

4 SEP 1991

Ref: 81-DFOI-1064

MEMORANDUM FOR CHIEF, RECORDS MANAGEMENT DIVISION  
HQDA-DAAG-AMR-S  
Hoffman 1, Room 1146  
2461 Eisenhower Avenue  
Alexandria, VA 22331

SUBJECT: Freedom of Information Request (Mr. Paul W. Killian, Legal Firm  
of Watt, Tieder, Killian, Toole & Hoffar)


We have been advised by the Office of the Under Secretary of Defense for Research and Engineering (OUSDR&E DAR Council) that the documents requested under paragraphs four and five of the attached request may be held by the Department of the Army. Therefore, request you respond direct to Mr. Killian concerning these two items. OUSDR&E has provided documents pertaining to items 1-3. Mr. John Dobbs is assisting Mr. Killian with this case and may be contacted at (703) 734-1600, if required.

SIGNED

Charles W. Hinkle  
Director, Freedom of Information  
and Security Review

Attachment

cc: PA Reading File

 WEJB/Woods/bp  
set

To be attached  
to the booklet.

Copy

61-160

Red

I pulled the original of  
the attached report and  
sent it for reproduction.

ABC

See

Mr B. said that at the  
proper time you ought to be  
thinking of ringing GSA in on this.

Also - every one seemed to agree  
that this should go to the  
construction industry.

that

61-160

Case 61-160 - Construction Coverage - ASPR. The members noted that the ASD(I&L) memorandum to the Assistant Secretaries of the Army and Navy (I&L) and the Special Assistant for Installations, Office, Secretary of the Air Force, dated 9 Nov 61, concerned the establishment of a special ASPR Subcommittee to proceed with the development of a single regulation covering contracting and contract administration procedures for construction work. This regulation will become a separate ASPR Section, containing all material pertinent to construction procurement, and will replace the existing regulations on this subject issued separately by the Departments of the Army, Navy and Air Force. The members further noted that the memorandum stated that meetings of the Subcommittee should be initiated at the earliest opportunity. Members appointed to the Special Subcommittee were:

Army - Mr. E. Manning Seltzer - OCE, Chairman

Navy - Mr. Harold Gold - Yards & Docks

Air Force - Mr. John Wren, SAFGC

The Committee requested the Subcommittee to present a planning status report of the Subcommittee's activities together with their contemplated completion date for consideration by 8 January 62.

(22 Nov 61)

Case 61-160 - Construction Coverage - ASPR - Information copies of a memorandum from the Assistant Secretary of Defense (I&L) dated 9 Nov 61, to the Assistant Secretaries of the Army and Navy (I&L) and the Special Assistant for Installations, Air Force, with respect to the development of ASPR coverage of the making and administration of construction contracts were distributed to the members.

(29 Nov 61)

Page 4 (22 Nov 61), Case 61-160 - Construction Coverage - ASPR. A new last paragraph was added to the minutes reading:

"The members noted that the second sentence of the first paragraph would necessitate including certain existing coverage in the regulation in the new part covering construction contracts. The members further noted that this approach is not consistent with the present treatment of specialized types of contracts and

instructed the Subcommittee to include only those items peculiar to construction in the construction part, cross-referencing, as appropriate, other pertinent parts of the regulations."

(13 Dec 61)

Case 61-160 - Construction Coverage - ASPR - Copies of a letter for the General Counsel, Office of the Chief of Engineers, dated 24 January 1962, signed by the ASD (I&L) were distributed to the members for information.

The Committee determined that it would request Mr. E. Manning Seltzer, Chairman of the Subcommittee to attend the ASPR meeting for discussion of this problem on Wednesday, 7 Feb 62, at 1000 hours.

(26 Jan 62)

Case 61-160 - Construction Coverage - ASPR - The Special Subcommittee developing the new section on "Construction" attended the meeting, and the Chairman of the Subcommittee provided the members with a resume of the Subcommittee's actions which have been taken to date to meet the deadline established for completion of this assignment by the Assistant Secretary of Defense (I&L). The members were further advised that in this effort the Subcommittee planned to minimize ASPR changes, and there was no intent to disturb any existing coverage having general applicability. The Subcommittee's effort would transfer only existing material relating solely to construction to the new construction section. It was stated that the publication of the new section, which would replace all existing regulations, manuals, and other media of guidance issued by the respective departments necessitated a detailed review and analysis of the existing publications to assure complete coverage. The Subcommittee will present a draft for consideration by 30 June 1962, the reporting date previously established.

(7 Feb 62)

10. Case 61-160 - Construction Coverage - ASPR. The Members preliminarily considered the Subcommittee report on the subject problem dated 28 June 1962 to determine what course of action should be followed in obtaining comments on the Subcommittee report. On the basis of this discussion, the Members concluded that:

(a) the Subcommittee report would be distributed with the next Agenda and scheduled for consideration at a Special Meeting to be held on Monday, 20 August 1962;

(b) this scheduling of the case would permit the Members an opportunity to thoroughly study the Subcommittee report and obtain such comments at Departmental level, as deemed appropriate; and,

(c) the Committee would undertake a review on a page-by-page basis and, upon completion of this effort and the development of a revised draft, sufficient time would be allowed to obtain additional comments on the revised draft.

(11 July 62)

1. Case 61-160 - Construction Coverage - ASPR. Representatives of the Subcommittee attended the meeting for consideration of their report in light of the Committee's initial review on this subject as set forth in the 27 August 1962 Minutes. Prior to undertaking detailed consideration, the Chairman advised that it would be necessary to determine with clarity the "Scope" of the proposed Construction Coverage so as to be consistent with the intent of the project. Specifically, whether the coverage should include only those items which are peculiar to construction, thus requiring utilization of the remainder of the Regulation for material having a general application to all contracts, or whether the construction coverage should be completely self-contained to the extent that in the placement of construction contracts only the construction section would have to be used by the contracting officers. In the discussion of this problem, it was noted that the Subcommittee report did not present complete self-contained approach in that numerous cross-references to other portions of ASPR were included rather than repeating the applicable paragraphs. At the chairman's request, the Subcommittee Chairman explained the background of the Subcommittee's assignment which to his understanding was the development of a construction contracting regulation as part of ASPR which would be as complete and self-contained as possible. He advised the Subcommittee recognized that this assignment constituted a departure from the conventional ASPR format, and in this respect the Subcommittee had deviated from this assignment in order to preserve the current ASPR approach. The Subcommittee approach necessitates that all contracting officers use not only the Construction part, but also the remainder of the regulation in the placement of Construction contracts. With respect to the approach taken by the Subcommittee, the Members expressed complete accord, on the basis that the establishment of a separate book for use in the Construction area would create a precedent for the development of separate books for other commodity areas such as subsistence, R&D, etc. with the inherent difficulties of maintaining "separate books" on a current basis. The Subcommittee expressed agreement that the Construction section should not be issued as a separate regulation, and further stated their agreement that construction contracting officers should be cognizant of the requirements in the entire Regulation.

The observation was then made that the proposed Construction coverage did not cover "minor construction" which is contracted for by all of the military departments. The Subcommittee Chairman advised that an initial draft coverage had been prepared by him for minor construction, but that in his opinion the draft required further work. He stated that it had not been presented to the Subcommittee or the ASPR Committee since the Subcommittee had not reached full agreement as to necessity for the coverage. After a brief discussion, it was the unanimous opinion of the ASPR Committee members that the subject of contracting for minor construction be included in the Regulation. It was noted that such coverage would obviate the need for issuance of separate DOD directives covering the various aspects of minor construction, such as procurement, forms, contract provisions, funding restrictions, etc.

The Subcommittee members endorsed the concept that minor construction be issued in the ASPR, and noted that, upon publication of this material in the Regulation, existing directives in this area should be cancelled to the extent practicable.

Further consideration of this subject was deferred until Monday, 17 September 1962.

(10 September 1962)

determined to have a Special Legal Subcommittee review the subject of "Possessions", considering the existing ASPR definition and the definition proposed for inclusion in the construction part. This assignment will be carried as Case 62-173 - Possessions, Review of.

Members designated to the Special Legal Subcommittee were:

Army	-	Lt. Robert J. Robertory, JAGC
Navy	-	Mr. William Speck, BuY&D - Chairman
AF	-	Mr. Richard Johnson, SAFGC
DSA	-	Mr. Robert Cole

In making this assignment, the Members expressed a preference to include any expansion of the definition of "Possession" in the general definition paragraph in Section I, unless a specific need exists for inclusion of the definition in the construction part.

The Subcommittee was requested to submit a report for consideration by 22 October 1962.

✓ The Navy Legal Member is the ASPR Committee liaison to the Subcommittee.

/ 4-1-201.22

The Committee agreed with the Subcommittee's definition of construction and further agreed the definition should be retained in Section IV with an appropriate cross-reference being included in Section I.

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4-1-201.23

With respect to this paragraph, the observation was made that demolition may be considered as construction. However it was noted that demolition is not part of the general definition of construction. It was suggested that this paragraph be cross-referenced to the appropriate sections with respect to Davis-Bacon coverage and Miller Act Bonds coverage and that appropriate demolition coverage of these aspects be included under the subject matter. The Subcommittee was requested to redraft the paragraph in light of the foregoing.

SUB-PART 3

4-1-300

The Committee requested the Subcommittee to redraft this paragraph to merge the first sentence with the ASPR coverage in 4-101.1. With respect to the second sentence the Committee concluded that the coverage is directed to a type of contract, rather than to a method of procurement and as such should be deleted.

4-1-301

The Members noted that this paragraph was misplaced and should be relocated properly under the heading of "Procurement Responsibilities". The Subcommittee was requested to relocate this paragraph.

4-1-302.1

The Members agreed with the Subcommittee that a need existed in the construction part for the substance of this paragraph, but not in this abbreviated form. Accordingly the Subcommittee was requested to redraft this paragraph.

4-1-302.2

The Members noted that this paragraph required redrafting in more concise language to reflect the Subcommittee's explanation concerning subcontracting, and to reflect the subcontract coverage as set forth in ASPR 4-104.

The Subcommittee was requested to redraft the paragraph.

4-1-303

It was the opinion of the Members that this paragraph should be deleted.

4-1-304

This paragraph was discussed at length without definitive action being taken.

Consideration of the remainder of the Subcommittee's report was deferred until 0930 hours, Monday, 24 September 1962.

(17 September 1962)



1. Case 61-160 - Construction Coverage - ASPR. The Members resumed consideration of the proposed coverage of this case starting with 4-1-304.

"4-1-304 - Time of Delivery or Performance". Discussion elicited the fact that the Subcommittee had intended in this paragraph to express the thought that contractors in the construction industry routinely take for granted that a contract completion date is ordinarily not much more than a target date and that time over-runs are normal and accepted practice. Consequently they engage in the practice of making extra charges for any overtime or shift work when it is required that they really meet the completion date stated in the contract.

The Subcommittee therefore felt that it was necessary to provide a statement to be used in contracts where completion dates were of the essence, stating that "in this particular case we really mean it". There was lengthy discussion among the Committee Members and some of the Subcommittee Members present in which the Committee finally took the position that provisions included in a contract were intended to be fully complied with, whereas the Subcommittee personnel took the position that industry practice was otherwise. They further stated that the courts and the Contract Review Board invariably allowed extra overtime and shift pay under the excusable delays clause unless there was a specific mention in the contract that a completion date had to be met and that the contractor was expected to take all measures necessary to meet it.

It was determined that if the industry practice were as well established as the Subcommittee Members indicated, coverage to that effect should be specifically inserted in the ASPR and reflected in contracts.

The Subcommittee was instructed to provide a more precise statement in this paragraph to the above effect.

The following revisions were deleted:

"4-1-305 Approval Signatures. See 1-306".

"4-1-306 Priorities, Allocations, and Allotments. See 1-307"

"4-1-307 Records of Contract Actions. See 1-308".

"4-1-308 Solicitations for Informational or Planning Purposes. See 1-309".

"4-1-309 Liquidated Damages". In the discussion of this provision it was mentioned that words like "generally the contract shall provide" should be substituted for the word "may" in the third line of this provision. The thought was also expressed that there should be specific guidelines as to when contracts should provide liquidated damages and when they should not.

The final conclusion reached was that the Subcommittee should redraft this provision reconciling it with ASPR 1-310.

"4-1-310 Government Estimate". The next to the last sentence of "(a)(1)" was deleted. In paragraph "(b)" in the first sentence the word "or" was inserted between "notices" and "invitations"; after the word "bids" a ",," was added and the word "or" was inserted.

During general discussion of this coverage, it was determined that the Subcommittee develop and insert that portion of the substance of DOD Directive 4105.45 dated 25 June 1952 which is currently valid and applicable. It was noted that a large portion of the present directive is ten years old and is considered out of date. The question of the inclusion of fee curves was discussed and it was finally determined that the Subcommittee should devote further study to this problem and submit a recommendation.



The need for (a)(3) was questioned and it was decided that the Subcommittee should consider whether it is necessary and should consult with industry to determine its reaction to this question. The question as to whether the applicability of several provisions in 4-1-310 should be restricted to contracts over \$10,000 was discussed. There was discussion as to whether a contract estimate in cases under \$10,000 should have to be prepared, and it developed that the Committee considered that such estimates were not necessary except in those cases where the Architect and Engineer fee is a percentage of the estimated contract costs and could thus not be established in construction contracts under \$10,000 unless an estimate of the construction contracts were made. The Subcommittee was instructed to develop a provision that estimates for construction contracts under \$10,000 were subject to determination by the contracting officer but where such estimates were essential to the establishment of the Architect and Engineer fee they were mandatory even below \$10,000.

- "4-1-311 Voluntary Refunds"
- "4-1-312 Procurement of Parts"
- "4-1-313 Contracting Officer's Decision Under the Disputes Clause"
- "4-1-314 Procurement of Jewel Bearings" and
- "4-1-315 Disclosure of Contractor Performance Data to Other Government Agencies and Foreign Governments", were deleted.
- "4-1-316 Expediting Construction Contracts" and
- "4-1-317 Statutory Cost Limitations"

During discussion it developed that the proposed coverage added language permitting contractors to identify items subject to statutory cost limitations in bid or proposal schedules apart from the body of the contract - for ease in effecting changes as necessary. The Committee questioned this proposal on the ground that it might unintentionally facilitate deviation from legislative cost limiting intent.

The Members requested that the Subcommittee present further explanation as to why their proposed coverage differed from the present ASPR language and instructed them to use the present ASPR language if there was no good reason to the contrary.

"4-1-318 Use of Foreign Currencies". The Members determined to withhold action on this revision pending the outcome of Case 62-90 - Appropriation Act Restrictions re Payments with Foreign Currencies.

"4-1-319 Improvement of Private Property". The Subcommittee was instructed to review DOD Directive 4165.16 of 19 December 1958 for the purpose of transferring the appropriate substance thereof to the ASPR

"4-1-320 Contracting With Architectural-Engineering Firms for Construction Work". Delete the words "except in the case of cost-type contracts for design and construction or". After discussion it was concluded that the wording of the remaining portion of the provision was ambiguous and the Subcommittee was instructed to clarify it.

"Subparts 4, 5, and 6" were deleted.

"Subpart 7 Small Business Concerns"

After considerable discussion it was the consensus of the Members (Army dissenting) that Small Business Coverage should be placed in Section VII and this subpart deleted subject to the opinion of the Director of Small Business Policy, OASD(I&L).

"4-1-705 Cooperation With the Small Business Administration" was deleted and will not be transferred to Section VII.

"Set-Asides for Small Business" will be discussed with the Director of Small Business Policy, OASD(I&L).

"4-1-707 Subcontracting with Small Business and Labor Surplus Area Concerns. This provision will be deleted but discussed with the Director of Small Business Policy, OASD(I&L).

"Subpart 8"

"4-1-800 Scope of Part",  
"4-1-801 Applicability", and  
"4-1-802 General Policy" were deleted.

Consideration of the remainder of the Subcommittee's report was deferred until 1 October 1962.

(24 September 1962)

1. Case 61-160 - Construction Coverage - ASPR. The Members resumed consideration of the proposed coverage of this case starting with 4-1-803:

"4-1-803 Minimum Standards for Responsible Prospective Contractors.  
See 1-903"

The first sentence of 4-1-803 was discussed and the Subcommittee was instructed to reword it to make it more clear and unequivocal.

There was extensive discussion as to the practice in the construction industry, referred to in the second sentence, with regard to the extent to which members of a joint venture have responsibility for performance of contract work. Discussion included the question as to what requirements in this regard should be written into ASPR. It was mentioned that 1-303, covering pools, was comparable in most respects with the concept of the joint venture. The question was discussed as to whether each venturer should be responsible for his share of the contract if he is a specialist, or whether all the venturers should be jointly and severally responsible for the complete job. This responsibility was questioned from a financial as well as a technical point of view. The opinion was expressed that ascribing total technical responsibility to each of the venturers would be a fiction, since in some cases the members of the venture are specialists in specialized fields, such as plumbing, electrical work, masonry, or carpentry.

The Subcommittee representative indicated that, while this might sometimes be the case, large construction jobs are frequently awarded to joint ventures composed of several contractors, any one of whom could complete the entire construction job with his own equipment and financing. The question was raised as to whether the contracting officers should explore the relationship established among the venturers and thus determine which responsibilities were assumed by each member. The idea was presented that, although each member of the venture need not be responsible for the total job, at least one should have sufficient competence and financing to be able to be held responsible for the total job.

Against the background of this discussion, the Subcommittee was instructed to explore this subject and be prepared to discuss firm recommendations with the Committee at a later date.

In accordance with the policy of the Committee, all topical headings of this draft which consist only of the words "see . . . . .", and refer only to other portions of ASPR were ordered automatically deleted throughout the remainder of this draft. Specific reference to other portions of ASPR which are included in provisions in accordance with general practice will be retained.

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The first sentence was deleted. The second sentence was discussed) and it was developed that the present practice of prequalifying a contractor maintains the presumption of advertising. The question was raised as to whether such a practice was not actually a form of negotiation. The question was also raised as to whether the Head of a Procuring Activity should have the authority to authorize contracting officers to require bidders to establish their qualifications prior to receipt of invitations.

Major Lukens was requested to coordinate this coverage with the Office of the Comptroller General and prepare language in accordance with the holdings of that office. Further consideration of this matter was deferred pending such GAO clearance.

"4-1-806 Subcontractor Responsibility"

After considerable discussion, this paragraph was deleted.

"Subpart 10. Qualified Products" was deleted.

"4-1-1102 Mandatory Specifications"

Considerable discussion was devoted to this provision and it was recognized that a serious problem was involved. Mr. W. H. Speck pointed out that, in practice, the use by contractors as well as DOD contracting personnel of specifications by reference, such as Military Specifications, can and frequently do generate confusion in that internal references to other specifications frequently balloon into an enormous volume of specifications, many of which are sometimes unavailable, out-of-date, or not applicable. The Subcommittee had therefore proposed that specifications, couched in more specific and directly applicable terms and expressed in fewer but more available documents specifically known in the industry, such as nationally recognized industry and technical society specifications and standards, be used to assure that requirements are more immediately related to industry and manufacturing practices.

The Committee did not concur, and expressed the opinion that such a practice would ignore the considerable progress which has been made by the DOD in the direction of specification standardization and general improvement, and that the coverage submitted was too loose. It was determined that OSD Staff personnel would explore this problem through Mr. Edward J. Sheridan and Mr. Paul H. Riley, OASD(I&L) with DSA standardization personnel, and that further consideration of this area be suspended pending this coordination.

"4-1-1103 Availability of Specifications, Plans, and Drawings"

Discussion of this provision developed the thought that it appeared to shift the burden presently on the contractor to secure the specifications described in the invitations, to the Government office to furnish the contractor such material. It was pointed out that ASPR presently requires that he be given specifications to the extent practicable, but, if not practicable to advise him where they are available. It was considered that this 4-1-1103 would impose too great an administrative burden on Government personnel. It was further stated that the proposed coverage could require an enormously expanded documentation, possibly in the invitation, and certainly to the successful contractor. Mr. Speck maintained however that the proposed practice would reduce the overall

volume of the specifications to which the bidder or contractor would have to refer, by eliminating a large quantity of specifications referred to in the Project Specifications, which are not needed, but have been "inherited" without review from often out-dated and inapplicable specifications.

The Committee questioned this reasoning but will review this paragraph in greater detail during its final examination of this section.

"4-1-1106 Purchase Descriptions" See 1-1206

The Subcommittee was instructed to substitute for reference to S.F. 23A, reference to 7-602.9.

"Subparts 12" and "13" were deleted, and Mr. Lintner was requested to explore the subject with the Director for Transportation and Warehousing Policy, OASD(I&L) for possible broader treatment and insertion in ASPR, initiating an ASPR case if necessary.

"4-2-101.1 General"

The Subcommittee was instructed to redraft this provision in the light of 4-1-300 and consider deletion of 4-2-000.

"4-2-104.2 Fixed-Price Contracts with Escalation. See 4-3-404.3."

The word "necessary" in line six should be deleted and the words "are appropriate" substituted therefor. The Subcommittee was instructed to reword this provision to assure that it not be interpreted to mean re-determination. It should further be checked for consistency with the applicable provisions in ASPR.

"4-2-201 Preparation of Invitation for Bids."

It was indicated by a Subcommittee representative that present ASPR coverage is not readily interpretable by construction procurement personnel and that this draft of 4-2-201 would improve their understanding.

The Committee decided that if current ASPR provisions are as difficult to understand as indicated they should be reviewed and clarified for general use, or, if clarification is required only for the construction area, such coverage should be inserted in the "peculiar to construction" part of the ASPR. To this end the Subcommittee was instructed to review this provision using any or all items in it which are considered necessary.

In paragraph (vii) a period should be inserted after the word "used" in the last sentence and the words "except where customary" deleted.

In provision (xvi) the period at the end of the sentence should be deleted and the words "to the IFL" should be inserted.

In paragraph (xviii) this provision should be modified to conform with 4-1-317 as modified.

In paragraph (xix) "See 4-1-302.2 and 4-7-103.15" should be deleted.

The Subcommittee was instructed to update the "Caution to Bidders" provisions in paragraph (xxi).

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"4-2-202.1 Bidding Time."

The Subcommittee was instructed to examine ASPR 2-202.1, to add "site inspection" provisions, including reference to "construction season" and other applicable subjects and to delete this paragraph 4-202.1.

"4-2-202.3 Bid Samples." and

"4-2-202.4 Descriptive Literature"

After discussion it was determined that these two paragraphs should be deleted. However, the Subcommittee was instructed that if it considers the "applicability" provisions are not adequate it should develop necessary modifications to the present ASPR.

"4-2-202.5 Site Inspection."

The Subcommittee was instructed to develop wording to be inserted as (xxi) in 4-2-201 (renumbering the present (xxi) to be (xxii)) consistent with the provisions in the invitation.

"4-2-203 Methods of Soliciting Bids."

It was decided to delete the "(a)" paragraph and in the "(b)" paragraph to substitute for the word "Advance" in the title the word "Preinvitation" deleting "(b)".

"4-2-207 Amendment of Invitations for Bids. See 2-207"

It was decided to delete the second and third sentences of this provision.

"4-2-210 Prequalification of Bidders."

It was decided to defer consideration of this provision in depth pending the results of Major Luken's coordination with the General Accounting Office in connection with Procedures for Determining Responsibility of Prospective Contractors.

"4-2-402 Opening of Bids"

The Subcommittee was instructed to restudy this provision in the light of 4-1-310 above.

"4-2-404.1 Cancellation of Invitation after Opening. See 2-404.1"

The Subcommittee was instructed to develop rewording of 2-404.1 to include the additional grounds for cancellation in this provision 4-2-404.1.

Consideration of the remainder of the Subcommittee's report was deferred until 8 October 1962.

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consideration of this case with an informal report by Major Lukens to the effect that the General Accounting Office had approved the principle of prequalification of bidders on the limited basis applicable to this case.

The Committee recognized that the subject was broad and complex though it had, up to the present, been limited to missile sites. The Members discussed the advisability of exploring it more broadly for the development of general ASPR coverage and determined to initiate a new case for that purpose. This was assigned No. 62-184 and entitled "Prequalification of Bidders". The following subcommittee members were designated:

Army	-	Lt. Robert Robertory, JAG-A
Navy	-	Lt. Cmdr. D. E. Ward, ONM
Air Force	-	Mr. John Wren, SAFGC
DSA	-	Mr. Tom Rooney - Chairman Maj. L. A. O'Toole

The DSA Policy Member was designated liaison to the ASPR Committee.

The reporting date for the subcommittee's report was established as 14 November 1962.

"4-2-405" - It was determined to withhold action on this paragraph until the subcommittee report on the Comptroller General decisions is received. Meanwhile, discussion developed the comment that anything which affects price is not a minor informality. Further discussion revolved around a case in which the inadvertent exclusion of an item from a low bid involved 1/20 of the price differential between it and the next low bidder, and that a corrected bid would therefore still be low. This was considered a minor informality since its inclusion would not have changed the relative standing of the low bidder. Other cases were cited and discussed and it was recognized that the problems involved are not limited to the construction field. It was decided that the Comptroller General decisions should be carefully scrutinized and that if it is determined to make any change in the coverage of this subject it should be on the basis of general application rather than special application to construction only.

"4-2-407" - After discussion of the Davis-Bacon rule, it was decided that there should be coverage of the Act and the subcommittee was instructed to give it consideration. Discussion centered around the fact that wage rate determinations vary and that contracts may not be awarded on the basis of wage rates in effect when the invitations were issued but which have expired before award. It was pointed out that if a new wage rate determined after bid date but before award is lower than the rate in effect on the date of the bid, acceptance of the bid which was low before the rate was changed is not necessarily proper, since a bidder who was not the lowest bidder on the basis of the original rate might now come in and bid a lower price than the original low bid. This statement has been informally confirmed by Mr. Welch of the Comptroller General's office. The subcommittee was instructed to review this paragraph in the light of this discussion, and Committee comment was withheld.

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Subpart 5 - The question was raised as to whether and why the development of alternative types of construction are necessarily limited, as the coverage seems to indicate, to two-step formal advertising. The members were unable to draw a clear understanding of this subpart and requested that the subcommittee clarify it.

"4-3-000" - It was mentioned that this paragraph may become unnecessary when the coverage of part 3 is recast.

"4-3-101(a)" - was deleted.

"4-3-101(b)" - The DOD directive setting forth uniform standards for the employment and payment of architect-engineers was again discussed and the subcommittee was instructed to develop coverage for insertion in ASPR of the substance of the directive. After a rigorous pruning of the material in the directive the subcommittee representatives urged that the curves be inserted in the draft. The subcommittee was instructed to place in its proposed ASPR coverage what it believes belongs in it, including the text related to the use of the curves. It was stated that the curves, in effect, give advance information as to the fees which the AE's may expect and thus destroy the Government negotiating position. The 6% maximum limitation indicates exactly how much the AE can expect to receive once the construction contract designs are fixed.

The subcommittee spokesmen indicated that they felt that part of the coverage should continue to be restricted. The subcommittee was further instructed to check all directives bearing on the subject and to assure that the draft would transfer all appropriate material into ASPR and permit cancellation of all directive material which thus becomes unnecessary.

"4-3-104.1" - was deleted.

"4-3-104.2" - "4-3-104.4" - was deleted and the subcommittee was instructed to insert in this area of their draft only such material which is unique to construction.

"4-3-105" - The subcommittee was instructed to reword this paragraph to make it clear that the estimate mentioned, which is used as the basis for the establishment of the architect-engineer fee, is actually a figure negotiated by the Government and the contractors, and not just the initial Government estimate. The subcommittee was instructed to determine where in ASPR to place this material.

"4-3-106" - was deleted.

"4-3-110" - After considerable discussion it was decided that the subcommittee should reword the paragraph to indicate their intent more clearly.

All of subpart 2 was deleted except that the substance of 4-3-201.3 was ordered retained but placed where the subcommittee determined to be proper.

"4-3-201.4" - in which only the second sentence was retained and placed in 3-206.2. At the same time the Committee indicated that the subcommittee should consider clarifying the basic authority in ASPR 206.2 for construction and removing the prohibition against negotiating construction contracts in Puerto Rico.

Subpart 3 was deleted.

(8 October 1962)



1. Case 61-160 - Construction Coverage. Consideration of the proposed construction coverage was resumed.

"4-3-100" was deleted.

"4-3-400" - Subpart 4" is unnecessary in view of the existence in the ASPR of Section III, Part 4.

In accordance with the present approach, applicable to the entire coverage of construction contracting, the Subcommittee was instructed to prepare coverage of only what is unique to construction in the light of what is now in Section III, Part 4 of ASPR.

At this point it was determined to set forth specifically the differences between the approach in accordance with which the document under examination was prepared and the new approach in accordance with which the Subcommittee is now required to prepare revised ASPR coverage. The original approach was to gather into one place in ASPR, such as a new Section IV, all material applicable specifically to construction contracting, whereas the new guidelines are to the effect that coverage in Section IV will comprise only material unique to construction contracting and that insertions or other revisions of all other appropriate areas of ASPR should be made to accommodate construction coverage. Additionally, the following three items only should be inserted in Subpart 6: (1) the difference between the \$2,000 maximum coverage proposed and the \$2,500 provision in existing ASPR. (2) the difference in provisions under which small purchases may be negotiated - namely, that under this provision at least three qualified sources must be solicited and ASPR coverage to the effect that less than three should be solicited, and (3) In 4-3-602 substitute for the reference to 4-3-201 the actual substance of 4-3-201. Generally the word "proposals" should be substituted for the word "quotations".

"Subpart 7" - The fact that negotiated overhead rates are very rarely used in construction was discussed but it was decided that, since AE contracts do sometimes use overhead rates, this should be mentioned in the coverage, being restricted to cost reimburseable type contracts which the AE may have. Reference to "the list of contractors" in this part was discussed and it developed that each service has and promulgates copies of this jointly prepared list. The rarity of use of the negotiated rate results from the fact that it is applicable only to personnel actually located in the AE's home office. The consensus of opinion among the Members was to delete Subpart 7 in its entirety unless the Subcommittee considered it necessary to enter some material to high-light the point involved.

"Subpart 8 - 4-3-800" - The point was raised that, since there is so little use of negotiated contracts in construction procurement, there is correspondingly little need for coverage of negotiation policy and techniques. The Committee determined therefore that the Subcommittee should review the entire Subpart in the light of the new guidelines and set forth only those portions of DOD Directives 4105.45 and 4105.56 which are unique to construction and belong in ASPR. It was also considered that some of the material belongs in a document such as a negotiators' handbook or guide. The Subcommittee was instructed to consider these aspects of the coverage.

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(15 Oct 62)

"4-3-806" - The Subcommittee was advised that, although the estimate is the basis of the fee computation, this fee computation is not the primary reason for the cost estimate. The Subcommittee was instructed to give serious consideration to the insertion in ASPR of fee ceilings - perhaps by the insertion of the curves themselves.

"4-3-808.2(b)" - The Subcommittee was instructed to verify the provisions of 10 U.S. Code 4540, 7212, and 9540 to determine whether the limitations therein set forth are applicable. It was not considered appropriate to cite the code provisions as the authority for this coverage.

"4-3-808.4(b)" - It was determined that this paragraph needed clarification and that it could also probably be reduced considerably.

"4-3-809" - It was considered that there is much unnecessary duplication in this paragraph and that it, as well as Subparts 9 and 10, should be reduced.

"4-3-1001.3" - In the second sentence delete "furnished by the subcontractor" and substitute "secured from the prime contractor". The next to the last sentence should be reworded by the Subcommittee so that it is not absolutely firm, because, although cost-plus-a-percentage-of-cost-type prime contracts are not legal and must not be used by the Government, we do not have the authority to outlaw them positively in subcontracting if the prime contractor with a fixed-price contract manages to secure the lowest subcontract price even though this type of subcontract is used. The Subcommittee was instructed to reword all of subpart 10.

"4-3-1003.3(a)" - Add "where possible" or words to that effect to clarify the meaning of the first sentence.

"4-3-1003.4" - The need for the second sentence was considered and Subcommittee representatives attributed its need to the clerical and fiscal complications which would result without it.

"4-3-1004(b)" - It was pointed out that, in redrafting this provision, the Subcommittee may find that existing Section XV may be adequate. (ASPR puts the advance understanding provision on a permissive basis whereas the present draft puts it on a mandatory basis.)

"Subpart 7" - The Subcommittee was instructed to up-date the list of agencies set forth, listing not only the Economy Act Agencies, but all others which have authority to use another agency to perform work for them.

"4-6-000" - The Special Subcommittee in Case No. 62-173, dealing with definitions of the "United States", should take this matter into consideration.

"Subpart 2 - 4-6-000" - Since the Buy American regulation is presently in a state of flux, the Subcommittee is instructed to reserve space for coverage but to take no other action at this time.

"4-6-701" - The Subcommittee in Case No. 62-173 should consider this provision.

"4-6-702" - The Subcommittee indicated that it had developed this provision because it considered that all the statutory requirements should be located in one place for convenience of use.

Further consideration of this case will be scheduled for 29 October 1962, at 0030 Hours.

(15 October 1962)

1. Case 61-160 - Construction Coverage. Consideration of the proposed construction coverage was resumed.

"4-6-700" - This paragraph was returned to the Subcommittee for reconsideration in connection with Case 62-173.

"4-6-702" - This paragraph was deleted.

"4-6-703" - The Subcommittee was instructed to rewrite this paragraph eliminating the mandatory feature and converting it into an "alert" to the desirability of technical agreements. The Subcommittee may reference 1-109.4 if considered necessary.

"4-6-704" - The first paragraph was considered unduly restrictive and the Subcommittee was instructed to reword the paragraph if it is considered necessary to retain it. The second paragraph was deleted.

"4-6-705" - In line 3, the word "near" was changed to "nearly". In lines 4 and 5 the following words were deleted, "with the labor laws of the place of the work and". In the last sentence the word "native" was changed to "indigenous" and in the line before the last, the word "ask" was replaced by the words "consider requesting".

"4-6-706" - The Subcommittee was instructed to reconsider the concept of designating a contractor "as agent for the United States". The following words were deleted "bring to the attention of the United States diplomatic officers" in the second sentence and replaced by the word "consider". The Subcommittee was also instructed to explore Section XI coverage and possibly buttressing that material, instead of using the material in 4-6-706, thus enabling the deletion of this paragraph.

"4-6-707" - This subject was considered more complex than the proposed coverage and more accurately covered elsewhere. It was considered not unique to construction and was therefore ordered deleted, and the subject is to be handled under Case 62-90. Mr. Speck was designated as a member of the Subcommittee on Case 62-90. Mr. Haugh agreed to communicate with the Subcommittee on Case 62-90 to determine the present status of their actions and the length of extension it would require to develop this added coverage.

"4-7-101(b)" - Insert the word "reimbursement" after the word "cost" in the first line. Deletion of all definition material was recommended to the Subcommittee in view of the definitions now in ASPR. "c" was deleted and the following substituted: "(c) The term 'Architect-Engineer contract' means any contract entered into for providing services for the production and delivery of designs, plans, drawings, and specifications and/or services for supervision and inspection of construction." "d" was deleted.

"4-7-102" - delete "as required" in the second line.

"4-7-102.3" - With regard to the use of Standard Form 23A, it was pointed out that Mr. Gasque of GSA may revise it. It was also pointed out that the definitions set forth in 4-7-102.1 through 102.7 were set forth in ASPR Section VII, Part 6 and in Standard Form 23A.

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"4-7-102.7(b)" - Should be clarified with GSA. A deviation now permits the Army to use this clause. The Subcommittee was instructed to check with GSA as to the present validity of the deviation. Change the material before the first comma to read as follows: "In multi-million dollar contracts in excess of one year;". The clause material set forth in this paragraph beginning with the word "where" through the word "excluded" was authorized. In paragraph "(c)" on pages 126 and 127 the second sentence was deleted and the remainder of the paragraph ordered transferred to 4-7-105.28. The following clauses were identified as being in ASPR: 4-7-102.8, 102.9, 1-2.11, 102.12, 102.17, 102.23, 102.25, and 102.26.

"4-7-102.27" - The words "the requirements of" were inserted after the word "with". In the second line "11-401.2" was changed to read "11-401.1 and 11-401.2 as appropriate".

"4-7-102.32" - The word "comprised" in the first sentence was changed to read "composed".

"4-7-103" - was deleted. The Subcommittee was instructed to use the expression "the requirements of" generally between the words "in accordance with" and the number identifying the provision.

"4-7-103.11" - The Subcommittee was instructed to give consideration to Case 62-154, ASPR Implementation of H.R. 5532, in connection with this paragraph.

"4-7-103.15" - In the second sentence of the clause, substitute the word "from" in lieu of the word "for" before "the contracting officer". The Subcommittee was instructed to revise 103.17(a) so as to make it usable in its present ASPR location for construction also. The words "as is authorized under" in the first sentence of the text were deleted and the words "consistent with" were substituted. This same substitution was ordered made in paragraph "b" of the text material on Page 141.

Further consideration of this case will be scheduled for 29 October 1962 0930 hours.

(22 October 1962)

1. Case 61-160 - Construction Coverage. Discussion of proposed ASPR coverage was resumed.

"4-7-103.18" - After discussion pointing out that the proposed coverage of the clauses differs from corresponding ASPR coverage to make them more specifically applicable to construction, it was determined that the Subcommittee redraft the provision reducing it to the minimum coverage necessary.

"4-7-103.19" - The same action was taken as in 4-7-103.18.

"4-7-103.20" - It was stated by the Subcommittee representatives that the clause set forth has been in use for years in the construction area. The \$10,000 minimum is not in accordance with the provision of Appendix E620 and E621. The Subcommittee had discussed the provision with Mr. John Bachman of the Contract Finance Committee who advised them that full conformance with provisions of ASPR 7-104.39 was mandatory.

"4-7-103.21" - This paragraph was revised to conform with 7-104.40, using the established phrase "in accordance with the requirements of". The Subcommittee was instructed not to take this action, however, pending the outcome of Case 62-154, in which it is expected that a definition of "effective" or "adequate" "competition" would be developed.

"4-7-104" - Delete "in accordance with departmental procedures".

"4-7-104.1" - Change the word "change" to "alterations" to conform with the wording of Standard Form 23. The Subcommittee was also instructed to insert the dates of all clauses after the titles routinely.

"4-7-104.3" - Although this clause was approved, the Subcommittee was instructed that, at some later date, after the close of this case, when review of this provision would again be made, consideration should be given to the development of guides for the use of the clause.

"4-7-104.4" - This clause was ordered moved so as to become 103.22.

"4-7-105" - The use of the words "additional provisions" was questioned as compared with the words "additional clauses" used in 4-7-104 and it was pointed out that since the word "provision" was used in Standard Form 23A it was repeated here. Discussion centered around the fact that the second sentence in paragraph (a) actually constituted a built-in blanket deviation, which the Committee did not approve.

The Committee decided that the deviation procedure in ASPR 1-109 should apply. The Committee however recognized the need of the Departments to use modification of the clauses in 4-7-105 under different circumstances. The Subcommittee was instructed therefore to submit alternative (standard) clauses to be used when circumstances are such that the clauses presently proposed in 4-7-105 would not be entirely suitable. The Subcommittee was also instructed to consider whether the clauses in 4-7-105 should be incorporated in 4-7-102, 103, or 104.

The Subcommittee was generally advised to avoid the use of the expression "and/or," and that contractors are now referred to as "he" and "his," and not "it".

"4-7-105.1" - The Committee considered this provision in the light of 4-7-102.2 and Standard Forms 20, 21, 22, 23, and 23A. The Subcommittee was asked to bring to the next meeting samples of invitations to bid embodying the material under consideration.

Further consideration of this case was suspended until 5 November 1962.

(29 October 1962)

Case 61-160 - Construction Coverage. Copies of a memorandum from the Army Legal Member dated 6 November 1962 were distributed to the Members under the subject case. The memorandum pointed out that the clauses prescribed in 1-1404 relating to Employment of Ocean-Going Vessels and Preference for United States-Flag Vessels which makes the requirements therein applicable to "any supplies to be furnished hereunder", is susceptible to the interpretation that these requirements do not apply to construction contracts. The memorandum further presented proposed revisions to the clauses to correct this situation.

The Committee agreed that this item should be added to the Agenda for the Wednesday, 21 November 1962 meeting for consideration.

(20 November 1962)

1. Case 61-160 - Construction Coverage. The Chairman raised the question of whether Architectural Engineer coverage should be included in the new construction section. The Committee concluded that the Subcommittee should endeavor to cover everything that is currently published in the Department of Defense Directives (4105.45 and 4105.56) except the profit and fee curves. The Committee further agreed that the Profit and Fee curves should remain in a separate directive, as long as the current classification is retained.

The Members then resumed consideration of the Subcommittee report dated 28 June 1962 commencing on page 154.

"4-7-105.3 and .4" were concurred in.

With respect to (a) of the "4-7-105.5" paragraph, the Members noted that the paragraph needed changing to provide for withholding of progress payments unless schedules are submitted.

The Subcommittee was requested to revise the "4-7-105.6" paragraph to determine the necessity of its retention.

(a) of the "4-7-105.7" paragraph was deleted.

The "4-7-105.8" paragraph was approved.

The Subcommittee was requested to review the "4-7-105.9" paragraph to determine its necessity.

"4-7-105.10" was concurred in.

"4-7-105.11" - The Subcommittee was requested to review the title and determine whether the last two sentences were necessary.

"4-7-105.12" - The Subcommittee was requested to review this paragraph and clarify the language.

"4-7-105.13" - The Subcommittee was requested to consolidate the liquidated damage paragraph with the liquidated damage coverage in 4-1-309.

"4-7-105.14" - The Subcommittee was requested to revise this paragraph to cover referenced specifications and the last sentence of subparagraph (c) of the clause was deleted.

"4-7-105.15" - The Subcommittee was requested to revise the clause under this paragraph.

"4-7-105.16" - This paragraph was approved.

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~~Clause to read "Identification, Government-Furnished Property"~~ Ad-  
monally the Subcommittee was requested to determine whether or not the

(Add this to top of page) "4-7-105.17" - Subparagraph (a) of the clause approved. Subparagraph (b), the Subcommittee was requested to revise the subparagraph to conform with the Department of Labor regulation. Subparagraph (c) was deleted.

Subparagraph (d), the Subcommittee was requested to consider the need for the retention of this subparagraph. Subparagraph (e), this subparagraph was discussed at considerable length and further consideration deferred to Monday, 3 December 1962, on the problem of whether disputes arising out of wage determination of the Secretary of Labor should be precluded from consideration by the Armed Services Board of Contract Appeals.

"4-7-105.18" - Concurred in as presented.

"4-7-105.19" - The Subcommittee was requested to change the title of the clause to read "Identification, Government-Furnished Property". Additionally the Subcommittee was requested to determine whether or not the third sentence is redundant of coverage in the standard Government-Furnished Property clause.

"4-7-105.20" - The Subcommittee was requested to ascertain whether this material is already included in the standard Government-Furnished Property clause.

"4-7-105.21" - The Subcommittee was requested to consolidate this coverage with the Utility coverage in Subpart 8.

"4-7-105.22" and ".23" concurred in as presented.

"4-7-105.24" - Concurred in as presented. Additionally the Subcommittee was requested to consider whether the AFPI coverage for Airfield signal lights should be included in this paragraph.

"4-7-105.25" - The first sentence of the introductory language was revised to read "a clause substantially as follows shall be inserted in all construction contracts where identification is required for security or reasons". The second sentence was deleted.

"4-7-105.26" - Paragraph (b) was deleted and the Subcommittee was requested to incorporate the substance in the material and workmanship clause on Page 128.

"4-7-105.27" - The first sentence was replaced with a statement to the effect that the paragraph is applicable where there are separate identifiable items for which completion dates may be designated separately from the completion date of the entire project or from that of any other part of the project.

"4-7-105.28" - Paragraph 4-102.7(c) material on page 127 should be worked in with this material and set forth in 105.28. In the last sentence of the "Payments for Mobilization and Preparatory Work, Payment Item No. (a)" on page 174, reference should be made to the disputes clause. Reference "(iii)" the Subcommittee should reexamine and clarify the substance of this paragraph. The need for additional general provisions and additional specifications in paragraph "(c)(ii)(b)" of the clause on page 175 and the meaning and significance of the percentage were questioned and the Subcommittee requested to clarify. In the last sentence of this, reference should be made to the disputes clause.

"4-7-106" - was deleted.

"4-7-107" - The first three sentences were deleted.

"4-7-108" - The first two sentences were deleted and the word "from" was deleted from the second from the last sentence.



1. Case 61-160 - Construction Coverage. The Committee resumed consideration of the subject case, starting with 4-7-105.17.

"4-7-105.17 - Subparagraph (d) deleted.

"4-8-000" and "4-8-001" - The Committee questioned the need for these two paragraphs and requested the Subcommittee to reconsider their coverage.

"4-8-201" - The Committee deleted 4-8-201 and 4-8-202 as unnecessary.

"4-8-300" and "4-8-301" - Were deleted.

"4-8-302" - Deleted from this location and suggested the Subcommittee insert this or equivalent coverage in appropriate place in ASPR.

"4-8-305(b)" - There was considerable discussion of the use and meaning of the expression "total cost basis". The Subcommittee was instructed to review this paragraph and develop a clearer coverage and suggested that insertion in Section VIII might be more appropriate. The question was raised as to why, if the "total cost basis" was used, the contracting officer is required to secure approval at different levels in the different departments. It was suggested that the last sentence of the paragraph should be transferred to Section VIII, and the whole of 4-8-305(b) should be discussed with the Termination Subcommittee.

"4-8-400" - It was suggested that the Subcommittee clarify which type of architect-engineer contracts are intended to be covered. The Committee further questioned whether the "scope" paragraph was needed at all.

With regard to the entire Subpart 4, the suggestion was made that the Subcommittee remove what is not especially applicable to construction and to integrate this removed material to the appropriate "supplies" area in ASPR, broadening the scope and abstracting material as necessary from service regulations. The Subcommittee was instructed to develop general policy coverage, and insert it in 8-402.

"4-8-510" - Foreign Construction and, "4-8-511 - Foreign Contractor Inventories" - Were ordered deleted and integrated in ASPR as appropriate.

"4-8-600" and "4-8-601" - Were deleted.

"4-8-603" through "4-8-603.5" - The Subcommittee was instructed to determine whether this material is of predominant interest to the construction field and of only negligible interest elsewhere in ASPR, and then on the basis of this determination, either to leave it in this area or transfer it elsewhere in ASPR.

"4-8-702(l)(vi)" - The Subcommittee was instructed to substitute the present ASPR wording in this paragraph.

"4-8-706" - The Subcommittee was instructed to change this clause to be similar to that in 4-8-705 - namely that the full clause should be set forth.

"4-8-802" - The word "whereas" should be capitalized.

"4-8-901(b)" - Insert period after contract in line 4 and delete remainder of sentence. In line five, substitute "shall" for "will".

Consideration of this case will be resumed on 10 December 1962.

(3 December 1962)

1. Case 61-160 - Construction Coverage. The members resumed consideration of the construction coverage contained in the Subcommittee's report of 28 June 1962 starting with paragraph 4-9-000.

"4-9-000" - In considering this paragraph, the Members observed that the second two sentences did not appear to be necessary and the Subcommittee was requested to consider this comment and to coordinate any final coverage with the departmental Members of the Patents Subcommittee.

"4-9-102" - The second sentence was revised to read "However, an authorization and consent clause should be included in all architectural-engineering contracts which require the delivery of models or samples or other products or which may require the use of patented processes to test or perform under the architect-engineer contract, and in all construction contracts".

"4-9-102.1" and "4-9-103" - The Subcommittee was requested to reconsider these paragraphs to determine whether the coverage should be kept separately for construction contracts.

"4-9-103.1" - The Subcommittee was requested to delete all reference to Standard Form 23A.

"4-9-103.2" - The Subcommittee was requested to reconsider the third sentence of this paragraph on the basis that it is redundant of the coverage contained on page 238.

"4-9-104" - Subparagraph (a). The observation was made that this subparagraph was redundant of the coverage in ASPR 1-904.

Subparagraph (b). The word "rights" following the word "proprietary" in the text material was changed to read "data". The word "data" in the clause was inserted in lieu of the words "materials" and "features" after the word "proprietary".

"4-9-107(a)" - The words "proprietary rights" were deleted from this paragraph.

"4-9-200" - The Subcommittee was requested to reconsider this paragraph to determine whether it should be retained.

"4-9-202(b)" - The Subcommittee was requested to clarify this paragraph.

"4-9-203.1" - The last sentence of the provision was revised to add the following at the end of the last sentence: "for a period of three years after completion of the project".

"4-9-203.2" - The Subcommittee was requested to revise the "Shop Drawings" provision to conform to the coverage in 4-9-202.

"Subpart 3" was deleted.

"4-10-103(b)(i)". The parenthetical words were deleted.

"4-10-103(c)" - The word "basic" was changed to read "original".

"4-10-109.1(b)" - The words "and his assignees" were inserted after the word "contractor" in the first line of the first sentence.

"4-10-109.2" - The Subcommittee was requested to reconsider this paragraph to determine the necessity of its retention.

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"4-11-101" - was deleted.

"Subpart 2" was deleted.

"4-11-301" - was deleted.

"4-11-401" - was deleted.

In taking this action, the Members agreed that the clause set forth in the present ASPR 11-401.1 would be used in all formally advertised construction contracts. The Navy reservations on this paragraph were withdrawn.

"4-12-000" - The Subcommittee was requested to consider the need for the retention of this paragraph.

"4-12 - Part 1" - This part was deleted.

In taking this action, the Army Member agreed to consider the advisability of presenting a new case to expand the current coverage in Section XII, Part 1.

"4-12-301(c)" - The Members noted that the "Eight Hour Laws" coverage throughout this part required updating to reflect the Work Hours Act (P.L. 87-581).

"4-12-302" - The Members noted a revision of this coverage had been developed under ASPR Case 60-71. Copies of the material forwarded to the Department of Labor were provided the Subcommittee representatives, and the Subcommittee was requested to revise the paragraph to conform to the coverage developed under Case 60-71.

"4-12-304.1" - The first sentence was revised to read: "The contracting officer shall ascertain that the contractor is informed of the labor standards provisions of the contract and of his responsibilities thereunder in accordance with (b) below".

"4-12-304.2(b) and (c)" - The observation was made that the "5" and "90" calendar days respectively would be changed to read "10" and "120" calendar days.

"4-12-304.11" - The words "the False Affidavits Act" and the parenthesis around 18 U.S.C. 1001 were deleted.

"4-12 - Subpart 4, Subpart 5, Subpart 6, and Subpart 7" - were deleted. With respect to Subpart 7, the Subcommittee was requested to consider moving the coverage with respect to coordination into Section I, Part 3, and the coverage of overseas area requirements into the appropriate Part (7 or 8) of Section VI.

"Part 13 - Government Property" - was deleted.

"Part 14 - Inspection and Acceptance" - was tentatively deleted by the Committee pending a receipt of recommendations from the Subcommittee with respect to the necessity of its retention.

Consideration of the remainder was rescheduled for Monday, 17 December 1962, starting with Part 15 - Contract Clause Principles and Procedures.

(10 December 1962)

1/ Construction Coverage. The Members resumed consideration of the report from the Construction Subcommittee dated 28 June 1962 commencing with Part 15 appearing on page 317 with the following action:

"Part 15, Subpart 1" - It was the conclusion of the Committee that this subpart should be deleted and the cost principle retained in Section XV.

"Subpart 2" - The Committee concluded that this part should be deleted and that the new coverage contained in Paragraph 4-15-203 covering architectural-engineering contracts should be included in Section XV.

"Subpart 3" was deleted.

"Part 16, page 331" - concurred in.

"page 332" - concurred in.

"page 333" - concurred in deleting the words "in accordance with departmental procedures" in paragraph 104.

"pages 334 and 335" - concurred in with minor editorial changes which were noted by the Subcommittee representatives.

"page 336" - The contract provision was revised to delete the third sentence. The language following the contract provision was referred back to the Construction Subcommittee for consideration of including in Part 2.

"page 337, subparagraph (e)" - was deleted.

"page 338, subparagraph (f)" - was deleted.

"page 339" - concurred in.

"page 340" - Subparagraph 105(a) - The Subcommittee was requested to include language to the effect that if a deviation was made from Standard Forms, notification of such deviation will be provided to GSA.

"page 341" - concurred in.

"page 342, subparagraph 106(a)(i)" - The subparagraph was deleted. The Subcommittee was instructed to move this coverage under the Davis-Bacon Act coverage.

"page 343, subparagraph (iv)" - The Subcommittee was requested to clarify that the "performance bonds" in this paragraph is not to be construed to be Miller Act Bonds.

"page 345" - concurred in, changing the word "form" to read "format".

"pages 346 and 347" - concurred in.

"page 348" - The Subcommittee was requested to clarify the language in subparagraph (c).

"page 349" - The first line of paragraph (b) was deleted. The Subcommittee was requested to clarify the language in paragraph 6.

"page 350, paragraph 22" - The clause citation was revised to read "11-401.1".

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"pages 351, 352 and 353" - concurred in.

"page 355" - concurred in subject to changing the word "form" to read "format".

"pages 356, 357, 358 and 359" - concurred in.

"page 360, paragraph (8)" - The words "to whom the contractor shall report and be responsible" were deleted.

"Paragraph 10(b)" - The Subcommittee was requested to revise the first sentence of this paragraph to "provide for approval by the contracting officer unless his authority is subject to approval by higher authority". Additionally the Subcommittee was requested to revise this coverage to be applicable to rates in excess of the Davis-Bacon Act rates. The last sentence of the paragraph was deleted.

"page 361, paragraph 11(b)" - The last sentence of this paragraph was tentatively deleted pending receipt of justification from the Subcommittee for its retention.

"pages 362, 363 and 364" - concurred in.

"page 365" - concurred in changing the word "form" to "format". Additionally the Subcommittee was requested to identify the "clause" cited in paragraph 4-16-401.2.

"pages 366 and 367" - concurred in.

"page 368" - The first and third WHEREAS provisions were deleted.

"pages 369, 370, 371 and 372" - concurred in.

"page 373, paragraph 11" - The words "to whom the architect-engineer shall report and be responsible" were deleted.

"paragraph 13" - The last sentence was deleted.

"page 374, paragraph 14" - The Subcommittee was requested to clarify the paragraph.

"pages 375, 376, 377, 379, 381" - were concurred in.

With respect to the contract form for "architect-engineer services", the Air Force Legal Member suggested it would be appropriate to include a clause in such contracts to have the architect-engineer defend the adequacy of the plans and specifications, when such plans or specifications are questioned by the construction contractor. Following discussion of this point, the Air Force Legal Member volunteered to present proposed language to the Subcommittee for consideration.

"page 383" - It was suggested that the title for Standard Form 1093 be updated.

"page 384" - concurred in.

"page 385, paragraph 4-16-804.1" - The Subcommittee was requested to clarify this paragraph to state there are two "change order forms"; one which provides for acceptance by the contractor, and the other being DD Form 1319 which is a unilateral change order.

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"page 386" - The Subcommittee was requested to include coverage with respect to price changes.

"page 387" - The "supplemental agreement" form was deleted with the recommendation that the Subcommittee reference DD Form 1320 in paragraph 4-16-804.2.

"pages 388, 389, 390, 391, 393, 395 and 397" - concurred in.

"page 399" - Concurred in with direction to the Subcommittee to revise block 10 to read "signature of representatives of the contractor indicate contractor's agreement upon the rates and classifications".

"pages 401 and 403" - concurred in.

Consideration of Tab B to the Subcommittee's report was deferred on the basis that the changes made throughout the proposed construction coverage would cause the Subcommittee to substantially revise this tab. The Subcommittee was requested to present a revised Tab B with submission of their revised report.

The Subcommittee was requested to develop a revised report covering construction contracts in view of the Committee's considerations of the 28 June 1962 draft. The Subcommittee was requested to present their revised report for consideration by 25 February 1963.

(17 December 1962)

Case 61-160 - Definition of Construction. The Navy distributed copies of a memorandum dated 14 December 1962 presenting a proposed revision of the definition of construction to emphasize that "construction" does not include the manufacturing, producing, furnishing, construction, altering, repairing, processing or assembling of vessels, aircraft or other kinds of personal property.

The Committee determined to refer the suggested definition to the Construction Contract Subcommittee for consideration in the redrafting of the construction coverage.

3. Case 62-227 - Disposition of Disputes Arising Out of Construction Labor Standards Clauses. (2 January 1963)  
The Committee reviewed memoranda from the Office of General Counsel (I&L) dated 30 November 1962 and the Chairman, Armed Services Board of Contract Appeals dated 3 December 1962 commenting on whether disputes arising out of wage determinations of the Secretary of Labor should be procured by the ASBCA. The Committee concurred in the substance of the alternative proposed coverage set forth in the 30 November 1962 memorandum from the Office of General Counsel (I&L).

It was determined to refer the memorandum to the Construction Contract Subcommittee under Case 61-160 for inclusion in the revised construction coverage. The Construction Subcommittee was further requested to consider clarifying the applicability of the labor provisions coverage in the Counsel's proposal.

CASE CLOSED  
(23 January 1963)

Case 61-160 - Construction Coverage. At the request of the Army, the reporting date for submission of a report on the subject was extended to 11 March 1963.

(27 February 1963)

Case 61-100 - Construction Coverage - ASPR. The Members briefly discussed the procedures to be utilized in the consideration of the subject case with respect to having the Subcommittee report edited. The Committee concluded that a Special Editing Subcommittee should be established for this subject.

Members designated to the Special Editing Subcommittee were:

Army - LtCol Donald T. Ruby, AMC, OGC, Chairman  
Navy - Miss Frances Kelly, OGC, BuS&A

Additionally the Members agreed that Messers. Ryan and Speck of OGC and BuS&A could be called in as consultants when desired by the Editing Members.

(17 May 1963)

1. Case 61-160 - Construction Coverage - ASPR. The Committee undertook consideration of the revised report from the Construction Contract Subcommittee dated 17 April 1963, presenting in its Tab A revised construction procedures and in its Tab B recommendations from the Subcommittee to modify other paragraphs in ASPR to accommodate the new construction coverage.

Before undertaking consideration of the report on a paragraph by paragraph basis, the Chairman stated that the Committee was now in a position to finalize the construction coverage and that after editing, Industry should have an opportunity to comment on the proposed construction coverage and that publication is anticipated in the fall. In connection with editing, Lt. Col. Ruby, AMC, and Miss Frances Kelly, OGC BuS&A, were designated as a Special Editing Subcommittee for this case. Lt. Col. Ruby is the Chairman.

The Navy then raised the point that the Bureau of Yards and Docks has not as yet reviewed the report in detail and stated that before committing themselves, the Bureau of Yards and Docks should be given an opportunity to go over the report thoroughly. The Committee determined that it could undertake consideration of Part 1 at today's meeting but deferred consideration of other Parts until 3 June 1963.

With representatives of the Construction Contract and the Special Editing Subcommittee present, the Committee then undertook consideration of Tab A to the Subcommittee's report on a paragraph by paragraph basis as follows:

"Part 1 - General Provisions - 18-100" - The Committee deleted the second and last two sentences in this paragraph and referred the balance to the Special Editing Subcommittee for editing.

"18-101.1" - This paragraph was discussed at length and there was discussion as to whether this subject was peculiar to construction. It was agreed that the subject did not belong as a definition, but that the Special Editing Subcommittee should provide coverage of it either as text material following the "Changes" clause in Section XVIII or in connection with the Change Order form for construction contracts.

"18-101.2" - The Committee deleted this paragraph having determined this subject was adequately covered in Section I, Part 2.

"18-101.3" - The Committee concurred in this paragraph, but requested the Special Editing Subcommittee substitute an appropriate cross-reference in Section I, Part 2, for the definition of "construction" in ASPR 1, 201.21.

"18-101.4" - The Committee deleted this paragraph in that it was unduly restrictive.



"18-102" - The Committee concurred with this paragraph but requested that the Special Editing Subcommittee rewrite this to be consistent with present ASPR 4-101.1.

"18-103" - The Committee deleted this paragraph as being unnecessary for ASPR coverage.

"18-104" - The Committee discussed this paragraph at length and determined that the words "in the United States" raised a question of proper geographic coverage and that this paragraph was not correctly written. The Committee did agree, by consensus, that the subject should be covered in ASPR. The Army Legal Member volunteered to rewrite this paragraph; the Air Force Policy Member was requested to furnish the appropriate AFPR which covers this subject to him. The Army Legal Member was requested to provide the rewrite for consideration by the Committee by 3 June 1963.

"18-105" and "18-106" - With minor editorial changes, the Committee concurred in these paragraphs and referred them to the Special Editing Subcommittee.

"18-107" - The Committee concurred with this paragraph and determined that the Special Editing Subcommittee should place an appropriate cross-reference in ASPR 1-903.

"18-108" - This paragraph was deleted in that it is covered adequately in 1-905.

"18-109" - The Committee concurred with this paragraph, with minor editorial changes which were referred to the Special Editing Subcommittee.

"18-110" - The Committee concurred in this paragraph heading.

"18-110.1(1)" - The Committee approved this subparagraph with minor editorial changes, but requested that the Special Editing Subcommittee should make it clear in their redraft that the contracting officer is not responsible for preparing estimates.

"18-110.1(2)" - The Committee concurred in this subparagraph with minor editorial changes and also requested that the Special Editing Subcommittee insert the language now in 4-101.2(a) in the last sentence, in their redraft of this subparagraph.

"18-110.1(3) and 18-110.1(4)" - The Committee concurred with these two subparagraphs after minor editorial changes.

"18-110.2" - The Committee discussed this heading at length. A Tri-Service Group has the subject of DOD Directive 4105.45, regarding Architect-Engineer contracts, under study and has suggested a meeting with the ASPR Committee. It was determined that the ASPR Committee Members should contact their Tri-Service Group representatives individually, and that further consideration on this subject should be deferred until that time. The Committee also determined that paragraph "18-312.2" of the Subcommittee's report should be placed in this paragraph.

"18-111" - The Committee concurred in this paragraph with minor editorial changes and referred to the Special Editing Subcommittee.

"18-112(a)" - The Committee concurred in this paragraph and referred to the Special Editing Subcommittee for editing.

"18-112(b)" - The Committee generally concurred in this paragraph but requested that the Special Editing Subcommittee make clear the waiver authority of the Secretary of Defense or his designee regarding cost limits on cold storage facilities, enlisted men's housing, BOQs, and warehouses, in their redraft.

"18-113" - The Committee concurred in this paragraph with the suggestion that "such" should be inserted before "expediting action" in the last sentence.

"18-114" - The Committee concurred with this paragraph and referred it to the Special Editing Subcommittee for editing. There was a question as to the omission of the word "Hawaii" since "Alaska" was included after the words "within the United States" but this was explained in that "Alaska" is limited to seasonal construction.

"18-115" - The Committee discussed this paragraph at length and made numerous minor changes. It was agreed that added inspection and superintendence costs should be the minimum - rather than the normal - measure of liquidated damages. The Special Editing Subcommittee was requested to revise this paragraph.

"18-116" - The Committee discussed this paragraph and concurred with it but determined that its two sentences should be combined into one. Also it was noted at this time that the words "Head of the Construction Agency" should be revised to read "Head of a Procuring Activity" throughout this report.

"18-117" - The Committee concurred in this paragraph but noted that it might require review at such time as the "Code of Conduct" coverage is received from the DIAC.

The Army Policy Member was designated to contact the Corps of Engineers as to the status of coverage of minor construction.

Further consideration of this case will be scheduled for Monday, 3 June 1963, 0930 hours.

(20 May 1963)

1. Case 61-160 - Construction Coverage - ASPR. Before the Committee resumed consideration of the revised report from the Construction Contract Subcommittee dated 17 April 1963 on the subject matter, the Army Legal Member distributed copies of his rewrite of paragraph 18-104 "Sources of Construction Services, dated 28 May 1963. He mentioned that his rewrite does not follow the DOD Directive 1135.2, dated 5 August 1952, in certain respects. The Chairman then checked with the Members as to whether they had checked with their Tri-Service Group representatives with respect to DOD Directive 4105.45 regarding Architect-Engineer contracts. Not all the Members had completed their checking. The Committee then determined that the rewrite of paragraph 18-104, and further consideration on the Architect-Engineer contracts coverage would be considered at a later date.

With representatives of the Construction Contract Subcommittee and the Special Editing Subcommittee present, the Committee then undertook further consideration of Tab A to the Subcommittee's report on a paragraph by paragraph basis, beginning with Part 2, as follows:

"18-201" - The Committee concurred in this paragraph and referred it to the Special Editing Subcommittee.

"18-202" - The Committee discussed this paragraph at length and determined that (i) through (viii) was a duplication in that this is covered in paragraph 18-1104.2, dealing with Standard Form 20, and should be deleted. With respect to (xxii) and (xxiii), the Committee determined that since these two subparagraphs were the same as the Late Bids paragraphs in Section II (which have recently been modified under Case 60-144), cross-references to Section II would be sufficient. In discussing subparagraph (xxvi), the Committee determined that the parentheses should be deleted from the parenthetical material.

"18-203, 18-204, and 18-205" - The Committee concurred in these paragraphs and referred them to the Special Editing Subcommittee for editing.

"18-206" - The Committee discussed this paragraph and determined that the Special Editing Subcommittee should add, after the word "contractors" in the fifth line, the words "unless this requirement is waived by the Head of the Procuring Activity". Also the Committee changes the word "Such" to read "Preinvitation" in the sixth line.

"18-207" - The Committee discussed this paragraph at length and determined that all treatment of the Davis Bacon Act and wage determinations thereunder should be in one place. Also the Committee inserted the words "by the contracting Department" between the word "received" and "from" in the second line. The Committee further instructed the Special Editing Subcommittee to put a cross-reference in Section XII to this material.

"18-208" - The Committee concurred in this paragraph but requested that the Special Editing Subcommittee should add an explanatory reference to paragraph 18-110.1(3) of this report, such as by adding "as provided in 18-110.1(3)".

"18-209" - The Committee discussed this paragraph at length and determined to delete the words "or where the bids disclose misconception of the work arising from an ambiguity in the specifications". The Navy requested that this paragraph should be reconsidered after the Bureau of Yards & Docks has checked it out.

"18-210" - The Committee determined to delete this paragraph in that this subject was considered under ASPR Case 63-24 - Minor Informalities or Irregularities in Bids, ASPR 2-405 (Rev.), and is covered adequately in Section II, Part 4.

"18-211" - The Committee determined to defer consideration of this paragraph until the Air Force had an opportunity to submit their comments under Case 62-184. The Air Force will bring in their comments Monday, 10 June 1963.

"18-212" - The Committee determined to delete this paragraph and requested that the Special Editing Subcommittee edit and insert its substance in ASPR 10-102.5.

"18-213(a)" - The Committee discussed this paragraph at length and determined that the first sentence of this subparagraph should have been covered in paragraph 18-112 of this report. The Army Subcommittee Member volunteered to redraft this subparagraph to clarify the words "contingencies and administration" for insertion in 18-112.

"18-213(ii) and (iii)" - The Committee determined that the substance of these two subparagraphs were previously covered under Case 63-28 - Wage Determination Modifications, ASPR 12-404.2(c), and approved for printing in Section XII, Part 4. The Special Editing Subcommittee was requested to look at this case and provide coverage in the single location where all Davis-Bacon rules would be spelled out. Presumably, this will be in Part 10 of the new Section XVII.

"18-213(b)" - The Committee concurred in this subparagraph and referred it to the Special Editing Subcommittee.

"Part 3"

"18-301 and 18-301.1" - The Committee concurred in these paragraphs and referred them to the Special Editing Subcommittee.

"18-301.2" - The Committee considered this paragraph at length and made numerous changes. The OSD(Installations) representative present was requested to get in touch with the Architect-Engineer people and report back on the subject of "uniform procedures to be developed jointly by the Military Departments". The Committee determined that "uniform procedures" should be developed for ASPR and questioned the words "contracting agency" throughout this paragraph. The Committee determined that this should be changed to "contracting office". Further consideration will be given this paragraph at a later date.

"18-301.3" - The Committee concurred in this paragraph, subject to editing, and requested that the Special Editing Subcommittee rewrite to make clear the reference to "Conterminous United States" throughout the draft.

"18-302.1" - The Committee concurred in this paragraph and referred it to the Special Editing Subcommittee.

"18-302.2" - The Committee concurred in this paragraph and determined to delete the word "GSA" in the third line between the words "Standard" and "Form".

"18-302.3" - The Committee discussed this paragraph at length and made numerous editorial changes which were noted by the Special Editing Subcommittee representative. Also, it requested the OSD(Installations) representative to check and see if the uniform classification system mentioned in this paragraph has been developed. The Committee further instructed the Special Editing Subcommittee to place a cross-reference to 18-302.2 in the second sentence.

"18-302.4" - The Committee concurred in this paragraph and referred it to the Special Editing Subcommittee. Also it was noted that a Standard Form had not been developed for use by the Military Departments as of this date. The OSD (Installations) representative will check into this.

"18-302.5" - The Committee discussed this paragraph at length and made minor editorial changes. The Special Editing Subcommittee was requested to rewrite "highly classified" to cover "Secret" and "Top Secret". Also the OSD (Installations) Representative volunteered to found out whether a Form had been developed for use in the submission of the consolidated quarterly reports which are required.

"18-303" - The Committee concurred in the map and referred it to the Special Editing Subcommittee.

"18-304" - The Committee concurred in this paragraph and referred it to the Special Editing Subcommittee.

"18-305.1 and 18-305.2" - The Committee questioned why these two paragraphs should be treated differently for construction contracts. The question was raised why there should be a determination of responsibility before solicitations are made. The Committee determined to delete these two paragraphs.

"18-306.1" - The Committee deleted this paragraph.

"18-306.2(a) and (b)" - The Committee determined that this should follow present ASPR 3-218 and requested the Special Editing Subcommittee to check this.

"18-306.2(c)" - The Committee concurred in this subparagraph but requested that the Special Editing Subcommittee should make this subparagraph consistent with the last two sentences in ASPR 4-101.1.

"18-307.1" - The Committee concurred in this paragraph except that it requested the Special Editing Subcommittee to insert a reference to DD Form 1155 in this paragraph in addition to Standard Form 19 for small purchases of construction.

"18-307.2" - The Committee concurred in this paragraph and referred it to the Special Editing Subcommittee.

"18-307.3" - The Committee determined to delete this paragraph in that this subject is covered adequately in Section III, Part 6.

"18-308" - The Committee deleted this paragraph since it is covered in ASPR Section III, Part 8.

"18-309.1" - The Committee determined to defer further consideration of this point until a later date, in view of the pending development of ASPR coverage of the Weighted Guidelines System for determining profit and fee targets.

"18-309.2" - The Committee determined to defer consideration of this point until Monday, 10 June 1963.

"18-309.3" - The Committee discussed this paragraph at length and the point was raised that the subcontractor fees are the prime contractor's business. Also, the Committee questioned the uninformative DOD Instruction citation. The Committee determined that this paragraph would have to be looked into further before they could approve it. The Committee determined to start with this paragraph at the Monday, 10 June 1963, meeting.

The Army Policy Member who was designated to contact the Corps of Engineers as to the status of the coverage on minor construction informed the Committee that he would furnish a report covering this subject not later than 28 June 1963.

Further consideration of this case will be scheduled for Monday, 10 June 1963, 0930 Hours.

(3 June 1963)

1. Case 61-160 - Construction Coverage, ASPR. The Committee resumed consideration of the revised report of the Construction Contract Subcommittee dated 17 April 1963, on the subject matter on a paragraph by paragraph basis, starting with paragraph 18-1000. Members of the Construction Contract Subcommittee and the Special Editing Subcommittee were present for this discussion, and during part of the time Members of the Patents Subcommittee were present.

The following actions were taken on this report, beginning with paragraph 18-1000:

18-1000 Deleted.

18-1000(a)(1) and (2) Deleted.

18-1000(a) (3) Deleted and Editing Subcommittee instructed to insert appropriately in Section XII, the substance of an informal draft to be furnished by Mr. Minkin.

18-1000(b) Deleted and Editing Subcommittee instructed to insert in Section XII, appropriately reworded.

18-1001(a) Last sentence "Applies only to United States" to be edited. Editors to assure that there is in Section VII a reference to Section XII and Section XVIII, Part 10.

18-1001(d) Revised to add the last two sentences of present ASPR 12-401(d) "Each....Attention: DSAH-PL."

18-1001(e) In last 2 lines delete "abide...(Section 18-1003.5)" and insert "to make payment in accordance with the Table of Employees Compensation, which is based on the Project Stabilization Agreement".

18-1002.1 - The Special Editing Subcommittee was requested to utilize Case 60-71 after further discussion by the Committee (see May 3 minutes.)

18-1002.2 Approved, but clear and explicit cross-reference to this should be inserted by the Editors in Section XII.

18-1003.1 Line 3 - Change "from" to "see" and enclose "see Standard Form 19A" in parentheses.

18-1003.2 - Delete 18-1003.2(1) and renumber "(2)" and "(3)" to "(1)" and "(2)".

18-1003.2(2) Update clause date and delete "Work Hours Act of 1962 - Overtime Compensation" and".

18-1003.3 Line 1 - Delete "Every" and edit, taking into consideration the exemption from the Work Hours Act for construction contracts under \$2,000.

18-1004.1 - Delete "procuring activity" in "(a)" and insert "Department".

18-1004.2 - Change "Head of the Construction Agency" to "Department". Edit "supersedeas decisions" concept into (c). Delete "(e)". Change "(f)" to "(e)". Delete (ii) and insert elsewhere as appropriate. Change (g) to (f).

18-1004.3 - Delete third sentence. The blank DOD Form mentioned in this paragraph is the one shown on page 207 of this draft. In next to last sentence change "Secretary" to "Department", delete "and to the Head of the Construction Agency," substituting "in accordance with departmental procedures". In last sentence delete "Head of the Construction Agency".

18-1004.4 Editors insert reference to certification form.

18-1004.5 DOD Form mentioned is that shown on page 207 of this draft.

18-1004.6(b) Change "construction agency" to "contracting officer".

18-1004.7 Form mentioned is that on page 207. Edit next to last sentence, deleting "if" and dividing it into "(i), (ii), and (iii)."

18-1004.8(g) Delete "on the project" in third sentence. DOD Form, fourth sentence, is the one on page 207 of draft.

18-1004.9 Editors requested to consider retention or deletion.

18-1004.10 Approved

18-1004.11 Make appropriate substitution for "Head of the Construction Agency".

18-1004.12(a) Delete "and" from expression "and/or" in first line. Edit out "a report to the Head of the Construction Agency" with appropriate substitution.

18-1004.13 Delete "Head of the Construction Agency", making appropriate substitution.

18-1004.14 Delete "construction agencies" and "Head of the Construction Agency" making the appropriate substitutions.

18-1004.15 Approved, except for "Head of a Construction Agency".

18-1005 Editing Subcommittee will edit first sentence.

18-1006 Mr. Noah Minkin will present revised coverage after discussion with Department of Labor personnel. Assure that the fourth sentence coincides with clause on page 69.

After completing consideration of 18-1006 the Committee undertook consideration of Part 7.

18-700 Revised by the Committee as follows: In third sentence insert "principle purpose of the" between "where the" and "procurement," deleting "wholly for". Revise last sentence to read as follows: "Where the procurement calls for both construction work or architect-engineer work and research and development, or supplies and materials, the contract shall include the patent, data, and copyright provisions set forth in Section IX. However, the contract may be divided into parts, and the appropriate Section IX provisions may be made applicable only to the non-construction (or non-architect-engineer) work, with the contractor (or architect-engineer) work being made subject to the patent rights, data, and copyright provisions of this Part if appropriate."

~~18-701~~ Approved



18-701.1 Approved

18-702 Approved

18-702.1 (i) The Editing Subcommittee was authorized to delete the first sentence. In the next sentence "Such" was replaced by "All construction", and cross reference to SF23A should be made. In (ii) "shall" in lines four and five were changed to "may".

During consideration of (ii) the Committee established Case 63-106 - Licenses for Non-standard Materials, Methods, etc. to be Used in Construction Contracts and assigned it to the Patents Subcommittee to determine (a) whether, as to non-standard materials, methods, etc. which must necessarily be used to perform a construction or other contract, the contracting officer shall endeavor to obtain, in accordance with departmental procedures, a license to use any patents to govern their use, and, if so, (b) to develop ASPR coverage accordingly. The Committee agreed that, if this concept is desirable for construction contracts, it would seem equally desirable for other contracts. Hence, the Patents Subcommittee was requested to consider this in the context of Defense contracts generally - not just construction contracts. Reporting date was set as 15 July 1963.

18-702.3 To be edited to avoid redundancy if possible with Section IX.

18-703 The cross-reference to 9-104 was approved. The Editors were requested to insert a new caption "18-704 - Notice of Patent or Copyright Designs" and to limit the coverage to patents and copyrights only - excluding "other proprietary data".

18-704 Change number to 18-705, delete from (a) the two sentences beginning with "Variations in size", through "as a work of art". The remainder of (a), and all of (b) and (c) should be edited.

18-705 Change to 18-706, delete second sentence.

18-706.1(new) Insert after "Definitions" the sentence deleted above.

18-706, 707.1, and 707.2 Renumber to be 18-707, 708, 708.1, and 708.2 respectively.

At this point consideration of this case was suspended to be resumed at 0930 hours, Monday, 24 June 1963.

(17 June 1963)

1. Case 61-160 - Construction Coverage, ASPR. The Committee resumed consideration of the revised report from the Construction Contract Subcommittee dated 17 April 1963 on the subject matter starting with paragraph 18-309.1 on a paragraph by paragraph basis. Members of the Construction Contract Subcommittee and Special Editing Subcommittee were present for this discussion.

The following actions were taken on this report beginning with paragraph 18-309.1:

"18-309.1" - The Committee concurred in this paragraph but noted that when the Committee resumed consideration of ASPR Case 62-218, in the latest draft of the Working Group, there is no exclusion of construction contracts. Also the Army Subcommittee Member volunteered to redraft this paragraph and provide to the Special Editing Subcommittee a brief revision.

"18-309.2" - The Committee concurred in this paragraph and referred it to the Special Editing Subcommittee.

"18-309.3(a)" - The Committee discussed this paragraph at length. Regarding the referenced DOD Instruction (4105.46, dated August 9, 1956) dealing with Fee Curves, it was determined that since it is classified "For Official Use Only", it should not be set forth in the ASPR. It was the consensus of the Committee that the material in the DOD Instruction was properly a matter for Departmental procedures.

"18-309.3(b)" - The Committee concurred in this subparagraph but determined that the Special Editing Subcommittee should edit to take out the words "and subcontractors" in this subparagraph as well as in subparagraph (a).

"18-309.4" - The question was raised on this paragraph as to the need for Incentive pricing in Architect-Engineer contracts. The Committee determined that the incentive clauses in A-E contracts were not necessary, and determined to delete reference to CPIF's and FPI's on this page and throughout this report. The Committee referred this paragraph to the Special Editing Subcommittee to accomplish this deletion and to further edit this paragraph.

"18-310, 18-311.1 and 18-311.2" - The Committee determined to delete these paragraphs with instruction to the Special Editing Subcommittee to put a cross-reference to Section III, Part 9.

"18-312.1(a)" - The Committee concurred in this paragraph with minor editorial changes. Also the Committee inserted the words "or more" after the words "involving \$10,000" in the second line.

"18-312.1(b)" - The Committee determined that the words "cost or" should be inserted before the word "pricing" throughout this subparagraph. The Committee further deleted the word "additional" appearing in the fifth line. The Committee referred this subparagraph to the Special Editing Subcommittee with instructions to place a cross-reference to Section III, Part 8, which covers Pricing.

"18-312.1(c)" - The Committee concurred in this subparagraph and referred it to the Special Editing Subcommittee.

"18-312.1(d)" - The Committee determined that the deletion of this subparagraph was up to the Special Editing Subcommittee, since it apparently is covered adequately in Section III, Part 9.

"18-312.2" - The Committee determined that this paragraph should be checked with the Tri-Service Group who have been working on DOD Directive 4105.45 with respect to Architect Engineer Contracts. It was suggested that perhaps the Tri-Service Group should draft material on A-E contracts for this Section rather than a draft revision to the DOD Directive and should furnish this material either to the ASPR Committee or the Special Editing Subcommittee. The Policy Members were again requested to check with their Departmental representatives on the Tri-Service Group and report back. Further consideration of this paragraph was deferred until this has been done.

"18-312.3 and 18-312.4" - It was the consensus of the Committee to combine 18-312.1 through 18-312.4 into two separate paragraphs; one covering construction contracts, the other covering Architect-Engineer contracts. The Special Editing Subcommittee was requested to accomplish this task.

"18-313.1" - The Committee concurred with this paragraph, placing a period in the fourth line after the word "estimate." and deleting the remainder of the sentence. Referred to the Special Editing Subcommittee for redrafting.

"18-313.2" - The Committee concurred with this paragraph after editorial changes and referred it to the Special Editing Subcommittee. The Special Editing Subcommittee representative present was requested to check statutory limits on Architect-Engineer fees.

"18-313.3 and 18-313.4" - The Committee concurred with these paragraphs but requested that the Special Editing Subcommittee consider deleting the first sentence in both paragraphs when editing.

"18-314" - The Committee concurred with this paragraph with instructions to the Special Editing Subcommittee to put in a reference to the "Changes" clause here.

"18-315" - The Committee determined to delete this paragraph in that it is covered in 3-809.

"18-316" - The Committee determined to delete this paragraph and revise 3-811 to consolidate this paragraph in there.

#### "Part 4"

"18-4 \_\_\_\_ .2" - The Committee concurred with this paragraph with editorial changes. The Special Editing Subcommittee was instructed to replace the first sentence with the substantially following language "When construction is contemplated in a foreign country, the Government of the United States and the Government of the foreign country may negotiate a technical working agreement to govern the construction. In such a case, it is highly desirable that the Corps of Engineers or the Bureau of Yards and Docks, as appropriate, should be consulted so that it can provide guidance on the terms of the technical working agreement."

"18-4 \_\_\_\_ .3" - The Committee concurred in this paragraph with minor editorial changes.

"18-4 \_\_\_\_ .4. The Committee concurred in this paragraph and referred it to the Special Editing Subcommittee.

#### "Part 5"

"18-500 through 18-501.3" - The Committee concurred in these paragraphs and referred them to the Special Editing Subcommittee.

"18-501.4 and 18-501.5" - The Committee concurred in this paragraph with instructions to the Special Editing Subcommittee to make them consistent with present ASPR Section VII, Part 6, regarding P.L. 87-653 requirements.

"18-501.6 and 18-501.7" - The Committee concurred in these two paragraphs.

"18-501.8" - The Committee concurred in this paragraph with minor editorial changes. It was determined that the (c) paragraph should be deleted since it is more fully and adequately covered in the (b) paragraph of the clause "Payments to Contractor (Nov. 1961)".

"18-501.9 through 18-501.26" - The Committee concurred in these paragraphs and referred them to the Special Editing Subcommittee.

18-701 Approved

18-701.1 Approved

18-702 Approved

18-702.1 (i) The Editing Subcommittee was authorized to delete the first sentence. In the next sentence "Such" was replaced by "All construction", and cross reference to SF23A should be made. In (ii) "shall" in lines four and five were changed to "may".

During consideration of (ii) the Committee established Case 63-106 - Licenses for Non-standard Materials, Methods, etc. to be Used in Construction Contracts and assigned it to the Patents Subcommittee to determine (a) whether, as to non-standard materials, methods, etc. which must necessarily be used to perform a construction or other contract, the contracting officer shall endeavor to obtain, in accordance with departmental procedures, a license to use any patents to govern their use, and, if so, (b) to develop ASPR coverage accordingly. The Committee agreed that, if this concept is desirable for construction contracts, it would seem equally desirable for other contracts. Hence, the Patents Subcommittee was requested to consider this in the context of Defense contracts generally - not just construction contracts. Reporting date was set as 15 July 1963.

18-702.3 To be edited to avoid redundancy if possible with Section IX.

18-703 The cross-reference to 9-104 was approved. The Editors were requested to insert a new caption "18-704 - Notice of Patent or Copyright Designs" and to limit the coverage to patents and copyrights only - excluding "other proprietary data".

18-704 Change number to 18-705, delete from (a) the two sentences beginning with "Variations in size", through "as a work of art". The remainder of (a), and all of (b) and (c) should be edited.

18-705 Change to 18-706, delete second sentence.

18-706.1(new) Insert after "Definitions" the sentence deleted above.

18-706, 707.1, and 707.2 Renumber to be 18-707, 708, 708.1, and 708.2 respectively.

At this point consideration of this case was suspended to be resumed at 0930 hours, Monday, 24 June 1963.

(17 June 1963)

- a. When required for reasons of security.
- b. For disciplinary action arising from military offenses.
- c. For training and maintaining competence in recognized trade skills.
- d. In and around the barracks which they themselves occupy or are about to occupy.

(d) Civil Service maintenance forces may, in addition to (a), above:

- (1) Perform construction where the work is of a minor nature.
- (2) Perform construction where conditions are such that it is impracticable to prepare plans and specifications.
- (3) Perform construction where the work must be performed intermittently to avoid disrupting other important operations.
- (4) Perform repair incident to maintenance.



18-503.10(a)(1) through (v) - The Committee has revised the Incentive Contract clause in Revision No. 12 of the 1962 Edition of the ASPR, and therefore the definitions here should be deleted.

"18-503.18(b) through (g)" - The Committee concurred in these paragraphs and referred them to the Special Editing Subcommittee.

"18-503.18(h)" - The question was raised as to why contractor inventory is peculiar to construction. The Army Subcommittee Member volunteered to check this.

"18-503.18(i) through (m)" - The Committee concurred in these subparagraphs and referred them to the Special Editing Subcommittee.

"18-503.19 through 18-503.24" - The Committee concurred in these paragraphs and referred them to the Special Editing Subcommittee.

"18-503.25(a)" - The Committee concurred in this subparagraph and referred it to the Special Editing Subcommittee.

"18-503.25(b)" - The Committee discussed this subparagraph at length and it was pointed out that the Department of Labor Regulations, Part 5 do not say anything about "agreement of the class of labor concerned". It was the consensus of the Members to leave this language in. The Committee concurred in this paragraph but determined that the Special Editing Subcommittee should use the words "the employees concerned or their representative" in place of "class of labor concerned".

"18-503.25(c)" - The Committee discussed this subparagraph at length, and the OSD(Manpower) representative present questioned whether its substance has been approved by the Department of Labor. It was agreed that this should be done prior to approving it for print. The OSD(Manpower) representative volunteered to furnish to the Special Editing Subcommittee clarifying changes in this subparagraph (c).

"18-503.26 and 18-503.27" - The Committee concurred in these two paragraphs with minor editorial changes and referred them to the Special Editing Subcommittee.

"18-503.28" - The Committee questioned the necessity of this paragraph. The Army Subcommittee Member volunteered to look at this and to advise the Special Editing Subcommittee if it is necessary. It was the consensus of the Committee that this paragraph should be deleted unless they are furnished an explanation as to why it is necessary.

"18-503.29 through 18-503.37" - With minor editorial changes, the Committee concurred in these paragraphs and referred them to the Special Editing Subcommittee.

"18-503.38" - The Committee requested the Special Editing Subcommittee to cross-reference paragraph 18-115, to consider revising the caption to read "Amount of Liquidated Damages", and to revise the last part of the clause to read "... shall pay the Government as liquidated damages, pursuant to the 'Termination for Default-Damages for Delay-Time Extensions' clause of this contract, the sum of \_\_\_\_\_ for each day of delay".

"18-504" - The Committee concurred in this paragraph and referred it to the Special Editing Subcommittee.

"18-504.1" - The Committee concurred with this paragraph after minor changes and instructed the Special Editing Subcommittee to put the date "(JAN. 1961)" in the clause.



"18-501.27" - The Committee concurred in this paragraph but determined at this point to delete throughout the report the words "the requirements of" whenever they pertain to references to other Sections of ASPR.

"18-501.28 through 18-501.33" - The Committee concurred in these paragraphs and referred them to the Special Editing Subcommittee.

"18-502" - The Committee determined to insert the word "Required" between "Additional" and "General" in the heading of this paragraph.

"18-502.1 through 18-502.3" - The Committee concurred in these paragraphs and referred them to the Special Editing Subcommittee.

"18-502.4" - The Committee approved this paragraph and referred it to the Special Editing Subcommittee with instruction that the "delays-damages clause" in the (c) paragraph should be given the proper title.

"18-502.5" - The Committee discussed this paragraph at length and it was the consensus of the Committee to keep only the first two sentences. Also the Special Editing Subcommittee was requested to spell out the proper titles of the Standard Form 23A clause.

"18-502.6" - The Committee discussed this paragraph at length and the question was raised of the necessity of the last two sentences of this clause. The Army Subcommittee Member volunteered to check into this and see if they are necessary. Also the Special Editing Subcommittee was requested to revise the "flow down" language.

"18-502.7 and 18-502.8" - The Committee concurred in these two paragraphs and referred them to the Special Editing Subcommittee.

"18-502.9" - The Committee approved the (a) and (b) subparagraphs of this clause but determined that the (c) subparagraph should be recast in that this is an instruction. The Special Editing Subcommittee was referred to page 158 of the prior Subcommittee report for a better treatment of subparagraph (c).

"18-502.10 through 18-503.9" - The Committee concurred in these paragraphs with minor editorial changes and referred them to the Special Editing Subcommittee.

"18-503.10" - The Committee concurred in this paragraph but requested the Special Editing Subcommittee to clarify the last part of it.

"18-503.11" - The Committee concurred in this paragraph but instructed the Special Editing Subcommittee to add coverage of the clauses in ASPR 7-104.41 and 7-104.42.

"18-503.12 through 18-503.15" - The Committee concurred with these paragraphs with minor editorial changes and referred them to the Special Editing Subcommittee.

"18-503.16" - The Committee determined to come back to this paragraph on Monday, 17 June 1963 when they will take up Part 7 of this report.

"18-503.17" - The Committee noted at this point that the reference to ASPR 13-402 might change due to the present ASPR Case 61-115 - Government Property - Section XIII (Rev.). The Committee determined that the (b) paragraph should end after the word "contracts." in the second line.

"18-504.2" - The Committee concurred in this paragraph and referred it to the Special Editing Subcommittee.

"18-504.3" - It was the consensus of the Committee that this paragraph should be deleted from here and placed in 18-502 of this report.

"Part 6 - Termination of Contracts" - The Committee discussed this Part and with minor editorial changes referred it to the Special Editing Subcommittee. The Army Subcommittee Member will fill in the number in paragraph 18-602 and give it to the Special Editing Subcommittee.

"Part 7 - Patents, Data, and Copyrights" - The Committee deferred consideration of this Part until Monday, 17 June 1963, in order to give ample time for everyone to be ready for this discussion.

"Part 8 - Bonds" - The Committee concurred in this Part, subject to the Special Editing Subcommittee revising it as necessary to reflect the results of ASPR Cases, 63-12 and 62-14. There was some discussion on "18-805.1 - Expediter Plan", as to whether the Department of Treasury is still handling the bonds on Navy and Air Force contracts. The Navy Legal Member volunteered to get information on this point.

"Part 9 - Taxes" - The question was raised as to why this Part is in this report in that it is already covered in Section XI, Part 1. It was the consensus of the Members to leave this Part in and it was referred to

"Part 10- Labor" - The Committee deferred consideration of this Part until Monday, 17 June 1963, in order that the Chairman of the Construction Contract Subcommittee or his Deputy could be present in order to present his views as to why this Part was left in. The Committee will resume consideration of this Part at 0930 Hours, 17 June 1963.

Further consideration of this case will be scheduled for Monday, 17 June 1963, 0930 Hours.

(10 June 1963)

1. Case 61-160 - Construction Coverage, ASPR. The Committee resumed consideration of the revised report of the Construction Contract Subcommittee dated 17 April 1963, on the subject matter on a paragraph by paragraph basis, starting with paragraph 18-1000. Members of the Construction Contract Subcommittee and the Special Editing Subcommittee were present for this discussion, and during part of the time Members of the Patents Subcommittee were present.

The following actions were taken on this report, beginning with paragraph 18-1000:

18-1000 Deleted.

1. Case 01-104 - Construction Coverage, ASPR. The Committee assumed consideration of the revised report from the Construction Subcommittee, dated 17 April 1963, on the subject matter, on a paragraph by paragraph basis.

The following actions were taken on this report:

The Committee established a Special Drafting Group to draft coverage, for insertion in the proposed ASPR Parts XVIII - 1 and 3, of the substance of DOD Directive 4105.45 dated June 1952 - Uniform Standards for the Employment and Payment of Architect-Engineer Services, and DOD Directive 4105.56 - Uniform Standards for the Selection of Architect-Engineer Firms for Professional Services. The following were designated Members of the Group:

Army - Edward C. Cox, OASA(I&L), Chairman  
- B. H. Knobla, ENG  
- H. B. Zackrison, ENG

Navy - Capt C. E. Spellman, USN, Y&D

AF - Col A. Witters, AFOCE

OSD - W. H. Beal, OASD(I&L)  
- M. Barth, OASD(I&L)

Date report due - 22 July 1963 - to be delivered directly to the Editing Subcommittee.

In again considering paragraph 18-104.1 in place of the Subcommittee draft of this paragraph, the Committee approved the following, submitted by the Army:

18-104 SOURCES OF CONSTRUCTION SERVICES. Generally military construction in the United States shall be performed by contract. The following exceptions to this policy are authorized:

(a) Military construction units, other military personnel and Civil Service maintenance personnel may:

(1) Perform construction in periods of emergency arising from fire, flood, explosion, pestilence or other disaster to provide essential facilities for shelter, safety, and protection of personnel and property.

(2) Perform construction where the isolated location of the work makes it impracticable to obtain qualified contractors.

(3) Perform construction where the necessity for obtaining security clearances for contractor personnel introduces unacceptable delays in operational schedules.

(b) Military construction units may perform construction in addition to that set forth in (a), above, but only when the integrity of the unit will be maintained and the project will contribute to the training of the unit for its wartime mission.

(c) Military personnel, other than military construction units, may, in addition to (a), above:

(1) Perform construction in connection with welfare and recreational facilities intended for their own use.

(2) Perform repair incident to maintenance:

Case 61-160 - Construction Coverage - ASPR. The members were advised that the Special Editing Subcommittee would be unable to meet its scheduled reporting date of 1 October 1963 on the subject case, and had requested an extension until 1 November 1963. The Committee approved the extension to 1 November 1963. In taking this action the Committee agreed that the Special Editing Subcommittee report should be submitted as soon as possible, but in no event later than 1 November 1963.

(20 September 1963)

Case 61-160 - Construction Coverage - ASPR. Copies of a memorandum dated 14 November 1963 from the Acting Chief, Liaison Staff, SBA, commenting on the proposed coverage developed under the subject case were distributed to the members for consideration when the edited draft of the construction coverage is considered.

(15 November 1963)

Case 61-160 - Construction Coverage - ASPR. Copies of an errata sheet dated 13 November 1963 presenting corrections to the Editing Subcommittee report on the subject case were distributed to the members for use in conjunction with the Editing Subcommittee report when this case is considered on Monday, 2 December 1963.

(20 November 1963)

Case 61-160 - Construction Coverage - ASPR. Consideration of the report from the Special Editing Subcommittee dated 1 November 1963 presenting an edited draft of Section XVIII "Procurement of Construction" which was scheduled to be considered on Monday, 2 December 1963, was rescheduled for consideration on Monday, 9 December 1963.

(27 November 1963)

1. Case 61-160 - Construction Coverage - ASPR. The Committee undertook consideration of a memorandum dated 1 November 1963 from the Special Editing Subcommittee together with its Exhibit "A," consisting of an edited draft of proposed Section XVIII "Procurement of Construction".

The Committee proceeded with a detailed examination of the exhibit, making the changes set forth below.

Page 2 - paragraph 18-102, 4th line from bottom, correct spelling of "accordance".

Page 3 - Mr. Ryan agreed to explore and report on 16 December as to the circumstances under which painting is subject to the Davis-Bacon Act.

Page 4 - paragraph 18-104, line 7, change "7-601.18" to "7-603.15;" paragraph 18-105, line 10, change "18-604.40" to "7-603.38".

Page 5 - paragraph 18-106, line 3 of text, change "that" to "whether". Line 5, delete "that," and after word "bonds" delete "can be required" and substitute "are to be furnished"; paragraph 18-107, line 4, after "basis" add "and".

It was suggested that this coverage be coordinated with the Office of the Assistant Secretary of Defense (Manpower).

18-805.1 - In the third line substitute "Companies" for "Executives", in the sixth line insert "capital stock" between "in behalf of" and "surety companies", and delete "members of the above Association and are." The Army indicated that the Treasury Department may discontinue the service it presently performs for the Navy and Air Force as indicated in the last sentence. No decision was made as to what action to take in this event.

18-1100 - To be edited by Editing Subcommittee.

18-1101 - Approved.

18-1102 - Editing Subcommittee requested to insert provision for use of DD Form 1155 here, as well as elsewhere as necessary.

18-1103 - Approved.

18-1104 and 18-1104.1 - Approved.

18-1104.2 - Editing Subcommittee requested to clarify the use and intent of the expression "the following paragraph" in "(2)".

18-1104.3 - Insert after "breakdown" in third line "for each separate schedule".

18-1105(b) - At end of "(b)" add provision that copies of such "changes or additional provisions" should be sent to the GSA.

18-1106 - On Page 175 of draft, clarify in clause "a" that it is applicable only to property covered by the contract.

18-1107 - Approved.

18-1108 - Add provision for use of DD Form 1155.

18-1109 - On Page 183 of draft, clarify Paragraph "5b."; on Page 185, Paragraph 11, specify that clause in 7-104.41(c) is to be used; on Page 186, make appropriate substitutions for "Head of a Construction Agency,"; on Page 189, Paragraph 42, Editors should provide appropriate insertion in blank space.

The remainder of the draft was approved.

The Editing Subcommittee was requested to use temporary letters to identify forms introduced.

Consideration of this case was suspended pending report from Editing Subcommittee.

(24 June 1963)

Page 14 paragraph 18-209 text revised to read "Wherever a construction project is urgent or complex, the Head of a Procuring Activity may authorize a contracting officer to invite bids from prequalified bidders only. Procedures used to prequalify bidders for such purpose shall be approved by the Head of the Procuring Activity or his designee."

Page 14 paragraph 18-210 - first two sentences revised and combined to read "No award shall be made at a price which, with allowances for Government imposed contingencies and overhead, exceeds the statutory authorization for the project unless the limitations for the particular contract can be and have been waived (see 18-110(c))."

Page 15 paragraph 18-301, paragraph revised to read "Contracts for construction (see 18-101.1) shall be formally advertised whenever such method is feasible and practicable (see 18-102) under existing conditions and circumstances, (but see 1-706.8), even though negotiation may be authorized as indicated hereafter".

Page 16 paragraph 18-301.1, lines 1 and 2 of text, delete "or repair"; paragraph 18-301.2, delete text and substitute "Contracts for construction to be performed outside the United States, its possessions, and Puerto Rico shall be negotiated pursuant to 10 USC 2304(a)(6), (3-206) unless formal advertising is authorized in accordance with 18-102".

Page 17 line 2, delete "while not required, may" and substitute "shall".

The Army member agreed to present on 16 December a proposed rewrite of 18-303 in the light of the weighted guidelines and DOD instructions relating to the determinations of fees for architect-engineer and construction contractors.

Page 18 paragraph 18-305.1(b), line 4 change "3-807.\_\_)" to "3-807.3)".

Pages 19 and 20 paragraph 18-305.2, revise text to read "This type of contract may be used either in construction or in the architect-engineer field only when its use is consistent with 3-405 and 18-112. In either case, a Government estimate will be prepared".

Page 20 - Mr. Beale to change 18-108.2 to cover "firm estimate".

Page 21 line 7 delete, "less the profit or fee of the construction contractor". (subject to confirmation by the Navy legal member); paragraph 18-307(a) revised to read "The principles set forth in 18-305.1(b) and 18-306.2 are applicable to modifications of fixed-price architect-engineer contracts for additional work outside the scope of the contract."; in paragraph (b), line 3, after "order" insert "with or without prior negotiation,"; delete paragraph (c).

The Navy legal member agreed to check the appropriateness of the proposed coverage of 18-306.3.

Page 22 renumber paragraph (d) as paragraph (c); delete original paragraph (c).

Consideration of Section XVIII, Part 4, was delayed pending receipt of revised material from Mr. Beale.

Page 32 paragraph 18-502.2, revise first sentence to read "When construction is contemplated in a foreign country, the Office of the Chief of Engineers, Department of the Army, or the Bureau of Yards and Docks, Department of the Navy, as appropriate, should be invited to participate in the negotiations of any technical working agreement with a foreign government concerning the construction."; in line 3 of next sentence substitute "should" for "shall".

Page 6 - line 3, delete "local"; paragraph 18-108.1(a), line 5, after "of" insert "such"; paragraph (b), line 3, substitute "it" for "they"; revise paragraph (d) to read as follows:

"If the procurement is by negotiation, cost breakdown figures in the Government estimate may be disclosed during negotiations but only to the extent deemed necessary for arriving at a fair and reasonable price and provided that the overall amount of the Government estimate is not thereby disclosed prior to award. At the time of award the 'For Official Use Only' designation shall be removed. After award the Government estimate may be revealed, upon request, to those firms or individuals who submitted proposals."

Page 7 paragraph 18-108.2, after title insert "(Reserved)". With regard to paragraph 18-109 Disclosure of Approximate Value of Construction Projects, there was discussion of a proposal that the concept of magnitude in terms of physical scope of construction be substituted for the concept of approximate value. The construction representatives present agreed to review this problem and report on 16 December.

The Army Policy Member agreed to present to the Committee on 16 December 1963 an exploration of the practice of unbalanced bidding and to comment on the feasibility, desirability, and legality of permitting or prohibiting it.

Page 8 paragraph (c), lines 5 and 6 after "regular" insert "(general purpose)"; delete "enlisted men's", after "barracks" insert "for enlisted personnel"; delete "and" and insert "or" and change the initial capitals in "Bachelor Officers' Quarters" to lower case letters; and in line 7 in "Annual" change initial capital to lower case "a".

Page 9 paragraph 18-111, line 3 in "Annual" change initial capital "A" to lower case "a"; paragraph 18-113 in line 4, change "7-601.41" to "7-603.39".

Page 10 line 2, delete "Normally however," and substitute "Whenever"; line 5, after "allowances" delete "Therefore"; paragraph 18-114, line 4 of text, after "price" insert "construction"; paragraph 18-115 - in lines 2 and 3 of text delete "Head of a Procuring Activity" and substitute "Secretary of the department concerned".

Mr. Williamson, OASD (I&L) was requested to consult with OSD Counsel as to whether Appendix G is applicable to construction contracts.



61-160

Page 34 lines 4 and 5 set off phrase "to the extent economical" by commas; add new paragraph "18-505 Cargo Preference Act - See Section I, Part 14".

Page 63 - paragraph 18-704.2(c), line 5, delete "procuring activity" and substitute "contracting department".

At this point consideration of Exhibit A was suspended, to be resumed on 15 December 1963.

(9 December 1963)

9. Case 61-160 - Construction Coverage - ASPR. A memorandum from Colonel Ruby dated 21 November 1963 presenting proposed coverage of Section XVIII, Part 9, was distributed for consideration at the next meeting devoted to this case.

The Committee resumed consideration of Exhibit A of the 1 November 1963 report of the Special Editing Subcommittee on page 21, paragraph 18-306.3 taking the following action:

Page 7, para. 18-109 - Mr. Ryan proposed rewording of paragraph title as "Disclosure of Magnitude of Construction Projects" and the last line of the first sentence so that the paragraph would read:

"Where the estimated value of the work is \$25,000 or more, advance notices or invitations for bids and requests for proposals shall include a statement of the magnitude in physical characteristics of the proposed construction".

The rest of the paragraph was deleted.

Page 21, para. 18-306.3 - The Navy Legal Member agreed to meet with the other legal members immediately following the meeting to develop exact language for insertion at the end of the paragraph.

Page 35, para. 18-601(b) - It was considered not clear and Mr. Ryan agreed to consult with Mr. Carl Clark and to prepare clearer language for the first sentence.

Page 36, para. 18-603 - It was suggested in the second from the last line of the paragraph (page 36) the words "compensation for" be inserted between "as" and "services".

Page 36, para. 18-606(a)(iii) - Insert "(as distinguished from a lump sum)" between "unit-price" and "architect-engineer".

Page 38, para. 18-608(ii) - Second line of second sentence change "cost-type" to "cost-reimbursement-type".

Page 40, para. 18-615 - Change "to" to "by" in second, third, and fourth lines.

Page 41 - Since 18-618, 18-618.1, 18-618.2, 618.3, and 618.6 duplicate the material in 8-603, and 8-603.1 through 8-603.4, these Section 8 paragraphs should perhaps be deleted. Mr. Ryan was requested to consider this and report to the Committee. It was determined to delete 8-603 and 8-603.1 through 8-603.4.

Page 41, para. 18-618.4 - The meaning and need of the second sentence were questioned and Mr. Ryan was requested to look into this and rewrite the sentence if it is needed.

Page 44 (b) - Move "so" from line 4 to line 5 between "unqualified" and "that".

Page 46, para. 18-618.5 - In third sentence delete "must not, however, abuse his discretion and".

Page 49, para. 18-625 - The text was changed to read "The Clause in 8-701(c) shall be inserted in each fixed-price type contract, as defined in 3-404, for architect-engineer services in excess of \$10,000 except that the clause shall be modified as provided in para. 8-701(d)."; 18-626 was similarly modified with the substitution of para. 8-702(c).

Page 53, para. 18-701.2(b) - Substitute "Kennedy" for "Canaveral" throughout the paragraph; material now in 12-402, 12-402.1, and 12-402.2 will appear in 18-702, 18-702.1, and 18-702.2. Changes in 12-402, etc. will be presented by Mr. Saylor regarding possible deletion of cooks, storekeepers, and foremen. Department of Labor concurrence will be secured by Colonel John S. Wilson, Army representative.

Page 58 - Make substitution of "Kennedy" for "Canaveral" throughout 18-703.5 if approved by Department of Air Force.

Page 62, para. 18-704.1(b)(ii) - This was deleted and Messrs. Saylor and Wilson will redraft this paragraph.

Page 62, para. 18-704.2(b) and (c) - Colonel Ruby and Mr. Ryan agreed to secure and present coverage of the subject of Secretary of Labor wage rate determinations made after award of contract.

Page 63, para. 18-704.2(c), line 5 - Substitute "contracting department" for "procuring activity".

Page 64 - Delete 18-704.2(e)(ii) and add to 2-201(c) as (XI):

"If it is necessary to advertise before receipt of a wage determination, a notice that the schedule of minimum wage rates to be paid under the contract shall be published as an amendment to the specifications".

Editor's Note: See old draft 18-1004.2(e)(ii).

Page 67, para. 18-704.7 - Sixth line from the bottom insert "or other" between "daily" and "reports".

Page 79, para. 18-706 - Third line from top of page insert "the department concerned" between "activity" and "and"; eighth line from bottom of page substitute "a" for "the" between "before" and "contracting"; insert "which might be affected by such an opinion of the Secretary of Labor" between "decision" and "is".

Page 80, para. 18-801 - Delete period at end of sentence and add "and such security shall be furnished prior to commencement of contract performance"; 18-802 insert "Performance bonds shall be furnished prior to commencement of contract performance;" comply with Editor's Note; delete para. 18-802.1; 18-803 insert "Payment bond shall be furnished prior to commencement of contract performance" and comply with Editor's Note.

61-160

There was discussion of the actual date which should appear on the performance bond, and it was agreed that the date of the signature or a later date would be proper, but a date prior to signature.

Page 81, para. 18-806 - Delete text and insert "Reserved", pending Navy development and presentation of revised text.

Pages 82, through 88 - Consideration of Part 9 was deferred until the next meeting on Construction, when the Navy would be prepared to propose revised material.

The Special Editorial Subcommittee was advised to consider all material currently revising the ASPR.

Exhibit B was taken under consideration:

Page 11, para. 7-602.22 - The text was corrected to read, "In accordance with 12-802, insert the clause set forth therein".

Page 11 para. 7-602.23 - The text was corrected to read, "In accordance with 18-703, insert the clauses entitled":

Page 29, para. 7-603.26 - In the second line of (c) of clause, insert quotes around "disputes".

Consideration suspended until next meeting devoted to Construction.

(20 December 1963)

7 20-64 100 110

Case 61-160 - Construction Coverage - ASPR. The members briefly discussed the scheduling of the subject case for 1400 hours, 7 February 1964 and concluded that consideration of this case should be rescheduled to Wednesday, 12 February 1964 at 1400 hours.

(24 January 1964)

Case 61-160 - Construction Coverage - ASPR. Copies of a memorandum from the staff dated 31 January 1964 on the subject case were distributed. The members were advised that due to the inability of the editor to be present for this case on 12 February 1964 the case was being rescheduled for consideration on Friday, 14 February 1964 at 1400 hours.

(31 January 1964)

3. Case 61-160 - Construction Coverage - ASPR. The Committee undertook consideration of a proposed draft of Section XVIII, Part 4, Architect-Engineer Selection Procedures, presented by Mr. Beal with a memorandum dated 6 February 1964 from the Director of Construction, OASD (I&E), stating that "the draft covers all material now contained in DOD Directive 4105.55 and, upon publication in ASPR, would supersede and cancel this directive".

The draft, as revised by the Committee, was approved and will be included in the material to be submitted to Industry.

The Quarterly Report Form (Attachment 2 of the Part 4 draft) was revised by the deletion of the word "basic" throughout the form.

The members considered the status of tasks previously assigned for the resolution of specific problems and took action on each as follows:

Page 7 of Exhibit A. Paragraph 18-108.2, was reserved pending action by the Tri-Service Committee on DOD Directive 4105.45. Mr. Beal agreed to follow up on this matter.

Page 8 of Exhibit A. Paragraph 18-110(c) was revised by the insertion after the first sentence of "An unbalanced bid or proposal is one which is based on prices significantly less than cost for some work, and prices which are overstated for other work".

Page 17 of Exhibit A. Paragraph 18-303.1. It was decided that the first sentence should not be changed and should read "The guidance set forth in 3-808, while not required, may be used in considering profit as an element of price under fixed-price type construction type contracts". The remainder of the paragraph was deleted.

Page 21 of Exhibit A. Paragraph 18-306.3. Mr. Markey reported that consultations among the legal members are continuing with regard to this coverage and have not reached a conclusion as yet, although he expects to be able to report by 15 March 1964. Meanwhile, the last sentence of the paragraph was deleted, and the subject area was reserved.

Page 43 of Exhibit A. Paragraph 18-618.4(a). Mr. Ryan concurred in the Committee's previous decision to delete the second sentence.

Page 82 of Exhibit A. Section XVIII, Part 9. This is reserved pending a report from the Patents Subcommittee, which has a present reporting date of 9 March 1964.

The total construction "package" as developed to date was ordered sent to Industry representatives for comment.

CASE SUSPENDED  
(14 February 1964)

Case 61-160 - Construction Coverage - ASPR. Copies of a revised draft incorporating the changes heretofore developed by the Committee were distributed to the members for information. It is contemplated that the revised draft will be forwarded to industry for comment in the near future.

(11 March 1964)

1. Case 61-160 - Construction Coverage - ASPR. The Chairman advised the members that at the request of the Navy consideration of the Patents Subcommittee report dated 31 March 1964 had been rescheduled to Friday, 17 April 1964 at 1400 hours.

(15 April 1964)

Page 2, Case 61-160 - Construction Coverage - ASPR (7 January 1964). The second paragraph was revised to insert a new second sentence reading as follows:

"Second line from the end of the paragraph delete "for the purpose of including profit" and between "as" and "services" insert "compensation for"."

Page 5. The last sentence of the paragraph continuing on the top of the page was revised to read as follows:

"Page 1, para. 3 of 16-815.1, current ASPR, was revised by adding:"

The quoted material in paragraph (c) following the sentence was revised to delete the first four words reading:

"If this form is".

The word "When" was substituted in lieu thereof.

(15 April 1964)

4. Case 61-160 - Construction Coverage - ASPR. The members considered a report from the Patents Subcommittee dated 31 March 1964 presenting proposed coverage for inclusion as Part 9 of Section XVIII with respect to Patents, Data and Copyrights. The Committee reviewed the proposed coverage on a page by page basis and made a number of changes therein which were noted by the Editing representative present. With respect to paragraph 18-910.2 the observation was made that this paragraph would have to be edited to conform to the new data coverage. Mr. Williamson of the staff volunteered to present the data coverage to the editors. The Editing Subcommittee was requested to present an edited report by 18 May 1964.

The Committee agreed that upon receipt of the edited coverage the proposed Part 9 of Section XVIII would be forwarded to industry for comment.

(17 April 1964)

Case 61-160 - Construction. Copies of the comments received from the Industry Associations on the proposed Section XVIII, Construction, were distributed to the Members. The Members agreed that the comments should be referred to the Construction Subcommittee to:

- (a) review the proposed coverage to determine whether changes should be made therein in light of the comments,
- (b) prepare a rationale for any substantive recommendations of industry which are not adopted, and
- (c) prepare the proposed Section XVIII in final form for printing.

Members of the Subcommittee are:

Army - Mr. E. Manning Seltzer, ENG, Chairman

Navy - Mr. Harold Gold, Y&D

AF - Mr. John C. Wren, SAFGC  
Mr. W. C. Girard, AFSFP

The Subcommittee was requested to present a report for consideration by 20 July 1964.

(12 June 1964)

Case 61-160 - Construction Coverage - ASPR. Mr. Walter Willson, SAFGC, was designated as the Air Force member of the subject subcommittee vice Mr. John Wren, SAFGC.

(19 June 1964)

#### G. ORGANIZATIONAL NOTES:

61-160 - The Air Force member designated Mr. Robert Reid, AFCE to to the Section XVIII Subcommittee as an Air Force member in addition to Mr. John Wren and Mr. William Girard.

(15 Jul 64)

2. Case 61-160 - Construction Coverage - ASPR. The Committee undertook consideration of a report from the Editing Subcommittee dated 1 June 1964 presenting edited coverage of the proposed Section XVIII, Part 9, covering Patents, Data and Copyrights. Representatives of the Departments were present for the discussion of this item. The members were first provided with a resume which lead to the development and need for special coverage in this area in the construction section, and next considered a number of Army Materiel Command comments on the proposed coverage. After discussion the AMC comments were not adopted.

The members then undertook consideration of Tab A to the Editing Subcommittee report on a page-by-page basis and made a number of changes therein which were noted by the Secretary. As revised, Part 9 of Section XVIII is set forth in the attached Tab A to these minutes. The Committee agreed that this Tab should be forwarded to the associations for comment.

( Tab B was deferred until such time as Section XVIII, Part 9, is being considered for printing. Consideration of Tab C was deferred to permit study by the patent representative of the departments, with the exception of the clause contained therein covering "Drawings and Other Data To Become Property of Government." With respect to this clause (7-607.2) which is also included in Tab A to these minutes, it was pointed out that while the clause may be unique for use in construction contracts it seems to be contrary to the data direction that no other data clauses will be used, except those in ASPR Section IX and Defense Procurement Circular No. 6. The Committee agreed that:

- a. the 7-607.2 clause should be forwarded to industry, and
- b. clearance should be obtained from the DASD (Procurement) for the use of the special clause for construction and A-E contracts.

In this latter respect the members expressed the opinion that in the most recent drafting of the data coverage, consideration was not given to either construction or A-E contracts. The clause was approved for forwarding to industry for comment subject to being cleared with the DASD (Procurement).

This facet of the case was suspended pending receipt of industry comments.

The Navy designated Mr. Joseph Cowden, Jr., as the Navy member of the Subcommittee vice Mr. William Speck.

(17 July 1964)

5. Case 61-160 - Construction Coverage - ASPR. A Subcommittee report dated 22 September 1964 was distributed attaching Subcommittee recommendations on the comments of industry in connection with the proposed ASPR coverage submitted to it.

(25 September 1964)

1. Case 61-160 - Construction Coverage - ASPR. Consideration of the report from the Construction Subcommittee dated 22 September 1964 was deferred until the additional comments developed by the Subcommittee are presented.

(7 October 1964)

3. Case 61-160 - Construction Coverage - ASPR. The Committee undertook consideration of two memoranda from the Construction Contract Subcommittee presented by the Chairman dated 22 September 1964 and 6 October 1964 respectively. The memoranda included tabs presenting the Subcommittee's reaction on the comments received from industry. The Committee first undertook consideration of the attachment to the 22 September 1964 meeting and concurred in the recommendations of the Subcommittee except as set forth below.

Tab A, paragraph 1 - The Committee did not concur in the Subcommittee's statement that it had no objection to amending 18-101.1 by adding to the last sentence thereof the phrase "nor does it include facilities contracts (see 13-101.11)."



SECTION XVIII, PART 9

PATENTS, DATA, AND COPYRIGHTS

18-900 SCOPE OF PART. This Part sets forth the policies, instructions, and contract clauses pertaining to patents, data, and copyrights in connection with the procurement of construction and related architect-engineer services. The provisions of Section IX as they relate to supplies are applicable where the procurement is of construction materials or supplies as such, as distinguished from "construction" as defined in 18-101.1. Similarly, the provisions of Section IX as they relate to research and development apply where one of the purposes of the procurement is experimental, developmental or research work, or test and evaluation studies (involving such work) of structures, equipment, processes, or materials for use in construction. Where the proposed contract calls for either (i) experimental, developmental, or research work, or (ii) supplies and materials, in addition to either construction or architect-engineer work, the pertinent provisions of Section IX shall be added to the contract pursuant to instructions contained in this Part. In such cases, the contract shall indicate clearly which of the clauses of Section IX apply only to the experimental, developmental, or research work, or to the supplies and materials being procured, and which apply only to the construction or architect-engineer work.

18-901 DEFINITIONS. For the purpose of this Part, the following terms have the meanings set forth below (see also 9-201):

(a) Plans and specification for construction means drawings, specifications, and other data for and preliminary to the construction of a particular public building, structure or work within the definition of construction in 18-101.1.

(b) Shop drawings for construction means drawings prepared by the construction contractor, subcontractor, or any lower tier subcontractor pursuant to the construction contract, showing in detail the proposed fabrication, assembly, or installation of structures, materials, or equipment.

(c) As-built drawings for construction means drawings prepared by a contractor or subcontractor to show the construction of a particular structure or work as actually completed under the contract.

18-902 AUTHORIZATION AND CONSENT. See 9-102.

18-902.1 General. The Authorization and Consent clause in 9-102.1 shall be included in all contracts for construction materials or supplies and in all construction contracts, except where both complete performance and delivery (if any) are to be accomplished outside the United States, its possessions, or Puerto Rico. Normally an authorization and consent clause shall not be included in an architect-engineer contract; however, the clause in 9-102.1 shall be included in architect-engineer contracts which require the delivery of models, samples, or other products, or which may require the use of patented devices or processes

to test or perform any part of the work, under the architect-engineer contract except where the contract is to be performed wholly outside the United States, its possessions, or Puerto Rico.

18-902.2 Authorization and Consent in Contracts Including Research or Development. Unless prohibited by 18-902.1, the clause set forth in 9-102.2 shall be included in architect-engineer contracts or construction contracts calling exclusively for experimental, developmental, or research work in the field of construction or architect-engineering. Where the contract calls for either experimental, developmental, or research work or supplies and materials, in addition to either construction or architect-engineer work, the clause set forth in 9-102.1 shall be used.

### 18-903 Patent Indemnification of Government by Contractor.

18-903.1 General. A patent indemnity clause shall not be included in contracts calling solely for architect-engineer or experimental, developmental, or research work in the field of construction.

18-903.2 Patent Indemnity Clauses in Supply Contracts. (See 9-103). The provisions of 9-103.1 relating to the procurement of supplies are applicable where the procurement is solely for construction materials or supplies as such, as distinguished from "construction" as defined in 18-101.1.

### 18-903 3 Patent Indemnity Clause in Construction Contracts.

(a) All contracts calling for "construction" as defined in 18-101.1 shall contain the clause set forth in 7-602.16 (see Standard Form 23A).

(b) If it is determined that the construction will necessarily involve the use of structures, products, materials, equipment, processes, or methods which are non-standard, non-commercial or special, the contract may list them in the specifications and may expressly exclude them from the patent indemnification by inserting the following in the schedule of the contract:

ITEMS EXCLUDED FROM PATENT INDEMNITY ( 1964)

The "Patent Indemnity" clause of this contract shall not apply to the following:

(Specifically identify the items to be excluded)

18-903.4 Waiver of Indemnity by the Government. Exemption of specific patents from the patent indemnity provisions of the clauses prescribed in 18-903.2 and 18-903.3(a) shall be made only upon the authorization of the Secretary concerned or his authorized representative in accordance with 9-103.4.

18-904 Notice and Assistance. Subject to the prohibitions of 9-104, all contracts calling for construction work shall include the Notice and Assistance Regarding Patent and Copyright Infringement clause in 9-104.

18-905 Screening of Patented, Copyrighted or Otherwise Restricted Designs. In architect-engineer contracts the design or specification called for may involve or contemplate the use of structures, products, materials, equipment, or processes which are covered by patents or copyrights. In such event the architect-engineer should report to the contracting officer the items which are known to him to be sole source or noncommercial or are covered by patent or copyright, and advise the contracting officer of the extent to which these items are necessary to meet the Government's requirements. This will make possible timely planning and arrangements for the use of sole source or noncommercial, patented or copyrighted features where appropriate, or provide added time to consider alternative means. For this purpose, the following clause may be inserted in architect-engineer contracts:

NOTICE REGARDING PATENTED, COPYRIGHTED OR OTHERWISE RESTRICTED DESIGNS  
( 1964)

(a) In the performance of this contract, the Contractor shall endeavor, to the extent possible in achieving the objectives of the contract, to direct the design contemplated so that the resulting construction work and later operation of the facility being designed will make maximum use of structures, machines, products, materials, construction methods, and equipment which are readily available through Government or commercial channels, or through standard or proven production techniques, methods, and processes. Unless approved by the Contracting Officer the Contractor shall not, in the performance of the work called for by this contract, produce a design or specification such as to require in this construction work or later operation of the facility being designed, the use of structures, products, materials, construction equipment, or processes which are known by the Contractor to be sole source, noncommercial, patented or copyrighted, or in the process of being patented or copyrighted, and not readily available to the public on the open market except from a sole source, patentee or a licensee of the patentee.

18-906 Processing of Infringement Claims. See 9-105.

18-907 Classified Contracts. See 9-106.

18-908 Patent Rights.

(a) Any construction or architect-engineer contract which calls for or can be expected to involve the design, for use in the construction or operation of a Government facility, of novel structures, machines, products, materials, processes, or equipment (including construction equipment), and any contract having as one of its purposes the performance of experimental, developmental, or research work or test and evaluation studies involving such work, should include a patent rights clause in accordance with the policy and guidance of 9-107.

(b) Any construction or architect-engineer contract which calls for or can be expected to involve only standard types of construction to be built by previously developed equipment, methods, and processes shall not include a patent rights clause. The term "standard types of construction" as used herein means construction in which the distinctive features, if any, in all likelihood will amount to no more than:

- (i) variations in size, shape or capacity of otherwise structurally orthodox and conventionally acting single structural members or multi-member structural groupings; or
- (ii) purely artistic or esthetic (as distinguished from functionally significant) architectural configurations and designs of both structural and nonstructural members or groupings, which may or may not be sufficiently novel or meritorious to qualify for protection under the design patent or copyright laws.

Rights of the Government in and to any such distinctive design or copyright features, as distinguished from inventions of a mechanical or functional nature resulting from an architect-engineer contract, are provided for in the clause in 7-607.2 entitled Drawings and Other Data to Become Property of Government.

(c) Construction and architect-engineer contracts which require the development of novel structures, machines, products, equipment (including construction equipment), materials, or processes shall include the clause in 7-607.2 in addition to the appropriate "Patent Rights" clause in Section IX.

18-909 Patent Royalties. The provisions of 9-110, 9-111, and 9-112 are applicable to contracts for construction or construction supplies.

18-910 Acquisition and Use of Plans, Specifications and Drawings.

18-910.1 Data Clauses for Architect-Engineer and Construction Work.

(a) Plans and specifications and as-built drawings. It is the policy of the Department of Defense in procuring plans and specifications and as-built drawings for construction to obtain full ownership thereof with the full right to use and reproduce the same. Accordingly, in contracts calling for plans and specifications for construction, or as-built drawings for construction, insert the clause set forth in 7-607.2. Upon request of the architect-engineer or others interested and upon the determination by the contracting officer that the public interest will not be adversely affected, permission will be granted by the Government for the reproduction and use of plans and specifications or as-built drawings for construction by other parties.

(b) Shop drawings for construction. It is the policy of the Department of Defense in procuring shop drawings for construction to obtain the full right to use and reproduce, including use and reproduction of such drawings for manufacture and procurement, but not to exclude a similar right in the designer or others. Accordingly, in contracts for such drawings, the clause in 7-603.5 shall be used.

18-910.2 Data Clauses for Construction Supplies and Research and Development.  
The provisions of Section IX, Part 2, relating to the acquisition of data and rights therein in connection with the procurement of supplies and materials and research and development are applicable where the procurement is confined to either construction materials (as distinguished from "construction" as defined in 18-101.1) or experimental, developmental, or research work, or both. In some circumstances the right to use such data, including drawings, may be limited in accordance with appropriate paragraphs of Section IX, Part 2.

18-910.3 Mixed Contracts. Where the proposed contract calls for either (i) experimental, developmental, or research work, or (ii) supplies and materials, in addition to either construction or architect-engineer work, the pertinent clauses of Section IX, Part 2, shall be added to the contract, in addition to the clauses in 7-603.5 and 7-607.2, as appropriate. In such cases, the contract shall indicate clearly which of the clauses of Section IX, Part 2, apply only to the experimental, developmental, or research work, or to the supplies and materials being procured, and which apply only to the construction or architect-engineer work.

\* \* \* \* \*

7-607.2 Drawings and Other Data to Become Property of Government.

DRAWINGS AND OTHER DATA TO BECOME PROPERTY OF GOVERNMENT ( 1964)

All drawings, designs, specifications, architectural designs of buildings and structures, notes and other architect-engineer work produced in the performance of this contract and all as-built drawings produced after completion of the work shall be and remain the sole property of the Government and may be used on any other work without additional cost to the Government; and with respect thereto the Architect-Engineer agrees not to assert any rights and not to establish any claim under the design patent or copyright laws. The Architect-Engineer for a period of three (3) years after completion of the project agrees to furnish or provide access to the originals or copies of all such materials on the request of the Contracting Officer.

Paragraph 5.g. - With respect to the Subcommittee's comments on paragraph 18-704.6 the Committee was advised that the Reduction in Implementation Panel was currently working on a rewrite of the labor clauses. On the basis of this information the Chairman suggested, and the Committee concurred, that Section XVIII, Part 7, should not be published at this time and that the part should be marked "Reserved".

Paragraph 5.l - The Committee did not concur in the Subcommittee's recommendation that the clause "contractor inspection system" in 7-602.10 be deleted and replaced with the clause contained in the original Subcommittee report under 4-7-105.26(b).

Paragraph 5.u. - The Committee concurred with the results set forth in this paragraph but not with the Subcommittee's rationale.

Paragraph 6.c - With respect to the Subcommittee's recommendation concerning the inclusion of provisions in ASPR which will protect American contractors from war risk, civil strike, and expropriation, the Committee agreed that this subject should be considered by the Subcommittee and recommendations presented for consideration.

The members then undertook consideration of the attachment to the 6 October 1964 memorandum and approved the Subcommittee's recommendations set forth in Tab A thereof with the following exceptions:

Paragraph 8 - Government Property - Following discussion of the Subcommittee's recommendations on this paragraph further consideration was deferred until a representative of the Subcommittee could be present.

Paragraph 14 - The Committee did not concur with the Subcommittee's recommendation to make no revision to subparagraphs 9-602.3(b) and 8-602.3(c) in connection with sureties, and in lieu of not revising those paragraphs to insert a new paragraph 10-618.3 covering "Preliminary Notice to Surety".

Paragraph 15 - This paragraph was not adopted by the Committee in view of the fact that the changes recommended were necessitated by the Subcommittee's changes set forth in paragraph 14 which was not adopted.

Paragraph 16 - The Committee generally concurred in the Subcommittee's changes set forth in this paragraph with the exception of subparagraph (i) covering termination. This subparagraph was approved for inclusion for the purpose of going forward though the Committee determined that the Subcommittee representatives would be questioned as to the necessity for the change in language in the last portion of this subparagraph.

Paragraph 18 - This paragraph was approved for inclusion with minor modification. The minor modification involved the insertion of the words "8-701(a) as modified by" in the second line of paragraph (d) before the citation "8-701(c)". The same question dealing with termination, as set forth in paragraph 16 above is also applicable to this paragraph.

Paragraph 19 - The Subcommittee's recommendation in this paragraph was not adopted on the basis that the change made in paragraph (d) of paragraph 18 accommodated the Subcommittee point.

Paragraph 23 - The Committee did not concur with the Subcommittee's recommendation to revise paragraph (b) of the text in 8-709 to insert the word "shall" in lieu of the word "may". Similarly the identical recommendation with respect to paragraph (c) of 16-401.3 contained in Exhibit C was rejected.

Paragraph 24 - The Subcommittee recommendation with respect to modifying 16-402.2 was withdrawn.

Consideration of the remainder of this case was deferred until Friday, 30 October 1964.

(28 October 1964)

2. Case 61-160 - Construction Coverage - ASPR. Prior to resuming consideration of the Subcommittee's recommendations in the attachment to the 6 October 1964 memorandum from the Subcommittee, the members discussed the proposed Government property coverage (paragraph 8) consideration of which had been deferred on 28 October 1964. Representatives of the Subcommittee present at the meeting explained the basis for the Subcommittee recommendation, and the Committee determined that 7-605.15 should be reinserted under the "required clauses for cost reimbursement type construction contracts," changing the reference therein to read '13-703'. In taking this action the members also determined that 7-605.10 and 7-606.1 should be deleted from the proposed clause coverage contained in Exhibit B.

The members next considered the Subcommittee's recommendation to revise subparagraph (i) of the termination clause under 8-701(a). Following discussion the Committee determined that the added language to subparagraph (i) should be deleted. It was noted that this action makes the remainder of subparagraph (i) identical with subparagraph (i) now contained in Section VIII. Accordingly, the reference to subparagraph (i) in paragraphs 8-701(a) and 8-701(c) were deleted.

The members were informed that inasmuch as Section XVIII also covers contracting for architect-engineering services that the title to the Section should be revised to reflect this coverage. The members agreed that the title should be changed to read:

"Procurement of Construction and Contracting for Architect-Engineer Services".

The Committee then considered the remainder of Tab A to the Subcommittee report first considering the Subcommittee's recommendation to insert a new paragraph 18-618.3 covering "preliminary notice to surety". The Committee concurred in this change and also determined to use the same language in paragraph 8-602.3(b) of the additional ASPR changes. The Committee concurred in the deletion of the language in 8-602.3(e) and the insertion of the revised language in lieu thereof set forth in paragraph 14 (d) of Tab A.

The change to 16-402.2 recommended by the Subcommittee in Tab A was withdrawn from consideration.

The members then considered Tab B to the Subcommittee report and approved the recommended changes set forth therein with the following exceptions:

Paragraph 5 - The Committee concluded that the change recommended by the Subcommittee to 3-811 should not be made.

Paragraphs 12 and 13 were not adopted at this time in view of the fact that these paragraphs involved changes in Part 7 of Section XVIII which has been reserved pending a major rewrite of the "Labor" coverage.

Paragraph 31(b) - The Committee did not concur in the Subcommittee's recommendation to include a statement in 7-607 to "substitute 'Architect-Engineer' for 'contractors' wherever that term appears" in lieu of repeating the instruction of substituting the above in the several clauses.



Paragraph 41 - The Committee noted that the Subcommittee's recommendation to revise 16-405.1(b) involved a reference to the labor clauses. The Committee determined that this paragraph for the time being should be marked "Reserved".

The Committee considered the Subcommittee's Tabs C and D and determined there was no necessity to repeat the check list contained in Section II in Section XVIII. Accordingly, these tabs were not adopted.

The Committee then considered Tab E and approved the Subcommittee's recommendations with some changes which were noted by the Secretary, with the following exceptions:

Paragraph 7, 11, 13, 19, 20, 21, 26a and 26b. The Committee noted that these paragraphs involved changes or references to the labor clauses which are in the process of being revised. Accordingly, the Subcommittee's recommendations in these paragraphs were not adopted at this time.

The Committee noted that paragraph 27 of Tab E referred to other changes from the Subcommittee, which were included in Tab B of the 17 April 1963 memorandum from the Subcommittee. The members agreed that consideration of the recommendations in Tab B would be undertaken at the 4 November 1964 meeting.

Tab F of the 6 October attachment will also be considered at the 4 November 1964 meeting.

(30 October 1964)

2. Case 61-160 - Construction Coverage - ASPR. The Committee resumed consideration of the subject case first considering Tab B to the Subcommittee's memorandum dated 17 April 1964. With respect to the Subcommittee's recommendation contained in paragraph 1., the Committee did not concur in the Subcommittee's recommendation to revise 2-202.1. Rather, the Committee determined that 2-202.1 should be revised to change the period at the end thereof to a comma and add the following:

"and for construction contracts see 18-202(b)".

The Committee then revised the Subcommittee's recommendation under this paragraph for inclusion as subparagraph (b) to 18-202, redesignating the present text to the paragraph as subparagraph (a).

(b) All invitations for bids shall allow sufficient bidding time (i.e., the period of time between the date of distribution of an invitation for bids and the date set for opening of bids) to allow bidders an adequate opportunity to prepare and submit their bids, giving due regard for the construction season, the time necessary for bidders to inspect the site, obtain subcontract bids, examine data concerning the work and prepare estimates from plans and specifications.

Paragraphs 2 and 3 - With respect to the Subcommittee's recommended addition to 5-701(c) and 5-702, it was the consensus of the Committee that the proposed changes were not acceptable in their present form. These two recommendations were returned to the Subcommittee for redrafting, if coverage is considered necessary.

Paragraph 4 - The Subcommittee's recommendation to revise 15-107 was rejected.

Paragraph 5 - The proposed changes to 15-403 recommended by the Subcommittee were not adopted in the form presented. Rather the Committee determined to revise Section XV, Part 4, as follows:

15-400 SCOPE OF PART. \* \* \* \*

15-401 BASIC CONSIDERATIONS.

15-401.1 Applicable Cost Principles. Except as otherwise provided in this Part 4, because of the specialized nature of construction and architect-engineers contracts, the allowability of costs shall be determined in accordance with Part 2 of this Section, except to the extent that the provisions of that Part are clearly inappropriate to such contracts.

15-401.2 Special Factors Affecting the Allowability of Costs. The scope of the work required under construction contracts may vary from routine projects of short duration to be performed within the contractor's home office locality to the erection of complex military installations at remote overseas locations over a period of several years. Climate and terrain may vary greatly among construction sites. All of these factors involving the nature, size, duration and location of a construction project generally affect the basic determination of the Government as to the type of contract to be awarded and the operating practices, techniques and procedures employed by the contractor, particularly with respect to the incurrence of the selected costs set forth in paragraphs 15-402.1 and 15-402.3. Advance understandings as set forth in 15-107, for such items as home office overhead, partner's compensation, employment of consultants, and equipment usage, are particularly important in construction and architect-engineers contracts in order to assure complete understanding of the parties and avoid possible subsequent disputes or disallowances.

With respect to the foregoing the Committee concluded that comments should be obtained from industry; and other Government agencies should be advised of the change. The staff was requested to accomplish this.

The Subcommittee representatives present advised the members that paragraph 7-603.31 appearing on page 31 of Exhibit B was misleading in that the title of the paragraph and the clause covered "layout of work and surveys". He advised the members that the words "and surveys" should be deleted in the title of the paragraph and the clause. The Committee concurred.

The Subcommittee representative present also advised the members that the notice appearing at the bottom of page 6 of Exhibit C was frequently dispatched by telegram and in the interest of shortening the notice the second sentence should be revised to read:

"Failure to acknowledge all amendments may cause rejection of the bid"

The Committee agreed to this change.

The Committee then undertook consideration of Tab F to the Subcommittee Memorandum of 6 October 1964 and approved the recommendations contained therein except as follows:

Part 1, paragraph 1, 2, and 3. The Committee noted that these paragraphs involved changes in Section XVIII, Part 7, which had been reserved. Accordingly, the changes recommended by the Subcommittee were not adopted at this time.

Paragraph 4 - The Committee concurred in the changes set forth in this paragraph except for those which involved Section XVIII, Part 7.

Paragraph 5 and 6 - These paragraphs were not adopted as they also involved changes in Section XVIII, Part 7.

Paragraph 8 - The Committee noted that the correct title should be:

"Contract Work Hours Standards Act - Overtime Compensation."

Exhibit C, paragraph 16-404.2. It was noted that clause 21 appearing on page 27 of Exhibit C was entitled "Nondiscrimination in Employment." The Committee agreed that this title should be changed to read "Equal Opportunity." In making this change it was also noted that a number of the clauses contained in the Subcommittee's exhibits carried a 1963 date. The Committee determined that the clause dates should be changed to correspond with the date of issuance in the Regulation, except for clauses which are standard clauses extracted from standard construction contract forms. In the latter case the members agreed that the date of the clauses should correspond with the date on which the standard clauses were issued in the revised standard forms; i.e., June 1964.

Exhibit B, paragraph 7-602.38 - The members noted that the staff had agreed to check the necessity of retaining this paragraph covering "Labor Reports." The members agreed that if no necessity for its retention existed the paragraph should be deleted.

Exhibit A - The Air Force member advised that the approval level for the Air Force set forth in 18-402.3(iii) was incorrect and would require revision to conform to Air Force regulations. The members agreed that the Air Force member should present revised language direct to the Secretary for inclusion in the construction coverage.

The remaining facets of this case will be considered at a subsequent meeting.

(4 November 1964)

Case 61-160 - Construction Coverage - ASPR. The members were advised that a number of small areas were yet to be cleared up with respect to the subject case and these matters were scheduled for consideration at 1000 hours, Friday, 20 November 1964.

(12 November 1964)

1. Case 61-160 - Construction Coverage - ASPR. The members further considered the action necessary to realign certain of the clauses and still retain the clauses specified in Section VII, Part 6, in view of the decision to refer Part 9 to industry for comment. Representatives of the Construction Subcommittee, the Patents Subcommittee and the staff were present for the discussion of this action.

The staff recommended that the existing 7-603.5 Rights in Shop Drawings presented in Exhibit B be relocated under a new number in Part 9 of Section XVIII. Pending publication of Part 9 the Departments would be authorized to use existing coverage in this area. In discussing this clause the Committee agreed that the clause should be revised to read as follows:

18-9 Rights in Shop Drawings.

In every contract for construction calling for shop drawings the following clause shall be inserted:

RIGHTS IN SHOP DRAWINGS ( 1965)

Shop drawings for constructions means drawings prepared by the construction contractor, subcontractor, or any lower tier subcontractor pursuant to the construction contract, showing in detail the proposed fabrication, assembly or installation of structures, materials, or equipment. The Government may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.

The staff was requested to change 18-901(b) to be consistent with the above quoted clause. The Committee further determined that the present ASPR paragraph 7-603.5 Rights in Data should be retained for use with the new Section XVIII. The staff was requested to provide language for inclusion in the notes and filing instructions of the revision promulgating the new Section XVIII with respect to the continued use of departmental clauses pending publication of Part 9 of Section XVIII.

7-607.2 - The Committee reviewed the 7-607.2 clause contained in Tab A to the 17 July 1964 minutes and revised the clause to read as follows:

7-607.2 Drawings and Other Data to Become Property of Government.

DRAWINGS AND OTHER DATA TO BECOME PROPERTY OF GOVERNMENT ( 1965)

All drawings, designs, specifications, architectural designs of buildings and structures, notes and other architect-engineer work produced in the performance of this contract and all as-built drawings produced after completion of the work shall be and remain the sole property of the Government and may be used on any other work without additional cost to the Government; and with respect thereto the Architect-Engineer agrees not to assert any rights and not to establish any claim under the design patent or copyright laws. The Architect-Engineer for a period of three (3) years after completion of the project agrees to furnish and to provide access to the originals or copies of all such materials on the request of the Contracting Officer.

The Committee determined that this clause should be issued concurrently with the new Section XVIII.

7-602.38 - The members were advised that the coverage in this clause appearing in the second sentence with respect to the contracting officer disapproving any part of or all progress payments where the contractor or subcontractor fails to furnish copies of payrolls, was not contained in any other clause. It was recommended that the substance of this sentence be recommended to the General Services Administration for inclusion in the new labor clauses as part of paragraph (d) of the "Payroll and Basic Records" clause. The Committee agreed with this suggestion and deleted the clause and number contained in Appendix B as 7-602.38.

7-603.26 - The Committee changed the entry under this number to read as follows:

7-603.26 Disputes Concerning Labor Standards. Insert the following clause in all contracts subject to the Davis-Bacon Act.

DISPUTES CONCERNING LABOR STANDARDS ( 1965)

Disputes arising out of the labor standards provisions of this contract shall be subject to the Disputes clause except to the extent such disputes involve the meaning of classification of the Secretary of Labor or the applicability of the labor provisions of the contract which questions shall be referred to the Secretary of Labor in accordance with the procedures of the Department of Labor.

The Subcommittee recommended that clauses appearing in 7-605.40, 7-605.41 and 7-605.42 be revised to read as follows:

7-605.40 Authorization and Consent. In accordance with the requirements of 9-102.1 include the clause set forth therein.

7-605.41 Notice and Assistance Regarding Patent and Copyright Infringement. In accordance with the requirements of 9-104, insert the contract clause set forth therein.

7-605.42 Patent Indemnity. Insert the clause set forth in 7-602.16.

The Committee agreed with these changes, noting that previous action by the Committee had changed the point numbers.

18-209 - The Committee discussed this paragraph covering Prequalification of Bidders and further noted that this area was the subject of further consideration under Case 64-204. On the basis of this information the Committee determined that the title and text should be deleted from 18-209 and the paragraph number marked "Reserved."

(20 November 1964)

Case 61-160 - Construction Coverage - ASPR. Copies of a revised paragraph 18-402.3(iii) prepared by the Air Force were distributed. The Committee determined to add this item to the Agenda for consideration on Friday, 27 November 1964.

(25 November 1964)

Case 61-160 - Construction Coverage - ASPR. The members considered the revision of 18-402.3(iii) prepared by the Air Force, copies of which were provided the members at the 25 November 1964 meeting. The Committee APPROVED the following language for insertion in this subparagraph:

(iii) when a selection is made by the Army Office of the Chief of Engineers, the Navy Bureau of Yards and Docks, or the Air Force Directorate of Civil Engineering for a contract whose estimated cost is \$500,000 or less, the selection shall require the approval of the Chief of Engineers, the Chief of the Bureau of Yards and Docks, or the Director of Civil Engineering, respectively, or their designees;

(27 November 1964)

Case 62-228 - Permanent ASPR Guidance Under New Internal Revenue Rules on Depreciation.

Case 61-115 - Government Property - Section XV.

Case 61-160 - Construction Coverage - ASPR. The cost principles contained in attachment, which were previously approved by the Committee, have now been coordinated with GSA, NASA, and AEC, and will be included in the next revision. Coordination resulted in only minor editorial changes.

(27 January 1965)

#### PART 4--CONSTRUCTION AND ARCHITECT-ENGINEERS CONTRACTS

15-400 SCOPE OF PART. No change

15 401 BASIC CONSIDERATIONS.

15-401.1 Applicable Cost Principles. Except as otherwise provided in this Part 4, because of the specialized nature of construction and architect-engineers contracts, the allowability of costs shall be determined in accordance with Part 2 of this Section, except to the extent that the provisions of that Part are clearly inappropriate to such contracts.

15-401.2 Special Factors Affecting the Allowability of Costs. The scope of the work required may vary from routine projects of short duration to be performed within the contractor's home office locality to the erection of complex military installations at remote overseas locations over a period of several years. Climate and terrain may vary greatly among construction sites. All of these factors involving the nature, size, duration and location of a construction project generally affect the basic determination of the Government as to the type of contract to be awarded and the operating practices, techniques and procedures employed by the contractor, particularly with respect to the incurrence of the selected costs set forth in paragraphs 15-402.1 and 15-402.3. Advance understandings as set forth in 15-107, for such items as home office overhead, partner's compensation, employment of consultants, and equipment usage, are particularly important in construction and architect-engineers contracts in order to assure complete understanding of the parties and avoid possible subsequent disputes or disallowances.

Case 61-160 - Construction Coverage - ASPR. The Chairman advised the members of the ASD (I&L) letter of 9 November 1964 to the Assistant Secretaries of the Departments, and the January 24, 1962 memorandum to the General Counsel OCE, regarding the cancellation of existing service coverage with respect to construction upon the issuance of the ASPR coverage. He informed the members that upon receipt of ASPR Revision 9 the departments should take action to cancel departmental coverage in this area. The members noted the information.

(5 February 1965)

Case 61-160 - Patent Coverage for Construction. Copies of the comments received from the Industry Associations on the subject coverage were distributed to the members for information, with the advice that copies had been provided the Patents Subcommittee.

The Committee requested the Patents Subcommittee to submit a report for consideration by 3 May 1965 on this problem.

(7 April 1965)

Case 61-160 - Construction Coverage - ASPR.  
Case 64-634 - Section VIII Construction. The Chairman of the Reduction in Implementation Panel was requested to send this case to the Subcommittee for action.

(21 May 1965)

3. Case 61-160 - Patent Coverage for Construction. The Committee considered a report from the Patents Subcommittee dated 3 May 1965, presenting a revised draft of the patent coverage for construction contracts to be issued in Section XVIII as Part 9, after review of the comments transmitted by industry. The Committee reviewed the report on a page-by-page basis and made a number of changes therein which were noted by the Secretary. The revised coverage is set forth in the attached TAB A to these minutes which is APPROVED FOR PRINTING.

During consideration of this matter the Committee discussed at length the "Data" clause appearing in paragraph 18-910.1 as to why the approach in this paragraph should be different from the basic data clause in Section IX, Part 2, which provides for generally acquiring data with unlimited rights as distinguished from exclusive ownership as provided for A-E plans in Section XVIII, Part 9. During the discussion of this matter, Paragraph 18-910.1 was realigned to change the emphasis on permission being granted by the Government for reproduction and use of plans and specifications by other parties. Additionally, the Army was requested to present a paper as to why there should be a difference in "Plans and specifications and as-built drawings" coverage to provide for Government ownership of such data, in contrast with the Section IX, Part 2 policy which provides for the Government acquiring data with unlimited rights. The Army was requested to present its report on this matter by 14 June 1965.

(SEE NEXT PAGE FOR TAB A)

(28 May 1965)

Case 61-160 - Patent Coverage for Construction. The Army member advised the Committee that the Army paper as to why there should be a difference in "Plans and Specifications and As Built Drawings" from the Section IX, Part 2 policy with respect to acquiring data with unlimited rights scheduled to be presented on 14 June would not be available until Friday, 18 June. On the basis of this information the Committee agreed that this item should be scheduled for consideration on Wednesday, 23 June 1965.

(11 June 1965)



SECTION XVIII, PART 9

PATENTS, DATA, AND COPYRIGHTS

18-900 SCOPE OF PART. This Part sets forth the policies, instructions, and contract clauses pertaining to patents, data, and copyrights in connection with the procurement of construction and related architect-engineer services. The provisions of Section IX as they relate to supplies are applicable where the procurement is of construction materials or supplies as such, as distinguished from "construction" as defined in 18-101.1. Similarly, the provisions of Section IX as they relate to research and development apply where one of the purposes of the procurement is experimental, developmental or research work, or test and evaluation studies (involving such work) of structures, equipment, processes, or materials for use in construction. Where the proposed contract calls for either (i) experimental, developmental, or research work, or (ii) supplies and materials, in addition to either construction or architect-engineer work, the pertinent provisions of Section IX shall be added to the contract pursuant to instructions contained in this Part. In such cases, the contract shall indicate clearly which of the clauses of Section IX apply only to the experimental, developmental, or research work, or to the supplies and materials being procured, and which apply only to the construction or architect-engineer work.

18-901 DEFINITIONS. For the purpose of this Part, the following terms have the meanings set forth below (see also 9-201):

(a) Plans and specification for construction means drawings, specifications, and other data for and preliminary to the construction of a particular public building, structure or work within the definition of construction in 18-101.1.

(b) Shop drawings for construction means drawings submitted by the construction contractor, subcontractor, or any lower tier subcontractor pursuant to the construction contract, showing in detail (1) the proposed fabrication and assembly of structural elements, and (2) the installation (i.e. form, fit and attachment details) of materials, or equipment.

(c) As-built drawings for construction means drawings submitted by a contractor or subcontractor to show the construction of a particular structure or work as actually completed under the contract.

18-902 AUTHORIZATION AND CONSENT. See 9-102.

18-902.1 General. The Authorization and Consent clause in 9-102.1 shall be included in all contracts for construction materials or supplies and in all construction contracts, except where both complete performance and delivery (if any) are to be accomplished outside the United States, its possessions, or Puerto Rico. Normally an authorization and consent clause

shall not be included in an architect-engineer contract; however, the clause in 9-102.1 shall be included in architect-engineer contracts which require the delivery of models, samples, or other products, or which may require the use of patented devices or processes to test or perform any part of the work, under the architect-engineer contract, except where the contract is to be performed wholly outside the United States, its possessions, or Puerto Rico.

18-902.2 Authorization and Consent in Contracts Including Research or Development. Unless prohibited by 18-902.1, the clause in 9-102.2 shall be included in architect-engineer contracts or construction contracts calling exclusively for experimental, developmental, or research work in the field of construction or architect-engineering. Where the contract calls for either experimental, developmental, or research work or supplies and materials, in addition to either construction or architect-engineer work, the clause in 9-102.1 shall be used.

18-903 Patent Indemnification of Government by Contractor.

18-903.1 General. A patent indemnity clause shall not be included in contracts calling solely for architect-engineer or experimental, developmental, or research work in the field of construction.

18-903.2 Patent Indemnity Clauses in Supply Contracts. (See 9-103). The provisions of 9-103.1 relating to the procurement of supplies are applicable where the procurement is solely for construction materials or supplies as such, as distinguished from "construction" as defined in 18-101.1.

18-903.3 Patent Indemnity Clause in Construction Contracts.

(a) All contracts calling for "construction" as defined in 18-101.1 shall contain the clause in 7-602.16 (see Standard Form 23A).

(b) If it is determined that the construction will necessarily involve the use of structures, products, materials, equipment, processes, or methods which are patented, non-patented or special, the contract may limit them in the specifications and may expressly exclude them from the patent indemnification by inserting the following in the schedule of the contract:

ITEMS EXCLUDED FROM PATENT INDEMNITY ( 1964)

The "Patent Indemnity" clause of this contract shall not apply to the

3:

(Specifically identify the items to be excluded)

18-903.4 Waiver of Indemnity by the Government. Exemption of specific patents from the patent indemnity provisions of the clauses prescribed in 18-903.2 and 18-903.3(a) shall be made only upon the authorization of the Secretary concerned or his authorized representative in accordance with 9-103.4

18-904 Notice and Assistance. Subject to the prohibitions of 9-104, all contracts calling for construction work shall include the Notice and Assistance Regarding Patent and Copyright Infringement clause in 9-104.

18-905 Approval of Restricted Designs. Specifications for construction should allow for maximum latitude in the use of various types of commercially

available products, materials, equipment or processes which will meet objective Government requirements. However, Government requirements may necessitate, or the architect-engineer may contemplate the use of structures, products, materials, equipment or processes which are available only from a sole source. In such event the architect-engineer should report to the contracting officer the items known to him to be sole source, and the reasons therefor, and advise the contracting officer of the extent to which such items are considered necessary to meet the Government's requirements. This will make possible timely planning and arrangements for the use of sole source items, or where appropriate, to consider alternate items. It is to be emphasized that this procedure is not intended to restrict the use of patented, or copyrighted items, but is merely to give the Government an opportunity to consider whether the specifications being drawn by the architect-engineer, in regard to any one item, are unnecessarily restricted, according to objective Government requirements, to a single sole item. The procedure is primarily for use in instances where the proposed design is expected to be conventional or standard and where the design may be used in subsequent procurements. For this purpose, the following clause may be inserted in architect-engineer contracts:

NOTICE AND APPROVAL OF RESTRICTED DESIGNS ( 1965)

(a) In the performance of this contract, the Contractor shall, to the extent practicable, make maximum use of structures, machines, products, materials, construction methods, and equipment which are readily available through Government or competitive commercial channels, or through standard or proven production techniques, methods, and processes. Unless approved by the Contracting Officer the Contractor shall not, in the performance of the work called for by this contract, produce a design or specification such as to require in this construction work the use of structures, products, materials, construction equipment, or processes which are known by the Contractor to be available only from a sole source. As to any such design or specification the Contractor shall report to the Contracting Officer giving the reason or reasons why it is considered necessary to so restrict the design or specification.

18-906 Processing of Infringement Claims. See 9-105.

18-907 Classified Contracts. See 9-106.

18-908 Patent Rights.

(a) Any construction or architect-engineer contract which calls for or can be expected to involve the design, for use in the construction or operation of a Government facility, of novel structures, machines, products, materials, processes, or equipment (including construction equipment), and any contract having as one of its purposes the performance of experimental, developmental, or research work or test and evaluation studies involving such work, should include a patent rights clause in accordance with the policy and guidance of 9-107.

(b) Any construction or architect-engineer contract which calls for or can be expected to involve only standard types of construction to be built by previously developed equipment, methods, and processes shall not include a patent rights clause. The term "standard types of construction" as used herein means construction in which the distinctive features, if any, in all likelihood will amount to no more than:

- (i) variations in size, shape or capacity of otherwise structurally orthodox and conventionally acting single structural members or multi-member structural groupings; or
- (ii) purely artistic or esthetic (as distinguished from functionally significant) architectural configurations and designs of both structural and nonstructural members or groupings, which may or may not be sufficiently novel or meritorious to qualify for protection under the design patent or copyright laws.

Rights of the Government in and to any such distinctive design or copyright features, as distinguished from inventions of a mechanical or functional nature resulting from an architect-engineer contract, are provided for in the clause in 7-607.2 entitled Drawings and Other Data to Become Property of Government.

(c) Construction and architect-engineer contracts which require the development of novel structures, machines, products, equipment (including construction equipment), materials, or processes shall include the clause in 7-607.2 in addition to the appropriate "Patent Rights" clause in Section IX.

18-909 Patent Royalties. The provisions of 9-110, 9-111, and 9-112 are applicable to contracts for construction or construction supplies.

#### 18-910 Acquisition and Use of Plans, Specifications and Drawings.

##### 18-910.1 Data Clauses for Architect-Engineer and Construction Work.

(a) Plans and specifications and as-built drawings. In procuring plans and specifications and as-built drawings for construction the Government shall obtain full ownership thereof with the full right to use and reproduce the same. Accordingly, in contracts calling for plans and specifications for construction, or as-built drawings for construction, insert the clause in 7-607.2. Upon request of the architect-engineer or others, permission will be granted by the Government for the reproduction and use of plans and specifications or as-built drawings for construction by other parties, interested unless the contracting officer determines that the public interest will be adversely affected.

(b) Shop drawing for construction. In procuring shop drawings for construction the Government shall obtain the unlimited right to use and reproduce such drawings, but not exclude a similar right in the designer or others. Accordingly, in contracts for such drawings, the clause in 7-602.47 shall be used.

18-910.2 Data Clauses for Construction Supplies and Research and Development. The provisions of Section IX, Part 2, relating to the acquisition of data and rights therein in connection with the procurement of supplies and

and materials and research and development are applicable where the procurement is confined to either construction materials (as distinguished from "construction" as defined in 18-101.1) or experimental, developmental, or research work, or both. In some circumstances the right to use such data, including drawings, may be limited in accordance with appropriate paragraphs of Section IX, Part 2.

18-910.3 Mixed Contracts. Where the proposed contract calls for either (i) experimental, developmental, or research work, or (ii) supplies and materials, in addition to either construction or architect-engineer work, the pertinent clauses of Section IX, Part 2, shall be added to the contract, in addition to the clauses in 7-602.47 and 7-607.2, as appropriate. In such cases, the contract shall indicate clearly which of the clauses of Section IX, Part 2, apply only to the experimental, developmental, or research work, or to the supplies and materials being procured, and which apply only to the construction or architect-engineer work.

\* \* \* \* \*

7-607.2 DRAWINGS AND OTHER DATA TO BECOME PROPERTY OF GOVERNMENT (Jan. 1965)

All drawings, designs, specifications, architectural designs of buildings and structures, notes and other architect-engineer work produced in the performance of this contract and all as-built drawings produced after completion of the work shall be and remain the sole property of the Government and may be used on any other work without additional cost to the Government; and with respect thereto, the Architect-Engineer agrees not to assert any rights and not to establish any claim under the design patent or copyright laws. The Architect-Engineer for a period of three (3) years after completion of the project agrees to furnish and to provide access to the originals or copies of all such materials on the request of the Contracting Officer.

When used in construction contracts substitute "Contractor" for "Architect-Engineer" in both places where the latter term appears in the clause.

\* \* \* \* \*

7-602.47 RIGHTS IN SHOP DRAWINGS (Aug. 1965)

Shop drawings for construction means drawings submitted to the Government by the Construction Contractor, Subcontractor or any lower tier subcontractor pursuant to a construction contract showing in detail (1) the proposed fabrication and assembly of structural elements and (2) the installation (i.e. form, fit and attachment details) of materials or equipment. The Government may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.

5. Case 61-160 - Construction Coverage - ASPR. The Committee considered a memorandum from the Army presenting reasons why there should be a difference in "acquiring title to plans and specifications and as-built drawings" under AE contracts in contrast with the Section IX, Part 2 policy which provides for the Government acquiring data with unlimited rights other than in exceptional cases. Representatives of the Office of Chief of Engineers were present for the discussion of the Army paper. The Army expressed the opinion that there really is no necessity for the policy in architect-engineer contracts concerning patent rights being identical with the patent coverage in ASPR Section IX, Part 2, on the basis that in AE contracts the Government is sharing the full costs for the development of the drawings, and the cost would not be reduced if the Government only took an unlimited license rather than title.

Following a lengthy discussion of this matter it was the consensus of the members that there was more merit in having a uniform policy in this area than there is to having a different policy for architect-engineer contracts solely because the practice has existed over the years. In arriving at this conclusion there was agreement by the members that there would be no objection to the construction agencies taking title, rather than a license for unlimited rights, in those instances involving special circumstances such as buildings, monuments, etc. which the Government does not want duplicated by anyone else. It was the consensus of the members that consistency with Section IX, Part 2, other than the exception mentioned above, would not be harmful to the construction agencies.

The Army member reserved his position on this matter.

(23 June 1965)

Case 61-160 - Patent Coverage for Construction. Copies of a report from the Patents Subcommittee dated 3 September 1965, presenting a revised draft of the Section XVIII, Part 9 "data clause"; a recommendation that the Rights in Shop Drawings clause (7-602.47) be deleted; and a revision of 9-203.2(d) to reference Section XVIII, Part 9, were distributed. The Committee determined to add this item to the agenda for Wednesday, 29 September 1965 at 1000 Hours, for consideration, at which time the following cases will also be considered:

64-608 - Section IX, Consolidation (Partial Report #3)

64-608 - Consolidation of Section IX, Patents - Fourth and Final Report.

65-157 - 9-206 "Technical Information", Canadian Deviation.

(8 September 1965)

3. Case 61-160 - Construction Coverage - ASPR. The Committee considered a report from the Patents Subcommittee dated 3 September 1965, presenting recommended changes in Section XVIII, Part 9, to conform more closely with the data policy and clauses set forth in Section IX, Part 2. The Committee considered the attachments of the Subcommittee report with the following observations.

The Committee generally concurred in the Subcommittee's proposed revision of 18-910.1(a). With respect to subparagraph (b) the Committee recommended that the language be made consistent with the language contained in the clause set forth in 7-602.47. The Committee did not concur in the insertion in the foregoing paragraphs of the reference to 9-203(d) and reinstated in lieu thereof 7-602.47. The Committee further agreed that the clause in 7-607.2 should be recast to provide that the Government has unlimited rights in drawings and other data. With this action, the report was referred to the Editing Subcommittee for editing and re-submission by 13 October 1965. The DSA legal member agreed that he would assist the editors in this assignment.

(29 September 1965)

5. Case 61-160 - Patent Coverage for Construction. The Committee considered a report from the Editing Subcommittee dated 2 December 1965, presenting edited language with respect to data clauses for AE and construction contracts. In considering the proposed coverage the observation was made by the Navy legal member that the proposed clause 7-602.47 and 7-607.2 would have to be reconciled with the coverage contained in Section XVIII. Additionally, the Navy member presented a proposed revision of a clause in 7-607.2 to provide that the AE would not establish any claim under the design, patent, or copyright laws, and would not publish, reproduce or authorize any others so to do without written consent of the Government until such time as the Government releases the matter to the public. The Committee concurred in the revision to 7-607.2.

After extended discussion and minor changes in the proposed coverage, which were noted by the editing representative present, the report was tentatively concurred in and returned to the Editing Subcommittee for preparation of a clean draft to be forwarded to industry for comment.

DATE SUSPENDED  
(7 January 1966)

Case 61-160 - Patent Coverage for Construction. The Committee reconsidered its decision of 7 January 1966 with respect to forwarding a copy of the revised patent coverage for construction to industry for comment. The members were informed by the staff that the proposed coverage was not as harsh as the material forwarded to industry and there appeared to be no reason to resolicit industry comments. The Committee concurred with the staff recommendation and determined that when the edited material is received from the Editing Subcommittee the only remaining action would be approval for printing.

(12 January 1966)

Case 61-160 - Construction Coverage - ASPR. The Army member distributed copies of a disposition form providing the views of the Office of Chief of Engineers with respect to the Committee's action on 7 January 1966, with respect to the subject matter. The Army member requested that the Engineer views be considered at such time as the Editing report on this matter is reviewed.

(21 January 1966)

Case 61-160 - Patent Coverage for Construction. Copies of a report from the Editing Subcommittee dated 4 February 1966, presenting edited coverage with respect to construction were distributed to the members. The Committee agreed that this item would be added to the next printed agenda for consideration.

(4 February 1966)

(5)



10. Case 61-160 - Patent Coverage for Construction. The Committee undertook consideration of a report from the Editing Subcommittee dated 4 February 1966, presenting proposed patent coverage for construction contracts, together with a redraft of the Editing Subcommittee report by the Assistant General Counsel (Patents)(OCE). Following an extended discussion of the proposed coverage, the Committee determined to work primarily from the redraft presented by the OCE Assistant General Counsel. The following basic changes to the Editing Subcommittee report were recommended and approved:

- (1) the inclusion in the "Property of Government" clause (7-607.2) of provision for the A-E to furnish a duly executed instrument evidencing Government title in architectural designs that the Government might desire to protect by design patent, or otherwise;
- (2) the inclusion in the "unlimited rights" clause for architectural design of a provision for license rights in the Government in any design patent or copyrights that the A-E might obtain on architectural designs; and
- (3) the provision of a separate "shop drawings" clause for construction contracts providing for unlimited Government use of such drawings.

With this action the Chairman of the Editing Subcommittee was requested to present a clean draft of the revised coverage direct to the Chairman for printing.

The Committee commended the OCE Assistant General Counsel for his efforts on this matter.

CASE CLOSED  
(11 March 1966)

FOR OFFICIAL USE  
DEPARTMENT OF DEFENSE  
ASPR COMMITTEE

MINUTES

#61

Friday, 17 July 1964, 0930 Hours  
Room 3D 776                      The Pentagon

ATTENDANCE

Col. Roger H. Terzian, OASD(I&L)	OSD Member, Chairman
Edward C. Cox, OASA(I&L)	Army Policy Member
Col. Arthus Slade, JAG	Army Legal Member
LeRoy Haugh, ONM	Navy Policy Member
Albert Green, OGC	Navy Legal Member
Major Jacob B. Pompan, AFSP	Air Force Policy Member
R. Timothy Hanlon, SAFGC	Air Force Legal Member
Robert Lintner, DSA	DSA Policy Member
Maurice Paradis, DSA	DSA Legal Member
A. B. Carter, OASD(I&L)	Secretary
R. J. Sumner, OASD(I&L)	Acting Secretary
Charles L. Pistorino, ENG	
Leo Ross, ONR	
John Robertie, ENG	
Hugh Francis, OASD(I&L)	
Louis A. Cox, OASD(I&L)	
Francis Kelly, BuS&A	

A. MINUTES

- a. The minutes of 17 June 1964 were approved as written.
- b. The minutes of 19 June 1964 were approved as written.
- c. The minutes of 24 June 1964 were approved as written.

D. UNSCHEDULED ITEMS

Case 64-113 - Allocation of Overhead Costs to IR&D Projects, ASPR 15-205.35(f). The members were advised that further consideration of the subject case by representatives of OSD would be delayed until after 1 September 1964 in order to evaluate information obtained by field surveys scheduled during the months of July and August. On the basis of this information the Committee determined that the subject case should be suspended.

(17 July 1964)

Case 64-132 - Authority of Coordinated Overhead Negotiating Committee Under ASPR 3-705 and 3-706. Copies of a memorandum from the Army member dated 15 July 1964 were distributed. The memorandum requested a written expression of the intent of the ASPR Committee with respect to publishing 3-705 and 3-706 in regard to the authority of a coordinated overhead rate negotiation group in light of the definition of a contracting officer published in ASPR 1-201.3. The members agreed that this item would be added to the Agenda for consideration on 22 July 1964.

(17 July 1964)

Case 64-75 - Firm Fixed-Price Contracts in Non-Competitive Procurements. At the request of the Navy member the reporting date for the Subcommittee considering the subject problem was extended to 3 August 1964.

(17 July 1964)

Case 64-45 - Labor Surplus Area Set-Asides - 1-801.1. The DSA member distributed copies of an exchange of correspondence between the Deputy Director, DSA, and Senator Edward V. Long, with respect to a set-aside procedure which should be applied in future cases where there is a reasonable expectation that only two firms will bid, only one of which is not a labor surplus area, for consideration when this case is further discussed.

Copies of a memorandum from the Director, Economic Utilization Policy, dated 17 July 1964, presenting a further revision of 1-804.1(a)(ii) were distributed to the members. The Committee agreed that this case would be further discussed on Wednesday, 22 July 1964.

(17 July 1964)

Case 64-0 - ASPR Changes Directed by Higher Authority or Cases Not Otherwise Assigned a Case Number. (a.) Costing of Special Facilities Such as Computers and Wind Tunnels. The Army member distributed copies of a memorandum to the Secretaries of the Army, Navy, and Air Force dated 2 July 1964, from the Assistant Secretary of Defense (Comptroller), entitled "costing of special facilities such as computers and wind tunnels," which transmitted a joint audit letter for issuance by the three Services. It was found that this procedure, in effect, provides interpretation and implementation of the contract cost principles.

(b.) Cost and Pricing Data, 3-807.3. The Army member distributed copies of a D&F dated 29 June 1964 waiving the use of the clauses contained in 7-104.29(c), 7-104.41(d) and 7-104.42(c) from a fixed-price contract with Mippon Telegraph and Telephone Public Corporation for telecommunications maintenance services from 1 October 1964 through 30 October 1965. This D&F was issued pursuant to 3-807.3(e). The waiver was noted.

(17 July 1964)

Case 61-115 - Section XIII - Government Property. Notes and Filing Instructions for Facilities Clauses, Section VII, Part 7. The members briefly discussed the proposed notes and filing instructions, prepared by the staff for inclusion in Revision 7, with respect to the new facilities clauses. The Committee made minor changes to stress the optional use of the clauses pending the issuance of Section XIII. After comment that further

modification might be necessary, further consideration was deferred until Wednesday, 22 July 1964.

A draft of proposed rewording of 15-205.1(b)(iii), prepared by Mr. Hanlon to reflect discussion at the previous meeting was distributed to the members.

(17 July 1964)

E. ACTION ITEMS

1. Case 64-603 - Procurement of Research and Development. The Air Force member distributed copies of a memorandum dated 15 July 1964 commenting on the 13 April 1964 memorandum signed by Messrs. Morris and Fubini. The memorandum presented a proposed revision of the general policy statement to cover the subject of oral interchange of information between Government and contractor personnel. The members agreed that the Air Force proposal would be considered upon receipt of the proposals from the other members.

(17 July 1964)

2. Case 61-160 - Construction Coverage - ASPR. The Committee undertook consideration of a report from the Editing Subcommittee dated 1 June 1964 presenting edited coverage of the proposed Section XVIII, Part 9, covering Patents, Data and Copyrights. Representatives of the Departments were present for the discussion of this item. The members were first provided with a resume which lead to the development and need for special coverage in this area in the construction section, and next considered a number of Army Materiel Command comments on the proposed coverage. After discussion the AMC comments were not adopted.

The members then undertook consideration of Tab A to the Editing Subcommittee report on a page-by-page basis and made a number of changes therein which were noted by the Secretary. As revised, Part 9 of Section XVIII is set forth in the attached Tab A to these minutes. The Committee agreed that this Tab should be forwarded to the associations for comment.

Tab B was deferred until such time as Section XVIII, Part 9, is being considered for printing. Consideration of Tab C was deferred to permit study by the patent representative of the departments, with the exception of the clause contained therein covering "Drawings and Other Data To Become Property of Government." With respect to this clause (7-607.2) which is also included in Tab A to these minutes, it was pointed out that while the clause may be unique for use in construction contracts it seems to be contrary to the data direction that no other data clauses will be used, except those in ASPR Section IX and Defense Procurement Circular No. 6. The Committee agreed that:

- a. the 7-607.2 clause should be forwarded to industry, and
- b. clearance should be obtained from the DASD (Procurement) for the use of the special clause for construction and A-E contracts.

In this latter respect the members expressed the opinion that in the most recent drafting of the data coverage, consideration was not given to either construction or A-E contracts. The clause was approved for forwarding to industry for comment subject to being cleared with the DASD (Procurement).

This facet of the case was suspended pending receipt of industry comments.

The Navy designated Mr. Joseph Cowden, Jr., as the Navy member of the Subcommittee vice Mr. William Speck.

(17 July 1964)

3. Case 64-57 - Mistake in Bids - Waiver of Contractor Rights for Correction Under Specified Amounts. The members undertook further consideration of the subject case in light of the justification for the waiver of mistake in bids procedure presented by the Army. The departmental representative present provided a resume of the history of this waiver in mistake in bid provision and advised the members that the Corps of Engineers had found the approach:

- a. has reduced the number of protests received,
- b. has speeded up the award of contracts,
- c. has been accepted by the Construction industry, both large and small, without objection, and
- d. has provided an advantage to both the Government and contractors in savings of time and the forestalling of delays, particularly where weather conditions are a prime factor.

The DSA member advised that he would appreciate time to explore the legal aspects of the procedure. Additionally, he stated that in his opinion the procedure was not equitable in that it does, in fact, penalize a contractor for the amount of the mistake waived even in those instances where the contractor proves his mistake and is reimbursed the amount of the mistake other than the waived portion.

A further question was raised that if the saving in time is the justification for the use of this procedure why shouldn't this procedure be extended to all formal advertising areas where delivery time is important.

Following a general discussion of this matter the Committee determined to return this case to the Subcommittee to review and report on the existing departmental practices with respect to mistake in bids in the construction area, to present recommendations on whether the waiver of mistake in bid procedure should be prescribed for use by all construction agencies in the Department of Defense and, in the event it is recommended for adoption in construction, should it not be extended for other formal advertising areas where delivery time is important. In this connection it was the sense of the Committee that the waiver in mistake in bid procedure either should be used by all the construction elements or by none of the construction elements for the same type of procurement unless cogent reasons to the contrary can be shown.

The DSA member designated Mr. Robert Homann as a DSA member of the Subcommittee. The Subcommittee was requested to provide a report for consideration by 24 August 1964. If a final report cannot be presented the Subcommittee was requested to present a progress report.

(17 July 1964)

SECTION XVIII, PART 9

PATENTS, DATA, AND COPYRIGHTS

18-900 SCOPE OF PART. This Part sets forth the policies, instructions, and contract clauses pertaining to patents, data, and copyrights in connection with the procurement of construction and related architect-engineer services. The provisions of Section IX as they relate to supplies are applicable where the procurement is of construction materials or supplies as such, as distinguished from "construction" as defined in 18-101.1. Similarly, the provisions of Section IX as they relate to research and development apply where one of the purposes of the procurement is experimental, developmental or research work, or test and evaluation studies (involving such work) of structures, equipment, processes, or materials for use in construction. Where the proposed contract calls for either (i) experimental, developmental, or research work, or (ii) supplies and materials, in addition to either construction or architect-engineer work, the pertinent provisions of Section IX shall be added to the contract pursuant to instructions contained in this Part. In such cases, the contract shall indicate clearly which of the clauses of Section IX apply only to the experimental, developmental, or research work, or to the supplies and materials being procured, and which apply only to the construction or architect-engineer work.

18-901 DEFINITIONS. For the purpose of this Part, the following terms have the meanings set forth below (see also 9-201):

(a) Plans and specification for construction means drawings, specifications, and other data for and preliminary to the construction of a particular public building, structure or work within the definition of construction in 18-101.1.

(b) Shop drawings for construction means drawings prepared by the construction contractor, subcontractor, or any lower tier subcontractor pursuant to the construction contract, showing in detail the proposed fabrication, assembly, or installation of structures, materials, or equipment.

(c) As-built drawings for construction means drawings prepared by a contractor or subcontractor to show the construction of a particular structure or work as actually completed under the contract.

18-902 AUTHORIZATION AND CONSENT. See 9-102.

18-902.1 General. The Authorization and Consent clause in 9-102.1 shall be included in all contracts for construction materials or supplies and in all construction contracts, except where both complete performance and delivery (if any) are to be accomplished outside the United States, its possessions, or Puerto Rico. Normally an authorization and consent clause shall not be included in an architect-engineer contract; however, the clause in 9-102.1 shall be included in architect-engineer contracts which require the delivery of models, samples, or other products, or which may require the use of patented devices or processes

4. Case 64-66 - Concurrent Performance of CPFF and FP Type Contracts. The members considered a memorandum from the Special Subcommittee dated June 1964 proposing additions to 3-108, 3-403(a) and (b), and 3-803. After discussion and testing a number of possible revisions of the proposed material, it was decided by consensus that the present general policy as set forth in the ASPR, having been in satisfactory use for many years, was adequate, and no action was taken.

CASE CLOSED  
(17 July 1964)

5. Case 64-611 - Change in Place of Manufacture. The members considered a memorandum from the Reduction in Implementation Panel dated 29 June 1964 proposing a new paragraph 1-326 covering Change in Place of Performance. The material was considerably revised, referred to the Editing Subcommittee, and APPROVED FOR PRINTING subject to editing and direct submission to the Chairman. Since a member of the Editing Subcommittee was present and took notes, the coverage is not set forth herein but will be distributed with later minutes.

CASE CLOSED  
(17 July 1964)

6. Case 64-609 - Consolidation of Section I. The members agreed to examine their own departmental regulations and to arrange to have appropriate deleting action taken therein which would become possible as a result of the revised ASPR coverage.

CASE CLOSED  
(17 July 1964)

A. B. CARTER

to test or perform any part of the work, under the architect-engineer contract except where the contract is to be performed wholly outside the United States, its possessions, or Puerto Rico.

18-902.2 Authorization and Consent in Contracts Including Research or Development. Unless prohibited by 18-902.1, the clause set forth in 9-102.2 shall be included in architect-engineer contracts or construction contracts calling exclusively for experimental, developmental, or research work in the field of construction or architect-engineering. Where the contract calls for either experimental, developmental, or research work or supplies and materials, in addition to either construction or architect-engineer work, the clause set forth in 9-102.1 shall be used.

18-903 Patent Indemnification of Government by Contractor.

18-903.1 General. A patent indemnity clause shall not be included in contracts calling solely for architect-engineer or experimental, developmental, or research work in the field of construction.

18-903.2 Patent Indemnity Clauses in Supply Contracts. (See 9-103). The provisions of 9-103.1 relating to the procurement of supplies are applicable where the procurement is solely for construction materials or supplies as such, as distinguished from "construction" as defined in 18-101.1.

18-903.3 Patent Indemnity Clause in Construction Contracts.

(a) All contracts calling for "construction" as defined in 18-101.1 shall contain the clause set forth in 7-602.16 (see Standard Form 23A).

(b) If it is determined that the construction will necessarily involve the use of structures, products, materials, equipment, processes, or methods which are non-standard, non-commercial or special, the contract may list them in the specifications and may expressly exclude them from the patent indemnification by inserting the following in the schedule of the contract:

ITEMS EXCLUDED FROM PATENT INDEMNITY ( 1964)

The "Patent Indemnity" clause of this contract shall not apply to the following:

(Specifically identify the items to be excluded)

18-903.4 Waiver of Indemnity by the Government. Exemption of specific patents from the patent indemnity provisions of the clauses prescribed in 18-903.2 and 18-903.3(a) shall be made only upon the authorization of the Secretary concerned or his authorized representative in accordance with 9-103.4.

18-904 Notice and Assistance. Subject to the prohibitions of 9-104, all contracts calling for construction work shall include the Notice and Assistance Regarding Patent and Copyright Infringement clause in 9-104.



18-905 Screening of Patented, Copyrighted or Otherwise Restricted Designs. In architect-engineer contracts the design or specification called for may involve or contemplate the use of structures, products, materials, equipment, or processes which are covered by patents or copyrights. In such event the architect-engineer should report to the contracting officer the items which are known to him to be sole source or noncommercial or are covered by patent or copyright, and advise the contracting officer of the extent to which these items are necessary to meet the Government's requirements. This will make possible timely planning and arrangements for the use of sole source or noncommercial, patented or copyrighted features where appropriate, or provide added time to consider alternative means. For this purpose, the following clause may be inserted in architect-engineer contracts:

NOTICE REGARDING PATENTED, COPYRIGHTED OR OTHERWISE RESTRICTED DESIGNS  
( 1964)

(a) In the performance of this contract, the Contractor shall endeavor, to the extent possible in achieving the objectives of the contract, to direct the design contemplated so that the resulting construction work and later operation of the facility being designed will make maximum use of structures, machines, products, materials, construction methods, and equipment which are readily available through Government or commercial channels, or through standard or proven production techniques, methods, and processes. Unless approved by the Contracting Officer the Contractor shall not, in the performance of the work called for by this contract, produce a design or specification such as to require in this construction work or later operation of the facility being designed, the use of structures, products, materials, construction equipment, or processes which are known by the Contractor to be sole source, noncommercial, patented or copyrighted, or in the process of being patented or copyrighted, and not readily available to the public on the open market except from a sole source, patentee or a licensee of the patentee.

18-906 Processing of Infringement Claims. See 9-105.

18-907 Classified Contracts. See 9-106.

18-908 Patent Rights.

(a) Any construction or architect-engineer contract which calls for or can be expected to involve the design, for use in the construction or operation of a Government facility, of novel structures, machines, products, materials, processes, or equipment (including construction equipment), and any contract having as one of its purposes the performance of experimental, developmental, or research work or test and evaluation studies involving such work, should include a patent rights clause in accordance with the policy and guidance of 9-107.

(b) Any construction or architect-engineer contract which calls for or can be expected to involve only standard types of construction to be built by previously developed equipment, methods, and processes shall not include a patent rights clause. The term "standard types of construction" as used herein means construction in which the distinctive features, if any, in all likelihood will amount to no more than:

- (i) variations in size, shape or capacity of otherwise structurally orthodox and conventionally acting single structural members or multi-member structural groupings; or
- (ii) purely artistic or esthetic (as distinguished from functionally significant) architectural configurations and designs of both structural and nonstructural members or groupings, which may or may not be sufficiently novel or meritorious to qualify for protection under the design patent or copyright laws.

Rights of the Government in and to any such distinctive design or copyright features, as distinguished from inventions of a mechanical or functional nature resulting from an architect-engineer contract, are provided for in the clause in 7-607.2 entitled Drawings and Other Data to Become Property of Government.

(c) Construction and architect-engineer contracts which require the development of novel structures, machines, products, equipment (including construction equipment), materials, or processes shall include the clause in 7-607.2 in addition to the appropriate "Patent Rights" clause in Section IX.

18-909 Patent Royalties. The provisions of 9-110, 9-111, and 9-112 are applicable to contracts for construction or construction supplies.

18-910 Acquisition and Use of Plans, Specifications and Drawings.

18-910.1 Data Clauses for Architect-Engineer and Construction Work.

(a) Plans and specifications and as-built drawings. It is the policy of the Department of Defense in procuring plans and specifications and as-built drawings for construction to obtain full ownership thereof with the full right to use and reproduce the same. Accordingly, in contracts calling for plans and specifications for construction, or as-built drawings for construction, insert the clause set forth in 7-607.2. Upon request of the architect-engineer or others interested and upon the determination by the contracting officer that the public interest will not be adversely affected, permission will be granted by the Government for the reproduction and use of plans and specifications or as-built drawings for construction by other parties.

(b) Shop drawings for construction. It is the policy of the Department of Defense in procuring shop drawings for construction to obtain the full right to use and reproduce, including use and reproduction of such drawings for manufacture and procurement, but not to exclude a similar right in the designer or others. Accordingly, in contracts for such drawings, the clause in 7-603.5 shall be used.

18-910.2 Data Clauses for Construction Supplies and Research and Development.  
The provisions of Section IX, Part 2, relating to the acquisition of data and rights therein in connection with the procurement of supplies and materials and research and development are applicable where the procurement is confined to either construction materials (as distinguished from "construction" as defined in 18-101.1) or experimental, developmental, or research work, or both. In some circumstances the right to use such data, including drawings, may be limited in accordance with appropriate paragraphs of Section IX, Part 2.

18-910.3 Mixed Contracts. Where the proposed contract calls for either (i) experimental, developmental, or research work, or (ii) supplies and materials, in addition to either construction or architect-engineer work, the pertinent clauses of Section IX, Part 2, shall be added to the contract, in addition to the clauses in 7-603.5 and 7-607.2, as appropriate. In such cases, the contract shall indicate clearly which of the clauses of Section IX, Part 2, apply only to the experimental, developmental, or research work, or to the supplies and materials being procured, and which apply only to the construction or architect-engineer work.

\* \* \* \* \*

7-607.2 Drawings and Other Data to Become Property of Government.

DRAWINGS AND OTHER DATA TO BECOME PROPERTY OF GOVERNMENT ( 1964)

All drawings, designs, specifications, architectural designs of buildings and structures, notes and other architect-engineer work produced in the performance of this contract and all as-built drawings produced after completion of the work shall be and remain the sole property of the Government and may be used on any other work without additional cost to the Government; and with respect thereto the Architect-Engineer agrees not to assert any rights and not to establish any claim under the design patent or copyright laws. The Architect-Engineer for a period of three (3) years after completion of the project agrees to furnish and provide access to the originals or copies of all such materials on the request of the Contracting Officer.

*and to*

*Print to Section 18*

## GENERAL PROVISIONS

(Construction Contract)

### 1. DEFINITIONS

(a) The term "head of the agency" or "Secretary" as used herein means the Secretary, the Under Secretary, any Assistant Secretary, or any other head or assistant head of the executive or military department or other Federal agency; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the head of the agency or the Secretary.

(b) The term "Contracting Officer" as used herein means the person executing this contract on behalf of the Government and includes a duly appointed successor or authorized representative.

### 2. SPECIFICATIONS AND DRAWINGS

The Contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In case of discrepancy either in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without such a determination shall be at his own risk and expense. The Contracting Officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided.

### 3. CHANGES

The Contracting Officer may, at any time, by written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract if within its general scope. If such changes cause an increase or decrease in the Contractor's cost of, or time required for, performance of the contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the Contractor of the notification of change unless the Contracting Officer grants a further period of time before the date of final payment under the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 of these General Provisions; but nothing provided in this clause shall excuse the Contractor from proceeding with the prosecution of the work as changed. Except as otherwise provided in this contract, no charge for any extra work or material will be allowed.

### 4. CHANGED CONDITIONS

The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (a) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (b) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered, and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; or

unless the Contracting Officer grants a further period of time before the date of final payment under the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 of these General Provisions.

### 5. TERMINATION FOR DEFAULT—DAMAGES FOR DELAY—TIME EXTENSIONS

(a) If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. Whether or not the Contractor's right to proceed with the work is terminated, he and his sureties shall be liable for any damage to the Government resulting from his refusal or failure to complete the work within the specified time.

(b) If fixed and agreed liquidated damages are provided in the contract and if the Government so terminates the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Government in completing the work.

(c) If fixed and agreed liquidated damages are provided in the contract and if the Government does not so terminate the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until the work is completed or accepted.

(d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

(1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers; and

(2) The Contractor, within 10 days from the beginning of any such delay (unless the Contracting Officer grants a further period of time before the date of final payment under the contract), notifies the Contracting Officer in writing of the causes of delay.

The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension, and his findings of fact shall be final and conclusive on the parties, subject only to appeal as provided in Clause 6 of these General Provisions.

(e) If, after notice of termination of the Contractor's right to proceed under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or that the delay was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the Government, be

the same as if the notice of termination had been issued pursuant to such clause. If, in the foregoing circumstances, this contract does not contain a clause providing for termination for convenience of the Government, the contract shall be equitably adjusted to compensate for such termination and the contract modified accordingly; failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(f) The rights and remedies of the Government provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

#### 6. DISPUTES

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged; *Provided, however*, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This Disputes clause does not preclude consideration of questions of law in connection with decisions provided for in paragraph (a) above. Nothing in this contract, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

#### 7. PAYMENTS TO CONTRACTOR

(a) The Government will pay the contract price as herein-after provided.

(b) The Government will make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates approved by the Contracting Officer. If requested by the Contracting Officer, the Contractor shall furnish a breakdown of the total contract price showing the amount included therein for each principal category of the work, in such detail as requested, to provide a basis for determining progress payments. In the preparation of estimates the Contracting Officer, at his discretion, may authorize material delivered on the site and preparatory work done to be taken into consideration. Material delivered to the Contractor at locations other than the site may also be taken into consideration (1) if such consideration is specifically authorized by the contract and (2) if the Contractor furnishes satisfactory evidence that he has acquired title to such material and that it will be utilized on the work covered by this contract.

(c) In making such progress payments, there shall be retained 10 percent of the estimated amount until final completion and acceptance of the contract work. However, if the Contracting Officer, at any time after 50 percent of the work has been completed, finds that satisfactory progress is being made, he may authorize any of the remaining progress payments to be made in full. Also, whenever the work is substantially complete, the Contracting Officer, if he considers the amount retained to be in excess of the amount adequate for the protection of the Government, at his discretion, may release to the Contractor all or a portion of such excess amount. Furthermore, on completion and acceptance of each separate building, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made therefor without retention of a percentage.

✓ All material and work covered by progress payments shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work, or as waiving the right of the Government to require the fulfillment of all of the terms of the contract.

(c) Upon completion and acceptance of all work, the amount due the Contractor under this contract shall be paid upon the presentation of a properly executed voucher and after the Contractor shall have furnished the Government with a release, if required, of all claims against the Government arising by virtue of this contract, other than claims in stated amounts as may be specifically excepted by the Contractor from the operation of the release. If the Contractor's claim to amounts payable under the contract has been assigned under the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15), a release may also be required of the assignee.

#### 8. ASSIGNMENT OF CLAIMS

(a) Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15), if this contract provides for payments aggregating \$1,000 or more, claims for moneys due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Unless otherwise provided in this contract, payments to an assignee of any moneys due or to become due under this contract shall not, to the extent provided in said Act, as amended, be subject to reduction or setoff. (The preceding sentence applies only if this contract is made in time of war or national emergency as defined in said Act; and is with the Department of Defense, the General Services Administration, the Atomic Energy Commission, the National Aeronautics and Space Administration, the Federal Aviation Agency, or any other department or agency of the United States designated by the President pursuant to Clause 4 of the proviso of section 1 of the Assignment of Claims Act of 1940, as amended by the Act of May 15, 1951, 65 Stat. 41.)

(b) In no event shall copies of this contract or of any plans, specifications, or other similar documents relating to work under this contract, if marked "Top Secret," "Secret," or "Confidential," be furnished to any assignee of any claim arising under this contract or to any other person not entitled to receive the same. However, a copy of any part or all of this contract so marked may be furnished, or any information contained therein may be disclosed, to such assignee upon the prior written authorization of the Contracting Officer.

#### 9. MATERIAL AND WORKMANSHIP

(a) Unless otherwise specifically provided in this contract, all equipment, material, and articles incorporated in the work covered by this contract are to be new and of the most suitable grade for the purpose intended. Unless otherwise specifically provided in this contract, reference to any equipment, material, article, or patented process, by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition, and the Contractor may, at his option, use any equipment, material, article, or process which, in the judgment of the Contracting Officer, is equal to that named. The Contractor shall furnish to the Contracting Officer for his approval the name of the manufacturer, the model number, and other identifying data and information respecting the performance, capacity, nature, and rating of the machinery and mechanical and other equipment which the Contractor contemplates incorporating in the work. When required by this contract or when called for by the Contracting Officer, the Contractor shall furnish the Contracting Officer for approval full information concerning the material or articles which he contemplates incorporating in the work. When so directed, samples shall

The Contractor will send to each labor union or representative of workers with which he has a collective-bargaining agreement or other contract or understanding, a notice, advising



be submitted for approval at the Contractor's expense, with all shipping charges prepaid. Machinery, equipment, material, and articles installed or used without required approval shall be at the risk of subsequent rejection.

(b) All work under this contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may, in writing, require the Contractor to remove from the work any employee the Contracting Officer deems incompetent, careless, or otherwise objectionable.

#### 10. INSPECTION AND ACCEPTANCE

(a) Except as otherwise provided in this contract, inspection and test by the Government of material and workmanship required by this contract shall be made at reasonable times and at the site of the work, unless the Contracting Officer determines that such inspection or test of material which is to be incorporated in the work shall be made at the place of production, manufacture, or shipment of such material. To the extent specified by the Contracting Officer at the time of determining to make off-site inspection or test, such inspection or test shall be conclusive as to whether the material involved conforms to the contract requirements. Such off-site inspection or test shall not relieve the Contractor of responsibility for damage to or loss of the material prior to acceptance, nor in any way affect the continuing rights of the Government after acceptance of the completed work under the terms of paragraph (f) of this clause, except as hereinabove provided.

(b) The Contractor shall, without charge, replace any material or correct any workmanship found by the Government not to conform to the contract requirements, unless in the public interest the Government consents to accept such material or workmanship with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.

(c) If the Contractor does not promptly replace rejected material or correct rejected workmanship, the Government (1) may, by contract or otherwise, replace such material or correct such workmanship and charge the cost thereof to the Contractor, or (2) may terminate the Contractor's right to proceed in accordance with Clause 5 of these General Provisions.

(d) The Contractor shall furnish promptly, without additional charge, all facilities, labor, and material reasonably needed for performing such safe and convenient inspection and test as may be required by the Contracting Officer. All inspection and test by the Government shall be performed in such manner as not unnecessarily to delay the work. Special, full size, and performance tests shall be performed as described in this contract. The Contractor shall be charged with any additional cost of inspection when material and workmanship are not ready at the time specified by the Contractor for its inspection.

(e) Should it be considered necessary or advisable by the Government at any time before acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the Contractor shall, on request, promptly furnish all necessary facilities, labor, and material. If such work is found to be defective or nonconforming in any material respect, due to the fault of the Contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, an equitable adjustment shall be made in the contract price to compensate the Contractor for the additional services involved in such examination and reconstruction and, if completion of the work has been delayed thereby, he shall, in addition, be granted a suitable extension of time.

(f) Unless otherwise provided in this contract, acceptance by the Government shall be made as promptly as practicable after completion and inspection of all work required by this contract. Acceptance shall be final and conclusive except as regards latent defects, fraud, or such gross mistakes as may amount to fraud, or as regards the Government's rights under any warranty or guarantee.

#### 11. SUPERINTENDENCE BY CONTRACTOR

The Contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the Contracting Officer, on the work at all times during progress, with authority to act for him.

#### 12. PERMITS AND RESPONSIBILITIES

The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any applicable Federal, State, and municipal laws, codes, and regulations, in connection with the prosecution of the work. He shall be similarly responsible for all damages to persons or property that occur as a result of his fault or negligence. He shall take proper safety and health precautions to protect the work, the workers, the public, and the property of others. He shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire construction work, except for any completed unit of construction thereof which theretofore may have been accepted.

#### 13. CONDITIONS AFFECTING THE WORK

The Contractor shall be responsible for having taken steps reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work or the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work without additional expense to the Government. The Government assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of this contract, unless such understanding or representations by the Government are expressly stated in the contract.

#### 14. OTHER CONTRACTS

The Government may undertake or award other contracts for additional work, and the Contractor shall fully cooperate with such other contractors and Government employees and carefully fit his own work to such additional work as may be directed by the Contracting Officer. The Contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor or by Government employees.

#### 15. PATENT INDEMNITY

Except as otherwise provided, the Contractor agrees to indemnify the Government and its officers, agents, and employees against liability, including costs and expenses, for infringement upon any Letters Patent of the United States (except Letters Patent issued upon an application which is now or may hereafter be, for reasons of national security, ordered by the Government to be kept secret or otherwise withheld from issue) arising out of the performance of this contract or out of the use or disposal by or for the account of the Government of supplies furnished or construction work performed hereunder.

#### 16. ADDITIONAL BOND SECURITY

If any surety upon any bond furnished in connection with this contract becomes unacceptable to the Government, or if any such surety fails to furnish reports as to his financial condition from time to time as requested by the Government, the Contractor shall promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by this contract.

#### 17. COVENANT AGAINST CONTINGENT FEES

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

#### 18. OFFICIALS NOT TO BENEFIT

No member of Congress or resident Commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

## 19. BUY AMERICAN

(a) Agreement. In accordance with the Buy American Act (41 U.S.C. 10a-10d) and Executive Order 10582, December 17, 1954 (3 CFR Supp.), the Contractor agrees that only domestic construction material will be used (by the Contractor, subcontractors, materialmen, and suppliers) in the performance of this contract, except for nondomestic material listed in the contract.

(b) Domestic construction material. "Construction material" means any article, material, or supply brought to the construction site for incorporation in the building or work. An unmanufactured construction material is a "domestic construction material" if it has been mined or produced in the United States. A manufactured construction material is a "domestic construction material" if it has been manufactured in the United States and if the cost of its components which have been mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. "Component" means any article, material, or supply directly incorporated in a construction material.

(c) Domestic component. A component shall be considered to have been "mined, produced, or manufactured in the United States" (regardless of its source in fact) if the article, material, or supply in which it is incorporated was manufactured in the United States and the component is of a class or kind determined by the Government to be not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

## 20. CONVICT LABOR

In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment at hard labor.

## 21. EQUAL OPPORTUNITY CLAUSE

(The following clause is applicable unless this contract is exempt under the rules and regulations of the President's Committee on Equal Employment Opportunity (41 CFR, Chapter 60). Exemptions include contracts and subcontracts (i) not exceeding \$10,000, (ii) not exceeding \$100,000 for standard commercial supplies or raw materials, and (iii) under which work is performed outside the United States and no recruitment of workers within the United States is involved.)

During the performance of this contract, the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this nondiscrimination clause.

(b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

(c) The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency Contracting Officer, advising the said labor union or workers' representative of the Contractor's commitments under this nondiscrimination clause, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The Contractor will comply with all provisions of Executive Order No. 10925 of March 6, 1961, as amended, and of the rules, regulations, and relevant orders of the President's Committee on Equal Employment Opportunity created thereby.

(e) The Contractor will furnish all information and reports required by Executive Order No. 10925 of March 6, 1961, as amended, and by the rules, regulations, and orders of the said Committee, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Contractor's noncompliance with the nondiscrimination clause of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 10925 of March 6, 1961, as amended, and such other sanctions may be imposed and remedies invoked as provided in the said Executive order or by rule, regulation, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law.

(g) The Contractor will include the provisions of paragraphs (a) through (g) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to section 303 of Executive Order No. 10925 of March 6, 1961, as amended, so that such provisions will be binding upon each subcontractor or vendor. \*The Contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance. Provided, however, that in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

*\*Unless otherwise provided, the Equal Opportunity Clause is not required to be inserted in subcontracts below the second tier except for subcontracts involving the performance of 'construction work' at the 'site of construction' (as those terms are defined in the Committee's rules and regulations) in which case the clause must be inserted in all such subcontracts. Subcontracts may incorporate by reference the Equal Opportunity Clause.*

## 22. UTILIZATION OF SMALL BUSINESS CONCERNS

(a) It is the policy of the Government as declared by the Congress that a fair proportion of the purchases and contracts for supplies and services for the Government be placed with small business concerns.

(b) The Contractor agrees to accomplish the maximum amount of subcontracting to small business concerns that the Contractor finds to be consistent with the efficient performance of this contract.



IN REPLY REFER TO  
ENGCG-H

HEADQUARTERS  
DEPARTMENT OF THE ARMY  
OFFICE OF THE CHIEF OF ENGINEERS  
WASHINGTON 25, D.C.

17 April 1963

MEMORANDUM FOR: CHAIRMAN, ASPR COMMITTEE

SUBJECT: Case 61-160 - Construction Coverage - ASPR

I. Purpose: To submit a revised report, Tab A, covering construction contracting procedures.

II. Discussion:

1. The attached revised report, Tab A, prepared in the Office of the General Counsel, Office of the Chief of Engineers, incorporates generally the recommendations of the Committee as expressed in their review of the draft of 28 June 1962.

2. Certain deletions recommended by the Committee in Part 12, Labor, of 28 June 1962 draft, particularly in paragraph 4-12-101 thereof have not been made. I am of the opinion that the recommended deletions would tend to hamper or restrict a Construction Agency in the discharge of its labor relations responsibilities and functions. Accordingly, the matter as originally submitted is resubmitted for the further consideration of the Committee. It is requested that I or my representative be permitted to present our views in this matter upon the Committee's reconsideration thereof.

3. At the time of its review of the draft of 28 June 1962 the Committee deferred consideration of Subpart 2 of Part 6 thereof, Buy American Act - Construction Contracts. Accordingly, Part 4, Foreign Purchases, of the revised report has been reserved in part for this material pending review by the Committee of the original submission.

4. The Committee directed that the revised report incorporate the Architect-Engineers Negotiation Manual. At the time of the preparation of the revised report a Joint (Tri-Service) Committee established as a result of a Memorandum dated 22 October 1962 from Mr. John Heard, Director of Construction, Office of the Assistant Secretary of Defense (I&L), had prepared and submitted a study of the Architect-Engineer Negotiation Manual. In that study the Joint Committee recommended that a conference be arranged with the ASPR Committee concerning the undesirability of incorporating the A-E Negotiation Manual in ASPR. In view both of the study and report made by the Joint Committee and their recommendation, it was considered that no useful purpose would be served by incorporating the A-E Manual in ASPR until the above has been completed and resolved.

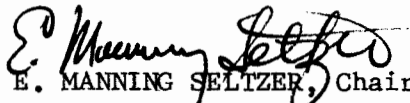


5. It is recognized that deletions in other sections of ASPR will be required upon the adoption of a new section in ASPR covering construction contracting. Action to make such deletions will, however, depend upon the Committee's review of the revised report. Accordingly, such action is deferred pending the Committee's review. Modifications in other paragraphs of ASPR to include coverage of construction contracting are included as Tab B.

III. Recommendation: That the revised draft section on construction contracting be referred to the three Departments for comment and that thereafter it be reviewed by the Committee and be included in ASPR as Section XVIII, Procurement of Construction.

2 Incls

1. Tab A (80 cys)
2. Tab B (dupe)

  
E. MANNING SELTZER, Chairman  
General Counsel  
Office, Chief of Engineers

TAB B

MODIFICATIONS OF PARAGRAPHS IN ASPR TO  
INCLUDE CONSTRUCTION COVERAGE THEREIN

It is recommended that:

1. The first sentence in 2-202.1 be deleted and the following be substituted therefor:

"Consistent with the needs of the Government for obtaining the supplies or services or for completion of the construction project, and, in the case of construction, with due regard for the construction season, the time necessary for bidders to inspect the site, obtain subcontract bids, examine data concerning the work and prepare estimates from plans and specifications, all invitations for bids shall allow sufficient bidding time (i.e. the period of time between the date of distribution of an invitation for bids and the date set for opening of bids) to allow bidders an adequate opportunity to prepare and submit their bids."

2. The following paragraph be added as 5-701(c):

"5-701(c). An order for construction may be placed with another agency which will contract for the work when it can furnish engineering, inspection or administrative services therefor. Contracts shall be made in the name of the requiring agency except when the requiring agency is one of those named in 5-701(b), the Atomic Energy Commission, the National Aeronautics and Space Administration, the Central Intelligence Agency, the Agency for International Development, the National Science Foundation, or any other agency which has authority to use another to perform work. Work for other agencies shall be performed in accordance with the policies and procedures of the requiring agency, the performing agency, or both as shall be required or agreed for the project or projects.

3. The first sentence in 5-702 be amended by inserting after the word "services" in the fourth line thereof the following:

"including for the performance of construction appropriate sums for changes, changed conditions and contract administration,"

4. The following modifications be made in 15-107:

(a) In subparagraph (ii) thereof add at the end the phrase "including construction equipment."

(b) Delete the word "and" at the end of subparagraph (vii) and add the following subparagraphs:

- "(ix) equipment usage;
- (x) location allowances (See 12-105);
- (xi) labor recruitment, transportation and traveling expense;
- (xii) material expediting expense;
- (xiii) procurement offices;
- (xiv) bonds and insurance;
- (xv) home office expense; and
- (xvi) gains or losses on foreign exchange.

5. Add the following as 15-403:

"15-403 ARCHITECT-ENGINEER CONTRACTS. Any determination of costs under architect-engineer cost-reimbursement type contracts shall be governed by the principles set forth in Part 2 of this Section. However, items of cost, where appropriate, such as home office overhead, partner's compensation, employment of consultants and use of computers shall be the subject of specific treatment in the contract. (See 15-107).

61-162

M

18-402.3

- (iii) when a selection is made by the Army Office of the Chief of Engineers, the Navy Bureau of Yards and Docks, or the Air Force Directorate of Civil Engineering for a contract whose estimated cost is \$500,000 or less, the selection shall require the approval of the Chief of Engineers, the Chief of the Bureau of Yards and Docks, or the Director of Civil Engineering, respectively, or their designees;

ENGCC-H

17 April 1963

MEMORANDUM FOR: CHAIRMAN, ASPR COMMITTEE

SUBJECT: Case 61-160 - Construction Coverage - ASPR

I. Purpose: To submit a revised report, Tab A, covering construction contracting procedures.

II. Discussion:

1. The attached revised report, Tab A, prepared in the Office of the General Counsel, Office of the Chief of Engineers, incorporates generally the recommendations of the Committee as expressed in their review of the draft of 28 June 1962.

2. Certain deletions recommended by the Committee in Part 12, Labor, of 28 June 1962 draft, particularly in paragraph 4-12-101 thereof have not been made. I am of the opinion that the recommended deletions would tend to hamper or restrict a Construction Agency in the discharge of its labor relations responsibilities and functions. Accordingly, the matter as originally submitted is resubmitted for the further consideration of the Committee. It is requested that I or my representative be permitted to present our views in this matter upon the Committee's reconsideration thereof.

3. At the time of its review of the draft of 28 June 1962 the Committee deferred consideration of Subpart 2 of Part 6 thereof, Buy American Act - Construction Contracts. Accordingly, Part 4, Foreign Purchases, of the revised report has been reserved in part for this material pending review by the Committee of the original submission.

4. The Committee directed that the revised report incorporate the Architect-Engineers Negotiation Manual. At the time of the preparation of the revised report a Joint (Tri-Service) Committee established as a result of a Memorandum dated 22 October 1962 from Mr. John Heard, Director of Construction, Office of the Assistant Secretary of Defense (I&L), had prepared and submitted a study of the Architect-Engineer Negotiation Manual. In that study the Joint Committee recommended that a conference be arranged with the ASPR Committee concerning the undesirability of incorporating the A-E Negotiation Manual in ASPR. In view both of the study and report made by the Joint Committee and their recommendation, it was considered that no useful purpose would be served by incorporating the A-E Manual in ASPR until the above has been completed and resolved.

5. It is recognized that deletions in other sections of ASPR will be required upon the adoption of a new section in ASPR covering construction contracting. Action to make such deletions will, however, depend upon the Committee's review of the revised report. Accordingly, such action is deferred pending the Committee's review. Modifications in other paragraphs of ASPR to include coverage of construction contracting are included as Tab B.

III. Recommendation: That the revised draft section on construction contracting be referred to the three Departments for comment and that thereafter it be reviewed by the Committee and be included in ASPR as Section XVIII, Procurement of Construction.

2 Incls

1. Tab A (80 cys)
2. Tab B (dupe)

E. MANNING SELTZER, Chairman  
General Counsel  
Office, Chief of Engineers

TAB B

MODIFICATIONS OF PARAGRAPHS IN ASPR TO  
INCLUDE CONSTRUCTION COVERAGE THEREIN

It is recommended that:

1. ~~The first sentence in 2-202.1 be deleted and the following be substituted therefor:~~

15-22-201 ← "Consistent with the needs of the Government for obtaining the supplies or services or for completion of the construction project, and, in the case of construction, with due regard for the construction season, the time necessary for bidders to inspect the site, obtain subcontract bids, examine data concerning the work and prepare estimates from plans and specifications, all invitations for bids shall allow sufficient bidding time (i.e. the period of time between the date of distribution of an invitation for bids and the date set for opening of bids) to allow bidders an adequate opportunity to prepare and submit their bids," *giving*

2. The following paragraph be added as 5-701(c):

"5-701(c). An order for construction may be placed with another agency which will contract for the work when it can furnish engineering, inspection or administrative services therefor. Contracts shall be made in the name of the requiring agency except when the requiring agency is one of those named in 5-701(b), the Atomic Energy Commission, the National Aeronautics and Space Administration, the Central Intelligence Agency, the Agency for International Development, the National Science Foundation, or any other agency which has authority to use another to perform work. Work for other agencies shall be performed in accordance with the policies and procedures of the requiring agency, the performing agency, or both as shall be required or agreed for the project or projects.

3. The first sentence in 5-702 be amended by inserting after the word "services" in the fourth line thereof the following:

"including for the performance of construction appropriate sums for changes, changed conditions and contract administration,"

4. The following modifications be made in 15-107:

(a) In subparagraph (ii) thereof add at the end the phrase "including construction equipment."

(b) Delete the word "and" at the end of subparagraph (vii) and add the following subparagraphs;

- 12-105*
- "(ix) equipment usage;
  - (x) location allowances (See 12-105);
  - (xi) labor recruitment, transportation and traveling expense;
  - (xii) material expediting expense;
  - (xiii) procurement offices;
  - (xiv) bonds and insurance;
  - (xv) home office expense; and
  - (xvi) gains or losses on foreign exchange.

5. Add the following as 15-403:

"15-403. ARCHITECT-ENGINEER CONTRACTS. Any determination of costs under architect-engineer cost-reimbursement type contracts shall be governed by the principles set forth in Part 2 of this Section. However, ~~items of cost, where appropriate, such as home office overhead, partner's compensation, employment of consultants and use of computers shall be the subject of specific treatment in the contract.~~ (See 15-107)

*For such - see 15-107*





DEPARTMENT OF THE NAVY  
OFFICE OF NAVAL MATERIAL  
WASHINGTON 25, D. C.

61-160 *file*

IN REPLY REFER TO  
MO3B1/DGA:vbe  
14 December 1962

MEMORANDUM FOR THE CHAIRMAN, ASPR COMMITTEE

Subj: ASPR 1-201.21; Definition of Construction

1. The term "Construction" has often been mistaken to include the work done in relation to the shipbuilding program such as the manufacturing, producing, furnishing, construction, alteration, etc. of vessels and sometimes aircraft and other kinds of personal property. Some of this in the Navy, perhaps, comes from the basic responsibilities of the Navy Bureau of Ships as set forth in Navy Regulations which refer specifically to the construction of vessels, amphibious craft vessels, boats, etc.

2. It is suggested that the definition of construction in 1-201.21 be revised as follows:

1-201.21 Construction means construction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property. ["Construction" does not include the manufacturing, producing, furnishing, construction, altering, repairing, processing or assembling of vessels, aircraft or other kinds of personal property]. For purposes of this definition, the terms "buildings, structures, or other real property" include, but are not limited to, buildings, structures, and improvements of all types such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, railways, airport facilities, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, and channels.

LEROY J. HAUGH  
Navy Procurement Policy Member  
ASPR Committee

25 February 1963

Dear Mr. Hecht:

I have your inquiry of 18 February 1963 concerning the new construction section of the Armed Services Procurement Regulation. In view of the comprehensive coverage on construction contracting being contemplated, the ASPR Committee has not completed its task in this respect. We anticipate considerable work in our sub-committee drafting this material as a result of a review of the initial drafts.

In the event we decide to circulate this material to the construction industry prior to publication, we will place the name of your association on the mailing list.

Sincerely,

*[Signature]*

WILLIAM W. THIBODY  
Colonel, USA  
Chairman, ASPR Committee

Mr. John W. Hecht  
Manager, Rocky Mountain Chapter  
National Electrical Contractors Association  
2717 East Third Avenue  
Denver 6, Colorado

61-160  
D. Wm. Carter

Encl T

6 November 1962

MEMORANDUM FOR THE CHAIRMAN, ASPR COMMITTEE

SUBJECT: ASPR Case 61-160 - Construction Coverage - ASPR

I. PROBLEM: To revise ASPR 1-1404 so as to clarify the applicability of the clauses prescribed therein to construction contracts.

II. RECOMMENDATION: The clauses prescribed in ASPR 1-1404(b) should be revised as proposed in Tab A.

III. DISCUSSION: The language presently in the clauses prescribed by 1-1404(b) which makes the requirements thereof applicable to "any supplies to be furnished hereunder" is susceptible to the interpretation that these requirements do not apply to construction contracts. Such an interpretation is not considered correct for the reason that the term "any contract" as used in ASPR 1-1404(b) (1) apparently means all kinds of contracts, including construction contracts. Furthermore, the definition of "supplies" in ASPR 1-201.19 is broad enough to cover construction materials, and "supplies" as used in Part 14, Section I of ASPR is believed to have the same meaning as in ASPR 1-201.19. However, this office has received questions which indicate that the quoted language has caused some confusion among contracting personnel. It is noted that specific coverage of Cargo preference requirements in connection with construction contracts is being considered in connection with the subject ASPR case (see page 16 of TAB A to the Memorandum for the Chairman, ASPR Committee, subject as above, dated 28 June 1962).

JOHN D. KOOKEN  
Colonel, JAGC  
Army, Legal Member  
ASPR Committee

Incl: 1  
TAB A

Lt. Chapman/ 6 Nov 62/PR

ASPR CASE 61-160PROPOSED REVISION OF ASPR 1-1404**1-1404 Procedures.**

(a) Except for those supplies obtained for non-reimbursable contributions to foreign assistance programs for which the ocean transportation is to be provided by and at the expense of the recipient government, ocean transportation of supplies owned by the Government and in the possession of either

a Military Department, or a contractor, or subcontractor of any tier, of a Military Department, will be provided by the Military Sea Transportation Service. Accordingly, any contract which may involve ocean transportation of property owned by the Government and in the possession of the contractor or any of his subcontractors (including any contract under which title to property may pass to the Government prior to shipment) shall include a provision requiring the shipment of such property only as directed by the contracting officer, who shall be guided by this Regulation and applicable Departmental procedures. The Military Sea Transportation Service shall take such action as may be necessary and practicable to assure proper utilization of Government vessels and private United States vessels in accordance with this Part, and applicable regulations. The Commander of the Military Sea Transportation Service, or his designated representative is authorized to make any determination as to availability of United States-flag vessels required to assure such proper utilization.

(b) (1) Except as provided in paragraph (2) below, procuring activities shall include the following clause in any contract which may involve the ocean transportation of supplies of the type described in 1-1402(i) (B) and (C) above:

**EMPLOYMENT OF OCEAN-GOING VESSELS (JAN. 1958)**

If ocean transportation is required after the date of award of this contract in delivering any of the supplies to be furnished hereunder,

**for which are to be incorporated in any end product, structure or work called for by this contract,**

the Contractor, promptly after each shipment, shall furnish to the Contracting Officer one copy of the applicable ocean shipping document indicating for each shipment made under this contract the name and nationality of the vessel and the measurement tonnage (40 cubic feet) of dry cargo, or long tons (2,240 pounds) of bulk liquid cargo, shipped on such vessel; *provided*, that the Contractor need not furnish such a document for any shipment of less than 120 measurement tons of dry cargo or less than 35 long tons of bulk liquid cargo; *provided further*, if this contract is an indefinite quantity contract or a requirements contract, the Contractor need furnish such documents only in connection with shipments made after the date of any delivery order requiring ocean transportation in delivering supplies thereunder.

Additional provisions concerning the vessels to be used may be inserted in accordance with Departmental procedures.

(2) The contract shall include the following clause in lieu of the clause set forth in (1) above (i) when determined by the Head of a Procuring Activity to be necessary to assure proper implementation of the policy expressed in this paragraph or (ii) when the procuring activity has been instructed, pursuant to 1-1405.2 below, that particular supplies of the type described in 1-1402(i) (B) and (C) above are to be carried exclusively in private United States vessels:

**PREFERENCE FOR UNITED STATES-FLAG VESSELS (DEC. 1955)**

(a) After the date of award of this contract, the Contractor shall employ privately owned United States-flag commercial vessels, and no others, in the transportation by sea of any supplies to be furnished hereunder for which are to be incor-

corporated in any end product, structure or work called for by this contract.

It is provided, however, that if such vessels are not available for timely shipment at fair and reasonable rates for such vessels, the Contractor shall so notify the Contracting Officer and request authorization to ship in foreign-flag vessels or designation of available United States-flag vessels. If the Contractor is authorized in writing by the Contracting Officer to ship such supplies in foreign-flag vessels, the contract price shall be equitably adjusted to reflect the difference in costs of shipping such supplies on privately owned United States-flag commercial vessels and foreign-flag vessels.

(b) Promptly after each shipment the Contractor shall furnish the Contracting Officer one copy of the applicable shipping document indicating for each shipment made under this contract the name and nationality of the vessel and the measurement tonnage (40 cubic feet) of dry cargo, or long tons (2,240 pounds) of bulk liquid cargo, shipped on such vessels.

61-160

Mr. Carter, Sec -  
ASPR Committee

SEP 28 1962

Dear Mr. Hebert:

Captain J. E. Harvey, Jr., Chief, Procurement Division, Defense Supply Agency, has forwarded us your letter of September 14, 1962 to Lt. General McNamara.

The Engineering News-Record publication of July 26, 1962 is correct in reporting that a special section of the Armed Services Procurement Regulations is being developed to cover the subject of construction contracts. The new section, however, will not affect continuity of the current regulations and procedures pertaining to our furnishing pre-invitation notices and invitations for bids for unclassified construction work to organizations which maintain plan display rooms. In the event problems arise having to do with this matter we would be very glad to have you refer them to this office.

Sincerely,

SIGNED

WILLIAM W. THYBONY  
Colonel, USA  
Chairman, ASPR Committee

Honorable F. Edward Hebert  
House of Representatives



Prepared by: WCTaylor/rbs/27Sep62  
3D773 X74796

Coordinated by:

LA \_\_\_\_\_  
LC \_\_\_\_\_

X032.2

ASPR EDITING SUBCOMMITTEE

16 April 1962

REPORT TO THE ASPR COMMITTEE

SUBJECT: ASPR Case 61-91 - Termination for Default or for  
Convenience of the Government

1. This complies with the ASPR Committee's directions at the  
6 April 1962 meeting.

2. Attached as TAB A is the edited version of subject clause.  
The bracketed language in (e) (2), in (f), and in (g) is recommended  
by the Army and Air Force editors to implement the compromise offered  
by Mr. Reinstein when he was presiding at the time this case was  
considered.

WALTER P. LUKENS  
Major, OCSA JAG  
Army Member

FRANCES A. KELLY  
Chairman  
Navy Member

JOHN D. KELLY  
Air Force Member

Termination ( 1962)

(a) General. (1) The Government may terminate performance of work under this contract in whole, or from time to time in part, if the Contracting Officer determines that such termination is in the best interest of the Government. Any termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the type of termination, the extent to which performance of work under the contract is terminated, and the effective date. Any such termination shall be final, and the Contractor's rights and remedies therefor shall be limited to those provided in this clause. The Contractor shall continue the performance of the contract to the extent not terminated.

(2) If the Contracting Officer determines that the Contractor is in default (as described in paragraph (b) below), the Notice of Termination shall state, and paragraphs (d) and (e) below shall apply. *that the termination is a default termination*  
~~If the Notice of Termination states that the termination is for the convenience of the Government, [states that the contract is terminated without failure of performance on the part of the contractor],~~ paragraphs (f) and (g) below shall apply.

(b) Default. The following constitute default:

- (i) failure of the Contractor to deliver the supplies or perform the services required by this contract within the time specified herein or any extension thereof, or the Contractor's repudiation of his obligation to so deliver or perform; or
- (ii) failure of the Contractor to perform or comply with any other provision of this contract, or failure to make progress so as to endanger performance of this contract in accordance with its terms, if, in either case under this (ii), the Contractor does not cure the failure within ten (10) days after receipt of written notice from the Contracting Officer specifying such failure (or such longer period as the Contracting Officer may approve in writing).

(c) Excusable Delays. Except with respect to defaults of subcontractors, the Contractor shall not be in default for any failure which arises out of causes beyond the control and without the fault or negligence of the Contractor. If the failure is caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault



or negligence of either of them, the Contractor shall not be in default for such failure unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

(d) Default Rights and Liabilities. If the Notice of Termination states that the Contractor is in default, the Government may procure, on such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated. Subject to paragraph (e) below, the Contractor shall be liable to the Government for any excess costs of such supplies or services. The Contractor shall transfer title and deliver to the Government, as the Contracting Officer may direct, (i) any completed supplies, and (ii) such other items, data, and rights as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. Payment for completed supplies delivered to and accepted by the Government shall be at the contract price. Payment for such other items, data, and rights delivered to and accepted by the Government, and for the protection and preservation of property, shall be in an amount agreed upon by the Contractor and Contracting Officer; failure to agree to such amount shall be a dispute concerning a question of fact within the meaning of the "Disputes" clause. The Government may withhold from amounts otherwise due the Contractor for such completed supplies or manufacturing materials such sum as the Contracting Officer determines to be necessary to protect the Government against loss because of outstanding liens or claims of former lien holders.

(e) Disputed Defaults. If the Notice of Termination states that the Contractor is in default, and the Contractor disagrees, the disagreement shall be a dispute concerning a question of fact within the meaning of the "Disputes" clause, and the Notice of Termination shall constitute a decision of the Contracting Officer under that clause. If it is later determined for any reason that the Contractor was not in default, by virtue of paragraph (c) above or otherwise, then paragraph (g) below shall apply; provided, however, that any payment which would otherwise be made to the Contractor under paragraph (g) below shall be equitably reduced if the Contractor has not, promptly upon receipt of the Notice of Termination, taken all reasonable steps to mitigate costs relating to the terminated work. The rights and remedies of the Government provided in paragraphs (a) through (e) hereof are in addition to any other rights and remedies provided by law or under this contract.

TAB A

*non default*

(f) Contractor's Obligations Upon Termination. (1) After receipt of a Notice of Termination ~~for the convenience of the Government, [which states that the contract is terminated without failure of performance on the part of the contractor]~~ the Contractor shall stop work; place no further subcontracts or orders, and terminate, and settle when approved by the Contracting Officer, those that have been placed; make assignments of subcontract rights to the Government when requested; transfer to the Government, or otherwise dispose of, property of all kinds which would have passed to the Government if the contract had been fully completed (but in no event shall the Contractor be required to extend credit to any purchasers); preserve and protect property in the Contractor's possession that is related to the contract; and appropriately account for termination inventory - all in accordance with the Notice of Termination and as the Contracting Officer may direct.

(2) After expiration of the plant clearance period, as defined in Section VIII, Armed Services Procurement Regulation, as it may be amended from time to time, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of any or all items of termination inventory not previously disposed of, exclusive of items whose disposition has been directed or authorized by the Contracting Officer, and may request the Government to remove such items or enter into a storage agreement covering them. Not later than fifteen (15) days thereafter, the Government shall accept title to such items and remove them or enter into a storage agreement covering the same; provided, that the list submitted shall be subject to verification by the Contracting Officer upon removal of the items, or, if the items are stored, within forty-five (45) days from the date of submission of the list. Any necessary adjustment to correct the list as submitted shall be made prior to final settlement.

*non default*  
(g) Payment for Terminated Work. (1) After receipt of a Notice of Termination ~~for the convenience of the Government, [which states that the contract is terminated without failure of performance on the part of the contractor]~~ the Contractor shall submit his termination claim to the Contracting Officer in the form prescribed by the Contracting Officer. The Contractor and the Contracting Officer may agree on the whole or any part of the amount to be paid to the Contractor by reason of the termination, including a reasonable profit for work done. If the Contractor and the Contracting Officer fail to agree on the full amount to be paid to the Contractor by reason of the termination, the Contracting Officer shall determine the amount on the basis of the sum of the following:

- (1) the contract price for completed supplies accepted by the Government (or otherwise disposed of with Government consent and with appropriate credit to the Government);

TAB A

(ii) the total of -

- (A) costs incurred in performing terminated work that are not allocable to supplies covered under (i) above;
- (B) costs incurred in settling and paying claims on subcontracts and orders which were terminated by reason of the termination under this clause; and
- (C) a sum, as profit, equal to two (2) percent of that part of the amount of (A) above which represents supplies not processed by the Contractor plus eight (8) percent of the remainder of such amount, but the aggregate shall not exceed six (6) percent of the whole of such amount; provided, that if it appears the Contractor would have sustained a loss on the entire contract had it been completed, no sum as profit shall be included and the over-all sum to be paid shall be reduced to reflect the indicated rate of loss; and

(iii) the reasonable costs of settlement and of protection and disposition of property related to the terminated work.

Any determination of costs under this paragraph shall be governed by the principles for consideration of costs set forth in Section XV, Part 2, of the Armed Services Procurement Regulation, as in effect on the date of this contract.

(2) In arriving at the amount due the Contractor under this clause there shall be deducted:

- (i) all unliquidated advance or other payments on account theretofore made to the Contractor, applicable to the terminated portion of this contract;
- (ii) any claim which the Government may have against the Contractor in connection with this contract; and
- (iii) the agreed price for, or the proceeds of sale of, any materials, supplies, or other things acquired by the Contractor or sold, pursuant to the provisions of this clause, and not otherwise recovered by or credited to the Government.

(3) If the termination hereunder be partial, prior to the settlement of the terminated portion of this contract, the Contractor may file with the Contracting Officer a request in writing for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract (the portion not terminated by the Notice of Termination), and such equitable adjustment as may be agreed upon shall be made in such price or prices.

(4) The Government may from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the terminated portion of this contract whenever in the opinion of the Contracting Officer the aggregate of such payments shall be within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this clause, such excess shall be payable by the Contractor to the Government upon demand, together with interest computed at the rate of 6 percent per annum, for the period from the date such excess payment is received by the Contractor to the date on which such excess is repaid to the Government; provided, however, that no interest shall be charged with respect to any such excess payment attributable to a reduction in the Contractor's claim by reason of retention or other disposition of termination inventory until ten days after the date of such retention or disposition, or such later date as determined by the Contracting Officer by reason of the circumstances.

(5) Unless otherwise provided for in this contract, the Contractor, from the effective date of termination and for a period of three years after final settlement under this contract, shall preserve and make available to the Government at all reasonable times at the office of the Contractor, but without direct charge to the Government, all his books, records, documents, and other evidence bearing on the costs and expenses of the Contractor under this contract and relating to the work terminated hereunder, or, to the extent approved by the Contracting Officer, photographs, micro-photographs, or other authentic reproductions thereof.

(6) If the Contractor does not submit his termination claim within one year of the effective date of termination or such further time as the Contracting Officer may provide, the Contracting Officer may determine the amount, if any, to be paid by reason of the termination.

(7) Notwithstanding subparagraph (1) above:

- (i) determinations or agreements by the Contracting Officer as to any amount to be paid by reason of a termination shall be subject to any Settlement Review Board approvals required by ASPR Section VIII;

- (ii) if the Contractor disagrees with any determination of the Contracting Officer under this paragraph, such disagreement shall be deemed to be a dispute concerning a question of fact within the meaning of the "Disputes" clause of this contract, except that the Contractor shall have no right of appeal under the "Disputes" clause if he has failed to submit his claim within the time allowed and has not requested an extension; and
- (iii) the total amount to be paid to the Contractor by reason of the termination, exclusive of settlement costs, shall in no event exceed the total contract price as reduced by the amount of payments otherwise made or credited and by the contract price of any work not terminated.

DEPARTMENT OF THE NAVY  
OFFICE OF NAVAL MATERIAL  
WASHINGTON 25, D. C.

M302A/CWC:ems

19 March 1962

MEMORANDUM FOR THE CHAIRMAN, ASPR COMMITTEE

Subj: Case 61-91 Termination for Default or for Convenience of the Government

- I. PROBLEM. To review the draft of the single termination clause, dated 8 January 1962, for purposes of refinement and for the preparation of a revised clause to be submitted to Industry.
- II. RECOMMENDATION. That TAB "A" be submitted to Industry for review and comment.

TAB "A" contains the majority and minority views of the Subcommittee on certain aspects of the clause. The differences are clearly set forth and identified as to whether they are majority or minority recommendations. Other changes unanimously recommended by the Subcommittee are bracketed but not identified.

- III. DISCUSSION. It is the understanding of the Subcommittee that the policy question of whether or not the ASPR Committee will adopt a unified clause has not been finally decided, but that a majority of the Committee has voted in favor of submitting a unified clause to Industry for comment. Your Termination Subcommittee has reviewed the clause and in accordance with the ASPR minutes of 24 January 1962 has added substantive provisions and made certain editorial changes. The members of the Subcommittee disagree on two points. Major Lukens and Mr. Perlman, hereafter referred to as the minority, believe that the type of termination should not be specified and the majority believes that it should be. The reasons for the different positions have been stated in previous reports of the Subcommittee. This difference of opinion is reflected throughout TAB "A".

In paragraph (f) of TAB "A", the majority has used the language set out in ASPR 8-701(b) to specify in detail the actions which the contractor shall take upon receipt of a notice of termination for convenience. This is considered necessary in order to clearly state what the contractor is obligated to do upon receipt of such a notice.

The minority believes that the language in its paragraph (f) is sufficiently detailed to indicate to contractors the actions they must take. The minority sees no need to increase the size of the clause by going into the detail proposed by the majority.

Termination ( 1962)

(a) General. (1) The Government may terminate performance of work under this contract in whole, or from time to time in part, if the Contracting Officer determines that such termination is in the best interest of the Government. Any termination will be effected by delivery to the Contractor of a Notice of Termination specifying

Majority - [the type of termination,] <sup>st</sup>  
the extent to which performance of work under the contract is terminated and the effective date. Any such termination will be final and the Contractor's rights and remedies therefor will be limited to those provided in this clause. [The Contractor shall continue the performance of the contract to the extent not terminated.]

(2) If the Contracting Officer determines that the Contractor is in default (as described in paragraph (b) below), the Notice of Termination will so state and paragraphs (d) and (e) below will apply. If the Notice of Termination

Majority - [states that the termination is for the convenience of the Government]

Minority - ~~Does not state that the Contractor is in default~~

paragraphs (f) and (g) below will apply.

(b) Default. The following constitute default:

(i) failure of the Contractor to deliver the supplies, or perform the services, required by this contract within the time specified herein or any extension thereof, or the Contractor's repudiation of his obligation to so deliver or perform; or

(ii) failure of the Contractor to perform [or comply with] any other provision of this contract, or failure to make progress so as to endanger performance of this contract in

accordance with its terms, if, in either case under this (ii), the Contractor does not cure the failure within ten (10) days after receipt of written notice from the Contracting Officer specifying such failure (or such longer period as the Contracting Officer may approve in writing).

(c) Excusable Delays. Except with respect to defaults of subcontractors, the Contractor shall not be in default for any failure which arises out of causes beyond the control and without the fault or negligence of the Contractor. If the failure is caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be in default for such failure unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

(d) Default Rights and Liabilities. If the Notice of Termination states that the Contractor is in default, the Government may procure, on such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated. Subject to paragraph (e) below, the Contractor shall be liable to the Government for any excess costs of such ~~similar~~ supplies or services. ~~Further [more]~~ The Contractor will transfer title and deliver to the Government, as the Contracting Officer may direct, (i) any completed supplies, and (ii) such other items, data, and rights as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. Payment for completed supplies delivered to and accepted by the Government shall be at the contract



price. Payment for such other items, data, and rights delivered to and accepted by the Government, and for the protection and preservation of property, shall be in an amount agreed upon by the Contractor and Contracting Officer; failure to agree to such amount shall be a dispute concerning a question of fact within the meaning of the "Disputes" clause. [The Government may withhold from amounts otherwise due the Contractor for such completed supplies or manufacturing materials such sum as the Contracting Officer determines to be necessary to protect the Government against loss because of outstanding liens or claims of former lien holders.]

(e) Disputed Defaults. If the Notice of Termination states that the Contractor is in default and the Contractor disagrees, the disagreement shall be a dispute concerning a question of fact within the meaning of the "Disputes" clause and the Notice of Termination shall constitute a decision of the Contracting Officer under that clause. If it is later determined for any reason that the Contractor was not in default, by virtue of paragraph (c) above or otherwise, then paragraph (g) below will apply; provided, however, that any payment which would otherwise be made to the Contractor under paragraph (g) below will be equitably reduced if the Contractor has not, promptly upon receipt of the Notice of Termination, taken all reasonable steps to mitigate costs relating to the terminated work. [The rights and remedies of the Government provided in paragraphs (a) through (e) hereof ~~shall not be affected~~ are in addition to any other rights and remedies provided by law or under this contract.]

(f) Majority - Convenience. After receipt of a Notice of Termination for the convenience of the Government, and except as otherwise directed by the Contracting Officer, the Contractor shall:

- (i) stop work under the contract on the date and to the extent specified in the Notice of Termination;

- (ii) place no further orders or subcontracts for materials, services or facilities, except as may be necessary for completion of such portion of the work under the contract as is not terminated;
- (iii) terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination;
- (iv) assign to the Government, in the manner, at the times, and to the extent directed by the Contracting Officer, all of the right, title, and interest of the Contractor under the orders and subcontracts so terminated, in which case the Government shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;
- (v) settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the Contracting Officer, to the extent he may require, which approval or ratification shall be final for all the purposes of this clause;
- (vi) transfer title and deliver to the Government, in the manner, at the times, and to the extent, if any, directed by the Contracting Officer, (A) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the Notice of Termination, and (B) the completed or partially completed plans, drawings, information, and other property which, if

the contract had been completed, would have been required to be furnished to the Government;

- (vii) use his best efforts to sell, in the manner, at the times, to the extent, and at the price or prices directed or authorized by the Contracting Officer, any property of the types referred to in (vi) above; provided, however, that the Contractor (A) shall not be required to extend credit to any purchaser, and (B) may acquire any such property under the conditions prescribed by and at a price or prices approved by the Contracting Officer; and provided further that the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the Government to the Contractor under this contract or shall otherwise be credited to the price or cost of the work covered by this contract or paid in such other manner as the Contracting Officer may direct; and
- (viii) take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation of the property related to this contract which is in the possession of the Contractor and in which the Government has

or may acquire an interest.]

*Contractor's Obligations upon Termination*  
Minority - Concluding Terminated Work. After receipt of a Notice of Termination ~~that does not state that the Contractor is in default~~ *for convenience*, the Contractor shall stop work; place no further subcontracts or orders and terminate; and settle, when approved by the Contracting Officer, those that have been placed, make assignments of subcontract rights to the Government when requested; transfer to the Government, or otherwise dispose of property of all kinds which would have passed to the Government if the contract had been fully completed, (but

in no event shall the Contractor be required to extend credit to any purchasers), preserve and protect property in his possession that is related to the contract; and appropriately account for termination inventory - all in accordance with the Notice of Termination and as the Contracting Officer may direct.] --

[At any time after expiration of the plant clearance period, as defined in Section VIII, Armed Services Procurement Regulation, as it may be amended from time to time, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of any or all items of termination inventory not previously disposed of, exclusive of items the disposition of which has been directed or authorized by the Contracting Officer, and may request the Government to remove such items or enter into a storage agreement covering them. Not later than fifteen (15) days thereafter, the Government will accept title to such items and remove them or enter into a storage agreement covering the same; provided, that the list submitted shall be subject to verification by the Contracting Officer upon removal of the items, or if the items are stored, within forty-five (45) days from the date of submission of the list and any necessary adjustment to correct the list as submitted shall be made prior to final settlement.]

(g) Payment for Terminated Work. (1) After receipt of a Notice of Termination -

Majority - [for the convenience of the Government]

~~Minority - [that does not state that the Contractor is in default]~~ -

the Contractor will submit his termination claim to the Contracting Officer in the form prescribed by the Contracting Officer. The Contractor and the Contracting Officer may agree on the whole or any part of the amount to be paid to the Contractor by reason of the termination, including a reasonable profit for work

done. If the Contractor and the Contracting Officer fail to agree on the full amount to be paid to the Contractor by reason of the termination, the Contracting Officer shall determine the amount on the basis of the sum of the following:

- (i) the contract price for completed supplies accepted by the Government (or otherwise disposed of with Government consent and with appropriate credit to the Government);
- (ii) the total of -
  - (A) costs incurred in performing terminated work that are not allocable to supplies covered under (i) above;
  - (B) costs incurred in settling and paying claims on sub-contracts and orders which were terminated by reason of the termination under this clause; and
  - (C) a sum, as profit, equal to two (2) percent of that part of the amount of (A) above which represents supplies not processed by the Contractor plus eight (8) percent of the remainder of such amount, but the aggregate shall not exceed six (6) percent of the whole of such amount; provided, that if it appears the Contractor would have sustained a loss on the entire contract had it been completed, no sum as profit will be included and the over-all sum to be paid will be ~~appropriately~~ reduced /to reflect the indicated rate of loss/; and
- (iii) the reasonable costs of settlement and of protection and disposition of property related to the terminated work.

[Any determination of costs under this paragraph shall be governed by the principles for consideration of costs set forth in Section XV, Part 2, of the Armed Services Procurement Regulation, as in effect on the date of this contract.]

[(2) In arriving at the amount due the Contractor under this clause there shall be deducted (i) all unliquidated advance or other payments on account theretofore made to the Contractor, applicable to the terminated portion of this contract, (ii) any claim which the Government may have against the Contractor in connection with this contract, and (iii) the agreed price for, or the proceeds of sale of, any materials, supplies, or other things acquired by the Contractor or sold, pursuant to the provisions of this clause, and not otherwise recovered by or credited to the Government.]

[(3) If the termination hereunder be partial, prior to the settlement of the terminated portion of this contract, the Contractor may file with the Contracting Officer a request in writing for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract (the portion not terminated by the Notice of Termination), and such equitable adjustment as may be agreed upon shall be made in such price or prices.]

[(4) The Government may from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the terminated portion of this contract whenever in the opinion of the Contracting Officer the aggregate of such payments shall be within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this clause, such

excess shall be payable by the Contractor to the Government upon demand, together with interest computed at the rate of 6 percent per annum, for the period from the date such excess payment is received by the Contractor to the date on which such excess is repaid to the Government; provided, however, that no interest shall be charged with respect to any such excess payment attributable to a reduction in the Contractor's claim by reason of retention or other disposition of termination inventory until ten days after the date of such retention or disposition, or such later date as determined by the Contracting Officer by reason of the circumstances.]

[(5) Unless otherwise provided for in this contract, ~~or by applicable statute~~, the Contractor, from the effective date of termination and for a period of three years after final settlement under this contract, shall preserve and make available to the Government at all reasonable times at the office of the Contractor but without direct charge to the Government, all his books, records, documents, and other evidence bearing on the costs and expenses of the Contractor under this contract and relating to the work terminated hereunder, or, to the extent approved by the Contracting Officer, photographs, micro-photographs, or other authentic reproductions thereof.]

[(6) If the Contractor does not submit his termination claim within one year of the effective date of termination or such further time as the Contracting Officer may provide, the Contracting Officer may determine the amount, if any, to be paid by reason of the termination.]

[(7) Notwithstanding anything in subparagraph (1) above (i) determinations or agreements by the Contracting Officer as to any amount to be paid by reason of a termination will be subject to any Settlement Review Board approvals required by ASPR Section VIII; (ii) if the Contractor disagrees with

any determination of the Contracting Officer under this paragraph, such disagreement will be deemed to be a dispute concerning a question of fact within the meaning of the "Disputes" clause of this contract, except that the Contractor will have no right of appeal under the "Disputes" clause if he has failed to submit his claim within the time allowed and has not requested an extension; and (iii) the total amount to be paid to the Contractor by reason of the termination, exclusive of settlement costs, will in no event exceed the total contract price as reduced by the amount of payments otherwise made or credited and by the contract price of any work not terminated.]



61-91  
12 July 1961

MEMORANDUM FOR: CHAIRMAN, ARMED SERVICES PROCUREMENT REGULATION COMMITTEE

SUBJECT: Termination for Default or for the Convenience of the Government

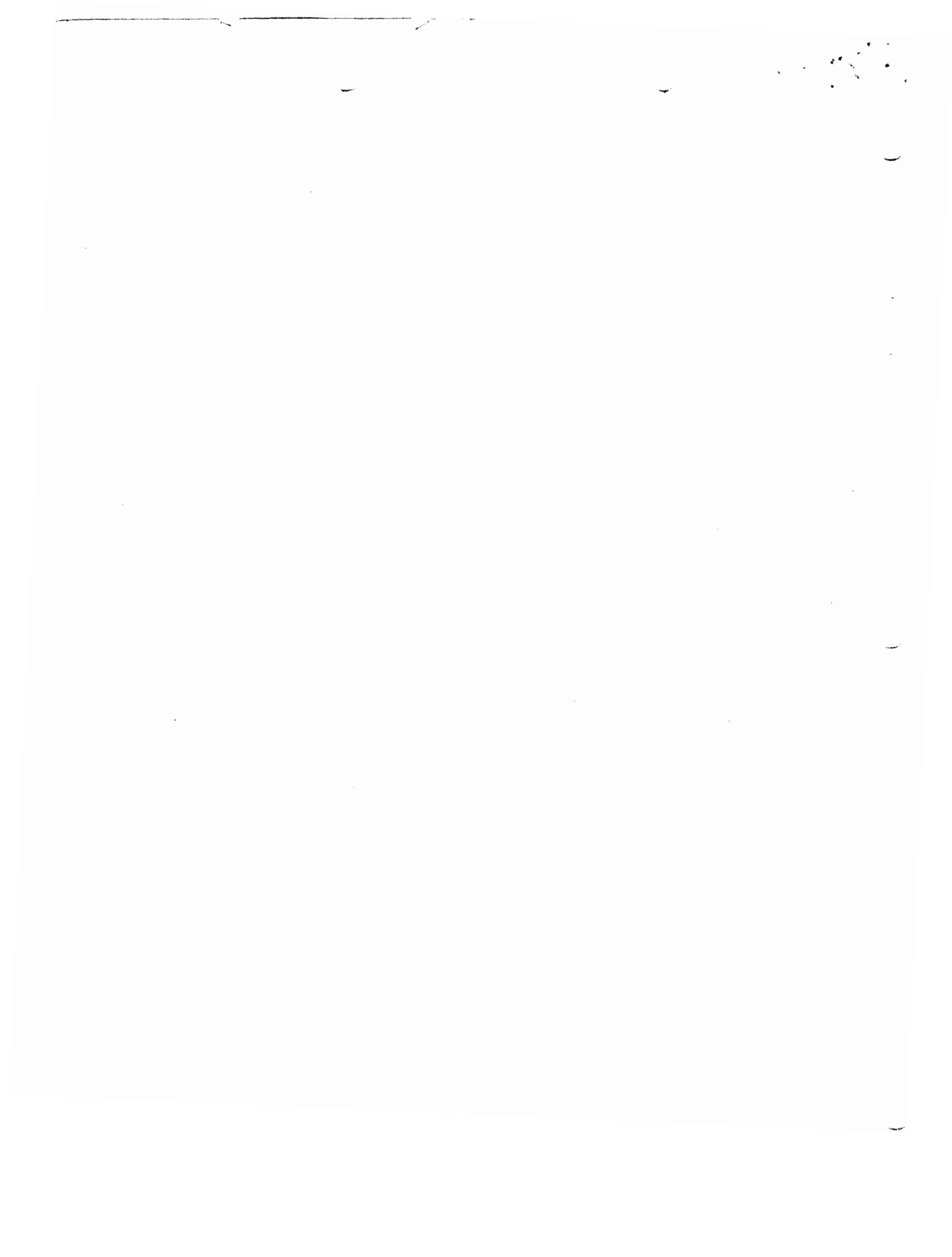
1. The Court of Claims held in S. Harvey Klein, Assignee for the Benefit of Creditors of Beam Radionics Corporation v. United States, 285 Fed. (2d) 778 (Ct. Clms., 18 Jan. 61) that the Government's erroneous termination for default was a breach of contract and could not be converted to a termination for convenience of the Government under the Default clause (ASPR 8-707(e)). The Court also indicated that the Government could not rely on the right to terminate for the convenience of the Government because the contracting officer at the time of the original termination had not made a determination that such a termination would be in the best interests of the Government.

2. This decision of the Court of Claims is contrary to the intended meaning of the ASPR clauses governing Default and Termination for the Convenience of the Government that: (i) any erroneous default termination be treated as a termination for the convenience of the Government; and (ii) that the Government's right to terminate for the convenience of the Government is not conditioned upon a prior formal determination of the contracting officer that such a termination will be in the best interests of the Government. In reaching its decision it appears that the Court may have been confused by the fact that there are separate clauses governing termination for convenience and termination for default.

3. It is recommended that the Contract Termination Subcommittee consider revision of the clauses entitled "Default", "Termination For Convenience of the Government" and "Termination" to make clear the intended meaning as set out in paragraph 2 above. It is further recommended that the related clauses on Default and Termination for Convenience of the Government be combined and that the revised clause clearly express the intended meaning set forth above. In this manner there will be no doubt that when the Government erroneously terminates for default, it may convert that termination to one for the convenience of the Government. A recommended clause for fixed-price contracts to accomplish this objective is attached (Tab).

1 Incl.  
Tab

*for* *ER Shepherd* *Co*  
JOHN D. KOOKEN  
Colonel, JAGC  
Army Legal Member  
ASPR Committee



20 June 1961

Termination (\_\_\_\_ 1961)

(a) General. The Government may terminate the performance of work under this contract in whole, or from time to time in part, if for any reason the Contracting Officer determines that such termination is in the best interests of the Government. Any such termination will be final; any recourse of the Contractor will be limited to that provided in this clause. Any such termination will be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated and the date when such termination becomes effective. If the Contracting Officer determines that the Contractor is in default, as described in paragraph (b) below, the Notice of Termination will so state and the provisions of paragraphs (d) and (e) below will apply. If the Notice of Termination does not state that the Contractor is in default, then paragraphs (f) and (g) below will apply.

(b) Default. Except as provided in paragraph (c) below, any of the following constitutes default:

- (i) failure of the Contractor to make delivery of the supplies, or to perform the services, required by this contract within the time specified therefor or any extension thereof;
- (ii) failure of the Contractor to perform any other provision of this contract; or
- (iii) failure of the Contractor to make progress in the performance of this contract in accordance with its terms, if such failure endangers such performance;

provided, as to (ii) and (iii), that the Contracting Officer has given the Contractor written notice specifying the failure and the Contractor has not cured the failure within a period of ten (10) days after receipt of such notice (or such longer period as the Contracting Officer may approve in writing).

(c) Excusable Delays. Except with respect to defaults of subcontractors, the Contractor shall not be in default for any failure which arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure is caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be in default for such failure unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

(d) Default Rights and Liabilities. If the Notice of Termination states that the Contracting Officer determines that the Contractor is in default as provided in paragraph (a) above, the Government may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated. Subject to paragraph (e) below, the Contractor shall be liable to the Government for any excess costs of such similar supplies or services. Furthermore, the Government, in

in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. Payment for completed supplies delivered to and accepted by the Government shall be at the contract price. Payment for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property shall be in an amount agreed upon by the Contractor and Contracting Officer; failure to agree to such amount shall be a dispute concerning a question of fact within the meaning of the "Disputes" clause. Except as otherwise provided in this paragraph (d) and subject to paragraph (e) below the Government shall not be liable under this contract for any payment relating to such part of this contract as has been terminated.

(e) Disputed Defaults. If the Notice of Termination states that the Contracting Officer determines that the Contractor is in default as provided in paragraph (a) above, and if the Contractor disagrees with the Contracting Officer's determination, such disagreement shall be a dispute concerning a question of fact within the meaning of the "Disputes" clause and the Notice of Termination shall constitute a decision of the Contracting Officer under that clause. If it is later determined for any reason that the Contractor

was not in default, by virtue of paragraph (c) above or otherwise, then paragraph (g) below will apply; provided, however, that any payment which would otherwise be made to the Contractor under paragraph (g) below will be equitably reduced if the Contractor has not, promptly upon receipt of the Notice of Termination, taken all reasonable steps to mitigate costs relating to the terminated work.

(f) Concluding Terminated Work. After receipt of any Notice of Termination which does not state that the Contractor is in default, except as otherwise directed by the Contracting Officer, the Contractor shall:

- (i) stop work under the contract on the date and to the extent specified in the Notice of Termination;
- (ii) place no further orders or subcontracts for materials, services or facilities, except as may be necessary for completion of such portion of the work under the contract as is not terminated;
- (iii) terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination;
- (iv) assign to the Government, in the manner, at the time, and to the extent directed by the Contracting Officer, all of the right, title, and interest of the Contractor under the orders and subcontracts so terminated, in which case the Government shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;
- (v) settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the Contracting Officer, to the extent he may require, which approval or ratification shall

be final for all the purposes of this clause;

- (vi) transfer title and deliver to the Government, in the manner, at the times, and to the extent, if any, directed by the Contracting Officer, (A) the fabricated or unfabricated parts, work in process, completed work, supplies, and other materials produced as a part of, or acquired in connection with the performance of, the work terminated by the Notice of Termination, and (b) the completed or partially completed plans, drawings, information, and other property which, if the contract had been completed, would have been required to be furnished to the Government;
- (vii) use his best efforts to sell, in the manner, at the times, to the extent, and at the price or prices directed or authorized by the Contracting Officer, any property of the types referred to in (v) above; provided, however, that the Contractor (A) shall not be required to extend credit to any purchaser, and (B) may acquire any such property under the conditions prescribed by and at a price or prices approved by the Contracting Officer; and provided further that the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the Government to the Contractor under this contract or shall otherwise be credited to the price or cost of the work covered by this contract or paid in such other manner as the Contracting Officer may direct;
- (viii) complete performance of such part of the work as shall not have been terminated by the Notice of Termination; and

- (ix) take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation of the property related to this contract which is in the possession of the Contractor and in which the Government has or may acquire an interest.

At any time after expiration of the plant clearance period, as defined in Section VIII, Armed Services Procurement Regulation, as it may be amended from time to time, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of any or all items of termination of inventory not previously disposed of, exclusive of items the disposition of which has been directed or authorized by the Contracting Officer, and may request the Government to remove such items or enter into a storage agreement covering them. Not later than fifteen (15) days thereafter, the Government will accept title to such items and remove them or enter into a storage agreement covering the same; provided, that the list submitted shall be subject to verification by Contracting Officer upon removal of the items, or if the items are stored, within forty-five (45) days from the date of submission of the list, and any necessary adjustment to correct the list as submitted shall be made prior to final settlement.

(g) Payment for Terminated Work. (1) After receipt of a Notice of Termination which does not state that the Contractor is in default, or after a determination pursuant to paragraph (d) above that the Contractor was not in default, the Contractor shall submit to the Contracting Officer his termination claim, in the form and with certification prescribed by the Contracting Officer. Such claim shall be submitted promptly but in no event later than one year from the effective date of termination, unless one or more extensions



in writing are granted by the Contracting Officer, upon request of the Contractor made in writing within such one year period or authorized extension thereof. However, if the Contracting Officer determines that the facts justify such action, he may receive and act upon any such termination claim at any time after such one year period or any extension thereof. Upon failure of the Contractor to submit his termination claim within the time allowed, the Contracting Officer may, subject to any Settlement Review Board approvals required by Section VIII of the Armed Services Procurement Regulation in effect as of the date of execution of this contract, determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall thereupon pay to the Contractor the amount so determined.

(2) Subject to the provisions of subparagraph (1), and subject to any Settlement Review Board approvals required by Section VIII of the Armed Services Procurement Regulation in effect as of the date of execution of this contract, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of the total or partial termination of work pursuant to this clause, which amount or amounts may include a reasonable allowance for profit on work done; provided, that such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. The contract shall be amended accordingly, and the Contractor shall be paid the agreed amount. Nothing in paragraph (e) of this clause, prescribing the amount to be paid to the Contractor in the event of failure of the Contractor and the Contracting Officer to agree upon the whole amount to be paid to the

Contractor by reason of the termination of work pursuant to this clause, shall be deemed to limit, restrict, or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to the Contractor pursuant to this paragraph (d).

(3) In the event of the failure of the Contractor and the Contracting Officer to agree as provided in subparagraph (2) upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, the Contracting Officer shall, subject to any Settlement Review Board approvals required by Section VIII of the Armed Services Procurement Regulation in effect as of the date of execution of this contract, determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall pay to the Contractor the amounts determined as follows:

- (i) for completed supplies accepted by the Government (or sold or acquired as provided in paragraph (f) (vii) above, if applicable), and not theretofore paid for, a sum equivalent to the aggregate price for such supplies computed in accordance with the price or prices specified in the contract, appropriately adjusted for any saving of freight or other charges;
- (ii) the total of —
  - (A) the costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but exclusive of any costs attributable to supplies paid or to be paid for under paragraph (e)(i) hereof;

- (B) the cost of settling and paying claims arising out of the termination of work under subcontracts or orders, as provided in paragraph (f)(v) above, if applicable, which are properly chargeable to the terminated portion of the contract (exclusive of amounts paid or payable on account of supplies or materials delivered or services furnished by subcontractors or vendors prior to the effective date of the Notice of Termination, which amounts shall be included in the costs payable under (A) above; and
- (C) a sum, as a profit, equal to 2 percent of that part of the amount determined under (A) above, which represents the cost of articles and materials not processed by the Contractor, plus a sum equal to 8 percent of the remainder of such amount, but the aggregate of such sums shall not exceed 6 percent of the whole of the amount determined under (A) above; provided, however, that if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this subdivision (C) and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss; and
- (iii) the reasonable costs of settlement, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settle-

ment of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to this contract.

The total sum to be paid to the Contractor under (i) and (ii) of this paragraph (3) shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Except for normal spoilage, and except to the extent that the Government shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the Contractor as provided in (e) (i) and (ii) (A) above, the fair value, as determined by the Contracting Officer, of property which is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government, or to a buyer pursuant to paragraph (b)(vii).

(4) Any determination of costs under subparagraph (1) or (3) hereof shall be governed by the principles for consideration of costs set forth in Section XV, Part 2, of the Armed Services Procurement Regulation, as in effect on the date of this contract.

(5) The Contractor shall have the right of appeal, under the clause of this contract entitled "Disputes" from any determination made by the Contracting Officer under subparagraph (1) or (3) above, except that if the Contractor has failed to submit his claim within the time provided in subparagraph (1) above and has failed to request extension of such time, he shall have no such right of appeal. In any case where the Contracting Officer has made a determination of the amount due under subparagraph (1) or (3) above, the Government shall pay to the Contractor the following: (i) if there is no right of appeal hereunder or if no timely appeal has been taken,

the amount so determined by the Contracting Officer, or (ii) if an appeal has been taken, the amount finally determined on such appeal.

(6) In arriving at the amount due the Contractor under this clause there shall be deducted (i) all unliquidated advance or other payments on account theretofore made to the Contractor, applicable to the terminated portion of this contract, (ii) any claim which the Government may have against the Contractor in connection with this contract, and (iii) the agreed price for, or the proceeds of sale of, any materials, supplies, or other things acquired by the Contractor or sold, pursuant to the provisions of this clause, and not otherwise recovered by or credited to the Government.

(7) If the termination hereunder be partial, prior to the settlement of the terminated portion of this contract, the Contractor may file with the Contracting Officer a request in writing for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract (the portion not terminated by the Notice of Termination), and such equitable adjustment as may be agreed upon shall be made in such price or prices.

(8) The Government may from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the terminated portion of this contract whenever in the opinion of the Contracting Officer the aggregate of such payments shall be within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this clause, such excess shall be payable by the Contractor to the Government upon demand, together with interest computed at the rate of 6 percent per annum, for the period from the date such excess payment

is received by the Contractor to the date on which such excess is repaid to the Government; provided, however, that no interest shall be charged with respect to any such excess payment attributable to a reduction in the Contractor's claim by reason of retention or other disposition of termination inventory until ten days after the date of such retention or disposition, or such later date as determined by the Contracting Officer by reason of the circumstances.

(9) Unless otherwise provided for in this contract, or by applicable statute, the Contractor, from the effective date of termination and for a period of three years after final settlement under this contract, shall preserve and make available to the Government at all reasonable times at the office of the Contractor but without direct charge to the Government, all his books, records, documents, and other evidence bearing on the costs and expenses of the Contractor under this contract and relating to the work terminated hereunder, or, to the extent approved by the Contracting Officer, photographs, micro-photographs, or other authentic reproductions thereof.

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16 March 1964

Mr. Karl G. Harr  
President  
Aerospace Industries Association  
of America, Inc.  
1725 De Sales Street, N. W.  
Washington, D. C. 20036

Dear Mr. Harr:

We are forwarding for your information proposed ASPR coverage of construction contracting and certain related matters. Due to the nature of the subject being covered, we are requesting "industry comments" from a somewhat different set of associations than would usually be the case. It may be that, in view of the subject matter of this material, you will not wish to submit any comments. If you do, we request that they should be submitted by not later than 20 May 1964.

Sincerely yours,

WILLIAM W. THYBONY  
Colonel, USA  
Chairman, ASPR Committee

Enclosure

OASD(I&L)LACox:mep 3/11/64  
3D 776 74796

Identical letter also sent to the  
attached list of addresses.



OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE  
WASHINGTON, D.C. 20301

31 January 1964

INSTALLATIONS AND LOGISTICS

MEMORANDUM FOR THE ASPR COMMITTEE MEMBERS

SUBJECT: Case 61-160 - Case XVIII, Construction

The following is the status of tasks assigned in connection with Exhibit A of this case:

Page 9, par. 18-110(c) - Mr. Edward Cox agreed to review and propose a definition of unbalanced bids. He submits the following (substantially that used in "Frank Stamato and Company vs. City of New Brunswick"- 90A.2nd 34, 31 - also 38 Comp Gen 572):

"An <sup>un</sup>balanced bid is one which is based on nominal prices (less than cost) for some work, and prices which are overstated for other work."

Page 17, par. 18-303.1 - Mr. Edward Cox agreed to present material on weighted guidelines for revision of the coverage. He suggested revising the first sentence of 18-303.1 to read

"The guidance set forth in 3-808 shall be used in considering profit as an element of price under negotiated fixed-price type construction contracts which are not the result of competition."

Page 21, par. 18-306.3 - Mr. Markey agreed to consult with the other Legal members and develop revised coverage. Coverage has not been received to date.

Page 22, Part 4 - Architect-Engineer Contracts. A tri-Service group was designated to prepare a revised Part 4. A copy of this was submitted by Mr. Beale, and Colonel Ruby made minor editorial changes in it. As revised, it has been distributed to Committee members. Additional copies are available.

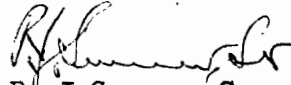
Page 43, par. 18-618.4(a) - Mr. Ryan agreed to review the second sentence and recommend its revision or concur in its deletion. Deletion was recommended.

Page 53, par. 12-402 - Changes recommended were to have been presented by Mr. Saylor, and Department of Labor concurrence was to have been obtained by Colonel Wilson. Comments were withdrawn, and no changes were recommended.



Page 62, par. 18-704.1(b)(ii) - Colonel Wilson and Mr. Saylor agreed to redraft this subparagraph on Preconstruction Conferences. They agreed that no redraft was necessary but made the comment that cooks and storekeepers are not covered by the Davis Bacon Act.

Page 82, Part 9 - Patents, Data, and Copyrights. This was assigned to the Patents Subcommittee for revision with a reporting date of 10 February 1964.

  
R. J. Sumner, Sr.  
Acting Secretary  
ASPR Committee

61-160

16 FEB 1965

Mr. Paul A. Barron, LR  
General Services Administration  
Assistant General Counsel  
Regulations and General Law Division  
Washington 25, D. C.

Dear Mr. Barron:

Reference is made to your letter of 3 February 1965 requesting the designation of a Department of Defense representative to participate with an interagency study group in the development, for the FPR, of a consolidated construction regulation.

As you know the Department of Defense has just completed a similar consolidation of the military department coverage in the area of construction for issuance in the ASPR. This material is in the process of being printed and will be issued within a few days in ASPR Revision No. 9. The Department of Defense representative to the interagency group is:

Mr. E. Manning Seltzer  
General Counsel, OCE  
Room 1207 Tempo 7  
Gravelly Point  
X54424

Mr. Seltzer's alternate to the interagency group is:

Mr. John H. Ryan, OCE  
Room 1213 Tempo 7  
Gravelly Point  
X54531

Sincerely yours,

Signed

Prep by: ABCarter/16/2/65/cc  
Rm3D776 X75476

ROGER E. TERZIAN  
COL. USAF  
Chairman, ASPE Committee

Mr. Carl G. Barr  
President  
Aerospace Industries Association  
of America, Inc.  
1725 De Sales Street, N. W.  
Washington, D. C. 20036

Dear Mr. Barr:

We are forwarding for your information proposed AFPR coverage of construction contracting and certain related matters. Due to the nature of the subject being covered, we are requesting "industry comments" from a somewhat different set of associations than would usually be the case. It may be that, in view of the subject matter of this material, you will not wish to submit any comments. If you do, we request that they should be submitted by not later than 30 May 1964.

Sincerely yours,

WILLIAM W. TERRY  
Colonel, USA  
Chairman, AFPR Committee

Enclosure

WWT(121) LAC:map 3/11/64  
30 YTS 74796

Identical letter also sent to the  
attached list of addressees.

# INDUSTRY ASSOCIATIONS COOPERATING ON AFSA

Mr. J. W. Starnes, President  
Machinery and Allied Products Institute  
1200 18th Street, N. W.  
Washington 6, D. C. (RE 7-2325)

Mr. C. W. Starnes  
Machinery and Allied Products Institute  
1200 18th Street, N. W.  
Washington 6, D. C. (RE 8-3430)

Mr. J. W. Starnes  
Contracts Division  
Association  
Commonwealth Building  
Washington 6, D. C. (RE 1-0772)

Mr. Reynolds Bennett  
National Association of Manufacturers  
Two East 40th Street  
New York 17, New York (RE 8-4200)

Mr. J. W. Starnes, USA (Ret.)  
Executive Director  
National Industrial Association  
Building  
Washington 6, D. C. 20006 (347-7256)

Capt. R. E. McFarlane, USA (Ret.)  
Executive Director  
National Security Industrial Association, Inc.  
1107 19th Street, N. W.  
Washington 6, D. C. (RE 8-7474)

~~Mr. J. W. Starnes, Executive Director  
National Industrial Association  
Building  
Washington 6, D. C. (RE 2-2040)~~

Mr. Edwin E. Hood, President  
Shipbuilders Council of America  
1730 K Street, N. W.  
Washington 6, D. C. (RE 8-7722)

Mr. J. W. Starnes  
Manufacturers Association  
Building  
Washington 6, D. C. (298-7970)

Mr. C. Earl Miller  
Strategic Industries Association  
740 S. Western Avenue, Suite 107  
Los Angeles, California (DU 5-8491)

Mr. E. R. Rector, Executive Vice President  
Strategic Industries Association  
Building  
Washington 6, D. C. (RE 8-3902)

Mr. Reuben Silverman  
U. S. Chamber of Commerce  
1615 H Street, N. W.  
Washington, D. C. (RE 8-2380)

Mr. J. W. Starnes, USA (Ret.)  
Executive Vice President  
Strategic Industries Association  
Building  
Washington 6, D. C. (RE 7-6606)

Mr. E. E. Furry, Executive Vice President  
Western Electronic Manufacturers Association  
Travelers Building  
3600 Wilshire Boulevard  
Los Angeles, Calif. 90005 (213/397-5191)

## Financial and Accounting Matters

~~Mr. J. W. Starnes, Chairman  
Panel on Government Procurement Policies  
Financial Executive Institute  
Two Park Avenue  
New York 26, New York~~

~~Mr. Daniel W. Potter, Chairman,  
Panel on Government Procurement Policies  
Financial Executive Institute  
Two Park Avenue  
New York 26, New York~~

STET

## Information Copies To

Mr. J. W. Starnes  
Executive Director, Defense Group  
Accounting and Audit Division  
Operating Office, Room 5079  
Washington 6, D. C. (Code 129, 34353)

Mr. Barry Millito  
Logistics Management Institute  
Room 3D 761, The Pentagon (362-9633)  
Room 2E 761, The Pentagon (GE 5-3176)

AFSA Committee Members

Mr. William E. Dunn  
Executive Director  
The Associated General Contractors  
of America, Inc.  
1957 H Street, N. W.  
Washington 6, D. C.

Dear Mr. Dunn:

Enclosed is a proposed revision to the Armed Services Procurement Regulation covering the procurement of construction and certain related matters. You will note that the enclosed material comprises four separate sections: Exhibits "A", "B", and "C", covering respectively a proposed new Section XVIII of ASPR on procurement procedures for construction, a proposed new part to Section VII of ASPR covering contract clauses for construction contracts, and proposed additions to Section XVI of ASPR covering certain contract forms for use in connection with construction contracts; and certain additional ASPR changes which would be appropriately interpreted elsewhere in the Regulation.

We would appreciate receiving any comments which you may wish to make on this material by not later than 30 May 1964. We should take this occasion to point out that, by and large, the proposed material represents a codification of existing procurement procedures rather than the creation of new procedures. We should also point out that, due to the size of this undertaking, we have confronted a continuing problem of keeping the proposed construction material current in relation to other portions of ASPR which have undergone changes while the construction material was being developed. We recognize that the enclosed material is not entirely up to date in all respects. For instance, in connection with recent revisions in the Department of Labor's regulations concerning the Davis-Bacon Act and related legislation, you will note that the attached material does not reflect these revisions. Needless to say, before this material is finally published in ASPR, it will be brought up to date.

Sincerely yours,

WILLIAM W. THROCK  
Colonel, USA  
Chairman, ASPR Committee

Enclosure

CAED(121) LAC:mp 3/11/64  
3D 776 74796

Identical letter also sent to  
the attached list of addressees.

X Institute of Electrical and  
Electronic Engineers  
345 East 47th Street  
New York 17, New York

✓ American Institute of Architects  
1635 New York Avenue, N. W.  
Washington, D. C.

Attn: Mr. Kenneth C. Lanley

*Info copy to:*  
Mr. Harold H. Rubin

Associate Director, Defense Group  
Defense Accounting and Audit Div.  
General Accounting Office, Rm. 6079  
441 O Street, N. W.  
Washington, D. C.

X National Association of Plumbing,  
Heating, Cooling Contractors  
1016 20th Street, N. W.  
Washington 6, D. C.  
Attn: Mr. C. D. Bromell, President

✓ American Society of Mechanical Engineers  
345 East 47th Street  
New York 17, New York  
Attn: Mr. G. D. Schler

*Info copy to:*  
Mr. Harry Shillito  
Logistics Management Institute  
The Pentagon, Room 3D 777

Mr. John H. Sullivan  
Directorate of Information Services  
OASD (PA)  
The Pentagon, Room 2E 761

Mr. Robert Chapen  
Aircraft Associates  
Cockeysville, Maryland

Dear Bob:

As I promised you in our recent telephone conversation,  
I am attaching a copy of the proposed AFR Construction  
"package" being sent to selected industry associations  
for comment.

Sincerely yours,

WILLIAM W. THYSON  
Colonel, USA  
Chairman, AFR Committee

Attachment

62-101 (101) R/Banner: map 3/9/64

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Mr. M. N. Quade, Chairman  
Coordinating Committee on Relations of Engineers  
in Private Practice with Government  
165 Broadway  
New York 6, New York

16 March 1964

Dear Mr. Quade:

I appreciate your letter of 5 March 1964 in which you offer the services of your Committee in formulating comments on the proposed ASPR material covering construction contracting, architect-engineer contracting, and certain related matters. We enclose the 11 copies of the proposed material which you requested. We are asking for comments by not later than 20 May 1964.

We should take this occasion to point out that, by and large, the proposed material represents a codification of existing procurement procedures rather than the creation of new procedures. We should also point out that, due to the size of this undertaking, we have confronted a continuing problem of keeping the proposed construction material current in relation to other portions of ASPR which have undergone changes while the construction material was being developed. We recognize that the enclosed material is not entirely up to date in all respects. For instance, in connection with recent revisions in the Department of Labor's regulations concerning the Davis-Bacon Act and related legislation, you will note that the attached material does not reflect these revisions. Needless to say, before this material is finally published in ASPR, it will be brought up to date.

Thank you very much for your cooperation with us in this matter.

Sincerely yours,

WILLIAM W. THYBONY  
Colonel, USA  
Chairman, ASPR Committee

Enclosures (11)

Info cys to: John H. Sullivan, OSD(PA)  
Barry Shillito, LMI, Pentagon  
Harold H. Rubin, GAO

OASD(I&L)LAG:mep 3/11/64  
3D 776 74796



Date July 7, 1964 R. T.

ASPR CASE NO. 61-162

Subject: 175 PR 18-1900

STAFF ACTION

Comments or Recommended OSD Position:

I think the Committee should  
give careful thought before it  
authorizes what are in effect  
2 §1X's. Why could the original  
one IX cover all cases ~~even if~~  
it is reproduced in §18

✓ 18-910.1 - Full ownership <sup>of plan.</sup> should  
be paid for by the Govt

Coordination:

(a) None required \_\_\_\_\_

(b) Other elements in OSD \_\_\_\_\_

(c) Other Agencies (e.g., GSA, NASA, SBA, etc.) GSA

(d) Recommendation as to Industry Coordination Yes

HCH

(Signature)

Ed. note on capitalization: All paragraphs titles should have initial caps except 18-901 (a), (b), and (c) which only the first word should be capitalized.

ASPR Case 61-160

Tab A

## SECTION XVIII PART 9

### PATENTS, DATA, AND COPYRIGHTS

18-900 ~~SCOPE OF PART~~. This Part sets forth the policies, instructions, ~~regulations~~ and contract clauses pertaining to patents, data, and copyrights in connection with the procurement of construction and related architect-engineer services. The provisions of Section IX <sup>as they</sup> ~~relating to the procurement~~ <sup>of</sup> supplies are applicable where the procurement is of construction materials or supplies as such, as distinguished from "construction" as defined in 18-101.1. Similarly, where one of the purposes of the procurement is ~~for~~ experimental, developmental or research work, or ~~for~~ test and evaluation studies (involving such work) of structures, equipment, processes, or materials or use in construction, the provisions of Section IX <sup>as they</sup> ~~relating to the procure-~~ <sup>ment of</sup> research and development <sup>apply</sup> ~~are applicable~~. Where the proposed contract calls for either <sup>(i)</sup> experimental, developmental, or research work, or <sup>(ii)</sup> supplies and materials, in addition to either construction or architect-engineer work, the pertinent provisions of Section IX shall be added to the contract pursuant to instructions contained in this Part. In such cases, the contract ~~may be~~ <sup>shall</sup> ~~divided into parts or otherwise written to indicate clearly which of these the~~ ~~contract~~ clauses of Section IX apply only to the experimental, developmental or research work, or supplies and materials being procured, <sup>only to the</sup> ~~under the contract~~.

18-901 ~~DEFINITIONS~~. For the purpose of this Part, the following terms have the meanings set forth below (See also 9-201):

(a)  
18-901.1 PLANS AND SPECIFICATIONS FOR CONSTRUCTION means drawings, specifications, and other data for and preliminary to the construction of

a particular public building, structure or work within the definition of construction ~~as set forth~~ in 18-101.1.

(b)

~~18-901.2~~ SHOP DRAWINGS FOR CONSTRUCTION means drawings prepared by the construction contractor, subcontractor, or any lower tier subcontractor pursuant to the construction contract, showing in detail <sup>Proposed</sup> the fabrication, assembly, or installation of structures, materials, or equipment.

(c)

~~18-901.3~~ AS-BUILT DRAWINGS FOR CONSTRUCTION means drawings prepared by a contractor or subcontractor to show the construction of a particular structure or work as actually completed under the contract.

18-902 AUTHORIZATION AND CONSENT. See 9-102.

18-902.1 GENERAL. <sup>The</sup> An Authorization and Consent clause <sup>IN 9-102.1</sup> shall be included in all contracts for construction materials or supplies and in all construction contracts, except where both complete performance and delivery (if any) are to be accomplished outside the United States, its possessions, or Puerto Rico. Normally an authorization and consent clause shall not be included in an architect-engineer contract; <sup>the</sup> However, <sup>IN 9-102.1</sup> such a clause shall be included in architect-engineer contracts which require the delivery of models, samples, or other products, or which may require the use of patented devices or processes to test or perform any part of the work, ~~under the architect-engineer contract~~ <sup>stet</sup> except where the contract is to be performed wholly outside the United States, its possessions, or Puerto Rico.

18-902.2 AUTHORIZATION AND CONSENT IN CONTRACTS INCLUDING RESEARCH OR DEVELOPMENT. Unless ~~prohibited by 18-902.1~~, the clause set forth in 9-102.2 shall be included ~~in architect-engineer contracts or construction contracts~~ <sup>stet.</sup>

in the field of construction or architect-engineering.  
calling exclusively for experimental, developmental, or research work. Where  
the contract calls for either experimental, developmental, or research work or  
supplies and materials, in addition to either construction or architect-  
engineer work, the clause set forth in 9-102.1 shall be used.

18-903 PATENT INDEMNIFICATION OF GOVERNMENT BY CONTRACTOR. [A patent  
18-903.1 General.  
indemnity clause shall not be included in contracts calling solely for  
architect-engineering or experimental, developmental, or research work in the  
field of construction.

18-903.2 PATENT INDEMNITY CLAUSES IN SUPPLY CONTRACTS. (See 9-103).

The provisions of 9-103.1 and 9-103.2 relating to the procurement of supplies  
are applicable where the procurement is solely for construction materials or  
supplies as such, as distinguished from "construction" as defined in 18-101.1.

18-903.3 PATENT INDEMNITY CLAUSE IN CONSTRUCTION CONTRACTS. (a) All  
contracts calling for any "construction" as defined in 18-101.1 shall contain  
the clause set forth in 7-602.16 (see Standard Form 23A).

(b) If it is determined that the construction will necessarily  
involve the use of structures, products, materials, equipment, processes,  
or methods which are ~~not standard commercial materials, methods, etc.~~ <sup>non-standard or special</sup>, the  
contract may list such nonstandard materials, methods, etc., in the specifi-  
cations and may expressly exclude them from the patent indemnification by  
inserting the following in the Schedule of the contract:  
~~adding to the clause set forth in 7-602.16 the following sentence:~~

~~The foregoing shall not apply to the following contract~~

~~items:~~

~~(list items to be excluded)~~

ITEMS EXCLUDED FROM PATENT INDEMNITY (\_\_\_\_\_) 1964)

The "Patent Indemnity" clause of this contract shall not apply to the  
following ~~contract items:~~

~~(list items to be excluded)~~

*(Specifically identify the*

18-903.4 WAIVER OF INDEMNITY BY THE GOVERNMENT. Exemption of specific patents from the patent indemnity provisions of the <sup>prescribed in 18-903.2 and 18-903.3</sup> ~~preceding~~ clauses shall be made only upon the authorization of the Secretary concerned or his authorized representative and in accordance with 9-103.4.

18-904 NOTICE AND ASSISTANCE. Subject to the prohibitions of 9-104, all contracts calling for construction work shall include the Notice and <sup>Regarding Patent and Copyright Infringement</sup> Assistance clause of 9-104. *Nothing is stated*

18-905 SCREENING OF PATENTED OR COPYRIGHTED DESIGNS. In architect-engineer contracts the design or specification called for may involve or contemplate the use of structures, products, materials, equipment, or processes which are covered by patents or copyrights. In such event the architect-engineer should report the items <sup>which are sole source or</sup> ~~known to him to be~~ noncommercial <sup>are</sup> or ~~to be~~ covered by patent or copyright, <sup>to the contracting officer</sup> and advise <sup>the</sup> ~~him~~ of the extent to which these <sup>items</sup> ~~features~~ are necessary to meet the Government's requirements. This will <sup>make possible</sup> ~~enable~~ timely planning and arrangements for the use of <sup>sole source or</sup> ~~noncommercial~~, patented or copyrighted features where appropriate, or <sup>provide</sup> ~~added~~ time to consider alternative means, ~~where desirable~~. The following clause may be inserted in architect-engineer contracts <sup>for this purpose,</sup> ~~for this purpose,~~

NOTICE REGARDING PATENTED <sup>or</sup> ~~OR~~ COPYRIGHTED DESIGNS <sup>(1964)</sup>

(a) In the performance of this contract, the Contractor shall endeavor, to the extent possible in achieving the objectives of the contract, to direct the design contemplated so that the resulting construction work and later operation of the facility being designed will make maximum use of structures, machines,

products, materials, construction methods, and equipment which are readily available through Government or commercial channels, or through standard or proven production techniques, methods, and processes. Unless approved by the Contracting Officer the Contractor <sup>shall</sup> ~~will~~ not, in the performance of the work called for by this contract, produce a design or specification such as to require in this construction work or later operation of the facility being designed, the use of structures, products, materials, construction equipment, or processes which are known by the Contractor to be <sup>OR copyrighted,</sup> patented <sup>OR copyrighted,</sup> or in the process of being patented <sup>a sole source</sup> and not readily available to the public on the open market except from the patentee or a licensee of the patentee.

18-906. PROCESSING OF INFRINGEMENT CLAIMS. <sup>Sec 9-105.</sup> ~~The military departments shall process claims for alleged unauthorized use of inventions in accordance with instructions of each respective military department.~~

18-907. CLASSIFIED CONTRACTS. <sup>Sec 9-106.</sup> ~~In accordance with 9-106, insert the Filing of Patent Applications contract clause set forth in 9-106 or 9-106.1, as appropriate, in every classified architect-engineer or construction contract and in every unclassified architect-engineer or construction contract which covers or is likely to cover classified subject matter.~~

18-908 PATENT RIGHTS. (a) Any architect-engineer or construction contract which calls for or can be expected to involve the design, for use in the construction or operation of a Government facility, of novel structures,

machines, products, materials, processes, or equipment (including construction equipment), <sup>^</sup> ~~should be considered as having a potential for yielding inventions and therefore should include provision for governmental rights in any possibly resulting invention. Accordingly, a patent rights clause in accordance with the policy and guidance of 9-107, shall be included in every construction or architect-engineer contract of the above type and in every other contract and any contract~~ <sup>^</sup> having as one of its purposes the performance of experimental, developmental, or research work or test and evaluation studies involving such work,

(b) Any architect-engineer or construction contract which calls for or can be expected to involve only standard types of construction to be built by previously developed equipment, methods, and processes shall not include a patent rights clause. The term "standard types of construction" as used herein means construction in which the distinctive features, if any, in all likelihood will amount to no more than: (i) variations in size, shape or capacity of otherwise structurally orthodox and conventionally acting single structural members or multimember structural groupings; or (ii) purely artistic or esthetic (as distinguished from functionally significant) architectural configurations and designs of both structural and nonstructural members or groupings, <sup>which may or may not be sufficiently</sup> ~~which may or may not be significantly novel or artistically meritorious to be~~ <sup>quality for</sup> ~~subject to protection under the design patent or copyright laws.~~ <sup>in</sup> <sup>entitled</sup> Rights of the Government in and to any such distinctive design or copyright features, as distinguished from inventions of a mechanical or functional nature resulting from an architect-engineer contract, are provided for in the clause <sup>of</sup> 7-607.2, <sup>entitled</sup> "Drawings and Other Data to Become Property of Government".

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(c) <sup>and</sup> Architect-engineer contracts which require the development of novel structures, machines, products, equipment (including construction equipment), materials, or processes shall include <sup>in</sup> the appropriate "Patent Rights" clause of Section IX in addition to the <sup>in</sup> clause ~~of~~ 7-607.2. <sup>in addition</sup>

~~(d) Construction contracts which require the development of novel structures, machines, products, equipment (including construction equipment), materials or processes shall include the appropriate "Patent Rights" clause of Section IX in addition to the clause of 7-607.2.~~

18-909 PATENT ROYALTIES. The provisions of 9-110, 9-111, and 9-112 are applicable to contracts for construction or construction supplies..

18-910 ACQUISITION AND USE OF PLANS, SPECIFICATIONS AND DRAWINGS.

~~(See 7-607.2)~~

18-910.1 DATA CLAUSES FOR ARCHITECT-ENGINEER AND CONSTRUCTION WORK.

(a) Plans and specifications and as-built drawings. It is the

policy of the Department of Defense in procuring plans and specifications <sup>and</sup> ~~as-built drawings~~

for construction to obtain full ownership thereof with the full right to

use and reproduce <sup>the same</sup> ~~and to exclude use and reproduction of those plans and specifications by others. This same policy applies to as-built drawings.~~

Upon request of the architect-engineer or others interested and upon the <sup>by the contracting officer</sup> determination that the public interest will not be adversely affected, permission will be granted by the Government for the reproduction and use of plans and specifications or as-built drawings for construction by other parties. Accordingly, in ~~every~~ contracts calling for plans and specifications

for construction, or as-built drawings for construction, insert the clause set forth in 7-607.2.



det

(b) Shop drawings for construction. It is the policy of the Department of Defense<sup>X</sup> in procuring shop drawings for construction to obtain the full right to use and reproduce, including use and reproduction of such drawings for manufacture and reprocurement, but not to exclude a similar right in the designer or others. Accordingly, in ~~every~~ contract<sup>S</sup> for such drawings, the clause<sup>IN</sup> ~~of~~ 7-603.5 shall be used.

18-910.2 DATA CLAUSES FOR CONSTRUCTION SUPPLIES AND RESEARCH AND DEVELOPMENT. The provisions of Section IX, Part 2 relating to the acquisition of data and rights therein in connection with the procurement of supplies and materials and research and development are applicable where the procurement is confined to either or both construction materials (as distinguished from "construction" as defined in 18-101.1) or ~~for~~ experimental, developmental, or research work. In some circumstances the right to use such data, including drawings, may be limited in accordance with appropriate paragraphs of Section IX, Part 2.

18-910.3 MIXED CONTRACTS. Where the proposed contract calls for either experimental, developmental, or research work, or supplies and materials, in addition to either construction or architect-engineer work, the pertinent clauses of Section IX, Part 2 shall be added to the contract, in addition to the clauses ~~set forth~~ in 7-607.2 and 7-603.5, as appropriate. In such cases, the contract may be divided into parts or otherwise written <sup>shall</sup> to indicate <sup>which</sup> clearly ~~that the data~~ clauses of Section IX, Part 2 apply only to the experimental, development<sup>al</sup>, or research work, or <sup>only to the</sup> supplies and materials being procured, ~~under the contract.~~

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LIST OF CHANGES TO ASPR IX, PART 1  
NECESSARY TO CONFORM TO ASPR XVIII, PART 9

1. 9-103.1(a), lines 1 and 2, delete "is appropriate in formerly<sup>a</sup> advertised construction contracts and".
2. Delete the following in the Patent Indemnity (Predetermined) clause of 9-103.1(a):
  - lines 6 and 7, "or out of construction . . . as 'construction work'"
  - lines 8 and 9, "or construction work"
  - lines 17 and 18, "or construction work performed".
- ~~3. 9-103.2, lines 3 and 4, delete "(i) formerly<sup>a</sup> advertised construction contracts and (ii)".~~
4. Delete the following in the Patent Indemnity (not Predetermined) clause; ~~9-103.2:~~
  - lines 6 and 7, "or out of construction, alteration, modification or repair of real property (hereafter referred to as 'construction work')"
  - line 9, "construction work"
  - lines 10 and 11, ", and which construction work normally is of a type performed for,"
  - lines 12 and 13, ", construction work,"
  - lines 22 and 23, "or construction work performed".
5. 9-103.3, lines 2 and 3, delete ", but may be included in negotiated construction contracts and," and insert "; however,"<sup>(1)</sup>
  - line 4, after (B),<sup>(2)</sup> insert "such a clause" *maybe inserted*
6. 9-103.3(a), lines 2 and 3, delete "construction work or".

*delete "and (3)" and*

Revisions and Additions to Proposed  
Section XVIII, Exhibit B

Exhibit B of the proposed construction coverage should be revised or added to in pertinent paragraphs to read as follows:

7-602.16 Patent Indemnity. In accordance with 18-903.3, insert the following clause:

(no change in clause)

7-602.30 Notice and Assistance Regarding Patent Infringement. In accordance with 9-104 and 18-904, insert the clause set forth in 9-104.

7-602.31 Authorization and Consent. In accordance with 18-902, insert the appropriate clause set forth in 9-102.

7-603.3 Filing of Patent Applications. In accordance with 9-106 ~~and 18-903.3~~, insert the appropriate clause set forth in 9-106.

7-603.16 Patent Rights. In accordance with 18-908, insert the appropriate clause set forth in 9-107.

7-603.40 Items Excluded from Patent Indemnity Clause. In accordance with 18-903.3, the clause set forth therein may be inserted.

7-603.41 Refund of Royalties. In accordance with 9-112 and 18-909, the clause in 9-112 may be inserted.

7-603.42 Drawings and Other Data to Become Property of Government. In accordance with 18-910.1(a), the clause in 7-607.2 shall be inserted, substituting "Contractor" for "Architect-Engineer."

7-605.40 Authorization and Consent. In accordance with 18-902, insert the appropriate clause in 9-102.

7-605.41 Notice and Assistance Regarding Patent and Copyright Infringement. In accordance with 9-104 and 18-904, insert the clause in 9-104.

7-605.42 Patent Indemnity. In accordance with 18-903.3, insert the clause in 7-602.16.

7-606.3 Items Excluded from Patent Indemnity Clause. In accordance with 18-903.3(b), the clause set forth therein may be inserted.

7-606.4 Filing of Patent Applications. In accordance with 9-106 and 18-907, insert the appropriate clause set forth in 9-106.

7-606.5 Patent Rights. In accordance with 18-908, insert the appropriate clause set forth in 9-107.

7-606.6 Reporting of Royalties. In accordance with the requirements of 9-110, insert the appropriate clause set forth therein.

7-606.7 Drawings and Other Data to Become Property of Government. In accordance with 18-910.1(a), the clause in 7-607.2 shall be inserted, substituting "Contractor" for "Architect-Engineer."

7-608 Clauses to be Used Where Applicable for Lump Sum Architect-Engineer Contracts.

7-608.1 Notice Regarding Patented or Copyrighted Designs. In accordance with 18-905, the clause therein may be inserted.

7-608.2 Authorization and Consent. In accordance with 18-902, insert the appropriate clause set forth in 9-102.

7-608.3 Patent Rights. In accordance with <sup>18-908</sup>~~9-106~~, insert the appropriate clause set forth in 9-107.

ASPR Case 61-160  
TAB C

ASPR 7-607.2 Drawings and Other Data to Become Property of Government.

DRAWINGS AND OTHER DATA TO BECOME PROPERTY OF GOVERNMENT (— 1964)

All drawings, designs, specifications, architectural designs of buildings and structures, notes and other architect-engineer work produced in the performance of this contract and all as-built drawings produced after completion of the work shall be and remain the sole property of the Government and may be used on any other work without additional cost to the Government; and with respect thereto the <sup>Architect-Engineer</sup>~~contractor~~ agrees not to assert any rights and not to establish any claim under the design patent or copyright laws. The Architect-Engineer for a period of three <sup>(3)</sup> years after completion of the project agrees to furnish or provide access to the originals or copies of all such materials on the request of the Contracting Officer.

ABC

DEPARTMENT OF THE AIR FORCE  
WASHINGTON

OFFICE OF THE SECRETARY

24 JUN 1964

MEMORANDUM FOR THE CHAIRMAN, ASPR COMMITTEE

SUBJECT: Case 61-91, Termination for Default or for Convenience of the Government

On June 9, 1964 Colonel Slade and I met at GSA with Mr. Barron, Mr. Read, Mr. Silverstein and Mr. Ronemus, to discuss the subject case. Mr. Barron, as the principal spokesman for GSA, was receptive to the idea of a combined "Termination" clause as a simplification of concept and language. He was concerned, however, about the effect of the proposal on Standard Form 32. To leave the present "Default" clause on the SF 32, with permission to the Defense Department to delete that clause and substitute the combined "Termination" clause (somewhat as we now add our "Termination for Convenience of the Government" clause) would be a further departure from the optimum of a really standard form. On the other hand, to leave the "Default" clause and also include on the form our combined clause would result in duplication of contract language or, at the minimum, further lengthening of the form and possible confusion of contractors.

Mr. Barron also raised a different but related problem. As a result of the current reorganization of the federal supply system, the difference in philosophy between the Defense Department and the civilian agencies on the subject of termination-for-convenience protection is becoming, in the view of GSA, embarrassingly exposed. A practical problem, for instance, arises from the transfer of the paint and hand tool industries to GSA from DSA; those industries reportedly are not pleased at the idea of giving up termination-for-convenience protection.

Mr. Barron suggested that this would be an appropriate time to consider really uniform termination policy for the Government as a whole. We then discussed the feasibility of drafting and prescribing a single "Termination" clause to appear on the SF 32 for use by everyone. In particular, we discussed what GSA considers the principal reason for objection by the civilian agencies to our termination-for-convenience coverage. They say that in any case in which we cancel a contract for any sort of supplies because the contractor is in default in performance, but his default is later determined to have been excusable, we then "make the contractor well" under the "convenience" provision. This seems to them the

wrong result in cases where the contractor is to furnish standard commercial items. In such cases, they say, in the commercial world or under the practice of the civilian agencies, when the contractor is unable to perform for reasons beyond his control, the parties simply walk away from their deal and each of them is left with whatever loss he has incurred. Colonel Slade and I indicated that this seemed a reasonable area to study even though difficult problems of implementation might arise. One problem, for instance, would be the definition of the kinds of items as to which the GSA approach would be preferable. What about, for instance, otherwise standard commercial items that are painted brown for the Army? Furthermore, a threshold question might be, just what are the termination charges we are concerned about if the items involved are really standard commercial?

At any rate, Mr. Barron's suggestion was that we explore the possibility of drafting, and attempt to draft, a standard "Termination" clause which would include both convenience and default measures of recovery but would restrict convenience recovery to areas where it is really appropriate. Such a clause could appear on the SF 32 for mandatory use by both the Defense Department and the civilian agencies. A further suggestion was that, as long as we may be undertaking an extensive drafting job in this area, we consider providing, through the "Termination" clause, an administrative remedy for all breaches of contract by the Government. That is, we might provide that any breach by the Government is, in effect, a termination for convenience. It seems to me that this is also a promising area for exploration and one that might be welcomed by industry as well as by the Government.

I propose, therefore, that the ASPR Committee initiate a new case to consider the matters set forth in this memorandum (and to draft a general-application "Termination" clause if, after further study, that still seems desirable). Case 61-91 could properly be merged into such a new, broader consideration of the termination area.)

Signed

R. TIMOTHY HANLON  
Air Force Legal Member

*Change - Committee refers to  
existing ASPR + new draft  
ASPR meeting 28 Oct 64  
RJS*

INUGC-U

22 September 1964

MEMORANDUM FOR THE CHAIRMAN, ASPR COMMITTEE

SUBJECT: Case 61-160 Construction

Attached are the recommendations of the Construction Subcommittee on the comments of industry in connection with ASPR Case 61-160, Construction. The subcommittee expects to submit soon some additional comments on the edited draft of the proposed ASPR coverage of construction.

Incl  
as

E. MORRIS SELTZER, Chairman  
Construction Contract Subcommittee

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HEADQUARTERS  
DEPARTMENT OF THE ARMY  
OFFICE OF THE CHIEF OF ENGINEERS  
WASHINGTON, D.C. 20315

*file*

IN REPLY REFER TO

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6 October 1964

MEMORANDUM FOR THE CHAIRMAN, ASPR COMMITTEE

SUBJECT: Case 61-160 Construction

The attached Tabs are submitted in connection with Section XVIII in the form in which it was sent to industry for comment. Tab A sets forth suggested revisions considered to be significant. Tab B contains suggested revisions which are editorial or minor in nature. Since your subcommittee continues to be of the opinion that the inclusion of a separate paragraph in Section XVIII on the preparation of invitations for bids is desirable, such a paragraph is submitted as Tab C. If this is adopted certain other actions will be necessary, and these are contained in Tab D. Tab E sets forth paragraphs in ASPR referring to construction which it is believed should be considered for revision or deletion. Tab F represents changes which are deemed necessary as a result of the June 1964 revisions of SF 19A and SF 23A. Because of new regulations issued by the Secretary of Labor it is considered that changes will be required in Part 7 of Section XVIII. It is understood that this has been undertaken by a subcommittee of the RIP Panel.

All the members of the subcommittee have expressed their agreement with the above. With the adoption of the recommendations in these comments and those set forth in your subcommittee's report on the comments of industry, it is believed that Section XVIII is ready for publication.

Incl  
as

*E. Manning Seltzer*  
E. MANNING SELTZER, Chairman  
Construction Contract Subcommittee



*file  
6-1-60*

Your Subcommittee submits the following recommended changes, considered to be of significance, to Section XVIII:

1. 18-108.2. It is recommended that the following be inserted as paragraph 18-108.2:

"18-108.2 Architect-Engineer Contracts. A Government estimate in accordance with the provisions of pertinent Department of Defense Directives shall be prepared for each proposed contract and modifications thereto affecting price. It shall be marked 'For Official Use Only,' unless the information therein requires a security classification in which case it shall be handled in accordance with applicable security regulations. The Government estimate shall at no time be disclosed even to the Architect-Engineer to whom award is made or in any other way be made public."

2. 18-206. ASPR 2-207 makes the use of DD Form 1260 mandatory. ASPR 16-401.1(viii) modifies, for construction, 2-207 to the extent that the use of DD Form 1260 is optional, not mandatory, for construction. Accordingly it is recommended that reference be made in 18-206 to ASPR 16-401.1(viii). For this purpose the references in 18-206 should be amended to read:

"18-206. Amendment of Invitations For Bids. See 2-207, 16-401.1 (viii) and 18-704.2."

3. 7-602.27. Pursuant to this paragraph, as written, the Federal, State and Local Tax clause in 11-401.1 is prescribed for use in all fixed-price contracts including negotiated contracts in excess of \$10,000 even

though the contracting officer might not be satisfied that the contract price excludes contingencies for state and local taxes. This result was not intended and is inconsistent with the note in proposed 16-401.1(viii). Accordingly, it is recommended that 7-602.27 be amended to read as follows:

"7-602.27 Federal, State and Local Taxes. In accordance with 11-401, insert the contract clause set forth in 11-401.1 or 11-401.2, as appropriate."

4. 7-602.29. The clauses set forth in 7-602 are clauses for fixed-price construction contracts in excess of \$10,000. The clause 8-705.2 is for use in contracts not in excess of \$10,000. Accordingly it is recommended that the words "and 8-705.2" be deleted from the proposed 7-602.29 and that it be revised to read:

"Insert the clause set forth in 8-701(a) as modified by 8-701(c)."

5. It is recommended that the following clauses be included in the 7-603 clauses:

(a) "7-603. Required Source For Jewel Bearings. In accordance with the requirements of 1-315, insert the clause set forth therein."

(b) "7-603. Employment of Ocean-Going Vessels By Construction Contractors. In accordance with the requirements of 1-1409, insert the clause set forth therein."

6. It is recommended that the following clause be added to the clauses set forth in 7-605.

"7-605. Excusable Delays. In accordance with 18-624, insert the clause set forth in 8-708."

7. 7-605. Your subcommittee is of the opinion that the clauses for cost-plus-fixed-fee construction contracts should be divided into "where applicable" and "required" clauses instead of making them almost all "required" clauses. This is consistent with the division of clauses in cost-plus-fixed-fee supply contracts in ASPR. Accordingly, it is recommended that the following clauses be transferred to the "where applicable" clauses in 7-606:

- (a) 7-605.20 Approval of Wage Rates
- (b) 7-605.29 Buy American
- (c) 7-605.30 Nondomestic Construction Materials
- (d) 7-605.31 Priorities, Allocations, and Allotments
- (e) 7-605.39 Interest
- (f) 7-605.45 Military Security Requirements
- (g) 7-605.46 Workmen's Compensation Insurance (Defense Base Act)
- (h) 7-605.47 Use of Foreign Currency
- (i) 7-605.49 Alterations

8. 7-605.15 Government Property. It is recommended that this paragraph be deleted. 7-606.1 properly provides for a Government furnished property clause among the "where applicable" clauses. In addition, 7-605.15 refers to 13-503.5, a non-existent paragraph.

9. 7-605.19 Labor. Since different labor clauses are required in different contracts in accordance with 18-703, it is recommended the clause in 7-605.19 be deleted and the following be substituted therefor: "In accordance with the requirements of 18-703 insert the appropriate clauses set forth therein."

10. 7-605.20 Approval of Wage Rates. In addition to transferring this clause to the "where applicable" clauses, since it is for use only in contracts to be performed in the United States it is recommended that the following text be added: "Insert the following clause in contracts to be performed in the United States:".

11. 7-605.21 It is recommended that this paragraph be deleted and that the following be included in 7-606:

"7-606. Payment for Overtime Premiums. In accordance with the requirements of 12-102.3(a) insert the clause set forth therein."

12. 7-605.43. It is recommended that the following be substituted for 7-605.43:

"7-605.43 Utilization of Small Business Concerns. In accordance with 1-707.3(a) insert the clause set forth therein."

13. 7-606. It is recommended that the following clauses be included in the 7-606 clauses:

(a) "7-606. Small Business Subcontracting Program. In accordance with 1-707.3(c), insert the clause set forth therein."

(b) "7-606. Approval of Contract. Insert the clause set forth in 7-105.2 where approval of the contract is required."

14. On page 1 of ASPR Additional Changes it is proposed to amend subparagraph 8-602.3(b) and 8-602.3(e). Both of these proposed subparagraphs are concerned with sureties. It is recommended that the proposed action not be taken and that the modifications set forth below be made in lieu thereof. Since performance bonds are not generally required on contracts other than construction contracts and are required by law on construction

contracts exceeding \$2,000, it is considered that the material covered in the proposed subparagraphs being substantially concerned with construction should be in a section involving construction. In addition, ASPR 8-602 concerns itself with Termination of Fixed-Price Supply Contracts for Default and the Default clause for supply contracts in 8-707. The insertion in such a paragraph of coverage of action in connection with the default of a construction contract is not deemed appropriate. It is recommended that the proposed modifications be deleted and the following substituted therefor:

- (a) Insert a new paragraph 18-618.3 to read:

"18-618.3 Preliminary Notice to Surety.

(a) Whenever a termination for default appears imminent, a written notification of that fact (not an actual notice of default) may be given by the contracting officer to the surety at both its home and local offices.

(b) If it is requested by the surety, and agreed to by the contractor and his assignees, if any, arrangement may be made to have future checks mailed to the contractor in care of the surety. In such a case, the contractor must forward a written request to the designated disbursing officer specifically directing a change in address for mailing of checks."

- (b) Renumber present paragraphs 18-618.3 through 18-618.10 as 18-618.4 to 18-618.11 and change the renumbered paragraph 18-618.4(d) to read:

"18.618.4 \*\*\*

(d) The same distribution shall be made of the termination notice as was made of the contract. A copy thereof shall also be furnished to the contractor's surety at the same time that the notice is furnished to the contractor. The surety at the same time should be requested to advise if he desires to enter into any arrangement for completion of the work. In addition, the disbursing officer involved shall be notified to withhold further payments under the terminated contract pending further advice which should be furnished at the earliest practicable time."

(c) Because of the above recommended changes it is recommended that 18-804 be revised to read:

"18-804 Default Procedure. See 18-618."

15. 18-619 If the changes recommended in paragraph 14 are accepted, the references to "18-618.3(a)" and "18-618.3(c)" should be changed to "18-618.4(a)" and "18-618.4(c)", respectively.

16. 8-701(a) (p. 1 Additional ASPR Changes). As a result of the proposed amendment, ASPR 8-701(a) is prescribed for use without modification of subparagraphs (f) and (i) thereof. Subparagraph (f) provides for the use of the principles in Section XV, Part 2. Subparagraph (i) provides for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract. For the reasons set forth below it is recommended that the following changes be made in subparagraph (f) and (i) and in the texts of 8-701(a) and (c):



(a) Subparagraph (f). ASPR Section XV, Part 4 prescribes the principles to be used in construction and architect-engineer contracts. Accordingly it is recommended that the following subparagraph (f) be used:

"(f) Any determination of costs under paragraph (c) or (e) hereof shall be governed by the principles for consideration of costs set forth in Section XV, Part 4, of the Armed Services Procurement Regulation, as in effect on the date of this contract."

(b) Subparagraph (i). In many construction contracts there may be no price or prices specified in the contract relating to the continued portion of the contract. Accordingly, it is recommended that the following subparagraph (i) be used.

"(i) If the termination hereunder be partial, prior to the settlement of the terminated portion of this contract, the Contractor may file with the Contracting Officer a request in writing for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract (the portion not terminated by the Notice of Termination), and such equitable adjustment as may be agreed upon shall be made in such price or prices; however, nothing contained herein shall limit the right of the Government and the Contractor to agree upon the amount or amounts to be paid to the Contractor for the completion of the continued portion of the contract when said contract does not contain an established contract price for such continued portion."

(c) Because of the above recommended changes the following changes are recommended in the proposed texts of 8-701 (a) and (c):

(a) 8-701(a). Delete the first sentence at the top of page 2, Additional ASPR Changes and substitute the following therefor:

"The following clause shall be used in all fixed price construction contracts in excess of \$10,000 except that paragraphs (e), (f) and (i) thereof shall be deleted and the paragraphs in (c) below shall be used."

(b) 8-701(c). Delete the text and substitute the following therefor:

"(c) The following clause paragraphs shall be used in place of (e), (f) and (i) above, when the contract is for construction in excess of \$10,000:"

17. It is noted that it is intended to insert a new subparagraph (d) rather than "to change 8-701(d) and (e)" as stated in the middle of page 4 of the "Additional ASPR Changes."

18. 8-701(d) (p. 4 Additional ASPR Changes). For the reasons set forth in paragraph 8 above, the same modifications of subparagraph (f) and (i) are suggested for Architect-Engineer contracts as for construction contracts. Accordingly it is recommended that the text of the proposed 8-701(d) be revised to read as follow:

"(d) In any contract for Architect-Engineer services in excess of \$10,000, the clause in 8-701(c) shall be used, the term 'Architect-Engineer' shall be substituted for the term 'Contractor', and the following paragraph (e) shall be used in place of paragraph (e) therein:

"(e) In the event of the failure of the Architect-Engineer and the Contracting Officer to agree as provided in paragraph (d) upon the whole amount to be paid to the Architect-Engineer by reason of the termination of work pursuant to this clause, the Contracting Officer shall, subject to any Settlement Review Board Approvals required by Section VIII of the Armed Services Procurement Regulation in effect as of the date of execution of this contract, determine, on the basis of information available to him, the amount, if any, due to the Architect-Engineer by reason of the termination and shall pay to the Architect-Engineer the amounts determined as follows:

"(i) for completed work and services accepted by the Government, the price or prices specified in the contract for such work, less any payments previously made;

"(ii) the total of--

"(A) the costs incurred in the performance of the work and services terminated, including initial costs and preparatory expenses allocable thereto, but exclusive of any costs attributable to the work and services paid or to be paid for under paragraph (e)(i) thereof;

"(B) the cost of settling and paying claims arising out of the termination of work or services under subcontracts or orders as provided in paragraph (b)(v) above, which are properly chargeable to the terminated portion of the

contract (exclusive of amounts paid or payable on account of work or services delivered or furnished by subcontractors prior to the effective date of termination, which amounts shall be included in the costs payable under (A) above); and

"(C) a sum, as a profit, equal to 6 percent of the whole of the amount determined under (A) above; provided, however, that if it appears that the Architect-Engineer would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this subdivision (C) and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss; and

"(iii) the reasonable cost of the preservation and protection of property incurred pursuant to paragraph (b)(ix); and any other reasonable cost incidental to the termination of work under this contract, including expense incidental to the determination of the amount due to the Architect-Engineer as a result of the termination of work under this contract.

The total sum to be paid to the Architect-Engineer under (i) and (ii) above shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced

by the contract price of work not terminated. Except for normal spoilage, and except to the extent that the Government shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the Architect-Engineer under (ii) above, the fair value, as determined by the contracting officer, of property which is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government, or a buyer pursuant to paragraph (b)(vii). ( 1963)."

19. 18-625. If the modification suggested in paragraph 18 above is adopted, it is recommended that in the text of 18-625 the reference to "8-701(a)" be deleted and "8-701(c)" be substituted therefor.

20. 8-705.2 (p. 7, Additional ASPR Changes). Since generally there is no need for a termination for convenience clause in construction contracts not in excess of \$10,000, it is recommended that the proposed change in the text in 8-705.2 be deleted and the present text in ASPR 8-705.2, which clearly expresses this policy, remain unchanged.

21. Since it is considered desirable to have a termination for convenience clause in Architect-Engineer contracts not in excess of \$10,000, it is recommended that the following paragraph 8-705.3 be inserted:

"8-705.3 Architect-Engineer Contracts. The clause in 8-705.2 shall be used in Architect-Engineer contracts not in excess of \$10,000."

22. (a) 8-709(a), p. 9 Additional ASPR Changes. SF 19 which is prescribed for use in construction contracts not in excess of \$10,000, has its own Termination for Default clause. In view of the provisions of 16-401.3(c) it is recommended that the words "in excess of \$10,000" be inserted at the end of the text in 8-709(a).

(b) 18-623. As a result of the above recommended change, it is recommended that the words "in excess of \$10,000" be inserted at the end of this paragraph.

23. 8-709(b), p. 11 Additional ASPR Changes. In the interests of uniformity, it is recommended that the word "may" in the first sentence be deleted and the word "shall" be substituted therefor. A similar recommendation is made with respect to proposed 16-401.3(e), p. 9. Exhibit C.

24. 16-402.2, p. 10 Exhibit C. Since ASPR 16-303.2(b) (x) contains instructions on the use of DD 1155 for construction contracts, it is recommended that there be added at the end of 16-402.2 the words "and in 16-303.2(b)(x)".

TAB "B"

Your Subcommittee recommends that the following modifications and amendments, which are considered to be minor or editorial in nature, be made in Section XVIII:

1. 18-205(a)(v). Since approximate values in dollar figures are not to be used, see 18-109, it is suggested that 18-205(a)(v) be modified to read:

"(v) include a statement of the magnitude in terms of physical characteristics of the proposed construction in accordance with 18-109, where the estimated value is \$25,000 or more;"

2. 18-209. The word "project" should be inserted in the first sentence after the word "construction".

3. 18-301.1. As appears in ASPR Minutes #114, 9 December 1963, the words "or repair" should be deleted. A similar deletion was made in 18-301.2.

4. 18-303.3(b) and 18-303.4. Since the material which was the basis for the reference in 18-303.3(b) and 18-303.4 "See 18-303.1", has been deleted from 18-303.1, it is recommended that the words "See 18-303.1" be deleted from 18-303.3(b) and 18-303.4.

5. 3-811(a). In ASPR Minutes #2, 7 January 1964, a revised ASPR 3-811(a) was approved which reads in the last sentence thereof "Documentation required by 18-306.1 and 18-306.2 covering revisions in negotiated fixed-price construction and architect-engineer contracts shall be included in the contract file." Since the documentation required by 18-306.1 and 18-306.2 pertains to revisions in the Government estimate, and not in the contracts,

TAB "B"

it is recommended that the last sentence of the proposed 3-811(a) be revised to read:

"Documentation required by 18-306.1 and 18-306.2, covering revisions in the Government estimate in connection with negotiated fixed-price construction and architect-engineer contracts shall be included in the contract file."

6. 18-307. It is recommended that the reference to the "Changes" clause be changed from "7-602.3" to "7-607.5".

7. The paragraph numbered 18-402.2 on page 30 of Exhibit "A" should be numbered 18-404.2.

8. 18-402.2(a). It is noted that, in 18-402.2(a) and the form at the end of this paragraph, what appears to be the same Report Control Symbol has different numbers: i.e. DD-I&L(Q)559 and 599.

9. It is suggested that the heading of the fifth column of the Quarterly Report form on page 30a of Exhibit "A" be changed to read "Contract or Modification Number".

10. 18-618.7 In TAB "A" (par. 14) it is proposed to renumber paragraphs 18-618.3 through 18-618.10. The reference should be to "18-618.7" rather than to "8-603.4". If the paragraphs are not renumbered the reference should be to "18-618.6".

11. 18-620. It is recommended that the text in 18-620 be amended to read as follows:

"Insert the clause set forth in 8-701(a), modified as provided therein, and in 8-701(b), if appropriate, in each fixed-price type construction contract, as defined in 18-201, in excess of \$10,000."



12. 18-704.2(e). Since it is suggested in 18-704.2(e) that subparagraph (ii) be transferred elsewhere, it is recommended that subparagraph (i) be deleted as such and that it be placed simply as a sentence after the second sentence which ends with the word "procedures".

13. 18-703.5. In the next-to-the-last line of the introductory paragraph, the words "or Merritt Island Launch Area" should be inserted. In the clause title the word "Launch" should be inserted after the words "Merritt Island".

14. 18-802. This paragraph should be amended to add as a text the same text appearing in 18-803 concerning payment bonds: "Performance bonds shall be furnished prior to the commencement of contract performance."

15. Since Part 6, Section VII, includes clauses for architect-engineer contracts, it is recommended that the title be changed to read "Clauses for Construction and Architect-Engineer Contracts".

16. 7-601. The reference to "16-402" should be to "16-402.2" and the reference to "1-201.21" should be to "18-101.1".

17. 7-602.7. The word "therefore" in the last line of (c) should be changed to "therefor".

18. 7-602.23. The last clause listed in 7-602.23 should read "Employee Compensation -- Cape Kennedy, Patrick Air Force Base and Merritt Island Launch Area."

19. 7-602.26(b). The reference should be to "1-707.3(c)" instead of to "1-707.3(b)."

20. 7-602.42. In the last line of subparagraph (a) in the Accident Prevention clause in 7-602.42(a) the word "reasonable" should be changed to

"reasonably". In the second line of 7-602.42(b) the reference "(e)" should be inserted after the word "subparagraph" and the following should be inserted after the colon:

"(e) Prior to commencement of the work the Contractor will:".

21. 7-602.44. Since there is only one paragraph, the designation "(a)" should be deleted.

22. 7-603.5. The first sentence after the clause title should be moved up to follow immediately the paragraph title.

23. 7-603.10. In accordance with Revision 5, ASPR, paragraph 7-603.10 should be revised to delete the proposed coverage and to mark the paragraph reserved.

24. 7-603.28. The reference to "7-604.25" should be changed to "7-603.25".

25. 7-603.31. It is recommended that the comma after the phrase "unit price contracts" in the text be deleted.

26. 7-603.35. It is recommended that the word "such" be inserted after the word "two" in the second line of paragraph (a)(ii) of the clause.

27. 7-603.37. It is suggested that the designation "Head of the Construction Agency" in the text be changed to read "Head of the Procuring Activity". In paragraph (a) of the clause the semicolon in the third line on page 35, Exhibit "B", after the word "quarters" should be changed to a comma. In addition, in the third sentence from the end of paragraph (a) of the clause the word "on" after the word "Contractor" should be changed to "of".

28. 7-605.1. The first sentence after the words "Statement of Work" should be deleted from this paragraph and transferred to 7-605.

29. 7-605.26. It is recommended that this paragraph be modified to read:

"7-605.26 Subcontracts. In accordance with the requirements of 3-903.2 insert the clause set forth in 7-203.8(a) subject to the instructions in 7-203.8(b) and (c) except that in (c) the variations specified therein may be established by the Head of a Procuring Activity."

30. 7-605.46. The word "Workman's" should read "Workmen's".

31. 7-607. (a) In accordance with 8-711 (p. 11, Additional ASPR Changes) it is recommended that provision be made for inclusion of a Termination for Default clause in the lump-sum architect-engineer contracts clauses as follows:

"7-607. Termination for Default. Insert the clause set forth in 8-711."

(b) In place of repeating in the several clauses the expression "substituting 'Architect-Engineer' for 'Contractor'", it is recommended that that expression be deleted in the individual clauses and the text of 7-607 be modified to read:

"The following clauses shall be inserted in all lump-sum Architect-Engineer contracts substituting 'Architect-Engineer' for 'Contractor' wherever that term appears."

32. 7-607.7. In view of the recommendations contained in paragraphs 18 and 21 of Tab "A" and the proposed insertion of a "Termination for Default" clause, it is recommended that 7-607.7 be deleted and the following substituted therefor:

"7-607.7 Termination for Convenience of the Government. Insert the clause set forth in 8-701(a) as modified by 8-701(d) or 8-705.2 as appropriate."

33. 7-607.8. The word "Architect" is misspelled.

34. 7-607.10. The reference to "7-608.8" should be changed to "7-602.8".

35. 7-607.11. Since the Accident Prevention clause would serve no useful purpose in contracts for Title I services only, where no field work is involved, it is recommended that the text of 7-607.11 be modified to read:

"Insert the clause set forth in 7-602.42 except in contracts for Title I services only, where no field work is involved."

36. 16-401.2(c)(ii). It is recommended that the following sentence be inserted at the beginning of the text:

"Bidders shall be requested to return only two signed copies of their bids."

37. 16-401.2(c)(ii)(1)(B)(I). In view of the provisions of ASPR 10-103.1(a) it is recommended that the text be changed and the following substituted therefor:

"I. Performance Bond. The penal sum of the performance bond shall equal \_\_\_\_ per cent (\_\_\_\_%) of the contract price. (Insert the appropriate per cent determined in accordance with the provisions of 10-103.1(a).)"

38. 16-401.3. The subparagraph following (d) on page 9 of Exhibit "C" should be identified as "(e)" instead of "(3)".

39. 16-403.5. In Clause 6 the word "negotiations" is misspelled. In Clause 7 the reference to "Clause 13" should be changed to "Changes clause".

40. 16-404.2. (a) On page 23 of Exhibit "C" it is recommended that the sentence starting with the words "Liquidated Damages" be deleted and that a clause be added as follows:

"\_\_\_\_. Liquidated Damages. Insert the clause set forth in 7-603.39. The rate of liquidated damages will be determined in accordance with 18-113."

(b) In view of the above, paragraph 16-404.1(c) should be deleted.

41. 16-405.1(b). In line 2 of subparagraph (b) on page 29, Exhibit "C", the reference to "18-704.2" should be changed to "18-704.11."

42. 8-702. Consistent with the proposed change in 8-701(a) it is recommended that the material on 8-702 on page 6 of "Additional ASPR Changes" be deleted and the following substituted therefor:

"8-702 Termination Clause for Cost-Reimbursement Type Contracts.

"(a) The following clause shall be used in any cost-reimbursement type contract, as defined in 3-405, for supplies and experimental, developmental, or research work other than experimental, developmental, or research work with educational or nonprofit institutions where no fee is contemplated. The following clause shall be used in all cost-reimbursement type construction contracts except that paragraph (e)(i)(D)(II) thereof shall be deleted and the paragraph in (b) below substituted therefor:"

Insert a new paragraph 8-702(b) to read:

"(b) In all cost-reimbursement type construction contracts paragraph (e)(i)(D)(II) above should be deleted and the following substituted:"

43. 8-709. In subparagraph (a) the words "within the time specified in this contract or any extension" should be inserted in the third line between the words "completion" and "thereof".

TAB "C"

18-202 PREPARATION OF INVITATION FOR BIDS. Forms used to invite bids are prescribed in Section XVI, Part 4, and are set forth in Appendix F. Invitations for bids shall contain the applicable information described below, and any other information required for the particular work.

- (i) Invitation number.
- (ii) Date of issuance.
- (iii) Name and location of the project, including the title of the work, name of the installation and location of the work.
- (iv) Department or Agency soliciting the bid.
- (v) Name and address of issuing office.
- (vi) Number of copies of the bid required to be submitted.
- (vii) Date, hour and place of opening. See 2-202.1 concerning bidding time. Prevailing local time shall be used. Timing by the 24-hour clock shall not be used except where customary in the industry. The exact location of the bid depositary, including the room and building numbers, and a statement that hand-carried bids must be deposited therein or submitted to the bid opening officer at the place of bid opening.

(viii) Insert the following paragraphs on the face of the form:

(A) Bid Bonds. Each bidder shall submit with his bid a bid bond (Standard Form 24) with good and sufficient surety or sureties acceptable to the Government, or other security as provided in paragraph 4 of Instructions to Bidders (Standard Form 22) in the form of twenty per cent

TAB "C"

(20%) of the bid price or \$3,000,000, whichever is lesser. The bid bond penalty may be expressed in terms of a percentage of the bid price or may be expressed in dollars and cents.

(B) Performance and Payment Bonds. Within \_\_\_\_\_ days after the prescribed forms are presented to the bidder to whom award is made for signature, a written contract on the form prescribed by the specifications shall be executed and two bonds, each with good and sufficient surety or sureties acceptable to the Government, furnished; namely a performance bond (Standard Form 25 or 27) and a payment bond (Standard Form 25A or 27A). The penal sums of such bonds will be as follows:

I. Performance Bond. The penal sum of the performance bond shall equal \_\_\_\_\_ per cent (\_\_\_\_%) of the contract price. (Insert the appropriate per cent determined in accordance with the provisions of 10-103.1(a).)

II. Payment Bond.

a. When the contract price is \$1,000,000 or less the penal sum will be fifty per cent (50%) of the contract price.

b. When the contract price is in excess of \$1,000,000 but not more than \$5,000,000 the penal sum shall be forty per cent (40%) of the contract price.



c. When the contract price is more than  
\$5,000,000 the penal sum shall be \$2,500,000.

Any bonds furnished will be furnished by the contractor to  
the Government prior to commencement of contract performance.

(ix) Information regarding bidding material which shall include the  
instructions to Bidders, the Bid Form, the Contract Form, the specifications  
and drawings (see 1-1203), and such general contract provisions or conditions  
as are required by law or by this Regulation.

(x) A paragraph containing information as to the charge, if any, to  
be made for the drawings and specifications and the conditions under which they  
may be obtained by interested parties. If a charge is made for the drawings  
and specifications the following sentences will be included:

Payment will be made by cash or check, or money order  
and delivered to the Finance and Accounting Officer,  
\_\_\_\_\_. Checks and money orders  
should be made payable to "Treasurer of the United  
States".

(xi) Description of the work, which shall succinctly set forth  
its principal features, the time allowed for performance (see 18-105), any  
liquidated damages (see 18-113), and the estimated magnitude of the proposed  
construction required by 18-109.

(xii) If any information or data are to be submitted with the bid, a  
description of such information or data and a statement of the effect of failure  
to furnish them.

(xiii) When considered necessary by the contracting officer, a require-  
ment that all bids must allow a period for acceptance by the Government of not

less than a minimum period stipulated in the invitation for bids, and that bids offering less than the minimum stipulated acceptance period will be rejected. This time shall normally be 30 days, but may be less when it can be expected that evaluation and pre-award processing will be completed more promptly. In unusual circumstances, up to, but not to exceed, 60 days may be specified. To accomplish the foregoing, a paragraph substantially as follows may be included:

**BID ACCEPTANCE PERIOD (APR. 1960)**

Bids offering less than \_\_\_\_\_ days for acceptance by the Government from the date set for opening of bids will be considered nonresponsive and will be rejected.

(xiv) Statement of any special technical or other qualifications required of bidders and of any information or data required to be submitted to show satisfaction of these qualifications.

(xv) A statement on the face of the invitation that "BIDS MUST SET FORTH FULL, ACCURATE, AND COMPLETE INFORMATION AS REQUIRED BY THIS INVITATION FOR BIDS (INCLUDING ATTACHMENTS). THE PENALTY FOR MAKING FALSE STATEMENTS IN BIDS IS PRESCRIBED IN 18 U.S.C. 1001." (See 2-405 and 2-406.)

(xvi) Applicable wage determinations of the Secretary of Labor or if it is necessary to advertise before receipt of a wage determination, a notice that the schedule of minimum wages to be paid under the contract will be published as an amendment to the Invitation for Bids.

(xvii) A statement of the exact basis upon which bids will be evaluated and award made, to include any Government costs or expenditures (other than bid prices) to be added or deducted, or any provision for escalation as factors for evaluation.

(xviii) Statutory cost limitation provisions (see 18-110).

(xix) If the contract is to be conditioned on the availability of funds, a clear statement of such condition (see 1-318).

(xx) If a construction contract is estimated to exceed \$1,000,000, or in appropriate contracts under \$1,000,000, the clause set forth in 7-603.15 and a statement that the successful bidder must furnish the contracting officer within (number) days after award the items of work which he will perform with his own forces and the estimated cost of those items unless he has submitted those items with his bid. (See 18-104.)

(xxi) Statement of arrangements to be made for inspecting the construction site and examining data which may affect performance of the work, such as boring samples, original boring logs, etc., including time and place, designation of the person or persons, if any, with whom such arrangements may be made and who will answer questions, or furnish information (see 18-203).

(xxii) A statement substantially as follows (prominently placed in the invitation):

CAUTION TO BIDDERS--LATE BIDS. See paragraph 7 of Standard Form 22 entitled "Late Bids and Modifications or Withdrawals" which provides that late bids and modifications or withdrawals thereof sent through the mails ordinarily will be considered ONLY IF TIMELY MAILED BY REGISTERED MAIL OR BY CERTIFIED MAIL FOR WHICH A POSTMARKED RECEIPT HAS BEEN OBTAINED AS SPECIFIED IN SUCH PROVISION. (\_\_\_\_\_ 1964)

(xxiii) Information concerning the furnishing of utilities during construction (see 18-203).

(xxiv) Information concerning prebid conference (see 18-205).

(xxv) If the contract is to involve construction work (subject to the Davis-Bacon Act) at Cape Kennedy or Patrick Air Force Base or Merritt

Island Launch Area, the Employee Compensation Clause and Table of Employee Compensation (see 18-703.5).

(xxvi) Insert the following paragraph in all invitations for bids:

MODIFICATIONS PRIOR TO DATE SET FOR OPENING BIDS

The right is reserved, as the interest of the Government may require, to revise or amend the specifications or drawings or both prior to the date set for opening bids. Such revisions and amendments, if any, will be announced by an amendment or amendments to this invitation for bids. If the revisions and amendments are of a nature which requires material changes in quantities or prices bid or both, the date set for opening bids may be postponed by such number of days as in the opinion of the issuing officer will enable bidders to revise their bids. In such cases, the amendment will include an announcement of the new date for opening bids.

(xxvii) Insert the following paragraph in all invitations for bids involving estimated quantities and unit prices (see 16-401.2(c)(iv)):

GOVERNMENT'S PRIVILEGE IN MAKING AWARDS

The Government further reserves the right to make award on any or all schedules of any bid, unless the bidder qualifies such bid by specific limitation; also to make award to the bidder whose aggregate bid on any combination of bid schedules is low. For the purpose of this invitation for bids, the word "item", as used in paragraph 10(c) of Standard Form 22, shall be considered to mean "schedule".

(xxviii) Where DD Form 1260, Amendment to Invitation for Bids, is not used, each amendment to an invitation for bids should contain a statement as follows:

\*NOTICE: Failure to acknowledge this and all other amendments on the bid form or by separate letter or telegram may cause rejection of the bid.

(xxix) Permission, if any, to submit telegraphic bids (see 2-202.2).

(xxx) Permission, if any, to submit alternate bids, including alternate materials or designs (see 1-1207).

(xxxi) Any authorized special provisions relating to Government-furnished property proposed to be furnished for the performance of the contract.

(xxxii) The Certification of Independent Price Determination as required by 1-115.

(xxxiii) When the procurement involves a set-aside for small business concerns, the following provision will be placed on the face of the invitation or on a cover sheet:

THIS IS A \_\_\_\_\_% SET ASIDE FOR SMALL BUSINESS  
CONCERNS. (MAR. 1964).

(xxxiv) A statement that prospective bidders may submit inquiries by writing or calling (collect calls not accepted) Mr. (insert name and address; telephone area code, number, and extension).

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\*This is preferred to the notice in paragraph (D) at the bottom of page 6, Exhibit "C", since this notice is often communicated to bidders by telegram.



10-10-10

TAB "D"

If Section XVIII is modified to include in 18-202 all provisions to be included in invitations for bids, the following actions should be taken:

1. The reference to "2-201(a)(xi)" in the next to the last line of 18-110(b) should be changed to "18-202(xv)".

2. On pages 3, 4, 5, 6 and 7 of Exhibit "C" the following changes should be made:

(a) 16-401.2(c)(ii) on page 3, Exhibit "C", should be amended to read:

"(ii) Standard Form 20 (Invitations for Bids). This form shall be completed by including the appropriate data listed in 18-202."

(b) Pages 4, 5 and 6 should be deleted from Exhibit "C" excepting for paragraph (C) on page 6 relating to paragraph 10 of Standard Form 22 which should be transferred to 16-401.2(c)(iv) on page 7, Exhibit "C".

3. 2-201(a)(xix), 2-201(a)(xxxi) and 2-201(c) should be deleted.

4. In 2-201(a)(xxv) the reference to paragraph 7 of Standard Form 22 should be deleted.

5. The reference in 3-501(b)(xxxvii) to "2-201(c)(ii)" should be changed to "18-202(xx)".

6. The words "including construction" should be deleted from the first line of 2-201(a), and the words "excluding construction" should be deleted from the first line of 2-201(b). The information listed under (a) and (b) then should be set out in one listing for supply and service contracts.





TAB "E"

The following paragraphs of ASPR referring to construction should be considered for revision or deletion:

1. 1-310 should be amended by deleting the last sentence of (a) and substituting: "Liquidated damages provisions for construction contracts are covered by 18-113, 7-603.39 and 8-709."

2.(a) It is recommended that the provisions of 4-102.1 be inserted in 2-203.1 at the end thereof and that it read:

"In addition, on request, pre-invitation notices and invitations for bids (with plans and specifications) for unclassified construction work will be furnished without charge to organizations which maintain plan display rooms for the benefit of contractors, subcontractors and material suppliers, without charge to the public. Requests from organizations in the United States may be honored on an annual or semi-annual basis for all or for a stated class of construction projects. The geographical extent of this distribution shall be as determined on a case by case basis by the contracting officer."

(b) As a result of the change recommended in (a) above, it is recommended that the references in the 19th line of 1-1002.1 and the fourth line of 2-210(a) to "4-102.1" be changed to "2-203.1".

3. 3-200. The reference to "3-218" in the next to the last line should be changed to "18-301".

4. 3-203.2. The reference to "4-106" should be changed to "18-302".

5. 3-218 should be deleted. It is covered in 18-301.

6. It is recommended that the words in the parentheses in 3-501(b)(xiv) be deleted, a period placed after the word "proposals" and that the following from 4-103.1 be inserted:

"All requests for proposals shall contain a provision that in the event several proposals are received and the contracting officer is satisfied that the offerors understand the work and are responsible prospective contractors and that the low proposal is reasonable and does not differ unreasonably from the Government estimate, if any, award may be made to the firm whose proposal is low, without further negotiation.

7. In 3-501(b)(xvi) the reference to "Section XII, Part 4" should be changed to "Section XVIII, Part 7".

8. In 3-501(b)(xxxvi) the reference to "4-101.4" should be changed to "18-110".

9. In 3-501(b)(xxxvii) the reference to "4-104.2" should be changed to "18-104".

10. In 3-501(b)(xxxviii) the language "estimated value of construction, see 4-101.3" should be changed to read "estimated magnitude of the proposed construction, see 18-109."

11. In 3-501(b)(xliii) the reference to "12-403.5" should be changed to "18-703.5".

12. The provisions in Section IV concerning construction should be deleted.

13. In 7-104.1(a), 7-204.1(a), 7-303.1(a) and 7-403.1(a) the reference to "12-403" should be changed to "18-703". The clause titles also should be amended to conform with new Standard Form 19A.

14. 8-603 should be deleted. It is covered in 18-618.
15. 8-703 should be deleted. It is covered in 8-701.
16. It is recommended that 10-101.6 be amended to read:
- "10-101.6 Construction contract or subcontract means any contract or subcontract for construction as defined in 18-101.1."
17. In 10-102.4(b) the reference to "16-401.3" should be changed to "16-401.2(a)".
18. In 12-102.6 the reference to "4-107" should be changed to "18-111".
19. In 12-302(vi) the reference to "12-403.1" should be changed to "18-703.1".
20. Section XII, Part 4, should be deleted.
21. In 16-303.2(b)(x) the references in the third line to "12-403.2(2) and (3) and 12-403.4" and in the last line to "12-403.4" should be changed to "18-703.2 and 18-703.4" and "18-703.4", respectively.
22. Section XVI, Part 4, should be deleted.
23. 16-803.1 should be deleted. It is covered in 16-405.1.
24. 16-814 should be deleted. It is covered in 16-405.2.
25. It is noted that changes in the following paragraphs were proposed in the ASPR Minutes #2, 7 Jan 64: 1-201.21; 1-903.2; 3-808.2(b); 10-102.5 and 16-815.1.
26. As a result of the publication of the new clauses for facilities contracts in Revision 7 of ASPR the following changes are recommended:
- (a) In paragraphs 7-702.46, 7-703.38 and 7-704.30 the references to "12-403.1(2)" should be changed to "18-703.1(2)" and the clause title should be changed to correspond with the new title in the June 1964 edition of Standard Form 19A.

(b) In paragraph 7-705.5 in the introductory sentence the references to "12-403.2, 12-403.3 and 12-403.4" and "12-402" should be changed to "18-703.2, 18-703.3 and 18-703.4" and "18-702.1", respectively. In paragraph (b) of the clause the reference to "12-403.1" should be changed to "18-703.1", and the clause titles in paragraph (b) should be changed to correspond with the new titles in the June 1964 edition of Standard Form 19A.

27. Your attention is invited to TAB "B" of 17 April 1963 Memorandum for the Chairman, ASPR Committee, containing recommended modifications in other paragraphs of ASPR to include coverage of construction contracting. In addition to these changes, it is recommended that the title to Part 4, Section XV, be amended to read "Construction and Architect-Engineer Contracts".

TAB "F"

I. Changes as a result of June 1964 Edition of SF 19A.

1. The clauses in 18-703.1 (1)-(6) (page 54-56 of Exhibit "A" will have to be replaced by clauses (1)-(6) of SF 19A, June 1964 Edition, since these latter clauses change the text and in some instances the title of the clause.

2. The clause in 18-703.1(7) and the text after it should be deleted and the following substituted.

"(7) Subcontracts (\_\_\_ 1964)

The Contractor agrees to insert the clauses hereof entitled 'Davis-Bacon Act,' 'Contract Work Hours Standards Act - Overtime Compensation,' 'Apprentices,' 'Payrolls and Payroll Records,' 'Compliance with Copeland Regulations,' 'Withholding Of Funds,' 'Subcontracts' and 'Contract Termination - Debarment' in all subcontracts. The term 'Contractor' as used in such clauses in any subcontract shall be deemed to refer to the subcontractor except in the phrase 'Government Prime Contractor.'"

"When Standard Form 19A is used the 'Subcontracts' clause therein shall be used in lieu of the above clause."

3. 18-703.1 should be amended by adding as subparagraph (8) clause 8 of the SF 19A entitled "Contract Termination-Debarment".

4. 7-602.23 should be amended to change the title of several of the clauses therein to correspond with the new titles in 18-703.1 required by the SF 19A June 1964 Edition and to add the new proposed 18-703.1(8). In addition the title of the clause in 7-602.23 "Employee Compensation - Cape Canaveral etc" should be changed to "Employee Compensation - Cape Kennedy,

Patrick Air Force Base And Merritt Island Launch Area." Also the title in 18-703.5 should add the word "Launch" after "Island".

5. 18-703.3 should be modified by deleting the two items after "shall include" numbered (i) and (ii) and substituting therefor the following.

"(i) The clause entitled 'Contract Work Hours Standards Act - Overtime Compensation' set forth in 18-703.1(2), (ii) the 'Subcontracts' clause set forth in 18-703.1(7) except that the first sentence thereof shall be modified to refer only to the clauses entitled 'Contract Work Hours Standards Act - Overtime Compensation,' 'Subcontracts' and 'Contract Termination-Debarment,' and (iii) the clause entitled 'Contract Termination-Debarment' set forth in 18-703.1(8)."

6. In 18-703.5 subparagraph "f" of the clause should be modified to substitute the titles "Contract Work Hours Standards Act - Overtime Compensation," "Apprentices," "Payrolls and Payroll Records," "Compliance With Copeland Regulations," "Withholding Of Funds," "Subcontracts" and "Contract Termination-Debarment" for the titles appearing after "Davis-Bacon Act".

7. The titles in 7-602.37 should be deleted and the new titles in SF 19A used. In addition the title "Nondiscrimination in Employment" should be deleted and the title "Equal Opportunity" substituted therefor.

8. The following title should be changed in 7-607.14 and clause 19 on p. 26 of Exhibit "C" "Work Hours Act of 1962 - Overtime Compensation" to "Contract Work Hours Standards Act - Overtime Compensation".

II. Changes as a result of June 1964 Edition of SF 23A.

1. Subparagraph (e) of 8-709 (page 11 Additional ASPR Changes) should be modified to conform to new subparagraph (e) of clause 5 of new SF 23A.

2. Because of change of title in clause 21, which is reflected in Defense Procurement Circular No. 8, the title of 7-602.22 should be changed to "Equal Opportunity". This same change should be made in 7-605.22, (p. 43 Exhibit "B") and 7-607.12 (p. 50, Exhibit "B").

3. Subparagraph (h) of 16-401.3 (p. 9, Exhibit "C") should be deleted since the Equal Opportunity clause in Defense Procurement Circular No. 8 is the same as Clause 5 of new SF 23A.

#### III Changes as a result of June 1964 Edition of SF 22

1. In 16-401.2 (c)(iv) (page 7 Exhibit "C") delete the words "as amended pursuant to 2-201(a)(xxv)".

IV Changes in proposed DD Form "B", "Statement and Acknowledgement" will be required to set forth new titles for clauses enumerated therein.







HEADQUARTERS  
DEPARTMENT OF THE ARMY  
OFFICE OF THE CHIEF OF ENGINEERS  
WASHINGTON, D.C. 20315

IN REPLY REFER TO

8 October 1964

MEMORANDUM FOR: THE CHAIRMAN, ASPR COMMITTEE

SUBJECT: Case No. 64-160 Liquidated Damages - FPR

I PROBLEM

To review ASPR coverage of liquidated damages particularly in construction contracts in light of proposed changes in the Federal Procurement Regulations which are designed to establish an affirmative policy requiring the use of liquidated damages provisions in contracts for construction, except in justifiable circumstances, while retaining a permissive policy regarding other contracts for supplies and services. Also to prepare a proposed reply to the letter of the General Services Administration referring for comment the proposed coverage in the Federal Procurement Regulations.

II DISCUSSION

1. Construction Contracts. The approved edited draft of the proposed ASPR coverage of construction provides in 18-113 that a liquidated damages clause generally shall be included in all construction contracts except cost-plus-fixed-fee contracts or those in which the contractor cannot control the pace of the work. The two specific exceptions are contracts which by their nature are deemed clearly inappropriate for the inclusion of a liquidated damages provision, since in neither of them does it appear that firm completion dates can be established with sufficient validity to justify the use of a liquidated damages provision. It is believed, however, that these two should be the only exceptions since your subcommittee perceives of no sufficient reason which would warrant the exclusion of a liquidated damages provision in any other types of construction contracts.

2. Your subcommittee notes the inclusion of the word "generally" in the proposed ASPR 18-113. It is believed that this word would not furnish any useful guidance to contracting officers and, in light of the above, recommends its deletion.

3. Supply Contracts. It appears to your Subcommittee that the provisions of ASPR on contracts for supplies and services other than construction closely parallel those in the proposed FPR 1-1.315-2.

RECOMMENDATION:

That the word "generally" be deleted from the proposed ASPR 18-113 and that that paragraph as amended be included in the ASPR coverage of construction. In addition, that the attached proposed reply be sent to the General Services Administration.

CONSTRUCTION CONTRACT SUBCOMMITTEE

BY:

Harold Gold (Y&D - Navy)

*Walter Willson*  
Walter Willson (SAFGC - Air Force)

*William C. Girard*  
William C. Girard (SPP - Air Force)

*Robert Reid*  
Robert Reid (OCE - Air Force)

*E. Manning Seltzer*  
E. Manning Seltzer, Chairman (Eng - Army)

TO: General Services Administration  
Washington, D. C. 20405

Attn: Paul A. Barron, Assistant General Counsel, Regulations  
and General Law Division

Reference is made to your letter dated 19 August 1964 concerning a proposed revision of subsections 1-1.315-1 and 1-1.315-2 of the Federal Procurement Regulations covering the use of liquidated damages provisions in procurement contracts.

It is proposed in the near future to publish a revision to ASPR which will contain substantial coverage of the procurement of construction in the Department of Defense. Among the provisions in this coverage is one which states in part that a liquidated damages provision shall be included in all construction contracts except cost-plus-a-fixed-fee contracts and those in which the contractor cannot control the pace of the work. A copy of the proposed paragraph is attached. These two types of construction contracts are excepted, since it would appear that firm completion dates cannot be established with sufficient validity to justify the inclusion of a liquidated damages provision in them. No other exception is made, since no sufficient reason can be perceived which would justify the non-use of a liquidated damages provision in such other construction contracts. So far as contracts for supplies or services other than construction are concerned, it is believed that the present ASPR provisions already closely parallel those proposed in FPR 1-1.315-2, concerning them.

In accordance with the above, liquidated damages will be covered in the proposed ASPR 18-113 for construction contracts and is covered for other contracts for supplies or services in ASPR 1-310.

~~44-3~~  
Case File 61-160

28 OCT 1964

Mr. Paul A. Barron  
Assistant General Counsel  
Regulations & General Law Division  
General Services Administration  
Washington, D. C. 20405

Dear Mr. Barron:

Reference is made to your letter dated 19 August 1964 concerning a proposed revision of subsections 1-1.315-1 and 1-1.315-2 of the Federal Procurement Regulations covering the use of liquidated damages provisions in procurement contracts.

We plan to publish in the near future a revision to ASPR which will contain substantial coverage of the procurement of construction in the Department of Defense. One of the proposed revisions provides that a liquidated damages clause shall be included in all construction contracts except those in which the contractor must control the pace of the work. CDF contracts are specifically excluded since selection of this type contract is based, in part, on the contractor's inability to control construction progress within specific time frames. A copy of the proposed revision is attached. As to contracts other than for construction, present ASPR provisions already closely parallel those proposed in FPR 1-1.315.2, and no ASPR revisions are planned.

I hope the above will be helpful.

Sincerely,

*Signature*

ROGER E. THOMAS  
Colonel, USAF  
Chairman, ASPR Committee

Attachment

Prepared by: HIFrancis/wab/26Oct64  
3D-776 X-71277

ASPR Case File

61-160

12 NOV 1964

Mr. William E. Dann  
Executive Director  
The Associated General Contractors  
of America, Inc.  
1957 E Street, N. W.  
Washington 6, D. C.

1 June 64

Dear Mr. Dann:

After consideration of certain changes to the ASPR which you coordinated on last June, the ASPR Committee determined that certain changes to Section XV, Part 4 were necessary. These changes are not considered to be substantial, but are of the nature of editing and clarification. Normally, Industry coordination would not be considered necessary.

However, your association participated extensively in coordination of the basic directive and we found your comments very useful. We are therefore attaching six copies of the proposed revisions to Section XV. Will you please have someone take a look at these and advise if there are any questions you would like for us to consider prior to publication?

An early answer will be appreciated.

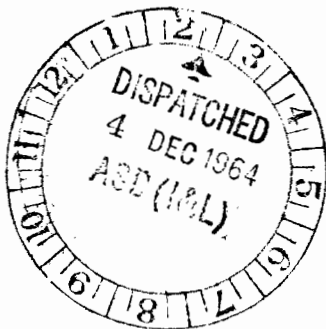
Sincerely yours,

Signed

ROGER H. TERZIAN  
Colonel, USAF  
Chairman, ASPR Committee

Attachment

Prepared by: GWThompson/mb/10Nov64  
3D-776 X-71277



11-12-64  
fel  
18 DEC 1964

Mr. Paul A. Barron  
Assistant General Counsel  
Regulations and General  
Law Division  
General Services Administration  
Washington 25, D. C.

Dear Mr. Barron:

This is in response to your letter of 13 November 1964, requesting comments upon the proposed revision of FPR Subpart 1-12.4, Labor Standards in Construction.

We suggest that you make the following two changes in the proposed coverage:

(a) Rewrite the last sentence of paragraph (a) of the Work Hours Standards Act clause to read as follows:

"The 'basic rate of pay', as used in this clause, shall be the amount paid per hour, exclusive of the contractor's contribution or cost for fringe benefits and any cash payment made in lieu of providing fringe benefits, or the basic hourly rate contained in the wage determination, whichever is greater."  
(Revision underscored).

This change will make it clear that the basic rate of pay, for overtime purposes, does not include the value of fringe benefits.

(b) Add the following paragraph (d) to the clause entitled Payrolls and Basic Records:

"(d) If the Contractor fails to submit for any week a copy of all payrolls to the Contracting Officer as required by paragraph (b) of this clause, the Contracting Officer may disapprove all or any part of any progress payment estimate for the period covered by such payrolls until they are received by him."

The addition of this paragraph will provide a sanction that is considered necessary to assure the timely submission of payrolls by Contractors.

We appreciate the opportunity afforded to comment upon your proposed revision of the FTR.

Sincerely yours,

HOWARD E. THORIAN  
Colonel, USAF  
Chairman, AFPR Committee

Approved by: [Signature] / [Signature]  
[Signature]

Submitted with the AFPR Committee  
Chairman \_\_\_\_\_  
Mr. Louis Cox \_\_\_\_\_

The addition of this paragraph will provide a sanction that is considered necessary to assure the timely submission of payrolls by Contractors.

We appreciate the opportunity afforded to comment upon your proposed revision of the FTR.

Sincerely yours,

ROBERT E. THORIAN  
Colonel, USAF  
Chairman, ASFR Committee

Approved by: [Signature] / [Signature]  
[Signature] / [Signature]

Submitted with the ASFR Committee  
Chairman \_\_\_\_\_  
Mr. Louis Cox \_\_\_\_\_



6/1/65  
3 May 1965

MEMORANDUM FOR THE CHAIRMAN, ASPR COMMITTEE

SUBJECT: ASPR Case 61-160, Patent Coverage for Construction

I PROBLEM

Review of proposed Section XVIII, Part 9, Patents, Data and Copyrights in the light of comments submitted by industry.

II RECOMMENDATION

That the attached revised draft of Section XVIII, Part 9, Patents, Data and Copyrights be adopted.

III DISCUSSION

The Patents Subcommittee has reviewed the comments made by industry with regard to the proposed Section XVIII, Part 9, Patents, Data and Copyrights. In view of industry comments a revised version of Part 9 is attached as TAB A. The following changes have been made.

(1) 18-901(b), the definition of shop drawings for construction has been revised to more clearly indicate that only form, fit and attachment details of materials and equipment are to be included in the drawings.

(2) 18-905, the screening clause and introductory statement have been rewritten to more clearly state the reasons for using this type of clause and to emphasize that the clause is not intended to restrict the use of items merely because they may be patented.

(3) 7-607.2, Drawings and Other Data to Become Property of Government has been amended to provide for the substitution of "Contractor" for "Architect-engineer" when the clause is used in construction contracts.

(4) 7-6XX, Rights in Shop Drawings clause and 18-910.1(b) Shop drawings for construction have been revised to show that only form, fit and attachment details are required for materials and equipment.

PATENTS SUBCOMMITTEE

By:

William G. Gapcynski (Army)

Leo Ross (Navy)

J. A. O'Connell (DSA)

M. Freudenberg (Air Force)

F. J. Duchelle (Air Force)

3 Incl

1. Tab A

2. Tab B

3. Tab C

*Doc. 11*  
*Tab H*  
May 1965

## SECTION XVIII, PART 9

### PATENTS, DATA, AND COPYRIGHTS

18-900 SCOPE OF PART. This Part sets forth the policies, instructions, and contract clauses pertaining to patents, data, and copyrights in connection with the procurement of construction and related architect-engineer services. The provisions of Section IX as they relate to supplies are applicable where the procurement is of construction materials or supplies as such, as distinguished from "construction" as defined in 18-101.1. Similarly, the provisions of Section IX as they relate to research and development apply where one of the purposes of the procurement is experimental, developmental or research work, or test and evaluation studies (involving such work) of structures, equipment, processes, or materials for use in construction. Where the proposed contract calls for either (i) experimental, developmental, or research work, or (ii) supplies and materials, in addition to either construction or architect-engineer work, the pertinent provisions of Section IX shall be added to the contract pursuant to instructions contained in this Part. In such cases, the contract shall indicate clearly which of the clauses of Section IX apply only to the experimental, developmental, or research work, or to the supplies and materials being procured, and which apply only to the construction or architect-engineer work.

18-901 DEFINITIONS. For the purpose of this Part, the following terms have the meanings set forth below (see also 9-201):

← (a) Plans and specification for construction means drawings, specifications, and other data for and preliminary to the construction of a particular

public building, structure or work within the definition of construction in 18-101.1.

(b) Shop drawings for construction means drawings submitted by the construction contractor, subcontractor, or any lower tier subcontractor pursuant to the construction contract, showing in detail (1) the proposed fabrication, and assembly of structural elements, and (2) the installation (i.e. form, fit and attachment details) of materials, or equipment.

(c) As-built drawings for construction means drawings submitted by a contractor or subcontractor to show the construction of a particular structure or work as actually completed under the contract.

18-902 AUTHORIZATION AND CONSENT. See 9-102.

18-902.1 General. The Authorization and Consent clause in 9-102.1 shall be included in all contracts for construction materials or supplies and in all construction contracts, except where both complete performance and delivery (if any) are to be accomplished outside the United States, its possessions, or Puerto Rico. Normally an authorization and consent clause shall not be included in an architect-engineer contract; however, the clause in 9-102.1 shall be included in architect-engineer contracts which require the delivery of models, samples, or other products, or which may require the use of patented devices or processes to test or perform any part of the work, under the architect-engineer contract, except where the contract is to be performed wholly outside the United States, its possessions, or Puerto Rico.

18-902.2 Authorization and Consent in Contracts Including Research or Development. Unless prohibited by 18-902.1, the clause ~~set forth~~ in 9-102.2

shall be included in architect-engineer contracts or construction contracts calling exclusively for experimental, developmental, or research work in the field of construction or architect-engineering. Where the contract calls for either experimental, developmental, or research work or supplies and materials, in addition to either construction or architect-engineer work, the clause ~~set forth~~ in 9-102.1 shall be used.

18-903 Patent Indemnification of Government by Contractor.

18-903.1 General. A patent indemnity clause shall not be included in contracts calling solely for architect-engineer or experimental, developmental, or research work in the field of construction.

18-903.2 Patent Indemnity Clauses in Supply Contracts. (See 9-103). The provisions of 9-103.1 relating to the procurement of supplies are applicable where the procurement is solely for construction materials or supplies as such, as distinguished from "construction" as defined in 18-101.1.

18-903.3 Patent Indemnity Clause in Construction Contracts.

← (a) All contracts calling for "construction" as defined in 18-101.1 shall contain the clause ~~set forth~~ in 7-602.16 (see Standard Form 23A).

← (b) If it is determined that the construction will necessarily involve the use of structures, products, materials, equipment, processes, or methods which are non-standard, non-commercial or special, the contract may list them in the specifications and may expressly exclude them from the patent indemnification by inserting the following in the schedule of the contract:

ITEMS EXCLUDED FROM PATENT INDEMNITY ( 1964)

The "Patent Indemnity clause of this contract shall not apply to the following:  
(Specifically identify the items to be excluded)

18-903.4 Waiver of Indemnity by the Government. Exemption of specific patents from the patent indemnity provisions of the clauses prescribed in 18-903.2 and 18-903.3(a) shall be made only upon the authorization of the Secretary concerned or his authorized representative in accordance with 9-103.4.

18-904 Notice and Assistance. Subject to the prohibitions of 9-104, all contracts calling for construction work shall include the Notice and Assistance Regarding Patent and Copyright Infringement clause in 9-104.

18-905 Approval of Restricted Designs. Specifications for construction should allow for maximum latitude in the use of various types of commercially available products, materials, equipment or processes which will meet objective Government requirements. However, Government requirements may necessitate, or the architect-engineer may contemplate the use of structures, products, materials, equipment or processes which are available only from a <sup>sole</sup>~~single~~ source. In such event the architect-engineer should report to the contracting officer the items known to him to be <sup>sole</sup>~~single~~ source, and the reasons therefor, and advise the contracting officer of the extent to which such items are considered necessary to meet the Government's requirements. This will make possible timely planning and arrangements for the use of <sup>sole</sup>~~single~~ source items, or where appropriate, to consider alternate items. It is to be emphasized that this procedure is not intended to restrict the use of patented, or copyrighted items, but is merely to give the Government an opportunity to consider whether the specifications being drawn by the architect-engineer, in regard to any one item, are unnecessarily restricted, according to objective Government requirements, to a single <sup>sole</sup>~~source~~ item. The procedure is primarily for use in instances where the proposed design is expected

to be conventional or standard and where the design may be used in subsequent procurements. For this purpose, the following clause may be inserted in architect-engineer contracts:

NOTICE AND APPROVAL OF RESTRICTED DESIGNS ( 1965)

(a) In the performance of this contract, the Contractor shall, to the extent practicable, make maximum use of structures, machines, products, materials, construction methods, and equipment which are readily available through Government or competitive commercial channels, or through standard or proven production techniques, methods, and processes. Unless approved by the Contracting Officer the Contractor shall not, in the performance of the work called for by this contract, produce a design or specification such as to require in this construction work the use of structures, products, materials, construction equipment, or processes which are known by the Contractor to be available only from a ~~single~~<sup>sole</sup> source. As to any such design or specification the Contractor shall report to the Contracting Officer giving the reason or reasons why it is considered necessary to so restrict the design or specification.

18-906 Processing of Infringement Claims. See 9-105.

18-907 Classified Contracts. See 9-106.

18-908 Patent Rights.

← (a) Any construction or architect-engineer contract which calls for or can be expected to involve the design, for use in the construction or operation

of a Government facility, of novel structures, machines, products, materials, processes, or equipment (including construction equipment), and any contract having as one of its purposes the performance of experimental, developmental, or research work or test and evaluation studies involving such work, should include a patent rights clause in accordance with the policy and guidance of 9-107.

← (b) Any construction or architect-engineer contract which calls for or can be expected to involve only standard types of construction to be built by previously developed equipment, methods, and processes shall not include a patent rights clause. The term "standard types of construction" as used herein means construction in which the distinctive features, if any, in all likelihood will amount to no more than:

- (i) variations in size, shape or capacity of otherwise structurally orthodox and conventionally acting single structural members or multi-member structural groupings; or
- (ii) purely artistic or esthetic (as distinguished from functionally significant) architectural configurations and designs of both structural and nonstructural members or groupings, which may or may not be sufficiently novel or meritorious to qualify for protection under the design patent or copyright laws.

Rights of the Government in and to any such distinctive design or copyright features, as distinguished from inventions of a mechanical or functional nature resulting from an architect-engineer contract, are provided for in the clause in 7-607.2 entitled Drawings and Other Data to Become Property of Government. ~~See~~

~~see B):~~



(c) Construction and architect-engineer contracts which require the development of novel structures, machines, products, equipment (including construction equipment), materials, or processes shall include the clause in 7-607.2 in addition to the appropriate "Patent Rights" clause in Section IX.

18-909 Patent Royalties. The provisions of 9-110, 9-111, and 9-112 are applicable to contracts for construction or construction supplies.

18-910 Acquisition and Use of Plans, Specifications and Drawings.

18-910.1 Data Clauses for Architect-Engineer and Construction Work.

← (a) Plans and specifications and as-built drawings. ~~It is the policy of the Department of Defense~~ *In* procuring plans and specifications and as-built drawings for construction ~~to~~ *The Government shall* obtain full ownership thereof with the full right to use and reproduce the same. Accordingly, in contracts calling for plans and specifications for construction, or as-built drawings for construction, insert the clause ~~(a-1)~~ in 7-607.2. Upon request of the architect-engineer or others interested ~~and upon the determination by~~ *unless determined* the contracting officer that the public interest will ~~not~~ be adversely affected, permission will be granted by the Government for the reproduction and use of plans and specifications or as-built drawings for construction by other parties, ←

← (b) Shop drawings for construction. ~~It is the policy of the Department of Defense~~ *The Government shall* *In* procuring shop drawings for construction ~~to~~ obtain the unlimited right to use and reproduce such drawings, but not ~~be~~ exclude a similar right in the designer or others. Accordingly, in contracts for such drawings, the clause in 7-~~607~~ ~~(a-1)~~ shall be used.

602.49

18-910.2 Data Clauses for Construction Supplies and Research and Development.

The provisions of Section IX, Part 2, relating to the acquisition of data and rights therein in connection with the procurement of supplies and materials and research and development are applicable where the procurement is confined to either construction materials (as distinguished from "construction" as defined in 18-101.1) or experimental, developmental, or research work, or both. In some circumstances the right to use such data, including drawings, may be limited in accordance with appropriate paragraphs of Section IX, Part 2.

18-910.3 Mixed Contracts. Where the proposed contract calls for either (i) experimental, developmental, or research work, or (ii) supplies and materials, in addition to either construction or architect-engineer work, the pertinent clauses of Section IX, Part 2, shall be added to the contract, in addition to the clauses in <sup>-602.47</sup>7, ~~602.47~~ and 7-607.2, as appropriate. In such cases, the contract shall indicate clearly which of the clauses of Section IX, Part 2, apply only to the experimental, developmental, or research work, or to the supplies and materials being procured, and which apply only to the construction or architect-engineer work.

7-607.2 DRAWINGS AND OTHER DATA TO BECOME PROPERTY OF GOVERNMENT (Jan. 4 1965)

All drawings, designs, specifications, architectural designs of buildings and structures, notes and other architect-engineer work produced in the performance of this contract and all as-built drawings produced after completion of the work shall be and remain the sole property of the Government and may be used on any other work without additional cost to the Government; and with respect thereto the Architect-Engineer<sup>b</sup> agrees not to assert any rights and not to establish any claim under the design patent or copyright laws. The Architect-Engineer<sup>b</sup> for a period of three (3) years after completion of the project agrees to furnish and to provide access to the originals or copies of all such materials on the request of the Contracting Officer.

When used in construction contracts substitute "Contractor" for "Architect-Engineer" in both places where the in term appears in the clause.

7-6XX RIGHTS IN SHOP DRAWINGS ( 1965)

Shop drawings for construction means drawings submitted to the Government by the Construction Contractor, Subcontractor or any lower tier subcontractor pursuant to a construction contract showing in detail (1) the proposed fabrication and assembly of structural elements and (2) the installation (i.e. form, fit and attachment details) of materials or equipment. The Government may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.

SECTION XVIII, PART 9  
PATENTS, DATA, AND COPYRIGHTS

18-900 SCOPE OF PART. This Part sets forth the policies, instructions, and contract clauses pertaining to patents, data, and copyrights in connection with the procurement of construction and related architect-engineer services. The provisions of Section IX as they relate to supplies are applicable where the procurement is of construction materials or supplies as such, as distinguished from "construction" as defined in 18-101.1. Similarly, the provisions of Section IX as they relate to research and development apply where one of the purposes of the procurement is experimental, developmental or research work, or test and evaluation studies (involving such work) of structures, equipment, processes, or materials for use in construction. Where the proposed contract calls for either (i) experimental, developmental, or research work, or (ii) supplies and materials, in addition to either construction or architect-engineer work, the pertinent provisions of Section IX shall be added to the contract pursuant to instructions contained in this Part. In such cases, the contract shall indicate clearly which of the clauses of Section IX apply only to the experimental, developmental, or research work, or to the supplies and materials being procured, and which apply only to the construction or architect-engineer work.

18-901 DEFINITIONS. For the purpose of this Part, the following terms have the meanings set forth below (see also 9-201):

(a) Plans and specification for construction means drawings, specifications, and other data for and preliminary to the construction of a particular public building, structure or work within the definition of construction in 18-101.1.

(b) Shop drawings for construction means drawings prepared by the construction contractor, subcontractor, or any lower tier subcontractor pursuant to the construction contract, showing in detail the proposed fabrication, assembly, or installation of structures, materials, or equipment.

(c) As-built drawings for construction means drawings prepared by a contractor or subcontractor to show the construction of a particular structure or work as actually completed under the contract.

18-902 AUTHORIZATION AND CONSENT. See 9-102.

18-902.1 General. The Authorization and Consent clause in 9-102.1 shall be included in all contracts for construction materials or supplies and in all construction contracts, except where both complete performance and delivery (if any) are to be accomplished outside the United States, its possessions, or Puerto Rico. Normally an authorization and consent clause shall not be included in an architect-engineer contract; however, the clause in 9-102.1 shall be included in architect-engineer contracts which require the delivery of models, samples, or other products, or which may require the use of patented devices or processes to test or perform any part of the work, under the architect-engineer contract except where the contract is to be performed wholly outside the United States, its possessions, or Puerto Rico.

18-902.2 Authorization and Consent in Contracts Including Research or Development. Unless prohibited by 18-902.1, the clause set forth in 9-102.2 shall be included in architect-engineer contracts or construction contracts calling exclusively for experimental, developmental, or research work in the field of construction or architect-engineering. Where the contract calls for either experimental, developmental, or research work or supplies and materials,

in addition to either construction or architect-engineer work, the clause set forth in 9-102.1 shall be used.

18-903 Patent Indemnification of Government by Contractor.

18-903.1 General. A patent indemnity clause shall not be included in contracts calling solely for architect-engineer or experimental, developmental, or research work in the field of construction.

18-903.2 Patent Indemnity Clauses in Supply Contracts. (See 9-103). The provisions of 9-103.1 relating to the procurement of supplies are applicable where the procurement is solely for construction materials or supplies as such, as distinguished from "construction" as defined in 18-101.1.

18-903.3 Patent Indemnity Clause in Construction Contracts.

(a) All contracts calling for "construction" as defined in 18-101.1 shall contain the clause set forth in 7-602.16 (see Standard Form 23A).

(b) If it is determined that the construction will necessarily involve the use of structures, products, materials, equipment, processes, or methods which are non-standard, non-commercial or special, the contract may list them in the specifications and may expressly exclude them from the patent indemnification by inserting the following in the schedule of the contract:

ITEMS EXCLUDED FROM PATENT INDEMNITY ( 1964)

The "Patent Indemnity" clause of this contract shall not apply to the following:

(Specifically identify the items to be excluded)

18-903.4 Waiver of Indemnity by the Government. Exemption of specific patents from the patent indemnity provisions of the clauses prescribed in 18-903.2 and 18-903.3(a) shall be made only upon the authorization of the Secretary concerned or his authorized representative in accordance with 9-103.4.

the Contractor shall not, in the performance of the work called for by this contract, produce a design or specification such as to require in this construction work or later operation of the facility being designed, the use of structures, products, materials, construction equipment, or processes which are known by the Contractor to be sole source, noncommercial, patented or copyrighted, or in the process of being patented or copyrighted, and not readily available to the public on the open market except from a sole source, patentee or a licensee of the patentee.

18-906 Processing of Infringement Claims. See 9-105.

18-907 Classified Contracts. See 9-106.

18-908 Patent Rights.

(a) Any construction or architect-engineer contract which calls for or can be expected to involve the design, for use in the construction or operation of a Government facility, of novel structures, machines, products, materials, processes, or equipment (including construction equipment), and any contract having as one of its purposes the performance of experimental, developmental, or research work or test and evaluation studies involving such work, should include a patent rights clause in accordance with the policy and guidance of 9-107.

(b) Any construction or architect-engineer contract which calls for or can be expected to involve only standard types of construction to be built by previously developed equipment, methods, and processes shall not include a patent rights clause. The term "standard types of construction" as used herein means construction in which the distinctive features, if any, in all likelihood will amount to no more than:



18-904 Notice and Assistance. Subject to the prohibitions of 9-104, all contracts calling for construction work shall include the Notice and Assistance Regarding Patent and Copyright Infringement clause in 9-104.

18-905 Screening of Patented, Copyrighted or Otherwise Restricted Designs. In architect-engineer contracts the design or specification called for may involve or contemplate the use of structures, products, materials, equipment, or processes which are covered by patents or copyrights. In such event the architect-engineer should report to the contracting officer the items which are known to him to be sole source or noncommercial or are covered by patent or copyright, and advise the contracting officer of the extent to which these items are necessary to meet the Government's requirements. This will make possible timely planning and arrangements for the use of sole source or non-commercial, patented or copyrighted features where appropriate, or provide added time to consider alternative means. For this purpose, the following clause may be inserted in architect-engineer contracts:

NOTICE REGARDING PATENTED, COPYRIGHTED OR OTHERWISE RESTRICTED  
DESIGNS ( 1965 )

(a) In the performance of this contract, the Contractor shall endeavor, to the extent possible in achieving the objectives of the contract, to direct the design contemplated so that the resulting construction work and later operation of the facility being designed will make maximum use of structures, machines, products, materials, construction methods, and equipment which are readily available through Government or commercial channels, or through standard or proven production techniques, methods, and processes. Unless approved by the Contracting Officer

- (i) variations in size, shape or capacity of otherwise structurally orthodox and conventionally acting single structural members or multi-member structural groupings; or
- (ii) purely artistic or esthetic (as distinguished from functionally significant) architectural configurations and designs of both structural and nonstructural members or groupings, which may or may not be sufficiently novel or meritorious to qualify for protection under the design patent or copyright laws.

Rights of the Government in and to any such distinctive design or copyright features, as distinguished from inventions of a mechanical or functional nature resulting from an architect-engineer contract, are provided for in the clause in 7-607.2 entitled Drawings and Other Data to Become Property of Government. (See Tab B).

(c) Construction and architect-engineer contracts which require the development of novel structures, machines, products, equipment (including construction equipment), materials, or processes shall include the clause in 7-607.2 in addition to the appropriate "Patent Rights" clause in Section IX.

18-909 Patent Royalties. The provisions of 9-110, 9-111, and 9-112 are applicable to contracts for construction or construction supplies.

18-910 Acquisition and Use of Plans, Specifications and Drawings.

18-910.1 Data Clauses for Architect-Engineer and Construction Work.

(a) Plans and specifications and as-built drawings. It is the policy of the Department of Defense in procuring plans and specifications and as-built drawings for construction to obtain full ownership thereof with the full right to use and reproduce the same. Accordingly, in contracts calling for plans and specifications for construction, or as-built drawings for construction, insert the clause set forth in 7-607.2. Upon request of the architect-engineer or

others interested and upon the determination by the contracting officer that the public interest will not be adversely affected, permission will be granted by the Government for the reproduction and use of plans and specifications or as-built drawings for construction by other parties.

(b) Shop drawings for construction. It is the policy of the Department of Defense in procuring shop drawings for construction to obtain the full right to use and reproduce, including use and reproduction of such drawings for reprourement, but not to exclude a similar right in the designer or others. Accordingly, in contracts for such drawings, the clause in 7-6XX (see Tab C) shall be used.

18-910.2 Data Clauses for Construction Supplies and Research and Development.

The provisions of Section IX, Part 2, relating to the acquisition of data and rights therein in connection with the procurement of supplies and materials and research and development are applicable where the procurement is confined to either construction materials (as distinguished from "construction" as defined in 18-101.1) or experimental, developmental, or research work, or both. In some circumstances the right to use such data, including drawings, may be limited in accordance with appropriate paragraphs of Section IX, Part 2.

18-910.3 Mixed Contracts. Where the proposed contract calls for either (i) experimental, developmental, or research work, or (ii) supplies and materials, in addition to either construction or architect-engineer work, the pertinent clauses of Section IX, Part 2, shall be added to the contract, in addition to the clauses in 7.6XX and 7-607.2, as appropriate. In such cases, the contract shall indicate clearly which of the clauses of Section IX, Part 2, apply only to the experimental, developmental, or research work, or to the supplies and materials being procured, and which apply only to the construction or architect-engineer work.

7-607.2 DRAWINGS AND OTHER DATA TO BECOME PROPERTY OF GOVERNMENT ( 1965)

All drawings, designs, specifications, architectural designs of buildings and structures, notes and other architect-engineer work produced in the performance of this contract and all as-built drawings produced after completion of the work shall be and remain the sole property of the Government and may be used on any other work without additional cost to the Government; and with respect thereto the Architect-Engineer agrees not to assert any rights and not to establish any claim under the design patent or copyright laws. The Architect-Engineer for a period of three (3) years after completion of the project agrees to furnish and to provide access to the originals or copies of all such materials on the request of the Contracting Officer.

7-6XX RIGHTS IN SHOP DRAWINGS ( 1965)

Shop drawings for constructions means drawings prepared by the construction contractor, subcontractor, or any lower tier subcontractor pursuant to the construction contract, showing in detail the proposed fabrication, assembly or installation of structures, materials, or equipment. The Government may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.

ASPR EDITING SUBCOMMITTEE

December 2, 1965

MEMORANDUM FOR THE CHAIRMAN, ASPR COMMITTEE

SUBJECT: ASPR Case No. 61-160 -- Patent  
Coverage for Construction

Pursuant to the Minutes of September 29, 1965, coverage of the subject case is attached as TAB A. This coverage represents revision of the report of the Patents Subcommittee dated 3 September 1965. Pursuant to instructions of the Committee, 18-910.1 and .2 were revised, the proposed change to 9-203(d) was deleted, and a new 7-602.47 was developed, with the assistance of Mr. Paradis. Additionally, a few minor editorial changes were made.

L.W. CARUTHERS  
Lt. Col., JAGC  
Army Member

JOHN LANE, JR.  
Air Force Member  
Chairman

MARY K. WARD  
DSA Member

N.

1. Litigation

2. Purchase of property

3. Possible HE review of matter

H. Classified

18-910.1 Data Clauses for Architect-Engineer and Construction Work.

(a)

Where

the purpose of a contract for architect-engineer services or for construction involving architect-engineer services is to obtain a unique architectural design of a building, a monument, or construction of similar nature, which for [REDACTED] artistic, esthetic or other reasons the Government does not want duplicated by anyone else, the Government may desire to acquire exclusive control of the data pertaining to such design. The clause set forth in 7-607.2 shall be used only in those cases where the contracting officer determines for the foregoing reasons that it is desirable to maintain exclusive control over the data.

(b) In all other contracts calling for plans, specifications, shop drawings, or as-built drawings, insert the clause in 7-602.47.

18-910.2 Data Clauses for Construction Supplies and Research and Development. The provisions of Section IX, Part 2, relating to the acquisition of data and rights therein in connection with the procurement of supplies and materials and research and development are applicable where the procurement is confined to either construction materials (as distinguished from "construction" as defined in 18-101.1) or experimental, developmental, or



research work, or both. In some circumstances the right to use such data, including drawings, may be limited in accordance with appropriate paragraphs of Section IX, Part 2.

18-910.3 Mixed Contracts. Where the proposed contract calls for either (i) experimental, developmental, or research work, or (ii) supplies and materials, in addition to either construction or architect-engineer work, the pertinent clauses of Section IX, Part 2, shall be included in the contract, in addition to the appropriate clause prescribed by 18-910.1. In such cases, the contract shall indicate clearly that the clauses of Section IX, Part 2 apply only to the experimental, developmental, or research work, or only to the supplies and materials being procured, and that the appropriate clause prescribed by 18-910.1 applies only to the construction or architect-engineer work.

7-602.47 Drawings and Other Data - Government Use.

DRAWINGS AND OTHER DATA - GOVERNMENT USE ( 1965)

The Government may duplicate, use, and disclose in any manner and for any purpose whatsoever, and have others do so, all or any part of the drawings, designs, specifications, architectural designs of buildings and structures, notes, and other architect-engineer work produced in the performance of this contract, and all as-built drawings produced after completion of the work.

Q13C

ASPR EDITING SUBCOMMITTEE

4 February 1966

MEMORANDUM FOR THE CHAIRMAN, ASPR COMMITTEE

SUBJECT: ASPR Case No. 61-160 -- Patent  
Coverage for Construction

1. Pursuant to instructions to the Editors on 7 January 1966, there is submitted herewith revised coverage of the subject case. On January 12, the Committee decided that it is not necessary to resubmit this coverage to industry.

2. TAB B represents a revision of TAB A of our report dated December 2, 1965, pursuant to instructions of the Committee.

3. TAB C contains a revision of 7-607.2, approved by the ASPR Committee, which is necessary to conform 7-607.2 to 18-910.1(a).

L. W. CARUTHERS  
Lt. Col., JAGC  
Army Member

MARY K. WARD  
DSA Member

[FOR DISTRIBUTION AT THE TABLE]

18-910.1 Data Clauses for Architect-Engineer and Construction Work.

(a) Where the purpose of a contract for architect-engineer services or for construction involving architect-engineer services is to obtain a unique architectural design of a building, a monument, or construction of similar nature, which for artistic, esthetic or other special reasons the Government does not want duplicated by anyone else, the Government may desire to acquire exclusive control of the data pertaining to such design. The clause set forth in 7-607.2 shall be used only in those cases where the contracting officer determines for the foregoing reasons that it is desirable to maintain exclusive control over the data.

(b) In all other contracts calling for plans, specifications, shop drawings, or as-built drawings, insert the clause in 7-602.47.

18-910.2 Data Clauses for Construction Supplies and Research and Development. The provisions of Section IX, Part 2, relating to the acquisition of data and rights therein in connection with the procurement of supplies and materials and research and development are applicable where the procurement is confined to either construction materials (as distinguished from "construction" as defined in 18-101.1) or experimental, developmental, or research work, or both. In some circumstances the right to use such data, including drawings, may be limited in accordance with appropriate paragraphs of Section IX, Part 2.

18-910.3 Mixed Contracts. Where the proposed contract calls for either (i) experimental, developmental, or research work, (ii) supplies and materials, or (iii) both, in addition to either construction or architect-engineer work, the pertinent clauses of Section IX, Part 2, shall be included in the contract, in addition to the appropriate clause prescribed by 18-910.1. In such cases, the contract shall indicate clearly that the clauses of Section IX, Part 2 apply only to the experimental, developmental, or research work, or only to the supplies and materials being procured, or to both, and that the appropriate clause prescribed by 18-910.1 applies only to the construction or architect-engineer work.

7-602.47 Drawings and Other Data - Government Use.

DRAWINGS AND OTHER DATA - GOVERNMENT USE ( 1966)

The Government may duplicate, use, and disclose in any manner ~~and for any purpose whatsoever~~, and have others do *for the benefit of the Government*, all or any part of the drawings, designs, specifications, architectural designs of buildings and structures, notes and other architect-engineer work produced in the performance of this contract, and all as-built drawings produced after completion of the work.

\* \* \* \*

7-607.2 Drawings and Other Data To Become Property of Government. The following clause shall be inserted in accordance with the provisions of 18-910.1(a)1.

DRAWINGS AND OTHER DATA TO BECOME PROPERTY OF GOVERNMENT

( 1966)

All drawings, designs, specifications, architectural designs of buildings and structures, notes and other architect-engineer work produced in the performance of this contract and all as-built drawings produced after completion of the work shall be and remain the sole property of the Government and may be used on any other work without additional cost to the Government; and with respect thereto the Architect-Engineer agrees not to assert any rights or to establish any claim under the design patent or copyright laws and not to publish or reproduce such matter in whole or in part or in any manner or form, or authorize others so to do, without the written consent of the Government until such time as the Government may have released such matter to the public. The Architect-Engineer for a period of three (3) years after completion of the project agrees to furnish and provide access to the originals or copies of all such materials on the request of the Contracting Officer.

*Letter*

Mr. Kenneth C. Landry  
Administrator  
Governmental Affairs  
The American Institute of Architects  
1735 New York Avenue, N.W.  
Washington, D. C. 20006

Dear Mr. Landry:

Your letter of 6 October 1965 made inquiry as to the disposition of your comments of February, 1965, on proposed Armed Services Procurement Regulations, Section XVIII, Part 9, particularly those provisions relating to the acquisition and use by the Government of plans, specification and drawings. In essence, your comments indicated your belief that the architect-engineer should retain ownership of drawings and specifications and that when building designs are re-used the architect of the original work should have the opportunity of serving as a paid consultant to the new work.

Your comments, along with those of several other professional and industrial associations, have been considered in detail by an ASPR subcommittee which has proposed several amendments to Section XVIII, Part 9, in view of those comments. The ASPR Committee has considered the proposed changes at some length but as yet has not reached a final conclusion in this case.

Insofar as your particular comments are concerned, you may be interested in the attached "Legal Notes" from Building Construction of July, 1965, which discusses several court decisions holding that "In the absence of a contrary agreement, the client, not the architect is the owner of the plans". I should also point out that retention of

*Reverend*

2

sole ownership of plans, specifications and drawings by the architect would be in direct conflict with the basic data policy of the Department of Defense as expressed in ASPR IX, Part 2.

When action on this matter is concluded the coverage will be issued in a revision of the ASPR. Following our normal practice, any major revision of the regulation having an impact on industry, will be circulated for comment. The attached "order form" provides information with respect to obtaining copies of the Armed Services Procurement Regulation.

Please be assured that your comments on these proposed changes to the Regulations are appreciated and have been given every consideration.

Sincerely,

REAGAN A. SCURLOCK  
Colonel, USAF  
Chairman, ASPR Committee

Enclosures 2

Prepared by: *ABC* ABCarter/pb/15 Nov 65  
3D 780 X75476

*Reverend*

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Chairman, ASPR Committee

Enclosures 2

Prepared by: *ABC* ABCarter/pb/15 Nov 65  
3D 780 X75476



16 NOV 1965

Mr. Kenneth C. Landry  
Administrator, Governmental Affairs  
The American Institute of Architects  
1735 New York Avenue, N. W.  
Washington, D. C. 20006

Dear Mr. Landry:

Your letter of 6 October 1965 made inquiry as to the disposition of your comments of February, 1965, on proposed Armed Services Procurement Regulation, Section XVIII, Part 9, particularly those provisions relating to the acquisition and use by the Government of plans, specifications and drawings. In essence, your comments indicated your belief that the architect-engineer should retain ownership of drawings and specifications and that when building designs are reused the architect of the original work should have the opportunity of serving as a paid consultant to the new work.

Your comments, along with those of several other professional and industrial associations, have been considered in detail by an ASPR subcommittee which has proposed several amendments to Section XVIII, Part 9, in view of those comments. The ASPR Committee has considered the proposed changes at some length but as yet has not reached a final conclusion in this case.

Insofar as your particular comments are concerned, you may be interested in the attached "Legal Notes" from Building Construction of July, 1965, which discusses several court decisions holding that "In the absence of a contrary agreement, the client, not the architect is the owner of the plans". I should also point out that retention of sole ownership of plans, specifications and drawings by the architect would be in direct conflict with the basic data policy of the Department of Defense as expressed in ASPR IX, Part 2. Under that policy, the Government would expect to have unlimited rights to use, duplicate or disclose the plans for any purpose whatsoever.

The attached "order form" provides information with respect to obtaining copies of the Armed Services Procurement Regulation.

Please be assured that your comments on these proposed changes to the Regulation are appreciated and have been given every consideration.

Sincerely,

Signed

REAGAN A. SCURLOCK  
Colonel, USAF  
Chairman, ASFR Committee

Enclosures

Prepared by ABCarter/pb/15Nov65  
3D 776 X75476

Rewritten by HCHWilliamson/trd/16Nov65  
3D 776 X77076

*File copy*

ASPR EDITING SUBCOMMITTEE

March 25, 1966

MEMORANDUM FOR THE CHAIRMAN, ASPR COMMITTEE

SUBJECT: ASPR Case No. 61-160 -- Patent  
Coverage for Construction

1. Pursuant to instructions of the Committee on March 11, 1966, there is submitted as TABS A and B a clean draft of the approved coverage of the subject case. TAB A is the coverage for Section XVIII, and TAB B is the clauses for Section VII.

2. I have made the following changes, in addition to those directed by the Committee.

(a) I changed the title of 18-910.1 from "Data Clauses for Architect-Engineer and Construction Work" to "Data Clauses for Architect-Engineer or Construction Contracts," since the clauses are for both types of contracts, not only for contracts involving both types of work.

(b) I have removed the clauses themselves from Section VII and placed them with the instructional text in Section XVIII. This treatment simplifies the new Section VII coverage in TAB B, because references to the clauses must appear in the Section VII paragraphs containing clauses for construction contracts as well as in the paragraph containing clauses for architect-engineer contracts -- and the way the clauses are written, with the word "architect-engineer" in the text of the clause and a footnote instruction to change it to "Contractor" in construction contracts, the clauses are really not appropriate for insertion in either the architect-engineer paragraph or the construction paragraphs. Furthermore, this approach is consistent with the Section IX approach.

(c) I have changed the title of the two data clauses consistently with the title of the Section XVIII paragraph. This also enables use of a single title in Section VII to refer to both clauses.

(d) In the text of 18-910.1(b), I made some minor editing changes.

(e) In 18-910.3, I added back "or (iii) both" in the third line, "only" in the ninth line, and "or to both" in the

tenth line. These changes were made in the later Editing report which the Army people did not have in preparing their draft. I also added "clause or" in the eleventh line to make it consistent with the change made by the Army earlier in the paragraph.

(f) With respect to the Section VII coverage in TAB B, I have (i) made the data clauses "when applicable" clauses for construction contracts (as well as required for architect-engineer contracts), consistently with the instructions contained in the text of 18-910.1; and (ii) made the shop drawings clause mandatory for use in cost reimbursement type construction contracts as well as fixed-price type.

JOHN LANE, JR.  
Air Force Member  
Chairman

[Additional information copies  
provided for distribution at  
the table.]

ASPR Case No. 61-160  
TAB A  
March 23, 1966

18-910 Acquisition and Use of Plans, Specifications and Drawings. 3/29/66  
etc

18-910.1 Architectural Designs and Data Clauses for Architect-Engineer or Construction Contract<sup>S</sup>

(a) Plans and Specifications and As-Built Drawings.

(1) Where the purpose of a contract for architect-engineer services or for construction involving architect-engineer services is to obtain a unique architectural design of a building, a monument, or construction of similar nature, which for artistic, esthetic or other special reasons the Government does not want duplicated by anyone else, the Government may desire to acquire exclusive control of the data pertaining to such design. The following clause shall be used only in those cases where the contracting officer determines for the foregoing reasons that it is desirable to maintain exclusive control over the design and data.

ARCHITECTURAL DESIGNS AND DATA -- GOVERNMENT RIGHTS  
(SOLE PROPERTY) ( 1966)

All drawings, designs, specifications, architectural designs of buildings and structures, notes and other architect-engineer work produced in the performance of this contract <sup>or in contemplation thereof</sup> and all as-built drawings produced after completion of the work shall be and remain the sole property of the Government and may be used on any other work without additional cost to the Government; and

with respect thereto the Architect-Engineer\* agrees not to assert any rights or to establish any claim under the design patent or copyright laws and not to publish or reproduce such matter in whole or in part or in any manner or form, or authorize others so to do, without the written consent of the Government until such time as the Government may have released such matter to the public. Further, with respect to any architectural design which the Government desires to protect by applying for and prosecuting a design patent application, or otherwise, the Architect-Engineer\* agrees to furnish the Contracting Officer such duly executed instruments and other papers (prepared by the Government) as are deemed necessary to vest in the Government the rights granted it under this clause. The Architect-Engineer\* for a period of three (3) years after completion of the project agrees to furnish and provide access to the originals or copies of all such materials on the request of the Contracting Officer.

\*When used in construction contracts, substitute "Contractor" for "Architect-Engineer."

(2) In all other contracts calling for architect-engineer services or for construction involving architect-engineer services, insert the following clause.

ARCHITECTURAL DESIGNS AND DATA -- GOVERNMENT RIGHTS  
(UNLIMITED RIGHTS) (1966)

The Government shall have unlimited rights, for the benefit of the Government, in all drawings, designs, specifications, architectural designs of buildings and structures, notes and other architect-engineer work produced in the performance of this contract, or in contemplation thereof, and all as-built drawings produced after completion of the work, including the right to use same on any other Government work without additional cost to the Government; and with respect thereto the Architect-Engineer\* agrees to and does hereby grant to the Government a royalty-free license to all such data which he may cover by copyright and to all architectural designs as to which he may assert any rights or establish any claim under the design patent or copyright laws. The Architect-Engineer\* for a period of three (3) years after completion of the project agrees to furnish and to provide

\*When used in construction contracts, substitute "Contractor" for "Architect-Engineer."

access to the originals or copies of all such materials on the request of the Contracting Officer.

(b) Shop Drawings for Construction. In procuring shop drawings for construction, the Government shall obtain the unlimited right to use and reproduce such drawings, but shall not exclude a similar right in the designer or others. Accordingly, in contracts calling for delivery of such drawings, insert the following clause.

RIGHTS IN SHOP DRAWINGS ( 1966)

(a) Shop drawings for construction means drawings, submitted to the Government by the Construction Contractor, Subcontractor or any lower tier subcontractor pursuant to a construction contract, showing in detail (i) the proposed fabrication and assembly of structural elements and (ii) the installation (i.e., form, fit, and attachment details) of materials or equipment. The Government may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.

(b) This clause, including this paragraph (b), shall be included in all subcontracts hereunder at any tier.



18-910.2 Data Clauses for Construction Supplies and Research and Development. The provisions of Section IX, Part 2, relating to the acquisition of data and rights therein in connection with the procurement of supplies and materials and research and development are applicable where the procurement is confined to either construction supplies and materials (as distinguished from "construction" as defined in 18-101.1) or experimental, developmental, or research work, or both. In some circumstances the right to use such data, including drawings, may be limited in accordance with appropriate paragraphs of Section IX, Part 2.

18-910.3 Mixed Contracts. Where the proposed contract calls for either (i) experimental, developmental, or research work, (ii) supplies and materials, or (iii) both, in addition to either construction or architect-engineer work, the pertinent ~~clauses~~ of Section IX, Part 2, shall be included in the contract, in addition to the appropriate clause or clauses prescribed by 18-910.1. In such cases, the contract shall indicate clearly that the clauses of Section IX, Part 2, apply only to the experimental, developmental, or research work, or only to the supplies and materials being procured, or to both, and that the appropriate clause or clauses prescribed by 18-910.1 apply only to the construction or architect-engineer work.

1. The following changes to Section VII cover the data clauses.

7-603.42 Architectural Designs and Data -- Government Rights. In accordance with 18-910.1(a), insert one of the two clauses therein, if appropriate.

7-606.14 Architectural Designs and Data -- Government Rights. In accordance with 18-910.1(a), insert one of the two clauses therein, if appropriate.

7-607.2 Architectural Designs and Data -- Government Rights. In accordance with 18-910.1(a), insert ~~one of the two clauses~~ therein.

2. The following changes to Section VII cover the shop drawings clause.

7-602.47 Rights in Shop Drawings. Insert the clause in 18-910.1(b).

7-605.40 Rights in Shop Drawings. Insert the clause in 18-910.1(b).

**Problems Affecting Costs of  
Steel Plate Fabricating Industry in  
Prime and Subcontracts on Government Work**

**Procurement Practices -**

1. Requests for quotations should indicate the type of contract to be awarded.
2. Do not require breakdown of prices on quotations.
3. Time for preparation of bid should be realistically determined and all addenda to bidding instructions should provide for an adequate extension of the bid time.
4. Alternates should be allowed and encouraged in bidding. Such alternates should not be a basis for re-bidding or an addendum to the invitation to bid.
5. Require that prime contracts and major subcontracts have an adequate excusable delays clause, a changes clause and a disputes clause.
- ⑥ 6. Require that bidding documents define acceptable tolerances and quality control provisions on prior work which can be relied upon by second phase contractors. Deviations from these definitions shall be cause for settlement under changes clauses.
7. Award should be mandatory within 30 days.
8. On jobs being bid, issue lists of all companies who are sent copies of plans and specifications.

**Engineering and Quality Control -**

- ① 1. Organize specifications so that <sup>each</sup> major item <sup>is</sup> ~~are~~ completely specified in one section.
2. Greater care should be exercised to ensure that plans and specifications are complete and not in conflict.
3. When details and methods of construction are specified, responsibility for performance should always remain with the buyer.

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Steel Plate Fabricating Industry in  
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3. When details and methods of construction are specified, responsibility for performance should always remain with the buyer.

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE

Mr. Cas

9/20/65

61-160

1. The claim in 9-203 (dt) is  
not added to be used only in  
cases where the head of  
Proc. Agency has made finding  
etc.

2. Under 9-203 (b) AG drawings  
etc. would fall under

9-203 (a) of the claim

3. Item regarding as in 2 above  
would apply under proposed  
18-910.1 (a)

4. Document this with

copy under 9/21/65 and  
be agreed and will talk  
to SAC and Blake

A 9407

Stetten

*Tel com 12/18 Told 13 man quiet review of case 61-100 required. Next to be in there.*

**DEPARTMENT OF THE AIR FORCE**  
AIR FORCE LOGISTICS MANAGEMENT CENTER (AU)  
GUNTER AIR FORCE STATION, ALABAMA 36114



REPLY TO  
ATTN OF:

LGC

7 December 1978

SUBJECT:

*area rental rate + 6% or 11 Mar. Told him to give us 2 weeks to 15 day notice so we can pull bill from FR C TSC*

Construction Contract Administration Study,  
Project Number 780601

TO: Acting Director, DAR Council (Mr. T. Cassaday)  
OUSD R & E Rm 3D 1080  
Pentagon  
Washington, D.C. 20301

1. This office has been tasked by the Air Staff to study the area of construction contract administration at the base level insofar as tasks being performed, the frequency of task accomplishment and the necessity for task accomplishment in light of effective administration of construction contracts.

2. Many of the tasks now being performed by the contract administrator are directly related to the clauses incorporated into construction contracts by direction of the Defense Acquisition Regulation (DAR). A list of these clauses is as follows:

DAR REFERENCE

CLAUSE TITLE

*9 folders*

7 - 602.2	Specifications and Drawings (1964 Jun)
7 - 602.4	Differing Site Conditions (1968 Feb)
7 - 602.5	Termination for Default - Damages for Delays - Time Extensions (1969 Aug)
7 - 602.7	Payments to Contractor (1976 Mar)
7 - 602.9	Material and Workmanship (1964 Jun)
7 - 602.10	Contractor Inspection System (1964 Nov)
7 - 602.11	Inspection and Acceptance (1976 Oct)
7 - 602.23(a)(i)	Davis Bacon Act (40 USC 276a to a-7) (1977 Dec)
7 - 602.23(a)(ii)	Contract Work Hour and Safety Standards Act - Overtime Compensation (40 USC 327 - 333) (1977 Dec)
7 - 602.23(a)(iii)	Apprentices and Trainees (1977 Dec)
7 - 602.23(a)(iv)	Payrolls and Basic Record (1977 Dec)
7 - 602.23(a)(v)	Compliance with Copeland Regulation (1974 Jun)
7 - 602.23(a)(vi)	Withholding of Funds (1977 Dec)
7 - 602.34	Protection of Existing Vegetation, Structures, Utilities and Improvements (1965 Jan)
7 - 602.37	Subcontractors (1972 Feb)
7 - 602.40	Cleaning Up (1965 Jan)

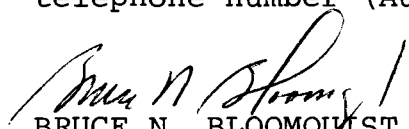
7 - 602.42            Accident Prevention (1977 Jun)  
7 - 602.43            Government Inspectors (1965 Jan)  
7 - 602.54            Shop Drawings (1976 Oct)  
7 - 603.10            Required Insurance (1977 Jan)  
7 - 603.48            Progress Charts and Requirements  
                      for Overtime Work (1965 Jan)

3. Information is required as to what prompted above clauses to be incorporated into the DAR. Was incorporation strictly a result of policy, was it a result of policy to implement an existing law or was the clause itself extracted out of the law? Per our telephone discussion of 6 December 1978, if your office could do a preliminary research and extract the required information or if available, but requires indepth research, obtain the documents so someone from this office could visit and do the necessary research, it would be greatly appreciated.

4. Please send all information to:

AFLMC/LGC  
Bldg 205  
Gunter AFS AL 36114

or call either MSgt Bloomquist or MSgt McShain at telephone number (Autovon) 921-4085.

  
BRUCE N. BLOOMQUIST, MSgt, USAF  
Project Manager  
Directorate of Contracting

abc

3 September 1965

MEMORANDUM FOR THE CHAIRMAN, ASPR COMMITTEE

SUBJECT: ASPR Case 61-160, Patent Coverage for Construction

# I PROBLEM

Revision of proposed Section XVIII, Part 9 data clauses to conform more closely with the data policy and clauses set forth in Section IX, Part 2.

# II RECOMMENDATION

(a) That the attached revised draft of Section XVIII, Part 9 data clauses be adopted.

(b) That 7-602.47 Rights in Shop Drawings be deleted.

(c) That 9-203(d) be revised to refer to Section 18, Part 9 data clauses.

# III DISCUSSION

The data clauses of Section XVIII, Part 9, particularly 18-910.1, Data Clauses for Architect-Engineer and Construction Work, have been revised to make them more consistent with the data policy expressed in Section IX, Part 2. As proposed, 18-910.1 will now provide for the acquisition by the Government of exclusive control of data pertaining to unique architectural designs of buildings, monuments and construction of a similar nature having special artistic or esthetic appeal. In all other cases the specific acquisition data clause of 9-203(d) is to be used. Minor changes in 18-910.3, Mixed Contracts, are recommended to conform with the changes of 18-910.1.



Deletion of the clause of 7-602.47, Rights in Shop Drawings is recommended since that clause gives unlimited rights to the data and 9-203(d) is suitable for use in carrying out that intent without having a multiplicity of clauses for the same purpose.

Addition of a reference to Section XVIII, Part 9 in the instruction to 9-203(d) is recommended to avoid confusion in the use of that clause.

PATENTS SUBCOMMITTEE

By:

William G. Gapcynski (Army)

Leo Ross (Navy)

J. A. O'Connell (DSA)

M. Freudenberg (Air Force)

F. J. Duchelle (Air Force)

Incl  
Rev draft

18-910.1 Data Clauses for Architect-Engineer and Construction Work.

(a) Plans and specifications and as-built drawings. In procuring plans and specifications and as-built drawings for construction the Government shall obtain full ownership thereof with the full right to use and reproduce the same. Accordingly, in contracts calling for plans and specifications for construction, or as-built drawings for construction, insert the clause in 7-607.2. Upon request of the architect-engineer or others, permission will be granted by the Government for the reproduction and use of plans and specifications or as-built drawings for construction by other parties interested, unless the contracting officer determines that the public interest will be adversely affected. [Where the purpose of a contract for architect-engineer services or for construction involving architect-engineer services is to obtain a unique architectural design of a building, a monument, or construction of similar nature, which because of special artistic, esthetic or other reasons the Government does not want duplicated by anyone else, the Government may desire to acquire the exclusive control of the data pertaining to such design. The clause set forth in 7-607.2 shall be used only in those cases where the contracting officer determines for the foregoing reasons that it is desirable to maintain exclusive control over the data. In all other contracts calling for plans, specifications, or as-built drawings for construction, insert the clause set forth in 9-203(d).]

(b) Shop drawing for construction. In procuring shop drawings for construction the Government shall obtain the unlimited right to [duplicate,] use and reproduce [disclose] such drawings, but not exclude a similar right

5  
X  
e  
X

in the designer or others. Accordingly, in contracts for such drawings, the clause in ~~7-602.47~~ <sup>512</sup> ~~[9-203(a)]~~ shall be used.

18-910.2 Data Clauses for Construction Supplies and Research and Development. The provisions of Section IX, Part 2, relating to the acquisition of data and rights therein in connection with the procurement of supplies and materials and research and development are applicable where the procurement is confined to either construction materials (as distinguished from "construction" as defined in 18-101.1) or experimental, developmental, or research work, or both. In some circumstances the right to use such data, including drawings, may be limited in accordance with appropriate paragraphs of Section IX, Part 2.

18-910.3 Mixed Contracts. Where the proposed contracts calls for either (i) experimental, developmental, or research work, or (ii) supplies and materials, in addition to either construction or architect-engineer work, [any] the pertinent clauses of Section IX, Part 2, shall be ~~added to~~ [included in] the contract, in addition to the clauses [prescribed by 18-910.1] ~~in 7-602.47 and 7-607.2;~~ as appropriate. In such cases, the contract shall indicate clearly which of the clauses of Section IX, Part 2, apply only to the experimental, developmental, or research work, or to the supplies and materials being procured, and which [clauses prescribed by 18-910.1] apply <sup>only</sup> ~~only~~ to the construction or architect-engineer work.

9-203(d) Technical Data Clause - Specific Acquisition.

Change the last sentence of the instructions to read as follows:

"The clause shall not be used under any other circumstances [except as specified in Section XVIII, Part 9.]"

~~7-602.47--Rights-in-Shop-Drawings-(Aug.-1965)-~~

~~Shop-drawings-for-construction-means-drawings-submitted-to-the-Government  
by-the-Construction-Contractor,-Subcontractor-or-any-lower-tier-subcon-  
tractor-pursuant-to-a-construction-contract-showing-in-detail-(1)-the  
proposed-fabrication-and-assembly-of-structural-elements-and-(2)-the  
installation-(i.e.-form,-fit-and-attachment-details)-of-materials-or  
equipment.--The-Government-may-duplicate,-use,-and-disclose-in-any-manner  
and-for-any-purpose-shop-drawings-delivered-under-this-contract~~



## ROUTING SLIP

2/10/64

TO	INITIALS	ASSISTANT SECRETARY (I & L)	AS	TO	INITIALS	DEPUTY ASSISTANT SECRETARY PROCUREMENT	DP
		IMMEDIATE OFFICE	AE			DIRECTOR OF PROCUREMENT POLICY	CD
		MESSAGE CENTER	MC	3		ASST. DIRECTOR PROC. POLICY & CHIEF OF ASPR	CR
		ECONOMIC ADJUSTMENT ADVISOR	EA				
		DIR. ECONOMIC UTILIZATION POLICY	AU			DIRECTOR OF PROCUREMENT MANAGEMENT	CM
		DIR. TECH. LOG. DATA & INFORMATION	AR			PROC. MANAGEMENT REVIEW DIVISION	CT
						PROC. ANALYSIS DIVISION	CA
		DEPUTY ASSISTANT SECRETARY DEFENSE (I & L)	DR			PROC. ORG. & RESOURCES DIVISION	CO
						CONTRACTOR PERFORMANCE EVAL. DIV	CE
		DIRECTOR FOR INTERNATIONAL LOGISTICS	RC			DIRECTOR OF SMALL BUSINESS POLICY	BD
		DIR. FOR RESEARCH AND SPECIAL PROJECTS	RP			CENTRAL MIL. PROC. INFORMATION OFFICE	BI
		DEPUTY ASSISTANT SEC. SUPPLY AND SERVICES	SD			DEPUTY ASST. SEC. PROPERTIES & INSTALLATIONS	DI
		COST REDUCTION COORDINATOR	SC				
		DIRECTOR OF SUPPLY MANAGEMENT POLICY	SD	2	JA	DIRECTOR OF CONSTRUCTION	ID
		REQUIREMENTS AND PROVISIONING DIVISION	SR			PROJECTS DIVISION	IP
		DATA SYSTEMS & SUPPLY POLICY DIVISION	SS	1	MB	TECHNICAL DIVISION	IT
						RESERVE FORCES FACILITIES DIVISION	IR
		DIRECTOR OF TRANS. & WARE. POLICY	TD			DIRECTOR OF REAL PROPERTY MANAGEMENT	LD
		TRANSPORTATION POLICY & PLANS DIVISION	TA			REAL PROPERTY DIVISION	LR
		TRANSPORTATION SINGLE MANAGER DIVISION	TM			BASE UTILIZATION DIVISION	LU
		ASSISTANT FOR MOVEMENT MANAGEMENT	TV				
		STORAGE & WAREHOUSING DIVISION	TW			DEPUTY ASST. SEC. FAMILY HOUSING	DF
		DIRECTOR OF TELECOMMUNICATIONS POLICY	XD			DIRECTOR OF PROGRAMMING (Family Housing)	FP
		POLICY GUIDANCE & COORDINATION DIVISION	XP			DIRECTOR OF MANAGEMENT & EVALUATION	FM
		SYSTEMS PLANNING & REVIEW DIVISION	XS			DIRECTOR OF STANDARDIZATION & DESIGN	FS
		DIRECTOR OF PETROLEUM POLICY	OD			DEPUTY ASSISTANT SEC. EQUIPMENT MAINT. AND READINESS	DE
		DEPUTY ASSISTANT SEC. WEAPONS ACQUISITION AND INDUSTRIAL READINESS	DM			ASST. FOR INDL MGT PRACTICES	PB
						DIRECTOR OF MAINTENANCE POLICY	MD
		DIRECTOR OF WPNS SYSTEMS SCH. & ANALYSIS	PD			ASST. FOR EQUIPMENT READINESS	MP
		DIRECTOR OF INDUSTRIAL READINESS	PA			INDUSTRIAL ENGINEERING DIVISION	ME
		INDUSTRIAL PRODUCTION EQUIPMENT DIVISION	PE			DIRECTOR OF QUALITY CONTROL & RELIABILITY	PI
						DIRECTOR OF VALUE ENGINEERING & PRODUCTIVITY	VE
THIS IS AN				REMARKS			
<input type="checkbox"/> ACTION COPY <input type="checkbox"/> INFORMATION COPY							
ACTION COPY TO							
INFORMATION COPY TO							
COPY RETAINED IN MAIL AND RECORDS							
<input type="checkbox"/> YES <input type="checkbox"/> NO							
REPLY TO BE PREPARED FOR SIGNATURE OF							
SECRETARY OF DEFENSE							
DEPUTY SECRETARY OF DEFENSE							
ASD (I & L)							
DEPUTY ASD (I & L)							
DIRECTOR							
STAFF DIRECTOR							
BRANCH CHIEF							
PREPARER							
ADDRESSEE							
				FOR			
				APPROVAL		RECOMMENDATIONS	
				COORDINATION		SIGNATURE	

3 December 1964

MEMO FOR MR. SUMNER:

To assist you in assembling the Construction ASPR package for printing we have listed the Sections, Parts and paragraphs of ASPR which, to the best of our knowledge from information we have available, should be included.

This listing is offered as a check list as most of the Sections, Parts and paragraphs listed have already been included in the package. The source references listed may be disregarded unless you find that some of the approved changes are missing from the package.

Attached are pages containing the second change in 2-201(a)(xxv), the change in 2-201(a)(xxxv), the deletion of 3-501(b)(xl ix) and the change in 10-102.4(a) which presently may not be among the revised pages.

Revisions approved in ASPR cases 64-135, 64-137, 64-143, 64-171, 64-172, 64-173 and 64-607 have been included in this listing since they are so closely related to the Construction ASPR package.

*Addie M.*  
Addie Mueller  
OGC, OCE

CONSTRUCTION PACKAGE:

Section XVIII (less parts 7 and 9) -- in Exhibit "A"

Sec. VII, Part 6 -- in Exhibit "B"

Section XVI, Part 4 -- in Exhibit "C"

NOTE: If 16-405.1 of Exh. "C" is printed, then 16-803.1 should be deleted. However, if 16-405.1 is reserved for action with Part 7, Sec. XVIII, no change is required in 16-803.1 at this time.

*Verified!*  
*1/8/65*  
*kt*

In addition, the following pars. should be revised:

16-814 -- pursuant to TAB "E" of 6 Oct 64 submission

16-815.1 -- add par. (c) -- ASPR Min. #2 of 7 Jan 64 as revised  
by #35 of 15 Apr 64.

16-303.1(c)	)	
16-303.2(b)(x)	)	ASPR Case 64-172
16-401.1(i) of Exhibit "A"	)	



## Section I

- / 1-201.21 -- ASPR Min. #2, 7 Jan 64
- / 1-310 -- TAB "E" of 6 October 64 submission
- 1-903.2 -- ASPR Min. #2, 7 Jan 64
- / 1-1002.1 -- TAB "E" of 6 October 64 submission

## Section II

- / 2-201(a)(xv) and (xx) revised; 2-201 (a)(xxviii) added -- p.5, ASPR Min. #2, 7 Jan 74
- / 2-201(a)(xxv) -- ASPR Case #64-137 and 64-171.
- / 2-201(a)(xxxv) -- ASPR Case 64-135.
- / 2-201(c)(i), (ii) and (iii) revised; 2-201(c)(v) thru (xi) added -- p.5-6, ASPR Min. #2, 7 Jan 64
- / 2-210(a) -- Tab "E" of 6 October 64 submission

## Section III

- / 3-200 -- Tab "E" of 6 Oct 64 submission
- / 3-203.2 -- Tab "E" of 6 Oct 64 submission
- / 3-218 -- ASPR Min. #2, 7 Jan 64
- / 3-501(b) ~~xxxxvi~~ )  
(xxxvi) ) TAB "E" of 6 Oct 64  
(xxxvii) )  
(xxxviii) )
- / 3-501(b)(xlix) delete -- see ASPR Case 64-143

## Section IV, Part 1 -- delete

Section VII (clause titles)

/ 7-104.1(a)

/ 7-204.1(a)

TAB "E" of 6 Oct 64 submission

/ 7-303.1(a)

/ 7-403.1(a)

*VII - Part 6*  
/ 7-702.46

/ 7-703.38

/ 7-704.30

/ 7-705.5

Section VIII

/ 8-602.3 -- Additional ASPR Changes (as amended in Tab "A" of 6 Oct 64,  
and ASPR Min. #94, 4 Nov 64)

/ 8-603 -- ASPR Min. #120, 20 Dec 63 and Tab "E" of 6 Oct 64 submission

/ 8-701(a) revised; -- ADDITIONAL ASPR Changes as amended by Tab "A" of  
(c) new; 6 Oct 64 submission  
(d) new

8-702 becomes (a); -- ADDITIONAL ASPR Changes as amended by TAB "B" of  
(b) and (c) new. 6 Oct 64 submission

/ 8-703 -- Tab "E" of 6 Oct 64 submission

/ 8-705.2 -- Par. 20 of Tab "A" of 6 Oct 64 submission.

/ 8-705.3 added -- Par. 21 of Tab "A" of 6 Oct 64 submission.

/ 8-707 -- supply default clause included in this change because it is  
on the same page as revised construction material. This clause  
was taken from Clause 11 of Std. Form 32 (ASPR Case 64-143)

/ 8-708 becomes (a); -- ADDITIONAL ASPR Changes  
new (b).

Sec. VIII (Cont'd):

- 8-709 revised text in (a); -- taken from Clause 5 of Standard Form 23A (e) of clause revised. (Jun 1964 edition)
- 8-711 new -- ADDITIONAL ASPR Changes
- 8-801.1(a) and (b) amended; -- Par. 59 of Col. Ruby's 1 Nov 63 memo added new (c) and (d):
- 8-801.2 (a) and (b) amended; -- Par. 59 of Col. Ruby's 1 Nov 63 memo added new (c) and (d):

Section X:

- R 11*  
*61-160+*  
*61-629+*  
*36*  
*64-139*
- / 10-101.6 -- Par. 16 of Tab "E" of 6 Oct 64 submission
  - / 10-102.4(a) -- ASPR Case 64-137
  - 10-102.4(b) -- Par. 17 of Tab "E" of 6 Oct 64 submission
  - 10-102.5 -- ASPR Min. #2 of 7 Jan 64 (page 6)
  - 10-103.1(c) -- see page 7 of ASPR Min. #120 of 20 Dec 63.
  - 10-103.2(c) -- " " " " " "
  - 10-103.4(a) and (b) -- ADDITIONAL ASPR Changes -- see par. 61 of Col. Ruby's 1 Nov 63 memo.

Section XII:

Section XII (less Part 8) Consolidation -- ASPR Case 64-607. When this case was retyped for submission to ASPR Comm. the following paragraphs were included:

12-107 and 12-108 -- from last two pages of ADDITIONAL ASPR Changes in draft of Construction package (ASPR Case 61-160)

12-301 and 12-302 -- from ASPR Case 64-173

12-303.1 -- from Clause 16 of Standard Form 32 (June 1964)

NOTE: When Sec. XII is typed for publication, par. 12-102.6 presently in ASPR should be revised by deleting reference "4-107" and substituting "18-111". (Case 61-160)

Section XII (Cont'd):

12-403.1 -- clauses from Standard Form 19A (June 1964)  
(ASPR Case 64-135)

12-403.2 delete -- ASPR Case 64-172

12-403.3 -- revision necessary due to new Std. Form 19A

12-403.4 -- ASPR Case 64-172

12-403.5 references to Cape Kennedy and titles in (f) of clause  
revised -- revision in clause titles necessary because of  
new Std. Form 19A.

12-404.1 on page 1216.2 -- reference to 12-403.2 deleted.

APPENDIX "F":

F-100.19 -- insertion of reference to 16-401.1(i) -- ASPR Case 64-172

F-200.1155 -- insertion of reference to 16-303.1(c) -- ASPR Case 64-172

F-100.18 -- ASPR Case 64-143 -- insert Std. Form 18 (June 1964) edition

F-100.32 -- ASPR Case 64-143 -- insert Std. Form 32 (June 1964) edition

F-100.19A	)	
	)	
F-100.21	)	Std. Forms 19A, 21, 22 and 23A (June 1964) edition
	)	should be inserted. See ASPR Cases 64-135 and 64-137.
F-100.22	)	
	)	
F-100.23A	)	

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE

~~Col. J. J. [unclear]~~ <sup>Nov 20</sup>  
~~Low rank [unclear]~~ <sup>6-1-60 to [unclear]</sup>  
all career <sup>Be sure [unclear]</sup>  
This [unclear] has no [unclear]

objection to the proposed  
ASPR as written -

He do not agree with the

attached recommendation

*[Signature]* <sup>2nd [unclear]</sup>  
A 9407/63

November 14, 1963

MEMORANDUM FOR: Colonel W. W. Stephens, Chairman  
ASPR Committee

**ASPR Case 61-160 -- Construction Coverage**

Case 61-160 was discussed at the meeting on the 6 November Agenda, under the heading of "Prequalification of Bidders," at the direction of the ASPR Committee.

SBA recommends the following:

SBA feels that such a review of the restrictive construction coverage is necessary. The restrictive coverage is such that it is not possible to proceed with the procedure for the construction of the guidelines for the construction of the general nature of the construction.

From the review of the construction of the prequalification procedure, it is intended. SBA has had several cases of construction, the latest one for the Air Force District Office. The Corps of Engineers has also had a case (MARA) 64-12. The Air Force District Office has appealed the construction of the construction of the final analysis isn't a preaward. The Air Force District Office's interest in this case.

Colonel W. W. Stephens, Acting  
Chairman

11/15  
November 14, 1963

MEMORANDUM FOR: Colonel W. W. Thybony, Chairman  
ASPR Committee

SUBJECT: ASPR Case 61-160 -- Construction Coverage

Please refer to Case 61-160 which appears on the 6 November Agenda, specifically paragraph 18-209, Prequalification of Bidders, at the bottom of page 14, Exhibit "A".

SBA recommends the deletion of the cited paragraph.

SBA feels that such a requirement may be unduly restrictive on small construction concerns which wish to participate in the procurements to which this procedure is applied. It is not understood why the preaward survey evaluation will not accomplish the same purpose. If the procedure is to be authorized at all it seems that reasonably specific guidelines for its use would be spelled out in ASPR rather than the general nature of the cited paragraph.

From the standpoint of actual practice, we wonder if the prequalification procedure serves the purpose for which it is intended. SBA has had several cases of this kind brought to its attention, the latest one involving Algernon Blair, Inc., of Montgomery, Alabama. The Corps of Engineers would not permit the company to bid on IFB ENG (NASA) 64-16, 17, and 22. Parties unknown interceded in the company's behalf and the Engineers agreed to let it bid on 16 and 17. The company has appealed the denial of 22 to the Comptroller General (B-152757). In the final analysis, isn't it the preaward survey that will protect the Government's interest in this case?

✓ CC: Richard W. Webb  
Director, Small Business Policy

W. F. Lawton, Jr., Acting  
Chief, Liaison Staff

file by  
61-160

Case 61-160

Jan 24 1962

MEMORANDUM FOR MR. E. MANNING SELTZER  
GENERAL COUNSEL, OFFICE, CHIEF OF ENGINEERS

SUBJECT: ASPR Coverage of the Making and Administration of Construction Contracts

The following comments are made concerning your memoranda to me dated 12 December and January 5, and the memorandum of 15 January to Messrs. Heard and Risik.

In general, your proposal to create a new section of ASPR relating to construction is acceptable. Please assure that a high priority is assigned to bringing into ASPR material now in departmental publications which ought to receive common treatment. The basic thrust of this effort is, as previously indicated, to replace the existing regulations on this subject issued by the military departments. I suggest that your task group should not attempt to make fine distinctions that will result in the exclusion of material on the basis that "operating instructions" are concerned.

Your estimated completion date is too far in the future. I believe a task group report should be possible by about March 15. You have indicated a four month period for submission of problems to higher authority in the military departments. In order to shorten this phase of the effort, I have asked the Chairman of the ASPR Committee to consider this project under regular Committee procedures which provide for rapid resolution of problems.

Accordingly, it is requested you accept future direction on this subject from the Chairman of the ASPR Committee and render future reports, including the completed task group draft of the new section, to the Committee. Messrs. Heard and Risik will remain available to your task group for such assistance as you may request.

(Signed) Thomas D. Morris

THOMAS D. MORRIS  
Assistant Secretary of Defense  
Installations and Logistics





IN REPLY REFER TO

HEADQUARTERS  
DEPARTMENT OF THE ARMY  
OFFICE OF THE CHIEF OF ENGINEERS  
WASHINGTON 25, D.C.

28 June 1962

MEMORANDUM FOR THE CHAIRMAN, ASPR COMMITTEE

SUBJECT: Case 61-160 - Construction Coverage - ASPR

I. PROBLEM: To develop a new ASPR section relating to construction.

II. RECOMMENDATIONS:

1. That the draft Section IV, Tab A, be incorporated in ASPR as Section IV and that the material presently in Section IV on Construction be deleted and the other material presently in Section IV, pertaining to matters other than construction, be transferred elsewhere in ASPR.

2. That deletions or revisions be made of material appearing in other sections of ASPR as set forth in Tab B.

3. That the proposed draft section be referred to the Departments for comment. In addition, that it be referred to industry organizations such as the Associated General Contractors of America and the American Road Builders Association for their comments.

4. That the Subcommittee be established as a permanent Subcommittee to maintain the proposed Section IV in a constantly current status. The construction industry is a coherent, important and dynamic segment of the American economy. Over a period of time its relations and dealings with the Department of Defense, which are substantial, have been centralized almost exclusively in the Offices of the Chief of Engineers and of the Bureau of Yards and Docks. These relations have been well organized and have been most productive of benefits both to the Government and to the industry, particularly in the field of regulations pertaining to construction. The result has been that the Offices of the Chief of Engineers and of the Bureau of Yards and Docks are kept currently informed both of the impact of Government construction regulations on the economical and efficient operation of the construction industry and of the recommendations and needs of industry in the area of regulations. It is believed that the establishment of this Subcommittee as a permanent Subcommittee would most effectively continue this relationship which has been so beneficial to industry and Government.

5. The committee is in agreement on all matters contained in the proposed Section IV except in one instance hereinafter stated.

**SUBJECT: Case 61-160 - Construction Coverage - ASPR**

**III. DISCUSSION:**

1. The Assistant Secretary of Defense (I&L), by Memoranda dated 9 and 30 November 1961, directed that a single regulation be developed covering contracting and contract administration procedures on construction work. He further stated that this regulation was to become a separate ASPR section containing all material pertinent to construction procurement and to replace existing Departmental regulations on this subject. In addition, he designated the members of this committee to accomplish this task.

2. In pursuance of their assignment the committee agreed that the section on construction should contain several parts, each dealing exclusively with construction, corresponding to the several sections of ASPR, i.e., Part 1, General Provisions; Part 2, Formal Advertising, etc., thereby covering in one section all aspects of construction procurement. In proceeding with the development of the section, it was recognized by the committee that there is some material presently in ASPR which deals exclusively with construction while other material in ASPR, general in nature, is equally applicable to the procurement of construction as well as supplies and services. Accordingly, the committee determined that the material presently in ASPR dealing specifically with construction should be removed from its present location and be made a part of the new section. In addition, the other material in ASPR, general in nature and applicable to construction, would be incorporated into the new section by reference. Finally, other appropriate material not presently found in ASPR would also be included in the new section. This method of approach and format, which was generally approved by the Assistant Secretary of Defense (I&L) in a Memorandum dated 24 January 1962, was followed in the development of the attached proposed Section IV of ASPR which deals exclusively with construction.

3. In some areas the proposed regulation departs from present policies and procedures. These departures are set forth in the attached Tab C which also contains the explanations therefor.

4. The proposed section does not presently contain a table of contents. The committee is prepared to develop a table of contents in connection with the preparation of a final definitive regulation.

5. Paragraphs 4-12-304.2(e), Letters of Inadvertence, and 4-12-304.9, Computation of Underpayments, have both been designated as reserved in view of the pending issuance by the Labor Department of new regulations in these two areas. Further action will be taken by the committee on these two paragraphs upon publication of the Labor Department regulations.

6. Pages 399 - 403 contain three proposed DOD forms which are referred to in paragraphs 4-12-304.3, 4-12-304.5, 4-12-304.7 and 4-12-304.8(g) of the proposed Section IV. These forms cover authorization of additional

SUBJECT: Case 61-160 - Construction Coverage - ASPR

classifications and rates, contractor's statement on subcontracting and subcontractor's acknowledgment of inclusion of clauses in subcontracts and labor standards interviews. They have been included in the submission for convenience of reference but would not be part of the regulation in its final approved form. Appropriate action for their approval would have to be taken in accordance with DOD Instruction 7760.1.

7. Deletion of material in Departmental regulations will depend upon the action taken with respect to the proposed Section IV.

8. Minority View of Air Force Member. As previously stated the committee is in agreement on all matters except one. The Air Force Member dissents from the proposal of the majority that the Federal, State and Local Taxes clause in ASPR 11-401.2 be used in construction contracts rather than the clause in ASPR 11-401.1. Use of the clause set forth in ASPR 11-401.2 in all construction contracts would mean that every contractor would be reimbursed for any increase in Federal, State or local tax or duty, the burden of which it is required to bear. It is not considered that it is necessary for the Government to insure the contractor against all possible tax increases any more than it is necessary to insure it against possible increases in labor and material costs.

9. Majority Rebuttal. A majority of the construction subcommittee proposes that the Federal, State and Local Taxes clause in ASPR 11-401.2 be used in construction contracts rather than the clause in ASPR 11-401.1. The clause in 11-401.2 provides for price adjustments for both State and local taxes and Federal excise taxes in the event new taxes are imposed or existing taxes increased; the clause in 11-401.1 provides such adjustment only for Federal excise taxes. This proposal is made for the following reasons. Federal excise taxes (e.g., on gasoline, tires) have little impact on construction, but State and local taxes (e.g., personal property, sales and use, and gross receipts) may have a large impact. If it is wise and economical to eliminate tax contingencies for Federal tax changes, it is all the more wise and economical to do so for the more significant State and local taxes.

CONSTRUCTION CONTRACT SUBCOMMITTEE

BY:

*Harold Gold*  
Harold Gold (Navy)

*John C. Wren*  
John C. Wren (Air Force)

*E. Manning Seltzer*  
E. Manning Seltzer, Chairman (Army)

Attachments

Tab A  
Tab B  
Tab C



IN REPLY REFER TO

HEADQUARTERS  
DEPARTMENT OF THE ARMY  
OFFICE OF THE CHIEF OF ENGINEERS  
WASHINGTON 25, D.C.

28 June 1962

MEMORANDUM FOR THE ASSISTANT SECRETARY OF DEFENSE (I&L)

SUBJECT: ASPR Coverage of the Making and Administration of Construction Contracts

1. Reference is made to your memoranda, subject as above, dated 9 and 30 November 1961 and 24 January 1962.


2. In accordance therewith the subcommittee which you appointed has developed a new separate ASPR section (Tab A) containing all material pertinent to construction. This section has been designated by the subcommittee as a proposed Section IV and has been submitted to the ASPR Committee, together with a list (Tab B) of proposed deletions and revisions of material presently in ASPR as a result of the material in the new section and a statement and explanation (Tab C) of departures from present policies and procedures. Copies of Tabs A, B and C are inclosed for your information.

3. In the development of the new section, the Task Group followed the method of approach and format set forth in my memoranda to you dated 12 December 1961 and 5 January 1962 and to Messrs. Heard and Risik dated 15 January 1962. The section, accordingly, contains several parts, each dealing exclusively with construction, corresponding to the several sections of ASPR, i.e., Part 1, General Provisions; Part 2, Formal Advertising, etc., thereby covering in the one section all phases of construction procurement.

4. The subcommittee recommends that it be established as a permanent subcommittee to the ASPR Committee to maintain the proposed Section IV in a constantly current status. The construction industry is a coherent, important and dynamic segment of the American economy. Over a period of time its relations and dealings with the Department of Defense, which are substantial, have been centralized almost exclusively in the Offices of the Chief of Engineers and of the Bureau of Yards and Docks. These relations have been well organized and have been most productive of benefits both to the Government and to the industry, particularly in the field of regulations pertaining to construction. The result has been that the Offices of the Chief of Engineers and of the Bureau of Yards and Docks are kept currently informed both of the impact of Government construction regulations on the economical and efficient operation of the

SUBJECT: ASPR Coverage of the Making and Administration of Construction Contracts

construction industry and of the recommendations and needs of industry in the area of regulations. It is believed that the establishment of this Subcommittee as a permanent Subcommittee would most effectively continue this relationship which has been so beneficial to industry and Government.

  
E. MANNING SELTZER, Chairman  
General Counsel  
Office of the Chief of Engineers

- 1 Incl.  
Cy memo 28 Jun 62  
for ASPR Comm. with  
incl. Tabs A, B and C



HEADQUARTERS  
DEFENSE SUPPLY AGENCY  
CAMERON STATION  
ALEXANDRIA, VIRGINIA

IN REPLY  
REFER TO

**DSAH-FPR**

20 SEP 1962

**MEMORANDUM FOR SECRETARY OF DEFENSE (INSTALLATIONS AND LOGISTICS)**  
**ATTN: Chairman, Armed Services Procurement Regulation**  
**Committee**

**SUBJECT: Forwarding of Congressional Inquiry Regarding Construction Plans**

Attached is forwarded for your action per your telephone conversation with Mr. Anthony Foy of this Office. For your information I have also inclosed a copy of our interim reply to Congressman Hebert.

**FOR THE DIRECTOR:**

2 Incl

1. Ltr fm  
Congressman  
Hebert dtd  
14Sep62
2. Copy ltr to  
Congressman  
Hebert from DSA

**J. E. HARVEY, JR.**  
Captain, SC, USN  
Chief, Procurement Division  
Directorate, Procurement and Production



CONGRESS OF THE UNITED STATES  
House of Representatives  
Washington, D. C.

September 14, 1962

1. General Andrew T. McNamara, Director  
Defense Supply Agency  
Department of Defense  
Washington 25, D. C.

Dear General McNamara:

In 1960 a meeting was arranged between the  
International Builders Exchange Executives with Commander  
Malloy, Chairman of the Joint Committee on Armed Services  
Procurement Regulations of the Defense Department.

The purpose of the meeting was to retain for  
association plan rooms the privilege of receiving plans on all  
construction projects of the Armed Services. According to  
the attached memorandum a new regulation is being prepared  
wherein procurement with regard to the Defense will be  
centralized.

I would appreciate your advice as to who might  
be contacted relative to the Construction Industry Association  
of New Orleans' desire to assure continuity of the existing  
arrangement.



- Corps, DOD will see indirect provisions
- Director appointed for DPT's new ASD office
- General indicted on federal bid-rigging charges

A special setting of the Armed Services Procurement Regulations (ASPR) devoted to construction will be issued this fall. The new regulations will serve as a bible for all military agencies engaged in construction contracting and will bring together in a single Defense Department document policies and procedures previously published in separate manuals of the Army Corps of Engineers and the Navy Bureau of Yards and Docks.

Purpose of the new document is to eliminate contradictory provisions of the two major construction contracting agencies. There are now over 100 significant changes in basic construction policy incorporated. Until now, ASDA has been principally concerned with the interests of national defense, while other offices have prepared a single departmental ASPR regulation which would be of uniform construction contracting procedures.

A draft version, running over 500 pages, has been prepared by a committee headed by R. M. Helmer, general counsel for the Corps of Engineers. The military services now are reviewing the draft. At a later date, before issuance, construction industry representatives are expected to get a chance to make comments. This is the way Mr. Helmer put it to ASDA. "There is no point in having two sets of regulations when both the Corps and the Bureau do business with the same industry."

The Bureau of Public Roads has a director for its new Office of Research and Development. He is Robert F. Rouse, formerly chief of the Transportation Engineering Center at Ohio State University and formerly research engineer for the West Virginia Road Commission and the Kentucky Department of Highways. In his new post, Mr. Rouse will administer a wide range of research, from studies on highway materials and designs to driver behavior and traffic control. His new office replaces ASDA's old Office of Research and Studies, the Development Institute previously headed by the Office of Operations.

Department of Transportation is the nation's largest program now managed by ASDA to regulate the construction industry. It is similar to the Federal Highway and Aviation and the Office of Aeronautics and Astronautics. The ASDA will be responsible for seeing that the States observe both the highway program and at a fair price. It will reserve right of way land and developed standards for highways. The Federal will be responsible for ensuring that States for rehabilitation of the Federal roads of highway work. Regarding ASPR procedures and for ensuring that ASDA's other activities are properly conducted. It also will have the job of the Federal Department of Transportation's Office of Road and Railroad.

Responsibility of right-of-way will be moved for other operations of the Department out of the Federal Highway program. The Federal Highway and the Bureau of Planning and other standards governing right-of-way in Florida, Massachusetts and West Virginia. The Office of Aeronautics and Space has reported finding deficiencies in the highway program in the



OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE  
WASHINGTON 25, D.C.

COMPTROLLER

18 July 1962

MEMORANDUM FOR THE CHAIRMAN OF THE ASPR COMMITTEE

SUBJECT: Proposed ASPR Section IV, Procurement of Construction  
(Case 61-160, 20 August Agenda)

In the event I am not able to attend the meeting at which this case is considered, I am submitting my preliminary reactions for your consideration.

The proposed ASPR coverage of procurement of construction provides for shifting the cost principles applicable to construction contracts from Section XV to the proposed Section IV. This was done in accordance with the objective of putting all material applicable to construction in one place to the extent practicable. However, in so doing, we would be undoing a similar achievement when we put all the cost principles in one section. If the new Sec. IV, Part 15 were entirely self-contained, the change might be better justified. However, the proposed Part 15 merely represents departures from the basic principles of Sec. XV, Part 2. This is made clear in the proposed 4-15-201.1. Further, the proposal gives rise to a "double cross reference" situation; e.g., for guidance as to application of cost principles to fixed-price contracts, 4-15-200 refers the reader to Subpart 3. Subpart 3 says only "See Sec. XV, Part 6."

Because of these interrelationships of the various parts of Section XV, I suggest that Part 4 and the related portions of the other parts of Section XV not be shifted to the proposed new Section IV. Instead, I suggest that appropriate references to Section XV be set forth in the proposed new Section IV.

If, for other reasons, it is decided to make the shifts as proposed, the draft material should be carefully edited and reviewed for undesirable substantive changes. A quick review of the material on cost principles set forth in the proposed new Section IV disclosed many discrepancies. Some examples follow:

Proposed 4-15-000 taken from 15-000 refers to fixed-price type contracts; whereas, 15-000 properly refers to negotiated fixed-price type contracts.

Proposed 4-15-101 taken from 15-101 is just as broad as 15-101 even though 4-15-101 was intended to cover only construction and related architect-engineer contracts.

Proposed 4-15-102(iii) taken from 15-102(iii) mentions the two kinds of termination, whereas 15-102(iii) does not.

Proposed 4-15-104 taken from 15-107 is considerably different from 15-107 and some of the changes effected are questionable.

Proposed 4-15-201.2 makes reference to 15-402.1 and 15.402.3--two paragraphs recommended for deletion.

15-106 makes reference to Part 4 which would not exist if it were shifted to the proposed new Section IV.

  
K. K. Kilgore  
Director

Directorate of Audit Policy

Nov 9 1961

MEMORANDUM FOR THE ASSISTANT SECRETARY OF THE ARMY (IAL)  
THE ASSISTANT SECRETARY OF THE NAVY (IAL)  
THE SPECIAL ASSISTANT FOR INSTALLATIONS,  
Office, Secretary of the Air Force

SUBJECT: ASPR Coverage of the Making and Administration of Construction Contracts

This will confirm our agreement to proceed with the development of a single regulation covering contracting and contract administration procedures on construction work. This regulation will become a separate ASPR section, containing all material pertinent to construction procurement, and will replace the existing regulations on this subject issued separately by your respective departments.

It is understood that Mr. Manning Seltzer, General Counsel for the Office Chief of Engineers, and Mr. Harold Gold, Counsel for Bureau of Yards and Docks, will represent their departments in this effort and that an Air Force representative will be named. In order to accomplish this task expeditiously, this group should meet continuously until the assignment is completed. Mr. John Heard, Director of Construction, and Mr. Philip M. Risik of our office of Procurement Policy will monitor progress and are available to assist the task group as necessary.

Meetings should be initiated at the earliest opportunity. The assignment should not be considered completed until it is possible to cancel existing separate regulations with the issuance of a single procedure.

(Signed) Thomas D. Morris

THOMAS D. MORRIS  
Assistant Secretary of Defense  
(Installations and Logistics)

STANDARD FORM 23-A  
GENERAL PROVISIONS  
(Construction Contract)

1. DEFINITIONS
2. SPECIFICATIONS AND DRAWINGS
3. CHANGES
4. CHANGED CONDITIONS
5. TERMINATION FOR DEFAULT - DAMAGES FOR DELAY - TIME EXTENSIONS
6. DISPUTES
7. PAYMENTS TO CONTRACTOR
8. ASSIGNMENT OF CLAIMS
9. MATERIAL AND WORKMANSHIP
10. INSPECTION AND ACCEPTANCE
11. SUPERINTENDENCE BY CONTRACTOR
12. PERMITS AND RESPONSIBILITIES
13. CONDITIONS AFFECTING THE WORK
14. OTHER CONTRACTS
15. PATENT INDEMNITY
16. ADDITIONAL BOND SECURITY
17. COVENANT AGAINST CONTINGENT FEES
18. OFFICIALS NOT TO BENEFIT
19. BUY AMERICAN
20. CONVICT LABOR
21. EQUAL OPPORTUNITY CLAUSE
22. UTILIZATION OF SMALL BUSINESS CONCERNS



## GENERAL PROVISIONS

(Construction Contract)

### 1. DEFINITIONS

(a) The term "head of the agency" or "Secretary" as used herein means the Secretary, the Under Secretary, any Assistant Secretary, or any other head or assistant head of the executive or military department or other Federal agency; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the head of the agency or the Secretary.

(b) The term "Contracting Officer" as used herein means the person executing this contract on behalf of the Government and includes a duly appointed successor or authorized representative.

### 2. SPECIFICATIONS AND DRAWINGS

The Contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In case of discrepancy either in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without such a determination shall be at his own risk and expense. The Contracting Officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided.

### 3. CHANGES

The Contracting Officer may, at any time, by written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract if within its general scope. If such changes cause an increase or decrease in the Contractor's cost of, or time required for, performance of the contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the Contractor of the notification of change unless the Contracting Officer grants a further period of time before the date of final payment under the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 of these General Provisions; but nothing provided in this clause shall excuse the Contractor from proceeding with the prosecution of the work as changed. Except as otherwise provided in this contract, no charge for any extra work or material will be allowed.

### 4. CHANGED CONDITIONS

The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (a) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (b) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered, and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; or

unless the Contracting Officer grants a further period of time before the date of final payment under the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 of these General Provisions.

### 5. TERMINATION FOR DEFAULT—DAMAGES FOR DELAY—TIME EXTENSIONS

(a) If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. Whether or not the Contractor's right to proceed with the work is terminated, he and his sureties shall be liable for any damage to the Government resulting from his refusal or failure to complete the work within the specified time.

(b) If fixed and agreed liquidated damages are provided in the contract and if the Government so terminates the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Government in completing the work.

(c) If fixed and agreed liquidated damages are provided in the contract and if the Government does not so terminate the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until the work is completed or accepted.

(d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

(1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers; and

(2) The Contractor, within 10 days from the beginning of any such delay (unless the Contracting Officer grants a further period of time before the date of final payment under the contract), notifies the Contracting Officer in writing of the causes of delay.

The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension, and his findings of fact shall be final and conclusive on the parties, subject only to appeal as provided in Clause 6 of these General Provisions.

(e) If, after notice of termination of the Contractor's right to proceed under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or that the delay was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the Government, be

the same as if the notice of termination had been issued pursuant to such clause. If, in the foregoing circumstances, this contract does not contain a clause providing for termination for convenience of the Government, the contract shall be equitably adjusted to compensate for such termination and the contract modified accordingly; failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(f) The rights and remedies of the Government provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

#### 6. DISPUTES

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged; *Provided, however*, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This Disputes clause does not preclude consideration of questions of law in connection with decisions provided for in paragraph (a) above. Nothing in this contract, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

#### 7. PAYMENTS TO CONTRACTOR

(a) The Government will pay the contract price as herein-after provided.

(b) The Government will make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates approved by the Contracting Officer. If requested by the Contracting Officer, the Contractor shall furnish a breakdown of the total contract price showing the amount included therein for each principal category of the work, in such detail as requested, to provide a basis for determining progress payments. In the preparation of estimates the Contracting Officer, at his discretion, may authorize material delivered on the site and preparatory work done to be taken into consideration. Material delivered to the Contractor at locations other than the site may also be taken into consideration (1) if such consideration is specifically authorized by the contract and (2) if the Contractor furnishes satisfactory evidence that he has acquired title to such material and that it will be utilized on the work covered by this contract.

(c) In making such progress payments, there shall be retained 10 percent of the estimated amount until final completion and acceptance of the contract work. However, if the Contracting Officer, at any time after 50 percent of the work has been completed, finds that satisfactory progress is being made, he may authorize any of the remaining progress payments to be made in full. Also, whenever the work is substantially complete, the Contracting Officer, if he considers the amount retained to be in excess of the amount adequate for the protection of the Government, at his discretion, may release to the Contractor all or a portion of such excess amount. Furthermore, on completion and acceptance of each separate building, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made therefor without retention of a percentage.

(d) All material and work covered by progress payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work, or as waiving the right of the Government to require the fulfillment of all of the terms of the contract.

(e) Upon completion and acceptance of all work, the amount due the Contractor under this contract shall be paid upon the presentation of a properly executed voucher and after the Contractor shall have furnished the Government with a release, if required, of all claims against the Government arising by virtue of this contract, other than claims in stated amounts as may be specifically excepted by the Contractor from the operation of the release. If the Contractor's claim to amounts payable under the contract has been assigned under the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15), a release may also be required of the assignee.

#### 8. ASSIGNMENT OF CLAIMS

(a) Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15), if this contract provides for payments aggregating \$1,000 or more, claims for moneys due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Unless otherwise provided in this contract, payments to an assignee of any moneys due or to become due under this contract shall not, to the extent provided in said Act, as amended, be subject to reduction or setoff. (The preceding sentence applies only if this contract is made in time of war or national emergency as defined in said Act; and is with the Department of Defense, the General Services Administration, the Atomic Energy Commission, the National Aeronautics and Space Administration, the Federal Aviation Agency, or any other department or agency of the United States designated by the President pursuant to Clause 4 of the proviso of section 1 of the Assignment of Claims Act of 1940, as amended by the Act of May 15, 1951, 65 Stat. 41.)

(b) In no event shall copies of this contract or of any plans, specifications, or other similar documents relating to work under this contract, if marked "Top Secret," "Secret," or "Confidential," be furnished to any assignee of any claim arising under this contract or to any other person not entitled to receive the same. However, a copy of any part or all of this contract so marked may be furnished, or any information contained therein may be disclosed, to such assignee upon the prior written authorization of the Contracting Officer.

#### 9. MATERIAL AND WORKMANSHIP

(a) Unless otherwise specifically provided in this contract, all equipment, material, and articles incorporated in the work covered by this contract are to be new and of the most suitable grade for the purpose intended. Unless otherwise specifically provided in this contract, reference to any equipment, material, article, or patented process, by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition, and the Contractor may, at his option, use any equipment, material, article, or process which, in the judgment of the Contracting Officer, is equal to that named. The Contractor shall furnish to the Contracting Officer for his approval the name of the manufacturer, the model number, and other identifying data and information respecting the performance, capacity, nature, and rating of the machinery and mechanical and other equipment which the Contractor contemplates incorporating in the work. When required by this contract or when called for by the Contracting Officer, the Contractor shall furnish the Contracting Officer for approval full information concerning the material or articles which he contemplates incorporating in the work. When so directed, samples shall

be submitted for approval at the Contractor's expense, with all shipping charges prepaid. Machinery, equipment, material, and articles installed or used without required approval shall be at the risk of subsequent rejection.

(b) All work under this contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may, in writing, require the Contractor to remove from the work any employee the Contracting Officer deems incompetent, careless, or otherwise objectionable.

#### 10. INSPECTION AND ACCEPTANCE

(a) Except as otherwise provided in this contract, inspection and test by the Government of material and workmanship required by this contract shall be made at reasonable times and at the site of the work, unless the Contracting Officer determines that such inspection or test of material which is to be incorporated in the work shall be made at the place of production, manufacture, or shipment of such material. To the extent specified by the Contracting Officer at the time of determining to make off-site inspection or test, such inspection or test shall be conclusive as to whether the material involved conforms to the contract requirements. Such off-site inspection or test shall not relieve the Contractor of responsibility for damage to or loss of the material prior to acceptance, nor in any way affect the continuing rights of the Government after acceptance of the completed work under the terms of paragraph (f) of this clause, except as hereinabove provided.

(b) The Contractor shall, without charge, replace any material or correct any workmanship found by the Government not to conform to the contract requirements, unless in the public interest the Government consents to accept such material or workmanship with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.

(c) If the Contractor does not promptly replace rejected material or correct rejected workmanship, the Government (1) may, by contract or otherwise, replace such material or correct such workmanship and charge the cost thereof to the Contractor, or (2) may terminate the Contractor's right to proceed in accordance with Clause 5 of these General Provisions.

(d) The Contractor shall furnish promptly, without additional charge, all facilities, labor, and material reasonably needed for performing such safe and convenient inspection and test as may be required by the Contracting Officer. All inspection and test by the Government shall be performed in such manner as not unnecessarily to delay the work. Special, full size, and performance tests shall be performed as described in this contract. The Contractor shall be charged with any additional cost of inspection when material and workmanship are not ready at the time specified by the Contractor for its inspection.

(e) Should it be considered necessary or advisable by the Government at any time before acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the Contractor shall, on request, promptly furnish all necessary facilities, labor, and material. If such work is found to be defective or nonconforming in any material respect, due to the fault of the Contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, an equitable adjustment shall be made in the contract price to compensate the Contractor for the additional services involved in such examination and reconstruction and, if completion of the work has been delayed thereby, he shall, in addition, be granted a suitable extension of time.

(f) Unless otherwise provided in this contract, acceptance by the Government shall be made as promptly as practicable after completion and inspection of all work required by this contract. Acceptance shall be final and conclusive except as regards latent defects, fraud, or such gross mistakes as may amount to fraud, or as regards the Government's rights under any warranty or guarantee.

#### 11. SUPERINTENDENCE BY CONTRACTOR

The Contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the Contracting Officer, on the work at all times during progress, with authority to act for him.

#### 12. PERMITS AND RESPONSIBILITIES

The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any applicable Federal, State, and municipal laws, codes, and regulations, in connection with the prosecution of the work. He shall be similarly responsible for all damages to persons or property that occur as a result of his fault or negligence. He shall take proper safety and health precautions to protect the work, the workers, the public, and the property of others. He shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire construction work, except for any completed unit of construction thereof which theretofore may have been accepted.

#### 13. CONDITIONS AFFECTING THE WORK

The Contractor shall be responsible for having taken steps reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work or the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work without additional expense to the Government. The Government assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of this contract, unless such understanding or representations by the Government are expressly stated in the contract.

#### 14. OTHER CONTRACTS

The Government may undertake or award other contracts for additional work, and the Contractor shall fully cooperate with such other contractors and Government employees and carefully fit his own work to such additional work as may be directed by the Contracting Officer. The Contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor or by Government employees.

#### 15. PATENT INDEMNITY

Except as otherwise provided, the Contractor agrees to indemnify the Government and its officers, agents, and employees against liability, including costs and expenses, for infringement upon any Letters Patent of the United States (except Letters Patent issued upon an application which is now or may hereafter be, for reasons of national security, ordered by the Government to be kept secret or otherwise withheld from issue) arising out of the performance of this contract or out of the use or disposal by or for the account of the Government of supplies furnished or construction work performed hereunder.

#### 16. ADDITIONAL BOND SECURITY

If any surety upon any bond furnished in connection with this contract becomes unacceptable to the Government, or if any such surety fails to furnish reports as to his financial condition from time to time as requested by the Government, the Contractor shall promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by this contract.

#### 17. COVENANT AGAINST CONTINGENT FEES

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

#### 18. OFFICIALS NOT TO BENEFIT

No member of Congress or resident Commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.



## 19. BUY AMERICAN

(a) Agreement. In accordance with the Buy American Act (41 U.S.C. 10a-10d) and Executive Order 10582, December 17, 1954 (3 CFR Supp.), the Contractor agrees that only domestic construction material will be used (by the Contractor, subcontractors, materialmen, and suppliers) in the performance of this contract, except for nondomestic material listed in the contract.

(b) Domestic construction material. "Construction material" means any article, material, or supply brought to the construction site for incorporation in the building or work. An unmanufactured construction material is a "domestic construction material" if it has been mined or produced in the United States. A manufactured construction material is a "domestic construction material" if it has been manufactured in the United States and if the cost of its components which have been mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. "Component" means any article, material, or supply directly incorporated in a construction material.

(c) Domestic component. A component shall be considered to have been "mined, produced, or manufactured in the United States" (regardless of its source in fact) if the article, material, or supply in which it is incorporated was manufactured in the United States and the component is of a class or kind determined by the Government to be not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

## 20. CONVICT LABOR

In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment at hard labor.

## 21. EQUAL OPPORTUNITY CLAUSE

(The following clause is applicable unless this contract is exempt under the rules and regulations of the President's Committee on Equal Employment Opportunity (41 CFR, Chapter 60). Exemptions include contracts and subcontracts (i) not exceeding \$10,000, (ii) not exceeding \$100,000 for standard commercial supplies or raw materials, and (iii) under which work is performed outside the United States and no recruitment of workers within the United States is involved.)

During the performance of this contract, the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this nondiscrimination clause.

(b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

(c) The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency Contracting Officer, advising the said labor union or workers' representative of the Contractor's commitments under this nondiscrimination clause, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The Contractor will comply with all provisions of Executive Order No. 10925 of March 6, 1961, as amended, and of the rules, regulations, and relevant orders of the President's Committee on Equal Employment Opportunity created thereby.

(e) The Contractor will furnish all information and reports required by Executive Order No. 10925 of March 6, 1961, as amended, and by the rules, regulations, and orders of the said Committee, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Contractor's noncompliance with the nondiscrimination clause of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 10925 of March 6, 1961, as amended, and such other sanctions may be imposed and remedies invoked as provided in the said Executive order or by rule, regulation, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law.

(g) The Contractor will include the provisions of paragraphs (a) through (g) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to section 303 of Executive Order No. 10925 of March 6, 1961, as amended, so that such provisions will be binding upon each subcontractor or vendor. \*The Contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance. Provided, however, that in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

*\*Unless otherwise provided, the Equal Opportunity Clause is not required to be inserted in subcontracts below the second tier except for subcontracts involving the performance of 'construction work' at the 'site of construction' (as those terms are defined in the Committee's rules and regulations) in which case the clause must be inserted in all such subcontracts. Subcontracts may incorporate by reference the Equal Opportunity Clause.*

## 22. UTILIZATION OF SMALL BUSINESS CONCERNS

(a) It is the policy of the Government as declared by the Congress that a fair proportion of the purchases and contracts for supplies and services for the Government be placed with small business concerns.

(b) The Contractor agrees to accomplish the maximum amount of subcontracting to small business concerns that the Contractor finds to be consistent with the efficient performance of this contract.

## GENERAL PROVISIONS

(Supply Contract)

### 1. DEFINITIONS

As used throughout this contract, the following terms shall have the meanings set forth below:

- (a) The term "Secretary" means the Secretary, the Under Secretary, or any Assistant Secretary of the Department, and the head or any assistant head of the executive agency; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the Secretary.
- (b) The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.
- (c) Except as otherwise provided in this contract, the term "subcontracts" includes purchase orders under this contract.

### 2. CHANGES

The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: (i) drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change: *Provided, however*, That the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

### 3. EXTRAS

Except as otherwise provided in this contract, no payment for extras shall be made unless such extras and the price therefor have been authorized in writing by the Contracting Officer.

### 4. VARIATION IN QUANTITY

No variation in the quantity of any item called for by this contract will be accepted unless such variation has been caused by conditions of loading, shipping, or packing, or allowances in manufacturing processes, and then only to the extent, if any, specified elsewhere in this contract.

### 5. INSPECTION

(a) All supplies (which term throughout this clause includes without limitation raw materials, components, intermediate assemblies, and end products) shall be subject to inspection and test by the Government, to the extent practicable at all times and places including the period of manufacture, and in any event prior to final acceptance.

(b) In case any supplies or lots of supplies are defective in material or workmanship or otherwise not in conformity with the requirements of this contract, the Government shall have the right either to reject them (with or without instructions as to their disposition) or to require their correction. Supplies or lots of supplies which have been rejected or required to be corrected shall be removed or corrected in place, as requested by the Contracting Officer, by and at the expense of the Contractor promptly after notice, and shall not again be tendered for acceptance unless the former tender and either the rejection or requirement of correction is disclosed. If the Contractor fails promptly to remove such supplies or lots of supplies, when requested by the Contracting Officer, and to proceed promptly with the replacement or correction thereof, the Government either (i) may by contract or otherwise replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby, or (ii) may terminate this contract for default as provided in the clause of this contract entitled "Default." Unless the Contractor elects to correct or replace the supplies which the Government has a right to reject and is able to make such correction or replacement within the required delivery schedule, the Contracting Officer may require the delivery of such supplies at a reduction in price which is equitable under the circumstances. Failure to agree to such reduction of price shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(c) If any inspection or test is made by the Government on the premises of the Contractor or a subcontractor, the Contractor without additional charge shall provide all reasonable facilities and assistance for the safety and convenience of the Government inspectors in the performance of their duties. If Government inspection or test is made at a point other than the premises of the Contractor or a subcontractor, it shall be at the expense of the Government: *Provided*, That in case of rejection the Government shall not be liable for any reduction in value of samples used in connection with such inspection or test. All inspections and tests by the Government shall be performed in such a manner as not to unduly delay the work. The Government reserves the right to charge to the Contractor any additional cost of Government inspection and test when supplies are not ready at the time such inspection and test is requested by the Contractor. Final acceptance or rejection of the supplies shall be made as promptly as practicable after delivery, except as otherwise provided in this contract; but failure to inspect and accept or reject supplies shall neither relieve the Contractor from responsibility for such supplies as are not in accordance with the contract requirements nor impose liability on the Government therefor.

(d) The inspection and test by the Government of any supplies or lots thereof does not relieve the Contractor from any responsibility regarding defects or other failures to meet the contract requirements which may be discovered prior to final acceptance. Except as otherwise provided in this contract, final acceptance shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud.

(e) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the supplies hereunder. Records of all inspection work by the Contractor shall be kept complete and available to the Government during the performance of this contract and for such longer period as may be specified elsewhere in this contract.

### 6. RESPONSIBILITY FOR SUPPLIES

Except as otherwise provided in this contract, (i) the Contractor shall be responsible for the supplies covered by this contract until they are delivered at the designated

delivery point, regardless of the point of inspection; and (ii) the Contractor shall bear all risks as to rejected supplies after notice of rejection.

## 7. PAYMENTS

The Contractor shall be paid, upon the submission of properly certified invoices or vouchers, the prices stipulated herein for supplies delivered and accepted or services rendered and accepted, less deductions, if any, as herein provided. Unless otherwise specified, payment will be made on partial deliveries accepted by the Government when the amount due on such deliveries so warrants; or, when requested by the Contractor, payment for accepted partial deliveries shall be made whenever such payment would equal or exceed either \$1,000 or 50 percent of the total amount of this contract.

## 8. ASSIGNMENT OF CLAIMS

(a) Pursuant to the provisions of the Assignment of Claims Act of 1940 (31 U. S. Code 203, 41 U. S. Code 15), if this contract provides for payments aggregating \$1,000 or more, claims for moneys due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Notwithstanding any provision of this contract, payment to an assignee of any claim under this contract shall not be subject to reduction or set-off for any indebtedness of the Contractor to the Government arising independently of this contract. (The preceding sentence applies only if this contract is with a military department.)

(b) In no event shall copies of this contract or of relating to work under this contract, if marked "Top Secret," "Secret," "Confidential," or "Restricted," be furnished to any assignee of any claim arising under this contract or to any other person not entitled to receive the same. Provided, That a copy of any part or all of this contract so marked may be furnished, or any information contained therein may be disclosed, to such assignee upon the prior written authorization of the Contracting Officer.

## 9. ADDITIONAL BOND SECURITY

If any surety upon any bond furnished in connection with this contract becomes unacceptable to the Government, or if any such surety fails to furnish reports as to his financial condition from time to time as requested by the Government, the Contractor shall promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by this contract.

## 10. FEDERAL, STATE, AND LOCAL TAXES

(a) Definitions.—As used throughout this clause, the following terms shall have the meanings set forth below:

(i) The term "direct tax" means any tax or duty directly applicable to the completed supplies or services covered by this contract, or any other tax or duty from which the Contractor or this transaction is exempt. It includes any tax or duty directly applicable to the importation, production, processing, manufacture, construction, sale, or use of such supplies or services; it also includes any tax levied on, with respect to, or measured by sales, receipts from sales, or use of the supplies or services covered by this contract. The term does not include transportation taxes, capital stock taxes, property taxes, and such other taxes as are not within the definition of the

term "direct tax" as set forth above in this paragraph.

(ii) The term "contract date" means the effective date of this contract if it is a negotiated contract, or the date set for the opening of bids if it is a contract entered into as a result of formal advertising.

(b) Federal Taxes.—Except as may be otherwise provided in this contract, the contract price includes all applicable Federal taxes in effect on the contract date.

(c) State or Local Taxes.—Except as may be otherwise provided in this contract, the contract price does not include any State or local direct tax in effect on the contract date.

(d) Evidence of Exemption.—The Government agrees, upon request of the Contractor, to furnish a tax exemption certificate or other similar evidence of exemption with respect to any direct tax not included in the contract price pursuant to this clause; and the Contractor agrees, in the event of the refusal of the applicable taxing authority to accept such evidence of exemption, (i) promptly to notify the Contracting Officer of such refusal, as to preserve all rights to refund thereof; and (iii) if so directed by the Contracting Officer, to take all necessary action, in cooperation with and for the benefit of the Government, to secure a refund of such tax (in which event the Government agrees to reimburse the Contractor for any and all reasonable expenses incurred at its direction).

(e) Price Adjustment.—If, after the contract date, the Federal Government or any State or local government either (i) imposes or increases (or removes an exemption with respect to) any direct tax, or any tax directly applicable to the materials or components used in the manufacture or furnishing of the completed supplies or services covered by this contract, or (ii) refuses to accept the evidence of exemption, furnished under paragraph (d) hereof, with respect to any direct tax excluded from the contract price, and if under either (i) or (ii) the Contractor is obliged to and does pay or bear the burden of any such tax (and does not secure a refund thereof), the contract price shall be correspondingly increased. If, after the contract date, the Contractor is relieved in whole or in part from the payment or the burden of any direct tax included in the contract price, or any tax directly applicable to the materials or components used in the manufacture or furnishing of the completed supplies or services covered by this contract, the Contractor agrees to promptly to notify the Contracting Officer of such relief, and the contract price shall be correspondingly decreased or the amount of such relief paid over to the Government. Invoices or vouchers covering any increase or decrease in contract price pursuant to the provisions of this paragraph shall state the amount thereof, as a separate added or deducted item, and shall identify the particular tax imposed, increased, eliminated, or decreased.

(f) Refund or Drawback.—If any tax or duty has been included in the contract price or the price as adjusted under paragraph (e) of this clause, and if the Contractor is entitled to a refund or drawback by reason of the export or re-export of supplies covered by this contract, or of materials or components used in the manufacture or furnishing of the completed supplies or services covered by this contract, the Contractor agrees that he will promptly notify the Contracting Officer thereof and that the amount of any such refund or drawback obtained will be paid over to the Government or credited against amounts due from the Government under this contract: *Provided, however, That the Contractor shall not be required to apply for such refund or drawback unless so requested by the Contracting Officer.*

## 11. DEFAULT

(a) The Government may, subject to the provisions of paragraph (b) below, by written Notice of Default to the



## GENERAL PROVISIONS

### (Supply Contract)

Contractor terminate the whole or any part of this contract in any one of the following circumstances:

(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

(b) The Contractor shall not be liable for any excess costs if any failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes include, but are not restricted to, acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and defaults of subcontractors due to any of such causes unless the Contracting Officer shall determine that the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

(c) In the event the Government terminates this contract in whole or in part as provided in paragraph (a) of this clause, the Government may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated, and the Contractor shall be liable to the Government for any excess costs for such similar supplies or services, *Provided*, That the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.

(d) If this contract is terminated as provided in paragraph (a) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. The Government shall pay to the Contractor the contract price for completed supplies delivered to and accepted by the Government, and the amount agreed upon by the Contractor and the Contracting Officer for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property. Failure to agree shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(e) If, after notice of termination of this contract under the provisions of paragraph (a) of this clause, it is determined that the failure to perform this contract is due to causes beyond the control and without the fault or negligence of the Contractor pursuant to the provisions of paragraph (b) of this clause, such Notice of Default shall be deemed to have been issued pursuant to the clause of this contract entitled "Termination for Convenience of the Government," and the rights and obligations of the parties hereto shall in such event be governed by such clause. *(Except as otherwise provided in this contract, this paragraph (e) applies only if this contract is with a military department.)*

(f) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

### 12. DISPUTES

Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall be final and conclusive: *Provided*, That if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

### 13. NOTICE AND ASSISTANCE REGARDING PATENT INFRINGEMENT

(a) The Contractor agrees to report to the Contracting Officer, promptly and in reasonable written detail, each claim of patent infringement based on the performance of this contract and asserted against it, or against any of its subcontractors if it has notice thereof.

(b) In the event of litigation against the Government on account of any claim of infringement arising out of the performance of this contract or out of the use of any supplies furnished or construction work performed hereunder, the Contractor agrees that it will furnish to the Government, upon request, all evidence and information in its possession pertaining to the defense of such litigation. Such information shall be furnished at the expense of the Government except in those cases in which the Contractor has agreed to indemnify the Government against the claim being asserted.

### 14. BUY AMERICAN ACT

The Contractor agrees that there will be delivered under this contract only such unmanufactured articles, materials, and supplies (which term "articles, materials, and supplies" is hereinafter referred to in this clause as "supplies") as have been mined or produced in the United States, and only such manufactured supplies as have been manufactured in the United States substantially all from supplies mined, produced, or manufactured, as the case may be, in the United States. Pursuant to the Buy American Act (41 U. S. Code 10a-c), the foregoing provision shall not apply (i) with respect to supplies excepted by the Secretary from the application of that Act, (ii) with respect to supplies for use outside the United States, (iii) with respect to the supplies to be delivered under this contract which are of a class or kind determined by the Secretary or his duly authorized representative not to be mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or (iv) with respect to such supplies, from which the supplies to be delivered under this contract are manufactured, as are of a class or kind determined by the Secretary or his duly authorized representative not to be mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, provided that this exception (iv) shall not permit delivery of supplies manufactured outside the United States if such supplies are manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

16-60656-1

15. CONVICT LABOR

In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment at hard labor.

16. EIGHT-HOUR LAW OF 1912

This contract, to the extent that it is of a character specified in the Eight-Hour Law of 1912 as amended (40 U. S. Code 324-326) and is not covered by the Walsh-Healey Public Contracts Act (41 U. S. Code 35-45), is subject to the following provisions and exceptions of said Eight-Hour Law of 1912 as amended, and to all other provisions and exceptions of said Law:

No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the Contractor or any subcontractor contracting for any part of the said work, shall be required or permitted to work more than eight hours in any one calendar day upon such work, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this clause. The wages of every such laborer and mechanic employed by the Contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day; and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this clause a penalty of five dollars shall be imposed upon the Contractor for each such laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this clause; and all penalties thus imposed shall be withheld for the use and benefit of the Government.

17. WALSH-HEALEY PUBLIC CONTRACTS ACT

If this contract is for the manufacture or furnishing of materials, supplies, articles, or equipment in an amount

18. NONDISCRIMINATION IN EMPLOYMENT

which exceeds or may exceed \$10,000 and is otherwise subject to the Walsh-Healey Public Contracts Act as amended (41 U. S. Code 35-45), there are hereby incorporated by reference all representations and stipulations being subject to all applicable rulings and interpretations of the Secretary of Labor which are now or may hereafter be in effect.

19. OFFICIALS NOT TO BENEFIT

No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

20. COVENANT AGAINST CONTINGENT FEES

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

DEPARTMENT OF THE AIR FORCE  
WASHINGTON


OFFICE OF THE SECRETARY

NOV 27 1961

MEMORANDUM FOR ASSISTANT SECRETARY OF DEFENSE  
(INSTALLATIONS AND LOGISTICS)

SUBJECT: ASPR Coverage of the Making and Administration of  
Construction Contracts

1. Reference is made to your memorandum dated 9 November, same subject as above.
2. In response to the second paragraph of your memorandum, the Air Force representative on this sub-committee will be Mr. John Wren, SAFGC, Room 4C-949, Extension 54435.
3. It is understood that a number has not yet been assigned to this case. Mr. Wren is available to meet with representatives of the other two services upon call of the chairman.

  
HAROLD W. HOUSTON  
Lt. Colonel, USAF  
Executive to the Special  
Assistant for Installations

0420 (137)

1961 NOV 27 PM 4 25

RECEIVED

L. Johnson 11/7/66  
ABC

ASPR Case No. 61-160

Change 7-607.2 as follows:

asset to the Government; and with respect thereto the Architect Engineer agrees not to assert any rights and not [or] to establish any claim under the design, patent or copyright laws [and not to publish or reproduce such matter in whole or in part or in any manner of form, or authorize others so to do, without the written consent of the Government until such time as the Government may have released such matter to the public].

61-91

Termination for Default or for Convenience of the  
Government

From a policy standpoint, it doesn't make much difference whether there is one clause or two. Precedents have long been set under the current two clauses but a change to one clause is not thereby precluded.

When any suggestion for change stirs such a controversy that results in differences of opinion and excited telephone calls from concerned industry and Government personnel, it is time to assay what the change will accomplish. Change for change's sake is certainly not indicated. The lack of urgency of the situation does not require compromises for acceptance.

I am, therefore, constrained to suggest that we cure the "Klein problem" and not tinker with the clauses and text at this time. It seems too ambitious a program to tackle, when so many more important things need attention. The one thing the majority and minority reports seem to agree on is the "Klein cure," except that the minority provides for a limitation "to the extent then reasonable and practicable" on the rights, duties, and obligations of the parties. I recommend that this type of treatment be applied to the current default clauses. I would suggest, however, that the words "determination of default was otherwise erroneous or wrongful" be changed to "contract should not otherwise have been terminated for default"

At the risk of the consequences of injecting new thoughts, I would like to do away with the myth that the contracting officer determines that the termination is in the best interest of the Government. The contracting officer receives his orders to terminate from a higher headquarters and doesn't determine anything in this connection. I think the reference to the determination can be eliminated without harm and with some regard for actuality.