does not apply to a contract with a foreign government, or agency thereof, or international organization, or subsidiary body thereof, if the head of the agency determines that the application of the Act to the contract would not be in the public interest.

Maritime Contracts

Sec 4. Appeals under paragraph g of section 8 and suits under section 10, arising out of maritime contracts, shall be governed by the Act of March 9, 1920, as amended (41 Stat. 525, as amended; 46 U.S.C. 741-752) or the Act of March 3, 1925, as amended (43 Stat. 1112, as amended; 46 U.S.C. 781-790) as applicable, to the extent that those Acts are not inconsistent with this Act.

Fraudulent Claims

Sec 5. If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misreprentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim. Liability under this subsection shall be determined within 6 years of the commission of such misrepresentation of fact or fraud.

Decision by the Contracting Officer

Sec 6. (a) All claims by a contractor against the Government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the Government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this Act. Specific findings of fact are not required, but if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or

regulation which another Federal agency is specifically authorized to administer, settle or determine. This section shall not authorize any agency head to settle, compromise or pay or otherwise adjust any claim involving fraud.

(b) The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this Act. Nothing in this Act shall prohibit executive agencies from including a clause in Government contracts requiring that pending final decision of an appeal or suit, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the Contracting Officer's decision.

(c)(1) A contracting Officer shall issue a decision on any submitted claim of $50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, and that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over $50,000--

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(4) A contractor may request the agency board of contract appeals to direct a contracting officer to issue a decision in a specified period of time, as determined by the board, in the event of undue delay on the part of the contracting officer.

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this Act. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

Contractor's Right of Appeal to Board of Contract Appeals

SEC 7. Within ninety days from the date of receipt of a contracting officer's decision under section 6, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 8.

Agency Boards of Contract Appeals

SEC 8. (a)(1) Except as provided in paragraph (2) an agency board of contract appeals may be established within an executive agency when the agency head, after consultation with the Administrator, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least three members who shall have no other inconsistent duties. Workload studies will be updated at least once every three years and submitted to the Administrator.

(2) The Board of Directors of the Tennessee Valley Authority may establish a board of contract appeals for the Authority of an indeterminate number of members.

(b)(1) Except as provided in paragraph (2), the members of agency boards shall be selected and appointed to serve in the same manner as hearing examiners appointed pursuant to section 3105 title 5 of the United States Code, with an additional requirement that such members shall have had not fewer than five years' experience in public contract law. Full-time members of agency boards serving as such on the effective date of this Act shall be considered qualified. The chairman and vice chairman of each board shall be designated by the agency head from members so appointed. The chairman of each agency board shall receive compensation at a rate equal to that paid a GS-18 under the General Schedule contained in section 5332, United States Code, the vice chairman shall receive compensation at a rate equal to that paid a GS-17 under such General Schedule, and all other members shall receive compensation at a rate equal to that paid a GS-16 under such General Schedule. Such positions shall be in addition to the number of positions which may be placed in GS-16, GS-17, and GS-18 of such General Schedule under existing law.

(2) The Board of Directors of the Tennessee Valley Authority shall establish criteria for the appointment of members to its agency board of contract appeals established in subsection (a)(2), and shall designate a chairman of such board. The chairman of such board shall receive compensation at a rate equal to the daily rate paid a GS-18 under the General Schedule contained in section 5332, United States Code for each day he is engaged in the actual performance of his duties as a member of such board. All other members of such board shall receive compensation at a rate equal to the daily rate paid a GS-16 under such General Schedule for each day they are engaged in the actual performance of their duties as members of such board.

(c) If the volume of contract claims is not sufficient to justify an agency board under subsection (a) or if he otherwise considers it appropriate, any agency head shall arrange for appeals from decisions by contracting officers of his agency to be decided by a board of contract appeals of another executive agency. In the event an agency head is unable to make such an arrangement with another agency, he shall submit the case to the Adminis-

an arrangement with another agency, he shall submit the case to the Administrator for placement with an agency board. The provisions of this subsection shall not apply to the Tennessee Valley Authority.

(d) Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relating to a contract made by its agency, and (2) relating to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the Claims Court.

(e) An agency board shall provide, to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes, and shall issue a decision in writing or take other appropriate action on each appeal submitted, and shall mail or otherwise furnish a copy of the decision to the contractor and the contracting officer.

(f) The rules of each agency board shall include a procedure for the accelerated disposition of any appeal from a decision of a contracting officer where the amount in dispute is $50,000 or less. The accelerated procedure shall be applicable at the sole election of only the contractor. Appeals under the accelerated procedure shall be resolved, whenever possible, within one hundred and eighty days from the date the contractor elects to utilize such procedure.

(g)(1) The decision of an agency board of contract appeals shall be final, except that--

(A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the board of contract appeals to the United States Court of Appeals for the Federal Circuit for judicial review, under section 1295 of title 28, United States Code, as amended herein, within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.

(2) Notwithstanding the provisions of paragraph (1), the decision of the board of contract appeals of the Tennessee Valley Authority shall be final, except that--

(A) a contractor may appeal such a decision to a United States district court pursuant to the provisions of section 1337 of title 28, United States Code within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) The Tennessee Valley Authority may appeal the decision to a United States district court pursuant to the provisions of section 1337 of title 28, United States Code, within one hundred twenty days after the date of the decision in any case.

(h) Pursuant to the authority conferred under the Office of Federal Procurement Policy Act, the Administrator is authroized and directed, as may be necessary or desirable to carry out the provisions of this Act, to issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards (except for a board established by the Tennessee Valley Authority).

(i) Within one hundred and twenty days from the date of enactment of this Act, all agency boards, except that of the Tennessee Valley Authority, of three or more full-time members shall develop workload studies.

Small Claims

SEC 9. (a) The rules of each agency board shall include a procedure for the expedited disposition of any appeal from a decision of a contracting officer where the amount in dispute if $10,000 or less. The small claims procedure shall be applicable at the sole election of the contractor.

(b) The small claims procedure shall provide for simplified rules of procedure to facilitate the decision of any appeal thereunder. Such appeals may be decided by a single member of the agency board with such concurrences as may be provided by rule or regulation.

(c) Appeals under the small claims procedure shall be resolved, whenever possible, within one hundred twenty days from the date on which the contractor elects to utilize such procedure.

(d) A decision against the Government or the contractor reached under the small claims procedure shall be final and conclusive and shall not be set aside except in cases of fraud.

(e) Administrative determinations and final decisions under this section shall have no value as precedent for future cases under this Act.

(f) The Administrator is authorized to review at least every three years, beginning with the third year after the enactment of the Act, the dollar amount defined in section 9(a) as a small claim, and based upon economic indexes selected by the Administrator adjust that level accordingly.

Actions in Court; Judicial Review of Board Decisions

SEC 10(a)(1). Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 6 to an agency board, a contractor may bring an action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(2) In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a United States district court pursuant to section 1337 of title 28, United States Code, nowithstanding any contract provision, regulation, or rule of law to the contrary.

(3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.

(b) In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 8, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

(c) In any appeal by a contractor or the Government from a decision of an agency board pursuant to section 8, the court may render an opinion and judgment and remand the case for further action by the agency board or by the executive agency as appropriate, with such direction as the court considers just and proper.

(d) If two or more suits arising from one contract are filed in the Claims Court and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the Claims Court may order the consolidation of such suit in the court or transfer any suits to or among the agency boards involved.

(e) In any suit filed pursuant to this Act involving two or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where miltiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties.

Subpoena, Discovery, and Deposition

SEC 11. A member of an agency board of contract appeals may administer oaths to witnesses, authorize depositions and discovery proceedings, and require by subpoena the attendance of witnesses, and production of books and papers, for the taking of testimony or evidence by deposition or in the hearing of an appeal by the agency board. In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of the United States district court, the court, upon application of the agency board through the Attorney General, or upon application by the board of contract appeals of the Tennessee Valley Authority, shall have jurisdiction to issue the person an order requiring him to appear before the agency board or a member thereof, to produce evidence or to give testimony, or both. Any failure of any such person to obey the order of the court may be punished by the court as a contempt thereof.

Interest

SEC 12. Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) from the contractor until payment thereof.

The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.

Appropriations

SEC 13. (a) Any judgment against the United States on a claim under this Act shall be paid promptly in accordance with the procedures provided by section 1302 of the Act of July 1956 (70 Stat. 694, as amended; 31 USC 724a).

(b) Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) above.

(c) Payments made pursuant to subsections (a) and (b) shall be reimbursed to the funds provided by section 1302 of the Act of July 27, 1956, (70 Stat. 694, as amended; 31 U.S.C. 724a) by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes.

(d)(1) Notwithstanding the provisions of subsection (a) through (c), any judgment against the Tennessee Valley Authority on a claim under this Act shall be paid promptly in accordance with the provisions of section 9(b) of the Tennessee Valley Authority act of 1933 (16 U.S.C. 831(h)).

(2) Notwithstanding the provisions of subsection (a) through (c), any monetary award to a contractor by the board of contract appeals for the Tennessee Valley Authority shall be paid in accordance with the provisions of section 9(b) of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831(h)).

Amendments and Repeals

SEC 14. (a) The first sentence of section 1346(a)(2) of title 28, United States Code, is amended by inserting before the period a comma and the following: "except that the district courts shall not have jurisdiciton of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978".

(b) Section 2401(a) of title 28, United States Code, is amended by striking out "Every" at the beginning and inserting in lieu thereof "Except as provided by the Contract Disputes Act of 1978, every".

(c) Section 1302 of the Act of July 27, 1956, as amended (70 Stat. 694, as amended; 31 U.S.C. 724a), is amended by adding after "2677 of title 28" the words "and decisions of boards of contract appeals".

(d) Section 2414 of title 28, United States Code, is amended by striking out "Payment" at the beginning and inserting in lieu thereof "Except as provided by the Contract Disputes Act of 1978, payment".

(e) Section 2517(a) of title 28, United States Code, is amended by striking out "Every" at the beginning and inserting in lieu thereof "Except as provided by the Contract Disputes Act of 1978, every".

(f) Section 2517(b) of title 28, United States Code, is amended by inserting after "case or controversy" the following: ", unless the judgment is designated a partial judgment, in which event only the matters described therein shall be discharged,".

(g) There shall be added to subsection (c) of section 5108 of title 5, United States Code, a paragraph (17) reading as follows:

"(17) the heads of executive departments or agencies in which boards of contract appeals are established pursuant to the Contract Disputes Act of 1978, and subject to the standards and procedures prescribed by this chapter, but without regard to subsection (d) of this section, may place additional positions, not to exceed seventy in number, in GS-16, GS-17, and GS-18 for the independent quasi-judicial determination of contract disputes, with the allocation of such positions among such executive departments and agencies determined by the Administrator for Federal Procurement Policy on the basis of relative case load."

(h)(1) Section 2510 of title 28, United States Code, is amended by--

(A) inserting "(a)" immediately before such section; and

(B) adding the following new subsection at the end thereof:

"(b)(1) The head of any executive department or agency may, with the prior approval of the Attorney General, refer to the Court of Claims for judicial review any final decision rendered by a board of contract appeals pursuant to the terms of any contract with the United States awarded by that department or agency which such head of such department or agency has concluded is not entitled to finality pursuant to the review standards specified in section 10(b) of the Contract Disputes Act of 1978. The head of each executive department or agency shall make any referral under this section within one hundred and twenty days of the receipt of a copy of the final appeal decision.

(2) The Court of Claims shall review the matter referred in accordance with the standards specified in section 10(b) of the Contracts Disputes Act of 1978. The Court shall proceed with judicial review on the administrative record made before the board of contract appeals on matters so referred as in other cases pending in such court, shall determine the issue of finality of the appeal decision, and shall, as appropriate, render judgment thereon, take additional evidence, or remand the matter pursuant to the authority specified in section 1491 of this title."

(2)(A) The section heading of such section is amended to read as follows:

"SEC 2510. Referral of cases by the Comptroller General or the head of an executive department or agency."

(B) The items relating to section 2510 in the table of sections for chapter 165 of title 28, United States Code, is amended to read as follows:

"2510. Referral of cases by the Comptroller General or the head of an executive department or agency."

(i) Section 1491 of title 28, United States Code, is amended by adding the following sentence at the end of the first paragraph: "The Court of Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under the Contract Disputes Act of 1978."

Severability Clause

SEC 15. If any provision of this Act, or the application of such provision to any person or circumstances, is held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

Effective Date of Act

SEC 16. This Act shall apply to contracts entered into one hundred twenty days after the date of enactment. Notwithstanding any provision in a contract made before the effective date of this Act, the contractor may elect to proceed under this Act with respect to any claim pending then before the contracting officer or initiated thereafter.

Designated HR 11002, 95th Congress, enacted 21 Oct. 1978, Signed 2 Nov. 1978.

EQUAL ACCESS TO JUSTICE ACT

(5 USC 504)

COSTS AND FEES OF PARTIES

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantally justified or that special circumstances make an award unjust.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified.

(3) The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor.

(b)(1) For the purposes of this section--

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee);

(B) "party" means a party, as defined in section 551(3) of this title which is an individual, partnership, corporation, association, or public or private organization other than an agency, but excludes (i) any individual whose net worth exceeded $1,000,000 at the time the adversary adjudication was initiated, and any sole owner of an unincorporated business, or any partnership, corporation, association, or organization whose net worth exceeded $5,000,000 at the time the adversary adjudication was inititated,

except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association, and (ii) any sole owner of an unincorporated business, or any partnership, corporation, association, or organization, having more than 500 employees at the time the adversary adjudication was initiated;

(C) "adversary adjudication" means an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license; and

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication.

(2) Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this title apply to this section.

(c)(1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28, United States Code.

(2) A party dissatisfied with the fee determination made under subsection (a) may petition for leave to appeal to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. If the court denies the petition for leave to appeal, no appeal may be taken from the denial. If the court grants the petition, it may modify the determination only if it finds that the failure to make an award, or the calculation of the amount of the award, was an abuse of discretion.

(d)(1) Fees and other expenses awarded under this section may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgement is made pursuant to sections 2414 of title 28, United States Code.

(2) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984, such sums as may be necessary to pay fees and other expenses awarded under this section in such fiscal years.

(e) The Chairman of the Administrative Conference of the United States, after consultation with the Chief Counsel for Advocacy of the Small Business Administration, shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year

pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards. Each agency shall provide the Chairman with such information as is necessary for the Chairman to comply with the requirements of this subsection. P.L. 96-481, Oct. 21, 1980, 94 Stat. 2325.

CHAPTER SEVENTEEN

THE TUCKER ACT

28 USC, §1491, et seq.

Sections

1491. Claims against United States generally; actions involving Tennessee Valley Authority.
1492. Congressional reference cases.
1494. Accounts of officers, agents or contractors.
1495. Damages for unjust conviction and imprisonment; Claims against United States.
1496. Disbursing Officers' claims.
1497. Oyster growers' damages from dredging operations.
1498. Patent and copyright cases.
1499. Penalties imposed against contractors under eight hour law.
1500. Pendency of Claims in other courts.
1501. Pensions.
1502. Treaty cases.
1503. Set-offs.
1504. Tort claims.
1505. Indian claims.
1506. Transfer to cure defect of jurisdiction.

§1491. CLAIMS AGAINST UNITED STATES GENERALLY; ACTIONS INVOLVING TENNESSEE VALLEY AUTHORITY.

The United States Claims Court shall have jurisdiction to render judgement upon any claim against the United States founded either upon the Constititution, 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. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchange, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. (2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgement, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978. (3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper,

including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

(b) Nothing herein shall be construed to give the United States Court jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority. As amended Nov. 1, 1978, Pub. L. 95-563, §14(i), 92 Stat. 2391; Oct. 10, 1980, Pub. L. 96-417, Title V, §509, 94 Stat. 1743.

§1492. CONGRESSIONAL REFERENCE CASES.

Any bill, except a bill for a pension, may be referred by either House of Congress to the chief judge of the United States Claims Court for a report in conformity with section 2509 of this title. As amended Oct. 15, 1966, Pub. L. 89-681, §1, 80 Stat. 958.

§1493. REPEALED. July 28, 1953, c. 253, §8, 67 Stat. 226.

§1494. ACCOUNTS OF OFFICERS, AGENTS, OR CONTRACTORS.

The United States Claims Court shall have jurisdiction to determine the amount, if any, due to or from the United States by reason of any unsettled account of any officer or agent of, or contractor with, the United States, or a guarantor, surety or personal representative of any such officer, agent, or contractor, and to render judgement thereof where-

(1) Claimant or the person he represents has applied to the proper department of the Government for settlement of the account;

(2) three years have elapsed from the date of such application without settlement; and

(3) no suit upon the same has been brought by the United States. As amended July 28, 1953, c. 253, §9, 67 Stat. 226; Sept. 3, 1954, c. 1263, §44(c), 68 Stat. 1242.

§1495. DAMAGES FOR UNJUST CONVICTION AND IMPRISONMENT: CLAIM AGAINST UNITED STATES.

The United States Claims Court shall have jurisdiction to render judgement upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned. June 25, 1948, c. 646, 62 Stat. 941.

§1496. DISBURSING OFFICERS' CLAIMS.

The United States Claims Court shall have jurisdiction to render judgement upon any claim by a disbursing officer of the United States or by his administrator or executor for relief from responsibility for loss, in line of duty, of Government funds, vouchers, records or other papers in his charge. June 25, 1948, c. 646, 62 Stat. 941.

§1497. OYSTER GROWERS, DAMAGES FROM DREDGING OPERATIONS.

The United States Claims Court shall have jurisdiction to render judgment upon any claim for damages to oyster growers on private or leased lands or bottoms arising from dredging operations or use of other machinery and equipment in making river and harbor improvements authorized by Act of Congress. June 25, 1948, c. 646, 62 Stat. 941.

§1498. PATENT AND COPYRIGHT CASES.

(a) Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the United States Claims Court for recovery of his reasonable and entire compensation for such use and manufacture.

For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

The court shall not award compensation under this section if the claim is based on the use or manufacture by or for the United States of any article, owned, leased, used by, or in the possession of the United States prior to July 1, 1918.

A Government employee shall have the right to bring suit against the Government under this section except where he was in a position to order, influence, or induce use of the invention by the Government. This section shall not confer a right of action on any patentee or any assignee of such patentee with respect to any invention discovered or invented by a person while in the employment or service of the United States, where the invention was related to the official functions of the employee, in cases in which such functions included research and development, or in the making of which Government time, materials, or facilities were used.

(b) Hereafter, whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the Government, the exclusive remedy of the owner of such copyright shall be by action against the United States in the Claims Court of the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages as set forth in section 504(c) of title 17, United States Code: Provided, that a Government employee shall have right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the copyrighted work by the Government: Provided, however, that this subsection shall not confer a right of action on any copyright owner or any assignee of such owner with respect to any copyrighted work prepared by a person while in the employment or service of the United States, where the copyrighted work was prepared as

a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: And provided further, That before such action against the United States has been instituted the appropriate corporation owned or controlled by the United States or the head of the appropriate department or agency of the Government, as the case may be, is authorized to enter into an agreement with the copyright owner in full settlement and compromise for the damages accruing to him by reason of such infringement and to settle the claim administratively out of available appropriations.

Except as otherwise provided by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than three years prior to the filing of the complaint or counter-claim for infringement in the action, except that the period between the date of receipt of a written claim for compensation by the Department or agency of the Government or corporation owned or controlled by the United States, as the case may be, having authority to settle such claim and the date of mailing by the Government of a notice to the claimant that his claim has been denied shall not be counted as a part of the three years, unless suit is brought before the last-mentioned date.

(c) The provisions of this section shall not apply to any claim arising in a foreign country. As amended Oct. 31, 1951, c. 655, §50(c), 65 Stat. 727; July 17, 1952, c. 930, 66 Stat. 757; Sept. 8, 1960, Pub. L. 86-726, §§1, 4, 74 Stat. 855, 856.

(d) Hereafter, whenever a plant variety protected by a certificate of plant variety protection under the laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor or any person, firm, or corporation acting for the Government and with the authorization and consent of the Government, the exclusive remedy of the owner of such certificate shall be by action against the United States in the Claims Court for the recovery of his reasonable and entire compensation as damages for such infringement: Provided, That a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence or induce use of the protected plant variety by the Government: Provided, however, That this subsection shall not confer a right of action on any certificate owner or any assignee of such owner with respect to any protected plant variety made by a person while in the employment or service of the United States, where such variety was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: And provided further, That before such action against the United States has been instituted, the appropriate corporation owned or controlled by the United States or the head of the appropriate agency of the Government, as the case may be, is authorized to enter into an agreement with the certificate owner in full settlement and compromise, for the damages accrued to him by reason of such infringement and to settle the claim administratively out of available appropriations. June 25, 1948, c. 646, 62 Stat. 941; May 24, 1949, c. 139, §87, 63 Stat. 102; Oct. 31, 1951, c. 655, §50(c), 65 Stat. 727; July 17, 1952, c. 930, 66 Stat. 757; Sept. 8, 1960, Pub. L. 86-726, §§1, 4, 74 Stat. 855, 856; Dec. 24, 1970, Pub. L. 91-577, Title III, §143(d), 84 Stat. 1559.

§1499. LIQUIDATED DAMAGES WITHHELD FROM CONTRACTORS UNDER CONTRACT WORK HOURS AND SAFETY STANDARDS ACT.

The United States Claims Court shall have jurisdiction to render judgment upon any claim for liquidated damages withheld from a contractor or subcontractor under section 104 of the Contract Work Hours Standards Act. As amended Aug. 13, 1962, Pub. L. 87-581, Title II, §202(a), 76 Stat. 360.

§1500. PENDENCY OF CLAIMS IN OTHER COURTS.

The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act directly or indirectly under the authority of the United States. June 25, 1948, c. 646, 62 Stat. 942.

§1501. PENSIONS.

The United States Claims Court shall not have jurisdiction of any claim for a pension. June 25, 1948, c. 646, 62 Stat. 942.

§1502. TREATY CASES.

Except as otherwise provided by Act of Congress, the Court of Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations. June 25, 1948, c. 646, 62 Stat. 942; May 24, 1949, c. 139, §88, 63 Stat. 102.

§1503. SET-OFFS.

The United States Claims Court shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court. June 25, 1948, c. 646, 62 Stat. 942.

§1504. TORT CLAIMS.

Repealed H.R. 4482, March 22, 1982.

§1505. INDIAN CLAIMS.

The United States Claims Court shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the teritorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or executive orders of the President, or is one which otherwise would be cognizable in the Claims Court if the claimant were not an Indian tribe, band, or group. Added May 24, 1949, c. 139, §89(a), 63 Stat. 102.

FEDERAL COURTS IMPROVEMENT ACT OF 1982

HR 4482, Effective Oct 1, 1982

TITLE I -- UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT AND UNITED STATES CLAIMS COURT

PART A -- Organization, Structure, and Jurisdiction

Number and composition of Circuits

Sec. 101. Section 41 of title 28, United States Code, as amended by the Fifth Circuit Court of Appeals Reorganization Act of 1980 (Public Law 96-452; 94 Stat. 1994), is amended by striking out "twelve" and inserting in lieu thereof "thirteen" and by adding at the end thereof the follow g:

"Federal..... All Federal judicial districts."

Number of Circuit Judges

Sec. 102. (a) Section 44(a) of title 28, United States Code, as amended by the Fifth Circuit Court of Appeals Reorganization Act of 1980 (Public Law 96-452; 94 Stat. 1994), is amended by adding at the end thereof the following:

"Federal..... 12"

(b) Section 44(c) of title 28, United States Code, is amended by adding the following sentence at the end thereof: "While in active service, each circuit judge of the Federal judicial circuit appointed after the effective date of this Act, and the chief judge of the Federal judicial circuit, when-ever appointed, shall reside within fifty miles of the District of Columbia."

PANELS OF JUDGES: Number of Judges for Hearings

Sec. 103. (a) Section 46(a) of title 28, United States Code, is amended by striking out "divisions" and inserting in lieu thereof "panels".

(b) Section 46(b) of title 28, United States Code, is amended--

(1) by striking out "divisions" each place it appears and inserting in lieu thereof "panels";

(2) by inserting immediately before the period at the end of the first sentence the following: ", at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness"; and

(3) by adding at the end thereof the following new sentence: "The United States Court of Appeals for the Federal Circuit Court shall

determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentence of this subsection, may determine by rule the number of judges, not less than three, who constitute a panel."

(c) The first sentence of section 46(c) of title 28, United States Code, is amended by inserting immediately after "three judges" the following: "(except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide)."

(d) Section 46(d) of title 28, United States Code, is amended by striking out "division" and inserting in lieu thereof "panel".

PLACES FOR HOLDING COURT

Sec. 104. (a) Section 48 of title 28, United States Code, is amended by striking out the first two sentences and inserting in lieu thereof the following:

"(a) The courts of appeals shall hold regular sessions at the places listed below, and at such other places within the respective circuit as each court may designate by rule."

(b) Section 48 of title 28, United States Code, as amended by the Fifth Circuit Court of Appeals Reorganization Act of 1980 (Public Law 96-452; 94 Stat. 1994), is amended further by inserting at the end of the table of circuits and places the following:

"Federal..... District of Columbia, and in any other place listed above as the court by rule directs."

(c) Section 48 of title 28, United States Code, is amended further by striking out the final paragraph and inserting in lieu thereof the following:

"(b) Each court of appeals may hold special sessions at any place within its circuit as the nature of the business may require, and upon such notice as the court orders. The court may transact any business at a special session which it might transact at a regular session.

"(c) Any court of appeals may pretermit, with the consent of the Judicial Conference of the United States, any regular session of court at any place for insufficient business or other good cause.

"(d) The times and places of the sessions of the Court of Appeals for the Federal Circuit shall be prescribed with a view to securing reasonable opportunity to citizens to appear before the court with as little inconvenience and expense to citizens as is practicable."

ORGANIZATION OF UNITED STATES CLAIMS COURT

Sec. 105. (a) Chapter 7 of title 28, United States Code, is amended to read as follows:

"CHAPTER 7 -- UNITED STATES CLAIMS COURT

"Sections

171. Appointment and number of judges; character of court; designation of chief judge.

172. Tenure and salaries of judges.

173. Times and places of holding court.

174. Assignment of judges; decisions.

175. Official duty station; residence.

176. Removal from office.

177. Disbarment of removed judges.

"§171. Appointment and number of judges; character of court; designation of chief judge.

"(a) The President shall appoint, by and with the advice and consent of the Senate, sixteen judges who shall constitute a court of record known as the United States Claims Court. The court is declared to be a court established under article I of the Consitution of the United States.

"(b) The President shall designate one of the judges of the Claims Court who is less than seventy years of age to serve as chief judge. The chief judge may continue to serve as such until he reaches the age of seventy years or until another judge is designated as chief judge by the President. After the designation of another judge to serve as chief judge, the former chief judge may continue to serve as a judge of the court for the balance of the term to which appointed.

"§172. Tenure and salaries of judges.

"(a) Each judge of the United States Claims Court shall be appointed for a term of fifteen years.

"(b) Each judge shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.

"§173. Times and places of holding court.

"The principal office of the United States Claims Court shall be in the District of Columbia, but the Claims Court may hold court at such times and

in such places as it may fix by rule of court. The times and places of the sessions of the Claims Court shall be prescribed with a view to securing reasonable opportunity to citizens to appear before the Claims Court with as little inconvenience and expense to citizens as is practicable.

"§174. Assignment of judges; decisions.

"(a) The judicial power of the United States Claims Court with respect to any action, suit, or proceeding, except congressional reference cases, shall be exercised by a single judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other judges.

"(b) All decisions of the Claims Court shall be preserved and open to inspection.

"§175. Official duty station; residence.

"(a) The official duty station of each judge of the United States Claims Court is the District of Columbia.

"(b) After appointment and while in active service, each judge shall reside within fifty miles of the District of Columbia.

JURISDICTION OF THE UNITED STATES COURT
OF APPEALS FOR THE FEDERAL CIRCUIT

Sec. 127(a). Chapter 83 of title 28, United States Code, is amended by adding at the end thereof the following new sections:

"§1295. Jurisdication of the United States Court of Appeals for the Federal Circuit.

"(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction--

"(1) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title, except that a case involving a claim arising under any Act of Congress relating to copyrights or trademarks and no other claims under section 1338 (a) shall be governed by sections 1291, 1292, and 1294 of this title;

"(2) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a

regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title;

"(3) of an appeal from a final decision of the United States Claims Court;

"(4) of an appeal from a decision of--

"(A) The Board of Appeals or the Board of Patent Interferences of the Patent and Trademark Office with respect to patent applications and interferences, at the instance of an applicant for a patent or any party to a patent interference, and any such appeal shall waive the right of such applicant or party to proceed under section 145 or 146 of title 35;

"(B) the Commissioner of Patents and Trademarks or the Trademark Trial and Appeal Board with respect to application for registration of marks and other proceedings as provided in section 21 of the Trademark Act of 1946 (15 U.S.C. 1071); or

"(C) a district court to which a case was directed pursuant to section 145 or 146 of title 35;

"(5) of an appeal from a final decision of the United States Court of International Trade;

"(6) to review the final determinations of the United States International Trade Commission relating to unfair practices in import trade, made under section 337 of the Tariff Act of 1980 (19 U.S.C. 1337);

"(7) to review, by appeal on questions of law only, findings of the Secretary of Commerce under headnote 6 to schedule 8, part 4, of the Tariff Schedules of the United States (relating to importation of instruments or apparatus);

"(8) of an appeal under section 71 of the Plant Variety Protection Act (7 U.S.C. 2461);

"(9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5; and

"(10) of an appeal from a final decision of an agency board of contract appeals pursuant to section 8(g)(1) of the Contract Disputes Act of 1978 (41 U.S.C. 607(g)(1)).

"(b) The head of any executive department or agency may, with the approval of the Attorney General, refer to the Court of Appeals for the Federal Circuit for judicial review any final decisions rendered by a board of contract appeals pursuant to the terms of any contract with the United States awarded by that department or agency which the head of such department or agency has concluded is not entitled to finality pursuant to the review standards specified in section 10(b) of the Contract Disputes Act of 1978 (41 U.S.C. 609(b)). The head of each executive department or agency shall

make any referral under this section within one hundred and twenty days after the receipt of a copy of the final appeal decision.

"(c) The Court of Appeals for the Federal Circuit shall review the matter referred in accordance with the standards specified in section 10(b) of the Contract Disputes Act of 1978. The court shall proceed with judicial review on the administrative record made before the board of contract appeals on matters so referred as in other cases pending in such court, shall determine the issue of finality of the appeal decision, and shall, if appropriate, render judgment thereon, or remand the matter to any administrative or executive body or official with such direction as it may deem proper and just.

* * * * *

INTEREST ON JUDGMENTS

Sec. 302. (a) Section 1961 of title 28, United States Code, is amended--

(1) by inserting "(a)" immediately before "Interest shall" in the first sentence;

(2) by striking out "at the rate allowed by State law" in the last sentence and inserting in lieu thereof the following: "at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges"; and

(3) by adding at the end thereof the following new subsections:

"(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of title 28, United States Code, and section 1302 of the Act of July 27, 1956 (31 U.S.C. 724(a)), and shall be compounded annually.

"(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at a rate established under section 6621 of the Internal Revenue Code of 1954.

"(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal Circuit, at the rate provided in subsection (a) and as provided in subsection (b).

"(3) Interest shall be allowed, computed, and paid on judgments of the United States Claims Court only as provided in paragraph (1) of this subsection or in any other provision of law.

"(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section."

(b) Section 2411 of title 28, United States Code, is amended--

(1) in subsection (a) by striking out "(a)"; and

(2) by repealing subsection (b).

(c) Section 1302 of the Act of July 27, 1956 (31 U.S.C. 724(a)), is amended by striking out "to which the provisions of section 2411(b) of Title 28 apply."

* * * * *

EFFECTIVE DATE

Sec. 402. Unless otherwise specified, the provisions of this Act shall take effect on October 1, 1982.

EFFECT ON PENDING CASES

Sec. 402. (a) Any case pending before the Court of Claims on the effective date of this Act in which a report on the merits has been filed by a commissioner, or in which there is pending a request for review, and upon which the court has not acted, shall be transferred to the United States Court of Appeals for the Federal Circuit.

(b) any matter pending before the United States Court of Customs and Patent Appeals on the effective date of this Act shall be transferred to the United States Court of Appeals for the Federal Circuit.

(c) Any petition for rehearing, reconsideration, alteration, modification, or other change in any decision of the United States Court of Claims or the United States Court of Customs and Patent Appeals rendered prior to the effective date of this Act that has not been determined by either of those courts on that date, or that is filed after that date shall be determined by the United States Court of Appeals for the Federal Circuit.

(d) Any matter pending before a commissioner of the United States Court of Claims on the effective date of this Act, or any pending dispositive motion that the United States Court of Claims has not determined on that date, shall be determined by the United States Claims Court.

(e) Any case in which a notice of appeal has been filed in a district court of the United States prior to the effective date of this Act shall be decided by the court of appeals to which the appeal was taken.

* * * * *

PUBLIC LAW 85-804

Chapter 29, National Defense Contracts

(50 U.S.C. 1431-1435)

§1431. AUTHORIZATION; OFFICIAL APPROVAL; CONGRESSIONAL ACTION: NOTIFICATION OF COMMITTEES OF CERTAIN PROPOSED OBLIGATIONS, RESOLUTION OF DISAPPROVAL, CONTINUITY OF SESSION, COMPUTATION OF PERIOD.

The President may authorize any department or agency of the Government which exercises functions in connection with the national defense, acting in accordance with regulations prescribed by the President for the protection of the Government, to enter into contracts or into amendments or modifications of contracts heretofore or hereafter made and to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense. The authority conferred by this section shall not be utilized to obligate the United States in an amount in excess of $50,000 without approval by an official at or above the level of an Assistant Secretary or his Deputy, or an assistant head or his deputy, of such department or agency, or by a Contract Adjustment Board established therein. The authority conferred by this section may not be utilized to obligate the United States in any amount in excess of $25,000,000 unless the Committees on Armed Services of the Senate and the House of Representatives have been notified in writing of such proposed obligation and 60 days of continuous session of Congress have expired following the date on which such notice was transmitted to such Committees and neither House of Congress has adopted, within such 60-day period, a resolution disapproving such obligation. For purposes of this section, the continuity of a session of Congress is broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of such 60-day period. Pub. L. 85-804, §1, Aug 28, 1958, 72 Stat. 972, amended Pub. L. 93-155, Title VIII, §807(a), Nov. 16, 1973, 87 Stat. 615.

§1432. RESTRICTIONS.

Nothing in this chapter shall be construed to constitute authorization hereunder for--

(a) the use of the cost-plus-a-percentage-of-cost system of contracting;

(b) any contract in violation of existing law relating to limitation of profits;

(c) the negotiation of purchases of or contracts for property or services required by law to be procured by formal advertising and competitive bidding;

(d) the waiver of any bid, payment, performance, or other bond required by law;

(e) the amendment of a contract negotiated under section 2304(a)(15) of Title 10 or under section 252(c)(13) of Title 41, to increase the contract price to an amount higher than the lowest rejected bid of any responsible bidder; or

(f) the formalization of an informal commitment, unless it is found that at the time the commitment was made it was impracticable to use normal procurement procedures.

§1433. PUBLIC RECORD; EXAMINATION OF RECORDS BY COMPTROLLER GENERAL; EXEMPTIONS: EXCEPTIONAL CONDITIONS; REPORTS TO CONGRESS.

(a) All actions under the authority of this chapter shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be detrimental to the national security.

(b) All contracts entered into, amended, or modified pursuant to authority contained in this chapter shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment, have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions other than actions related to such contracts or subcontracts. Under regulations to be prescribed by the President, however, such clause may be omitted from contracts with foreign contractors or foreign subcontractors if the agency head determines, with the concurrence of the Comptroller General of the United States or his designee, that the omission will serve the best interests of the United States. However, the concurrence of the Comptroller General of the United States or his designee is not required for the omission of such clause--

(1) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the law of the country involved from making its books, documents, papers, or records available for examination; and

(2) where the agency head determines, after taking into account the process and availability of the property or services from United States sources, that the public interest would be best served by the omission of the clause.

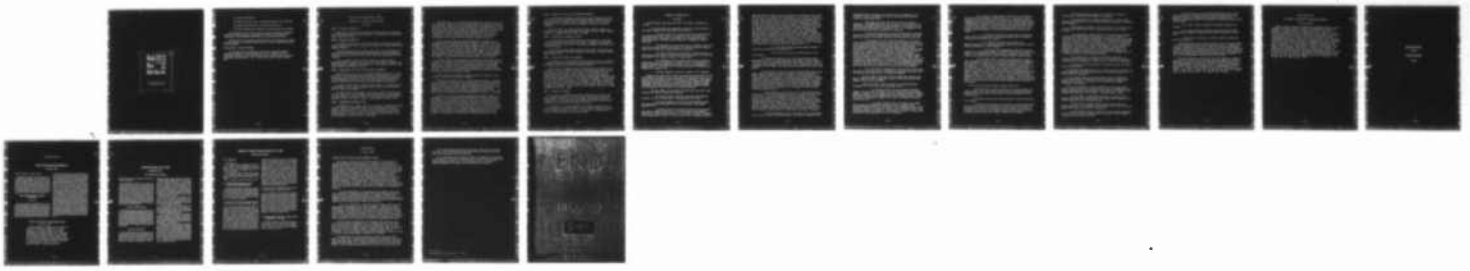
If the clause is omitted based on a determination under clause (2), a written report shall be furnished to the Congress, Pub. L. 85-804, §3, Sept. 27, 1966, 80 Stat. 851.

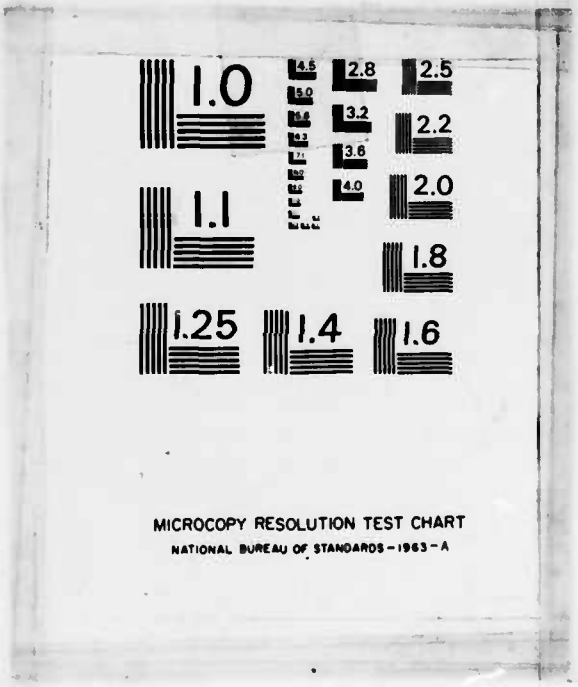
§1434. REPORTS TO CONGRESS; PUBLICATIONS.

(a) Every department and agency acting under authority of this chapter shall, by March 15 of each year, report to Congress all such actions taken by that department or agency during the preceding calendar year. With respect to actions which involved actual or potential cost to the United States in excess of $50,000 the report shall--

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(1) name of contractor;

(2) state the actual cost or estimated potential cost involved;

(3) describe the property or services involved; and

(4) state further the circumstances justifying the action taken.

With respect to (1), (2), (3), and (4), above, and under regulations prescribed by the President, there may be omitted any information the disclosure of which would be detrimental to the national security.

(b) The Clerk of the House and the Secretary of the Senate shall cause to be published in the Congressional Record all reports submitted pursuant to this section.

Section 1435. EFFECTIVE PERIOD.

This chapter shall be effective only during a national emergency declared by Congress or the President and for six months after the termination thereof or until such earlier time as Congress, by concurrent resolution, may designate. Pub. L. 85-804, §5, Aug. 28, 1958, 72 Stat. 973.

UNITED STATES CLAIMS COURT STATUTES

Amended by H.R. 4482, March 22, 1982

TITLE 28

§2501. TIME FOR FILING SUIT.

Every claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

§2503. PROCEEDINGS GENERALLY.

"(a) Parties to any suit in the United States Claims Court may appear before a judge of that court in person or by attorney, produce evidence, and examine witnesses.

"(b) The proceedings of the Claims Court shall be in accordance with such rules of practice and procedure (other than the rules of evidence) as the Claims Court may prescribe and in accordance with the Federal Rules of Evidence.

"(c) The judges of the Claims Court shall fix times for trials, administer oaths or affirmations, examine witnesses, receive evidence, and enter dispositive judgments. Hearings shall, if convenient, be held in the counties where the witnesses reside."

§2508. COUNTERCLAIM OR SET-OFF; REGISTRATION OF JUDGMENT.

Upon the trial of any suit in the United States Claims Court in which any set-off, counterclaim, claim for damages, or other demand is set up on the part of the United States against any plaintiff making claim against the United States in said court, the court shall hear and determine such claim or demand both for and against the United States and plaintiff.

If upon the whole case it finds that the plaintiff is indebted to the United States it shall render judgment to that effect, and such judgment shall be final and reviewable.

The transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records and shall be enforceable as other judgments. June 25, 1948, c. 646, 62 Stat. 977; July 28, 1953, c. 253, §10, 67 Stat. 227; Sept. 3, 1954, c. 1263, §47(a), 68 Stat. 1243.

§2509. CONGRESSIONAL REFERENCE CASES.

(a) Whenever a bill, except a bill for a pension, is referred by either House of Congress to the chief judge of the United States Claims Court pursuant to section 1492 of this Title, the chief judge shall designate a judge as hearing officer for the case and a panel of three judges of the court to serve as a reviewing body. One member of the review panel shall be designated as presiding officer of the panel.

(b) Proceedings in a congressional reference case shall be under rules and regulations prescribed for the purpose by the chief judge who is hereby authorized and directed to require the application of the pertinent rules of practice of the Claims Court insofar as feasible. Each hearing officer and each review panel shall have authority to do and perform any acts which may be necessary or proper for the efficient performance of their duties, including the power of subpoena and the power to administer oaths and affirmations. None of the rules, rulings, findings, or conclusions authorized by this section shall be subject to judicial review.

(c) The hearing officer to whom a congressional reference case is assigned by the chief commissioner shall proceed in accordance with the applicable rules to determine the facts, including facts relating to delay or laches, facts bearing upon the question whether the bar of any statute of limitation should be removed, or facts claimed to excuse the claimant for not having resorted to any established legal remedy. He shall append to his findings of fact conclusions sufficient to inform Congress whether the demand is a legal or equitable claim or a gratuity, and the amount, if any, legally or equitably due from the United States to the claimant.

(d) The findings and conclusions of the hearing officer shall be submitted by him, together with the record in the case, to the review panel for review by it pursuant to such rules as may be provided for the purpose, which shall include provision for submitting the report of the hearing officer to the parties for consideration, exception, and argument before the panel. The panel, by majority vote, shall adopt or modify the findings or the conclusions of the hearing officer.

(e) The panel shall submit its report to the chief judge for transmission to the appropriate House of Congress.

(f) Any act of failure to act or other conduct by a party, a witness, or an attorney which would call for the imposition of sanctions under the rules of practice of the Claims Court shall be noted by the panel or the hearing officer at the time of occurrence thereof and upon failure of the delinquent or offending party, witness, or attorney to make prompt compliance with the order of the panel or the hearing officer a full statement of the circumstances shall be incorporated in the report of the panel.

(g) The Claims Court is hereby authorized and directed, under such regulations as it may prescribe, to provide the facilities and services of the office of the clerk of the court for the filing, processing, hearing, and dispatch of congressional reference cases and to include within its annual appropriations the costs thereof and other costs of administration, including (but without limitation to the items herein listed) the salaries and traveling expenses of the judges serving as hearing officers and panel members, mailing and service of process, necessary physical facilities, equipment, and supplies, and personnel (including secretaries and law clerks). As amended Oct. 15, 1966, Pub. L. 89-681, §2, 80 Stat. 958.

§2510. REFERRAL OF CASES BY THE COMPTROLLER GENERAL.

(a) The Comptroller General may transmit to the United States Claims Court for trial and adjudication any claim or matter of which the Claims Court might take jurisdiction on the voluntary action of the claimant, together with all vouchers, papers, documents, and proofs pertaining thereto.

(b) The Claims Court shall proceed with the claims or matters so referred as in other cases pending in such court and shall render judgment thereon. As amended March 22, 1982, H.R. 4482.

§2514. FORFEITURE OF FRAUDULENT CLAIMS.

A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.

In such cases the United States Claims Court shall specifically find such fraud or attempt and render judgment of forfeiture. June 25, 1948, c. 646, 62 Stat. 978.

§2516. INTEREST ON CLAIMS AND JUDGMENTS.

(a) Interest on a claim against the United States shall be allowed in a judgment of the United States Claims Court only under a contract or Act of Congress expressly providing for payment thereof.

(b) Interest on judgments against the United States affirmed by the Supreme Court after review on petition of the United States shall be paid at a rate of interest equal to the coupon issue yield equivilent (as determined by the Secretary of the Tresuary) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. From the date of the filing of the transcript of the judgment in the General Accounting Office to the date of the mandate of affirmance. Such interest shall not be allowed for any period after the term of the Supreme Court at which the judgment was affirmed. June 25, 1948, c. 646, 62 Stat. 978; Sept. 3, 1954, c. 1263, §57, 68 Stat. 1248.

§2517. PAYMENT OF JUDGMENTS.

(a) Except as provided by the Contract Disputes Act of 1978, every final judgment rendered by the United States Claims Court against the United States shall be paid out of any general appropriation therefor, on presentation to the General Accounting Office of a certification of the judgment by the clerk and chief judge of the court.

(b) Payment of any such judgment and of interest thereon shall be a full discharge to the United States of all claims and demands arising out of the matters involved in the case or controversy. As amended Nov. 1, 1978, P.L. 95-563, §14(e), (f), 92 Stat. 2390.

FREEDOM OF INFORMATION ACT

5 USC §552

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby the public may obtain information, make submittals or requests, or obtain decisions;

(B) Statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available, or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of the personal privacy, an agency may delete

identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefitting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from complainant. In such case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this

subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member of every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions of judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this paragraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this paragraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request--

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need for search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), and (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by any agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are--

(1)(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order;

(2) related solely to the internal personnel rules and practices of any agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with the enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of, an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geographical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include--

(1) The number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(f), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each use, the disposition of such case, and the cost, fees, and penalties assessed under subsection (a)(4)(E), (F), (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For the purpose of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency. P.L. 89-554, Sept. 6, 1966, 80 Stat. 383; P.L. 90-23, §1, June 5, 1967, 81 Stat. 54; P.L. 93-502, Nov. 21, 1974, 88 Stat. 1561; P.L. 94-409, Sept. 13, 1976, 90 Stat. 1247. P.L. 95-454, Oct. 13, 1978.

TRADE SECRETS ACT

DISCLOSURE OF CONFIDENTIAL INFORMATION GENERALLY

18 U.S.C. §1905

Whoever, being an officer or employee of the United States or of any department or agency thereof, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment. (P.L. 96-349, Sept. 12, 1980, 94 Stat. 1158).

CHAPTER EIGHTEEN

No Statutes

CHAPTER NINETEEN

No Statutes

CHAPTER TWENTY

FRAUD AND FALSE STATEMENTS

18 U.S.C. § 1001

§ 1001. *Statements or Entries Generally.*

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, o: device, a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

Offsets Against Judgments Against the United States

31 USC § 227

When any judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff. (Act of March 3, 1875, ch. 149, 18 Stat. 481; P.L. 428, March 3, 1933, 47 Stat. 1516.)

FALSE, FICTITIOUS OR FRAUDULENT CLAIMS

18 U.S.C. 287

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
June 25, 1948, c. 645, 62 Stat. 698.

Defense Production Act of 1950

50 USC App. § 2071

Title I-Priorities and Allocations

§ 2071. *Priority in contracts and orders; Allocation of material and facilities.*

(a) The President is authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials and facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate to promote the national defense.

Critical and strategic materials

(b) The powers granted in this section shall not be used to control the general distribution of any material in the civilian market unless the President finds (1) that such material is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.

Domestic energy supplies

(c)(1) Notwithstanding any other provision of this Act (section 2061 et seq. of this Appendix), the President may, by rule or order, require the allocation of or the priority performance under contracts or orders (other than contracts of employment) relating to supplies of materials and equipment in order to maximize domestic energy supplies if he makes the findings required by paragraph (3) of this subsection.

(2) The President shall report to the Congress within sixty days after the date of enactment of this subsection of the manner in which the authority contained in paragraph (1) will be administered. This report shall include the manner in which allocation will be made, the procedure for requests and appeals, the criteria for determining priorities as between competing requests, and the office or agency which will administer such authorities.

(3) The authority granted in this subsection may not be used to require priority performance of contracts or orders, or to control the distribution of any supplies of materials and equipment in the marketplace, unless the President finds that—

(A) such supplies are scarce, critical, and essential to maintain or further (i) exploration, production, refining, transportation, or (ii) the conservation of energy supplies, or (iii) for the construction and maintenance of energy facilities; and

(B) maintenance or furtherance of exploration, production, refining, transportation, or conservation of energy supplies or the construction and maintenance of energy facilities cannot reasonably be accomplished without exercising the authority specified in paragraph (1) of this subsection.

(4) During any period when the authority conferred by this subsection is being exercised, the President shall take such action as may be appropriate to assure that such authority is being exercised in a manner which assures the coordinated administration of such authority with any priorities or allocations established under subsection (a) of this section and in effect during the same period. As amended June 30, 1952, 9:36 a.m. E.D.T. c. 530, §§ 101, 102, 66 Stat. 296; June 30, 1953, c. 171, § 3, 67 Stat. 129; Dec. 22, 1975, Pub. L. 94-163, Title I, § 104(a) 89 Stat. 878.

FEDERAL CLAIMS COLLECTIONS ACT OF 1966

31 USC § 951, 952, 953

§ 951. Definitions

In this chapter—

(a) "agency" means any department, office, commission, board, service, Government corporation, instrumentality, or other establishment or body in either the executive or legislative branch of the Federal Government;

(b) "head of an agency" includes, where applicable, commission, board, or other group of individuals having the decision-making responsibility for the agency.

Pub. L. 89-508, § 2, July 19, 1966, 80 Stat. 308.

952. Collection and Compromise—Agency Collection; Rules and Regulations

(a) The head of an agency or his designee, pursuant to regulations prescribed by him and in conformity with such standards as may be promulgated jointly by the Attorney General and the Comptroller General, shall attempt collection of all claims of the United States for money or property arising out of the activities of, or referred to, his agency.

Compromise of claims; termination of collection action and; rules and regulations $20,000 limitation.

(b) With respect to such claims of the United States that have not been referred to another agency, including the General Accounting Office, for further collection action and that do not exceed $20,000, exclusive of interest, the head of an agency or his designee, pursuant to regulations prescribed by him and in conformity with such standards as may be promulgated jointly by the Attorney General and the Comptroller General, may (1) compromise any such claim, or (2) cause collection action on any such claim to be terminated or suspended where it appears that no person liable on the claim has the present or prospective financial ability to pay any significant sum thereon or that the cost of collecting the claim is likely to exceed the amount of recovery. The Comptroller General or his designee shall have the foregoing authority with respect to claims referred to the General Accounting Office by another agency for further collection action. The head of an agency or his designee shall not exercise the foregoing authority with respect to a claim as to which there is an indication of fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any other party having an interest in the claim, or a claim based in whole or in part on conduct in violation of the antitrust laws; nor shall the head of an agency, other than the Comptroller General of the United States, have authority to compromise a claim that arises from an exception made by the General Accounting Office in the account of an accountable officer.

Conclusive effect of compromise; fraud, misrepresentation, false claims, mutual mistake of fact

(c) A compromise effected pursuant to authority conferred by subsection (b) of this section shall be final and conclusive on the debtor and on all officials, agencies, and courts of the United States, except if procured by fraud, misrepresentation, the presentation of a false claim, or mutual mistake of fact. No accountable officer shall be liable for any amount paid or for the value of property lost, damaged, or destroyed, where the recovery of such amount or value may not be had because of a compromise with a person primarily responsible under subsection (b). Pub. L. 89-508, § 3, July 19, 1966, 80 Stat. 309.

953. Existing Agency Authority to Litigate, Settle, Compromise, or Close Claims

Nothing in this chapter shall increase or diminish the existing authority of the head of an agency to litigate claims, or diminish his existing authority to settle, compromise, or close claims. Pub. L. 89-508, § 4, July 19, 1966, 80 Stat. 309.

EXCESS PROFITS

10 U.S.C. 2382

CONTRACT PROFIT CONTROLS DURING EMERGENCY PERIODS.

(a)(1) Upon a declaration of war by Congress or a declaration of national emergency by the President or by Congress, the President is authorized to prescribe such regulations to control excessive profits on defense contracts as he determines are necessary during the period of such war or national emergency. Such regulations shall be prescribed only after consultation with the Secretary of Defense, the Secretary of the Treasury, and the Secretary of Commerce and shall apply to appropriate defense contracts and subcontracts (as determined by the President), and to appropriate major modifications of defense contracts and subcontracts (as determined by the President), that are entered into during such war or national emergency. Such regulations, if prescribed by the President, shall be transmitted to Congress within sixty days after the declaration of such war or national emergency. Any material amendment to such regulations shall be prescribed in the same manner and shall promptly be submitted to Congress.

(2) Such regulations, if prescribed by the President, shall set forth standards and procedures for determining what constitutes excessive profits and shall establish thresholds for coverage of contracts and exemptions (including contracts awarded under competition and contracts for standard commercial articles and services) that will minimize administrative expenses and not impose unfair burdens on contractors.

(3) In this subsection, 'excessive profits' means profits that are unconscionable or amount to an unjust enrichment of contractors or subcontractors, as determined under such regulations as may be prescribed by the President under subsection (a), taking into consideration all relevant circumstances, including the character of the business, complexity of the work or services performed under the contract or subcontract, the amount of assets and capital required to perform the contract or subcontract, and the extent to which profit limitations are imposed on nondefense contractors.

(b) Regulations transmitted by the President under subsection (a) (including any material amendment to such regulations) shall take effect unless both Houses of Congress, within sixty legislative days after the date upon which the President transmits the regulations, adopt a concurrent resolution stating in substance that the Congress disapproves the regulations. For the purposes of the preceding sentence, a legislative day is a day on which either House of Congress is in session.

(c) Regulations not disapproved by both Houses of Congress shall remain in effect for a period of not more than five years after the date on which they take effect unless they are extended by a concurrent resolution adopted by both Houses of the Congress before the date on which they would expire. Any such extension may not be for a period in excess of one year.

(d) The United States Court of Claims shall have exclusive jurisdiction over claims arising from actions taken under this section and under regulations prescribed under this section.

(e) The President shall transmit a report to Congress on the operation of this section at the end of each one-year period during which regulations issued under this section are in effect and at the end of any war or national emergency during which such regulations are in effect".

AUGAFS, AL (830550) 4100

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