

Page 7 (3 Jan 62), Item 8, "Case 61-19 - Changes in ASPR as a Result of the Issuance of the Revised Construction Contract Forms."

Case 61-111 - Patents Indemnity (Not Predetermined) ASPR 9-103.2 - Construction Contracts." The first paragraph was revised to read:

"The members considered a report from the Patents Subcommittee dated 12 Dec 61, presenting recommendations with respect to the Subcommittees assigned to further study the problem presented with respect to revising the clause set forth in 9-103.2 to conform to the ASPR Committee's action of 19 July 1961 in deleting the reference to formally advertised construction contracts from the introductory language of the clause and to ascertain what Patent Indemnity clause is currently used in construction contracts which utilizes Standard Form 23A."

The third sentence of the second paragraph was revised to read:

"The clauses in 9-103.1 and 9-103.2 are retained for use according to instructions applicable thereto which, are to be modified so that it is made clear that the appropriate clause may be used in any contract involving construction where S.F. 23A is not used."

(24 Jan 62)

R 4 11/41

Case 61-111 - Patents Indemnity (Not Predetermined) ASPR 9-103.2 - Construction Contracts.

Case 61-19 - Changes in ASPR as a Result of the Issuance of the Revised Construction Contract Forms.

The members considered a report from the Patents Subcommittee dated 11 Sept. 61 with respect to revising the clause set forth in 9-103.2 to conform to the ASPR Committee's action of 19 July 61 in deleting the reference to formally advertised construction contracts from the introductory language of the clause. Representatives of the Patent Subcommittee were present for this item. The Committee concluded that the members of the Patents Subcommittee should further study this problem, ascertaining from the construction elements of the Departments what patent indemnity clause is currently used in construction contracts which utilize Standard Form 23A.

In taking this action, the Committee determined that printing of the change approved on 19 July 61 in the introductory language of 9-103.2 (ASPR Case 61-19) should be withheld. The Patents Subcommittee was requested to provide a report for consideration by 23 Oct.

(22 Sept. 61)

Case 61-19 - Changes in ASPR as a Result of the Issuance of the Revised Construction Contract Forms. The Army member called the Committee's attention to the "Price Adjustment for Suspension, Delays, or Interruptions of Work" clause (7-604.3) contained in ASPR revision 6. He advised the members that the ASPR clause contained the words "... final settlement of the contract," in contrast to the words "... in final payment under the contract" appearing in the Federal Procurement Regulations. He further advised the members that this difference in language stemmed from the Subcommittee incorporating the Army Procurement Procedures clause without changing the language to reflect the Federal Procurement Regulation clause.

The members agreed that the ASPR clause should contain the words "... final payment under the contract" which were agreed to in discussions with representatives of GSA. The staff was requested to accomplish this correction upon receipt of the galley proofs of revision 6.

(18 Oct 61)

8. Case 61-19 - Changes in ASPR as a Result of the Issuance of the Revised Construction Contract Forms.

Case 61-111 - Patents Indemnity (Not Predetermined) ASPR 9-103.2 - Construction Contracts. The question as to which patent indemnity clause, i.e. ASPR 9-103.1, 9-103.2, or the clause in S.F. 23A, is to be used in construction contracts was considered.

After discussion, it was decided that in formally advertised construction contracts, where S.F. 23A is used, no ASPR Patent Indemnity clauses would be substituted for the clause in S.F. 23A. ASPR patent indemnity clauses may be used in negotiated construction contracts. The clauses in 9-103.1 and 9-103.2 are retained for use according to instructions applicable thereto which, in the case of 9-103.2, are to be modified so that it is made clear that the 9-103.2 clause may be used in any contract involving construction where S.F. 23A is not used. The instructions as to use of ASPR clauses are to be conformed to this approach wherever necessary. The case was referred to the Editing Subcommittee for development of appropriate language.

(3 Jan 62)

Tab A. Page 2. (30 June 61). Case 61-19 - Changes in ASPR as a Result of the Issuance of the Revised Construction Contract Forms. Paragraph (b) of 7-602.6 was revised to replace the colon with a period, and to delete in its entirety the parenthetical words "(Copy from form)".

(14 July 61)

Case 61-19 - Changes in ASPR as a Result of the Issuance of the Revised Construction Contract Forms. The Army Policy member called the members attention to the action taken on 30 June 61, in prescribing clauses for fixed-price construction contracts to be included in Section VII, Part 6, particularly with respect to the patent indemnity clause (7-602.16). He advised the members that the new clause differed from the patent indemnity clause contained in ASPR 9-103.2 which provides "...the clause set forth is appropriate in (1) formally advertised construction contracts...". The Committee determined to revise the introductory language to 9-103.2 as follows:

"9-103.2 Patent Indemnification in Formally Advertised Contracts--Commercial Status Not Predetermined. Except as prohibited by 9-103, the clause set forth below is appropriate for formally advertised contracts for supplies or component parts thereof when it is not determined in advance of issuing the invitation for bids that such supplies or component parts (or such supplies or component parts apart from relatively minor modifications to be made thereto) normally are or have been sold or offered for sale by any supplier to the public in the commercial open market. (For construction contracts see 7-602.16.)

The members approved the foregoing for printing.

(19 July 61)

Case 61-19 - Changes in ASPR as a Result of the Issuance of the Revised Construction Contract Forms. Copies of a letter from NASA to GSA, dated August 7, 1961, relative to the Disputes clause in Standard Form 32 were distributed to the members for information. It was stated therein that NASA prefers the Disputes clause in the present edition of SF 32 to the one in SF 23A.

Copies of letter from GSA to OSA, dated August 4, 1961, relative to the Disputes clause were distributed to the members for information. In this letter GSA indicates that the Disputes clause in Standard Form 32 will not be revised at this time.

(11 August 61)

Page 3. 11 August 61. Case 61-19 - Changes in ASPR as a Result of the Issuance of the Revised Construction Contract Forms. The letters "OSA" appearing in the first line of the second paragraph were revised to read "OSI."

(23 August 61)

16-401.1

...

- (v) Standard Form 22--Instructions to Bidders (Construction Contract). ~~Pending revision of the March 1953 edition of Standard Form 22, it should be changed to comply with 2-201(a)(xiv) and 10-102.4(a)(ii).~~

...

16-401.4

...

- (e) During a period of national emergency, Clause ~~5(e)~~ 5(d)(1) of Standard Form 23A may be changed by deleting the word "unforeseeable" and inserting the phrase "other than normal weather" after the word "causes" where it first appears in the first sentence.

...

- ~~(h)--Pending revision of Standard Form 23A, in order to reflect the amendment of the Copeland (Anti-Kickback) Act, the word "statements" shall be substituted for the word "affidavits" in Clause 24, line 9, of that form.~~

writing to suspend all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government.

(b) If, without the fault or negligence of the Contractor, the performance of all or any part of the work is for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of the contract, or by his failure to act within the time specified in the contract (or if no time is specified, within a reasonable time), an adjustment shall be made by the Contracting Officer for any increase in the cost of performance of the contract (excluding profit) necessarily caused by the unreasonable period of such suspension, delay, or interruption, and the contract shall be modified in writing accordingly. No adjustment shall be made to the extent that performance by the Contractor would have been prevented by other causes even if the work had not been so suspended, delayed, or interrupted. No claim under this clause shall be allowed (i) for any costs incurred more than twenty days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply where a suspension order has been issued), and (ii) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption but not later than the date of final settlement of the contract. Any dispute concerning a question of fact arising under this clause shall be subject to the Disputes clause.

7-604.4 Taxes Where Foreign Agreements Do Not Apply. In accordance with the instructions of 11-404, in contracts to be performed outside the United States, its possessions and Puerto Rico, the clause set forth therein may be inserted.

Changes to be made in Section VIII

8-709 Default Clause for Fixed Price Construction Contracts.

(a) The following clause shall be used in all fixed-price construction contracts.

TERMINATION FOR DEFAULT--DAMAGES FOR DELAY--TIME EXTENSIONS

(Copy from form)

(b) During a period of national emergency, paragraph (c) of the above clause may be changed by deleting the word "unforeseeable" and inserting the phrase "other than normal weather", after the word "causes" where it first appears in the first sentence.

Changes to be made in Section XVI

7-603.8 Priorities, Allocations, and Allotments. In accordance with the requirements of 1-307.2, insert the contract clause set forth in 7-104.18.

7-603.9 Subcontracts. In accordance with the requirements of 3-903.1, insert an appropriate Subcontracts clause.

7-603.10 Payment for Overtime and Shift Premiums. In accordance with the requirements of 12-102, insert the contract clause set forth in 12-102.3 (c).

7-603.11 Price Reduction for Defective Cost Data. In accordance with the instruction in 7-104.29, insert the contract clause set forth therein.

7-603.12 Workmen's Compensation Insurance Overseas. In accordance with the requirements of 10-403, insert the clause entitled "Workmen's Compensation Insurance (Defense Base Act)".

7-603.13 Taxes. In accordance with the requirements of 11-403.2, in contracts to be performed outside the United States, its possessions and Puerto Rico, insert one of the clauses set forth in (a) and (b) thereof.

7-603.14 Advance Payments. When advance payments are to be made in accordance with Appendix E, Part 4 of this Regulation, insert the appropriate clause as set forth in E-414.2.

7-603.15 Performance of Work by Contractor. In accordance with the requirement of 4-104.2, insert the contract clause set forth therein.

7-603.16 Patent Rights. In accordance with the requirements of 9-107 in contracts involving experimental, developmental or research work, insert the appropriate contract clauses set forth therein.

7-604. Additional Clauses. The following clauses shall be inserted in accordance with Departmental procedures where it is desired to cover the subject matter thereof in such contracts.

7-604.1 Alterations in Contracts. The contract clause set forth in 7-105.1 may be inserted.

7-604.2 Approval of Contract. The contract clause set forth in 7-105.2 may be inserted.

7-604.3 Price Adjustment for Suspension, Delays, or Interruption of Work. The following clause may be included in fixed price construction contracts.

Price Adjustment for Suspension, Delays, or Interruption
of Work

(a) The Contracting Officer may order the contractor in

7-602.25 Gratuities. In accordance with the requirements of 7-104.16, insert the contract clause set forth therein.

7-602.26 Utilization of Small Business Concerns. In accordance with the requirements of 7-104.14, insert the contract clause set forth therein.

7-602.27 Federal, State and Local Taxes. In accordance with the requirements of 11-401, insert the contract clause set forth in 11-401.1 or 11-401.2 as appropriate.

7-602.28 Renegotiation. In accordance with the requirements of 7-103.13, insert the appropriate contract clause set forth therein.

7-602.29 Termination for Convenience of the Government. In accordance with the requirements of 8-703 and 8-705.2, insert the appropriate contract clause.

7-602.30 Notice and Assistance Regarding Patent Infringement. In accordance with the requirements of 9-104, insert the contract clause set forth therein.

7-602.31 Authorization and Consent. In accordance with the requirements of 9-102.1 include the clause set forth therein.

7-603. Clauses To Be Used When Applicable.

7-603.1 Notice to Government of Labor Disputes. In accordance with the requirements of 7-104.4, insert the contract clause set forth therein.

7-603.2 Soviet-Controlled Areas. In accordance with the requirements of 6-403, insert the contract clause set forth therein.

7-603.3 Filing of Patent Applications. In accordance with the requirements of 9-106, insert the contract clause set forth in 9-106 or 9-106.1, as appropriate.

7-603.4 Reporting of Royalties. In accordance with the requirements of 9-110, insert the appropriate contract clause set forth therein.

7-603.5 Rights in Data. In accordance with the requirements of Part 2 of Section IX of this Regulation, insert one of the contract clauses set forth in 9-203.1, 9-204.2, or 9-206, as appropriate. When the contract clause in 9-203.1 is used, the appropriate additional provisions shall be added in accordance with the requirements in 9-203, 9-203.2, 9-203.3 or 9-203.4; and the additional provision in 9-204.1 may be added under the circumstances set forth in 9-204.1.

7-603.6 Military Security Requirements. In accordance with the instructions of 7-104.12, insert the contract clause set forth therein.

7-603.7 Examination of Records. In accordance with the requirements of 7-104.15, insert the contract clause set forth therein.

7-602.14 Conditions Affecting The Work.

(Copy from form)

7-602.15 Other Contracts.

(Copy from form)

7-602.16 Patent Indemnity.

(Copy from form)

7-602.17 Additional Bond Security. Insert the clause set forth in 7-103.9.

7-602.18 Covenant Against Contingent Fees.

(Copy from form)

7-602.19 Officials Not to Benefit.

(Copy from form)

7-602.20 Buy American. In accordance with the requirements of 6-204, insert the contract clause set forth therein.

7-602.21 Convict Labor. Insert the contract clause set forth in 12-203.

7-602.22 Nondiscrimination In Employment. In accordance with the requirements of 12-802, insert the contract clause set forth therein.

7-602.23 Labor Standards Provisions. In accordance with the requirements of 12-403, insert the clauses entitled:

Davis-Bacon Act

Eight-Hour Laws--Overtime Compensation

Apprentices

Payroll Records and Payrolls

Copeland ("Anti-Kickback") Act

Withholding of Funds to Assure Wage Payment

Subcontracts--Termination

7-602.24 Nondomestic Construction Materials. In accordance with the requirements of 6-204.4 include the clause set forth therein.

In accordance with Departmental procedures, the foregoing clause may be modified to provide for intermediate appeal to the Head of the Procuring Activity concerned. The decision of the contracting officer referred to in the above clause shall, if mailed, be sent by certified mail, return receipt requested.

(b) In procurements to be performed outside the United States, its possessions and Puerto Rico, where it is anticipated that the contractor will be a foreign firm, one of the clauses provided for in 7-103.12(b) will be inserted in accordance with the instructions therein:

(Copy from form)

(c) The form in which the contracting officer shall notify the contractor of his decision under the Disputes clause is set forth in 1-314.

7-602.7 Payments to Contractor.

(Copy from form)

7-602.8 Assignment of Claims.

(Copy from form)

The last two sentences of paragraph (a) of the foregoing clause shall be deleted from contracts entered into with foreign contractors.

7-602.9 Material and Workmanship.

(Copy from form)

7-602.10 Contractor Inspection System. Insert the following clause in all contracts in excess of \$10,000.

CONTRACTOR INSPECTION SYSTEM

The Contractor shall (i) maintain an adequate inspection system and perform such inspections as will assure that the work performed under the contract conforms to contract requirements, and (ii) maintain and make available to the Government adequate records of such inspections.

7-602.11 Inspection and Acceptance.

(Copy from form)

7-602.12 Superintendence By Contractor.

(Copy from form)

7-602.13 Permits and Responsibilities.

(Copy from form)

Tab A
30 June 61 Minutes
Case 61-19

PART 6--CLAUSES FOR FIXED PRICE CONSTRUCTION CONTRACTS.

7-601. Applicability. As used throughout this Part, the term "fixed-price construction contract" means any contract (other than a short form construction contract (see 16-401.3(a) and (b)) a letter contract, a notice of award, or a modification not effecting new procurement) which (i) is entered into at a fixed price (with or without any provision for price redetermination, escalation, or other form of price revision as covered in 3-403), and (ii) is for construction as defined in 1-201.22.

7-602. Required Clauses. The following clauses shall be inserted, as required, in all fixed-price construction contracts, except as otherwise provided in this part.

7-602.1 Definitions.

(Copy from form)

7-602.2 Specifications and Drawings.

(Copy from form)

7-602.3 Changes.

(Copy from form)

In the foregoing clause, the period of "30 days" within which any claim for adjustment must be asserted may be varied in accordance with Departmental procedures.

7-602.4 Changed Conditions.

(Copy from form)

7-602.5 Termination For Default -- Damages For Delay -- Time Extensions. Insert the clause set forth in 8-709.

7-602.6 Disputes.

(a) Except as provided in (b) below, insert the following clause:

(Copy from form)

change from the 1953 edition of Standard Form 23A necessitated an immediate change in ASPR 16-401.3(c). The members approved revising paragraph (c) to read:

"(c) Contracts Estimated To Exceed \$10,000. Standard Forms 19A, 20, 21, 22, 23, and 23A shall be used for these construction contracts executed as a result of formal advertising."

Additionally, it was noted that the issuance of the revised Form 23A permitted the deletion of subparagraph (h) of 16-401.4. The foregoing changes were approved for inclusion and deletion in ASPR revision No. 5)

(28 June 61)

2. Case 61-19 - Changes in ASPR as a Result of the Issuance of the Revised Construction Contract Forms. The members resumed consideration of a report from the Special Subcommittee, dated 13 June 61, presenting proposed clauses for inclusion in Part 6, Section VII with respect to the Construction Fixed-price Contracts. The Subcommittee Chairman was present for consideration of this case. The Committee made a number of changes throughout the Subcommittee's report which are reflected in the attached Tab A to these minutes.

Two particular points discussed under the Subcommittee report included:

- (a) The Subcommittee's recommendation that the clause entitled "Contract Inspector System" be deleted. The members did not concur with this recommendation, noting that this problem had previously been determined and the decision made that a clause in this area would be utilized, and
- (b) The Subcommittee's recommendation that the proposed clause entitled "Preference for United States Flag Vessels - Employment of Ocean-Going Vessels" be deleted. The basis for the recommendation being that neither the act nor the requirements of 1-404(b) requires construction contractors to ship their supplies, materials, or equipment which is not purchased by or for the United States pursuant to the requirements of the act. The members concurred in the Subcommittee's recommendation with respect to the deletion of this clause.

The members further noted that the existing "Buy American Act" clause in 6-204.5 should be deleted and the revised clause published in lieu thereof. As revised in the attached Tab A, the construction contract clauses were approved for printing. CASE CLOSED.

(30 June 61)

Page 3. (5 Apr 61). Case 61-19 - Changes in ASPR as a Result of the Issuance of the Revised Construction Contract Forms. A new sentence was added at the end of the second paragraph, reading:

"The members further noted that the same issue will subsequently arise when a revision of Standard Form 32 is undertaken and, at that time, consideration would be given to the retention of the words 'by a court of competent jurisdiction.'"

(19 Apr 61)

7. Case 61-19 - Changes in ASPR as a Result of the Issuance of the Revised Construction Contract Forms. The Committee considered a report from the Editing Subcommittee, dated 7 Apr 61, presenting proposed clause coverage for fixed-price construction contracts, to be published in the Regulation as Part 6 of Section VII, together with related changes occasioned by the issuance of the revised construction contract forms in Section VIII and in Section XVI. The Committee approved the Editing Subcommittee recommendation that the material attached to the Editing Subcommittee report be forwarded to an appropriate Subcommittee for review. The Committee established a Special two-man Subcommittee to undertake this review, and noted that in addition to the clauses covered in the Editing Subcommittee report, no mention was made of the Suspension of Work clause, or the Nondomestic Materials clause appearing in 6-20^{4.4}. With respect to this latter clause, the question was raised as to whether the clause was appropriate for inclusion in the construction contracts Part, and referencing in the Construction Contract clause coverage. Members designated to the Subcommittee are:

Army - Mr. Malcolm P. McGregor, ENG (Chairman)
Navy - Mr. W. H. Speck, Y&D

The Subcommittee was requested to provide a report for consideration by 22 May 61.

The Army Legal member is the ASPR Committee liaison to the Subcommittee.

(19 Apr 61)

<u>Case</u>	<u>Problem</u>	<u>Subcommittee</u>	<u>Action</u>
61-19	Changes in ASPR As a Result of the Issuance of the Revised Construction Contract Forms	Special	Report by 19 June 61

(31 May 61)

4. Case 61-19 - Changes in ASPR as a Result of the Issuance of the Revised Construction Contract Forms. The members considered a report from the Special Subcommittee dated 13 June 61, presenting proposed clauses for inclusion in Part 6, Section VII with respect to Construction Fixed-price Contracts. Representatives of the Subcommittee were present for the discussion of this case.

The Committee reviewed the attachment to the Subcommittee report and made a number of changes which were noted by the Secretary in the first six pages of the report. Upon completion of consideration of this case, an attachment to the minutes will reflect the new part as revised covering Construction Fixed-price Contract clauses. Consideration of the remainder of the Subcommittee report was deferred until the Friday, 30 June 61 meeting at 1100 hours.

In the discussion of this case, it was pointed out to the members that FPR Circular No. 15 dated 12 April 61 set forth in Standard Form 19 the governing Labor Standards Provisions applicable to construction contracts, which would involve the use of Standard Form 23A, and that this

2. Case 61-19 - Changes in ASPR as a Result of the Issuance of the Revised Construction Contract Forms. The Legal members advised of a meeting with representatives of GSA and the GAO with respect to the proposed revision of the Disputes clause in Standard Form 23A, which deleted the words "by a court of competent jurisdiction." The GAO representatives apparently could not be convinced of the need to retain the words quoted above, and the GSA General Counsel suggested alternate language, tracking the words of the "Wunderlich" statute (41 U.S.C. 321), as follows:

"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.

The Legal members were unanimous in expressing their preference for retaining the current language, since the alternate language is not clear and precise. ~~It was felt that the inclusion of the new language, which achieves essentially the same results as the existing language, would require an explanation for the change.~~ There is need for expeditious consideration of this matter by higher authority in order that the Department of Defense position on the alternative language can be provided GSA. While the Legal members expressed divergent views as to how this matter should be handled, the OSD Counsel representative present was requested to present this matter to higher authority for consideration. The item will be further discussed at the next meeting.

(31 Mar 61)

Case 61-19 - Changes in ASPR as a Result of the Issuance of the Revised Construction Contract Forms. The Chairman distributed copies of a memorandum from the Deputy ASD (I&L) (Procurement), dated 3 Apr 61, which advised that the Department of Defense had concurred in the alternate language tracking the words of the Wunderlich statute, for inclusion in the Disputes clause to be issued in Standard Form 23A in lieu of the words "by a court of competent jurisdiction."

The members noted that while the new language would be issued in the Disputes clause in Standard Form 23A for use in the United States, that the General Accounting Office had agreed to the use of the present Disputes clause containing the words "by a court of competent jurisdiction," for use in contracts overseas, with a further change in the clause to insert the words "United States" immediately ahead of the above quoted language. In this respect, it was noted that the Department of Defense would be using a different Disputes clause in contracts overseas than the clause promulgated in Standard Form 23A. *(See correction to minutes dated 17 April 61)* 5 Apr 61)

Page 2. (31 Mar 61). Item 2. Case 61-19 - Changes in ASPR as a Result of the Issuance of the Revised Construction Contract Forms. The second sentence of the second paragraph was revised to read:

"It was concluded that the inclusion of the new language, which, in the unanimous opinion of the members, resulted in no substantive change whatsoever, would require an explanation for the change in language."

(12 Apr 61)

Case 61-19 - Changes in ASPR as a Result of the Issuance of the Revised Construction Contract Forms. Copies of the Federal Procurement Regulations promulgating the new Standard Construction Contract Forms: SF 20, Invitation for Bids; SF 21, Bid Form; SF 22, Instruction to Bidders; SF 23, Construction Contract; and SF 23A, General Provisions, were distributed to the members for information. The members noted that the issuance of the new forms necessitated changes in:

- a. The Buy American coverage in Section VI with respect to construction contracts.
- b. Inclusion in an appropriate location of the DOD requirement for construction contractors to "maintain an inspection system and inspection records" (Case 60-66).
- c. Inclusion of the new construction contract clauses in Section VII.
- d. Revision of Section XVI to reflect the new forms, and
- e. Revision of Section II to reflect the coverage of "items with statutory cost limitations," and any other appropriate changes, such as revision of 2-201(a)(xv).

With respect to a. above, the Committee noted that this language had previously been provided the Staff and could be incorporated with the other changes for printing.

With respect to b. through e. above, these tasks were assigned to the Editing Subcommittee for accomplishment. The Editing Subcommittee was requested to provide a report for consideration by 13 Mar 61.

(8 Feb 61)

Case 61-19 - Changes in ASPR as a Result of the Issuance of the Revised Construction Contract Forms. The Air Force Legal member called the Committee's attention that clause 6, Disputes, in the new Standard Form 23A, omitted the words "by a court of competent jurisdiction," which language had been recommended for retention by Defense in a letter from the Chairman, ASPR Committee, to the Assistant Commissioner for Procurement Policy, GSA, dated 25 Mar 60. The Committee noted that its representatives had agreed in subsequent discussions with GSA, that the above language could be omitted.

Notwithstanding this agreement, the members concluded that the retention of the omitted language was sufficiently important to initiate immediate action to effect its reinsertion in Defense contracts.

The Committee requested the Chairman to discuss this matter with the Assistant Commissioner for Procurement Policy, GSA, on a priority basis.

(15 Feb 61)

Case 61-19 - Changes in ASPR as a Result of the Issuance of the Revised Construction Contract Forms. The Chairman advised the members that GSA has agreed to withhold printing of the revised Standard Form 23A in order to give DOD further opportunity to submit reasons why the words "by a court of competent jurisdiction" should be included in the Disputes clause. It was agreed that the Legal members, with the Air Force Legal member as Chairman, would prepare a suitable paper for this purpose by 24 Feb 61.

(17 Feb 61)

Case 61-19 - Changes in ASPR as a Result of the Issuance of the Revised Construction Contract Forms. Copies of a letter from the Chairman to the Assistant Commissioner for Procurement Policy, GSA, dated 23 Feb 61, transmitting the "Department of Defense comments on omission of the words 'by a court of competent jurisdiction' from the 'Disputes' clause in Standard Form 23A," were distributed to the members for information.

(24 Feb 61)

ASPR EDITING SUBCOMMITTEE

7 April 1961

MEMORANDUM TO THE ASPR COMMITTEE

SUBJECT: ASPR Case 61-19 - Changes in ASPR as a Result of the Issuance
of the Revised Construction Contract Forms

1. This report complies with the Minutes of 8 February 1961.
2. The attached TABs A, B, and C are submitted with the recommendation that the material included therein be forwarded for review to an appropriate subcommittee.

JOHN D. KOOKEN
Colonel, JAGC

ROBERT F. HOMANN
Navy Member

JOHN D. KELLY
Air Force Member

Part 6--Clauses for Fixed Price Construction Contracts

7-601 Applicability. As used throughout this Part, the term "fixed-price construction contract" means any contract (other than a short form construction contract (See 16-403.1(a) and (b)), a letter contract, a notice of award, or a modification not effecting new procurement) which (i) is entered into at a fixed price (with or without any provision for price redetermination, escalation, or other form of price revision as covered in 3-403), and (ii) is for construction (See 1-201.22).

7-602 Required Clauses. The following clauses shall be inserted, as required, in all fixed-price construction contracts.

7-602.1 Definitions.

(Copy from form)

7-602.2 Specifications and Drawings.

(Copy from form)

7-602.3 Changes.

(Copy from form)

In the foregoing clause, the period of "30 days" within which any claim for adjustment must be asserted may be varied in accordance with Departmental procedures.

7-602.4. Changed Conditions.

(Copy from form)

7-602.5 Termination For Default -- Damages For Delay -- Time Extensions. Insert the clause set forth in 8-709.

7-602.6 Disputes.

(a) Except as provided in (b) below, insert the following clause:

(Copy from form)

In accordance with Departmental procedures, the foregoing clause may be modified to provide for intermediate appeal to the Head of the Procuring Activity concerned. The decision of the contracting officer referred to in the above clause shall, if mailed, be sent by certified mail, return receipt requested.

(b) In procurements to be performed outside the United States, its possessions and Puerto Rico, where it is anticipated that the contractor will be a foreign firm, either the clause in 7-103.12(a) will be used after modifying it to insert "United States" before "court of competent jurisdiction" or the clause in 7-103.12(b) will be inserted in accordance with instructions therein:

(Copy from form)

(c) The form in which the contracting officer shall notify the contractor of his decision under the Disputes clause is set forth in 1-314.

7-602.7 Payments to Contractor.

(Copy from form)

7-602.8 Assignment of Claims.

(Copy from form)

The last two sentences of paragraph (a) of the foregoing clause shall be deleted from contracts entered into with foreign contractors.

7-602.9 Material and Workmanship.

(Copy from form)

7-602.10 Contractor Inspection System. Insert the following clause in all contracts in excess of \$10,000.

CONTRACTOR INSPECTION SYSTEM

The Contractor shall (i) maintain an adequate inspection system and perform such inspections as will assure that the work performed under the contract conforms to contract requirements, and (ii) maintain and make available to the Government adequate records of such inspections.

7-602.11 Inspection and Acceptance.

(Copy from form)

7-602.12 Superintendence By Contractor.

(Copy from form)

7-602.13 Permits and Responsibilities.

(Copy from form)

7-602.14 Conditions Affecting The Work.

(Copy from form)

7-602.15 Other Contracts.

(Copy from form)

7-602.16 Patent Indemnity.

(Copy from form)

7-602.17 Additional Bond Security. Insert the clause set forth in

7-103.9.

7-602.18 Covenant Against Contingent Fees. Insert the contract clause set forth in 7-103.10.

7-602.19 Officials Not To Benefit.

(Copy from form)

7-602.20 Buy American. In accordance with the requirements of 6-204, insert the contract clause set forth therein.

7-602.21 Convict Labor. Insert the contract clause set forth in 12-203.

7-602.22 Nondiscrimination In Employment.

(Copy from form)

7-602.23 Labor Standards Provisions. In accordance with the requirements of 12-403, insert the clauses entitled:

Davis-Bacon Act

Eight-Hour Laws--Overtime Compensation

Apprentices

Payroll Records and Payrolls

Copeland ("Anti-Kickback") Act

Withholding of Funds to Assure Wage Payment

Subcontracts--Termination

7-602.24 Federal, State and Local Taxes. In accordance with the requirements of 11-401, insert the contract clause set forth in 11-401.1 or 11-401.2 as appropriate.

7-602.25 Renegotiation. In accordance with the requirements of 7-103.13, insert the appropriate contract clause set forth therein.

7-602.26 Termination for Convenience of the Government. In accordance with the requirements of 8-703 and 8-705.2, insert the appropriate contract clause.

7-602.27 Notice and Assistance Regarding Patent Infringement. In accordance with the requirements of 9-104, insert the contract clause set forth therein.

7-603 Clauses To Be Used When Applicable.

7-603.1 Notice to Government of Labor Disputes. In accordance with the requirements of 7-104.1, insert the contract clause set forth therein.

7-603.2 Soviet-Controlled Areas. In accordance with the requirements of 6-403, insert the contract clause set forth therein.

7-603.3 Filing of Patent Applications. In accordance with the requirements of 9-106, insert the contract clause set forth in 9-106 or 9-106.1, as appropriate.

7-603.4 Reporting of Royalties. In accordance with the requirements of 9-110, insert the appropriate contract clause set forth therein.

7-603.5 Rights in Data. In accordance with the requirements of Part 2 of Section IX of this Regulation, insert one of the contract clauses set forth in 9-203.1, 9-204.2, or 9-206, as appropriate. When the contract clause in 9-203.1 is used, the appropriate additional provisions shall be added in accordance with the requirements in 9-203, 9-203.2, 9-203.3 or 9-203.4; and the additional provision in 9-204.1 may be added under the circumstances set forth in 9-204.1.

7-603.6 Military Security Requirements. In accordance with the instructions of 7-104.12, insert the contract clause set forth therein.

7-603.7 Utilization of Small Business Concerns. In accordance with the requirements of 7-104.14, insert the contract clause set forth therein.

7-603.8 Examination of Records. In accordance with the requirements of 7-104.15, insert the contract clause set forth therein.

7-603.9 Gratuities. In accordance with the requirements of 7-104.16, insert the contract clause set forth therein.

7-603.10 Priorities, Allocations, and Allotments. In accordance with the requirements of 1-307.2, insert the contract clause set forth in 7-104.18.

7-603.11 Defense Subcontracting Small Business Program. In accordance with 1-707.2(b), insert the contract clause set forth in 7-104.22.

7-603.12 Subcontracts. In accordance with the requirements of 3-903.1, insert an appropriate Subcontracts clause.

7-603.13 Payment for Overtime and Shift Premiums. In accordance with the requirements of 12-102, insert the contract clause set forth in 12-102.3(c).

7-603.14 Price Reduction for Defective Cost Data. In accordance with the instruction in 7-104.29, insert the contract clause set forth therein.

7-603.15 Workmen's Compensation Insurance Overseas. In accordance with the requirements of 10-403, insert the clause entitled "Workmen's Compensation Insurance (Defense Base Act)".

7-603.16 Taxes. In accordance with the requirements of 11-403.2, in contracts to be performed outside the United States, its possessions and Puerto Rico, insert one of the clauses set forth in (a) and (b) thereof.

7-603.17 Advance Payments. When advance payments are to be made in accordance with Appendix E, Part 4 of this Regulation, insert the appropriate clause as set forth in E-414.2.

7-603.18 Preference for United States-Flag Vessels - Employment of Ocean-Going Vessels. In accordance with the requirements of Part 14 of Section I, insert one of the clauses set forth in 1-1404(b), as appropriate.

7-604 Additional Clauses. The following clauses shall be inserted in accordance with Departmental procedures where it is desired to cover the subject matter thereof in such contracts.

7-604.1 Alterations in Contracts. The contract clause set forth in 7-105.1 may be inserted.

7-604.2 Approval of Contract. The contract clause set forth in 7-105.2 may be inserted.

7-604.3 Bill of Materials. The contract clause set forth in 7-105.6 may be inserted pursuant to the provisions of said paragraph.

7-604.4 Stop Work Orders. The clause set forth in 7-105.8 is authorized for use under the criteria and in accordance with the instructions in 7-105.8.

7-604.5 Liquidated Damages. In accordance with the requirements of 1-310, insert the contract clause set forth in 7-105.5.

7-604.6 Taxes Where Foreign Agreements Do Not Apply. In accordance with the instructions of 11-404, in contracts to be performed outside the United States, its possessions and Puerto Rico, the clause set forth therein may be inserted.

8-709 Default Clause for Fixed Price Construction Contracts.

(a) The following clause shall be used in all fixed-price construction contracts.

TERMINATION FOR DEFAULT--DAMAGES FOR DELAY--TIME EXTENSIONS

(Copy from form)

(b) During a period of national emergency, paragraph (c) of the above clause may be changed by deleting the word "unforeseeable" and inserting the phrase "other than normal weather," after the word "causes" where it first appears in the first sentence.

16-401.1

. . .

- (v) Standard Form 22--Instructions to Bidders (Construction Contract). Pending revision of the March 1953 edition of Standard Form 22, it should be changed to comply with 2-201 (a)(xiv) and 10-102.4(a)(ii).

. . .

16-401.4

. . .

- (e) During a period of national emergency, Clause 5(e) [5(d)(1)] of Standard Form 23A may be changed by deleting the word "unforeseeable" and inserting the phrase "other than normal weather" after the word "causes" where it first appears in the first sentence.

. . .

- (h)--Pending revision of Standard Form 23A, in order to reflect the amendment of the Copeland (Anti-Kickback) Act, the word "statements" shall be substituted for the word "affidavits" in Clause 24, line 9, of that form.



HEADQUARTERS
DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON 25, D.C.

IN REPLY REFER TO
ENGGC-C

13 June 1961

MEMORANDUM FOR The Chairman, ASPR Committee

SUBJECT: Case 61-19 - "Changes in ASPR as a result of the issuance of the Revised Construction Contract Forms."

I. Problem:

To publish in Part 6 of Section VII clauses to be used in fixed - price construction contracts. The establishment of a separate part for such clauses is in line with current policy of the ASPR Committee to provide separate coverage for construction contract procedures due to the basic differences in many areas between supply and construction procurement.

II. Recommendation:

1. That the clauses set forth in Tab 1, hereto, be placed in Part 6 of Section VII, for inclusion in construction fixed price contracts over \$10,000 which are executed on S. F. 23a.

2. That the clauses set forth in S. F. 19 shall constitute the contract (not in excess of \$2,000) in its entirety.

III. Discussion:

1. The subcommittee agrees that a separate part should be included in ASPR for clauses to be used in fixed-price construction contracts in excess of \$10,000. /However, the Editing Committee in its proposal to the ASPR Committee has included several clauses now in use for supply contracts which this subcommittee does not recommend for use in construction procurement. The reasons for suggested deletions or changes in the Editing Committee's draft are set forth in Tab 1 at the appropriate place.

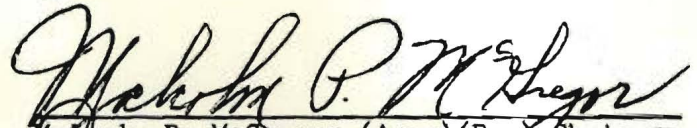
2. The "Form" referred to in Tab A, in the phrase "Copy from form," is S. F. 23a, April 1961. It will be noted that in many instances, the words "in accordance with the (instructions) (Requirements) of _____" have been deleted. This has been done to be literally correct since the instructions usually pertain to supply contracts.

3. It is contemplated in this report that the clauses to be included in the proposed Part 6 of Section VII are applicable only to

contracts over \$10,000 executed on S. F. 23a. The subcommittee recommends that no additional clauses be added to S.F. 19. Additional clauses would defeat the purpose of simplicity and understandability which dictated the promulgation of this form. (See 3-600 through 610 and 7-104.15 for examples of short form of procurement)

SUBCOMMITTEE, CONSTRUCTION CONTRACT CLAUSES

1 Incl
Tab 1


Malcolm P. McGregor (Army) (Eng) Chairman

The Navy member concurs in this report except as indicated in 7-602.6(b).

TAB 1

ASPR Case 61-19

Part 6--Clauses for Fixed Price Construction Contracts.

7-601. Applicability. As used throughout this Part, the term "fixed-price construction contract" means any contract (other than a short form construction contract (See 16-401.3(a) and (b)) a letter contract, a notice of award, or a modification not effecting new procurement) which (i) is entered into at a fixed price (with or without any provision for price redetermination, escalation, or other form of price revision as covered in 3-403); (ii) is for construction as defined in 1-201.22. Clauses set forth herein are not required for contracts to be performed outside the United States except where so stated (See 16-401.1)

7-602. Required Clauses. Fixed price construction contracts shall include the clauses set forth in this part. Inclusion of the clauses in 7-602.1-21 shall be accomplished by use of S.F.23a in accordance with 16-401 and 7-602.22 shall be accomplished by use of S.F. 19a.

7-602.1 Definitions

(Copy from form.)

7-602.2 Specifications and Drawings.

(Copy from form.)

7-602.3 Changes.

(Copy from Form.)

In the foregoing clause, the period of "30 days" within which any claim for adjustment must be asserted may be varied in accordance with Departmental procedures.

7-602.4 Changed Conditions.

(Copy from form.)

7-602.5 Termination for Default -- Damages for Delay -- Time Extensions.

(Copy from form.)

7-602.6 Disputes.

(a) Except as provided in (b) below, include the following clause:

(Copy from form.)

In accordance with Departmental procedures, the foregoing clause may be modified to provide for intermediate appeal to the Head of the Procuring Activity concerned. The decision of the contracting officer referred to in the above clause shall, if mailed, be sent by certified mail, return receipt requested.

(b) In procurements to be performed outside the United States and Puerto Rico, where it is anticipated that the contractor will be a foreign firm, the following clause shall be used: * Follow ASPR 7-103.12(a) & (b)

(c) The form in which the contracting officer shall notify the contractor of his decision under the Disputes clause is set forth in 1-314.

*The Navy member suggests that the above (b) be deleted inasmuch as the Navy does not have Boards of Contract Appeals outside of the United States and does not feel it is realistic that foreign contractors or even United States contractors doing work outside the United States will or can be forced to, come to Washington to appeal. Suggests that each Department be allowed to devise their own Disputes Article for contracts outside the United States. He states that the Department of Justice advised that many foreign courts refuse to recognize contract provisions for decision of one

of the contracting parties, and in such contracts the contractors cannot be forced to take an ASBCA Appeal. The Navy member recommends that each Department be allowed to devise its own "Dispute" Article, area by area, so that foreign appeals panels, ASBCA or other appellate body may be used as appropriate. The Army member recommends that 7-602.6 be adopted. It has had no difficulty in handling its foreign appeals. Where it is necessary, an appeal board or panel can travel to the site of the foreign contractor.]

7-602.7 Payments to Contractor.

(Copy from form.)

7-602.8 Assignment of Claims.

(Copy from form.)

The last two sentences of paragraph (a) of the foregoing clause shall be deleted from contracts entered into with foreign contractors.

7-602.9 Material and Workmanship.

(Copy from form.)

[7-602.10 ~~Contractor/Inspection/System~~ Delete]

[It is the recommendation by this Subcommittee that this clause be deleted for the following reasons: (1) Government should rely on its own inspectors which are on every job; (2) the clause would require expensive duplication of administrative efforts; (3) contractor has his own system for his own protection; (4) and only on special occasions will the Government require a contractor to perform inspection services for the Government. Such may be provided for as the occasion arises.]

7-602.10 Inspection and Acceptance.

(Copy from form.)

- 7-602.11 Superintendence by Contractor.
(Copy from form.)
- 7-602.12 Permits and Responsibilities.
(Copy from form.)
- 7-602.13 Conditions Affecting the Work.
(Copy from form.)
- 7-602.14 Other Contracts.
(Copy from form.)
- 7-602.15 Patent Indemnity.
(Copy from form.)
- 7-602.16 Additional Bond Security.
(Copy from form.)
- 7-602.17 Covenant Against Contingent Fees.
(Copy from form.)
- 7-602.18 Officials Not to Benefit.
(Copy from form.)
- 7-602.19 Buy American Act.
(Copy from form.)
- Delete clause in 6-204.5. It does not conform to clause in form
- 7-602.20 Convict Labor.
(Copy from form.)
- 7-602.21 Nondiscrimination in Employment.
(Copy from form.)
- 7-602.22 Labor Standards Provisions.

In accordance with the requirements of 12-403 and 16-401.1 (ii) include the following clauses as set forth in Standard Form 19a:

- 7-602.22(i) Davis-Bacon Act
7-602.22(ii) Eight-Hour Laws--Overtime Compensation
7-602.22(iii) Apprentices
7-602.22(iv) Payroll Records and Payrolls
7-602.22(v) Copeland ("Anti-Kickback") Act
7-602.22(vi) Withholding of Funds to Assure Wage Payment
7-602.22(vii) Subcontracts--Termination
7-602.23 Information Regarding Buy American Act.

In accordance with the requirements of 6-204.2, include the clause set forth therein in Invitations for Bids and Requests for Proposals for work in the United States.

7-602.24 Nondomestic Construction Materials

In accordance with the requirements of 6-204.4 include the clauses set forth therein and list any additional construction materials or components excepted from the Buy American Act.

7-602.25 Gratuities.

Include the clause set forth in 7-104.16

[Inasmuch as this clause is required in all contracts using DOD appropriations, it is recommended that it be placed in the area of "Required" clauses.]

7-602.26 Utilization of Small Business Concerns.

Include the clause set forth in 7-104.14.

[It is recommended that this clause be placed in the area of required clauses inasmuch as it is a declaration of policy of the Department of Defense and should be in all construction contracts.]

7-602.27 Defense Subcontracting Small Business Program.

Include the clause set forth in 7-104.22 with the following modification:

Paragraph (b) shall be deleted and the following substituted in lieu thereof:

"A 'small business concern' is a concern (i) whose average annual receipts and its affiliates for the preceding three years have been \$5,000,000 or less; except that if it is located in Alaska, such receipts must have been \$6,250,000 or less; or (ii) is certified as a small business concern by the Small Business Administration."

[It is recommended that this clause be considered a required clause inasmuch as it sets forth the policy of the Department of Defense concerning Small Business. Also note, that the modification is a definition of small business as it pertains to construction concerns.]

7-602.28 Federal, State and Local Taxes.

In accordance with the requirements of 11-401 the clauses set forth therein for advertised and negotiated contracts will be used, as appropriate.

7-602.29 Renegotiation.

The requirements of 7-103.13, concerning the inclusion of a renegotiation clause, are applicable to construction contracts. Include the appropriate clause as set forth therein.

7-602.30 Termination for Convenience of the Government.

Include the clause set forth in 8-703.

7-602.31 Notice and Assistance Regarding Patent Infringement.

In order that the Government shall be notified of claims of infringement which might result from the performance of a construction contract, the clause set forth in 9-104 shall be included.

7-602.32 Authorization and Consent.

In accordance with the requirements of 9-102.1 include the clause set forth therein.

7-603 Clauses to be used when Applicable.

7-603.1 Notice to Government of Labor Disputes.

In accordance with the requirements of 7-104.4 for contracts for items on the urgency list, include the contract clause set forth therein.

7-603.2 Soviet-Controlled Areas.

The clause set forth in 6-403 shall be included in contracts where the work is to be performed outside the United States, its possessions and Puerto Rico.

7-603.3 Filing of Patent Applications.

In accordance with the requirements of 9-106, where there is classified subject matter in the performance of a contract, include the clause set forth in 9-106 or 9-106.1, as appropriate.

7-603.4 Reporting of Royalties.

In accordance with the requirements of 9-110, in order that the Government may determine whether it is being improperly charged with royalties, include the appropriate clause set forth therein.

~~7-603.5~~ ~~Rights in Data/ Delete~~

~~The clauses set forth in 9-203.1, 9-204.2 and 9-206 are inappropriate for construction contracts. By their very wording they are for contracts which provide for the design and furnishing of machinery and equipment or for production of motion pictures. In a construction contract a contractor bids in accordance with design drawings and specifications which he has had no part in producing. Accordingly, he owns no basic rights as contemplated by~~

the clauses in question. Therefore, it is recommended that a basic data clause is not necessary for a construction contract but that a special clause of this nature be written whenever a construction contractor must furnish data.]

7-603.5 Military Security Requirements.

Include the clause set forth in 7-104.12, where the performance of contracts will require access to classified information or material. Instructions therein are applicable to construction contracts.

7-603.6 Examination of Records.

The clause set forth in 7-104.15 shall be included in all negotiated fixed price construction contracts in excess of \$10,000.

7-603.7 Priorities, Allocations, and Allotments.

In accordance with the requirements of 1-307.2, in connection with contracts which are rateable, the clause set forth in 7-104.18 shall be included.

7-603.8 Subcontracts.

An appropriate subcontracts clause shall be included in contracts requiring Government approval of subcontracts. Instructions set forth in 3-903.1, shall apply, as appropriate, to construction contracts.

7-603.9 Payment for Overtime and Shift Premiums.

In accordance with the requirements of 12-102 concerning the provision for payment of overtime and shift premiums, the clause set forth in 12-102.3 shall be included.

7-603.10 Price Reduction for Defective Cost Data.

The instructions set forth in 7-104.29, pertaining to negotiated fixed price contracts expected to exceed \$100,000, shall apply to construction contracts and the clause set forth therein shall be included.

7-603.11 Workmen's Compensation Insurance Overseas.

The instructions set forth in 10-403, pertaining to extension of the Longshoremen's and Harbor Workers compensation Act to employees engaged in work outside of the United States, shall apply to construction contracts and the clause set forth therein, entitled "Workmen's Compensation Insurance (Defense Base Act)", shall be included.

7-603.12 Taxes.

In accordance with the requirements of 11-403.2, for contracts with foreign contractors or foreign governments, to be performed outside the United States, its possessions, and Puerto Rico, include one of the clauses set forth thereof in (a) and (b), as appropriate.

7-603.13 Advance Payments.

When advance payments are to be made in accordance with Appendix E, Part 4, of this regulation, insert the appropriate clause as set forth in E-414.2.

7-603.14 Contracts with a State or Political Subdivision.

The clause set forth in 12-403.4 shall be included in contracts with a State or political subdivision as provided therein.

~~7-603.15~~ Preference for United States Flag Vessels - Employment of Ocean-Going Vessels Delete/

~~It is recommended that no clause in connection with this subject matter be included in a construction contract. Neither the Act nor the requirements of ASPR 1-1404(b) contemplate requiring construction contractors to ship their supplies, material, or equipment, which is not purchased by or for the United States, pursuant to the requirements of the Act. Supplies, material, and equipment under a lump sum construction contract do not come within the purview of the procedures set forth in 1-1401 - 1-1404.7~~

7-603.15 Performance of work by contractor.

Include the clause as prescribed in 4-104.2 in contracts over \$1,000,000.

7-603.16 Patent Rights.

Include the appropriate clause in 9-107 in contracts involving experimental, developemental or research work.

7-604 Additional Clauses.

The following clauses shall be included as appropriate, in accordance with departmental procedures where it is desired to cover the subject matter thereof in such contracts.

7-604.1 Alterations in Contracts.

The contract clause set forth in 7-105.1 may be included.

7-604.2 Approval of Contract.

The contract clause set forth in 7-105.2 may be included.

~~7-604.3 Bill of Materials. Delete~~

~~This clause is not applicable to a construction contract and should not be used.~~

7-604.3 In lieu of "Stop Work Orders" clause, including following:
Price Adjustment for Suspension, Delays, or Interruption of Work.

The following clause shall be included in fixed price construction contracts, at the option of the Departments, whenever it is desired to provide for administrative relief for unreasonable periods of delay caused by the Contracting Officer in the administration of the contract:

(a) The Contracting Officer may order the contractor in writing to suspend all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government.

(b) If, without the fault or negligence of the Contractor, the performance of all or any part of the work is for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of the contract, or by his failure to act within the time specified in the contract (or if no time is specified, within a reasonable time), an adjustment shall be

made by the Contracting Officer for any increase in the cost of performance of the contract (excluding profit) necessarily caused by the unreasonable period of such suspension, delay, or interruption, and the contract shall be modified in writing accordingly. No adjustment shall be made if, and to the extent that, performance by the Contractor would have been prevented by other causes even if the work had not been so suspended, delayed, or interrupted. No claim under this clause shall be allowed (i) for any costs incurred more than twenty days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply where a suspension order has been issued), and (ii) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption but not later than the date of final settlement of the contract. Any dispute concerning a question of fact arising under this clause shall be subject to the Disputes clause.

7-604.4 ~~Stop/Work Orders/~~ Delete

The suggested clause in 7-105.8 is not for use in construction contracts.

7-604.5 ~~Liquidated Damages/~~ Delete

The suggested liquidated damages article is not for application in construction contracts. It is recommended that inasmuch as liquidated damages may be assessed to so many different items in a construction contract that this clause be left to the discretion of the Department, as it is now.

7-604.4 ~~Taxes Where Foreign Agreements Do Not Apply.~~

Recommend that this be deleted as a "standard" clause for construction contracts since this situation is always covered, where applicable by language "tailored" to the situation.

12 December 1961

MEMORANDUM FOR THE CHAIRMAN, ASPR COMMITTEE

SUBJECT: Case 61-111, Patent Indemnity (Not Predetermined) ASPR 9-103.2;
Case 61-19 Changes in ASPR as a Result of the Issuance of the
Revised Construction Contract Forms (Continued -- 22 September 1961
ASPR Minutes)

I PROBLEM

To study further the problem presented with respect to revising the clause set forth in 9-103.2 to conform to the ASPR Committee's action of 19 July 1961 in deleting the reference to formally advertised construction contracts from the introductory language of the clause. To ascertain from the construction elements of the Departments what patent indemnity clause is currently used in construction contracts which utilize Standard Form 23A.

II RECOMMENDATIONS

1. That the ASPR Committee's action of 19 July 1961 deleting reference to formally advertised construction contracts from the introductory language of 9-103.2 be rescinded.

2. That the "Note" under ASPR 16-401.1 (vii) (Revision 5, 21 Aug 1961) be amended to prescribe the use of the patent indemnity clause of either ASPR 9-103.1 or 9-103.2 where appropriate, in conjunction with Standard Form 23A.

3. That proposed ASPR Section VII, Part 6, Paragraph 7-602.16 relating to the use of a patent indemnity clause in construction contracts be revised to conform to the provisions of ASPR 9-103.

4. That consideration be given and determination made as to whether the application of ASPR 9-103 to construction contracts is expressly permitted under Section 1-16.404(a) of the Federal Procurement Regulations or constitutes a deviation therefrom as defined in 1-1.009-1(a) thereof, and as such requires deviation control in accordance with procedures set forth in Sections 1-1.009-2 and 1-16.404(b) of the above FPR (41 CFR).

III DISCUSSION

After further study of this problem, the PSC withdraws the recommendation in its report dated 11 September 1961. That recommendation was made merely for the purpose of having apparent consistency between the introductory language and the clause of ASPR 9-103.2.

Neither the scope of the patent indemnity provision of SF 23A nor the policy of the Federal Procurement Regulations requiring its use as part of a standard form in all formally advertised construction contracts is in accordance with the stated policy of ASPR 9-103.

DIVERGENT POLICIES OF ASPR AND FPR REGARDING USE OF PATENT INDEMNITY CLAUSE

With regard to policy governing the use of a patent indemnity provision, that of the FPR is rigid — making the use of its SF 23A clause mandatory in all formally advertised construction contracts — while that of ASPR, Section IX is flexible. In such contracts, both the clause of ASPR 9-103.1 (Predetermined) and that of 9-103.2 (Not Predetermined) are said by ASPR to be "appropriate," but there is no positive requirement to use either clause.

As for negotiated construction contracts, no patent indemnity clause is required, but such a clause "may be included" according to ASPR 9-103.3. This coincides with the policy of 41 CFR 1-16.403 which states: "Use of the form (including SF 23A) prescribed in Section 1-16.401 for negotiated (construction) contracts is optional."

Thus, while the policies of ASPR, Section IX and the FPR coincide as to use of a patent indemnity clause in negotiated construction contracts, those policies diverge with respect to formally advertised construction contracts. The PSC believes that ASPR policy is correct and to be preferred to that of the FPR.

In order to evaluate and compare the policies of ASPR, Section IX and the FPR more fully in this area it is appropriate to consider also the divergence between those policies regarding the use of a patent indemnity clause in supply contracts.

In contrast to its rigid policy of requiring a patent indemnity clause in all formally advertised construction contracts, 41 CFR 1-16.1 implemented by the Procurement Handbook, GSA, Federal Supply Service, 1959, prescribes a flexible policy regarding the use of a patent indemnity provision in supply contracts whether formally advertised or negotiated. Page 61 of that Procurement Handbook contains instructions regarding the use of Standard Form 32 and points out that Clause 13 of that form contains provisions relating only to notice and assistance regarding patent infringement. "Under some circumstances," the Handbook states: "the contracting

officer may feel that actual protection against asserted claims is warranted.

Either of the following two sample clauses will provide such protection:

"1. The contractor shall hold and save the Government, its officers, agents, servants, and employees, harmless from liability of any nature or kind, including costs and expenses, for or on account of any patented or unpatented invention, article or appliance manufactured or used in the performance of this contract, including their use by the Government.

"2. Patent Indemnity. The Contractor agrees to indemnify the Government and its officers, agent 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 hereunder. The foregoing indemnity shall not apply unless the Contractor shall have been informed as soon as practicable by the Government of the suit or action alleging such infringement, and shall have been given an opportunity to present recommendations as to the defense thereof; and further, such indemnity shall not apply in any one of the following situations: (1) any infringement resulting from the addition to any such supplies or other supplies not furnished by the Contractor for the purpose of such addition; (2) any settlement of a claim of infringement made without the consent of the Contractor, unless required by final decree of a court of competent jurisdiction."

The policy of ASPR on the other hand is rigid by comparison with that of the FPR regarding the use of a patent indemnity clause in formally advertised supply contracts. Thus, the clause of 9-103.1 "shall be included in formally advertised contracts for supplies when it has been determined in advance of issuing the invitation for bids that the supplies (or such supplies apart from relatively minor modifications to be made thereto) normally "are or have been sold or offered for sale by any supplier to the public in the commercial open market."

In negotiated supply contracts, ASPR 9-103.3 does not require a patent indemnity clause, but prohibits the use of such a clause unless the supplies

"are or have been sold or offered for sale by the contractor to the public in the commercial open market." ASPR 9-103 also contains the general prohibition against the use of a patent indemnity clause in any supply contract "where the contract is for supplies which clearly are not or have not been sold or offered for sale to the public in the commercial open market." Neither of these prohibitions appear in the FPR.

From the foregoing it is seen that the policy of GSA as reflected in the FPR is rigid with respect to the use of a patent indemnity provision in formally advertised construction contracts, while its policy is flexible in the case of supply contracts. By contrast, ASPR, Section IX policy in this regard is flexible in the field of construction contracts but contains a positive requirement and positive prohibitions with regard to supply contracts.

ASPR, Section IX policy is more logical than that of the FPR. The policy of Section IX, as stated above, is to require a patent indemnity provision in formally advertised contracts for supplies which are "standard commercial" with any supplier. The theory in such cases is to place all bidders on an equal basis. Where one bidder is a licensee under an agreement requiring the payment of patent royalties, the effect of permitting a non-licensee to bid against him without liability for patent indemnity is to favor the non-licensee bidder and discriminate against the licensee. The non-licensee in such cases is protected by the Government's authorization and consent and the eminent domain nature of Title 28, Section 1498, U. S. Code. In the absence of a patent indemnity obligation he enjoys a

competitive bidding advantage equal to a percentage represented by the royalty payment obligation on the patent licensee.

The situation is different in negotiated supply contracts. Here, a patent indemnity clause may not be used under ASPR [except as authorized in 9-103(i)(B)] unless the supplies are "standard commercial" with the Contractor. The reason for this is that the Government is seeking only the same patent indemnity that an ordinary purchaser in the commercial open market receives from the vendor as to his standard commercial product. When a Government Contractor is required to furnish supplies which are not standard commercial with him, a patent indemnity clause should not be used.

The reason ASPR deals differently with construction contracts than it does in supply contracts with regard to the requirement to use a patent indemnity provision is believed to be the recognition that many supply items are the same or similar to those sold commercially under circumstances which carry a warranty of merchantability which implies a patent indemnity obligation on the seller, whereas a parallel situation would be unusual in the case of construction work. Most construction contracts call for the contractor to build according to detailed plans and specifications. Nevertheless, ASPR permits the use of a patent indemnity clause in construction contracts. Such a clause is, as noted earlier, "appropriate" in formally advertised construction contracts. The language of the clause of 9-103.2 (Not Predetermined) limits its application to construction work which "normally is of a type performed for the public in the commercial open market." Again, the PSC believes that ASPR policy regarding the use of patent indemnity provisions is to be preferred to that of the FPR.

DIFFERENT PROVISIONS IN ASPR AND FPR CLAUSES

The patent indemnity clause of SF 23A contains none of the following exceptions recited in both the clauses of ASPR 9-103.1 and 9-103.2:

"The foregoing indemnity shall not apply unless the Contractor shall have been informed as soon as practicable by the Government of the suit or action alleging such infringement, and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in the defense thereof; and further, such indemnity shall not apply if: (i) the infringement results from compliance with specific written instructions of the Contracting Officer directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance of the contract not normally used by the Contractor; or (ii) the infringement results from addition to, or change in, such supplies or components furnished or construction work performed which addition or change was made subsequent to delivery or performance by the Contractor; or (iii) the claimed infringement is settled without the consent of the Contractor, unless required by final decree of a court of competent jurisdiction."

Nor, of course, does the clause of SF 23A limit its application to construction work which is of a "standard commercial" nature as does the clause of ASPR 9-103.2.

The opinion has been expressed on more than one occasion that the above exceptions of the clauses of ASPR 9-103.1 and 9-103.2 would be implied even if not expressly recited. If so, the argument is made that the ASPR predetermined indemnity clause is the legal equivalent of clause 13 of SF 23A. The PSC agrees that, except for some doubt regarding the words: "or directing a manner of performance of the contract not normally used by the Contractor", this is probably true. But to a Contractor the ASPR clause is very apt to appear less demanding than that of SF 23A. He may well derive considerable reassurance from the recited exceptions.

And if the foregoing exceptions in the clauses of 9-103.1 and 9-103.2 would be implied even though not recited, what is to be gained by their omission, except the reduction of a few words? The Government may in fact incur a disadvantage by such omission. As a practical matter, although it would be difficult to establish or disprove, the Government may pay more for the SF 23A clause than for an ASPR clause in construction contracts because of Contractors' price increments added as contingencies in view of what appears to be an additional liability under the broader patent indemnity imposed by SF 23A.

The PSC considers the language of the ASPR patent indemnity provisions more appropriate for construction contracts than that of SF 23A.

DEVIATION FROM THE FPR REQUIRED?

If recommendations 1, 2 and 3 above are adopted, the question should be resolved whether the continued application of ASPR 9-103 to construction contracts constitutes a deviation from the Federal Procurement Regulations as defined in 41 CFR 1-1.009-1(a) (see Tab B). If so, deviation control should apparently be effected in accordance with procedures set forth in 41 CFR 1-1.009-2 (Tab B) and 41 CFR 1-16.404(b) (Tab A).

The use of patent indemnity clauses, commercial status predetermined and not predetermined, long antedates the Federal Procurement Regulations of March 1959. Prior to that date, effective 1 December 1953, General Regulation No. 13 of GSA first prescribed the use of the patent indemnity clause which now appears in SF 23A (Tab C). General Regulation No. 13 at that time rather clearly permitted the Department of Defense to authorize the use of clauses inconsistent with standard GSA clauses. A subsequent

amendment to GSA Regulation No. 13 commenced a requirement that deviations in "classes" of cases should be a joint effort between the agency desiring the deviation and the GSA unless "circumstances would preclude such joint effort." Thus on 10 June 1959, the effective date of General Regulation No. 13, revised, (Tab D) the question appears to have been raised for the first time whether the Department of Defense is excluded from a requirement to use standard forms and clauses in classes of contracts without joint approval with GSA.

As of March 1959 the above question became more clearly raised. Section 1-1.009-1(a) of 41 CFR, effective 27 March 1959, (Tab B) describes a "deviation" as including the situation: "When a prescribed contract clause is set forth verbatim, use of a contract clause covering the same subject matter which varies from that set forth." Prior use by DOD of a different patent indemnity clause from that in SF 23A would not appear to avoid the question whether such use after March 1959 constitutes a "deviation" as above defined.

An argument may be made that 41 CFR 1-16.404(a) (Tab A) expressly permits the use of ASPR patent indemnity clauses in Defense Construction contracts. It states: "Additional terms, conditions and provisions considered by any agency to be essential to its contractual relationships and not inconsistent with those contained in the forms prescribed in Subpart 1-16.4 may be incorporated in the invitations for bids in which these forms are used - - -." Section 1-16.401(g) prescribes SF 23A.

If it be assumed that the ASPR forms of patent indemnity clauses are "essential" to DOD contractual relationships, the question is then whether

they are "inconsistent" with the terms of SF 23A. It may be said with considerable logic that the use of both the patent indemnity clause of SF 23A and that of either ASPR 9-103.1 or 9-103.2 is expressly permitted. The basis for this is that clause 13, Patent Indemnity, begins: "Except as otherwise provided - - -." Thus, the clause itself appears to recognize that another indemnity provision which predominates may be included in the contract. The PSC feels that the use of both the patent indemnity clause of SF 23A and an ASPR 9-103 clause is expressly permitted under 41 CFR 1-16.404(a). This practice is followed in a certain class of Air Force contracts for family housing construction, but whether for the above reason or not is not known. These contracts, known as "Wherry Rehabilitation and Improvement Housing" contracts, contain both the clause 13 of SF 23A and that of ASPR 9-103.2 (Not Predetermined).

It is not as easy to urge that the use of an ASPR clause in place of clause 13 of SF 23A is permitted under 41 CFR 1-16.404(a); the reason being that only "additional terms, conditions and provisions" are expressly permitted.

There also may be a further question as to whether the use after March 1959 of an ASPR prescribed patent indemnity clause differing from that of SF 23A constitutes a deviation under 41 CFR, Section 1-1.009-1(b) (Tab B) as involving the use of a different "form" from that prescribed in the Regulation. It seems to the PSC, however, that if a question of a deviation is raised at all, it would arise under Section 1-1.009-1(a).

In view of the foregoing considerations, it is felt that the ASPR Committee should, in the event that recommendations 1, 2 and 3 above are adopted, determine whether or not deviation control is necessary under the procedures prescribed in 41 CFR, Sections 1-1.009-2 and 1-16.404(b).

PATENT INDEMNITY CLAUSES CURRENTLY USED

In accordance with its assignment, the PSC has ascertained from construction elements of the Departments the patent indemnity clauses currently used in those construction contracts which utilize SF 23A. Army and Navy construction contracts currently use the patent indemnity provision of SF 23A. The Army, prior to 20 July 1961, used the Patent Indemnity Clause (Predetermined) of ASPR 9-103.1 as a substitute for the Patent Indemnity Clause of SF 23A in accordance with Paragraph 7-603, "Engineer Contracts Instructions". The Navy Yards and Docks has used the Patent Indemnity Clause of SF 23A since approximately April 1961, pursuant to Navy Manual TP-AD-4.

In Air Force contracts for the construction of "Capehart - Rains" family type housing under Public Law 345 - 84th Congress, as amended, a patent indemnity clause (predetermined), substantially identical with ASPR 9-103.1, is currently used, and has been so used since 1959. The patent indemnity clause in these contracts differs only slightly from the clause in ASPR 9-103.1 in that it provides that the "eligible builder" (i.e. the contractor) shall indemnify the Government and its officers, agents, and employees and the Mortgagor-Builder (a dummy corporation). Tab E contains the patent indemnity portion of a combined Patent Indemnity Notice and Assistance Authorization and Consent clause used in the above type of Air Force construction contracts.

Another class of Air Force family housing construction contracts are the so-called "Wherry R&I Housing" contracts referred to earlier. The PSC is advised that Section 404(a) of the National Housing Act provides authority to buy privately owned housing projects and to improve, rehabilitate, and repair these housing projects which were built under FHA and rented to military personnel. These contracts, as stated above, contain both the patent indemnity clause of SF 23A and also the Patent Indemnity (Not Predetermined) Clause of ASPR 9-103.2.

Approximately 90% of Air Force construction projects (exclusive of the family housing type referred to above) are not contracted by the Air Force, but by the Corps of Engineers or by the Bureau of Yards and Docks. Only the remaining 10% of these are contracted by the Air Force for the maintenance and repair or alteration of existing constructions. Some of these latter contracts, however, involve large expenditures. It has been the practice to insert the patent indemnity clause of ASPR 9-103.1 (Predetermined) in these contracts. Nevertheless, the opinion has been expressed by a contracting officer of the Construction Procurement Branch, Procurement Division, Wright-Patterson AFB that ASPR should permit the alternative use of the clause of ASPR 9-103.2 (Not Predetermined) in R&D type construction contracts (as, for example, the modification of, or addition to a wind tunnel, jet engine test cell, etc.). In these relatively few instances it seems hardly equitable or even logical to require patent indemnity of the Contractor extending beyond any part of the construction work which might be "standard commercial". While it is probable that such contracts would be negotiated, rather than advertised, it seems entirely possible that some would be formally advertised.

Since 21 November 1961, of course, (90 days after the publication date of Revision No. 5) ASPR 16-401.1 requires the use of SF 23A in formally advertised construction contracts.

ASPR 16-401.1 IS INCONSISTENT WITH ESTABLISHED POLICY OF 9-103

Admittedly, the flexible policy of ASPR Section IX, in contrast to the policy of the FPR, may result in lack of uniformity in the use of patent indemnity clauses in formally advertised construction contracts using SF 23A. As seen above, the Air Force has been using the clause of ASPR 9-103.1 modified to suit "Capehart - Rains" housing contracts. Both the patent indemnity clauses of ASPR 9-103.2 and SF 23A have been used in another class of housing contracts. In certain other construction contracts (other than housing), the Air Force has been using the clause of ASPR 9-103.1. It is not clear how two of the above classes of Air Force construction contracts are deemed to be of predetermined "standard commercial" status, while another class of construction contracts is considered of "not predetermined commercial status". Nevertheless, for reasons stated earlier, the flexible policy of ASPR Section IX is preferred.

The requirement of ASPR 16-401.1 (vii) to use SF 23A presents a problem: how to justify a different policy with regard to the scope of the patent indemnity clauses in construction contracts from that of the clauses used in supply contracts? The PSC can see no logical basis for distinction. The basic criterion as expressed in ASPR Section IX governing the use and scope of the patent indemnity provision is and should remain whether the Contractor's

product is "standard commercial", and substantially without regard to whether that product is supplies or construction.

Since the PSC was requested to consider this subject in its most basic aspect, some thought was given to whether a patent indemnity provision should be required at all in construction contracts. The clause does not appear to cause much concern to contractors, at present, but questions of patent infringement do arise occasionally in connection with construction work. Recently, litigation has been filed or threatened regarding spherical structures, "blast fences" for jet noise deflection, acoustic test cells for jet engines, and runway lighting installations, to cite a few examples. No cogent reasons could be advanced for eliminating the clause from construction contracts without also eliminating the clause from supply contracts. The theory of ASPR's policy in Section IX regarding patent indemnity in advertised contracts has already been explained. The clause should not be abolished in either class of contracts.

ASPR COMMITTEE

CASE 61-111
CASE 61-19

EXCERPTS FROM 41-CFR 1-16.404

* * *

1-16.404 Terms, conditions, and provisions.

(a) Additional terms, conditions, and provisions considered by any agency to be essential to its contractual relationships and not inconsistent with those contained in the forms prescribed in this Subpart 1-16.4 may be incorporated in invitations for bids in which these forms are used by so providing in addenda to the forms, in the Alterations paragraph of Standard Form 23, in the schedule, or in the specifications, as appropriate, in accordance with agency implementing instructions. Each executive agency shall review periodically such additional terms, conditions, and provisions which are in common use in such agency with a view to standardization of those in general use and elimination of unnecessary additions, and shall, from time to time, forward to the Administrator of General Services such additional terms, conditions, and provisions as are considered desirable for inclusion in the standard forms.

(b) In the interest of establishing and maintaining uniformity in Government contracts to the greatest extent feasible, deviations from

the forms prescribed in this Subpart 1-16.4 shall be kept to a minimum. Deviations may be authorized in accordance with Section 1-1.009 of this chapter. When a deviation is authorized, changes shall be made in addenda to the forms, in the Alterations paragraph of Standard Form 23, in the schedule, or in the specifications, as appropriate, in accordance with agency implementing instructions. * * *

* * *

TAB B
PSC 20/11/61

ASPR COMMITTEE

CASE 61-111
61-19

EXCERPTS FROM FEDERAL PROCUREMENT REGULATIONS CIRCULAR NO. 1,
DATED 27 MARCH 1953

GENERAL SERVICES ADMINISTRATION
Washington 25, D. C.

FPR CIRCULAR NO. 1
March 27, 1959

FEDERAL PROCUREMENT REGULATIONS

FPR Circulars. This is the first of a series of "FPR Circulars" which will be used to transmit, from time to time, new or revised Federal Procurement Regulations material prescribed by the Administrator of General Services under the Federal Property and Administrative Services Act of 1949. Each circular will identify material transmitted (both generally and by specific page number), summarize major additions or revisions, specify applicable effective dates, and will include filing instructions and notes. FPR Circulars may also contain procurement policies and procedures which are effective for less than six months, are instituted on an experimental basis, or require such expedited publication that their preparation in FPR form would not then be practicable.

* * *

SUBPART 1-1.0 REGULATION SYSTEM

1-1.000 Scope of part.

This part sets forth policies and procedures concerning: the Federal Procurement Regulations System; definition of terms used throughout this chapter; general policies of procurement; contingent fees; debarred and ineligible bidders; small business concerns; and reporting possible anti-trust violations.

1-1.001 Scope of subpart.

This subpart sets forth introductory information pertaining to the Federal Procurement Regulations System; its purpose, authority, applicability, issuance, arrangement, implementation, and deviation procedure.

1-1.002 Purpose.

This subpart establishes the Federal Procurement Regulations System for the codification and publication of uniform policies and procedures applicable to the procurement of personal property and nonpersonal services (including construction) by executive agencies, except as limited by the provisions of section 1-1.004 with respect to the Department of Defense. The System includes regulations prescribed by the Administrator of General Services, called the Federal Procurement Regulations (FPR), as well as individual agency procurement regulations which implement and supplement the FPR.

1-1.003 Authority.

The Federal Procurement Regulations System is prescribed by the Administrator of General Services under the Federal Property and Administrative Services Act of 1949, and the FPR are developed in cooperation with the procurement agencies and are issued by him under the Act or other authority specially cited.

1-1.004 Applicability.

Federal Procurement Regulations apply to all Federal agencies to the extent specified in the Federal Property and Administrative Services Act of 1949 or in other law. Except for standard Government forms and clauses, Federal Specifications and Standards, and except as directed by the President, Congress, or other authority, these Regulations are not mandatory on the Department of Defense. Therefore, the extent of their implementation within the Department of Defense and participation in the System will be determined by that Department. The Regulations apply to procurements made within and outside the United States unless otherwise specified.

1-1.005 Exclusions.

Certain Government-wide policies and procedures which come within the scope of this chapter nevertheless may be excluded from Federal Procurement Regulations. These exclusions include the following categories:

- (a) Subject matter which bears a security classification.

(b) Policy or procedure which is expected to be effective for a period of less than six months.

(c) Policy or procedure which is being instituted on an experimental basis for a reasonable period.

1-1.006 Issuance.

1-1.006-1 Code arrangement.

Federal Procurement Regulations are issued in the Code of Federal Regulations as Chapter I of Title 41, Public Contracts. Succeeding chapters of Title 41 are devoted to implementing and supplementing material developed and issued by particular Federal agencies to govern their procurement activities, as well as regulations of general application to procurement agencies issued by other Federal regulatory agencies, such as the Department of Labor under the Walsh-Healey Public Contracts Act.

1-1.006-2 Publication.

Federal Procurement Regulations are published (in Title 41) in the daily issue of the FEDERAL REGISTER, in cumulated form in the Code of Federal Regulations, and in separate loose-leaf volume form.

1-1.006-3 Copies.

Copies of Federal Procurement Regulations in Federal Register and Code of Federal Regulations form may be purchased by Federal agencies and the public, at nominal cost, from the Superintendent of Documents, Government Printing Office, Washington 25, D.C. Copies of Federal Procurement Regulations in loose-leaf volume form may be obtained by Federal agencies from the General Services Administration, in a very limited quantity, and may be purchased by the public from the Superintendent of Documents.

1-1.006-4 Coordination.

In the development of Federal Procurement Regulations, there will be solicited the views of interested Federal agencies and, where appropriate and feasible, the views of interested business and professional organizations. The Regulations will be coordinated with the Small Business Administration to assure adequate consideration of small business interests.

1-1.007 Arrangement.

1-1.007-1 General plan.

The general plan, numbering system, and nomenclature used in the Federal Procurement Regulations conform with Federal Register standards approved for the FPR.

1-1.007-2 Numbering.

The numbering system permits identification of every unit. The first digit represents the chapter number allocated to each agency, followed by a dash. This is followed by the part number which may be one or more digits followed by a decimal point. The numbers after the decimal point represent, respectively, the subpart, section (in two digits), and, after the dash, subsection, paragraph, subparagraph, and further inferior divisions. For example, this division is called "section 1-1.007-2," in which the first digit denotes the chapter, the second the part, the third the subpart, the fourth and fifth the section, and the sixth the subsection.

1-1.007-3 Citation.

Federal Procurement Regulations will be cited in accordance with Federal Register standards approved for the FPR. Thus, this section, when referred to in divisions of the Federal Procurement Regulations, should be cited as "section 1-1.007-3 of this chapter." When this section is referred to formally in official documents, such as legal briefs, it should be cited as "41 CFR 1-1.007-3." Any Section of Federal Procurement Regulations may be informally identified, for purposes of brevity, as "FPR" followed by the section number, such as "FPR 1-1.007-3."

1-1.008 Agency implementation.

As portions of FPR material are prescribed agencies shall publish in the FEDERAL REGISTER implementing regulations deemed necessary for business concerns, and others properly interested, to understand basic and significant agency procurement policies and procedures which implement, supplement, or deviate from the FPR. Detailed instructions of interest primarily for internal agency guidance need not be published. Implementing regulations shall be prepared to conform with FPR style and arrangement.

1-1.009 Deviation.

1-1.009-1 Description.

As used in these Regulations, the term "deviation" includes any of the following actions:

(a) When a prescribed contract clause is set forth verbatim, use of a contract clause covering the same subject matter which varies from that set forth.

(b) When a standard or other form is prescribed, use of any other form for the same purpose.

(c) Alteration of a prescribed standard or other form, except as may be authorized in the Regulations.

(d) The imposition of lesser or, where the regulation expressly prohibits, greater limitations than are imposed upon the use of a contract clause, form, procedure, type of contract, or upon any other procurement action, including but not limited to, the making or amendment of a contract, or actions taken in connection with the solicitation of bids or proposals, award, administration, or settlement of contracts.

(e) When a policy or procedure is prescribed, use of any inconsistent policy or procedure.

1-1.009-2 Procedure.

In the interest of establishing and maintaining uniformity to the greatest extent feasible, deviations from the Federal Procurement Regulations shall be kept to a minimum and controlled as follows:

(a) The head of each agency exercising procurement authority shall prescribe a formal procedure for the control of deviations within the agency. A copy of the procedure shall be furnished to the General Services Administration.

(b) In individual cases, deviations may be authorized by the head of the agency or the officers designated by him for this purpose, in accordance with procedures established by the agency. In each instance the file shall disclose the nature of the deviation and the reasons for such special action.

(c) Deviations in classes of cases shall be considered on an expedited basis jointly by the agency desiring the deviation and the General Services Administration unless, in the considered judgment of the agency and with

due regard to the objective of uniformity, circumstances preclude such joint effort. In such case, GSA will be notified of the deviation.

(d) Except as otherwise authorized, when any deviation in a contract form provision is authorized, physical change may not be made in the printed form but shall be made by appropriate provision in the schedule, specifications, or continuation sheet, as provided in agency procedures.

ASPR COMMITTEE

CASE 61-111
CASE 61-19

EXCERPTS FROM GSA- GENERAL REGULATIONS NO. 13, REVISED;

DATED 29 JANUARY 1959

GENERAL SERVICES ADMINISTRATION
Washington 25, D. C.

January 29, 1959

GENERAL REGULATION NO. 13, Revised

TO: Heads of Federal Agencies

SUBJECT: Standard Forms for Construction Contracts

1. General. This revised regulation prescribes standard forms for construction contracts. The principal purpose is to prescribe the small amount construction contract forms. A change in Standard Form 23A is prescribed. Standard Form 21 is changed only to conform the small business representation to the definition promulgated by the Small Business Administration for the construction industry (23 F. R. 3099). No changes are made in Standard Forms 20, 22, and 23.
2. Definitions. The terms used in this regulation shall have the meaning given them in the Federal Property and Administrative Services Act of 1949 (Public Law 152, 81st Congress), as amended.
3. Promulgation of Forms. Pursuant to the Federal Property and Administrative Services Act of 1949, as amended, the following standard forms, copies of which are attached, are prescribed:

<u>Form</u> <u>No.</u>	<u>Title</u>	<u>Date</u>
19	Invitation, Bid, and Award (Construction, Alteration, or Repair)	January 1959

19A	Labor Standards Provisions — Applicable to Contracts in Excess of \$2,000	January 1959
20	Invitation for Bids (Construction Contract)	March 1953
21	Bid Form (Construction Contract)	January 1959
22	Instructions to Bidders (Construction Contract)	March 1953
23	Construction Contract	March 1953
23A	General Provisions (Construction Contract)	March 1953

4. Mandatory Use of Forms. The use by Federal agencies of the above forms is mandatory for fixed price contracts, entered into pursuant to formal advertising, for construction, alteration, or repair of public buildings or works, except for: contracts for the construction, alteration, or repair of vessels; contracts for construction, alteration, or repair work in foreign countries; and as otherwise provided by regulation of the General Services Administration. * * *
5. Optional Use of Forms. Use of the forms prescribed in this regulation for negotiated contracts is optional. However, in the interest of uniformity, it is recommended that these forms be used (within the areas outlined in section 4 above) for contracts entered into on the basis of competitive bids but which are termed negotiated contracts because the requirements of formal advertising are not fully met. When used for negotiated contracts, the forms may be adapted as required by agency procedures (e. g., the requirement that bids be "sealed" and "publicly opened" may be lined out or obliterated, and language may be added to indicate that the contract is negotiated).

(Paragraph 6 Omitted)

7. Terms, Conditions, and Provisions

- a. Additional Terms, Conditions, and Provisions. Additional terms, conditions, and provisions considered by any agency to be essential to its contractual relationships and not inconsistent with those contained in the forms prescribed in this regulation may be incorporated in invitations for bids in which these forms are used by so providing in addenda to the forms, in the "Alterations" paragraph of Standard Form 23, in the schedule or in the specifications, as may be appropriate in accordance with agency implementing instructions. Each executive agency shall periodically review such additional terms, conditions, and provisions which are in common use in such agency with a view to standardization of those in general use and elimination of unnecessary additions, and shall, from time to time, forward to the Administrator of General Services such additional terms, conditions, and provisions as are considered desirable for inclusion in the standard forms.

- b. Inconsistent Terms, Conditions, and Provisions. In the interest of establishing and maintaining uniformity in Government contracts to the greatest extent feasible, deviations from standard forms prescribed in this regulation shall be kept to a minimum. Deviations may be authorized in individual cases by the head of an executive agency (including for this purpose any military department) or the officials designated by him for this purpose, in accordance with procedures established by each agency. Consideration of a deviation in classes of cases shall be a joint effort between the agency desiring the deviation and the General Services Administration unless, in the considered judgment of the agency, and with due regard to objectives of uniformity, circumstances preclude such joint effort. * * *

(Paragraphs 8 through 12 omitted)

13. Effective Date. This revision shall become effective June 1, 1959.

Standard Form 23A March 1953 edition was attached to the above Revised Regulation (1959) and contained the identical patent indemnity clause found in the original GSA - General Regulation No. 13 (1953) included in Tab C.

ASPR COMMITTEE

CASE 61-111
CASE 61-19

PATENT INDEMNITY CLAUSE USED SINCE 1959 IN AIR FORCE CONTRACTS FOR THE
CONSTRUCTION OF CAPEHART-RAINS HOUSING (P.L. 345 - 84TH CONGRESS, AS AMENDED)

(a) If the amount of this contract is in excess of \$5,000, the eligible builder shall indemnify the Government and its officers, agents, and employees and the mortgagor-builder against liability, including costs, for infringement of any United States letters patent (except letters patents issued upon an application which is now or may hereafter be kept secret or otherwise withheld from issue by order of the Government of the United States) arising out of the manufacture or delivery of supplies or out of construction, alteration, modification, or repair of real property (hereinafter referred to as "construction work") under this Housing Contract, or out of the use or disposal by or for the account of the Department of such supplies or construction work. The foregoing indemnity shall not apply unless the eligible builder shall have been informed as soon as practicable by the Department of the suit or action alleging such infringement, and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in the defense thereof; and further, such indemnity shall not apply if: (i) the infringement results from compliance with specific written

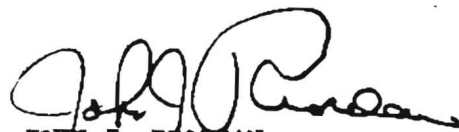
instructions of the Contracting Officer directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance of the contract not normally used by the eligible builder; or (ii) the infringement results from the addition to, or change in, the supplies furnished or construction work performed, which addition or change was made subsequent to delivery or performance by the eligible builder; or (iii) the claimed infringement is settled without the consent of the eligible builder, unless required by final decree of a court of competent jurisdiction.

41-19
OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE

30 June 1961

TO: Colonel Thybony *Carter* *Cover*

Thank you very much for your reassurance
Thursday that the decision to require inspection
systems for construction in ASPR had been
sustained.



JOHN J. RIORDAN
Staff Director for
Quality Control and
Reliability

A 9407

JUN 28 1961
RSH

PI

MEMORANDUM TO THE CHAIRMAN OF THE ASPR COMMITTEE

SUBJECT: Report of the Chairman of the Subcommittee for Construction Contract Clauses, Case 61-19

A copy of the Subcommittee Case 61-19 report discloses that the subcommittee apparently has recommended the deletion of the clause for "Construction Inspection System" which would appear at 7-602.10 in ASPR. This recommendation for deletion is contrary to the disposition designated by Captain Maloy, Chairman of the ASPR ~~Sub~~Committee, on 18 November 1960 when final disposition of ASPR Case 60-66 "Inspection and Acceptance in Construction Contracts" was directed. At that time after consultation with the General Service Administration, it was decided that the inspection system requirement would be a part of ASPR even though it would not be a requirement of the Federal Procurement Regulation.

Previous to the GSA meeting on 21 September when the ASPR Committee considered the Case 60-66 Subcommittee report and a minority report from the Subcommittee, there was a unanimous decision to accept the minority report which called for an inspection system clause and later the editing committee was instructed to revise proposed wording so that an "Inspection System" was required.

In view of these circumstances the Quality Control and Reliability Division, cannot concur with the Case 61-19 Subcommittee report of 19 June 1961 and recommends action by the ASPR Committee to initiate the ASPR requirement for an inspection system clause as previously directed by the ASPR Committee.

Richard P. Hussey
RICHARD P. HUSSEY

Quality Control and Reliability
Division
Office of Production Policy

*A review
as to
when it
will be
published*



OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON 25, D. C.

30913

CR

61-19

INSTALLATIONS AND LOGISTICS

April 3, 1961

MEMORANDUM FOR CAPTAIN MALLOY

Today I had a meeting with Jim Nash, John Kookan, George Markey and Herb Gallup on the proposed GSA Disputes Clause to be put in Standard Form 23A. All present agreed that the proposed language had no basic difference in meaning from our present language, but that it was extremely confusing and might lead to the conclusion that a change was intended. It was felt by the Army and the Air Force that no useful purpose would be served by making a high level argument out of this problem since we would inevitably lose. The Navy felt that as a matter of strategy one more pitch should be made to get the GSA to stay with our existing language. Subsequently, I discussed this with Nash and Stempler. They agreed that we could not win and that under no circumstances should this problem be served beyond Tom Morris - if we go that far.

I concluded that the best way to handle the matter was to discuss it with Charlie Gasque in a completely frank manner. This I have done.

I told him that we thought that the proposed substitute language was very inartistic, completely confusing as to meaning and, hence, far less to be preferred than our existing clause. I strongly urged him to stand up to the GAO and support our existing clause. I told him, however, that if he was unable to do so for any reason we would not make an issue of this matter at a higher level.

He agreed that the language was not satisfactory but has concluded, largely because of the strong position taken by his General Counsel, that he cannot buck the GAO at this time. He is aware of the fact that the same issue will arise subsequently with respect to Standard Form 32 and hopes to be able to take a more positive position at that time. Under the circumstances I have signed off on this clause with him.

Peto - You will want to advise the ASPR Committee

[Signature]
GRAEME C. BANNERMAN

Attachment

Disputes Clause

C
O
P
Y

3-31-61

Mr. Steger:

I have told George Markey that I think we should oppose this on the basis that the change would only confuse the issue.

I appreciate that it is difficult to argue against the use of statutory language as a compromise. If this proposal had been made in 1954 when the Wunderlich statute was enacted, I might have been disposed to go along. But to change our clause now can only give the impression that a substantive change is intended - a result which we do not intend - but GAO no doubt does intend. Hence the change at this time would muddy the waters so that no one could say with assurance what the clause means.

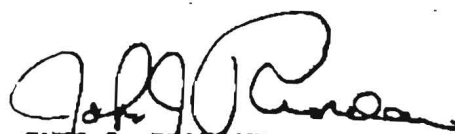
S.

41-19
OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE

30 June 1961

TO: Colonel Thybony *Carter*
Covey

Thank you very much for your reassurance
Thursday that the decision to require inspection
systems for construction in ASPR had been
sustained.


JOHN J. RIORDAN
Staff Director for
Quality Control and
Reliability

A 9407

JUN 28 1961
RHF

PI

MEMORANDUM TO THE CHAIRMAN OF THE ASPR COMMITTEE

SUBJECT: Report of the Chairman of the Subcommittee for Construction Contract Clauses, Case 61-19

A copy of the Subcommittee Case 61-19 report discloses that the subcommittee apparently has recommended the deletion of the clause for "Construction Inspection System" which would appear at 7-602.10 in ASPR. This recommendation for deletion is contrary to the disposition designated by Captain Maloy, Chairman of the ASPR ~~Sub~~Committee, on 18 November 1960 when final disposition of ASPR Case 60-66 "Inspection and Acceptance in Construction Contracts" was directed. At that time after consultation with the General Service Administration, it was decided that the inspection system requirement would be a part of ASPR even though it would not be a requirement of the Federal Procurement Regulation.

Previous to the GSA meeting on 21 September when the ASPR Committee considered the Case 60-66 Subcommittee report and a minority report from the Subcommittee, there was a unanimous decision to accept the minority report which called for an inspection system clause and later the editing committee was instructed to revise proposed wording so that an "Inspection System" was required.

In view of these circumstances the Quality Control and Reliability Division, cannot concur with the Case 61-19 Subcommittee report of 19 June 1961 and recommends action by the ASPR Committee to initiate the ASPR requirement for an inspection system clause as previously directed by the ASPR Committee.

Richard P. Hussey
RICHARD P. HUSSEY

Quality Control and Reliability
Division
Office of Production Policy

*Action
as to
when it
will be
published*

Disputes Clause

C
O
P
Y

3-31-61

Mr. Steger:

I have told George Markey that I think we should oppose this on the basis that the change would only confuse the issue.

I appreciate that it is difficult to argue against the use of statutory language as a compromise. If this proposal had been made in 1954 when the Wunderlich statute was enacted, I might have been disposed to go along. But to change our clause now can only give the impression that a substantive change is intended - a result which we do not intend - but GAO no doubt does intend. Hence the change at this time would muddy the waters so that no one could say with assurance what the clause means.

S.



OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON 25, D. C.

30913
CR
61-19

INSTALLATIONS AND LOGISTICS

April 3, 1961

MEMORANDUM FOR CAPTAIN MALLOY

Today I had a meeting with Jim Nash, John Kookan, George Markey and Herb Gallup on the proposed GSA Disputes Clause to be put in Standard Form 23A. All present agreed that the proposed language had no basic difference in meaning from our present language, but that it was extremely confusing and might lead to the conclusion that a change was intended. It was felt by the Army and the Air Force that no useful purpose would be served by making a high level argument out of this problem since we would inevitably lose. The Navy felt that as a matter of strategy one more pitch should be made to get the GSA to stay with our existing language. Subsequently, I discussed this with Nash and Stempler. They agreed that we could not win and that under no circumstances should this problem be served beyond Tom Morris - if we go that far.

I concluded that the best way to handle the matter was to discuss it with Charlie Gasque in a completely frank manner. This I have done.

I told him that we thought that the proposed substitute language was very inartistic, completely confusing as to meaning and, hence, far less to be preferred than our existing clause. I strongly urged him to stand up to the GAO and support our existing clause. I told him, however, that if he was unable to do so for any reason we would not make an issue of this matter at a higher level.

He agreed that the language was not satisfactory but has concluded, largely because of the strong position taken by his General Counsel, that he cannot buck the GAO at this time. He is aware of the fact that that the same issue will arise subsequently with respect to Standard Form 32 and hopes to be able to take a more positive position at that time. Under the circumstances I have signed off on this clause with him.

*Pete, - you will want to
advise the SPR Committee*

[Signature]
GRAEME C. BANNERMAN

Attachment

1-1.007 Arrangement.

1-1.007-1 General plan.

The general plan, numbering system, and nomenclature used in the Federal Procurement Regulations conform with Federal Register standards approved for the FPR.

1-1.007-2 Numbering.

The numbering system permits identification of every unit. The first digit represents the chapter number allocated to each agency, followed by a dash. This is followed by the part number which may be one or more digits followed by a decimal point. The numbers after the decimal point represent, respectively, the subpart, section (in two digits), and, after the dash, subsection, paragraph, subparagraph, and further inferior divisions. For example, this division is called "section 1-1.007-2," in which the first digit denotes the chapter, the second the part, the third the subpart, the fourth and fifth the section, and the sixth the subsection.

1-1.007-3 Citation.

Federal Procurement Regulations will be cited in accordance with Federal Register standards approved for the FPR. Thus, this section, when referred to in divisions of the Federal Procurement Regulations, should be cited as "section 1-1.007-3 of this chapter." When this section is referred to formally in official documents, such as legal briefs, it should be cited as "41 CFR 1-1.007-3." Any Section of Federal Procurement Regulations may be informally identified, for purposes of brevity, as "FPR" followed by the section number, such as "FPR 1-1.007-3."

1-1.008 Agency implementation.

As portions of FPR material are prescribed agencies shall publish in the FEDERAL REGISTER implementing regulations deemed necessary for business concerns, and others properly interested, to understand basic and significant agency procurement policies and procedures which implement, supplement, or deviate from the FPR. Detailed instructions of interest primarily for internal agency guidance need not be published. Implementing regulations shall be prepared to conform with FPR style and arrangement.

1-1.009 Deviation.

1-1.009-1 Description.

As used in these Regulations, the term "deviation" includes any of the following actions:

(a) When a prescribed contract clause is set forth verbatim, use of a contract clause covering the same subject matter which varies from that set forth.

(b) When a standard or other form is prescribed, use of any other form for the same purpose.

(c) Alteration of a prescribed standard or other form, except as may be authorized in the Regulations.

(d) The imposition of lesser or, where the regulation expressly prohibits, greater limitations than are imposed upon the use of a contract clause, form, procedure, type of contract, or upon any other procurement action, including but not limited to, the making or amendment of a contract, or actions taken in connection with the solicitation of bids or proposals, award, administration, or settlement of contracts.

(e) When a policy or procedure is prescribed, use of any inconsistent policy or procedure.

1-1.009-2 Procedure.

In the interest of establishing and maintaining uniformity to the greatest extent feasible, deviations from the Federal Procurement Regulations shall be kept to a minimum and controlled as follows:

(a) The head of each agency exercising procurement authority shall prescribe a formal procedure for the control of deviations within the agency. A copy of the procedure shall be furnished to the General Services Administration.

(b) In individual cases, deviations may be authorized by the head of the agency or the officers designated by him for this purpose, in accordance with procedures established by the agency. In each instance the file shall disclose the nature of the deviation and the reasons for such special action.

(c) Deviations in classes of cases shall be considered on an expedited basis jointly by the agency desiring the deviation and the General Services Administration unless, in the considered judgment of the agency and with

due regard to the objective of uniformity, circumstances preclude such joint effort. In such case, GSA will be notified of the deviation.

(d) Except as otherwise authorized, when any deviation in a contract form provision is authorized, physical change may not be made in the printed form but shall be made by appropriate provision in the schedule, specifications, or continuation sheet, as provided in agency procedures.

ASPR COMMITTEE

CASE 61-111
CASE 61-19

EXCERPTS FROM GSA- GENERAL REGULATIONS NO. 13,
DATED 19 MARCH 1953

GENERAL SERVICES ADMINISTRATION
Washington 25, D. C.

March 19, 1953

GENERAL REGULATION NO. 13

TO: Heads of Federal Agencies

SUBJECT: Standard Forms for Construction Contracts

1. General. This Regulation, developed cooperatively by the General Services Administration, other civilian agencies, and the Department of Defense, prescribes revised standard forms for construction contracts.
2. Definitions. The terms used in this Regulation shall have the meaning given them in the Federal Property and Administrative Services Act of 1949 (Public Law 152, 81st Congress), as amended.
3. Promulgation of Forms. Pursuant to the Federal Property and Administrative Services Act of 1949 (Public Law 152, 81st Congress), as amended, the following standard forms, copies of which are attached, are prescribed:

Standard Form 20, Invitation for Bids (Construction Contract)
Standard Form 21, Bid Form (Construction Contract)
Standard Form 22, Instructions to Bidders (Construction Contract)
Standard Form 23, Construction Contract
Standard Form 23a, General Provisions (Construction Contract)

4. Mandatory Use of Forms. The use by Federal agencies of the above forms is mandatory except for (a) negotiated contracts; (b) contracts not exceeding \$2000; (c) contracts for the construction, alteration, and repair of vessels; (d) contracts for construction, alteration, and repair work in foreign countries; and (e) as otherwise provided by regulations of the General Services Administration.

5. Terms, Conditions, and Provisions.

a. Additional Terms, Conditions and Provisions. Additional terms, conditions and provisions considered by any agency to be essential to its contractual relationships and not inconsistent with those contained in the forms may be incorporated in invitations in which these forms are used by so providing in addenda to the forms, in the "Alterations" paragraph of Standard Form 23, or in the specifications, as may be appropriate. Each Federal agency shall periodically review such additional terms, conditions and provisions which are in common use in such agency with a view to standardization of those in general use and elimination of unnecessary additions, and shall, from time to time, forward to the Administrator of General Services such additional terms, conditions and provisions as are considered desirable for inclusion in the standard forms.

b. Inconsistent Terms, Conditions and Provisions. Terms, conditions and provisions which are inconsistent with those of the foregoing forms may not be used unless authorized by the head of the Federal agency (including for this purpose any Military Department) or the officer designated by him for this purpose. Authority to use inconsistent terms, conditions and provisions should be granted only after full consideration of the interests of uniformity. A copy of each such approval for use of inconsistent terms, conditions and provisions in a class of cases shall be forwarded to the Administrator of General Services.

Changes should not be made in the forms themselves, but should be made by so providing in addenda to the forms, in the "Alterations" paragraph of Standard Form 23, or in the specifications, as may be appropriate.

c. Changes in Clause 5(c) of Standard Form 23a. During periods of national emergency, Federal agencies may, with the prior approval of the Administrator of General Services, amend Clause 5(c) of Standard Form 23A by deleting the word "unforeseeable" and inserting after the word "causes," where it first appears in the first sentence, the phrase "other than normal weather,".

6. Forms Superseded. The existing standard forms listed below are superseded and shall not be used after the effective date of this Regulation:

Standard Form 20, Invitation for Bids (Construction Contract), approved by the President, November 19, 1926.

Standard Form 21, Bid (Construction Contract), approved by the Secretary of the Treasury, April 5, 1937.

Standard Form 22, Instructions to Bidders, approved by the Acting Secretary of the Treasury, July 13, 1939.

Standard Form 23, Construction Contract, approved by the Secretary of the Treasury, April 3, 1942.

All agency forms used for the purpose for which the Standard Forms herein are prescribed are superseded and shall not be used after the effective date of this Regulation.

(Paragraph 7 omitted)

8. Deviations. No deviation from the use of the forms prescribed by this Regulation or from the format of such forms is permissible without prior approval of the Administrator of General Services.

(Paragraphs 9 and 10 omitted)

11. Effective Date. The provisions of this Regulation shall become effective on June 19, 1953.

RUSSELL FORBES
Acting Administrator

ATTACHMENT - Par. 13, SF 23-A

Standard Form 23A, March 1953, attached to the above GSA - General Regulation No. 13 contained the following patent indemnity clause:

13. 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.

ATTACHMENT

ASPR COMMITTEE

CASE 61-111
CASE 61-19

EXCERPTS FROM GSA- GENERAL REGULATIONS NO. 13, REVISED;
DATED 29 JANUARY 1959

GENERAL SERVICES ADMINISTRATION
Washington 25, D. C.

January 29, 1959

GENERAL REGULATION NO. 13, Revised

TO: Heads of Federal Agencies

SUBJECT: Standard Forms for Construction Contracts

1. General. This revised regulation prescribes standard forms for construction contracts. The principal purpose is to prescribe the small amount construction contract forms. A change in Standard Form 23A is prescribed. Standard Form 21 is changed only to conform the small business representation to the definition promulgated by the Small Business Administration for the construction industry (23 F. R. 3099). No changes are made in Standard Forms 20, 22, and 23.
2. Definitions. The terms used in this regulation shall have the meaning given them in the Federal Property and Administrative Services Act of 1949 (Public Law 152, 81st Congress), as amended.
3. Promulgation of Forms. Pursuant to the Federal Property and Administrative Services Act of 1949, as amended, the following standard forms, copies of which are attached, are prescribed:

<u>Form</u> <u>No.</u>	<u>Title</u>	<u>Date</u>
19	Invitation, Bid, and Award (Construction, Alteration, or Repair)	January 1959

19A	Labor Standards Provisions -- Applicable to Contracts in Excess of \$2,000	January 1959
20	Invitation for Bids (Construction Contract)	March 1953
21	Bid Form (Construction Contract)	January 1959
22	Instructions to Bidders (Construction Contract)	March 1953
23	Construction Contract	March 1953
23A	General Provisions (Construction Contract)	March 1953

4. Mandatory Use of Forms. The use by Federal agencies of the above forms is mandatory for fixed price contracts, entered into pursuant to formal advertising, for construction, alteration, or repair of public buildings or works, except for: contracts for the construction, alteration, or repair of vessels; contracts for construction, alteration, or repair work in foreign countries; and as otherwise provided by regulation of the General Services Administration. * * *
5. Optional Use of Forms. Use of the forms prescribed in this regulation for negotiated contracts is optional. However, in the interest of uniformity, it is recommended that these forms be used (within the areas outlined in section 4 above) for contracts entered into on the basis of competitive bids but which are termed negotiated contracts because the requirements of formal advertising are not fully met. When used for negotiated contracts, the forms may be adapted as required by agency procedures (e. g., the requirement that bids be "sealed" and "publicly opened" may be lined out or obliterated, and language may be added to indicate that the contract is negotiated).

(Paragraph 6 Omitted)

7. Terms, Conditions, and Provisions

- a. Additional Terms, Conditions, and Provisions. Additional terms, conditions, and provisions considered by any agency to be essential to its contractual relationships and not inconsistent with those contained in the forms prescribed in this regulation may be incorporated in invitations for bids in which these forms are used by so providing in addenda to the forms, in the "Alterations" paragraph of Standard Form 23, in the schedule or in the specifications, as may be appropriate in accordance with agency implementing instructions. Each executive agency shall periodically review such additional terms, conditions, and provisions which are in common use in such agency with a view to standardization of those in general use and elimination of unnecessary additions, and shall, from time to time, forward to the Administrator of General Services such additional terms, conditions, and provisions as are considered desirable for inclusion in the standard forms.

- b. Inconsistent Terms, Conditions, and Provisions. In the interest of establishing and maintaining uniformity in Government contracts to the greatest extent feasible, deviations from standard forms prescribed in this regulation shall be kept to a minimum. Deviations may be authorized in individual cases by the head of an executive agency (including for this purpose any military department) or the officials designated by him for this purpose, in accordance with procedures established by each agency. Consideration of a deviation in classes of cases shall be a joint effort between the agency desiring the deviation and the General Services Administration unless, in the considered judgment of the agency, and with due regard to objectives of uniformity, circumstances preclude such joint effort. * * *

(Paragraphs 8 through 12 omitted)

13. Effective Date. This revision shall become effective June 1, 1959.

Standard Form 23A March 1953 edition was attached to the above Revised Regulation (1959) and contained the identical patent indemnity clause found in the original GSA - General Regulation No. 13 (1953) included in Tab C.

ASPR COMMITTEE

CASE 61-111
CASE 61-19

PATENT INDEMNITY CLAUSE USED SINCE 1959 IN AIR FORCE CONTRACTS FOR THE
CONSTRUCTION OF CAPEHART-RAINS HOUSING (P.L. 345 - 84TH CONGRESS, AS AMENDED)

(a) If the amount of this contract is in excess of \$5,000, the eligible builder shall indemnify the Government and its officers, agents, and employees and the mortgagor-builder against liability, including costs, for infringement of any United States letters patent (except letters patents issued upon an application which is now or may hereafter be kept secret or otherwise withheld from issue by order of the Government of the United States) arising out of the manufacture or delivery of supplies or out of construction, alteration, modification, or repair of real property (hereinafter referred to as "construction work") under this Housing Contract, or out of the use or disposal by or for the account of the Department of such supplies or construction work. The foregoing indemnity shall not apply unless the eligible builder shall have been informed as soon as practicable by the Department of the suit or action alleging such infringement, and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in the defense thereof; and further, such indemnity shall not apply if: (i) the infringement results from compliance with specific written

instructions of the Contracting Officer directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance of the contract not normally used by the eligible builder; or (ii) the infringement results from the addition to, or change in, the supplies furnished or construction work performed, which addition or change was made subsequent to delivery or performance by the eligible builder; or (iii) the claimed infringement is settled without the consent of the eligible builder, unless required by final decree of a court of competent jurisdiction.

DIFFERENT PROVISIONS IN ASPR AND FPR CLAUSES

The patent indemnity clause of SF 23A contains none of the following exceptions recited in both the clauses of ASPR 9-103.1 and 9-103.2:

"The foregoing indemnity shall not apply unless the Contractor shall have been informed as soon as practicable by the Government of the suit or action alleging such infringement, and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in the defense thereof; and further, such indemnity shall not apply if: (i) the infringement results from compliance with specific written instructions of the Contracting Officer directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance of the contract not normally used by the Contractor; or (ii) the infringement results from addition to, or change in, such supplies or components furnished or construction work performed which addition or change was made subsequent to delivery or performance by the Contractor; or (iii) the claimed infringement is settled without the consent of the Contractor, unless required by final decree of a court of competent jurisdiction."

Nor, of course, does the clause of SF 23A limit its application to construction work which is of a "standard commercial" nature as does the clause of ASPR 9-103.2.

The opinion has been expressed on more than one occasion that the above exceptions of the clauses of ASPR 9-103.1 and 9-103.2 would be implied even if not expressly recited. If so, the argument is made that the ASPR predetermined indemnity clause is the legal equivalent of clause 13 of SF 23A. The PSC agrees that, except for some doubt regarding the words: "or directing a manner of performance of the contract not normally used by the Contractor", this is probably true. But to a Contractor the ASPR clause is very apt to appear less demanding than that of SF 23A. He may well derive considerable reassurance from the recited exceptions.

And if the foregoing exceptions in the clauses of 9-103.1 and 9-103.2 would be implied even though not recited, what is to be gained by their omission, except the reduction of a few words? The Government may in fact incur a disadvantage by such omission. As a practical matter, although it would be difficult to establish or disprove, the Government may pay more for the SF 23A clause than for an ASPR clause in construction contracts because of Contractors' price increments added as contingencies in view of what appears to be an additional liability under the broader patent indemnity imposed by SF 23A.

The PSC considers the language of the ASPR patent indemnity provisions more appropriate for construction contracts than that of SF 23A.

DEVIATION FROM THE FPR REQUIRED?

If recommendations 1, 2 and 3 above are adopted, the question should be resolved whether the continued application of ASPR 9-103 to construction contracts constitutes a deviation from the Federal Procurement Regulations as defined in 41 CFR 1-1.009-1(a) (see Tab B). If so, deviation control should apparently be effected in accordance with procedures set forth in 41 CFR 1-1.009-2 (Tab B) and 41 CFR 1-16.404(b) (Tab A).

The use of patent indemnity clauses, commercial status predetermined and not predetermined, long antedates the Federal Procurement Regulations of March 1959. Prior to that date, effective 1 December 1953, General Regulation No. 13 of GSA first prescribed the use of the patent indemnity clause which now appears in SF 23A (Tab C). General Regulation No. 13 at that time rather clearly permitted the Department of Defense to authorize the use of clauses inconsistent with standard GSA clauses. A subsequent

amendment to GSA Regulation No. 13 commenced a requirement that deviations in "classes" of cases should be a joint effort between the agency desiring the deviation and the GSA unless "circumstances would preclude such joint effort." Thus on 10 June 1959, the effective date of General Regulation No. 13, revised, (Tab D) the question appears to have been raised for the first time whether the Department of Defense is excluded from a requirement to use standard forms and clauses in classes of contracts without joint approval with GSA.

As of March 1959 the above question became more clearly raised. Section 1-1.009-1(a) of 41 CFR, effective 27 March 1959, (Tab B) describes a "deviation" as including the situation: "When a prescribed contract clause is set forth verbatim, use of a contract clause covering the same subject matter which varies from that set forth." Prior use by DOD of a different patent indemnity clause from that in SF 23A would not appear to avoid the question whether such use after March 1959 constitutes a "deviation" as above defined.

An argument may be made that 41 CFR 1-16.404(a) (Tab A) expressly permits the use of ASPR patent indemnity clauses in Defense Construction contracts. It states: "Additional terms, conditions and provisions considered by any agency to be essential to its contractual relationships and not inconsistent with those contained in the forms prescribed in Subpart 1-16.4 may be incorporated in the invitations for bids in which these forms are used - - -." Section 1-16.401(g) prescribes SF 23A.

If it be assumed that the ASPR forms of patent indemnity clauses are "essential" to DOD contractual relationships, the question is then whether

they are "inconsistent" with the terms of SF 23A. It may be said with considerable logic that the use of both the patent indemnity clause of SF 23A and that of either ASPR 9-103.1 or 9-103.2 is expressly permitted. The basis for this is that clause 13, Patent Indemnity, begins: "Except as otherwise provided - - -." Thus, the clause itself appears to recognize that another indemnity provision which predominates may be included in the contract. The PSC feels that the use of both the patent indemnity clause of SF 23A and an ASPR 9-103 clause is expressly permitted under 41 CFR 1-16.404(a). This practice is followed in a certain class of Air Force contracts for family housing construction, but whether for the above reason or not is not known. These contracts, known as "Wherry Rehabilitation and Improvement Housing" contracts, contain both the clause 13 of SF 23A and that of ASPR 9-103.2 (Not Predetermined).

It is not as easy to urge that the use of an ASPR clause in place of clause 13 of SF 23A is permitted under 41 CFR 1-16.404(a); the reason being that only "additional terms, conditions and provisions" are expressly permitted.

There also may be a further question as to whether the use after March 1959 of an ASPR prescribed patent indemnity clause differing from that of SF 23A constitutes a deviation under 41 CFR, Section 1-1.009-1(b) (Tab B) as involving the use of a different "form" from that prescribed in the Regulation. It seems to the PSC, however, that if a question of a deviation is raised at all, it would arise under Section 1-1.009-1(a).

In view of the foregoing considerations, it is felt that the ASPR Committee should, in the event that recommendations 1, 2 and 3 above are adopted, determine whether or not deviation control is necessary under the procedures prescribed in 41 CFR, Sections 1-1.009-2 and 1-16.404(b).

PATENT INDEMNITY CLAUSES CURRENTLY USED

In accordance with its assignment, the PSC has ascertained from construction elements of the Departments the patent indemnity clauses currently used in those construction contracts which utilize SF 23A. Army and Navy construction contracts currently use the patent indemnity provision of SF 23A. The Army, prior to 20 July 1961, used the Patent Indemnity Clause (Predetermined) of ASPR 9-103.1 as a substitute for the Patent Indemnity Clause of SF 23A in accordance with Paragraph 7-603, "Engineer Contracts Instructions". The Navy Yards and Docks has used the Patent Indemnity Clause of SF 23A since approximately April 1961, pursuant to Navy Manual TP-AD-4.

In Air Force contracts for the construction of "Capehart - Rains" family type housing under Public Law 345 - 84th Congress, as amended, a patent indemnity clause (predetermined), substantially identical with ASPR 9-103.1, is currently used, and has been so used since 1959. The patent indemnity clause in these contracts differs only slightly from the clause in ASPR 9-103.1 in that it provides that the "eligible builder" (i.e. the contractor) shall indemnify the Government and its officers, agents, and employees and the Mortgagor-Builder (a dummy corporation). Tab E contains the patent indemnity portion of a combined Patent Indemnity-Notice and Assistance Authorization and Consent clause used in the above type of Air Force construction contracts.

Another class of Air Force family housing construction contracts are the so-called "Wherry R&I Housing" contracts referred to earlier. The PSC is advised that Section 404(a) of the National Housing Act provides authority to buy privately owned housing projects and to improve, rehabilitate, and repair these housing projects which were built under FHA and rented to military personnel. These contracts, as stated above, contain both the patent indemnity clause of SF 23A and also the Patent Indemnity (Not Predetermined) Clause of ASPR 9-103.2.

Approximately 90% of Air Force construction projects (exclusive of the family housing type referred to above) are not contracted by the Air Force, but by the Corps of Engineers or by the Bureau of Yards and Docks. Only the remaining 10% of these are contracted by the Air Force for the maintenance and repair or alteration of existing constructions. Some of these latter contracts, however, involve large expenditures. It has been the practice to insert the patent indemnity clause of ASPR 9-103.1 (Predetermined) in these contracts. Nevertheless, the opinion has been expressed by a contracting officer of the Construction Procurement Branch, Procurement Division, Wright-Patterson AFB that ASPR should permit the alternative use of the clause of ASPR 9-103.2 (Not Predetermined) in R&D type construction contracts (as, for example, the modification of, or addition to a wind tunnel, jet engine test cell, etc.). In these relatively few instances it seems hardly equitable or even logical to require patent indemnity of the Contractor extending beyond any part of the construction work which might be "standard commercial". While it is probable that such contracts would be negotiated, rather than advertised, it seems entirely possible that some would be formally advertised.

Since 21 November 1961, of course, (90 days after the publication date of Revision No. 5) ASPR 16-401.1 requires the use of SF 23A in formally advertised construction contracts.

ASPR 16-401.1 IS INCONSISTENT WITH ESTABLISHED POLICY OF 9-103

Admittedly, the flexible policy of ASPR Section IX, in contrast to the policy of the FPR, may result in lack of uniformity in the use of patent indemnity clauses in formally advertised construction contracts using SF 23A. As seen above, the Air Force has been using the clause of ASPR 9-103.1 modified to suit "Capehart - Rains" housing contracts. Both the patent indemnity clauses of ASPR 9-103.2 and SF 23A have been used in another class of housing contracts. In certain other construction contracts (other than housing), the Air Force has been using the clause of ASPR 9-103.1. It is not clear how two of the above classes of Air Force construction contracts are deemed to be of predetermined "standard commercial" status, while another class of construction contracts is considered of "not predetermined commercial status". Nevertheless, for reasons stated earlier, the flexible policy of ASPR Section IX is preferred.

The requirement of ASPR 16-401.1 (vii) to use SF 23A presents a problem: how to justify a different policy with regard to the scope of the patent indemnity clauses in construction contracts from that of the clauses used in supply contracts? The PSC can see no logical basis for distinction. The basic criterion as expressed in ASPR Section IX governing the use and scope of the patent indemnity provision is and should remain whether the Contractor's

product is "standard commercial", and substantially without regard to whether that product is supplies or construction.

Since the PSC was requested to consider this subject in its most basic aspect, some thought was given to whether a patent indemnity provision should be required at all in construction contracts. The clause does not appear to cause much concern to contractors, at present, but questions of patent infringement do arise occasionally in connection with construction work. Recently, litigation has been filed or threatened regarding spherical structures, "blast fences" for jet noise deflection, acoustic test cells for jet engines, and runway lighting installations, to cite a few examples. No cogent reasons could be advanced for eliminating the clause from construction contracts without also eliminating the clause from supply contracts. The theory of ASPR's policy in Section IX regarding patent indemnity in advertised contracts has already been explained. The clause should not be abolished in either class of contracts.

ASPR COMMITTEE

CASE 61-111
CASE 61-19

EXCERPTS FROM 41-CFR 1-16.404

* * *

1-16.404 Terms, conditions, and provisions.

(a) Additional terms, conditions, and provisions considered by any agency to be essential to its contractual relationships and not inconsistent with those contained in the forms prescribed in this Subpart 1-16.4 may be incorporated in invitations for bids in which these forms are used by so providing in addenda to the forms, in the Alterations paragraph of Standard Form 23, in the schedule, or in the specifications, as appropriate, in accordance with agency implementing instructions. Each executive agency shall review periodically such additional terms, conditions, and provisions which are in common use in such agency with a view to standardization of those in general use and elimination of unnecessary additions, and shall, from time to time, forward to the Administrator of General Services such additional terms, conditions, and provisions as are considered desirable for inclusion in the standard forms.

(b) In the interest of establishing and maintaining uniformity in Government contracts to the greatest extent feasible, deviations from

the forms prescribed in this Subpart 1-16.4 shall be kept to a minimum. Deviations may be authorized in accordance with Section 1-1.009 of this chapter. When a deviation is authorized, changes shall be made in addenda to the forms, in the Alterations paragraph of Standard Form 23, in the schedule, or in the specifications, as appropriate, in accordance with agency implementing instructions. * * *

* * *

TAB B
PSC 20/11/61

ASPR COMMITTEE

CASE 61-111
61-19

EXCERPTS FROM FEDERAL PROCUREMENT REGULATIONS CIRCULAR NO. 1,
DATED 27 MARCH 1953

GENERAL SERVICES ADMINISTRATION
Washington 25, D. C.

FPR CIRCULAR NO. 1
March 27, 1959

FEDERAL PROCUREMENT REGULATIONS

FPR Circulars. This is the first of a series of "FPR Circulars" which will be used to transmit, from time to time, new or revised Federal Procurement Regulations material prescribed by the Administrator of General Services under the Federal Property and Administrative Services Act of 1949. Each circular will identify material transmitted (both generally and by specific page number), summarize major additions or revisions, specify applicable effective dates, and will include filing instructions and notes. FPR Circulars may also contain procurement policies and procedures which are effective for less than six months, are instituted on an experimental basis, or require such expedited publication that their preparation in FPR form would not then be practicable.

* * *

SUBPART 1-1.0 REGULATION SYSTEM

1-1.000 Scope of part.

This part sets forth policies and procedures concerning: the Federal Procurement Regulations System; definition of terms used throughout this chapter; general policies of procurement; contingent fees; debarred and ineligible bidders; small business concerns; and reporting possible anti-trust violations.

1-1.001 Scope of subpart.

This subpart sets forth introductory information pertaining to the Federal Procurement Regulations System; its purpose, authority, applicability, issuance, arrangement, implementation, and deviation procedure.

1-1.002 Purpose.

This subpart establishes the Federal Procurement Regulations System for the codification and publication of uniform policies and procedures applicable to the procurement of personal property and nonpersonal services (including construction) by executive agencies, except as limited by the provisions of section 1-1.004 with respect to the Department of Defense. The System includes regulations prescribed by the Administrator of General Services, called the Federal Procurement Regulations (FPR), as well as individual agency procurement regulations which implement and supplement the FPR.

1-1.003 Authority.

The Federal Procurement Regulations System is prescribed by the Administrator of General Services under the Federal Property and Administrative Services Act of 1949, and the FPR are developed in cooperation with the procurement agencies and are issued by him under the Act or other authority specially cited.

1-1.004 Applicability.

Federal Procurement Regulations apply to all Federal agencies to the extent specified in the Federal Property and Administrative Services Act of 1949 or in other law. Except for standard Government forms and clauses, Federal Specifications and Standards, and except as directed by the President, Congress, or other authority, these Regulations are not mandatory on the Department of Defense. Therefore, the extent of their implementation within the Department of Defense and participation in the System will be determined by that Department. The Regulations apply to procurements made within and outside the United States unless otherwise specified.

1-1.005 Exclusions.

Certain Government-wide policies and procedures which come within the scope of this chapter nevertheless may be excluded from Federal Procurement Regulations. These exclusions include the following categories:

- (a) Subject matter which bears a security classification.

(b) Policy or procedure which is expected to be effective for a period of less than six months.

(c) Policy or procedure which is being instituted on an experimental basis for a reasonable period.

1-1.006 Issuance.

1-1.006-1 Code arrangement.

Federal Procurement Regulations are issued in the Code of Federal Regulations as Chapter I of Title 41, Public Contracts. Succeeding chapters of Title 41 are devoted to implementing and supplementing material developed and issued by particular Federal agencies to govern their procurement activities, as well as regulations of general application to procurement agencies issued by other Federal regulatory agencies, such as the Department of Labor under the Walsh-Healey Public Contracts Act.

1-1.006-2 Publication.

Federal Procurement Regulations are published (in Title 41) in the daily issue of the FEDERAL REGISTER, in cumulated form in the Code of Federal Regulations, and in separate loose-leaf volume form.

1-1.006-3 Copies.

Copies of Federal Procurement Regulations in Federal Register and Code of Federal Regulations form may be purchased by Federal agencies and the public, at nominal cost, from the Superintendent of Documents, Government Printing Office, Washington 25, D.C. Copies of Federal Procurement Regulations in loose-leaf volume form may be obtained by Federal agencies from the General Services Administration, in a very limited quantity, and may be purchased by the public from the Superintendent of Documents.

1-1.006-4 Coordination.

In the development of Federal Procurement Regulations, there will be solicited the views of interested Federal agencies and, where appropriate and feasible, the views of interested business and professional organizations. The Regulations will be coordinated with the Small Business Administration to assure adequate consideration of small business interests.

12 December 1961

MEMORANDUM FOR THE CHAIRMAN, ASPR COMMITTEE

SUBJECT: Case 61-111, Patent Indemnity (Not Predetermined) ASPR 9-103.2;
Case 61-19 Changes in ASPR as a Result of the Issuance of the
Revised Construction Contract Forms (Continued -- 22 September 1961
ASPR Minutes)

I PROBLEM

To study further the problem presented with respect to revising the clause set forth in 9-103.2 to conform to the ASPR Committee's action of 19 July 1961 in deleting the reference to formally advertised construction contracts from the introductory language of the clause. To ascertain from the construction elements of the Departments what patent indemnity clause is currently used in construction contracts which utilize Standard Form 23A.

II RECOMMENDATIONS

1. That the ASPR Committee's action of 19 July 1961 deleting reference to formally advertised construction contracts from the introductory language of 9-103.2 be rescinded.

2. That the "Note" under ASPR 16-401.1 (vii) (Revision 5, 21 Aug 1961) be amended to prescribe the use of the patent indemnity clause of either ASPR 9-103.1 or 9-103.2 where appropriate, in conjunction with Standard Form 23A.

3. That proposed ASPR Section VII, Part 6, Paragraph 7-602.16 relating to the use of a patent indemnity clause in construction contracts be revised to conform to the provisions of ASPR 9-103.

4. That consideration be given and determination made as to whether the application of ASPR 9-103 to construction contracts is expressly permitted under Section 1-16.404(a) of the Federal Procurement Regulations or constitutes a deviation therefrom as defined in 1-1.009-1(a) thereof, and as such requires deviation control in accordance with procedures set forth in Sections 1-1.009-2 and 1-16.404(b) of the above FPR (41 CFR).

III DISCUSSION

After further study of this problem, the PSC withdraws the recommendation in its report dated 11 September 1961. That recommendation was made merely for the purpose of having apparent consistency between the introductory language and the clause of ASPR 9-103.2.

Neither the scope of the patent indemnity provision of SF 23A nor the policy of the Federal Procurement Regulations requiring its use as part of a standard form in all formally advertised construction contracts is in accordance with the stated policy of ASPR 9-103.

DIVERGENT POLICIES OF ASPR AND FPR REGARDING USE OF PATENT INDEMNITY CLAUSE

With regard to policy governing the use of a patent indemnity provision, that of the FPR is rigid -- making the use of its SF 23A clause mandatory in all formally advertised construction contracts -- while that of ASPR, Section IX is flexible. In such contracts, both the clause of ASPR 9-103.1 (Predetermined) and that of 9-103.2 (Not Predetermined) are said by ASPR to be "appropriate," but there is no positive requirement to use either clause.

As for negotiated construction contracts, no patent indemnity clause is required, but such a clause "may be included" according to ASPR 9-103.3. This coincides with the policy of 41 CFR 1-16.403 which states: "Use of the form (including SF 23A) prescribed in Section 1-16.401 for negotiated (construction) contracts is optional."

Thus, while the policies of ASPR, Section IX and the FPR coincide as to use of a patent indemnity clause in negotiated construction contracts, those policies diverge with respect to formally advertised construction contracts. The PSC believes that ASPR policy is correct and to be preferred to that of the FPR.

In order to evaluate and compare the policies of ASPR, Section IX and the FPR more fully in this area it is appropriate to consider also the divergence between those policies regarding the use of a patent indemnity clause in supply contracts.

In contrast to its rigid policy of requiring a patent indemnity clause in all formally advertised construction contracts, 41 CFR 1-16.1 implemented by the Procurement Handbook, GSA, Federal Supply Service, 1959, prescribes a flexible policy regarding the use of a patent indemnity provision in supply contracts whether formally advertised or negotiated. Page 61 of that Procurement Handbook contains instructions regarding the use of Standard Form 32 and points out that Clause 13 of that form contains provisions relating only to notice and assistance regarding patent infringement. "Under some circumstances," the Handbook states: "the contracting

officer may feel that actual protection against asserted claims is warranted.

Either of the following two sample clauses will provide such protection:

"1. The contractor shall hold and save the Government, its officers, agents, servants, and employees, harmless from liability of any nature or kind, including costs and expenses, for or on account of any patented or unpatented invention, article or appliance manufactured or used in the performance of this contract, including their use by the Government.

"2. Patent Indemnity. The Contractor agrees to indemnify the Government and its officers, agent 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 hereunder. The foregoing indemnity shall not apply unless the Contractor shall have been informed as soon as practicable by the Government of the suit or action alleging such infringement, and shall have been given an opportunity to present recommendations as to the defense thereof; and further, such indemnity shall not apply in any one of the following situations: (1) any infringement resulting from the addition to any such supplies or other supplies not furnished by the Contractor for the purpose of such addition; (2) any settlement of a claim of infringement made without the consent of the Contractor, unless required by final decree of a court of competent jurisdiction."

The policy of ASPR on the other hand is rigid by comparison with that of the FPR regarding the use of a patent indemnity clause in formally advertised supply contracts. Thus, the clause of 9-103.1 "shall be included in formally advertised contracts for supplies when it has been determined in advance of issuing the invitation for bids that the supplies (or such supplies apart from relatively minor modifications to be made thereto) normally are or have been sold or offered for sale by any supplier to the public in the commercial open market."

In negotiated supply contracts, ASPR 9-103.3 does not require a patent indemnity clause, but prohibits the use of such a clause unless the supplies

"are or have been sold or offered for sale by the contractor to the public in the commercial open market." ASPR 9-103 also contains the general prohibition against the use of a patent indemnity clause in any supply contract "where the contract is for supplies which clearly are not or have not been sold or offered for sale to the public in the commercial open market." Neither of these prohibitions appear in the FPR.

From the foregoing it is seen that the policy of GSA as reflected in the FPR is rigid with respect to the use of a patent indemnity provision in formally advertised construction contracts, while its policy is flexible in the case of supply contracts. By contrast, ASPR, Section IX policy in this regard is flexible in the field of construction contracts but contains a positive requirement and positive prohibitions with regard to supply contracts.

ASPR, Section IX policy is more logical than that of the FPR. The policy of Section IX, as stated above, is to require a patent indemnity provision in formally advertised contracts for supplies which are "standard commercial" with any supplier. The theory in such cases is to place all bidders on an equal basis. Where one bidder is a licensee under an agreement requiring the payment of patent royalties, the effect of permitting a non-licensee to bid against him without liability for patent indemnity is to favor the non-licensee bidder and discriminate against the licensee. The non-licensee in such cases is protected by the Government's authorization and consent and the eminent domain nature of Title 28, Section 1498, U. S. Code. In the absence of a patent indemnity obligation he enjoys a

competitive bidding advantage equal to a percentage represented by the royalty payment obligation on the patent licensee.

The situation is different in negotiated supply contracts. Here, a patent indemnity clause may not be used under ASPR [except as authorized in 9-103(1)(B)] unless the supplies are "standard commercial" with the Contractor. The reason for this is that the Government is seeking only the same patent indemnity that an ordinary purchaser in the commercial open market receives from the vendor as to his standard commercial product. When a Government Contractor is required to furnish supplies which are not standard commercial with him, a patent indemnity clause should not be used.

The reason ASPR deals differently with construction contracts than it does in supply contracts with regard to the requirement to use a patent indemnity provision is believed to be the recognition that many supply items are the same or similar to those sold commercially under circumstances which carry a warranty of merchantability which implies a patent indemnity obligation on the seller, whereas a parallel situation would be unusual in the case of construction work. Most construction contracts call for the contractor to build according to detailed plans and specifications. Nevertheless, ASPR permits the use of a patent indemnity clause in construction contracts. Such a clause is, as noted earlier, "appropriate" in formally advertised construction contracts. The language of the clause of 9-103.2 (Not Predetermined) limits its application to construction work which "normally is of a type performed for the public in the commercial open market." Again, the PSC believes that ASPR policy regarding the use of patent indemnity provisions is to be preferred to that of the FPR.

BID FORM
(CONSTRUCTION CONTRACT)

Read the Instructions to Bidders (Standard Form 22)

This form to be submitted in

DATE OF INVITATION

NAME AND LOCATION OF PROJECT

NAME OF BIDDER (Type or print)

(Date)

TO:

In compliance with the above-dated invitation for bids, the undersigned hereby proposes to perform all work for

in strict accordance with the General Provisions (Standard Form 23-A), Labor Standards Provisions Applicable to Contracts in Excess of \$2,000 (Standard Form 19-A), specifications, schedules, drawings, and conditions, for the following amount(s)

The undersigned agrees that, upon written acceptance of this bid, mailed or otherwise furnished within calendar days (calendar days unless a different period be inserted by the bidder) after the date of opening of bids, he will within calendar days (unless a longer period is allowed) after receipt of the prescribed forms, execute Standard Form 23, Construction Contract, and give performance and payment bonds on Government standard forms with good and sufficient surety.

The undersigned agrees, if awarded the contract, to commence the work within calendar days after the date of receipt of notice to proceed, and to complete the work within calendar days after the date of receipt of notice to proceed.

Receipt of Amendments: The undersigned acknowledges receipt of the following amendments of the invitation for bids, drawings, and/or specifications, etc. (*Give number and date of each*):

The bidder represents (*Check appropriate boxes*):

(1) That he ☐ is, ☐ is not, a small business concern. (*For this purpose, a small business concern is a business concern, including its affiliates, which (a) is independently owned and operated, (b) is not dominant in its field of operation, and (c) had average annual receipts for the preceding three fiscal years not exceeding \$5,000,000. For additional information see governing regulations of the Small Business Administration.*)

(2) (a) That he ☐ has, ☐ has not, employed or retained any company or person (other than a full-time bona fide employee working solely for the bidder) to solicit or secure this contract, and (b) that he ☐ has, ☐ has not, paid or agreed to pay any company or person (other than a full-time bona fide employee working solely for the bidder) any fee, commission, percentage or brokerage fee, contingent upon or resulting from the award of this contract; and agrees to furnish information relating to (a) and (b) above as requested by the Contracting Officer.

(*For interpretation of the representation, including the term "bona fide employee," see Code of Federal Regulations, Title 41, Subpart 1-1.5.*)

(3) That he operates as an ☐ individual, ☐ partnership, ☐ joint venture, ☐ corporation, incorporated in State of _____

Enclosed is bid guarantee, consisting of

in the amount of

NAME OF BIDDER (<i>Type or print</i>)	FULL NAME OF ALL PARTNERS (<i>Type or print</i>)
BUSINESS ADDRESS (<i>Type or print</i>)	
BY (<i>Signature in ink. Type or print name under signature</i>)	
TITLE (<i>Type or print</i>)	

DIRECTIONS FOR SUBMITTING BIDS

Envelopes containing bids, guarantee, etc., must be sealed, marked, and addressed as follows:

The undersigned agrees that, upon receipt of the contract, he will within _____ calendar days (unless a longer period is allowed) after receipt of the contract, submit a performance and payment bond on Government Standard Form 28, with full and sufficient surety.

The undersigned agrees that, upon receipt of the contract, he will within _____ calendar days (unless a longer period is allowed) after receipt of the contract, submit a performance and payment bond on Government Standard Form 28, with full and sufficient surety.

CAUTION: Bids should not be qualified by exceptions to the bidding conditions.

61-7
30 March 1961

MEMORANDUM FOR BUREAU COUNSEL

SUBJECT: Disputes Clause - Standard Form 23A

1. A conference was held today between representatives of the military departments, General Services Administration, and the General Accounting Office, to resolve the question posed by the elimination from Standard Form 23A (January 1961 edition) of the words "by a court of competent jurisdiction," which in the 1953 edition of the form identifies who may determine that a decision of the ASBCA has been "fraudulent, arbitrary, ~~capricious~~ capricious, or so grossly erroneous as necessarily to imply bad faith." After a great deal of controversial discussion, a proposal was made by GSA to track the words of the "Wunderlich" statute (41 U.S.C. 321), enacted in 1924, by appropriately substituting the following provision in the Disputes clause:

(Quote)

If this or a similar provision is adopted, the same substitution would be included in the Disputes clause of the Standard Form 32 when it is next revised.

2. In view of the fact that the revised Standard Form 23A has already been published in the Federal Register, time is of the essence in resolving this matter. It is proposed that it will be discussed at the ASPR Committee meeting tomorrow. Accordingly, it is requested that you furnish me any comments you may have, by telephone if desired, before the close of business today.

(Signed)

George W. Markey, Jr.
Assistant to the General Counsel.

C/C to Chairman, Navy Panel ASBCA



DEPARTMENT OF THE NAVY
OFFICE OF THE GENERAL COUNSEL
WASHINGTON 25, D. C.

OGC/GWM:ets
30 March 1961

MEMORANDUM FOR BUREAU COUNSEL


Subject: Disputes Clause - Standard Form 23A

1. A conference was held today between representatives of the military departments, General Services Administration, and the General Accounting Office to resolve the question posed by the elimination from Standard Form 23A (January 1961 edition) of the words "by a court of competent jurisdiction" which in the 1953 edition of this form identifies who may determine that a decision of the ASBCA has been "fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith". After a great deal of controversial discussion, a proposal was made by GSA to track the words of the "Wunderlich" statute (41 U.S.C. 321), enacted in 1954, by appropriately substituting the following provision in the Disputes clause:

"The decision of the Secretary, 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."

If this or a similar provision is adopted, the same substitution would be included in the Disputes clause of the Standard Form 32 when it is next revised.

2. In view of the fact that the revised Standard Form 23A has already been published in the Federal Register, time is of the essence in resolving this matter. It is proposed that it will be discussed at the ASPR Committee Meeting tomorrow. Accordingly, it is requested that you furnish me any comments you may have, by telephone if desired, before the close of business today.


George W. Markey, Jr.
Assistant to the General Counsel

cc:
Chairman, Navy Panel, ASBCA

At the present time the AFPR Conference is again considering a proposed change and our views have again been solicited. I have informally discussed the GSA provision with officials of that agency and have been advised that the change is again designed for editorial purposes and not to accomplish a substantive departure from the concept of the Hing case. In other words, it does not propose to pay for so-called consequential or impact cost.

In view of our present posture, particularly in the light of the Missile Program, I consider that a change merely for the sake of change would open up a veritable Pandora's Box of misconceptions and misconstructions. For this reason, if authorized by you, I will advise the Army Member of the AFPR Conference that our position today on a proposed change is negative, for the very reasons first expressed by me six years ago.

If, as a matter of policy, you consider that a construction contractor should be entitled to compensation for costs which, while not directly attributable to the cost of the change authorized, are nevertheless actually incurred as a consequence of the change, although remote in physical relation to the change, such a result can be clearly accomplished, not by an ambiguous revision such as that proposed by the GSA, but simply by adopting the language presently used in the supply contract form to the construction contract form.

The present standard form of supply contract (U. S. Standard Form 32) provides in the Changes article "that if any such change causes an increase or decrease in the cost of, or the time required for the performance of any part of the work under this contract, whether changed or not changed by any such price, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly." The inclusion of the underlined language in the construction contract would afford a sound legal basis for payment of consequential or impact costs.

I have attached for your ready reference a copy of the present form of construction Changes article (Tab A), the revised article, as proposed by GSA (Tab B), and the present form of supply Changes article (Tab C).

I have promised the Army Member of the AFPR Conference to give him a reply as soon as possible.

3 Attachments:

100-200000

- 1 - Constr. Changes Article
(Tab A)
- 2 - Revised article (Tab B)
- 3 - Supply Changes Article
(Tab C)

61-19

The decision of the Secretary, or his duly authorized representative, for the determination of such appeals shall be final and conclusive, but 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.

61-19 Miller
Head of the Agency
The decision of the ~~Board~~, or his duly authorized representative,

for the determination of such appeals shall be final and conclusive, ~~and~~

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 unprincipled or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence.

~~was determined by a court of competent jurisdiction to have been~~

61-19
Not a part of
of transcript from
Page 5

23 February 1961

Department of Defense Comments on Omission from the "Disputes" Clause in Standard Form 23A of Reference to "Court of Competent Jurisdiction"

1. The Disputes clause in the present (March 1953) edition of standard Form 23A reads in part -

"... the decision of the head of the department or his duly authorized representatives for the hearings of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive" (emphasis added).

The January 1961 edition of standard Form 23A would omit the words "by a court of competent jurisdiction." This omission has been urged by the General Accounting Office.

2. The words "by a court of competent jurisdiction" should be restored to the SF 23A Disputes clause immediately, notwithstanding that the January 1961 edition has been fully approved. Omitting them can do no good; it may do some harm.

3. The following points constrain us to press for immediate restoration of the words in question.

a. The omission bespeaks bad drafting - it may raise unnecessary questions. The omission leaves a dangling passive - "... unless determined . . .". Determined by whom? The contractor? The head of the contracting agency? The Comptroller General? Auditors of the contracting agency? A Congressman's assistant? There is no sound reason to leave to argument and construction the intention of the contracting parties. We should say what we mean.

b. The omission invites contractor distrust of the Disputes procedure. If the omission is not intended to work any change in the meaning of the Disputes clause, there is no point in making it. If it is made, it will be understood to work some change in the present meaning of the clause. In view of the GAO's having alone urged the omission and in view of the history of the "Wunderlich" Act, the most likely construction given the omission will be that the GAO is to begin

Department of Defense Comments on Omission from the "Disputes" Clause
in Standard Form 23A of Reference to "Court of Competent Jurisdiction" (cont.)

reviewing determinations of questions of fact which have been final, except on challenge in the courts, under the present clause. The point here is neither to predict whether the GAO will increase the scope of its review nor to debate the present dimensions of the GAO's power to review - it is simply that contractors may understand the omission as foretelling greater GAO activity in reviewing and disapproving determinations under the disputes procedure. They may also understand that a departure from such cases as *James Graham Mfg. Co.*, 91 F. Supp 715 (D. C. N. D. Cal. S. D., 1956) is intended. The result may be to impair contractor confidence in the impartiality of the disputes procedure and in its efficacy in providing timely and definite settlements of contractual disputes.

c. The omission would appear to be inconsistent with the intent of the Wunderlich Act. The highly ambivalent legislative history of the Wunderlich Act (41 U.S.C. 321, 322) may be cited for several mutually inconsistent propositions. But the fairest construction to be put on it is that the Congress did not intend to affect the GAO's jurisdiction one way or the other - the legislation was intended to recognize the jurisdiction which the GAO already had. Since that jurisdiction was virtually nil, insofar as review of determinations under the existing disputes procedure were concerned, and since at the hearings Defense and industry spokesmen had vigorously protested against legislative language giving the GAO powers of review equal to those to be given by the courts, it seems that Congress did not intend to prolong uncertainties by permitting the GAO to intrude into the process of determining contractual disputes.

d. The omission may require exhaustion of additional administrative remedies. The omission of the words "by a court of competent jurisdiction" after they have been used so long and so commonly may be understood as requiring review of BCA decisions by the GAO - and even by the agency head - before a contractor can go to the Court of Claims. The addition of such reviews would impose substantial administrative burdens on Government contracting activities - they would have to make a full report and file full documentation with the GAO. It would impose a concomitant burden on contractors - one way or another, most of the expense would be passed on to the Government. It would be contrary to the thrust of the Wunderlich Act - Congress apparently intended to assure effective judicial review of questionable decisions of the contracting agency; judicial review that can be won only at the end of a tortuous succession of slow bureaucratic proceedings is seldom truly effective judicial review.

e. The omission is not justified by any experience under the present clause. We are not aware of any case where inclusion of the words

Department of Defense Comments on Omission from the "Disputes" clause
in Standard Form 23A of Reference to "Court of Competent Jurisdiction" (cont.)

"by a court of competent jurisdiction" has worked in any way to the disadvantage of the Government. The words have been included in SF 23A, SF 32, and other standard contract forms for many years. At least in the case of SF 32, they were included after an unusually extensive process of "industry coordination" in the development of the form. Although they were omitted - perhaps erroneously - from SF 19 (which is only used in construction contracts of less than \$10,000), that omission is no precedent for SF 23A; many of the SF 19 provisions are compressed and simplified versions of provisions that are more fully stated in SF 23A; the full intent of the SF 19 Disputes language regarding finality can be gleaned from other standard Disputes clauses so long as the reference to "court of competent jurisdiction" remains in these other clauses. Nor can we regard omission of the words from the new SF 114 as a precedent; so far as we have been able to discover, the Department of Defense at no point agreed to the omission from the new SF 114 Disputes clause. So the situation is pretty much one of proven language about to be dropped for no good reason.

1. The omission may be inconsistent with efficient contract management. The contracting agencies have an obvious stake in a disputes procedure that is as fair and as speedy as feasible. If the omission were to lead to increased non-judicial review of disputes determinations by agencies outside the contracting agency concerned, the considerable investment of time, people, and money which we make in the disputes procedure would be significantly diluted. That part of the Government that is in the best position to determine the facts in a dispute - the contracting agency - in effect would be to some extent dislodged from the position of making such determinations. Moreover, it is likely that increased non-judicial review would prestage increased litigation.

3. The foregoing outlines the principal reasons for insisting on immediate restoration to the SF 23A Disputes clause of the words "by a court of competent jurisdiction." It has been suggested that the omission really wouldn't make much difference. (If so, why omit?) This suggestion seems too speculative to be reliable. But even if the omission would make no difference in the minds of those in the Government, we should strongly oppose it. We must be concerned with how the other party to our contracts will view the matter. We need the best contractors we can get. We need their confidence in the fairness and efficacy of our contract procedures so that we can have their unstinted willingness to compete for our business. To omit the words in question from the Disputes clause would run counter to these interests of the Government. The words must be retained.

CASE 61-19

23 February 1961

Dear Charlie:

I am inclosing a few copies of our basic argument in favor of restoring the words "by a court of competent jurisdiction" to the Disputes clause of the new standard form 23A. The attached represents a quickly developed summary of the highlights of this argument from our point of view. We would be glad to provide more detailed written argument if necessary. In any event, we request the opportunity of further oral discussions on this point in the event that you are not disposed to agree with our position. Your great cooperation in holding up the printing of the new standard form 23A in order to resolve this question is very much appreciated.

Sincerely yours,

(Signed)

J. M. MALLOY
Captain, SC, USN
Staff Director, ASPR Division
Office of Procurement Policy

Incl.

As stated

Mr. Charles W. Gasque, Jr.
Assistant Commissioner for
Procurement Policy
General Services Administration
Washington 25, D.C.

61-19

7 February 1961

Sections and paragraphs in AFPS which probably will require revision as a result of the issuance of the new Standard Forms, 20 "Invitation for Bids," 21 "Bid Form," 22 "Instructions to Bidders," 23 "Construction Contract," and 23-A "General Provisions," for construction contracts.

1. Buy American coverage in Section VI with respect to construction materials.
 2. Section XIV with respect to inspection.
 3. Inclusion of the Construction Contract clause in Section VII.
 4. Section XVI to reflect the new forms, and
 5. Section II, paragraph 2-201 (AFPS para 60-10) - Bids and Proposals - Items with Statutory Cost Limitations).
- and any other appropriate changes.

GENERAL SERVICES ADMINISTRATION ROUTING SLIP											
TO	CO	R1	R2	R3	R4	R5	R6	R7	R8	R9	R10
NAME AND/OR SYMBOL						BUILDING, ROOM, ETC.					
1. <div style="text-align: center;">Mr. Carter OSD S&L</div>						Room 3D780					
2.						The Pentagon					
3.						61-19					
4.											
5.											
<div style="display: flex; flex-wrap: wrap;"> <div style="width: 33%;"><input type="checkbox"/> ALLOTMENT SYMBOL</div> <div style="width: 33%;"><input type="checkbox"/> HANDLE DIRECT</div> <div style="width: 33%;"><input type="checkbox"/> READ AND DESTROY</div> <div style="width: 33%;"><input type="checkbox"/> APPROVAL</div> <div style="width: 33%;"><input type="checkbox"/> IMMEDIATE ACTION</div> <div style="width: 33%;"><input type="checkbox"/> RECOMMENDATION</div> <div style="width: 33%;"><input type="checkbox"/> AS REQUESTED</div> <div style="width: 33%;"><input type="checkbox"/> INITIALS</div> <div style="width: 33%;"><input type="checkbox"/> SEE ME</div> <div style="width: 33%;"><input type="checkbox"/> CONCURRENCE</div> <div style="width: 33%;"><input type="checkbox"/> NECESSARY ACTION</div> <div style="width: 33%;"><input type="checkbox"/> SIGNATURE</div> <div style="width: 33%;"><input type="checkbox"/> CORRECTION</div> <div style="width: 33%;"><input type="checkbox"/> NOTE AND RETURN</div> <div style="width: 33%;"><input type="checkbox"/> YOUR COMMENT</div> <div style="width: 33%;"><input type="checkbox"/> FILING</div> <div style="width: 33%;"><input type="checkbox"/> PER OUR CONVERSATION</div> <div style="width: 33%;"><input type="checkbox"/> YOUR INFORMATION</div> <div style="width: 33%;"><input type="checkbox"/> FULL REPORT</div> <div style="width: 33%;"><input type="checkbox"/> PER TELEPHONE CONVERSATION</div> <div style="width: 33%;"><input type="checkbox"/></div> </div> <div style="margin-top: 5px;"> <input type="checkbox"/> ANSWER OR ACKNOWLEDGE ON OR BEFORE _____ </div> <div style="margin-top: 5px;"> <input type="checkbox"/> PREPARE REPLY FOR THE SIGNATURE OF _____ </div>											
REMARKS <div style="text-align: center; padding: 10px;"> Confirming telephone conversation, attached are proofs of Standard Construction Contract Forms 20, 21, 22, 23, and 23A, together with related FPR material, all of which is scheduled for publication in the Federal Register on Friday, February 3, 1961. </div>											
FROM	CO	R1	R2	R3	R4	R5	R6	R7	R8	R9	R10
NAME AND/OR SYMBOL <div style="text-align: center;">C.K. Ford <i>GJ</i></div>						BUILDING, ROOM, ETC. <div style="text-align: center;">OPP-GSA</div>			DATE <div style="text-align: center;">1/30/61</div>		

REFERENCE

INVITATION FOR BIDS
(CONSTRUCTION CONTRACT)

DATE

NAME AND LOCATION OF PROJECT

DEPARTMENT OR AGENCY

BY (Issuing office)

Sealed bids in

for the work described herein will be received until

at

and at that time publicly opened.

Information regarding bidding material, bid guarantee, and bonds

Description of work

TITLE 41 - PUBLIC CONTRACTS

CHAPTER 1 - FEDERAL PROCUREMENT REGULATIONS

MISCELLANEOUS AMENDMENTS TO CHAPTER

Chapter 1 of Title 41 is amended as set forth below:

PART 1-1 - GENERAL

SUBPART 1-1.5 - CONTINGENT FEES

Section 1-1.503 is revised as follows:

1-1.505 Covenant.

Executive agencies shall include in every negotiated or advertised contract (except as provided in section 1-16.406) a "covenant against contingent fees" substantially as follows (set forth as article 20 of Standard Form 32, General Provisions (Supply Contract), and Clause 17 of Standard Form 23A, General Provisions (Construction Contract)):

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.

PART 1-2 - PROCUREMENT BY FORMAL ADVERTISING

SUBPART 1-2.2 - SOLICITATION OF BIDS

Section 1-2.201(a) is revised as follows:

1-2.201 Preparation of invitations for bids.

* * * * *

(a) * * *

(8) The time of delivery or performance requirements (see section 1-1.316).

* * * * *

(13) Pending revision of paragraphs 3 and 4 of the Terms and Conditions of the Invitation for Bids on the back of Standard Forms 30 (October 1957 edition) and 33 (October 1957 edition), the following provision shall be substituted, as to each form, for the cited paragraphs:

LATE BIDS AND MODIFICATIONS OR WITHDRAWALS

Bids and modifications or withdrawals thereof received at the office designated in the invitation for bids after the exact time set for opening of bids will not be considered unless received before award and (a) they are submitted by mail (or by telegraph, if authorized) and (b) it is determined by the Government that late receipt was due solely to either (1) delay in the mails (or by the telegraph company, if telegraphic bids are authorized) for which the bidder was not responsible or (2) mishandling by the Government after receipt at the Government installation. However, a modification which is received from an otherwise successful bidder and which makes the terms of the bid more favorable to the Government will be considered at any time it is received and may thereafter be accepted.

PART 1-7 - CONTRACT CLAUSES

SUBPART 1-7.6 - FIXED-PRICE CONSTRUCTION CONTRACTS

In 1-7.602-1, Price adjustment for suspension, delay, or interruption of the work, in the penultimate sentence of paragraph (b) of the clause set out therein, substitute "final payment under" for "final settlement of," so that the sentence will read:

No claim under this clause shall be allowed (i) for any costs incurred more than twenty days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this

requirement shall not apply where a suspension order has issued), and (ii) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of each suspension, delay, or interruption but not later than the date of final payment under the contract.

PART 1-10 - BONDS AND INSURANCE

SUBPART 1-10.1 - BONDS

In 1-10.102-4(a), Invitations for bids provisions, the second paragraph of the provision set forth in paragraph (2) is revised to read as follows:

A bid guarantee shall be in the form of a firm commitment, such as a bid bond, postal money order, certified check, cashier's check, irrevocable letter of credit or, in accordance with Treasury Department regulations, bonds or notes of the United States. Bid guarantees, other than bid bonds, will be returned (a) to unsuccessful bidders as soon as practicable after the opening of bids, and (b) to the successful bidder upon execution of such further contractual documents and bonds as may be required by the bid as accepted.

PART 1-16 - PROCUREMENT FORMS

SUBPART 1-16.4 - FORMS FOR ADVERTISED CONSTRUCTION CONTRACTS

1. Section 1-16.401(c) - (g) is revised as follows:

1-16.401 Forms prescribed.

* * * * *

(c) Invitation for Bids (Construction Contract) (Standard Form 20, January 1961 edition).

(d) Bid Form (Construction Contract) (Standard Form 21, January 1961 edition).

(e) Instructions to Bidders (Construction Contract) (Standard Form 22, January 1961 edition).

(f) Construction Contract (Standard Form 23, January 1961 edition).

(g) General Provisions (Construction Contract)(Standard Form 23A, January 1961 edition).

2. Section 1-16.402-3 is revised as follows:

1-16.402-3 Contracts estimated to exceed \$10,000.

Standard Forms 19A, 20, 21, 22, 23, and 23A shall be used for contracts estimated to exceed \$10,000.

3. In 1-16.404, Terms, conditions, and provisions, in the first sentence of paragraph (a) thereof, substitute "invitations for bids" for "addenda to the forms," so that the sentence will read as follows:

(a) Additional terms, conditions, and provisions considered by any agency to be essential to its contractual relationships and not inconsistent with those contained in the forms prescribed in this Subpart 1-16.4 may be incorporated in invitations for bids in which these forms are used by so providing in invitations for bids, in the Alterations paragraph of Standard Form 23, in the schedule, or in the specifications, as appropriate, in accordance with agency implementing instructions.

4. In 1-16.404, Terms, conditions, and provisions, in the last sentence of paragraph (b) thereof, substitute "invitations for bids" for "addenda to the forms," so that the sentence will read as follows:

When a deviation is authorized, changes shall be made in invitations for bids, in the Alterations paragraph of Standard Form 23, in the schedule, or in the specifications, as appropriate, in accordance with agency implementing instructions.

5. In 1-16.404, Terms, conditions, and provisions, paragraph (e) is revised to read as follows:

(e) During periods of national emergency, agencies may, with the prior approval of the administrator of General Services, amend paragraph (d) of Clause 5 (Termination for Default-Damages for Delay-Time Extensions) of Standard Form 23A by deleting the words "unforeseeable causes" in the two places where they appear in the first sentence, and substituting therefor the words, "causes, other than normal weather,".

6. Section 1-16.404-1, Revision of Standard Form 23A, is deleted.

7. Section 1-16.406 is revised as follows:

1-16.406 Covenant against contingent fees.

Whenever Standard Form 19 is used, in accordance with this Subpart 1-16.4, for formally advertised contracts, the requirement of section 1-1.503, for inclusion of the Covenant against Contingent Fees clause, shall be inapplicable.

SUBPART 1-16.9 - Illustrations of Forms

For the illustrations of Standard Forms 20, 21, 22, 23, and 23A, presently printed in 1-16.901-20 - 23A, there are substituted the January 1961 editions of these forms.

1-16.901-20 Standard Form 20: Invitation for Bids (Construction Contract).

(Insert form, attached)

1-16.901-21 Standard Form 21: Bid Form (Construction Contract).

(a) Page 1 of Standard Form 21.

(Insert page, attached)

(b) Page 2 of Standard Form 21.

(Insert page, attached)

1-16.901-22 Standard Form 22: Instructions to Bidders (Construction Contract).

(a) Page 1 of Standard Form 22.

(Insert page, attached)

(b) Page 2 of Standard Form 22.

(Insert page, attached)

1-16.901-23 Standard Form 23: Construction Contract.

(a) Page 1 of Standard Form 23.

(Insert page, attached)

(b) Page 2 of Standard Form 23.

(Insert page, attached)

1-16.901-23A Standard Form 23A: General Provisions (Construction Contract).

(a) Page 1 of Standard Form 23A.

(Insert page, attached)

(b) Page 2 of Standard Form 23A.

(Insert page, attached)

(c) Page 3 of Standard Form 23A

(Insert page, attached)

(d) Page 4 of Standard Form 23A.

(Insert page, attached)

Effective date. These regulations are effective July 1, 1961, but may be observed earlier.

(Sec. 265(c), 63 Stat. 390; 40 U.S.C. 486(c))

Dated: January 14, 1961

(Signed)

FRANKLIN FLOETE
Administrator of General Services

INSTRUCTIONS TO BIDDERS

(CONSTRUCTION CONTRACT)

1. *Explanations to Bidders.* Any explanation desired by a bidder regarding the meaning or interpretation of the invitation for bids, drawings, specifications, etc., must be requested in writing and with sufficient time allowed for a reply to reach bidders before the submission of their bids. Any interpretation made will be in the form of an amendment of the invitation for bids, drawings, specifications, etc., and will be furnished to all prospective bidders. Its receipt by the bidder must be acknowledged in the space provided on the Bid Form (Standard Form 21) or by letter or telegram received before the time set for opening of bids. Oral explanations or instructions given before the award of the contract will not be binding.

2. *Conditions Affecting the Work.* Bidders should visit the site and take such other steps as may be 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. Failure to do so will not relieve bidders from responsibility for estimating properly the difficulty or cost of successfully performing the work. The Government will assume no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of the contract, unless included in the invitation for bids, the specifications, or related documents.

3. *Bidder's Qualifications.* Before a bid is considered for award, the bidder may be requested by the Government to submit a statement regarding his previous experience in performing comparable work, his business and technical organization, financial resources, and plant available to be used in performing the work.

4. *Bid Guarantee.* Failure to furnish a required bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid.

A bid guarantee shall be in the form of a firm commitment, such as a bid bond, postal money order, certified check, cashier's check, irrevocable letter of credit or, in accordance with Treasury Department regulations, bonds or notes of the United States. Bid guar-

antees, other than bid bonds, will be returned (a) to unsuccessful bidders as soon as practicable after the opening of bids, and (b) to the successful bidder upon execution of such further contractual documents and bonds as may be required by the bid as accepted.

If the successful bidder withdraws his bid within the period specified therein for acceptance (sixty days if no period is specified) or, upon acceptance thereof by the Government, fails to enter into the contract and give bonds within the time specified (ten days if no period is specified) after the forms are presented to him, he shall be liable for any difference by which the cost of procuring the work exceeds the amount of his bid, and the bid guarantee shall be available toward offsetting such difference.

5. *Preparation of Bids.* (a) Bids shall be submitted on the forms furnished, or copies thereof, and must be manually signed. If erasures or other changes appear on the forms, each erasure or change must be initialed by the person signing the bid. Unless specifically authorized in the invitation for bids, telegraphic bids will not be considered.

(b) The bid form may provide for submission of a price or prices for one or more items, which may be lump sum bids, alternate prices, scheduled items resulting in a bid on a unit of construction or a combination thereof, etc. Where the bid form explicitly requires that the bidder bid on all items, failure to do so will disqualify the bid. When submission of a price on all items is not required, bidders should insert the words "no bid" in the space provided for any item on which no price is submitted.

(c) Unless called for, alternate bids will not be considered.

(d) Modifications of bids already submitted will be considered if received at the office designated in the invitation for bids by the time set for opening of bids. Telegraphic modifications will be considered, but should not reveal the amount of the original or revised bid.

6. *Submission of Bids.* Bids must be sealed, marked, and addressed as directed in the invitation for bids. Failure to do so may result in a premature opening of, or a failure to open, such bid.

7. *Late Bids and Modifications or Withdrawals.* Bids and modifications or withdrawals thereof received at the office designated in the invitation for bids after the exact time set for opening of bids will not be considered unless received before award and (a) they are submitted by mail (or by telegraph, if authorized) and (b) it is determined by the Government that late receipt was due solely to either (1) delay in the mails (or by the telegraph company, if telegraphic bids are authorized) for which the bidder was not responsible or (2) mishandling by the Government after receipt at the Government installation. However, a modification which is received from an otherwise successful bidder and which makes the terms of the bid more favorable to the Government will be considered at any time it is received and may thereafter be accepted.

8. *Withdrawal of Bids.* Bids may be withdrawn by written or telegraphic request received from bidders prior to the time set for opening of bids.

9. *Public Opening of Bids.* Bids will be publicly opened at the time set for opening in the invitation

for bids. Their content will be made public for the information of bidders and others interested, who may be present either in person or by representative.

10. *Award of Contract.* (a) Award of contract will be made to that responsible bidder whose bid, conforming to the invitation for bids, is most advantageous to the Government, price and other factors considered.

(b) The Government may, when in its interest, reject any or all bids or waive any informality in bids received.

(c) The Government may accept any item or combination of items of a bid, unless precluded by the invitation for bids or the bidder includes in his bid a restrictive limitation.

11. *Contract and Bonds.* The bidder whose bid is accepted will, within the time established in the bid, enter into a written contract with the Government and, if required, furnish performance and payment bonds on Government standard forms in the amounts indicated in the invitation for bids or the specifications.

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 paragraph (a) of this clause, it is determined that the delay is excusable under the provisions of paragraph (d) of this clause, such notice of termination 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. (This paragraph (c) applies only if this contract contains such termination clause.)

(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 unless determined to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This Disputes clause does not preclude consideration of questions of law in connection with decisions provided for in paragraph (a) above. Nothing in this contract, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

7. PAYMENTS TO CONTRACTOR

(a) The Government will pay the contract price as hereinafter provided.

(b) The Government will make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates approved by the Contracting Officer. If requested by the Contracting Officer, the Contractor shall furnish a breakdown of the total contract price showing the amount included therein for each principal category of the work, in such detail as requested, to provide a basis for determining progress payments. In the preparation of estimates the Contracting Officer, at his discretion, may authorize material delivered on the site and preparatory work done to be taken into consideration. Material delivered to the Contractor at locations other than the site may also be taken

into consideration (1) which 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 non-conforming 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. NONDISCRIMINATION IN EMPLOYMENT

(a) In connection with the performance of work under this contract, the Contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. The aforesaid provision 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 hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of the nondiscrimination clause.

(b) The Contractor further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

STANDARD FORM 23
JANUARY 1961 EDITION
GENERAL SERVICES ADMINISTRATION
FED. PROC. REG. (41 CFR) 1-16.401

CONSTRUCTION CONTRACT

(See instructions on reverse)

CONTRACT NO.

DATE OF CONTRACT

NAME AND ADDRESS OF CONTRACTOR

CHECK APPROPRIATE BOX

- ☐ Individual
☐ Partnership
☐ Joint Venture
☐ Corporation, incorporated in the
State of _____

DEPARTMENT OR AGENCY

CONTRACT FOR (Work to be performed)

PLACE

CONTRACT PRICE (Express in words and figures)

ADMINISTRATIVE DATA (Optional)

The United States of America (hereinafter called the Government), represented by the Contracting Officer executing this contract, and the individual, partnership, joint venture, or corporation named above (hereinafter called the Contractor), mutually agree to perform this contract in strict accordance with the General Provisions (Standard Form 23-A), Labor Standards Provisions Applicable to Contracts in Excess of \$2,000 (Standard Form 19-A), and the following designated specifications, schedules, drawings, and conditions:

WORK SHALL BE STARTED

WORK SHALL BE COMPLETED

Alterations. The following alterations were made in this contract before it was signed by the parties hereto:

In witness whereof, the parties hereto have executed this contract as of the date entered on the first page hereof.

THE UNITED STATES OF AMERICA

CONTRACTOR

By _____

(Name of Contractor)

(Official title)

By _____
(Signature)

(Title)

INSTRUCTIONS

1. The full name and business address of the Contractor must be inserted in the space provided on the face of the form. The Contractor shall sign in the space provided above with his usual signature and typewrite or print his name under the signature.

2. An officer of a corporation, a member of a partnership, or an agent signing for the Contractor shall place his signature and title after the word "By" under the name of the Contractor. A contract executed by an attorney or agent on behalf of the Contractor shall be accompanied by two authenticated copies of his power of attorney or other evidence of his authority to act on behalf of the Contractor.

File 61-19

GENERAL SERVICES ADMINISTRATION

Federal Supply Service
Washington 25, D. C.

August 4, 1961

In reply refer to: 71

Colonel William V. Thybarg
Staff Director, ASFA Division
Office of Procurement Policy
Department of Defense
Washington 25, D. C.

Dear Colonel Thybarg:

Reference is made to your letter of July 18, 1961, concerning our proposed reprinting of Standard Form 32. As stated in my letter of June 12, 1961, copies of the 1957 edition of Standard Form 32 are low and it is necessary, therefore, to proceed with a reprinting of the form for stock purposes.

I have noted that you feel that the new Standard Form 234 Disputes clause does not change the substance of the Disputes clause which is in the 1957 edition of Standard Form 32. However, since you believe that the wording of the Disputes clause in the new Standard Form 234 is somewhat awkward, we will not make a change at this time in the language of the Disputes clause currently in Standard Form 32 and will leave that clause for review and consideration in connection with our overall review and possible revision of all clauses in Standard Form 32. In the meantime, I would appreciate receiving from you suggested language which, in your opinion, would remove any ambiguities in the new Standard Form 234 Disputes clause without affecting its scope, purpose, or intent.

I appreciate the other suggestions made in your July 12 letter and assure you that they will be given full consideration in connection with the overall revision of Standard Form 32. This revision has been scheduled for undertaking in the early fall of this year.

With best personal regards, I remain

Sincerely yours,

Charles W. Osgood, Jr.
Assistant Comptroller
for Procurement Policy