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CONTRACT FORMS AND STANDARD CLAUSES
12 February 1946

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THE ARMY INDUSTRIAL COLLEGE

WASHINGTON, D. C.

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COLONEL BROWN:

Gentlemen, the Army yesterday, at the conclusion of its remarks on contracts, promised you, I think, a good session for today because they pointed out that Mr. Neale would pick up the ball where the Army dropped it and would carry the ball from that point on to the goalpost.

When I introduce speakers I always like to go back to grassroots and tell all about the boyhood activities, the college activities, and so forth, of the distinguished speakers. But recently my biographical experts have been letting down on the job. They just merely skim off the cream on the top.

Now all the information I have on the speaker this morning is that he graduated from Amherst in 1924. He also graduated from the Harvard Law School in 1927 and practiced law in the State of New York. In September 1942 he was commissioned a Lieutenant in the Supply Corps of the U. S. Navy. In August of 1944 he resigned his commission in the Navy to accept a position as Counsel, Bureau of Supply and Accounts, and later that of Assistant General Counsel. In November 1945 he was promoted to the position of General Counsel of the Navy Department, which position he now holds.

The subject of Mr. Neale's talk this morning is "Contract Forms and Standard Clauses." Gentlemen, Mr. Neale.

MR. NEALE:

Colonel Brown and gentlemen: I am very happy to be here and have already recognized some familiar faces from the Navy's Bureau of Supplies and Accounts.

Coming before a group like this on a lecture podium, to act as a mentor-professor, makes you sometimes think about the story of when Booker T. Washington was invited by the late President Theodore Roosevelt to come to dinner at the White House. It was quite an unheard-of thing for a negro to be invited to the White House for dinner. Teddy Roosevelt, with a little bit of sardonic humor, also invited one of the leading southern Senators "Pitchfork" Ben Tihlman. Later, someone asked the Senator how he liked it and what he did when he saw Washington there and when the President introduced the two. "Well," he said, "it was a pretty embarrassing situation. I just couldn't call him 'Mister' and it didn't seem quite right to say 'you damn nigger'. So I compromised, and called him 'Professor'." (Laughter)

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So that is the position I am in here this morning. But I understand that Captain Roth has given you a start on this question of contract clauses. I am sorry that we do not have here today the printed compilation of the common contract forms which have been agreed to by both the Army and the Navy. There is a lot of talk going on now about a merger. Well, we finally did merge, a few months ago, by getting together and agreeing on the same contract provisions.

It was not the easiest thing in the world. As a matter of fact, it took quite a long while for the Navy to establish its own contract provisions. About two years ago, an effort was made to get the various bureaus of the Navy to have uniform contract clauses. Mr. Hensel, the then General Counsel, asked the bureau counsel to name one man to act for his bureau and suggested that they be all locked in together in one room and kept there until they should agree on one common form. It was not done wholly in that way, but after a considerable amount of hard work we finally agreed on one contract form for the Navy.

Last June we sat down with the Army and began to work out a common contract form for the two services. There was, of course, a considerable hiatus after the Japanese surrender and the matter was stalled for a time while everyone busied himself with termination and demobilization and re-conversion problems. We finally got together on it again, around Christmas time, and straightened out the last few remaining unsettled points. We have agreed now on a common contract form with common contract clauses, which will be in printed form as soon as practicable. Unfortunately, we still have to rely on the Government Printing Office to get out the printing of the forms. By dint of great effort, fairly breaking its neck and working overtime, the Government Printing Office will get the form out about 15 March. So, we do not have that ready this morning.

The chairman, in introducing me, remarked about my present position as General Counsel for the Navy. Captain Stover suggested it might be a good idea if I would at the very outset, give you a little background of just what that position is.

First of all, let me say it is a wartime baby. There was nothing like it before the war. It had its origin in early 1941, shortly after Mr. Forrestal assumed the post of Under Secretary of the Navy. That was a new position, brought about by the war in Europe, and Mr. Forrestal was given the responsibility for the Navy procurement program. Well, he soon came to the conclusion he wanted to have some commercial lawyers, experienced in business law, to handle the legal details of that work. He managed to get down here, just to make a survey of the situation, Mr. H. Struve Hensel, a partner in one of the large New York law firms. He agreed to stay for sixty days. That sixty days has lengthened to about five years and he is still here now as Assistant Secretary of the Navy, but is retiring on the first of March.

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Mr. Hensel got as his assistant Mr. W. John Kenney, from California, who is becoming Assistant Secretary of the Navy on the first of March when Mr. Hensel retires. Those two men started, then, as Special Assistants to the Secretary.

In September 1941 the Under Secretary created a Procurement Legal Division, with Mr. Hensel as Chief and Mr. Kenney as Assistant Chief, which was charged with the responsibility of advising him personally as to the contracting powers and procedures in the Department and approving the larger contracts. That divisional setup had one man in each one of the contracting bureaus. Assistants were added from time to time and by Pearl Harbor there were about twenty, that is, in the entire organization. The members of the Procurement Legal Division acted, more or less, in a personal capacity for the Under Secretary in approving the larger contracts and working out standard clauses for the new types of contracts, particularly the Plant Facilities contracts and contracts of that nature, and generally assisting in the expediting of procurement.

Finally, in December 1942, the Secretary, in reorganizing the procurement procedures in the Navy Department, directed that there should be in each contracting bureau one single office of counsel, to be charged with the responsibility for all legal matters in connection with procurement. He also directed that all the lawyers that were scattered throughout the bureaus, some of them representing the Office of the Judge Advocate General, some the Procurement Legal Division, and some the bureaus themselves, should be consolidated into one single group in each particular bureau with one man, as counsel for the bureau, in charge of them, and with the central office of the Procurement Legal Division, headed by the Chief and the Assistant Chief, to act as a focal point and to lay down the general policies and generally supervise the activities of the entire group.

The name of that organization was changed in 1944 to the Office of the General of the General Counsel with the Chief of the Division being called the General Counsel. That was Mr. Hensel. The Assistant Chief was the Assistant General Counsel. That was Mr. Kenney. It has continued down to the present time.

At the time of the Japanese surrender we had approximately 150 men in the Office of the General Counsel. It was organized with a small central office of about six men, headed by the General Counsel and the two Assistant General Counsels. Then there was a Counsel in each one of the various contracting bureaus, with men in such offices as the Price Adjustment Board, the Industrial Readjustment Branch which handled termination matters, the Office of the Fiscal Director, the Office of Research and Inventions, and in a couple of the larger field activities. We did not get into many of the field activities of the Navy Department, but from 1943 on there were four or five men in the Aviation Supply Office at Philadelphia. Lately we have had a couple of men in the Navy Purchasing Office in New York and in the Supply Depot at Mechanicsburg, and for the last four or five months now we have had men in the Army and Navy Joint Medical Procurement Office in New York City.

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All of those lawyers were either civilians or reserve officers. The policy was that the men in the key positions, the General Counsel and his two chief Assistants and the bureau counsel, should all be civilians. That was why I was "fired" from the Navy and I resumed my civilian status when I became Counsel to the Bureau of Supplies and Accounts.

We are organized at the actual working level. There is almost complete autonomy in the bureau offices and we do not try to assume control from the central office with respect to the actual administration of the work in the bureaus. That, I think, is the major difference between the Army setup and the Navy setup. As I understand it, at least during wartime, on a particular problem ASF would lay down the basic policy and would prescribe three or four different alternative contract clauses to carry out that policy. The people in the field could pick which one of those clauses they wanted to use, but if they wanted to vary one of them in any way they could not do it without first coming to ASF and obtaining permission to do so.

We did not work quite in that way. We provided that the men in the bureaus could make the variations. We gave authority right down at the working level. The result was we operated mostly by word of mouth and telephone. We did not impose stringent requirements and restrictions upon the men at the working level, but rather relied upon having the basic policies and principles laid down above and leaving it to the men at the working level to carry them out, with whatever variations they felt to be necessary in a particular case, the entire operation being coordinated in the central office above.

Whether this activity, the Office of the General Counsel, will continue indefinitely after the war is a question still undecided. The Secretary has pondered as to whether or not it should be continued in somewhat the same form, or whether it should be transferred to the Office of the Judge Advocate General, or whether the various bureaus should have their own individual legal setup. A great many of our men have already left the Navy and returned to private practice and most of those still on hand are planning to leave by fall. New procurement of course has greatly fallen off and we are busy now mostly with attempting to clear up the loose debris of wartime contracting. But we do hope that in the next month or two at the latest some decision will be made so that there can be some coordination with whatever new group is assigned to take over the work and so that there can be some overlapping with no great hiatus and with some continuity between the way things were done in the past and are being done now with the way they will be taken care of in the future.

That, in brief, is a very sketchy account of the way in which the Office of the General Counsel has operated. I thought it might be well to outline for you, particularly for the Army people who are not familiar with the past history and present procedures, the way in which the Navy has operated during the wartime period from the legal standpoint with respect to procurement and related matters such as questions of termination, property disposal, renegotiation and financial matters in the Office of the Fiscal Director.

Now with respect to these contract clauses, I have here the present Navy forms. I think it might be well to pass them around so that you will be familiar with the clauses as the discussion proceeds. We are going to have to cover them very rapidly and only hit the high spots as we go along. We could spend actually an hour or more on each contract clause, but we will try to cover them in a general fashion and just give you the reason why they are there and what they are designed to accomplish, without going into details as to language and so forth.

The background with respect to the general contract form is found in what is known as Form 32. That was a contract form, or set of contract clauses, put out by the Treasury Procurement Service around 1933. There were some few revisions down to the time of the war, but in general, old standard Form 32 was the contract clause that was used by all the government departments before the war.

With the War Powers Act and the special problems of the wartime emergency it was found that many provisions in that Form 32 were no longer effective. We had to make various changes in them and a great many additions and gradually got to the point where we superseded Form 32 with our own contract form. But a lot of these provisions in this present form of ours are identical, or practically so, with the old Form 32. In general, we followed the same idea and the same planning as the old Form 32.

(Referring to the form which had been distributed to the students.)

Scope of Contract is Section 1. That, of course, speaks for itself. That provision sets forth in legal terms what would happen, as a matter of law, anyway. Then it does set forth what happens in the event there are differences and inconsistencies between the General Provisions and those added to it in the form of a typewritten special schedule for the particular contract. I might say that the general plan that we followed in the Navy, and I think the Army followed somewhat the same scheme, has been to have these printed General Provisions and then to make up, for each individual contract, a schedule which lists the description of the articles, the price, the time and place of delivery, specifications, packing instructions, priority preference rating, and any other special or particular provisions with respect to that particular deal. Any special pricing clause, any particular special guaranty, any variation in any standard clause, and so forth, would be included in the typewritten schedule and attached to these General Provisions. In the final analysis, this Section 1 simply sets forth what happens in the event there are differences between the provisions in the printed portion of the contract and the typewritten portion.

The Variation in Quantity clause, Section 2, takes the place of the old clause which was known as the Increase or Decrease clause in the old Form 32, which provided that a variation up to 10 percent in the quantities delivered under the contract would be acceptable if the variation was caused by conditions of loading, packing, shipping or allowances in manufacturing processes. We came to find during the war that many contractors regarded that as a 10 percent absolute variation and one which gave them more or less, an option. We actually had cases where contractors would have two contracts covering

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the same item, made at different times and at different prices, and would then attempt to deliver 90 percent of the contract at the lower price and 110 percent of the contract at the higher price and thought they could exercise their option under the Increase or Decrease clause. Also the inspector in the field regarded this old clause as giving a special option on his part. It was not intended to be so at all. It was intended to allow variation in quantity only if the variation was caused by one of those particular factors, that is, conditions of loading, packing, shipping or allowances in the manufacturing process.

So we changed this Section 2 to put the emphasis the other way: no variation would be allowed unless it is caused by one of those conditions. Unless the typewritten Special Provisions so provide, no variation is now allowed. The second thing this new form of the clause does is give flexibility instead of the rigid 10 percent of the old clause since it provides that the variation is allowed only to the extent provided in the Schedule. Obviously, when we get into astronomical figures, say a million undershirts, a variation of 10 percent which would give 100,000 additional ones was out of line. One or two percent would be ample to cover this situation. To give flexibility we provided in this Section 2 that the variation permitted is only that provided for in the Schedule.

Section 3, on Changes, is a very important one. In its present wording it is only authorized by virtue of the First War Powers Act, in that it provides for a negotiated agreement between parties with respect to any changes in specifications, or place of shipping, or place of delivery, and so forth. The old Form 32 in force in peacetime provided that adjustments in price by reason of changes specifications and the like were limited to \$500 unless they had the approval of the Chief of the Department. The obvious reason for that was to prevent evasion of the competitive-bidding statute, which required that contracts be awarded to the lowest responsible bidder. If prices could be varied by agreement of the parties other bidders would not have a chance to compete with respect to the changes. So the old form provided only that little incidental variations could be made but if it was desired to go above that low figure you had to get the permission of the head of the Department, in fact the Secretary himself.

Also this new Section 3 provides that changes can be made at any time by a Change Order issued by the contracting officer or his representative, which might be the inspector in the field. Later on the parties get together and negotiate and agree as to what the change in contract price would be, but in the meantime the change in specifications and so forth would be effective.

You will all note at the bottom of paragraph (b) of that clause that in case of failure to agree on the revised price it is handled as a dispute. I believe that Captain Roth yesterday discussed with you the operations of the Disputes Article and the Board of Contract Appeals.

We have to go to the Disputes clause if there is failure to agree as to the change in price in the event a Change Order was issued and the parties are unable to agree as to the revised amount to be paid.

Section 4, Payments, of course, speaks for itself.

Section 5, on Taxes, is a very complicated provision. I will not try to go into it in much detail this morning except to state that the policy of the Army and the Navy with respect to Federal excise taxes has materially changed during wartime; also, the policy of Congress has changes. Before the war there were, of course, only a few excise taxes, mostly manufacturers' excise taxes but some retailers taxes, on particular items. There has been a tax, for instance, on electric-light bulbs, a tax on automobiles, a tax on tires, a tax on refrigerators and electrical appliances of various kinds; a tax on all jewelry, and so on. Those taxes are from 10 percent up to as high as 20 percent.

The policy before the war was that we would always buy free of tax, the contractor having the right under the tax law to receive from the contracting activity a Certificate of Exemption, exempting the transaction from the tax. Of course, it was simply a case of taking from one pocket and paying to the other, so far as the Government was concerned. If we required the contractor to pay the tax he would increase his contract price accordingly and it would come out of the Navy or Army appropriation and the tax payment to the Treasury would come back as miscellaneous receipts. The policy of the Services was always to claim exemption in order to cut down the amount they would expend from their own appropriations, but it began to be realized during wartime that elimination of the exemption would not cost the Government anything as it was only taking money from one pocket and putting it in another and there was a lot of bookkeeping involved in these Tax Exemption Certificates. The simplest way seemed to be to have no tax exemption whatsoever and to have us pay the same as any private individual or corporation paid and let the money go into the Treasury. The additional money paid would come back to the Government any way and all the paper work and manpower required by tax exemption certificates would be eliminated.

So the Army and Navy got together about three years ago and agreed on a new policy. At first they only provided they would eliminate exemption only with respect to the various subsidiary articles or components, continuing it as to the final finished product or end article.

But then Congress, in February 1944, abolished the former Federal exemption on sales to the Federal Government for everything except radio and radio products, and even the exemption with respect to radio was abolished to take effect six months after the war was over. This tax clause in our present contract form carries into effect the new policy as laid down by Congress and as finally agreed to by the Army and the Navy, namely that any excise tax must be included in the price and no

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Certificate of Exemption will be given. We pay the tax in the price. The contractor, in turn, pays the tax and the money goes back to the Treasury in that way. That saves a lot of paper work and a lot of handling Exemption Certificates all the way down the line. Everything is now purchased tax-inclusive and no part of the tax bill will be refunded or exemption given.

The clause has a very important provision in that in case any new tax is levied on the contractor, that is, any excise tax or any other kind of direct tax after the contract is signed he is entitled to add the new tax to the contract price and pass it on to the Army or Navy. In that way we avoid having the contractor include in his contract price a cushion or reserve to cover the contingency of possible future tax. We try to give protection to the contractor on that. After we agree on a price for an item for delivery at a certain time, at so many dollars, if Congress comes along and levies a new tax and makes that product more expensive, it is only fair that we bear that burden. By the same token, if Congress reduces an existing tax or abolishes the tax, then the contractor must give us credit for that reduction, and the clause so provides.

Sections 6 and 9, Inspection and Guaranty, go along together. I think the only way one can get the meaning of those is to read them carefully. They are too difficult to explain in any short period of time. These clauses are designed to make sure that the Government gets its money's worth for what it buys, so that if the contract calls for a particular article, with particular performance specifications or particular material specifications, the contractor must furnish that article meeting those specifications or else make it good to us in some way either by replacing the article or giving us an allowance in the contract price.

Generally speaking, the Inspection Clause covers the situation up until the time delivery is made and we take title and pay for the article, while the Guaranty Clause covers it after we have taken title and protects the Government against a defect which should have been discovered, or could have been discovered by a careful inspection, but which was not discovered. Of course during wartime, with the great haste and speed that has been required in procurement and with the sometimes not-entirely-competent personnel in the Inspection Service, we have not been entirely safe in relying on inspection. We might make some spot-checks and the spots might be scattered and we would get stuff delivered to us which was not up to specifications. The Guaranty clause gives us the right, even after title has been passed to us and even though we could have discovered the defect if we had had a competent inspection at the time. The Inspection clause covers the situation up until the time when we actually get the goods delivered to us.

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This Guaranty was a new thing to the Army. In order to get together with the Army on the new contract clauses we had quite a bit of discussion regarding it. They had been relying on their Inspection Service, but they finally agreed to go along with us in the Navy with regard to Quartermaster items, items of General Stores and items which were not being especially manufactured and which, therefore, were not getting a special detailed inspection. They finally agreed to include the Guaranty clause in their new contracts. All during the war the Army relied entirely upon the Inspection clause with an occasional guaranty as to performance written into a few contracts; but there was no general Guaranty clause in the Army contracts during the war. Also there was no particular Guaranty clause in the old Form 32.

We have had Guaranty clauses in the Navy for the last three years and there has been very little difficulty with the contractors regarding them. Whenever they do object, all you have to say to them is, "You're not going to deliver something which isn't according to specifications, are you?". They will say, "No" and you say, "Well then, what are you kicking about? If you meet specifications, the clause doesn't apply. In case you don't do it, then we can and should hold you to it." Of course, the average contractor would stand back of his own product anyway and putting this clause in the contract takes care of the situation and avoids any arguments as to the terms and time limits of the Guaranty.

The guaranty is only with respect to defects in material or workmanship at the time of delivery. If the articles are in good condition and proper at that time and if they should later, in some way, deteriorate, this clause does not help any. The contractors sometimes object that they may deliver a good article but thereafter lose control over it and for all they know it may be stocked out in the open and let go to rack and ruin. The clause, though, only makes them guarantee that the articles are free from any defect in workmanship and material at the time of delivery and they are not responsible for defects caused later.

We have to give them notice of any defect within one year from the time of delivery or else this Guaranty clause does not take effect. That one year period is shortened for particular items or on particular transactions. Sometimes it is only six months. With automobile manufacturers usually we have a guaranty of three months or 5,000 miles, whichever first occurs, and so on. That period of time is flexible and we vary it from contract to contract, or class of material to class of material. But there is a limitation on the amount of time allowed for the Government to come in and make a claim against the contractor under his guaranty.

You will notice that Section 10 is Patents. I will not try to cover that. This clause simply lays down the general rule that the contractors must bear the result of any infringement of patents unless he is manufacturing the article in question under prescribed specifications, detailed plans and drawings of the Government. If we tell him just how he must make a certain thing and that he must follow these particular specifications, we do not require him to bear any burden with respect to patent infringements.

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But if we simply ask for a finished article and he can make it any way he wants, then if he violates any patent he has to bear the burden of that and hold us harmless from any suit or patent infringement brought by the owner of the patent.

That, then, is the sum and substance of the Patent clause. There are many exceptions and quirks to it. Now I, personally, am not a patent lawyer. I sometimes think we ordinary lawyers look on patent lawyers with the same degree of horror that the ordinary layman looks on the ordinary lawyer—they are just someone talking a language that is incomprehensible.

This Patent clause has been worked out by the special counsel of the departments, which, in the case of the Navy, are not included in the Office of the General Counsel. The patent counsel there are a part of the Office of Research and Inventions. They get together with the Army patent counsel and they lay down the law to us as to what patent clauses to include and we in turn pass on to them any kicks we get from contractors as to the patent provisions.

Transfer of Contract and Assignment of Contractor's Claims is a development since 1940. Before 1940 the Federal law was such that no claim for money under government contract could be assigned. There was a statute on the books for many, many years covering that point. Its main purpose was to insure that there would not be any brokerage or shopping around of contracts; that some fellows would not go and bid on a contract without any intention of performing it themselves and then go around and try to sell the successful bid to somebody else. It was also designed to prevent the Government from being faced with divergent claims for the payment of money on contracts. So the law was laid down flat there could be no assignment of contract or any claims due under any contract. The Government began to realize in 1940, however, with our expanded procurement, that many contractors needed financing. They could not go ahead and handle their own financing of contracts during that time. So Congress passed in 1940 the Assignment of Claims Act, which allowed one assignment, a single assignment, of the entire claim for moneys to become due under the contract, and in that way a contractor could go to his bank and get a loan and assign to the bank as security all moneys coming due from the Government under that particular contract.

The law and the regulations of the Comptroller General as to the administration of the law are rather complicated and detailed. That is the reason for the long contract provision regarding it. It is actually longer than it needs to be and we, in the new draft that will soon come out, have shortened it considerable. But, basically, it provides a contractor cannot assign any claim for moneys due unless he complies with the various requirements.

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He still cannot assign his entire contract. For example, if we contract with John Jones, he must perform. He cannot turn around and sell the contract to Mr. Smith and let Mr. Smith perform for us. Mr. Jones can subcontract to Mr. Smith, but we still look for the primary responsibility to Jones. He is the one who has to perform, and we do not allow him to shop around and peddle his contract off to someone else. There is an exception made with regard to the contractor's merger with another company. If the contractor sells his entire business, then we let the new fellow come in and perform the work.

The assignee must give various kinds of notices and file various papers, and so forth. There can only be one assignment, so that the contractor cannot assign part of the contract to X Bank and another part to Y Bank. The disbursing officer is thus still really dealing with only one person.

Now we come to the provisions covering labor which I think may require a little detailed discussion; at least Captain Lovenstein, in his letter to me, asked that we go into the labor clauses in a little more detail.

The only two clauses which we have to include in all contracts are Sections 12 (Walsh-Healey Act) and 13 (Overtime Compensation of Laborers and Mechanics). Those two clauses are mutually exclusive. I will explain that in just a minute.

The Walsh-Healey Act was a statute passed in 1936. It provided that in every government contract for supplies totalling over \$10,000 there had to be included contractual provisions whereby the contractor agreed to maintain certain minimum standards with respect to wages paid, hours of labor, age of workers, and so on. It was the forerunner of the Fair Labor Standards Act, which came along in the wartime period. It did not try to impose these standards upon all industries, generally, but if any manufacturer wanted government business and he got a government contract he had to agree to maintain those minimum standards in performing that contract. As a matter of fact, the minimum wage standards under the Walsh-Healey Act anyway were just about what most companies by the outbreak of the war were giving under their Union contracts, although, of course, there were a few who otherwise would not be doing it. They might not be paying that amount, but if they wanted government business they had to come in and meet those requirements.

We did run into some difficulties with respect to hours of labor, ages of workers, and so on. For instance, the Walsh-Healey Act says no female worker under 18 may be employed. During the war, with the manpower shortage, there were a number of cases where girls under 18 had to be employed and in many industries it did not do them any real harm, I suppose. The Labor Department is given authority under the Act to make special exceptions and variations. The Secretary of Labor did, early in the war, provide there were certain types of light work for which girls could be employed down to the age of 16.

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We ran into difficulty with respect to the hours of labor, particularly in the lumber industry. The lumberjacks out in the woods did not care much about a 40-hour week. However, they were stuck out there; they might as well work and earn their extra pay as to sit idly around the camp. We were faced with the limitation in the statute that they could not work more than the particular limited number of hours. Well, we finally did get a special variation from the Department of Labor with respect to the lumber industry, but it was limited to a certain number of million board-feet, in a certain area of the country, for certain types of lumber. It was very, very difficult to administer.

There were other situations similar and frankly in some cases we really met an impasse. I recall we had great difficulty in the cigar industry. The cigar manufacturers insisted they had to employ some girls under 18 in the work of making cigars. They always said they just had to do it. Under the Act, it was all right to let girls under 18 work in the cigar industry but they could not work for more than 40 hours. There was that little limitation placed upon them. We said to the cigar manufacturers, "Why can't girls under 18 work no more than the 40 hours?" They said, "Oh, we can't do that, because we have them working side by side with the older ones, on the same machine, and if we should pull her off at the end of 40 hours the whole machine would be forced to be idle."

All we could do there was simply not to let contracts with these cigar manufacturers for over \$10,000, because the Walsh-Healey Act provided that only contracts over \$10,000 were subject to the Act. We always kept our fingers crossed all during the war, as it perhaps was not quite cricket, but we had to have the cigars. I never could quite see why, myself, but apparently there were a lot of cigars being smoked in the Navy as a whole. (Laughter)

We finally got to the point where we received a letter from The Comptroller General one day which said, "I notice here in such and such an office you have awarded contracts Nos. 10001, 10002, 10003, 10004, 10005, 10006--about 15 or 20 of them--all dated the same day, all to the same contractor, all for cigars, and all in the amount of \$9,000." Well, we really had no answer for that. Somebody had just made a bull. Except this, and that is that the very first two lines of Section 12, you will notice, says that if the contract is for the manufacture or furnishing of materials and supplies in an amount exceeding \$10,000 then the provisions of the Walsh-Healey Act apply. Actually, I think the contractor would be stuck in a case like that. I think he was taking quite a risk in contracting for that number of contracts, all at the same time, when it might be regarded as a subterfuge and really was just one single contract. I think he might in such a case be subject to these first two or three lines of the section and have it determined by the Department of Labor that there was but one contract and that there was then a violation of the statute.

We try by those first couple of lines to make this section self-operative as otherwise it is too complicated to administer and to have separate forms for contracts over and under \$10,000. The Secretary of Labor was authorized to exempt various items from the Walsh-Healey Act. For instance, the Act says she may exempt, or he may exempt--we call it she because during most of the war it was Madame Perkins--perishable items. The question came up about ice: Is ice perishable or not? Well the Department of Labor ruled, strangely enough, that ice was not a perishable item. It was, therefore, subject to the provisions of the Act.

But we had to try to provide in this contract a simple little clause so that the ordinary drafting clerk could apply it and not be forced to analyze each particular article and determine if it was under the Act or not. We finally hit upon the self-operative provision that if the manufacturer is furnishing supplies, and so forth, in an amount which may exceed \$10,000 then there are incorporated these various provisions of the Act. Also, in the final lines it says, "subject to all applicable regulations, exceptions, variations", and so forth, and this covers the case where the Department of Labor has made a special exception or special variation for a particular product or particular contractor.

This next clause, Overtime Compensation of Laborers and Mechanics, is caused by an old law of 1912 which requires government contractors to agree that they will not employ their laborers or workmen more than 40 hours in any one week or eight hours in any one day unless they pay time-and-a-half for overtime. Now that same provision is also contained in the Walsh-Healey Act and the ruling was made early that if the contract were subject to the provisions of the Walsh-Healey Act, the overtime law, the eight-hour law, did not need to be included. If the contract is under \$10,000, or if the contract is for services (the Walsh-Healey Act does not cover contracts for services), then the eight-hour law applies.

So you have those two clauses. If the section which is entitled "Walsh-Healey Act" is inapplicable, then this other clause applies. Of course, it could have been done in the way you would ordinarily do as a private individual, and that would be, in drawing up a contract for a very large deal of some kind, you would sit down and right then and there determine which law applied and write that particular clause into the contract. But you could not do that in the hurly-burly of wartime contracting and we had to have some ready-made clauses that would be self-operative in 99 and 44/100 percent of the cases.

There are also three other labor sections which apply in some contracts, and they are worth mentioning, I think. One is the Davis-Bacon Act. The Davis-Bacon Act is a statute which provides that in every contract over \$2,000, for the construction, alteration or repair of public buildings or public works, there must be included in the advertisement of specifications a statement or a list of the prevailing minimum wages in the locality--the state, the town, or the city--where the work is being done, and the contractor must agree in the contract to pay those prevailing wages. What you have to do in a case like that, if you have a contract, say, for public works of any kind, is get in touch with a representative of the Department of Labor and have him give you a list of what is the prevailing wage.

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The prevailing wage is determined to be the general wage--not the minimum wage--the prevailing wage in that particular area. There is then listed right down in this schedule every particular class of workman or mechanic that is going to be used on that operation, with the prevailing wage as determined by the Department of Labor, and the contractor in his contract must agree to pay those wages.

There were two difficulties in connection with that statute: First, determining what is a public work. It is quite a difficult thing to work out, but ordinarily it means any improvement to real estate. It includes painting, decorating and so forth. That is construed to be a public work.

Then the second difficulty is finding out what the prevailing wage is and putting it in the contract. Of course, ordinarily contractors have to pay it anyway on account of their Union contracts, but this Davis-Bacon Act requires that it be included in the contract and the contractor must agree with the Government to pay that.

The second statute which also applies only to public works, is the Copeland Anti-Kickback Act. This prohibits the taking of any rebate or kickback from the wages of any person who is employed in the construction of public works. There, again, it is only required in those building or public works contracts. You must put in such a contract a provision which imposes upon the contractor a penalty if he accepts or asks for any rebate or kickback from any of his laborers or workmen.

Then, finally, there is the Miller Act, so-called, which is the statute which requires that there be a bond in all public works contracts to indemnify and make certain that the contractor will pay all of his laborers, and so forth. The Miller Act is the only statute throughout the war which was retained with respect to bonds. It simply requires, in these public works contracts, that the contractor shall give the Government a surety bond which will make certain that he will pay all his various workmen and material men on the job.

Section 14 is Renegotiation which, of course, expired 31 December 1945. The Act, by its very terms, does not apply to any contract made after 31 December, but all during the war we had to put that clause in the contract even though, as a matter of law, the contractor was subject to renegotiation if his total gross business was over \$500,000. The clause was required only in contracts of over \$100,000, so you will notice the self-operative provision at the beginning.

You will notice in these next two sections (Section 15 and 16) we have Termination for Default and Termination at the Option of the Government. Termination for default, I understand, was covered by Captain Roth.

The Termination at the option of the Government, also called the termination for Convenience clause, I have here which I will pass around. It is very, very long and you may cover that in some other parts of your course here. It is the Uniform Termination Article which was prescribed as a result of the Baruch-Hancock Report of early 1944, which laid down the general recommendations for the Contract Settlement Act which was finally passed in May of 1944. This is a prescribed clause which must be included in every contract over \$50,000.

This clause provides the details for settling claims of a contractor where the contract is terminated at option or the convenience of the Government not where there is any default on the part of the contractor but where we simply want to call the deal off and issue a termination notice. Of course, there have been thousands and thousands of terminations issued both before the Japanese surrender and since. As a matter of fact, Termination could be the subject of a whole course. It cannot be covered in the course of an hour's lecture. But I think a careful reading of this clause gives a good picture of the basic principles of settling termination claims.

The remaining provisions of the contract form are somewhat boiler-plate. I can run through them in five minutes' time

Section 17, Nondiscrimination in Employment. That was required by the President's Executive Order early in the war which was really the genesis of the F. E. P. C. It provides that there be included in every contract a provision to the effect that the contractor will not discriminate against any employee or applicant for employment because of race, creed, color or national origin. Such a clause must be placed in every contract; it cannot be eliminated and cannot be varied.

Section 18, Officials Not to Benefit, is an old clause that Congress provided for along about 1870. Congress apparently did not trust itself and provided in the statute that every government contract must provide that no member of Congress shall be admitted to any share or part of any contract except as a stockholder in a company in which case he is entitled to share as a stockholder. We must always include that clause in every contract. It was contained in the old Form 32. The section as we have it here is just about the same as the one in Form 32, except I think we did make a couple of grammatical improvements--or what we thought were improvements. There is also some slight change in the wording.

Section 19, Covenant Against Contingent Fees, is required by an Executive Order to the effect that every contract must contain this provision. This was designed to get after these contract brokers and commission agents who would advertise their influence and know-how, how they knew their way around Washington, and would say, "I'll get you a contract; just give me 10 percent". This clause was put in to hit those fellows. It provides that the contractor warrants he has not paid, or agreed to pay, such fee. If he has done so, and violated the clause, we are entitled to knock off the contract price the amount of the commission or fee.

The last sentence of the clause says that the warranty does not apply to any commission paid by the contractor to a bona fide established commercial or selling agency customarily maintained by the contractor for the purpose of securing business. They have always found a loophole in that exception to let the contractor off. In practice it proved to be just about impossible to reach this contingent fee practice by means of this clause.

The way we got those fellows during the war was by a special part of the Renegotiation Act. The renegotiation of commission agents is specially covered. "Whereas the ordinary limit for renegotiation is \$500,000 gross business of a contractor during the year, we could renegotiate commission men or contractor's agents if their gross ran over \$25,000.

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There is also a special group for handling the renegotiation of those men. It is actually a unit of the Navy Department, and from the beginning it has handled the renegotiation of all commission agents, brokers and so forth, for the Army, Navy, Maritime Commission, and all other government agencies. It was really the offspring of Mr. Jacob Davis, who was Assistant General Counsel. He was first charged with the enforcement of this Section 19, the contingent fee clause. He found it did not work, but as a result of his investigations he accumulated a great amount of data as to the money which was being made by these commission agents, brokers and so on. As a result of his investigations and researches into the matter the Renegotiation Act was amended to handle those men. The Special Services and Sales Renegotiation unit was then set up under Mr. Davis and that unit has been handling those people all through the war.

So, gentlemen, that is a very hasty and sketchy account of our contract clauses. As I said at the outset it is really the same as the old Form 32, although it is somewhat changed. It might be something like the case of the young man, the scion of a very famous father who had gone on to his eternal reward. The young man had no picture of the old gentleman and he wanted to have a portrait painted. He asked a painter if he would paint a portrait of his father. The painter told the young man he never knew the father. The son said, "That's all right. Go ahead and paint him any way." The painter asked, "Well, have you got a picture of some sort that I could perhaps copy?" "No; no I haven't any picture. You see he never had his picture taken." The painter then asked the boy if he could describe him, but he could not describe him because he was very difficult to describe. The artist pocketed the fee, shrugged his shoulders, and went to work painting the picture. When he had finished it, the son came to the studio and looking at it said "Well, well, well. That's father all right, but he certainly has changed."

That, gentlemen, is the way it is with these contract provisions. It is the same contract and the same provisions, but they certainly have changed.

Thank you.

COLONEL BROWN:

Mr. Neale, I am sure that the members of this College join in wishing me to express to you their appreciation for this most excellent lecture. It was quite clear and cogent. I trust that all the laymen absorbed all the terms because I thought the case was stated in quite ordinary layman's language. That is meant as a compliment.

Thank you, Mr. Neale.

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