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LEGAL DIVISION

by

Major C. C. Fern, J.A.G.D.
Chief, Legal Division, Planning Branch, O.A.S.W.

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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 effect a war production. You all heard the recent directive of the Assistant Secretary for "the early completion of contract forms adequate for all anticipated war conditions and simple enough to be readily understandable both by industry and by the representatives of the War Department." In contrast to the war contracts of 1917 and 1918, this phase of planning has advanced in a considerable degree.

You recently heard at the meeting of the procurement planning officers some discussion of World War contracts. May I summarize some of the points then considered. 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, the legal and financial difficulties 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 names thereafter. Contracts signed in this manner were generally called proxy-signed contracts. You have heard that of the 27,000 contracts of the War Department in existence on November 12, 1918, some 4,000 were proxy signed. The then Comptroller of the Treasury held that these contracts were not enforceable against the United States (XXV 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 velebat 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 could 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 without a consideration. That is, in order to make a valid amendment, something of value must pass to the United States. As this then adjudged informal agreement 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 Contract Adjustment 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! You may remember that I stated 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. 114). 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 reassignments of officers would be most frequent.

I do not want to leave the impression that World War contract procedure as a whole was not satisfactory. I only desire to emphasize these points as illustrations of what may be improved upon to make the same task easier and less complex in another emergency. After all, our basic

laws governing war procurement change but little, and are now about the same as we had in 1917.

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 profit 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 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."

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 containing war profits provisions, were introduced in the last Congress known as the Sheppard-May bill. These bills were favorably reported by the Senate and House Military Affairs Committees, but neither bill reached further legislative consideration.

The May bill contained the following tax provision

"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 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 or a similar 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 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.

WAR CONTRACT FORMS

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 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. Four contract forms were tentatively approved by Mr. Woodring as Assistant Secretary of War.

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

To avoid any proxy-signed contracts, 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. As a further assurance against proxy-signed contracts, a change has just been recommended in the Article on Definitions in all war contract forms to read

"ARTICLE ___ Definitions. Except for the original signing of this contract, the term "contracting officer" as used herein shall include his duly appointed successor or his authorized representative."

and also below the signature line for the contracting officer the following has been recommended

"

(Official Title)

(To be signed by a duly appointed contracting officer only)"

Although Army Regulations now carry these same instructions as to peacetime contracts, it was considered advisable that these instructions be made clear on all war emergency forms. Termination clauses are now included in all war contract forms.

As stated previously, a Judge Advocate Committee has recently revised these war forms and the proceedings of the Committee are now before the Contract Board for consideration. Representatives of the Navy are participating in this consideration. A short extract of the Committee report may be of interest

"In revising these contract forms and preparing the new forms the committee has borne in mind the instruction to make them as short as possible and as simple as possible so that they can be easily understood. With reference to such forms as the construction and supply contract forms, which will be used the same in war as in peacetime, no material change has been made except the addition of a termination clause and a clause covering changes in price when the price of labor or materials has been changed by a Federal agency. It is believed that industry should not be upset by the use for the same purposes of a new form in wartime which differs from what they are accustomed to in peacetime. The other existing contracts have been simplified as much as it is believed possible in view of the fact that many of these contracts involve cost accounting and unless the method of accounting is set out in some detail there will be great difficulty in settling the accounts when the contracts are completed or terminated with the result that many claims will be submitted."

You are all familiar with the provisions of Revised Statute 3709 which requires advertising for proposals for War Department contracts. The provisions of this same statute make an exception to this advertising directive if "public exigencies" require immediate delivery. By executive order the Secretary of War may therefore revoke the necessity for advertising, as was done by Secretary Baker in 1917. No additional war legislation is therefore necessary to accomplish this contract pro-

cedure.

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 formal 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. A new short form supply contract based on the Standard Short Form 53 has been recommended to the Assistant Secretary.

These 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.

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 open 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 matériel 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 this World War 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. The Judge Advocate revision committee has recommended a substantial change in the application and method of computing this fee.

Maximum and minimum limits are retained but the latter is stated as a flat two-thirds of the former. A descending scale of percentages is retained but each stated percentage is made applicable to a given cost bracket. The rates of percentage have

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been changed. The basis of settlement is materially changed. Instead of requiring a difficult evaluation of the fee in every case, the present draft provides that the Contractor will be paid the maximum fee if his work is satisfactory. If the work is not satisfactory, provision is made for scaling down the fee. Resort to this procedure will be necessary only in those cases where the Contractor's performance is definitely below standard. The revised form also provides that for work done by subcontract the minimum fee only will be paid the prime Contractor."

Although the War Department policy is to use the fixed-price supply 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. Complete conversion of plants or parts of plants may be required. While educational orders will help this situation, there will be instances such as farm implement manufacturers making artillery shell and adding machine companies making fuzes. These are situations where contractors might be more anxious to protect themselves against loss than to make large profits. For these and similar situations there has been developed the Adjusted Compensation Contract.

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 some 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 the rental period and the 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. The Judge Advocate Committee was not impressed with the merits of this form. It was the general belief that this form is too involved for war-time procurement. To quote from the Committee report.

"The serious efforts that have been made to find an absolutely

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fair basis for determining the fee are laudable, but the result accomplished is open to serious question. The contract is so involved that this office entertains grave doubts as to its workability under the stress of war conditions."

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.

REQUISITION & CONTRACT ORDERS UNDER SECTION 120, N.D.A.

With the objective of minimizing or discarding the use of the Adjusted Compensation Contract and of simplifying contractual procedure on M-day, the Contract Committee has just completed two forms of contract orders under the procurement authority delegated to the Secretary of War in time of actual or imminent war under Section 120 of the National Defense Act.

To orient you on the provisions of Section 120 it might be well to read it at this time

"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 ***."

Decisions of the courts since the World War indicate that two types of procurement orders may be issued under this Section. One a requisition order based on the authority of eminent domain one a contract order agreed to by the parties as to the terms and conditions for furnishing the products or materials required.

The following opinion of The Judge Advocate General approved by the War Department in 1917 is still controlling.

✓ "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[es] not apply to such contracts. (Sec. 2053, Dig. Op. of the J.A.G.)"

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. An interesting case on this point went to the Supreme Court in 1920. In 1917 the Navy placed an order for

36,000 knit undershirts and 36,000 drawers with the Moore & Tierney knitting company of Cohoes, New York, at a price of \$1.25 each F.O.B., New York City depot. In a suit involving nondelivery of goods under a contract entered into by the Moore Company prior to the Navy order, the Federal District Court of New York held that if the Moore Company

thinking it more profitable or patriotic to work for the government than in the performance of its existing contract with B, voluntarily sought a contract with the government and offered its services for compensation in the manufacture of such goods as the government required, and voluntarily entered into such a contract sought by it with the United States,
[and] thereupon voluntarily declined or refused to proceed further in the performance of [its] contract with party B, [it] is not excused and party B may recover.***Nonperformance is the result of [its] voluntary act or acts, not that of the government, and [it] acts under no compulsion whatever."

The court concluded that in the instant case an order had been issued under section 120 and the analogous Navy Act, and said

"Terms were agreed upon, fixing prices and quantities and deliveries, and reduced to writing in the form of contracts. ***If, after entering into these agreements, respectively, the plaintiff had refused to perform, I think it would have become liable to the United States, not only for damages, but to the pains and penalties of the act, and that the government lawfully could have and probably would have taken summary possession of its plant or factory, and would have been justified in so doing. The plaintiff would have been liable to a criminal prosecution and charge of disloyalty."

In holding the Moore Company not liable for this breach of contract with the B company the court concluded

"I do not doubt that Congress had power to place these burdens on the manufacturers, and on those with whom they had contracted or with whom they should contract. The war power is paramount, rises from necessity, and no government can endure without its exercise on occasion.***

"If the United States, in time of actual war with other nations and in an emergency, such as the case here, needs and desires the product of the mill or factory of a manufacturer, and of all the mills and factories in the country producing

that class or kind of goods, and which are mentioned in the acts of Congress above mentioned, and seeks such manufacturers of such goods, makes its wants and requirements known, ascertains prices and quantities that can be produced and delivered, and then states that it will take such and such quantities at the prices named, to be delivered at times specified, and accompanies this by statements that it does not want an answer that the manufacturer is "sold up" - that is, already has accepted orders for all such manufacturer can produce - and that it has carefully apportioned its requirements amongst all the mills and factories capable of producing that kind of goods, and then requires and enters into a written agreement fixing quantities, prices, and deliveries, has it not, within the meaning and intent of the acts of Congress, "placed an order," the execution of which by the manufacturer is obligatory, and has precedence over the other contracts of such manufacturer with private citizens and firms?"

This court decision rendered in July 1918 (Moore & Tierney v. Roxford Knitting Company, 250 Fed. 278) appears to me to outline a sound basis of M-day procurement of material in an emergency. The legality of such a plan has the approval of the United States Supreme Court as that court denied a writ certiorari in this case in 1920 (253 U.S. 498).

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 with the appellant, due to requisition by the government of the entire output of steel plate from that company for the year 1918. The private contract was at 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 in closing the court's opinion

"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.***

"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 became 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."

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. Our war procurement program is based upon the effectiveness of our allocation plan. The war load must be distributed in accordance with that plan. The wheels of industry must start rolling on a munitions program. Competition between departments and various supply agencies for particular industrial facilities must be minimized. The recently approved program for the purchase of special machinery for war production to augment the manufacturing capacity of certain facilities, and the educational orders program now authorized by Congress, 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.

Orders under Section 120 give a legal status to this immediate production program. 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.

Three means of price adjustment are provided in the two Contract Order forms referred to

1. Form A is for a fixed price to be determined by formal or informal bidding, by negotiation, by executive price fixing, or by determination from market price or available cost data.

2. Form B provides for.

- a. A 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.

- b. Experimental production of a designated number of first units on a fee basis, with a fixed price thereafter for the remaining units required under the order. By this means a

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legal status is given for the production of the total number of units required.

As the Navy Department contemplates the use of the same type of order in an emergency under the authority of an analogous statute (50 U.S.C. 82), it is hoped that an agreement will be met as to the use of similar forms by each Department.

In order that a better understanding of these Order forms may be had, each will now be informally discussed.

1. Contract Order A (Fixed price)
2. Contract Order B (Adjustment to fixed price)
3. Requisition Order - (Mandatory) - (Old Compulsory Order)

The fixed price contract order form (A) under Section 120 follows in principle, the standard supply form contract. As to the B form the Judge Advocate Committee made the following report:

"No reason is apparent to this office why Contract Order B is not applicable to all situations where the adjusted compensation contract might be used. Both are essentially cost-plus supply contracts. The two methods of computing the fee provided in the B form have the virtue of simplicity. One or the other can be put into operation in any emergency. The pilot contract idea incorporated in the B form appears to carry out the War Department's policy. This office understands that it is contemplated using the Adjusted Compensation contract only so long as is absolutely necessary to arrive at a satisfactory basis for a fixed-price contract.

"There is another factor in connection with the adjusted compensation contract that is considered worthy of some thought. The proposed payment of a fee equal to a rate of six per cent would hardly be as much as a court would allow for rental if the Government commended the plant. It is understood that the Navy Department has never agreed to use the Adjusted Compensation form or to limit Contractors' profits on a comparable basis. In time of emergency the War Department will be placed at a distinct disadvantage if it insists upon driving such harsh bargains while the Navy Department is prying on more liberal basis.***

"It would appear that the proposed form will accomplish the purpose for which it is intended. As hereinbefore stated, this form covers substantially the same field as does the Adjusted Compensation Supply Contract. In view of the fact that the Contract Order No. B is simple, comparatively easy of operation and understanding, and reduces the cost-plus features to a minimum, it is believed that it is preferable to the Adjusted Compensation Supply Contract for general use."

Under this B form no new contract is necessary at the end of the pilot period of manufacture. A formal acceptance of one sentence stating the price fixed and agreed to is all that is necessary to make a binding contract for the total production originally ordered. If a price is not agreed to, production must proceed and the Secretary of War sets a price, and the manufacturer is given the option to bring suit for the balance he may believe himself entitled to receive.

Another very important consideration in connection with the use of requisition and contract orders under Section 120, during an imminence of war or on M-day, is the legal question involved as to whether this statute authorizes contractual obligation by the President without the actual appropriation of funds. You will remember that an existing statute makes peace-time authorization for the "contract or purchase" of "clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies," without an appropriation Act of June 12, 1906. (Stat 255, Sect. 727 Mil. Laws) 7. Section 120 "empowers" the President "in addition to the present authorized methods of purchase or procurement, to place an order ***." It is not difficult to visualize the President declaring an emergency under the provisions of this Section, and authorizing a deficiency, or in any event, authorizing certain classes of contractual obligation to cover orders to

issued. You will soon have a Committee on War Contracts. This will be a fine problem for that Committee to solve.

In closing the subject of contracts, let me say this. It is not contemplated that in time of an emergency the Assistant Secretary shall dictate what particular form of war contract is to be used by a supply arm or service. The responsibility of the Office of the Assistant Secretary is to produce a legal form to meet a particular condition and circumstance. The use of a particular form is the responsibility of the procurement agencies, under the supervision of the Assistant Secretary.

There has of late been an increased interest by all concerned in the subject of war contracts. The Navy is now collaborating in their consideration. I personally feel that while there is still work to be done, we are now on a sound basis toward the desired objective.

LEGISLATION

Before discussing legislation pertaining to industrial mobilization, there are a few minor legal questions pertaining to war procurement which may be worthy of comment. The other day at the War College after Colonel Rutherford's lecture, a student of last year's class here asked why the War Department did not take steps to correct by legislation the present opposed provisions of Sections 5 and 5a of the National Defense Act regarding responsibility of the General Staff and the Assistant Secretary for supervision of procurement in time of war. He stated that although the conflict of designated authority was now covered by order of the Secretary of War, that in time of war

this order might be changed and as a result present war procurement plans would be voided and confusion result. This is not an unusual question. In reply may I say as to responsibility for supervision of War Department procurement, there is no conflict in the provisions of Sections 5 and 5a. Under Section 5a the Assistant Secretary alone is charged with that responsibility in both peace and war, and Section 5 does not delegate this responsibility to the General Staff. The conflict in the two sections and the subject of the administrative order of the Secretary referred to, is in regard to plans for material resource mobilization only.

Also the question of the merits of establishing a revolving fund for the Army is frequently discussed. The Army would welcome a revolving fund, but unfortunately Section 8 of Article I of the Constitution prohibits such legislation by provision that no appropriation for support of armies "shall be for a longer term than two years." This restriction does not prohibit the Navy.

Now a word about the necessity of legislation to permit contracts to be made without formal competition during an imminence or state of war. No legislation is needed. Section 5709 of the Revised Statutes which directs advertising, and the Act of March 2, 1901 which directs purchase at cheapest price, both contain authority for exceptions in time of emergency and the Supreme Court has held time and time again, that an imminence of, or actual war, creates such an emergency. Of course you remember that Section 120 gives the President this same authority. Present authority is ample during these periods for contractual negotiation or the use of restrictive list of bidders through

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personal presence, telephone, telegraph or radio, and awards can be made to one or more, entirely in the interest of national defense.

As you will soon have a committee problem on the War Powers of the President and Congress which will involve a study of legislation on economic and industrial mobilization, I shall not prolong these remarks with any detailed discussion of the subject.

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. 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.

The War and Navy Departments supported the so-called Sheppard-May bill before the last Congress. As you know, this bill was proposed and supported by the American Legion. The testimony of the officers representing departmental views may be found in the printed hearings and you would find it both interesting and instructive. Mr. Baruch, 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 by organized misinterpretation, were able to muster considerable opposition to the bill. As a matter of fact, the War Department prefers this general 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 commandeer on the "home front" as Mr. Baruch calls it, and authority to employ administrators and 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 M-day or thereafter as the situation may develop, are essential measures of national defense.

Colonel Frank Scott, whose sincerity and ability we all admire very

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much, apparently has serious doubts as to the advisability of supporting such peace-time legislation. As I remember, he cited in support of his contentions the effectiveness of the General Munitions Board and the so-called war powers exercised by the President and that Board in directing the industrial effort during the early period of the war. You have just finished your study of this subject. Would you advise a trial and error approach during an initial war period as the Munitions Board experienced, due principally to lack of authority? When did industrial mobilization become effective? Was there any time lost in its development? Was real industrial coordination attained after the creation of the War Industries Board and the passage of the Overman Act? Was it after the enforcement of licenses and commandeering and control of waste through the passage of the Food and Fuel Act of August 10, 1917? Was it after the enforcement of priorities through the authority of the Preferential Shipments Act of August 10, 1917? Would you question the efficiency of industrial mobilization in another war without these same basic controls? Was this legislation restrictive to other war powers exercised during the World War? Would you endorse the piecemeal passage of this legislation after a declaration of war, or would you favor the passage of one all-embracing general bill in time of peace with the exercise of controls optional as the national needs may require?

I leave these questions for your own answers, and I know that your Committee will in due time answer them to your satisfaction.

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Discussion Following Lecture of
Major C. C. Fenn, J.A.G.D.

December 12, 1938

Q. Major Fenn, I would like to ask one question about this provision in the B. Form with reference to compensation to be determined, and further payment to or refund by the depot. How do we get around -- what authority have we to get around it, for instance, the advancement of funds?

A. We get around it because we are buying services as well as supplies under this form, - services rendered, which is permitted by the present statute. Does that answer your question?

Q. It gives me an indication of where you think you --

A. I will say it is concurred in by the Judge Advocate General, if you want to argue with him all right.

Q. In reading a number of the statements of Mr. Baruch before the War Policies Commission, he made a strong advocacy of price fixing at some early stage of the war as selected by the President. Would you care to comment on that phase of determining some of our problems of prices in war?

A. You are getting a little out of my bailiwick. That belongs in the Contributory Division. Your assumption is correct. He did advocate what he said was price fixing and then he changed it to a price ceiling, but under his plan all prices will have a ceiling as of a certain date to be set by the President, the date presumably being before M-day or the declaration of war and that no prices will be allowed or permitted to go above that ceiling. I would rather not get into any argument on

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that because it really doesn't belong to the Legal Division. I do want to say this, though, in that connection. You may criticize as to what the War Department does, but that question brings up a point and a very valuable one. When the American Legion was active in introducing a bill at the last session of Congress their provision on price control was mandatory and was following the question I made. The War Department does not concur in such a plan of price control and rightly so, because we do not want to rigidly go into something we do not know what the situation at the time may present. So, with the cooperation of the American Legion the section now reads "by panels or echelons as the situation may develop", and the American Legion adopted that. In other words, if Congress had passed such a bill as had been proposed before the present bill or the one at the last Congress then you would have the necessity by legislation of freezing all prices.

Q. You stated that the war powers of the President did not include certain things, and I noticed in some of the testimony there seemed to be some doubt in the minds of some senators and congressmen as to the war powers of the President. Could you tell us?

A. The war powers of the President have never been definitely defined, and if there are any war powers of the President the passage of such a bill as the Sheppard-May bill would not take those war powers away from the President. We have certain provisions in which war powers not definitely assigned to peace time that become effective in time of war, such as in the Federal Power Act and in the Transportation Act as to railroad transportation. But as to price control enforcement of licenses (I mean by enforcement the authority to control by other than

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cooperation) -- and Mr. Baruch himself said that we will never have another war, in his opinion, on the basis of the cooperation phase that we had during the last war, and the war powers of the President did not become effective on those broad controls as to licenses, food and fuel control, elimination of waste, until you could get the authority of statute behind them so that you would have some penalty. We do not like to talk about penalties in time of war, but you are going to need them if you are going to have controls that are going to be sound. The President has no authority for putting John Jones in jail, we will say, because he wastes material that the Army needs. Those are the sort of war powers that are indefinite and undefined so we maintain that broad general bases should be covered by statute; make it definite. Have I answered your question?

Q. In the testimony which I referred to, Secretary Baker stated definitely that the war powers of the President are in the Constitution. I didn't know what he was talking about, but he satisfied this committee.

A. You will have a course later on the Constitution, and if there are any questions after the course I will be glad to answer them.

Major McPike: I want to ask about this matter of penalties - 120. What penalty is there if the manufacturer does not choose to produce these articles for the Government; is there a penalty connected with that?

A. A very rigid penalty. He is subject not only to having his plant commandeered but to a certain fine that is set up that we don't talk about

publicly. The answer is yes.

Q. I notice in paragraph 7 you have covered partial payments upon delivery and acceptance. Do you have any partial payments allowable in these contracts prior to acceptance, that is, based on inventory of stocks?

A. You are talking about the fixed price contract?

Q. On this requisition order B.

A. Yes, we have payments there.

Q. You cover for delivery and acceptance, but you do not cover partial payments for inventory on hand.

A. It is covered on the back under your manufacturing on a fee or cost-plus basis. The bills as they come in are to be paid without the specific delivery that you are talking about. Of course that would have to be. Your point is well taken.

Q. I was very much interested to get your personal slant on this question of passing legislation prior to war. The other day Major Dahlquist told us it was going to take us three months. It seems to me that your very excellent argument applies just as strongly to the desirability of passing a selective service law prior to declaration of war, and also it seems equally desirable to me to have a clear definition by statute as to the duties not only of The Assistant Secretary of War but the duties of the Secretary of the Navy, as well as for its procurement planning and industrial mobilization. I would like to get your reaction to that.

Major Fenn: How about General Harris answering that question?

General Harris: I think Major Fenn is rather imposing on me to

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expect me to take the load off his shoulders. It is a question that each person has his own opinion about. General Scott is, I think, opposed to trying to pass legislation in time of peace. As a matter of fact, the May bill originally also included selective service, that is, draft of man power. I don't know why the General Staff are opposed to putting that up for consideration in time of peace but I believe they are. We in the War Department who have anything to do with the industrial side are in favor of attempting to pass legislation in time of peace. I will admit that due to some unfortunate happenings in the last Congress it is going to make it almost impossible to pass such legislation. If those things had not occurred I believe that legislation would have been passed last session of Congress. We have not much hope of its passing. The Nye Committee did a lot of good, as well as embarrassing us. The work on contracts has been forward and contractual procedure has been very much more thorough because the Nye Committee took it to pieces. The contract forms were very unwieldy and the Nye Committee exposed that weakness and really started concentrated thought on the contract and the form. I think the advance in the last year and a half, particularly under Major Fenn, has been outstanding, and for the first time I am beginning to feel that the contract forms are simple enough and workable.