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LEGAL DIVISION - PLANNING BRANCH
by
Major Clarence C. Fenn, J A G D , OASW

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LEGAL DIVISION - PLANNING BRANCH

The Legal Division of the Planning Branch has two fundamental responsibilities - (1) War contract procedure, (2) Legislation pertaining to industrial mobilization.

The problem of war-time contracts is in reality one of developing the tools of efficient governmental business procedure under war conditions. The task as we see it is to avoid the contractual pitfalls of the World War, and to fit into present procurement planning the necessary contractual relationships to affect a war production. In contrast to the war contracts of 1917 and 1918, this phase of planning has advanced in a considerable degree.

Without criticising the general contracting procedure during the World War, which had as a whole gratifying results, a few of the principal difficulties in carrying out World War contracts will be discussed. First, it may be said that in 1917 each of the then six supply arms and services had its own "hand made" contracts. As a result contracts were let on approximately 400 different forms all of which had to be interpreted and construed. Second, legal and financial difficulties were encountered in fixed-price contracts where no allowance was made in the contracts for future variations in the price the contractor was forced to pay for materials and labor. Third, the legal difficulties which resulted from having no termination clause in war contracts, and lastly the irregular signing of contracts on the part of the Government by deputies appointed by the contracting officer, who signed the name of the contracting officer named in the body of the contract and then

signed their own name thereafter. Contracts signed in this manner were generally called proxy-signed contracts. Strange as it may seem, of the 27,000 contracts of the War Department in existence on November 12, 1918, 7,500 were proxy-signed. The then Comptroller of the Treasury held that these contracts were not enforceable against the United States (XYVI Dec. Comp. Treas. 398), and cited in support of this holding a decision of the United States Supreme Court of 1915 (N.Y. & Porto Rico S.S. Co. v. U.S. 239 U.S. 88). In terminating these contracts the Secretary of War was restricted to payments for goods had and received and services rendered to and accepted by the United States - restricted to what is legally known as a quantum meruit or quantum valebat settlement. This, however, would not do justice to the contractors, for in almost every instance there were goods in process, overhead expenses, and other items which would not be covered nor reimbursed by merely taking over the finished product at the stated value. The Secretary of War could not amend these contracts as he could in the case of agreements properly signed for it is a fundamental principle of law that an amendment is itself a new contract, and that no contract may be made with^{out} consideration. That is, in order to make a valid amendment, something of value must pass to the United States. Now, as this then adjudged informal contract was not enforceable against the United States, no amendment to the contract was legally possible.

It became obvious that in order to do justice to meet the situation action by Congress was required. Some months later the so-called Dent Act was passed. Under this act the contractor was obliged to file

his claim with the War Department and Boards of Contract Adjustment came into being which found themselves flooded with work. All this time the contractor was put to additional expense in presenting his claim, was deprived of his money, and in most instances interest thereon, through no or little fault of his own, and his war patriotism went to a low ebb. And Army so-called red tape gets the blame! As a paradox it may be said that in 1925, after these contracts had in most cases been settled, the Supreme Court held that a proxy-signed contract of the Quartermaster Corps with Swift & Company was a valid contract (U.S. v Swift & Co. 270 U.S 124). However, the court held in this case that the Contracting Officer had by actions subsequent to the initial signing of the contract confirmed and recognized the authority of his subordinate. In other words the law of a general agency would not apply and governmental liability in each such case would depend on what facts might develop after the proxy-signing of the contract, which would undoubtedly involve many legal entanglements and complicated proof during a war period when transfers and new assignments of officers would be most frequent.

Before discussing the present plans for war contract procedure a brief consideration of war profits may be of interest. This Nation is generally united in the opinion that if another war is necessary - there will be no excessive war profits.

Various theories of a war profits tax have been advanced. It will be remembered that the War Policies Commission recommended a tax of 95% of war profit above the previous three year average. The House

during the 74th Congress passed a bill (H.R. 5529 introduced by Mr. McSwain) carrying in general terms a war excess profit tax of 100 per cent. The Nye Committee reported an amendment to this bill taxing industry all war profit over 4.7% of the adjusted declared value of its capital stock and a 100% of all personal incomes over \$10,000. The Senate Finance Committee substituted and reported an amendment carrying an undistributed profit tax of 77% and a rather high rate on personal incomes, with low exemptions.

The War Department has consistently refrained from submitting any particular war tax provision under the premise that this is a responsibility of the Treasury Department. However, the War Department has maintained a strong attitude that a war taxation measure must not impose so much of a burden on industry that the production of war munitions might thereby be hampered, crippled or destroyed. As Secretary of War Dern stated before a Congressional Committee "Failure to produce munitions when needed may have to be paid for, not in dollars and cents, but in lives and the consequences of possible defeat."

Mr. Baruch recently advised the Nye Committee "In all solemnity let me say, there is such a thing as taking the profits out of war at the cost of losing the war. We should think peace, talk peace, and act peace, but if war comes, we should be ready to fight it and survive it. Wars are never won, but they can be lost. Let us at least avoid self-imposed defeat."

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The Senate Finance Committee recognized these principles in its report on the Nye bill. The Committee said.

"A tax law devised to yield revenue sufficient to run a war, should, in addition, be constructed so as not to hinder the production of war materials nor curb the incentive for continuous economic activity. More than on any other occasion, in a time of war the marginal producer is as necessary as the low-cost large-scale producer. His productive activities must therefore be fostered and maintained."

Upon initiative of the American Legion, companion bills were introduced in the 1st Session of the present Congress known as the Sheppard-Hill bill, both of which have been reported out of the Military Committees. The Senate bill is now before the Senate Finance Committee for consideration of the tax provision. The House Military Affairs Committee in May 1937, reported the bill (H.R. 6704) with a tax provision which reads:

"SEC 9. (a) During any war in which the United States is engaged there shall be in effect a system of taxation, which, without preventing a fair normal return to labor, management, and invested capital, such return to be fixed by Congress, shall absorb all surplus profits above such return.

(b) Whenever Congress shall declare war, the Secretary of the Treasury shall within thirty days thereafter recommend to the Congress a plan of taxation (retroactive or otherwise) making effective the provisions of subsection (a).

(c) To this end the Secretary of the Treasury is hereby authorized and directed upon the enactment of this Act to cause a continuing study to be made from year to year, with such investigation and accumulation of data as may be necessary which would be the basis in formulating a plan of taxation as outlined by subsection (a) to be transmitted to the Congress upon a declaration of war."

As you know the President has recently advocated to Congress the enactment of "legislation aimed at the prevention of profiteering in time of war."

Mr. Gray, the new Chairman of the House Committee, has just submitted a substitute tax provision as Section 9, which it is understood has the latest Committee approval. This substituted section provides

"SEC 9 (a) During any war in which the United States may be engaged there shall be in effect a system of taxation which shall absorb all profits above a fair normal return to be fixed by Congress.

(b) To this end the Secretary of the Treasury, upon the enactment of this Act, shall cause a continuing study to be made from year to year, with such investigations and accumulation of data as may be necessary to formulate such a plan of taxation.

(c) The Secretary of the Treasury shall on the first day of the Seventy-sixth Congress and each succeeding Congress

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transmit to the Congress a recommendation for such plan of taxation which upon its adoption by the Congress shall become effective upon a declaration of war by the United States."

Should this provision be enacted into law, then the Treasury Department would have a mandate to cause a continuing study of war taxation and transmit a bill to Congress on the first day of each succeeding Congress. This mandate would be comparable to the statutory directive to the Assistant Secretary of War to plan for war procurement and industrial mobilization.

Industry as a whole may now be said to appreciate that another war will bring only a normal profit return, and that cooperation will be extended on that basis with the hope and trust that producers will be protected against loss and ruin.

In view of the fact your recent Committee on War Contracts gave an able presentation of the subject, and you have recently heard a lecture by Major McCrossin on modern appraisals and valuations, I shall now only outline the present plans for war contract procedure. The policy of the Planning Branch is to follow peace time forms as closely as war conditions will permit. The current procurement forms for informal contracts and purchase orders are adaptable to war procurement. The present adopted formal war contract forms have been the subject of much study by the Planning Branch, and by the War Contract Board which is a permanent Board within the War Department, the personnel being made up from officers of the Planning Branch and from the various supply arms and services. Five contract forms have

been tentatively approved by the Assistant Secretary of War.

1. Contract for Supplies (Fixed Price).
2. Contract for Construction (Fixed Price).
3. Evaluated Fee Construction Contract.
4. Evaluated Fee Construction Sub-Contract.
5. Adjusted Compensation Contract.

The forms now adopted do not carry the name of the contracting officer in the body of the contract. The preamble states that the Government is "represented by the Contracting Officer executing this contract." This designation in the body of the contract is legally sufficient, and if signed by an authorized contracting officer, the difficulties encountered with the so-called proxy-signed contracts will be avoided. Termination clauses are now included in all war contract forms.

The fixed-price supply and construction contracts are in the main the same as the peace time forms except for a termination clause and a flexible price clause relating to material and labor entering into the particular production. There is no doubt that the inclusion of the latter provision will encourage normal and informal competition and contractual negotiation for a fixed price. If the contractor is assured he will be compensated for radical price changes he will feel more justified in making a set price agreement. The Assistant Secretary of War recently approved a recommendation of the War Contract Board which has broadened the original provisions of this adjustment clause.

The fixed price forms for the purchase of supplies and construction are to be used where procurement may be based on competition or negotiation. In other words where peace-time procurement has laid a basis for war-time expansion and a satisfactory determination of a fair price can be had - then the fixed price forms may be used. A thought in this connection is that the Quartermaster General now plans to let cantonment construction contracts on a fixed price basis after formal or informal competition. This illustrates one of the developments in procurement planning since the World War, when all such contracts were let on a cost-plus basis. It will be remembered in connection with war procurement, that the peace-time compulsion of formal competitive bidding set out in R.S. 3709 is not a directive to war-time contract procedure, but may be short cut in the discretion of the Secretary of War, under the provisions of the same statute.

Where competition is possible within a procurement district, more satisfactory results will be secured by open bidding. This is true even among allocated facilities where requirements at the time do not exceed the production capacity for the item concerned. War conditions may change the method of securing competition and the number of producers available may be limited, but the policy of opening bidding is sound and should be abandoned only when the necessity of the situation may so require. The greatest advantage of the fixed price contract is that it is the customary method of doing business. Other forms may seem sound theoretically but do not always work out well in practice.

In the event a construction project is not one subject to a fixed price contract, then the use of what has been approved as the Evaluated Fee Construction Contract is contemplated. Expansion of existing chemical plants and airplane factories, and the building of plants and additions thereto necessary in ordnance materiel production will probably come within this category, if done at Government expense.

The Evaluated Fee Construction form is in general modeled after the construction contracts used during the latter part of the war and found in general to be satisfactory. The principal change from the old form is the inclusion of a variable fee between certain percentage limitations, the adjustment to be based upon efficiency in performance by the Contractor, viz., speed of performance, quality of manufacture and economy of performance. The Evaluated Fee Construction Sub-Contract extends the principles of Evaluated Fee Contract to all of the subcontractors.

Although the War Department policy is to use the fixed price contract as far as practicable, it is certain there will be some situations where a contractor will not be in a position to bid a fixed price or one that is satisfactory to the Government. The article may be an extremely intricate invention that has never been manufactured in quantity. Complete conversion of plants may be required, for example, if an automobile manufacturer were to manufacture airplanes. These are situations where contractors might be more anxious to protect themselves against loss than to make large profits. They may expect that the Government will take most of their profits through excess profits

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taxes in any event, and for that reason might prefer some sort of a cost plus contract. For these and similar situations there has been developed the Adjusted Compensation Contract.

Your Committee has already analyzed this form. I may say in brief that this form proposes to reimburse the contractor for the cost of the work, and pay a profit which is based primarily on the property investment, that is, the value of the buildings, machinery and facilities utilized under the contract plus interest on a working capital. Additional profit may be gained by a saving between the estimated and actual cost of production, the actual payment to be in general 25% of the difference or potential saving involved.

The Adjusted Compensation form represents considerable thought and consideration by various experts. There are numerous instances in which it would undoubtedly be used as a workable contract. It was subjected to certain criticism by the Nye Committee and has since been changed and improved in some details. Its principal fault lies in the fact that we admit that the form is to be used for the manufacture of articles about which there is little information as to cost of production by the facility concerned, and still the first agreement necessary under the contract is an estimate of cost of labor and material and overhead necessary to secure this same production. In self protection the contractor is going to get these figures at a high safety margin, and as has already been noted, a part of his profit is based on a percentage of the difference between the estimated and actual cost.

The suggestion has been made by the promoters of this form that

in cases where no reliable figures are available for guidance in determining the estimated average cost of the work involved, the lapsed time of the contract may be limited to 4 or 6 months, so that ample opportunity may be given to secure reliable cost data under actual producing conditions, whereby the contract may be continued at the end of its initial period on a more accurate basis. The difficulty with this proposed arrangement is the impossibility of making a legal contract for the total items at a future fixed price.

Thus it will be seen that the problem of adjusting a war-time contract to meet this particular situation is heavily involved. A straight cost-plus contract could never be defended since our World War experience with this form. Contracts based upon estimated cost of production have the objectionable profit features just discussed. A fixed unit profit leaves no control over manufacturing costs paid by the Government, unless a profit or penalty fee based on an estimated price is also provided.

The Legal Section has completed a draft of a supply contract to bridge the field between the Fixed Price Contract and the Adjusted Compensation Contract. Representatives of the Treasury Department, the Internal Revenue Bureau, and various civilian agencies have been consulted in reference to its promulgation.

The objective has been to draw a contract as simple as possible under the circumstances, to avoid the necessity of basing the price on an estimated cost of production, and to divide the profit into elements which may be controlled to fit a particular contractual situa-

tion Profit is based on rental of facilities and a fee for management, the Government paying the actual cost of work performed. The contractor then is assuming no financial risk in connection with his manufacture.

The management fee is based on a maximum and minimum sliding scale dependent upon speed in performance, quality of work performed, and low cost consistent with speed and quality of production rendered to the Government. As the total cost of work (exclusive of rental) increases the percentages governing the fee or profit decrease. This same principle of compensation has already been approved in the Evaluated Fee Construction Contract.

The original draft of this contract was submitted to industry through the various supply arms' and services' field planning representatives. As a result a number of changes have been incorporated in the redraft which is now before the Judge Advocate General for review. One of the principal additions is a new section providing for a board of arbitration composed of three members, one selected by the Chief of Branch concerned, one by the contractor and the third by the two representatives so selected. It is proposed that this board will act in an advisory capacity to the Assistant Secretary of War on certain appeals permitted to the contractor under the provision of this section. Special authorization in appropriations would be necessary to pay the Government's share of the expenses of such a board.

What we have attempted in this new contract is to take what we consider the best elements of the Adjusted Compensation Contract and the Evaluated Fee Construction Contract and apply them in principle

to a supply contract for use when the particular circumstances of manufacture are not subject to a fixed price contract. You will remember that eight different estimates are necessary under the Adjusted Compensation Contract - cost of material, cost of labor, cost of overhead, cost of new construction (if any necessary), time of performance, rehabilitation, value of facilities and depreciation. This new contract reduces the estimates necessary to the last two - value of facilities and depreciation, and these two may be adjusted, we believe, in accordance with procedure and practice more or less recognized in, and familiar to, the business world today.

For the past six months the Legal Section has, among other things, been attempting to draft an Army Order under section 120 of the National Defense Act (USC 50 80) in such form that it may not be repulsive to the manufacturer in the obligation imposed, and permit the ways and means of adjusting and determining a fair and reasonable price for the material required. This form is now before the Judge Advocate General for consideration. It is hoped that it may eventually be coordinated with the Navy. Advancement in procurement planning in respect to the capacity of various facilities to produce the necessary war matériel, the distribution of the war load, and analysis by the manufacturer of the production which he has agreed to undertake in the event of a national emergency, has brought into prominent consideration the use of such an order as a means of mutually arriving at a fair and reasonable price, and of placing without delay a legal order for production.

Three means of price adjustment are provided

1. Fixed price by formal or informal bidding, by negotiation, by executive price fixing, or by determination from market price or available cost data.

2. Provisional price to terminate into a fixed price either during the fulfillment of the order or at its termination, thus supplying the producer with necessary funds to carry on production in the interim and leaving open the opportunity for negotiation for a fixed price.

3. Experimental production of a designated number of units on a fee basis, with a fixed price thereafter for the remaining units required under the order. By this means a legal status is given for the production of the total number of units required.

The draft of order now under consideration follows.

WAR DEPARTMENT

OFFICE OF _____

ARMY OPDEP NO. ____
Dated _____

TO _____

SIR

1 In accordance with the provisions of Section 120 of the National Defense Act (U.S.C. 50 80, quoted in part on the back of this page) and acting under the direction of the President of the United States, an order is hereby placed with you under the conditions stated in subparagraph ____ (subparagraphs ____ and ____ are eliminated and not a part hereof) to furnish and deliver FOB your plant at _____, the products and/or material needed by the Army as specified in the ____ sheets attached and made a part hereof. Compliance with this order is obligatory under the law and shall take precedence over all other commercial orders and contracts placed with you.

a. A price of \$_____ per unit has been determined as a reasonable price and if acceptable to you, payment will be made accordingly and acceptance of this price will be considered as constituting a formal release of all claims arising under this order.

b. As it is impracticable to now determine just compensation for the material and/or products herein specified, the fixing of the price will be subject to later determination by the Secretary of War. Pending this determination you will be paid a provisional price of \$_____ per unit, with the understanding that such price will not be considered as having any bearing upon the price to be subsequently fixed as fair and just. Any difference between the amount of such payment and the amount finally determined upon as just compensation will be paid to you or refunded by you, as the case may require.

c. As it is impracticable to now determine just compensation by a unit price, payment of first _____ units required under the terms of this order shall be the actual cost of production plus a lump sum profit of \$_____ (profit clause not used will be deleted and initialed by officer issuing the order) plus a profit of _____ per cent on said cost. Allowances under actual cost of production are defined under paragraph 1 of "Conditions" on back of this page. Costs as thus defined shall be subject to Governmental approval by _____ prior to payment thereof. After production on a cost basis of the required number of items aforesaid, a unit price shall be determined by the Secretary of War for remaining production required under this order.

2. This order must be complied with in any event. If placed in accordance with subparagraph a, you are only required to indicate below whether the price stated and fixed is acceptable or is not acceptable. If not acceptable, a separate letter of comment and qualification must accompany the original order that is to be signed by you and returned. If the order is placed under subparagraph b or c, the original is to be signed and returned. Do not make any alterations in this order. The order must be signed with the name of the firm or company over the actual signature of an officer of the company or member of the firm, with the official capacity of the signer indicated. The duplicate copy is to be retained by you in either case.

3. (Allowance for fluctuations in prices of labor and material)

4. (Changes)

5. (Inspection.)

6. (Acceptance and payment.)

7. (Board of Arbitration.)

9 (Termination)

By direction of The Secretary of War

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(BACK PAGE OF ORDER)

Extracts from National Defense Act
(U S C. 50 80)

Sec. 120. Purchase or Procurement of Military Supplies in time of Actual or Imminent War.-The President, in time of war or when war is imminent, is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm [etc.]. Compliance with all such orders for products or material shall be obligatory****and shall take precedence over all other orders and contracts theretofore placed ****and any individual, firm, [etc.] or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition or parts of ammunition, or any necessary supplies or equipment for the Army, and any individual, firm, [etc.] or the responsible head or heads thereof owning or operating any manufacturing plant, which in the opinion of the Secretary of War shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War, or who shall refuse to furnish such arms, ammunition, or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War, then, and in either such case, the President, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement herein provided for, is hereby authorized to take immediate possession of any such plant or plants*****.

CONDITIONS.

* * * * *

(Draft of order as a chart was before the class and an informal explanation followed).

A brief summary of a few legal decisions respecting orders under section 120 and the similar Navy Act of March 4, 1917, may be of interest.

What may be ordered as "necessary supplies or equipment for the Army"? In a late decision of the Supreme Court rendered in 1931 (International Paper Co. v. U.S., 282 U.S. 399) an Army order issued during the World War concerning water power was upheld. In this case the Court, speaking through Mr. Justice Holmes, said

"The Government has urged different defenses with varying energy at different stages of the case. The latest to be pressed is that it does not appear that the action of the Secretary was authorized by Congress. We shall give scant consideration to such a repudiation of responsibility. The Secretary of War in the name of the President, with the power of the country behind him, in critical time of war, requisitioned what was needed and got it. Nobody doubts, we presume, that if any technical defect of authority had been pointed out it would have been remedied at once. The Government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had. The doubt is rather late. We shall accept as sufficient answer the reference of the petitioner to the National Defense Act of June 3, 1916,***giving the President in time of war power to place an obligatory order with any corporation for such product as may be required, which is of the kind usually produced by such corporation."

In the case of Liggett and Meyers v. U.S (274 U.S. 215) decided by the Supreme Court in 1927, the validity of a Navy Order for tobacco products was recognized as an order for "war material". These two cases speak for themselves as to the scope of authority which may be exercised under this Act.

The New York State Court of Appeals, the highest appellate court in that state, held in 1920 "that the President had the right under this section to seize and operate plants for the manufacture of yarn and to seize all the yarn in the country, or that came into the country, and through a Government agency to control its use." (Crown Embroidery Works v. Gordon, 190 App. Div. 472, Sect. 1941 Mil. Laws 1929)

An important advantage to the manufacturer resulting from the use of this order is the legal relief thus given him from liability for breach of contracts with private persons which he is unable to carry out because of the Army order. As to the liability of the Government, the Supreme Court in 1923 passed on a case (Omnia Co. v. U S., 261 U.S 502) in which suit was brought against the Government to recover damages resulting from breach of a private contract by the Allegheny Steel Company due to requisition by the Government of the entire output of steel plate from that company for the year 1918. The private contract was a price below the market and the appellant claimed a loss of \$990,000.

Mr. Justice Sutherland speaking for the court in denying recovery said

"The conclusion to be drawn from these and other cases

which might be cited is, that for consequential loss or injury resulting from lawful governmental action, the law affords no remedy. The character of the power exercised is not material. ****If, under any power, a contract or other property is taken for public use, the Government is liable, but if injured or destroyed by lawful action, without a taking, the Government is not liable. What was here requisitioned was the future product of the Steel Company, *****.

"In exercising the power to requisition, the Government dealt only with the Steel Company, which company thereupon became liable to deliver its product to the Government, by virtue of the statute and in response to the order. As a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated but ended.

"Parties and a subject-matter are necessary to the existence of a contract, but neither constitutes any part of it - the contract consists in the agreement and obligation to perform. If one makes a contract for the personal services of another or for the sale and delivery of property, the Government, by drafting one of the parties into the army, or by requisitioning the subject-matter, does not thereby take the contract.****

"The Government took over during the war railroads, steel mills, ship yards, telephone and telegraph lines, the capacity output of factories and other producing activities. If appellant's contention is sound the Government thereby took

and become liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible.

Frustration and appropriation are essentially different things."

It is important to note that under the laws in effect today the issuance of an order under section 120 is the only legal means by which a contractor may avoid responsibility of existing private contracts.

In 1917 the following opinion of the Judge Advocate General was approved.

"Under section 120 ***the mere placing of an order for the supplies or materials required is sufficient without the execution of a formal contract therefor. No advertising for bids in any form whatever or filing of bids is necessary. R S. 3744 ** do not apply to such contracts. (Sec 2053, Dig. Op. of the J.A G.)

Under its provisions, section 120 becomes effective "in time of war or when war is imminent" Advancement year by year in procurement planning brings the War Department and industry to a closer relationship in a mutual understanding of war procurement problems and responsibilities. The recent Presidential recommendation for the purchase of special machinery for war production to augment the manufacturing capacity of certain facilities, and the congressional approval of educational orders will, if authorized, place a direct responsibility on the War Department and the facilities concerned for the fulfillment of a definite war procurement mission in the event of an emergency.

Personally I can see nothing repellant to cooperation in immediately placing an Army Order under section 120 for the requirements planned, thus giving a legal status to immediate production operations. A fair and reasonable price satisfactory to the producer will be the problem of the moment. If the form of order itself provides the necessary terms either for a fixed price or a fair means of establishing a fixed price acceptable to the producer, the legal obligation imposed by the order will be no different than that assumed by a contractor in any war contract. In other words, if the obligation is voluntarily accepted, there is no compulsion. Cooperation then is just as complete as in any other war contract.

In closing the subject of war contracts, let me say this. The perfect contract in or out of the Army, is still to be drawn. If such an instrument were possible a large number of law office shingles would be lowered to half-staff. Of this I am satisfied, however. We are going to have better contracts in another war than we had in the last.

WAR EMERGENCY LEGISLATION

Legislative proposals relating to industrial mobilization in time of war have in the past few years received considerable Congressional attention and consideration. In April of 1934, a Special Committee on Investigation of the Munitions Industry (known as the Nye Committee) was authorized by the Senate and directed among other things, to review the findings of the War Policies Commission made in its report of 1932. Pursuant to this Senate Resolution public

hearings were held in September and December of 1934 and throughout the first 4 months of 1935. As a result our 1933 Industrial Mobilization Plan became a subject of study, comment and criticism, and no small amount of credit is due our present Director of the Planning Branch, Colonel Harris, for his efficient and effective explanation of the plan and its defense before the Committee where such defense was found necessary. The so-called Nye bill (H. R. 5529, 74th Congress) came from this Committee, and the industrial features of that bill were finally approved by the Senate Military Affairs Committee in such form that this section is now included in the legislative annex of the 1936 Industrial Mobilization Plan. While we may personally disagree with some of the principles announced by certain members and associates of the Nye Committee, the fact remains that a better understanding of the War Department's aims, purposes and plans has resulted from these hearings.

The War and Navy Departments have supported the so-called Sheppard-Hill bill before the present Congress. Colonel Harris appeared before the Senate and House Military Affairs Committees as the War Department representative on this legislation. Captain Allen appeared for the Navy. Their testimony may be found in the printed hearings and you would find it both interesting and instructive. Mr. Bruch, General Johnson, the National Commander and the Legislative Representative of the American Legion, and others all testified in favor of the bill. The principal opposition came from peace and "pink" organizations and strange as it may seem, these societies have by organized misinterpretation, been able

to muster some opposition to the bill. As a matter of fact, the War Department prefers this bill, with certain minor amendments, to the more detailed legislation now set up in the legislative annex of the Industrial Mobilization Plan.

The enactment of such a bill in time of peace would give the services a sound legal basis for procurement planning, and avoid confusion and legislative delays at the time of an emergency. The controls extended by this bill are not mandatory, but optional in the discretion of the President at such time as he may deem our national and economic security imperiled, after a declaration of war by Congress.

Authority for price and wage controls, enforceable priorities and licenses, elimination of waste, authority to requisition and commander on the "home front" as Mr. Baruch called it, and authority to transfer the duties and functions of various executive agencies, during a national emergency, are all war powers of Congress and not included in the war powers of the President. To have permanent statutes delegating these controls to the President in time of war and giving him discretionary authority to impose one or more of them, if necessary, on Monday or thereafter as the situation may develop, are essential measures of national defense. In the near future you are to have a student committee on the War Powers of the President and one on Price and Profit Control in Time of War. At that time these interesting phases of industrial mobilization will, I am sure, receive careful consideration and able presentation.

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In closing may I quote from the House Military Affairs Committee report on the Sheppard-Hill bill

***the passage of the bill would bring to the attention of other nations the fact that if we were again forced into war our whole economic, industrial and financial life would be effectively and efficiently mobilized for the protection of our country. We ask passage of this bill as one more important step to the great goal of peace."